



Diversity and the Law: 2021

**A 5-STEP Guide to
Effective, Law-Attentive Design of
Diversity and Equity Policies—Faculty¹**

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Part I—Introduction

This guide seeks to help institutions of higher education (IHEs) maintain a strong commitment to building and sustaining a diverse faculty, which is an essential element of excellent and inclusive academic communities where all faculty and student talent can thrive. The need is particularly acute in science, technology, engineering, mathematics and medical (STEMM) fields, where people of color, as well as women and LGBTQ+ individuals, are often excluded or poorly represented, and where a diversity of backgrounds, life experiences and perspectives is critical to creativity and both identifying and well-serving the needs of a diverse society.¹ See the Diversity and the Law: 2021 Project (Project) **Research Charts**, <https://www.aaas.org/programs/diversity-and-law>. Eliminating barriers and advancing participation and success of all talent in the STEMM professoriate depends on pursuing effective and legally sustainable policies, systems, programs, strategies and practices (collectively, policies) that advance faculty employment equal opportunity (EEO), faculty-focused educational diversity to enhance the research endeavor and educational experiences and outcomes for all students, and equity.

This guide is particularly focused on how to design successful race² and gender³-conscious policies to advance faculty EEO, as the foundational aim of federal non-discrimination in employment law. It also addresses what IHEs *can* do to pursue all three priority interests—EEO, diversity and equity—largely unconstrained by federal non-discrimination law when possible, satisfying such law when it

² Race and ethnicity are distinct identities. However, federal non-discrimination law treats them in the same manner, and we use “race” to encompass both throughout this guide for brevity.

³ We use the term “gender” throughout this resource to mean the broadest definition of “sex” permitted by law in the circumstance. Federal non-discrimination laws in both the student/education and faculty/employment contexts use the term “sex,” which generally is interpreted to include sexual orientation, gender identity, and gender expression, at least insofar as:

- ◆ differential treatment against an individual is for not conforming to sex stereotypes (e.g., a woman dresses, or is “too aggressive,” or otherwise appears or behaves in ways that are not stereotypically “feminine”) and
- ◆ using the Supreme Court’s binary frame, when LGBTQ+ people are treated differently than those of another “biological” sex would be treated in the same circumstance (e.g., a man suffers adverse treatment in employment or education policies or practices for having a romantic relationship with a man, when a woman would not suffer such treatment if she were to have such relationship with a man).

The Supreme Court established this interpretation of “sex” in the context of Title VII, the main federal non-discrimination in employment law. See *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (holding “Because discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat individual employees differently because of their [binary or biological] sex, an employer who intentionally penalizes an employee for being homosexual or transgender also violates Title VII.”) While the Supreme Court explicitly reserved the issue, the U.S. Department of Education has applied the Court’s rationale and underlying principles to Title IX, the federal non-discrimination law on the basis of sex. See U.S. Department of Education, *Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, (June 22, 2021). 86 FR 32637. First level federal appeals courts in a number of geographically delineated federal circuits around the country have also protected transgender students from sex discrimination under Title IX, the U.S. Constitution’s 14th Amendment’s Equal Protection Clause and other rationales. See **Definition of Sex Under Federal Non-Discrimination Law**, <https://www.aaas.org/programs/diversity-and-law>, for elaboration and additional citations. Many IHEs have mission-driven diversity and equity interests in the broadest definition of sex. We use the term “gender” to mean the broadest definition of “sex” permitted by law in the circumstance.

applies, and avoiding action (or inaction) at odds with law that could result in more constraining law across the national higher education endeavor. Toward these ends, this guide offers a 5-STEP approach that IHEs can follow in their design and review processes. Some of our guidance reflects the explicit requirements of Supreme Court opinions; some reflects our best judgment on the implications and meaning inferred from the Court’s opinions and non-binding guidance.

The guide has three parts:

- **Part I**—This *Introduction* provides an overview of this guide, its purpose and scope. Part I also fits this guide within the larger context of the Project resources, tools and models, and reference materials.
- **Part II—Background**, includes—
 - **Part A—Foundations**, which introduces the need to achieve EEO, diversity and equity-related mission aims, while maintaining fealty to legal design parameters—recognizing the challenging legal landscape as well as the opportunities presented for advancing these aims; and
 - **Part B—Summary of the Current Legal Landscape**, which outlines the basic “design parameters” established by federal non-discrimination in employment laws that apply if an IHE may want to consider the race or gender of *individuals* in limited ways when conferring material opportunities or benefits in, or determining the terms and conditions of, employment without running afoul of applicable federal law, (i.e., when the policies are individually race or gender-conscious). This Part also draws IHEs’ attention to opportunities to appropriately avoid the burden of legal constraints, while advancing EEO, diversity and equity aims, by pursuing court-labeled “neutral” policy designs to the extent feasible and impactful.
- **Part III—5-STEP Approach to Designing Effective and Sustainable EEO, Diversity and Equity Systems and Policies**—Provides a sequence of integrated steps that support effective and legally sustainable faculty-focused EEO and supplemental educational diversity and equity policy design. This 5-STEP Approach includes a framework and substantive guidance for IHEs to satisfy the relevant legal requirements, while markedly, but wisely, advancing policy objectives:
 - **STEP 1**—Get Ready: Process Leadership & Design
 - **STEP 2**—Determine & Document EEO/Diversity/Equity-Associated Mission-Aims
 - **STEP 3**—Determine Whether Evidence of a Remedial Justification & Need Exist for Race- & Gender-Conscious Means; Consider the Annual Affirmative Action Plan (AAP); Evaluate Remedial Aims & Means Continually
 - **STEP 4**—Design Considerations for Race- & Gender-Conscious Policies & Neutral Policies with Disparate Impact
 - **STEP 5**—Advance Faculty-Focused Equity & Diversity Interests Without Triggering Exacting Legal Standards

Accompanying Tools, Models and Resources

Project resources that are referenced throughout the guide link interested readers to short, top-line operational aids, customizable examples, and more detailed guidance on particular issues. **Links to all Project resources are provided here** <https://www.aaas.org/programs/diversity-and-law>.

Primary Resources

- **Neutral Strategies Guide-Faculty** (*robust resource outlining of a broad range of barrier removal, inclusive strategies, and neutral criteria and systems that should not trigger exacting federal non-discrimination law standards, while advancing EEO, diversity and equity aims*)
- **5-Step Guide to Effective, Law Attentive Design of Diversity and Equity Policies-Students** (5-Step Design Guide-Students) (*a guide providing 5 steps for effective and sustainable design of systems and policies that advance educational diversity and equity aims for students—a diversity aim for faculty supplementing faculty EEO policies*)
- **Beyond Federal Law: Trends and Principles Associated with State Laws Banning the Consideration of Race, Ethnicity, and Sex Among Public Education Institutions** (State Law Bans Guide) (*summary of Arizona, California, Florida, Idaho, Michigan, New Hampshire, Nebraska, Oklahoma, and Washington State constitutional provisions, statutes and an executive order banning public IHEs from considering race or gender in education, employment and contracting, even in the limited circumstances when federal law would permit such consideration; the guide also includes associated state attorney general opinions and court rulings*)
- **Handbook on Diversity and the Law, 2nd Edition** (*while not cited here, this robust legal resource addressing a wide range of Constitutional provisions, statutes, regulations, guidance, and cases governing diversity, equity and inclusion (DEI) and EEO efforts; it is particularly useful for identifying legal source materials for key concepts and as a companion to other Project resources*)

Quick-Study & Key Issue Resources

- **Brief Legal Overview** (*non-discrimination law basics, with distinctions between student/education and faculty/employment legal regimes*) (companion to Key Definitions)
- **Key Definitions** (*basic meaning of diversity, equity, and other key terms*) (companion to Brief Legal Overview)
- **Federal Non-Discrimination Law on Sex and Gender** (*deeper dive analysis of federal non-discrimination law and associated cases governing gender and distinctions in treatment of gender and race*)
- **Definition of “Sex” Under Federal Non-Discrimination Law** (Definition of Sex) (*deeper dive analysis of federal non-discrimination law, cases, and agency guidance on the definition of sex and the extent to which it includes gender*)
- **Amplification of Underutilization** (*one-page explanation and example of underutilization as a remedial foundation for race- and gender-conscious action to advance employment equal opportunity is determined*)

Tools and Reference Materials

- **Big Picture Fundamentals & Staircase Diagram for DEI Policy Design-Faculty** (Big Picture Fundamentals & Staircase Diagram-Faculty) (*top-line two-page chart and diagram of a progression of actions that are conditions to pursuit of individual race- and gender-conscious faculty EEO/DEI policies—key actions within STEPS 2-4 of this guide*)
- **Big Picture Fundamentals & Staircase Diagram for DEI Policy Design-Students** (Big Picture Fundamentals & Staircase Diagram-Students) (*top-line two-page chart and diagram of progressive actions that are conditions to pursue individual race and gender-conscious student DEI policies*)
- **Model Charter & Diagram for a Multi-Office DEI Team** (*customizable model DEI team composition and charter*)
- **Customizable DEI Statements and Survey Questions** (*customizable model key policy segments and survey content*)

- **Example DEI Application Questions** (*customizable model questions to elicit DEI-related knowledge/experience or commitment of faculty and student applicants, a key neutral strategy to advance DEI aims without triggering exacting federal non-discrimination law standards*)
- **Research Charts** (*sample of research, articles and data reports on systemic inequity, high barriers in STEM, benefits of diversity and other diversity and equity issues of relevance*)

SEA Change: The SEA Change program provides principles, a process, a committed community of peers, and resources to support IHEs in evidence-based identification and disruption of systemic barriers to diversity, equity, and inclusion (DEI) for transformative change in their climate, norms, and culture. See <https://seachange.aaas.org/>

Part II—Background

A. Foundations: Achieving Mission with Fealty to Legal Design Parameters

Successful EEO, diversity and equity policies that are critical to an IHE’s mission and role in society require specific and measurable aims, leadership and resources, broad stakeholder understanding and ownership (including, importantly, by faculty). They also require attention to removing structural barriers and engaging process management and data-backed evaluation. EEO, diversity and equity aims may be accomplished via a range of policies (the means). Many IHEs would like to consider individuals’ race and gender, in limited ways, when determining certain faculty benefits and opportunities to advance EEO, diversity and equity aims. That implicates federal non-discrimination law.

The context for this guide includes a challenging legal landscape, both now and in the foreseeable future. While challenges are pending in four federal lawsuits as of fall 2021, the Supreme Court has provided 40 years of consistent precedent, including most recently in a 2016 decision, articulating clear conditions for when limited consideration of race in admission of college students is legally sustainable.ⁱⁱ The Court has provided some, but less, guidance on gender.ⁱⁱⁱ However, there is much less recent and clear Supreme Court precedent relating to when race- or gender-conscious policies in employment are legally sustainable; and none of the Court’s decisions relate to enhancing college faculty diversity for the beneficial educational experiences that faculty provide to all students.^{iv} When considering the progression of employment cases over the years, the Court has increasingly disfavored race- and gender-conscious policies.^v Below in Part B, we provide a Summary of the Legal Landscape and some key definitions. *See also* the Project’s **Big Picture Fundamentals & Staircase Diagram-Faculty, Brief Legal Overview, Key Definitions**, <https://www.aaas.org/programs/diversity-and-law>.^{vi} We urge users of this guide to read these Project resources for a grounding *before* engaging fully in faculty-focused EEO, diversity and equity policy design. For more, see **Federal Non-Discrimination Law on Gender**, <https://www.aaas.org/programs/diversity-and-law>.

B. The Current Legal Landscape

Policies that consider an individual’s race or gender when conferring an opportunity or benefit trigger exacting federal non-discrimination law design standards governing aims and the means of achieving them. However, there are fundamental differences in the legal regimes that apply to the use of such identity-conscious policies in student education contexts compared to faculty and other employment contexts.

Student Education Context. The student regime is grounded in forward-looking aims to provide the beneficial educational experiences and outcomes to **all** students that are associated with learning in broadly diverse academic settings (educational diversity). IHEs have considerable leeway to determine the diversity-related educational outcomes they seek when defining these aims,^{vii} but they must be educational aims and not remedial societal equity aims. IHEs may use limited race- and gender-conscious means to achieve their educational diversity aims when evidence supports the need. See the Project’s, **Big Picture Fundamentals & Staircase Diagram-Students, Brief Legal Overview, Key Definitions** and, for more, **5-STEP Design Guide—Students**, <https://www.aaas.org/programs/diversity-and-law>.

Employment Context. In stark contrast, the employment regime, which governs faculty, is grounded in present and backward-looking remedial aims to redress an IHE’s **own** failure to provide adequate EEO. This is an internal-facing equity interest that is limited to remedying the IHE’s own (not society’s) “underutilization” (or a similar court concept, “manifest imbalance”) or “presumed (or actual) discrimination,” as these terms are precisely defined by federal law (collectively, **remedial conditions**).^{viii} These remedial conditions are relatively inflexibly defined in law; IHEs must establish their existence and the aim to address them as foundational prerequisites for potentially justifying race or gender-conscious employment affirmative action. This inflexibility of aims makes taking such identity-conscious action in employment more challenging and less available than taking limited race- and gender-conscious action in the student context, where IHEs may, within broad bounds, define their unique educational diversity aims. That said, in the context of faculty employment, if a remedial condition exists, an IHE may—in addition to addressing that condition—embrace advancing specific faculty contributions to educational diversity to benefit all students as a supplementary aim.^{ix}

Societal Equity in Both Contexts. Advancing **general** societal racial and gender equity interests (external-facing, broader societal equity interests) is an aim that brings the most constraints under federal non-discrimination law, in both the faculty and student contexts. Race- and gender-conscious means may not be used to advance such general societal equity aims.^x However, as this guide demonstrates, there is much that IHEs nonetheless can do to advance faculty-focused educational diversity and societal and educational equity interests.

Overarching Concepts of Federal Non-discrimination in Employment Law and Definitions. With very limited exceptions, the main federal non-discrimination in employment law, Title VII, aims to facilitate EEO, while prohibiting discrimination (differential treatment) of individuals on the basis of their “race, color, sex, religion, or national origin” in employment (including, application, hiring, layoff, firing, promotion, wages, job assignments, fringe benefits and other terms and conditions).^{xi} The statute applies to all public employers and most private employers, including IHEs. Except for biological and physiological differences in sex that do not stereotype role, interest or capacity and are necessary qualifications for highly limited, specialized kinds of work, differential treatment of faculty and other employees on the basis of race and gender are equally disfavored by federal non-discrimination in employment law.^{xii} (No such qualification-related exception to the prohibition against differential treatment applies to race, nor should it.) See **Federal Non-Discrimination Law on Gender**, <https://www.aaas.org/programs/diversity-and-law>.

Employers must avoid imposing an undue burden on those who are not targeted for the benefit of a race- or gender-conscious action under federal non-discrimination in employment law. That requires demonstrating the necessity to take race- and gender-conscious action. Evidence must demonstrate that the sustained use of “neutral” policies has proven inadequate as a remedy for persistent and substantial, federally defined underutilization or presumed (or actual) discrimination affecting the races and gender targeted for remedial affirmative action.^{xiii} Generally, enabling all races and genders to compete for opportunities and benefits is also important, even when limited race- or gender-conscious affirmative

action is justified to address a remedial condition. The Supreme Court has found such identity-consciousness to be unjustified in layoffs, as it has held that reasonable expectations or vested interests of existing employees would be too greatly burdened.^{xiv}

Key Definitions and Concepts. Some definitions and concepts are fundamental to making the best use of this guide and developing faculty-focused EEO, diversity and equity policies that are effective and legally sustainable.

Affirmative Action is a remedial concept—it refers to policies that remedy discrimination or inadequate EEO as recognized by federal non-discrimination in employment laws (i.e., underutilization and presumed and actual discrimination). It encompasses policies that are aimed at righting wrongs already suffered by individuals based on their race or gender. This term is often misused to refer to action to advance educational diversity in the student context, which is a forward-looking and universally beneficial educational policy, not a remedial policy. The aims and evidence required to justify race- and gender-conscious means in employment and education contexts are different. Misuse of affirmative action and educational diversity labels should be avoided to minimize unnecessary legal consequences, public confusion, and controversy.

Underutilization is the predominant measure of inadequate EEO at an IHE. Underutilization is a remedial condition that may (but does not necessarily) justify race- or gender-conscious affirmative action in employment under federal employment non-discrimination law. Under such law, underutilization does not necessarily evidence discrimination and its acknowledgement does not constitute an admission of discrimination. Underutilization is defined as any less representation of a race or gender in an employer’s relevant workforce than would be expected, considering the group’s availability in the corresponding labor pool. Its existence is most commonly and prudently determined using the Department of Labor Office of Federal Contract Compliance Programs’ (OFCCP) **less than 80% test**,^{xv} which defines underutilization as:

- ◆ When a racial or sex group’s representation in the IHE’s own **relevant workforce** is less than 80% of that group’s representation in the **available and qualified labor pool**—on a percentage basis (not by comparison of absolute numbers). See the Project’s **Amplification of Underutilization**, <https://www.aaas.org/programs/diversity-and-law> for an example of this calculation. (Underutilization is likely similar to the Supreme Court’s concept of “manifest imbalance”—a substantial disparity between representation of a racial or sex group in an employer’s relevant workforce and in the available labor pool, but not so much as to raise the specter of presumed discrimination.^{xvi} Any difference in degree between underutilization and manifest imbalance has not yet been defined by the Supreme Court.)

The **relevant workforce** is the cluster of positions at an IHE—of a type, seniority level and discipline or expertise—that share a relevant recruitment market, considering the IHE’s size, organization and hiring structure. For one IHE, this could be, e.g., all faculty, who are tenured, and whose expertise is in any STEM field; for another, more or less specificity of faculty type, seniority level and discipline would be warranted.

The **available labor pool** is the pool of available *and qualified* people in the recruitment market from which an IHE could recruit for a particular position. The recruitment market may be local, regional, national, or international depending on the kind of position and the IHE’s character, reach and context. Using the example of recruiting an assistant professor of engineering, the labor pool could include all recent PhD recipients in an engineering field or specialty, or in any engineering field, or even in any STEM field—or possibly all Masters and PhD recipients in any STEM field—depending on the IHE.

Presumed discrimination is another remedial condition that may (but will not necessarily) justify race- or gender-conscious employment affirmative action under federal non-discrimination law. Determining presumed discrimination requires a similar comparative calculation as is used to determine

underutilization. However, presumed discrimination is defined as when a difference of two or more standard deviations exist between:

- ◆ The representation of a particular race or gender in the relevant workforce at an IHE and
- ◆ The representation of that group in the available and qualified labor pool from which the IHE could recruit.^{xvii}

Presumed discrimination may be rebutted by evidence of a legitimate, non-discriminatory reason for an employment policy or action that is neutral on its face, unless further evidence shows that the reason is a pretext.^{xviii}

IHEs, as federal contractors subject to OFCCP regulations, must use good faith efforts to remedy underutilization and presumed discrimination—but not necessarily by race or gender-conscious means if neutral policies would suffice. OFCCP neither requires, nor authorizes race- and gender-conscious action to address remedial conditions.^{xix} Actual (intentional) discrimination—if established, whether by data or direct evidence—must be remedied, though not necessarily by race-conscious means.^{xx}

The STEM dilemma. In STEM fields, the representation of people of color and women in the available and qualified labor pool for a position in a STEM department may be so low that even one or no individuals from those groups in a department’s relevant workforce may equal or exceed 80% of that group’s representation in the available and qualified labor pool on a percentage basis (so will not constitute underutilization). A difference of two or more standard deviations, indicating presumed discrimination, is even rarer. There are pathways problems and climate issues affecting individuals in these groups.^{xxi} Court-labeled “neutral” policies may be the only option in these situations, and they can be an important tool to advance faculty diversity and equity interests.

Race- or gender-conscious policies are those that, in the context of an IHE deciding whether to confer an employment opportunity or benefit or determining an employment term or condition:

- ◆ Explicitly consider an *individual’s* race or gender; **or**
- ◆ In practice, consider an *individual’s* race or gender (even where the policy avoids using those words).

Such identity-consciousness violates federal non-discrimination in employment law unless there is an aim to address a remedial condition (remedying persistent and substantial underutilization or presumed discrimination) and sustained use of neutral policies proves inadequate as a remedy.^{xxii}

Race- or gender-neutral policies are those that, in the context of an IHE deciding whether to confer an employment opportunity or benefit or determining an employment term or condition:

- ◆ Do not on their face or in practice consider an individual’s race or gender;
- ◆ Do have a substantial and authentic institutional aim related to education, research, service or EEO interests (not just to increase racial or gender compositional diversity as an aim in itself). With that authentic, substantial aim, also having awareness and even intent to increase some aspects of racial or gender compositional diversity should not diminish the neutrality of a policy.^{xxiii} Also, in employment, the institutional aim to increase compositional diversity to address a remedial condition is likely permissible, at least for private IHEs.^{xxiv}

Policies that target particular races or genders, but have an inclusive effect and do not burden individuals of any race or gender, also are treated similarly to neutral policies and do not trigger exacting federal non-discrimination law standards.^{xxv} Neutral policies are of great importance in the employment context—particularly in many STEM fields where underutilization and presumed discrimination are rarely established due to pathways and climate issues, and race- and gender-conscious policies are rarely justified

under federal law. See **Amplification of Underutilization** for an example and, for neutral strategies that can at least contribute to advancing faculty diversity, see the **Neutral Strategies Guide—Faculty**, <https://www.aaas.org/programs/diversity-and-law>.

The authenticity of an IHE’s aim as well as the IHE’s practice in implementation are often critical for determining whether a strategy is conscious or neutral. A policy, such as a selection criterion, may be neutral or conscious depending on that context. If an IHE uses a facially neutral criterion in conferring opportunities and benefits on individuals to advance an authentic interest beyond increasing racial or gender compositional diversity and it is unclear whether that criterion, if not amplified, would be construed as neutral or not, then the IHE would be wise to be intentional, clear and consistent about its authentic neutral interest (beyond just increasing compositional diversity) to avoid both mischaracterization of the criterion by those who would challenge it and the uncertainty of law governing facially (but not fully) neutral policies.

Policies, that do not on their face or otherwise intentionally treat individuals differently on the basis of race or gender, but disproportionately adversely affect some race(s) or gender unintentionally, are permitted only if there is no less disparately impactful policy available that would serve an important “business necessity,”^{xxvi} such as an IHE’s important mission-driven educational, research and service goals. For example, an IHE whose mission identifies equity as a priority may seek faculty who have the knowledge and commitment needed to advance this interest – regardless of their own identity. This criterion is likely a business necessity for the IHE, even if it is disproportionately satisfied by some races and genders.

Educational diversity refers to broad diversity, encompassing multiple aspects of an individual that reflect their life experiences and ability to both benefit from and contribute to a rich academic environment. That environment creates beneficial educational experiences and outcomes for all students and a productive, creative, and responsive teaching, research, and service workplace for faculty. That environment also supports student and faculty contributions to high-quality educational and research programs, and civic, economic, security and cultural interests of all in society-at-large.^{xxvii} Compositional (group) diversity is relevant only as a condition enabling beneficial educational experiences. See **Key Definitions**, <https://www.aaas.org/programs/diversity-and-law>, for more nuance.

Each IHE, and discipline within it, must define the broad diversity it needs in its student body and faculty to advance its particular educational mission. However, while broad diversity includes *knowledge*, however obtained (e.g., through personal experience, learning or service), as well as *commitment* associated with race and gender issues in society, it is much broader. It also includes, among other attributes, e.g.:

- individual perspectives;
- interest in particular disciplines;
- talents;
- geographical interest or background;
- socio- economic background;
- resource level of schools attended;
- experience or knowledge about homelessness and hunger;
- family definition and responsibility;

- knowledge and experience associated with disability and religion; and
- a range of self- and intersectional identities and characteristics.

Some aspects of broad diversity are easily achieved. Others—including experience, knowledge of issues and commitment associated with minoritized identities (e.g., race and gender, LGBTQ+ individuals, women

in a number of STEM fields or by men in nursing and women’s studies, and individuals whose intersectional identities include multiple minoritized identities such as LGBTQ+ people and women of color), low socio-economic background or disability—often require more focused outreach, capacity-building, barrier removal efforts, and more. The Supreme Court has not recognized faculty-focused educational diversity as a sufficient stand-alone aim to justify race- or gender-conscious strategies in the faculty employment context under current federal non-discrimination in employment law, but it has not foreclosed the possibility.^{xxviii} The essential role of faculty in designing and delivering the educational program and pedagogy makes seeking a broadly diverse faculty that can well-serve a diverse student body a critical supplementary aim. This secondary aim may bolster the imperative of remedying race- or gender-based underutilization or presumed or actual discrimination in the faculty, when addressing any such remedial condition is the primary aim.^{xxix}

See the Project’s **Big Picture Fundamentals & Staircase Diagram-Faculty, Key Definitions, Brief Legal Overview**, and **Big Picture Fundamentals & Staircase Diagram-Students**, <https://www.aas.org/programs/diversity-and-law>.

Part III—5-STEP Approach to Designing Effective and Sustainable EEO, Diversity and Equity Systems and Policies

This section outlines five steps to designing effective and legally sustainable Faculty-focused EEO, diversity and equity policies and strategies. Arrow-shaped banners mark each step and its focus, in sequence:

- STEP 1—Get Ready: Process Leadership & Design
- STEP 2—Determine & Document EEO/Diversity/Equity-Associated Mission-Aims
- STEP 3—Determine Whether Evidence of a Remedial Justification & Need Exist for Race- & Gender-Conscious Means; Consider the Annual Affirmative Action Plan (AAP); Evaluate Remedial Aims & Means Continually
- STEP 4—Design Considerations for Race- & Gender-Conscious Strategies & Neutral Strategies with Disparate Impact
- STEP 5—Advance Faculty-Focused Equity & Diversity Interests Without Triggering Exacting Legal Standards

The Project’s **Big Picture Fundamentals & Staircase Diagram-Faculty**, <https://www.aas.org/programs/diversity-and-law>, provides a top-line summary of principles that ground this guide’s STEPs 2, 3 and 4 and may be a helpful orientation.

EEO interests for faculty—namely barrier removal to provide equal access to employment opportunities and benefits, and eliminating federal law-defined remedial conditions in employment—are the focus of STEPs 1 through 4. Remedying general societal race and gender inequity is not the focus of these STEPs. The Supreme Court has long held that employers may consider individuals’ race and gender when conferring employment opportunities and benefits or determining employment terms and conditions only if remedying an IHE’s own presumed (or actual) discrimination or persistent and substantial race- or

gender-based underutilization^{xxx} in its relevant workforce is the aim (not remedying societal inequity) – and evidence demonstrates the need for such an identity-conscious remedy. The role of faculty in advancing educational diversity benefits for all students is also mentioned in these STEPs, as an important supplementary aim (but, under federal non-discrimination in employment law, not an adequate stand-alone aim).

We also reference educational diversity and equity interests in STEPs 1 through 4 to identify where diversity and equity interests, as well as EEO interests, can—and to achieve many IHEs’ mission-driven priorities effectively, should—be served by the same governance, mission, processes and so-called neutral policies, including neutral selection and participation criteria. These **aims**, without using individually race- or gender-conscious **means**, should not trigger the exacting standards or constraints of federal non-discrimination in employment law. There is still much that an IHE *can* do—without individual race- or gender-consciousness—to advance educational diversity and societal and institutional equity interests; these aims are the focus of STEP 5.

Focus on Underutilization vs. Presumed Discrimination.

STEPS 1-4 of this guide focus on underutilization, sometimes referencing only this term even though the same point also applies to presumed discrimination. We take this approach due to the rarity of presumed discrimination in STEMM, where pathways, climate and other barriers may result in poor representation of people of color and women in both the IHE’s relevant workforce and the available labor pool.

In any event, when presumed discrimination does exist, it is particularly important to seek situation- and institution- specific legal advice from an IHE’s own lawyers before any related communications and response actions are determined and pursued.

To lessen the burden of gathering evidence of need to consider race or gender to advance faculty EEO and designing the effective and legally sustainable faculty diversity and equity policies, the *process* for doing the design and evaluation work—and assembling the right *participants* in that process—are key. Creating a unified process for the design and evaluation of policies that apply to faculty EEO and faculty and student diversity and equity interests is a wise practice. Being aware of key institution-wide efforts, cross-pollenating ideas, and coordinating initiatives (where appropriate) across faculty and student realms can leverage expertise, existing data, and investments, maximizing the beneficial impact of efforts across the board and reducing associated burdens. All participants in a unified process need not engage to the same extent in faculty and student realms or in all activities within a single realm.^{xxxii} For example, connecting EEO efforts with faculty educational diversity and equity efforts, while retaining in the appropriate experts the responsibility for fulfilling technical EEO requirements, achieves more than siloed efforts. The connection makes the technical compliance work more useful in practice to advance effective and legally sustainable faculty EEO policy, as well as faculty and student diversity and equity policy.^{xxxiii} Siloed technical EEO efforts may satisfy legal imperatives for the creation of Affirmative Action Plans (AAP), but they will likely have little impact on DEI-related teaching, learning and employment experiences and outcomes. Connecting AAP data to faculty EEO and diversity policies of units across the institution is also an important element in determining whether those policies are the legally sustainable to advance EEO under federal non-discrimination in employment law.

1. Assuring leadership commitment and accountability at all levels of an IHE is a key foundation for aligning and advancing its EEO goals, as well as its mission-driven diversity- and equity-associated educational, research and service interests, in central and discipline-focused units institution-wide.

Effective leadership to advance all of these interests requires the commitment of knowledgeable senior level administrators, who establish and clearly communicate the reasons why advancing EEO, diversity and equity interests are critical for the integrity, excellence, and contributions of the IHE and disciplines within it. Also required are leaders who establish expectations for themselves and others at the IHE. *Assure that leadership norms are embedded in systems at every level of the IHE to avoid dependence on a single individual's commitment alone.*

Resources and Metrics. It is critical for leaders at all levels of the institution to champion and resource EEO, diversity and equity efforts that have positive, concrete impact and are legally sustainable. Metrics demonstrate an attentiveness to legal requirements for making good faith efforts to address any failure to provide adequate EEO (e.g., evidenced by underutilization or presumed discrimination). See Part III, STEP 2. Beyond assuring satisfaction of the technical annual AAP data collection and evaluation requirements, the establishment of metrics to evaluate the effectiveness of efforts to achieve beneficial experience- and inclusive climate-based goals associated with faculty-focused EEO, educational diversity, and equity interests can be a key to achieving positive impact. They also provide an evidentiary foundation for making resource allocation decisions to best achieve the IHE's EEO and DEI- associated priorities. Some IHEs consider demonstrated actions, such as policies pursued and efforts made, to advance EEO, diversity and equity interests (not the numerical outcomes *per se*) as a metric in unit budget decisions. By allocating adequate resources to support these efforts, leaders further demonstrate their commitment in a tangible

fashion. See the Project’s **Customizable DEI Statements and Survey Questions**, <https://www.aaas.org/programs/diversity-and-law>, for greater detail on how to collect data from your constituent groups on the impact of diversity on campus.

Governance models. Institutional leaders use a variety of models to drive their faculty EEO, educational diversity and equity efforts effectively. At some IHEs, the President/Chancellor or Provost assumes an active role in establishing goals and advancing EEO-, diversity- and equity-related goals. Other IHEs add or substitute a group of senior level administrators representing many faculty and administrative functions (e.g., from the Provost’s office, deans, human resources (HR), DEI offices, etc.) that contribute to advancing these interests. The leadership group engages stakeholders, establishes goals, and holds themselves, their units, and other units across the institution responsible for tangible actions toward achieving them. While creating clear oversight responsibility somewhere is important, the key to an effective leadership system is to assure that leadership at all levels of the IHE is engaged and that advancing DEI interests is made the responsibility of everyone —and is not a siloed duty of one position or office. Indeed, elevating the board of trustees’ or regents’ understanding and engagement around the IHE’s EEO, diversity and equity interests, so that the board may effectively oversee and support the institution’s progress in advancing these interests, is important to the board’s fulfillment of its fiduciary duty. Advancing DEI interests is important for the IHE’s future and societal role, considering the demographics of the talent pool (where a majority of the children under 18 years old in the U.S. are children of color) and the importance of diversity to the quality of the IHE’s education, research and service program.^{xxxiii} Tracking, evaluating and sharing the aims and results of EEO, diversity and equity efforts with the IHE’s governance board, leaders and broad community are common strategies for transparency, accountability and continuous improvement.^{xxxiv}

Communications. By its active engagement, senior leadership conveys the importance of the work and the relationship of EEO, diversity and equity to both the IHE’s and its various disciplines’ aligned educational missions and priorities. Continuously communicating this commitment in words and deeds is fundamental to effective leadership.

2. Establishing a collaborative, multidisciplinary team is essential for effectiveness and efficiency.

Evidence-based decision-making contributes to high-impact policymaking as well as legal sustainability. A multi-office team’s collaborative efforts can reduce the burdens of evidence collection, maximize the impact and sustainability of all programs, and advance an IHE’s overarching EEO, diversity- and equity-associated mission in an effective and time- and cost- efficient manner. While federal law’s design parameters for achieving each of these interests differ in some material respects, forming a team of key offices can facilitate utilization of existing databases, activities, and practices to gather available information and fill information gaps to support student and faculty efforts. Evidence-based decision-making is a legal requirement for race- and gender-conscious EEO and diversity efforts,^{xxxv} and also advances effective decision-making by encouraging investment of limited resources in policies with real and sustainable impact.

3. Operational considerations maximize the effectiveness of a multi-office team.

In structuring a team’s focus and operations, it is helpful to:

- ◆ Maintain the distinct areas of focus, responsibilities and authorities of each operational office on the team (e.g., outreach, recruitment, admission, aid, student life, academic affairs, HR, the EEO office, etc.) and of each advisory office (e.g., diversity and equity, institutional research, legal,

compliance, etc.);

- ◆ Create a norm of multi-office collaboration to share ideas and knowledge, and align each operational office's aims with the IHE's overarching EEO-, diversity- and equity-associated mission, while respecting the distinct function of each office and different legal regimes governing these aims;
- ◆ Where appropriate, create a norm of coordinating different offices' programs to enhance their respective singular and collective impacts;
- ◆ Engage expert advisors from the start of the design process, as partners in design, so that they can offer guidance, including a range of options that are both effective to advance the desired policy and legally sustainable—before effort is wasted on an ineffective or unsustainable design.

The multi-office team can best support and align institutional and discipline-specific efforts on a regular basis by, e.g.—

- ◆ Consulting with offices across the IHE that are pursuing EEO, diversity and equity efforts during their design and implementation processes and supporting ongoing evaluation and any needed changes to policies for effectiveness and sustainability;
- ◆ Publicizing examples of success as models across the IHE;
- ◆ Facilitating pairings of compatible disciplines to brainstorm ideas and collaborate on approaches;
- ◆ Providing templates and professional development/training;
- ◆ Creating systems, and providing guidance and targeted assistance to enable offices across the IHE to identify barriers and conduct their own EEO, diversity and equity program design and evaluative processes to eliminate barriers and advance aims; and
- ◆ Tracking and reporting on progress to leadership and a range of stakeholders with progress measured in relation to AAP goals for faculty EEO, diversity-associated educational experiences for all students occurring in a setting created by student and faculty compositional diversity, as well as equity in access, experience and outcomes.

The **Model Charter & Diagram for a Multi-Office DEI Team**, <https://www.aaas.org/programs/diversity-and-law>, can be customized for an IHE's use.

Determine and document the IHE's mission-related:

- ◆ Core remedial EEO aims, as defined by federal law (e.g., remedying underutilization and other lack of adequate EEO);
- ◆ Supplementary educational diversity-associated interests and aims (i.e., the connection between the IHE's educational mission and specific educational goals benefiting all students that are associated with broad student body *and* faculty diversity);
- ◆ Any supplementary equity interests and aims (i.e., interest in advancing educational and societal equity and their connection with the IHE's educational mission and faculty and student diversity); and
- ◆ Aligned, but tailored EEO, diversity, and equity interests and aims of each of the IHE's major disciplines (e.g., by school college and other major academic or research unit).

1. An IHE may have and clearly articulate any faculty diversity or equity related aims it values without triggering exacting federal non-discrimination in employment law standards; such law does not constrain subject matter or aims alone.

It is an effective policy for an IHE to determine and clearly articulate the importance of the role of faculty in furthering broad diversity in the student body, including but not limited to racial and gender diversity, and associated universal educational benefits. Also important is articulating the core faculty role in elevating knowledge of and commitment to ameliorating societal inequities. An IHE may determine that both of these faculty roles are essential levers for achieving mission-critical **aims**. With specificity unique to each IHE, these aims include delivering high quality educational and research programs that serve all students well and identifying and serving priority needs of society and the planet. It is only when the **means** of achieving those aims include race- and gender-conscious policies or practices that exacting federal non-discrimination in employment law requirements apply, demanding a legally sufficient, evidence-based justification for such individual identity-consciousness.



2. If an IHE may want to consider pursuing any individual race- or gender-conscious employment policy, the IHE must first establish a remedial condition and EEO aim that is recognized by federal non-discrimination in employment law (e.g., remedying persistent and substantial underutilization, as defined by federal law).^{xxxvi}

This requirement applies to hiring, promotion, research support, mentoring and other benefits, and terms and conditions of employment, including in the application process. See Part II.B of this guide^{xxxvii} and **Brief Legal Overview** and **Key Definitions**, <https://www.aaas.org/programs/diversity-and-law>.



3. To determine and document whether a legally-recognized remedial condition exists to support an EEO remedial aim, federal contractors, including IHEs, must prepare and annually update their AAPs, which evaluate adequacy of EEO, as evidenced by racial and gender composition in particular types and levels of positions, in clusters of related disciplines or areas of expertise that share a recruitment market.

IHEs are required to establish flexible goals (but not quotas, caps, or fixed numerical aims) and make good

faith efforts to remedy any underutilization or other federally defined remedial conditions identified in the AAP process. This evaluation compares demographics of the IHE's relevant workforce to those of the available and qualified labor pool from which the IHE could recruit for various categories of positions. (The comparison is *not* to general population demographics.)^{xxxviii} Making known where the IHE and its departments need to focus their efforts to remedy underutilization or other failure to provide adequate EEO is important for making these efforts a priority. Elevating this awareness is best done in an annual process, not in relation to a particular search or other employment action.

An IHE's HR or EEO office typically collects and evaluates data to make this required annual determination, sometimes with the help of an outside contractor. Consultation with academic leaders can help assure that the most meaningful database is accessed to determine the available and qualified labor pool in relevant faculty recruitment markets. This is consequential for determining whether there is a remedial condition, which is a prerequisite to any race- or gender-conscious affirmative action. While broad Department of Labor databases may be legally permissible sources for determining remedial conditions, they are not always reflective of the reality of faculty recruitment markets. Consultation with academic leaders can make the detailed work done annually for an AAP more useful operationally to advance the IHE's and departments' faculty EEO, diversity and equity efforts. See **Amplification of Underutilization**, <https://www.aas.org/programs/diversity-and-law>. In any event, it is a legal imperative to ground EEO efforts in departments and units in up-to-date AAP analyses.



4. Another potential EEO remedial aim that may justify limited race and gender affirmative action is remedying an “artificially limited labor pool,” if the IHE has contributed to creating that condition, directly or through its labor union. A labor pool is artificially limited, when its racial or gender composition is limited as a result of an employer’s or its labor union’s involvement in creating barriers that have prevented people of some races and gender from gaining needed experience or training to qualify for the relevant market’s higher skilled “trades, crafts or professions.” If an IHE plans to rely on an artificially limited labor pool, it should document this condition in its annual AAP and consult its lawyers.

The Equal Employment Opportunity Commission (EEOC), which is the federal agency that administers Title VII, the main federal non-discrimination in employment statute, has adopted a regulation that recognizes remedying an artificially limited labor pool to which an employer or its labor union has contributed as a remedial EEO condition under the statute. Such a remedial condition may justify an employer pursuing limited remedial race- and gender-conscious affirmative action in capacity-building programs (e.g., time-limited training, mentoring, professional development experiences and the like) in some situations. However, the remedial concept of an artificially limited labor pool has not been applied by the Supreme Court or, to our knowledge, by the EEOC, in a higher education setting without the formality of a union's long-term exclusionary practices and a corresponding limited-time remedial plan. Such formality was present in the 1979 Supreme Court decision on which the EEOC's regulation is based.^{xxxix} STEP 3 provides more information on the evidence base needed to establish an artificially limited labor pool. STEP 4 provides guidance on key design elements and examples of potentially sustainable remedial capacity building programs for STEMM (and other) faculty.

5. Advancing educational diversity may be a supplementary aim to a primary, federally-defined remedial aim relating to an IHE's inadequate EEO, if an IHE may want to consider pursuing any individual race- or gender-conscious employment policies. To articulate the importance of such a supplementary aim, an IHE must provide an institution-specific,

“reasoned, principled explanation” of the connection between broad faculty diversity (including but not limited to race and gender diversity) at the IHE overall and in clusters of related disciplines where faculty and students engage, *and* the associated specific, measurable, beneficial educational experiences and outcomes for all students.^{xi}

In addition to a primary focus on EEO aims, it is a good policy for an IHE to articulate why a broadly diverse faculty is critical to achieving its student educational diversity interests. Articulate the need for faculty who understand and can elevate understanding of issues of race and gender in education and society, as well as faculty who are committed to ameliorating related inequities, to advance the IHE’s educational diversity- and equity-related mission. These interests focus on faculty diversity, and race- and gender-related knowledge and commitment for their beneficial effects on the quality of teaching and student learning—not to achieve particular compositional numbers of a race or gender in the student body or faculty.^{xii} See **Design Guide-Students, STEP 2**, <https://www.aaas.org/programs/diversity-and-law>, for more detailed guidance on how an IHE can articulate its educational diversity and equity interests well. Addressing faculty and student diversity aims together, as integral, mutually reinforcing elements of the academic program, strengthens the diversity rationale for each of them.

The Supreme Court has raised the possibility (without deciding), and a Solicitor General has opined, that teacher contributions to educational diversity interests may be a substantial enough interest to justify race consciousness in the faculty employment context when those contributions are specifically identified.^{xiii} Note, however, that the Court has rejected teacher “role models” as an adequate interest to justify race-conscious employment policies and practices, at least in the context of layoff decisions.^{xliii} (The same rules would apply to gender-consciousness, as Title VII similarly protects against gender-based discrimination. See **Federal Non-Discrimination Law on Gender**, <https://www.aaas.org/programs/diversity-and-law>.) Yet, research has developed over the years since 1986 when the Supreme Court questioned race-based role model rationales. That research, together with institution-specific data, may back the importance of faculty role models, as well as effective mentoring by faculty (which is a complementary but distinct interest). See **Research and Resources Charts and Customizable DEI Statements and Survey Questions**, <https://www.aaas.org/programs/diversity-and-law>.^{xliiv} With such evidence, articulating the importance of a diverse faculty to both serve as role models and effective mentors may be worthwhile. However, none of these aims is sufficient alone for identity-conscious employment policies at this time; a legally-recognized remedial condition must exist and the IHE’s substantial aim must be addressing it.

6. If the IHE values faculty diversity for its contribution to educational diversity, determine, document, and take intentional institutional and departmental actions that will facilitate engagement of faculty, as well as student, diversity in particular settings and activities. Doing so will enable students to reap the associated educational benefits of diversity and support the quality of the educational, research, and service programs. Some benefits of diversity may arise organically, by creating a broadly diverse stage; however, pursuing proactive engagement efforts helps in operation and to demonstrate the authenticity of the IHE’s educational diversity interest.

How does the IHE know what means for engaging faculty and student diversity will be most effective?

- ◆ Considering student, student-facing staff and faculty feedback is key to making this determination (e.g., in course evaluations, surveys, focus groups or faculty and student committee studies);
- ◆ Facilitating engagement of diversity (as well as an equitable educational program) may involve a combination of some of the following, among other potential actions—

- Attending to the content of curriculum and other educational programming for breadth of perspective, experience and culture;
- Attending to pedagogical approaches that are effective for a diverse student body, and preparing faculty and teaching assistants to deploy these approaches well;
- Attending to climate issues to advance welcome and inclusion at the IHE, and to identify and counteract bias (with a focus on faculty, students, and staff, in all roles, but particularly in roles that affect student experience and opportunities);
- Creating broadly diverse faculty committees that address curriculum, policy issues, academic programs, and events, hiring and promotion, mentoring students and early career professionals, etc.;
- Creating diverse faculty and student groupings for special projects and experiential learning endeavors, etc.;
- Considering whether the focus of the research agenda is limited by longstanding norms driven by those in power-dominant racial and gender groups at an IHE or in a discipline; and assuring that a broad diversity of backgrounds, perspectives and ideas are being supported, with explicit recognition of the importance of diversity to pushing the boundaries of STEM and other fields and identifying and serving the needs of society and the planet.



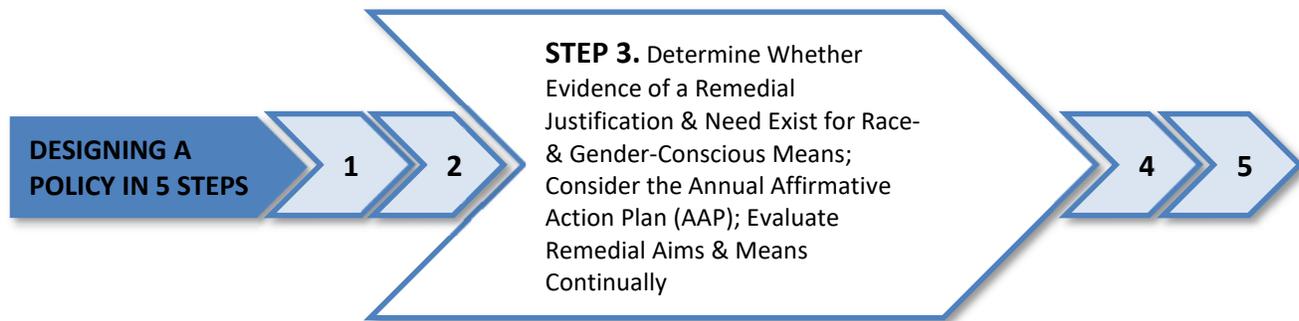
7. Remedying general societal inequity is not a legally sufficient aim to justify considering an individual’s race or gender in conferring employment benefits or opportunities or determining employment terms and conditions.

Awareness of societal conditions and inequities is important and legally permissible in connection with developing program content and effective delivery strategies. It is also a wise and important practice to articulate the IHE’s societal equity interests. However, federal law, as interpreted by the Supreme Court, would prohibit considering an individual’s race or gender status in conferring employment opportunities and benefits or deciding employment terms and conditions for the purpose of advancing societal equity—even with a connection to the IHE’s educational mission. STEP 5 focuses on such equity-aimed policies that IHEs *can* pursue under law.

Required numerical goals for employment EEO—Key differences between employment and education legal regimes affecting policy. *Employment:* Federal contractors, including IHEs, are required by OFCCP regulations to include in an annual update of their mandatory AAP, current/backward-facing data on racial and gender composition in various categories of employee positions (considering types of position, recruitment market-related disciplines or areas of expertise, and level of seniority). These regulations also require IHEs to have a general, forward-facing numerical goal as a focus for “good faith efforts” to remedy any underutilization or presumed discrimination that is identified by those backward-facing data. The forward-facing remedial numerical goals are not fixed quotas, floors, or caps; and they are not to be set in reference to general societal population demographics. They are intended to reflect the racial and gender composition (on a percentage basis) of the available and qualified labor pool from which an IHE could recruit for major categories of position—i.e., what racial and gender representation would be “expected” in each category based on their availability in the qualified market. While IHEs are required to have flexible numerical goals, and to generally exercise good faith efforts to advance toward them, IHEs are not authorized by these regulations to adopt individual race- or gender-conscious employment policies or practices in pursuit of these numerical goals. Courts have imposed exacting legal design standards that must be met to justify any such individual identity-conscious affirmative action in employment. Evidence must demonstrate that neutral strategies (barrier removal, inclusive outreach, and recruitment, and

neutral participation and selection criteria for opportunities and benefits—which can contribute to increases in at least some aspects of compositional diversity and inclusive climate) have been used on an ongoing basis and have proven ineffective to remedy a substantial and persistent underutilization or presumed discrimination. Title VII protects against race and gender discrimination in equal measure, so the standard is equally high for both.

Education: In contrast, in the student context, the Supreme Court looks first to the primary aim of forward-facing, universally beneficial educational experiences and outcomes for *all* students that are associated with a broadly diverse student body. Under this educational diversity rationale, only student experience-focused aims may justify limited race or gender identity consciousness and, even then, only when evidence demonstrates the necessity for race—and evidence at least approaching that for gender. The Court has rejected numerical quotas or seeking a specific numerical representation of, or cap on, each race or gender in the student body based on a population “availability” concept. Such quotas or caps are prohibited outright in admissions decision-making and are considered discriminatory. Student compositional diversity is relevant only as the setting in which beneficial student learning experiences and outcomes associated with diversity may occur. Goals may include increasing the diversity of the student body, in a program at the IHE, or in clusters of related disciplines where students interact—if the IHE is engaging existing levels of student body diversity to enhance education, but the diversity-related student experience is not of the quality sought. Determining how much more diversity is needed requires tracking backward-looking compositional data and conducting ongoing evaluation of the student experience and outcomes within the context of existing levels of student compositional diversity over time. It is not about seeking a specific forward-looking number by race or gender.



Before designing and pursuing individual race- or gender-conscious employment policies, federal non-discrimination in employment law requires IHEs to determine whether underutilization (or another measure of inadequate EEO) exists, as well as whether there is evidence of a need for such identity-conscious policies to remedy that condition. See **Big Picture Fundamentals & Staircase Diagram-Faculty and Amplification of Underutilization**, <https://www.aaas.org/programs/diversity-and-law>, for graphic overviews of federal requirements.^{xiv} Sustained use of neutral policies, with evidence of their having an inadequate effect alone, is an absolute requirement to justify any limited race- or gender-consciousness in employment opportunities or benefits. In many STEMM fields, neutral policies are the only option because a legally recognized EEO-grounded remedial condition cannot be established when there is meager representation of individuals of color and women in both the available, qualified labor pool from which an IHE can recruit and the relevant workforce at the IHE.

Before initiating these assessments under federal law, however, **public** IHEs must determine whether their state law creates additional restrictions that may make even the limited authority for identity-conscious policies under federal non-discrimination in employment law unavailable to them.



1. A threshold determination for any *public* IHE is whether their state constitution, law or executive order prohibits individual race- and gender-conscious policies in public education and employment. (As of August 2021, such bans exist in Arizona, California, Florida, Idaho, Michigan, Nebraska, New Hampshire, Oklahoma, and Washington State). Public IHEs located in a state that prohibits race and gender “preferences” in public education and employment may not consider an individual’s race or gender in conferring employment benefits and opportunities or deciding employment terms and conditions—even when federal law might *allow* but does not *require* such consideration. Importantly:

- ◆ Some so-called “ban” states provide an explicit exception to their state bans for public IHEs’ compliance with a federal requirement to adopt a race- or gender-conscious policy (e.g., a federal court order to use a conscious policy to remedy a public IHE’s intentional employment discrimination) or when a federal benefit requires such a policy.
- ◆ Title VII, the main federal non-discrimination in employment law, applies to public and private IHEs and *permits, but does not require voluntary* race- and gender-conscious affirmative action to address persistent underutilization or presumed discrimination—and such permission applies only when sustained use of neutral policies alone proves ineffective.^{xlvi}
- ◆ OFCCP EEO regulations that apply to public and private federal contractors, including IHEs, require “good faith efforts” to remedy underutilization or presumed discrimination, but neither require, nor authorize, the use of race- or gender-conscious remedial policies for inadequate EEO.^{xlvii}
- ◆ In the ban states, only those race- or gender-neutral policies that do not constitute “preferences” under state law limitations may be used by public IHEs, with very limited exceptions for fact-specific individual situations.^{xlviii} While many neutral policies that would be recognized under federal law are likely to be sustainable in ban states, it is critical to confer with

your IHE's legal counsel for guidance on these limitations as they apply to your IHE, state, and EEO or diversity policy.

See **State Law Bans Guide** and **Neutral Strategies Guide-Faculty**, <https://www.aaas.org/programs/diversity-and-law>.

For public IHEs in ban states, the rest of STEP 3 may be useful to track and communicate about the effect of state law, to inform the IHE's neutral EEO, diversity and equity efforts and to influence state policy changes. Otherwise, STEP 3 is not relevant to IHEs in ban states because it concerns the requirements of federal law associated with race- and gender-conscious EEO-advancing, remedial policies that are off-limits to public IHEs in ban states.

2. Private IHEs, and public IHEs that are not located in ban states, must have evidence of the need for individual race- or gender-conscious policies to address a *remedial condition*—before they may be utilized as an exception to federal non-discrimination law's general prohibition against differential treatment of individuals on those bases in employment (including applicants).

Necessity is measured by **five factors**:

Factor #1: Whether the IHE has an annually updated AAP, which substantiates the existence of a substantial and persistent remedial condition—a federally defined underutilization (or presumed discrimination);^{xlix}

Factor #2: Whether—

- Neutral barrier removal practices are identified and used, including neutral capacity building programs (meaning, e.g., mentoring, training and experience-building research and teaching programs and visiting and other temporary benefits and appointments), and attention is given to addressing climate issues and eliminating barriers such as exclusionary norms,
- Inclusive but targeted outreach to build a diverse applicant pool is undertaken (meaning robust general outreach, combined with targeted outreach to assure that prospective applicants of all races and genders effectively receive the same consequential information about a position and feel welcome to apply, without conferring material benefits on some races or genders and not others), and
- Neutral selection criteria for professional development, hiring, promotion, and other employment opportunities and benefits are identified and used (collectively, neutral policies) on an ongoing basis, but prove in practice to be inadequate alone to remedy the underutilization (or presumed discrimination);^l

Factor #3: If not adequate alone, whether neutral policies used on an ongoing basis, combined with limited race- and gender-conscious capacity-building programs, are adequate together to remedy a substantial and persistent underutilization (or other remedial condition);

Factor #4—If the combination of neutral policies and race- and gender-conscious capacity building programs prove inadequate, whether those policies also combined with limited consideration of individuals' race and gender in discrete aspects of the hiring or promotion process (not as a determinative factor, but for context, holistically considered with other factors), together provide an adequate remedy; and

Factor #5— Any consideration of race or gender is as limited as possible to avoid unduly burdening those who are not members of the positively targeted race or gender.

Factors ##3, 4, 5 (above) and 8 (below) generally require:

- ◆ Limiting the time period in which the race- or gender-conscious policy is used to assure it does not extend beyond the period of demonstrated need for race- and gender-consciousness;
- ◆ Not over-weighting race or gender status in relation to other factors; and
- ◆ Providing people of all races and genders the ability to compete for employment opportunities and benefits (avoiding race or gender exclusive policies).

Federal non-discrimination in employment law strongly disfavors race or gender exclusive employment opportunities, benefits, terms, and conditions (quotas, set-asides, particular race, or gender only benefits), which are rarely justifiable in the absence of a court-ordered remedy for proven intentional discrimination.

The information in **Factors ##1-3** (evidence of a failure to provide adequate EEO, evidence of use and effect of neutral policies and any need for identity consciousness, and the remedial plan) also should be included or referenced in the IHE's annual AAP.

3. Neither the EEOC nor the Supreme Court has provided guidance on whether or how the EEOC's regulation identifying remediation of an artificially limited labor pool as an aim that may justify limited race- or gender-conscious capacity-building policies (see Part III, STEP 2, par. 4) applies to IHEs. However, the EEOC regulation's wording is broad enough to apply to IHEs. To justify pursuit of race- or gender-conscious policies to remedy an artificially limited labor pool, the need for such policies must be assessed under the five factors noted above (expanded to apply each factor to the existence and remediation of an artificially limited labor pool in lieu of underutilization)—as well as considering the following three additional factors (#6-#8):

Factor #6: Whether there is evidence of the existence of an artificially limited labor pool in particular disciplines and ascending levels of tenure track and tenured positions at the IHE.

- This would generally require:
 - Identifying a substantial cohort of graduate students, post-doctoral associates, adjunct faculty, and early career faculty at the IHE (and possibly in the relevant trainable labor pool) who are members of particular racial or gender groups and have the foundational discipline knowledge to be trained for tenure track and tenured positions in the relevant disciplines;
 - Evidence that historically the racial or gender groups in the cohort have been systematically prevented from gaining the necessary experience and training to compete for such positions; and
 - A substantial imbalance (underutilization), comparing the groups' representation in the relevant labor pool from which the IHE or department could recruit (with the trainable cohort included in the relevant labor pool count)—to the group's representation in the IHE's relevant workforce (recruitment market-related disciplines and type and level of position);

Factor #7: Whether the IHE or its labor union has historically contributed to the barriers and exclusionary policies (with uncertainty as to whether there is a requirement for the IHE to have actively, as opposed to passively contributed); and whether the IHE can provide evidence of its involvement if challenged. An IHE must show that it contributed to inadequate EEO but is not required to have discriminated to qualify. And it may be possible for an IHE to show that the nature of its participation was a norm across higher education and American society due to systemic inequities. However, this rationale (while supportable with a combination of institution-

specific and broader evidence) has not been tested in the higher education context and consequentially comes with risk; and

Factor #8: Whether the IHE has included or referenced in its AAP a formal, time-limited remedial plan that focuses on temporary, remedial, capacity-building programs to prepare members of the trainable cohort to compete for employment and promotion into tenure track and tenured positions; and that the IHE is also providing these capacity building opportunities to

individuals from other groups who have the fundamental knowledge but need additional training, to avoid imposing undue burdens on members of such other groups. Capacity building programs are not regular employment or promotional positions.

Title VII includes a provision that affirmative action taken in good faith reliance on and in conformance with “written interpretation or opinion of the [EEOC]” shields an employer from liability under the statute.^{li} However, institution-specific assessment of whether the IHE has contributed to an artificially limited labor pool, consideration of the institution’s risk tolerance in light of the absence of guidance specific to IHEs and the need to have evidence of the IHE’s contribution, and institution-specific legal advice are warranted to enable the IHE to weigh benefits and risks. See **Brief Legal Overview** at <https://www.aaas.org/programs/diversity-and-law>.

4. Evaluate and document on an ongoing basis whether the five factors demonstrating necessity exist to justify use of race- and gender-conscious policies to achieve the IHE’s remedial EEO aims. Include the three additional factors relating to artificially limited labor pools, if the IHE seeks to rely on this remedial aim. Also evaluate evidence of need for faculty race- and gender-consciousness to advance supplementary educational diversity aims (but do not rely on those aims alone).

Points of emphasis and amplification are:

Point #1: Any underutilization or other indications of inadequate EEO must be substantial and persistent, even with sustained use of neutral policies, before conscious policies may be justified. Inadequate EEO must be determined by a legally-recognized test (e.g., the 80% test—see Part II.B (definitions text box))—and not in relation to general societal demographics.

Point #2: Sustained, robust and documented use of neutral policies is essential and should be evaluated for their impact on remedying underutilization or other indicators of inadequate EEO at an IHE before any race- or gender-conscious policies are considered. See **Neutral Strategies Guide-Faculty**, <https://www.aaas.org/programs/diversity-and-law>.

Point #3: Evidence of the need for race- and gender-consciousness policies—including the use and impact of neutral policies—must be collected, documented and evaluated. This should be part of the annual process to update the IHE’s AAP.

- Deploy the AAP in a regular system to raise awareness of departments that require action to address underutilization or other EEO remedial needs—not in connection with a specific search or other employment action.
- If presumed discrimination is found, confer with your legal counsel before disseminating this information or determining the remedy.
- Implement a system connecting HR and legal experts with the Provost’s office, deans, and department heads to assure legal justification and sustainable design before any race- or gender-conscious action is taken. (See STEP 4.)

Point #4: Determine the impacts of any race- and gender-conscious strategies to ensure that they are effective. Ineffective strategies are not necessary and unduly burden those who are not targeted for a benefit.ⁱⁱⁱ

Point #5: Based on these annual evaluations of evidence, adjust EEO aims and the policies used to achieve them, if warranted by changes in internal and external circumstances.

Point #6: Assess the use of neutral strategies and any need for conscious strategies to support the supplemental aim of increasing faculty diversity at the IHE and in its departments to advance beneficial educational diversity interests for all students. Where a remedial justification also exists, the educational diversity interest may bolster remedial justifications for limited race- or gender-consciousness when the inadequacy of neutral strategies can be demonstrated. See **5-Step Design Guide-Students** at <https://www.aaas.org/programs/diversity-and-law>.

5. An office with in-house or outside expertise in the requirements of AAPs (typically, Human Resources or the EEO office) should be responsible for the plan’s annual update and conclusions relating to the existence of underutilization or other remedial conditions that may (but will not necessarily) justify race- or gender-conscious policies in employment.

Collaboration among such experts, academic leaders and legal experts is critical to the application of the AAP information to the broader evaluation of whether race- or gender-consciousness is needed and justified on a specific occasion. Having a procedure in place whereby the IHE is transparent about such data collection with the campus community can prove to be helpful when attempting to make changes within often siloed departments and programs. Ensuring that these data do not simply stay within HR or EEO files but instead are understood by the IHE writ large, will be helpful for implementation and actualization of goals. Conferring first with legal counsel when undertaking analysis of any data that may raise the specter of discrimination (i.e., presumed discrimination is shown) is important, however, to gain the benefit of privileged advice on how best to pursue a remedy.

Coordinating the AAP effort with the IHE’s overall EEO, diversity and equity initiatives can help assure that the AAP—which requires a substantial annual effort—is operationally useful, while meeting technical legal requirements. This coordination, as well as supporting the most useful data-gathering and assessment related to faculty diversity’s role in advancing the IHE’s educational diversity interests, could be a key responsibility of the multi-office team (see Part III, STEP 1). The team would provide guidance to relevant units across the IHE that are collecting data and designing and implementing specific EEO- and diversity-aimed policies. The team would also provide templates, specialized expertise (including legal) and other support, and track progress.

6. Each IHE and discipline within an IHE will find different neutral policies to be workable to advance their faculty-focused EEO, educational diversity and equity goals in their unique circumstances. See **Neutral Strategies Guide-Faculty**, for guidance on major categories of neutral policies, with examples of policies from the field and promising ideas, and the customizable neutral **Target of Opportunity Policy-Faculty** sample, <https://www.aaas.org/programs/diversity-and-law>, that can contribute to faculty EEO and diversity and equity interests.

Two potentially high-impact neutral policies that are likely to be a “business necessity” for an IHE and departments with authentic EEO, educational diversity, and equity aims relates to merit criteria focused on DEI knowledge and commitment for faculty hiring, promotion, and other opportunities and benefits. Include, among other merit criteria: an individual’s knowledge and expertise about and ability to elevate others’ understanding of issues of race and gender inequity in education and society, and an individual’s demonstrated commitment to ameliorating these inequities. An individual’s identity-status is not a consideration in these criteria; only their knowledge and commitment are considered. And people of all races and genders may have these qualities. It is important to elicit and weigh information about the ability of individual candidates to advance EEO, diversity and equity interests, whatever their own identities may be, in a manner that is authentically neutral. This neutral policy is likely to result in increasing the compositional diversity of the faculty, and associated positive educational experiences for all students. That is because many people of color, women and LGBTQ+ individuals are likely to possess these qualifications based on their experiences in our society writ large, not based on the IHE’s employment action. See **Brief Legal Overview**, <https://www.aaas.org/programs/diversity-and-law>.

It is important to maintain valued race- and gender-related knowledge and expertise qualities or commitment qualities as separate interests to avoid advancing an assumption that people of color, women and LGBTQ+ individuals should be expected to advance both interests, thereby unfairly placing the burden of expertise and service on those who are targeted for inequity. An individual faculty member may have valuable expertise or knowledge, however obtained (whether from personal experiences with inequity, service, or learning), and an ability and passion to elevate students’ and colleagues’ understanding. Yet, they may not want to focus their core research, teaching or service on ameliorating societal inequity. To avoid the use or appearance of a proxy for race or gender and demonstrate authenticity and “business necessity” of these qualities, it is a wise practice for the IHE to articulate—with intentionality, authenticity, clarity and consistency—the importance of the relationship between race and gender issues *subject matter expertise* or demonstrated commitment to ameliorate such identity-based inequities and the IHE’s educational mission and goals. It is critical to assess whether each individual applicant contributes to such interests without considering the applicant’s own race or gender to avoid triggering exacting federal non-discrimination mandates in employment law. See **Neutral Strategies Guide-Faculty**, <https://www.aaas.org/programs/diversity-and-law>.

DESIGNING A POLICY IN 5

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STEP 4. Design Considerations for Race- & Gender-Conscious Policies & Neutral Policies with Disparate Impact

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If the evaluations in STEP 3 evidence a need for limited race- and gender-conscious policies to remedy legally-recognized underutilization or other inadequate EEO at an IHE (which is rare in many STEM fields), the design of such conscious strategies requires attention to key elements driven by federal non-discrimination law. Neutral policies that may have a disparate impact on individuals of different races or genders also require attention to some of these design elements to demonstrate business necessity. We note design elements that apply to such neutral strategies with an asterisk (*).



1. Satisfy the following federal law design parameters:^{liii}

- ◆ ***Articulate the EEO and DEI interests and their importance.** Whether or not an employment policy will involve race- or gender-consciousness, articulate in its description and related communications, the IHE's and department's interest in faculty-focused EEO and diversity and equity interests—and why these interests are integral to delivering excellent education, research and service programs, and achieving the IHE's and department's mission and the related priority aims for such programs. See **DEI Statements and Survey Questions**, <https://www.aaas.org/programs/diversity-and-law>.
 - Integrate the advancement of EEO, diversity and equity interests in the core teaching, research, and service duties for all faculty.
 - Correspondingly integrate the competency to advance these interests with other important qualities in definitions of merit and qualification criteria that are used to evaluate all individuals (irrespective of their race or gender) in performance assessments and for faculty hiring, promotion and other employment opportunities and benefits.
 - Establish clear, documented and appropriately transparent evaluation criteria, including the definition and dimensions of “merit” and related qualification requirements. Do not obscure the race and gender neutrality of identified criteria (and assure there is strong evidence of a remedial need and clear limits, if any such identity consciousness is involved). Obscuring a neutral design will just invite unnecessary legal challenges and internal confusion.
 - Train those in evaluative and decision-making positions (e.g., search committees, Provost's office, deans, and department heads) to support understanding and ownership of:
 - merit and qualifications without unnecessary barriers to EEO, diversity and equity;
 - the integral role of assessing the ability of each candidate, whatever their race or gender, to advance EEO, diversity and equity interests, among all other factors; and
 - how to maintain neutrality in the overwhelming circumstances when that will be a legal imperative while advancing DEI interests.
 - In rare situations when individual race- or gender-consciousness is sustainable in the employment context, provide institutional support to guide design and implementation within permissible parameters.

- ◆ **Do not unduly burden others.** Avoid remedying inadequate EEO using policies that unduly burden those who are not members of the races or genders targeted for a benefit:
 - Maximize use of neutral policies, avoid conscious ones to the greatest extent possible, and—even if a remedial justification and need for limited race- or gender-consciousness can be established—enable people of all races and genders to compete for opportunities and benefits (i.e., avoiding designated race- or gender-only, exclusive policies).
 - If conscious policies are needed, use them in capacity-building programs before (and, if possible, instead of in) hiring, promotion or more substantial employment opportunities and benefits.
 - Do not use conscious policies in layoff decision-making.
 - Do not create separate processes or qualification criteria for applicants on the basis of race and gender.

- ◆ **Limit the scope of identity-conscious policies to what data support.** Even if justified, *limited* consideration of individuals’ race or gender in conferring employment benefits and opportunities and determining employment terms and conditions must relate only to the targeted race(s) or gender(s)—and only to a type, discipline and level of position—that data demonstrate are underutilized or affected by other legally recognized inadequate EEO in an area of the IHE.
 - Use of race- and gender-consciousness in employment policies across the IHE or even across a department is prohibited under federal non-discrimination law (unless data show that the inadequate EEO is correspondingly widespread in its effect, as is the need for such an identity-conscious remedy).

- ◆ **Minimize identity-conscious policies, even if any are justified.** Race- and gender-consciousness, when justified (e.g., in a capacity-building program if sustained use of neutral policies proves inadequate to remedy a persistent failure to provide EEO), should be minimal and flexible, not mechanical, and not used as a determinative factor.
 - Race and gender^{liv} alone should not be determinative in conferring and deciding employment opportunities, benefits, terms, or conditions. However, the influence of identities on an individual’s life experience in society and associated ability to contribute to the educational, research and service priorities of the IHE and a department—assessed in a contextual, holistic manner for all applicants—may render these considerations meaningful for some individuals. In an individualized, contextual consideration, the weight of race and gender considerations should not be the same for all individuals of the same race or gender. (If there is an authentic justification for an employment decision, without considering an individual’s race and gender, it is unwise to create an unnecessary legal issue by considering such identities.)
 - Contextual consideration of race and gender is not about stereotypes or assumptions. Thus, it is important to ask for relevant information from all applicants about their life experience, and to not rely on assumed group stereotypes or experience.^{lv} See customizable **Example Application Questions** at <https://www.aas.org/programs/diversity-and-law>.

- ◆ ***Do not make mid-process changes.** Do not add or amend race- or gender-conscious policies—or neutral policies that may have a disparate impact on different races or genders—as they are applied to a specific occasion’s employment process once that process is initiated and made known to applicants. Such identity-conscious or disparately impactful changes mid-process frustrate the reasonable expectations of applicants and are overly burdensome and hard to justify under federal non-discrimination in employment law.^{lvi}

- To avoid a mid-course change, for neutral policies that may have a disparate impact, it is a good practice to adopt and publicize “umbrella” policies that automatically apply to all searches or other identified employment actions (or all such actions relating to certain categories of faculty position). *See, e.g.,* neutral **Sample Target of Opportunity Policy-Faculty**, <https://www.aaas.org/programs/diversity-and-law>.
 - Adoption of an umbrella policy should neither be associated with nor applied to any search or other employment process that is underway at the time of its adoption.
 - So long as it is applied to employment actions initiated after the policy’s adoption, there should be a credible position that an umbrella policy may provide for, e.g., the expedited hiring and funding of multiple positions rather than one, a higher level of financial or staffing support, or other employment benefits when an opportunity arises to hire, promote, or retain a faculty member who, regardless of their own race and gender, can especially advance high priority diversity and equity (or other) interests of an IHE or department—even if that opportunity arises in the middle of a search or other employment process.

◆ **If an IHE uses the neutral DEI knowledge and commitment criteria, the IHE must elicit the necessary information to apply the criteria with authenticity.** The California university system has emphasized the importance of eliciting and scoring information from applicants and candidates about their:

- Awareness and knowledge or expertise regarding racial and gender diversity and equity issues in society, relevant fields, and education programs;
- Track record of advancing these interests; and
- Specific plans and ideas for how they would advance these interests through their teaching, research, and service as a faculty member or in a leadership role.

Many people of color, women, and LGBTQ+ individuals may score well on this qualification criterion due to their experience of systemic racism and sexism in society and fields—not based on an employment action by the IHE or department. However, it is key that a person of any racial or gender identity can score well (or poorly) under these criteria because it is the substance of their individual awareness, track record and ideas, not their racial or gender identity, that is considered in scoring.

DEI Statements. Some IHEs elicit this information by requiring and scoring “DEI Statements,” an approach the University of California (UC) system has developed with sophistication. *See, e.g.,* [UC Berkeley’s model](#), which other universities in the system, including UC Davis and UC Irvine, have adapted for their own use. A structured interview protocol or other means of making similar

inquiries about EEO, diversity and equity interests of all candidates—using the same questions, in the same order for each person—can elicit the necessary information for scoring. Beware that an interview approach increases the opportunity for implicit or explicit identity bias to influence assessments and consider how to minimize that effect. (Consider using a strict protocol for uniformity in questions and process, assuring a diverse interviewer panel, and encouraging the panel to internally call out and discuss any bias concern for resolution.) DEI scores may be considered, along with other qualities and accomplishments, in the decision of whom to interview and whom to include on a short list, as well as in final decisions.

Holistic consideration. It is a good practice to consider this knowledge and commitment related information—whether elicited through a required statement or otherwise—as relating to one among other qualification criteria with the full application package. This may help make clear that ability to advance EEO, diversity and equity interests is integral to teaching, research and service

excellence, but is not over-weighted in relation to all other integral factors in the process. (Such clarity also helps to minimize claims of excessive disparate impact of a neutral policy on some races or genders by demonstrating that the consideration of contributions to EEO, diversity and equity are fully integrated with all important criteria.)

Minimizing the effects of explicit and implicit bias. If an IHE has data to demonstrate that implicit or explicit identity-based bias in search and other selection processes (pro- or con- any identities) has created a barrier to authentic and serious consideration of ability to assess EEO, diversity and equity related capabilities inherent in faculty positions' qualifications, however, it should be possible to justify a process that diminishes that barrier. For example, with such evidence, names, and all other parts of the application package of all individuals could be withheld until after information on EEO-, diversity- and equity-related capabilities is scored for all applicants. It is important to establish a minimal baseline adequate score tied to baseline faculty qualification criteria upfront (before reviewing any aspect of an application, including EEO, diversity and equity information), as a condition to advancing individuals in the process and reviewing the full package.

Building ownership of the DEI knowledge and commitment merit criteria in faculty hiring and promotion processes is critical, as well as challenging. Including respected faculty champions in the development process and as ambassadors to their peers is helpful. Piloting the concept, providing a reward to departments that participate, and highlighting the leadership of pilot departments to engage the natural competitiveness of others may help as well. Ultimately, institutional, and departmental leadership is needed to adopt the policy, after building faculty alliances and as much consensus as possible.

- ◆ **Consider an employment law nuance on design of neutral policies with EEO-related remedial goals.** If an affirmative action policy that does not consider an individual's race or gender is solely intended to increase compositional diversity to remedy underutilization—i.e., there is no other substantial and authentic institutional aim (and the IHE hasn't first tried fully neutral remedial policies that do have other authentic institutional aims)—the policy may be sustainable as inclusive and treated similarly to neutral policies under the main federal non-discrimination in employment statute, Title VII, and the regulations of OFCCP that apply to federal contractors. Such strategies are preferable alternatives to individual race- or gender-conscious remedial action and would advance the EEO aims of Title VII and the executive orders administered by OFCCP. While not clearly decided by the Supreme Court, treating such strategies as neutral should be a sound position for private IHEs to take. However, there is a key difference for public IHEs. AAPs required

by OFCCP, and recognized by the Supreme Court in Title VII decisions, do call for flexible compositional goals (not quotas, caps or fixed goals based on race or gender) to address findings of race- or gender-based underutilization (or a similar Court concept, "manifest imbalance"). Private IHEs are in a stronger position than public IHEs to adopt facially neutral policies whose sole aims are to advance these remedial numerical goals because private IHEs are only subject to Title VII and OFCCP regulations; they are not subject to the Equal Protection Clause of the U.S. Constitution (EPC). Public IHEs, however, are subject to Title VII, OFCCP regulations, and the EPC. Public IHEs are well-advised to first use fully neutral policies (for which there is a substantial and authentic institutional aim beyond just increasing compositional diversity), even when an underutilization exists. The Supreme Court has indicated that the EPC imposes stricter standards on public entities than Title VII imposes, though how much stricter is not defined.^{lvii} While the definition of "neutral" may be stricter for public than private IHEs, all IHEs are well advised to use a progressive approach, anchored in neutral policies and beginning with capacity building, when limited race- or gender-

consciousness is justified to address a persistent and substantial remedial condition. See **Big Picture Fundamentals & Staircase Diagram-Faculty**, <https://www.aaas.org/programs/diversity-and-law> for a top-line illustration of this important progressive approach.

The importance of legal guidance when neutral policies are not adequate alone to advance EEO remedial aims. While neutral policies can meaningfully contribute to EEO, diversity and equity aims, they may not be enough on their own to remedy inadequate EEO. IHEs are wise to establish a system that provides occasion-specific legal support to central offices and departments as a condition to their consideration of any individual's race or gender in conferring an employment opportunity or benefit or deciding an employment term or condition. EEO law imposes highly technical requirements to justify, and strongly disfavors, race- and gender-conscious policies. Justifying even limited use of race- or gender-conscious strategies is more difficult in the employment context, which impacts faculty, than in the student education context where still-exacting legal standards apply. Remedial justifications may exist for identity-consciousness on some occasions, however. So, rather than imposing a blanket ban on race- and gender-consciousness in employment, consider conditioning such action on case-specific legal advice to confirm justification, determine whether the action is sustainable, and guide the design.

DESIGNING A POLICY IN 5 STEPS

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STEP 5. Advance Faculty-focused Equity & Diversity Interests Without Triggering Exacting Legal Standards

The focus of STEPs 1-4 is on EEO-related aims recognized by federal non-discrimination in employment law and supplemental faculty-focused educational diversity aims. Those STEPs also address limited race- and gender-conscious policies when justified. In addition, they reference an IHE's societal equity and stand-alone educational diversity aims and policies throughout, where relevant to creating a coherent, effective, and efficient institutional EEO, diversity and equity-related mission and associated process management system. Building upon, but not repeating, the content in STEPs 1-4, STEP 5 lifts up some key points related to advancing equity and stand-alone educational diversity) in the faculty context where there is not a foundational remedial condition to potentially justify race- or gender-consciousness. It focuses on faculty-driven educational and societal equity aims.



1. When considering faculty employment, federal non-discrimination in employment law makes an important distinction between general societal equity-aimed policies and stand-alone, faculty-focused educational diversity policies on the one hand—and legally-recognized EEO-aimed policies, potentially bolstered by supplemental educational diversity policies, on the other.

The Supreme Court has held that the aim of remedying general societal inequity is not substantial enough to justify an exception to the federal non-discrimination mandate against considering the race or gender of individuals in conferring employment benefits and opportunities or determining employment terms and conditions. In contrast, the Court has held that the EEO aims of remedying underutilization or presumed discrimination are substantial enough to justify a time-limited exception to the non-discrimination mandate when evidence demonstrates the necessity.^{lviii} Consequently, race- and gender-conscious policies (means) may not be used to achieve an IHE's aims to right societal wrongs through faculty hiring, promotion or other employment policies. Also, the Court has not recognized the aim of advancing stand-alone, faculty-focused educational diversity (i.e., to create a broadly diverse faculty as an essential driver of high-quality educational experiences benefiting all students), as a justification for race- or gender-conscious policies; but, it has not foreclosed that possibility either.^{lix}

2. However, federal non-discrimination law does not foreclose meaningful opportunities for IHEs to pursue equity and faculty-focused educational diversity interests. IHEs are free to determine and articulate their educational diversity and equity aims, and can play a critical role in expanding knowledge about and advancing racial and gender equity through the faculty.

IHEs can take many actions to create a more equitable climate and culture for a broadly diverse faculty and student body. It can encourage welcoming, inclusive conduct, elevate knowledge about societal and field inequities, and advance excellence in education and a commitment to equity—without considering any individual's race or gender and without triggering exacting federal non-discrimination law standards.^{lx} Even though these Court-labeled “neutral” measures are not enough on their own to fully remedy inequity in a society with embedded systems of racism and sexism,^{lxi} their use and the recognition that societal norms and systems treat people differently based on their race and gender can be expected to result in both advancing equity interests and increasing racial and gender

compositional diversity at the IHE.

3. Examples of neutral means to achieve equity and stand-alone educational diversity aims are those that are tied to an IHE’s authentic educational, research and service mission. These means may be attentive to societal demographics, but should not aim to mirror societal demographics:

- ◆ Invest in developing mentoring and professional development programs with content that is explicitly inclusive of the needs and, in many cases, interests of people of color, women, LGBTQ+ individuals, as well as others who are in groups or who have intersectional identities that are not well-represented at, or have not been included in the dominant norms of, the IHE or a department. Participation criteria should not include identity status.
- ◆ Invest in faculty who have expertise and/or strong commitment to develop pedagogy that is effective for all students in a diverse student body; provide incentives to faculty and teaching assistants of all races and genders to participate in professional development and implement innovative inclusive strategies.
- ◆ Hire, invest in, and listen to faculty of any race or gender whose research, teaching, mentoring and service interests, expertise and records demonstrate a focus on the *subject matter* of race, gender and other educational or societal equity issues—or who are otherwise committed to elevating understanding of or ameliorating societal inequities.
- ◆ Engage and empower faculty and students who are directly affected by race- and gender-based inequity to guide actions that identify and systematically remove the IHE’s structural barriers to equity and diversity (i.e., redesign exclusionary systems and processes) in pursuit of a more inclusive and equitable academic community and broader society. Provide opportunities to people of color, women and LGBTQ+ individuals, including those with multiple intersectional identities that are the targets of inequity, to have input into needed actions. However, avoid burdening these individuals with the work unless they want to be involved. The effort and accountability to eliminate the cause of the harm should be broadly shared. Anyone who meaningfully advises or contributes to this effort should be credited for doing so (e.g., in performance assessments, compensation and other means of recognizing value).
- ◆ Sponsor regularly scheduled town hall meetings, symposia, community-building and other programming with a *subject matter focus* on issues of race, gender and other identities targeted for bias to elevate awareness and understanding of inequity and privilege issues, and to demonstrate a commitment to eliminate inequity. Do not consider individual identities in determining who may participate.
- ◆ Use selection criteria for interviewing, hiring, promotion, research support and other opportunities, benefits, terms, and conditions of employment and for participation in programs that consider meritorious or qualified those applicants and faculty who, regardless of their own race or gender,
 - demonstrate a sincere commitment and ability to contribute to ameliorating educational, employment, and societal inequities and supporting the success of a broadly diverse student body and faculty; and/or
 - have valued subject matter knowledge or expertise on issues of race, gender and other equity issues in society and an ability and passion to elevate others’ understanding (see the knowledge and commitment criteria in the Project’s **Neutral Strategies Guide-Faculty**, available at <https://www.aaas.org/programs/diversity-and-law> and Part III, STEP 4).
- ◆ Identify and eliminate barriers (including unnecessarily restrictive selection criteria and field definitions) to equitable faculty career opportunities and capacity-building programs.
- ◆ Engage a faculty committee, including well-respected faculty in any discipline and faculty

whose research focus is on the existence and effects of race- and gender-based societal inequity (e.g., in education, healthcare, housing, environmental justice, criminal justice, etc.) to consider

- the ways in which the IHE's research portfolio may be excluding effects on and interests of groups targeted for bias and unwittingly perpetuating inequity as well as stagnation of science, diminishing the portfolio's impact and contributions and
- how faculty could be made more aware of the merit of equity-focused research and incentivized to broaden the research focus. (See barrier removal strategies in the Project's **Neutral Strategies Guide-Faculty**, at <https://www.aaas.org/programs/diversity-and-law>.)
- ◆ Examine any institutional history of slavery, segregation, and other inequity, and engage a broad range of stakeholders in determining ways to acknowledge and address that history and its effects (past and present day). Identifying the harm caused (including ways in which the harm may be perpetuated in current norms and honors), owning it, and actively seeking to overcome or make amends for it, are critical to the creation of a welcoming and inclusive climate and culture. This requires hearing the voices of those who are affected and authentic openness (without defensiveness) to learning about continuing impacts and ways to end them.

Importantly, inclusive barrier removal and other neutral policies can be pursued in the faculty employment context to advance diversity and equity, as well as EEO, interests, whether a legally recognized remedial condition exists to justify race- and gender-conscious EEO policies. Neutral policies are the only option when an IHE's aim is advancing societal equity or stand-alone educational diversity interests through faculty employment (as opposed to remedying inadequate EEO). Being able to directly address systemic societal inequities based on race and gender by considering individuals' race and gender to level-set employment opportunities and benefits is a necessary foundation for equality under the law. However, with gaps in evidence of need for such level-setting undergirding the Supreme Court's employment decisions, current interpretations of federal non-discrimination law do not recognize this reality. That should not prevent IHEs from taking steps identified here, among others, to advance equity interests, even as we work to evolve the law toward more comprehensive means of advancing equity aims over time.

ⁱ Regarding high barriers: see, e.g., Riegle-Crumb, C., King, B., Irizarry, Y. (2019). *Does STEM Stand Out? Examining Racial/Ethnic Gaps in Persistence Across Postsecondary Fields*. *Educational Researcher*, 48(3), 133–144. <https://doi.org/10.3102/0013189X19831006>; Ong, C. W., Espinosa, L. & Orfield, G. (2011). *Inside the Double Bind: A Synthesis of Empirical Research on Undergraduate and Graduate Women of Color in Science, Technology, Engineering, and Mathematics*. *Harvard Educational Review*, 81(2), 172–209. <https://doi.org/10.17763/haer.81.2.t022245n7x4752v2>; U.S. Department of Education. (June 9, 2021). *Education in a Pandemic: The Disparate Impacts of COVID-19 on America's Students*. U.S. Department of Education Office of Civil Rights <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf>; National Academies, (June 2021). *Reports on Diversity, Equity, Inclusion and Racism In STEM Education and Workforce*; Malcom-Piqueux, L. (October 2020). *Transformation in the U.S. Higher Education System: Implications for Racial Equity*, National Academies. *Assessing and Responding to the Growth of Computer Science in Undergraduate Enrollments*, Consensus Study Report, (2018). National Academies <https://www.nap.edu/download/24926>; *Investigating the Potential Impact of COVID-19 on the Careers of Women in Academic Science, Engineering, and Medicine*, (2021). National Academies. <https://www.nationalacademies.org/our-work/investigating-the-potential-impact-of-covid-19-on-the-careers-of-women-in-academic-science-engineering-and-medicine>; *Women, Minorities, and People with Disabilities in Science and Engineering*, (2021). National Science Foundation [Women, Minorities, and Persons with Disabilities in Science and Engineering: 2021 | NSF - National Science Foundation](https://www.nsf.gov/pubs/2021/nsf2021-108/nsf2021-108.pdf) (all data are pre-COVID-19 pandemic, but indicate high barriers even before the pandemic for "Blacks or African American, Hispanics or Latinos and American Indians or Alaska Natives," as well as to a significant but lesser extent to women, in science and engineering education and the workforce); Carnevale, A. P., Fasules, M. L., Porter, A., Landis-Santos, J. (2016). *African Americans: College Majors and Earnings*. Georgetown Center on Education and the Workforce. https://1gyhoq479ufd3yna29x7ubjn-wpengine.netdna-ssl.com/wp-content/uploads/AfricanAmericanMajors_2016_web.pdf (discussing that African Americans account for only eight percent of general engineering majors, seven percent of mathematics majors, five percent of computer engineering majors, and 10 percent of health majors. In health, they are clustered in the lowest-earning detailed major: 21 percent in health and medical administrative services, six percent in higher-earning pharmacy, pharmaceutical sciences, and administration."); Riegle-Crumb, C., King, B., Irizarry, Y. (April 2019). *Does STEM Stand Out? Examining Racial/Ethnic Gaps in Persistence Across Postsecondary Fields*, *Educational Researcher*, Vol. 48 No. 3, pp. 133-144; Hughes, B., *Coming out in STEM: Factors affecting retention of sexual minority STEM students* (March 14, 2018). *Science Advances*. American Association for the Advancement of the Sciences. advances.sciencemag.org.

Regarding the benefits of broad faculty and student body diversity, see, e.g., Sorensen, N., Nagda, B. R. A., Gurin, P., and Maxwell, K. E. (2019). *Taking a "Hands On" Approach to Diversity in Higher Education: A Critical-Dialogic Model for Effective Intergroup Interaction* *Analyses of Social Issues and Public Policy*, Vol. 9, No. 1, pp. 3-35 (positing that higher education will be most influential when students encounter an educational environment that diverges from students' prior experiences and when its diversity and complexity encourages active thinking and an intellectual interest in exploring new and different educational experiences); Chang, M. J., et al., (2005), *The Educational Benefits of Sustaining Cross-Racial Interactions Among Undergraduates*, *The Journal of Higher Education* (indicating that one important conclusion that has emerged from research is that the vitality, stimulation, and educational potential of an institution are directly related to the composition of its student body, faculty, and staff); Bowman, N. A. (2011). *Promoting Participation in a Diverse Democracy: A Meta-Analysis of College Diversity Experiences and Civic Engagement*. *Review of Educational Research*, 81(1), 29–68. <https://doi.org/10.3102/0034654310383047>; Bowman, N. A., Brandenberger, J. W., Hill, P. L., Lapsley, D. K. (2011). *The Long-Term Effects of College Diversity Experiences: Well-Being and Social Concerns 13 Years After Graduation*. *Journal of College Student Development* 52(6), 729-239; Bowman, N. A., Denson, N., & Park, J. J. (2016). *Racial/cultural awareness workshops and post-college civic engagement: A propensity score matching approach*.

American Educational Research Journal, 53(6), 15561587 <https://doi.org/10.3102/0002831216670510>; Chang, M. J., Denson, N., Saenz, V., Misa, K. (2006). *The educational benefits of sustaining cross-racial interaction among undergraduates*. The Journal of Higher Education, 77(3), 430-55; Denson, N., Chang, M. J. (2009). *Racial Diversity Matters: The Impact of Diversity-Related Student Engagement and Institutional Context*. American Educational Research Journal, 46(2), 322–53, <https://www.jstor.org/stable/40284795>; Luo, J., Jamieson-Drake, D. (2009). *A retrospective assessment of the educational benefits of interaction across racial boundaries*. Journal of College Student Development, 50(1), 67-86; Pitt, R. N., Packard, J. (2012). *Activating Diversity: The Impact of Student Race on Contributions to Course Discussions*. The Sociological Quarterly, 53(2), 295-320; Wolfe, B. L., Fletcher, J. (2013). *Estimating benefits from university-level diversity* (No. w18812). National Bureau of Economic Research. https://www.nber.org/system/files/working_papers/w18812/w18812.pdf.

ⁱⁱ *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. University of Texas at Austin*, 570 U.S. 297 (2013) (*Fisher I*); *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016) (*Fisher II*); *Students for Fair Admissions, Inc. v. University of North Carolina*, No. 1:14CV954, 2019 WL 4773908 (M.D.N.C. Sept. 30, 2019); *Students for Fair Admissions Inc. v. President and Fellows of Harvard College*, 397 F.Supp.3d 126 (D. Mass. Sept. 30, 2019), *aff'd* 980 F.3d 157, *cert. docketed* No. 20-1199 (Mar. 1, 2021); *Students for Fair Admissions v. University of North Carolina*, No. 1:14-cv-00954-LCB-JLW (N.C.M.D. filed Nov. 14, 2017); *Students for Fair Admissions v. Yale University*, Case 3:21-cv-00241-KAD (filed Feb. 25, 2021).

ⁱⁱⁱ *See United States v. Virginia*, 518 U.S. 515, 532 (1996); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 729 (1982). In the *Virginia* case, the Supreme Court ruled that the exclusion of women from the Virginia Military Institute (VMI) (an institution designed through an “adversative” education to prepare men to be citizen-soldiers) violated the Equal Protection Clause, that the State’s effort to establish a parallel institution for women in response to the litigation did not provide a comparable opportunity for women, and that the state’s assertion that these institutions could be justified by an interest in providing the benefits of single gender education was not in fact the state’s purpose. In *Hogan*, the Court held that the exclusion of men from the Mississippi University for Women School of Nursing violated the Equal Protection Clause and tended to perpetuate the stereotyped view of nursing as a profession for women. These cases were significant in holding that the states had failed to provide an “exceedingly persuasive justification” for the exclusion of women or men, while at the same time articulating the longstanding intermediate standard that requires an important government aim and a demonstration that gender-consciousness is substantially related to achieving that aim. The decisions also found that the state had failed to show at the least that its policies were substantially related to an important government interest. The decisions thus resulted in some ambiguity and to discussions in lower court cases and commentaries as to whether the requirement of an “exceedingly persuasive justification” is equivalent to strict scrutiny or at least amounts to an enhanced intermediate standard of review, or whether the Court is just emphasizing that the intermediate standard still establishes a high bar of evidence of need for gender-consciousness.

^{iv} EEOC, Directives Transmittal No. 915.003, Compliance Manual, “Race and Color Discrimination,” at 15-31 – 15-34 (April 19, 2006) (citations omitted), available at www.eeoc.gov/policy/docs/race-color.html; *see also* Brief for the United States as Amicus Curiae, *Piscataway Twp. Bd. Ed. v. Taxman*, 519 U.S. 1089 (1997) (No. 96-679), 1997 WL 33561365, at *9 (citations omitted) (in which the Solicitor General opined that non-remedial affirmative action to achieve a diverse faculty does not violate Title VII where there are specific facts, not just broad assertions, that support the government’s compelling need for a diverse workforce to achieve the government’s mission—other than diversity as an end in itself—and where narrowly tailored consideration of race furthers that compelling mission).

The Supreme Court has not ruled on this issue under Title VII, which applies to private and public IHEs; public IHEs are subject to the stricter requirements of the U.S. Constitution’s Equal Protection Clause. Consequently, the educational benefits for all students of a diverse faculty is an important interest to articulate as a supplement to a remedying underutilization or presumed discrimination, but it is not alone adequate under current law. *See also*, Keith, J. L., (April 2019). *Pursuit of Student Body Diversity is Doable, But Do It Right!*. <https://educationcounsel.com/?publication=pursuit-of-student-body-diversity-is-doable-but-do-it-right>.

See also, *Steelworkers v. Weber*, 443 U.S. 193, 202, 208 (1979) in which the Supreme Court adopted a broadened 33

remedial justification for identity-conscious affirmative action in upholding an employer's training program that reserved 50% of the craft training spots for trainable black employees until the percentage of black craft workers was in line with their representation in the relevant labor pool—the local labor market—as appropriate, time-limited, voluntary affirmative action that implemented Title VII's purpose to break down racial hierarchy in occupations to which the employer has contributed that have been traditionally segregated without barring advancement by non-minorities. *Weber's* holding is codified in an EEOC regulation on artificially limited labor pools. See 29 C.F.R. Part 1608(3)(c)(2008).

^v See *Weber*, 443 U.S. at 209 (1979) (upholding under Title VII a collective bargaining agreement of a private employer reserving fifty percent of spots in an internal training program for skilled labor positions at an aluminum plant for its employed Black general laborers, where the union had historically barred Black laborers from membership, depriving them of the opportunity to train for the skilled positions and the employer hadn't employed them in those roles, but they were represented a high percentage of the available labor market and in the employer's general labor workforce and were trainable for higher skilled positions); *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 632-34, 642 (1987) (upholding under Title VII a county agency's affirmative action plan that did not set any quotas or fixed numerical goals but, on a temporary basis, considered race and sex in employee promotion decisions, with long and short term goals to address "manifest imbalance" of women and racial minorities in the county's work force as compared to their representation in the relevant general qualified labor force, where there had been job segregation; others could still compete for promotion; reserving the question of whether the Equal Protection Clause would apply greater limitations on such a plan); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 286 (1986) (race-conscious layoff policy is not narrowly tailored under applicable strict scrutiny standards because it is overly intrusive on and over-burdens already-employed individuals of other races—as distinguished from considering race when necessary in hiring decisions about individuals who are not yet employed). See also, *Ricci v. DeStefano*, 557 U.S. 557 (2009).

^{vi} For an even deeper analysis of federal non-discrimination law affecting faculty see Keith, J. L. (2019). *Enhancing Faculty Diversity: Policy, Law and Strategy Perspectives*, National Association of College and University Attorneys Annual Meeting. <https://educationcounsel.com/?publication=enhancing-faculty-diversity-policy-law-and-strategy-perspectives>. Since this article was written, two Supreme Court decisions of note were decided. See *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (holding that it is a violation of Title VII of the Civil Rights Act of 1964 for covered employers to treat an employee of one binary sex (man and woman) differently than the employer would have treated an employee of the opposite binary sex in the same circumstances, due to the employee's sexual orientation or gender identity); *Comcast Corp. v. National Association of African American-Owned Media*, 140 S. Ct. 2561 (2020) (in a decision interpreting Section 1981's prohibition against racial discrimination, reasoning that a plaintiff who sues for racial discrimination under Title VII bears the burden of showing that race was a determinative cause of the plaintiff's injury —i.e., that but-for racial discrimination the adverse action wouldn't have occurred—and that burden remains constant over the life of the lawsuit). These cases further amplify the Court's interpretation of Title VII's protections.

^{vii} A remedial justification, i.e., to remedy an IHE's own discrimination with strong evidence of current effects, also exists but is rarely used or successful – typically this approach has been used to address de jure segregation. See *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 28 (1971) ("Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis."); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

^{viii} See 42 U.S.C. § 2000e, et seq.; *supra note v*; *infra notes ix, xv*. See also 41 C.F.R. Part 60-20; OFCCP's Federal Contract Compliance Manual (Oct. 2014) https://www.dol.gov/ofccp/regs/compliance/fccm/FCCM_FINAL_508c.pdf. (A contractor may use a variety of methods to determine what constitutes "underutilization", including: (1) any numerical difference between incumbency and availability, (2) a numerical difference of one person or more, (3) minority or female incumbency that is less than 80% of availability (i.e., less than 80% of their representation in the available and qualified labor pool), (4) a disparity between the actual representation and expected representation for minorities and women that is statistically significant – namely -2.00 standard deviations or more); See also U.S. Dep't of Labor, OFCCP, *Technical Assistance Guide for Federal Supply and Service Contractors*, (Aug. 2009) at 21-22, <https://www.dfa.cornell.edu/sites/default/files/federal-contractors-tech-assistance-guide.pdf>. Applied broadly and in good faith, any of these approaches to underutilization should arguably afford educational institutions opportunities to engage in affirmative action that is at least as extensive as the affirmative action that is authorized under OFCCP regulations. The extent to which a court would uphold some of them, and the extent to which they differ from the

court-articulated concept of “manifest imbalance” is undecided. *See also, infra* note xvi for discussion of “manifest imbalance.” Federal contractors, including IHEs must use good faith efforts to remedy inadequate EEO, but are not authorized or required to discriminate on the basis of race or gender as a remedy. *See* Executive Orders 11246, 11375, 13672; OFCCP regulations at 41 C.F.R. Part 60.

^{ix} Equal Employment Opportunity Commission, Directives Transmittal No. 915.003, Compliance Manual, *Race and Color Discrimination*, (April 19, 2006) at15-31. www.eeoc.gov/policy/docs/race-color.html; Brief for the United States as Amicus Curiae, *Piscataway Twp. Bd. Ed. v. Taxman*, 519 U.S. 1089 (1997) (No. 96-679), 1997 WL 33561365, at 9 (in which the Solicitor General opined that non-remedial affirmative action to achieve a diverse faculty does not violate Title VII where there are specific facts, not just broad assertions, that support the government’s compelling need for a diverse workforce to achieve the government’s mission—other than diversity as an end in itself—and where narrowly tailored consideration of race furthers that compelling mission). *See also*, Egalite, A. J. and Kisida, B. (2016). *The Many Ways Teacher Diversity May Benefit Students*. (Washington, DC: Brookings Institution). <https://www.brookings.edu/blog/brown-centerchalkboard/2016/08/19/the-many-ways-teacher-diversity-may-benefit-students/>. *See also* Dee, T. (2005). *A Teacher Like Me: Does Race, Ethnicity, or Gender Matter?* *The American Economic Review* 95(2): 158-165. Taylor, O., Apprey, C., Hill, G., McGrann, L., and Wang, J., (2010). *Diversifying the Faculty*, *Peer Review* 12(3) <https://www.aacu.org/publications-research/periodicals/diversifying-faculty>; U.S. Department of Education, (2016). *Advancing Diversity and Inclusion in Higher Education: Key Data Highlights Focusing on Race and Ethnicity and Promising Practices*, Office of Planning, Evaluation and Policy Development Office of the Under Secretary U.S. Department of Education. <https://www2.ed.gov/rschstat/research/pubs/advancing-diversity-inclusion.pdf>.

^x *See Wygant*, 476 U.S. 267, 286. Societal discrimination alone is not sufficient to justify racial classification; rather, some showing of prior discrimination by governmental unit involved is required before limited use of racial classifications is allowed in order to remedy discrimination.

^{xi} 42 U.S.C. § 2000e, et seq.

^{xii} 42 U.S.C § 2000e-2(e); 29 C.F.R. § 1604.1-2. Title VII provides an exception to its prohibition of discrimination based on sex, religion, or national origin. That exception, called the bona fide occupational qualification (BFOQ), recognizes that in some extremely rare instances a person’s sex, religion, or national origin may be reasonably necessary to carrying out a particular job function in the normal operation of an employer’s business. Race is not included in the statutory exception and cannot, under any circumstances, be considered a BFOQ for any job. The EEOC has stated in its Guidelines on Discrimination Because of Sex, 29 C.F.R. §1604.1 et seq. (1980), that the BFOQ exception should be interpreted narrowly. The U.S. Supreme Court upheld that position in *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977), where the Court noted: “We are persuaded by the restrictive language of §703, the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission that the BFOQ exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.” In *Diaz v. Pan American World Airways*, 442 F.2d 385, 388 (5th Cir. 1971), the Court of Appeals for the Fifth Circuit held that “discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively.” In an earlier case, *Weeks v. Southern Bell Telephone and Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969), the same court said that an employer could rely on the BFOQ exception only by proving “that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.” *See also Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); *Dothard*, 433 U.S.at 333 (“But whatever the formulation, the federal courts have agreed that it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes.”); *Miller v. Texas State Board of Barber Examiners*, 615 F.2d 650 (5th Cir. 1980), *cert. denied*, 449 U.S. 891 (1980).

^{xiii} Public IHEs are subject to the main federal non-discrimination in employment statute, Title VII, as well as the U.S. Constitution’s Equal Protection Clause (EPC). Private IHEs are subject to Title VII, but not to the EPC. The EPC imposes somewhat stricter conditions than Title VII does on when race- and gender-conscious policies may be justified although how much stricter has not been fully defined by the Supreme Court. While serious consideration, sustained use of neutral policies, and evidence that such policies are alone inadequate to address a federal law-defined remedial condition are important for all IHEs as part of the justification for

race- and gender-conscious policies, public IHEs are likely subject to a somewhat more rigorous review of whether they have seriously identified and used neutral policies and whether their facially neutral policies have an authentic institutional aim beyond increasing compositional diversity (though also providing that benefit), before they can justify using race- or gender-conscious ones. See the definitional text box in Part II.B of this guide. See Licht, S. (May 2004). *Analyzing Racial Classifications in Employment Discrimination Litigation*, 52 U.S. Attorneys' Bulletin 10, 11; *Johnson v. Transp. Agency*, 480 U.S. 616, 632-34, 642 (1987) (distinctions between "manifest imbalance" justification for voluntary affirmative action under Title VII and actual discrimination justification for consideration of race and sex under the Equal Protection Clause); *Ricci v. DeStefano*, 557 U.S. at 594-96 (Scalia concurring, raised the issue of differences in Equal Protection Clause and Title VII standards: "Whether, or to what extent, are the disparate impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?" However, the Court did not address the question.). See also, *Johnson*, 480 U.S. at 635 (1987); *Shea v. Kerry*, 796 F.3d 42 (Fed. Cir. 2015), cert. denied, 136 S.Ct. 1656, (2016). See **Federal Non-Discrimination Law on Gender** at <https://www.aaas.org/programs/diversity-and-law>.

^{xiv} See *Wygant*, 476 U.S. 267 (holding that race-based teacher layoffs are too burdensome on employees' reasonable expectations); see also, *Taxman v. Bd. of Educ. of Twp. of Piscataway*, 91 F.3d 1547 (3d Cir. 1996) cert. dismissed, 527 U.S. 1010 (1997).

^{xv} The definition of "underutilization" is any less representation of a race or gender in an IHE's relevant workforce than would be expected, considering the available and already qualified labor pool in the recruitment market from which the IHE could reasonably recruit for a position. See 41 C.F.R. Part 60-20. See also OFCCP's Federal Contract Compliance Manual (Oct. 2014). A contractor may use a variety of methods to determine what constitutes "underutilization" of a racial or sex group, including: (1) any numerical difference between incumbency of the group in an employer's relevant workforce and its availability in the available and qualified labor pool, (2) a numerical difference of one person or more, comparing such representation, (3) incumbency of the group in an employer's relevant workforce that is less than 80% of its availability in the available and qualified labor pool, (4) a disparity between the actual representation and expected representation of the group in the employer's relevant workforce that is statistically significant – namely 2.00 or more standard deviations (which also raises the specter of presumed discrimination). See also U.S. Dep't of Labor, OFCCP (Aug. 2009). *Technical Assistance Guide for Federal Supply and Service Contractors*, at 21-22. Applied broadly and in good faith, any of these approaches to underutilization or presumed discrimination should arguably afford educational institutions opportunities to engage in remedial affirmative action under OFCCP regulations. The less than 80% test is most commonly used to measure underutilization and, while not decided by the Supreme Court, should be similar to the Court's definition of a "manifest imbalance" in a racial or sex group's representation in an employer's relevant workforce as compared to its availability in the labor pool. See *infra note* xvi. The extent to which a court would uphold some of the measures of underutilization, however, and the extent to which they differ from the court-articulated concept of "manifest imbalance" is undecided.

^{xvi} The Supreme Court articulates a likely similar concept to underutilization, a "manifest imbalance" in the representation of a racial or sex group in an employer's relevant workforce, as compared to the group's availability in the qualified labor pool. This is a substantial imbalance that evidences an employer's failure to provide EEO, which may (but will not necessarily) justify an identity-conscious remedy under Title VII, but is not so great as to rise to the level of presumed discrimination (a 2 or more standard deviations disparity). See *Johnson*, 480 U.S. 616 (1987) (consideration of race and sex as one of many factors in promotion decisions to address a manifest imbalance); see also, *Shea*, 796 F.3d at 57-60 (interpreting Supreme Court decisions, upholding removal of a barrier to people of color at the entry point to a hiring process in the State Department where the rigor of substantive hiring criteria is the same for all applicants and there is a manifest imbalance with robust evidence of longstanding, persistent exclusion of people of color, which had not been successfully remedied by neutral efforts over a period of years).

^{xvii} See, e.g., *Johnson*, 480 U.S. (1987) (comparing measures of discrimination and manifest imbalance); *supra note* xv (discussing OFCCP's measures of underutilization). An assessment of underutilization and presumed discrimination should be made annually by an IHE, typically by its Equal Opportunity or Human Resources Office or its contractor, as part of updating the IHE's Affirmative Action Plan, which is required of most IHEs as federal funding recipients. See also, 41 C.F.R. 60-2, 41 C.F.R. 6-300, and 41 C.F.R. 60-741 (OFCCP regulations outlining the specific content requirement for AAPs under each program).

^{xviii} See 42 U.S.C. § 2000e-2(a); *Comcast Corp. v. National Association of African American-Owned Media*, 140 S. Ct. 1009 (2020) (discussing the plaintiff’s argument that Comcast provided legitimate business reasons for its decision not to carry its channels, but that these reasons were pretextual); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (holding that once a plaintiff establishes a *prima facie* case of race discrimination through indirect proof, the defendant bears the burden of producing a race-neutral explanation for its action, after which the plaintiff may challenge the explanation as pretextual).

^{xix} OFCCP regulations and executive orders mandate that race, ethnicity, sex, and religion discrimination is prohibited for federal contractors, and reasonable affirmative action plans are required to attempt to address underutilization of minorities and women. But hiring decisions are expected to be made on a non-discriminatory basis. See Exec. Order No. 11246 (1965) (establishing requirements for non-discriminatory practices in hiring and employment on the part of U.S. government contractors); Exec. Order No. 11375 (1967) (banning discrimination on the basis of sex in hiring and employment in both the United States federal workforce and on the part of government contractors); Exec. Order No. 13672 (2014) (amending President Richard Nixon’s 1969 Exec. Order No. 11478 by adding “gender identity” as a class of people protected from discrimination, and also amending President Lyndon B. Johnson’s 1965 Exec. Order No. 11246 by adding “sexual orientation and gender identity” to the list of protected groups). See also 41 C.F.R. Part 60-1.20(a) (stating “(a) OFCCP may conduct compliance evaluations to determine if the contractor maintains nondiscriminatory hiring and employment practices and is taking affirmative action to ensure that applicants are employed and that employees are placed, trained, upgraded, promoted, and otherwise treated during employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin”); OFCCP (May 2020). *Federal Contract Compliance Manual*.
https://www.dol.gov/sites/dolgov/files/OFCCP/FCCM/508_FCCM_05012020.pdf.

^{xx} Generally, intentional discrimination occurs when the recipient acted, at least in part, because of the actual or perceived race, color, or national origin of the alleged victims of discriminatory treatment. *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 548 (3d Cir. 2011). While discriminatory intent need not be the only motive, a violation occurs when the evidence shows that the entity adopted a policy at issue “‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). The Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989), and *Adarand Constructors, Inc., v. Peña*, 515 U.S. 200, 226 (1995), established that any intentional use of race, whether for malicious or benign motives, is subject to the most careful, strict judicial scrutiny. Accordingly, the record need not contain evidence of “bad faith, ill will or any evil motive on the part of the [recipient].” *Williams v. City of Dothan*, 745 F.2d 1406, 1414 (11th Cir. 1984).

^{xxi} See *supra* note i for a more robust discussion.

^{xxii} See *Johnson*, 480 U.S.at 634 (1987); *Adarand Constructors*, 515 U.S at 235 (1995); *Shea*, 796 F.3d at 61.

^{xxiii} An authentic neutral institutional aim may be seeking faculty, of any race or gender, who will advance mission-related institutional priorities such as creating inclusive pedagogy and a welcoming academic environment where all faculty and students can thrive or broadening the research agenda’s contributions to important societal issues of race or gender equity. This is determined in reference to each person’s knowledge, expertise, and record, not by their identity status. See the University of California at Berkeley’s Criteria for Scoring educational diversity, equity and inclusion-advancing abilities of candidates for the professoriate or for promotion, which are based on knowledge, track record and plans, <https://ofew.berkeley.edu/recruitment/contributions-diversity/rubric-assessing-candidate-contributions-diversity-equity>.

See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-68 (1977) (Where a facially neutral government action produces a racially disparate impact, without evidence of discriminatory intent, equal protection is not offended, and strict scrutiny does not apply. Considerations for determining discriminatory intent include: historical background and legislative history for the decision showing an invidious purpose; process, action, and substantive anomalies in the decision, particularly if they led to a decision that is different than what would have been expected had norms been followed; and contemporaneous reports or statements of those involved in the decision making process); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (A 37

hiring policy giving veterans a preference had an overwhelmingly positive impact on men and adverse impact on women, due to well-known demographics of the military. However, the policy was not subject to strict scrutiny and reflected a legitimate purpose.) See, e.g., *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (referring at times to the challenged employment practice as “express, race-based decision making”); *Parents Involved in Community Schools*, 551 U.S. 701 (2007) (referring to challenged policy involving explicit consideration of race as “race-based”). See generally *Bakke*, 438 U.S. at 315-17 (discussing that to be narrowly tailored, a race-conscious admissions program cannot “insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants;” instead, it may consider race or ethnicity only as a “plus’ in a particular applicant’s file;” it must be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight”); *Grutter*, 539 U.S. at 340 (explaining that race neutral policies are those that are capable of producing a critical mass of diverse students without forcing an institution to abandon academic selectivity); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 630 (1990) (O’Connor, J., dissenting) (“To be narrowly tailored, a race-conscious admissions program must not “unduly burden individuals who are not members of the favored racial and ethnic groups.”), reversed by *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

^{xxiv} See, e.g., *supra* notes xiii, xvi.

^{xxv} A common example of a targeted but inclusive strategy concerns outreach and recruitment. It is the combination of robust outreach for all potentially qualified and capable applicants, with targeted outreach to groups that may not respond as well to the general outreach or feel welcome to enter the search process, to effectively convey the same consequential information and encourage everyone to apply.

Federal appeals and trial courts have made distinctions between inclusive and exclusive outreach in employment and enrollment. Compare, e.g., *Weser v. Glen*, 190 F. Supp. 2d 384, 399 (E.D. N.Y. 2002) (upholding targeted outreach to build a diverse applicant pool for law school, citing *Honadle* for the proposition that race and sex targeted outreach to “broaden a pool of qualified applicants and to encourage equal opportunity,’ but [that] do not confer a benefit or impose a burden do not implicate the Equal Protection Clause” and are “inclusive,” a distinction recognized by *Adarand*); *Honadle v. University of Vermont and State Agricultural College*, 56 F. Supp. 2d 419, 427-28 (D.Vt. 1999) (upholding targeted outreach in employment); *Shuford v. Alabama State Board of Education*, 897 F. Supp. 1535, 1553-56 (M.D. Ala. 1995) (upholding “inclusionary” targeted outreach to African Americans and women to expand the pool of qualified applicants for employment as part of an affirmative action plan; stating that “traditional” equal protection analysis should not apply, where race and sex are not considered in hiring decisions and the outreach does not have the effect of excluding qualified candidates from the pool on the basis of race or sex; but demonstrating strict scrutiny would be satisfied if it were to apply) to, e.g., *MD/DCI/DE Broadcasters Ass’n v. Federal Communications Commission*, 236 F.3d 13, 20 (D.C. Cir. 2001) (applying strict scrutiny to strike down an FCC rule requiring race-targeted outreach and tracking in licensee employment programs, which had the effect of requiring limited recruitment resources to be targeted to recruiting minorities, depriving others of information to compete for positions). To be treated as neutral and avoid application of exacting legal standards, the outreach may not provide a material benefit (e.g., an extra paid campus visit or guarantee of an interview) to some individuals and not others based in whole or in part on their race or gender; such a visit or interview provided to all short-listed candidates should be treated as inclusive and neutral, whereas a visit or interview only for one of the short-listed candidates in even partial consideration of the candidate’s race or gender would likely not be treated as inclusive. Inclusive mentoring initiatives targeted to people of color or women, or LGBTQ+ individuals may also be treated as inclusive and neutral if there is strong evidence (via surveys, regression analysis, etc.) that generally available mentoring is less available or effective for individuals in these groups and they are less knowledgeable about the keys to success in academic careers, whereas mentoring is available and effective for faculty from other groups, who are considerably more knowledgeable on the keys to success, and mentoring needs are being met across the board.

^{xxvi} 42 U.S.C. § 2000e-2(k)(2). An unlawful employment practice based on disparate impact is established if it is “demonstrate[d] that [an employer] uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the [employer] fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or . . . [it is proven that] an alternative employment practice [is available that has less disparate impact and the employer] refuses to adopt such alternative employment practice.” Title VII thus includes a “business necessity” defense to disparate impact claims. “Business necessity,” however, is not a defense to intentional discrimination (disparate treatment).

^{xxvii} See “Benefits of Diversity,” *supra* note i . See also *Grutter* 539 U.S. at 308 (“numerous expert studies and reports showing that such diversity promotes learning outcomes and better prepares students for an increasingly diverse workforce, [and] for society.”); See also *Grutter v. Bollinger*, 2003 U.S. S. Ct. Briefs LEXIS 144 statements of interests by Massachusetts Institute of Technology, Stanford, IBM, DuPont, National Academies, NACME who attest that a diverse student body and workforce are critical to their academic and professional missions.); cf: *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (Harvard Corp.), 397 F. Supp. 3d 126, 206 (D. Mass. 2019), *aff’d sub nom. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020),*aff’d* 980 F.3d 157, *cert. docketed* No. 20-1199 (Mar. 1, 2021) (The court recognized Harvard’s explanation that a diverse student body enhances faculty perspectives and teaching, which inure to the benefit of all students). Similarly, IHEs may survey, consult focus groups, or otherwise find that a diverse faculty enhances colleagues’ and students’ perspectives. If that is the case, it is important to maintain that documentation and articulate that finding as a supplement to the remedial aims for any race- and gender-conscious affirmative action in faculty employment.

^{xxviii} See *Wygant*, 476 U.S. at 288 (O’Connor, J., concurring in part and concurring in judgment).

^{xxix} See *id.* However, unless and until the Supreme Court holds otherwise, one federal appeals court, in a case concerning a race-based layoff decision, has expressly held that educational diversity is an inadequate aim under Title VII’s EEO and non-discrimination purposes to justify race-consciousness in employment. *Taxman v. Board of Education of the Township of Piscataway*, 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 521 U.S. 1117 (1997), *cert. dismissed*, 522 U.S. 1010 (1997) (a race-determinative decision in a seniority-based layoff process involving teachers of equal seniority with the aim of promoting teacher racial diversity for its benefit to all students—not to address an EEO remedial condition of race-based underutilization or discrimination—is a violation of Title VII). Title VII protects race and gender in equal measure, so this decision would apply to gender as well. This decision binds only those IHEs in the Third Circuit Court of Appeals jurisdiction: Pennsylvania, New Jersey, and Delaware. It may influence other federal judicial circuits. We do not interpret *Taxman* to prohibit educational diversity as an ancillary aim for race- or gender- conscious faculty EEO efforts (other than layoff policies) whose primary aim is addressing a federally defined remedial condition. IHEs in the covered states should consult their own lawyers about the effects of *Taxman*, if any, on this point.

The Supreme Court has held that race-based layoff decisions are unsustainable in the absence of a need to remedy an employer’s own discrimination. The Court has also indicated that, even as a remedy for discrimination, race-based layoffs would be unduly burdensome on the vested expectations of those who are not members of the targeted race. See *Wygant*, 476 U.S. 267 (1986).

Regarding the potential viability of an educational diversity rationale for race- or gender-based faculty EEO efforts, see EEOC, Directives Transmittal No. 915.003, (April 19, 2006). *Compliance Manual, Race and Color Discrimination*, at 15-31, www.eeoc.gov/policy/docs/race-color.html; Brief for the United States as Amicus Curiae, *Piscataway Twp. Bd. Ed. v. Taxman*, 519 U.S. 1089 (1997) (No. 96-679), 1997 WL 33561365, at 9 (in which the Solicitor General opined that non-remedial affirmative action to achieve a diverse faculty does not violate Title VII where there are specific facts, not just broad assertions, that support the government’s compelling need for a diverse workforce to achieve the government’s mission—other than diversity as an end in itself—and where narrowly tailored consideration of race furthers that compelling mission). The Supreme Court has not ruled on this issue under Title VII, which applies to private and public IHEs; and public IHEs are subject to the stricter requirements of the U.S. Constitution’s Equal Protection Clause. Consequently, the educational benefits for all students of a diverse faculty is an important interest to articulate as a supplement to a remedying underutilization or presumed discrimination, but it is not alone adequate under current law.

^{xxx} A similar judicial concept is “manifest imbalance,” when comparing representation of a race or gender in an employer’s relevant workforce and in the corresponding available, qualified labor pool. It is a substantial disparity in representation, but not as much as presumed discrimination (not a 2 or more standard deviation difference). See, e.g., *Johnson v. Transportation Agency*, 480 U.S. 616 (1987).

^{xxxi} Different legal regimes govern student/education diversity and employment/faculty diversity efforts, creating different required justifications for any race- or gender-conscious policies. However, faculty diversity is critical to

providing beneficial educational experiences and outcomes for a broadly diverse student body. Aligned diversity and equity aims, albeit with different initiatives, and awareness of key initiatives across the institution, can surface opportunities for productive coordination and maximize positive impacts.

^{xxxii} Technical EEO requirements include, e.g., calculating race and gender demographics, defining, and determining underutilization and presumed discrimination within federally established parameters, and updating the annual Affirmative Action Plan. The Human Resources Office or EEO Office, sometimes with an outside contractor, does this highly technical work. However, some input by academic leaders can assure that the most meaningful data sets are used to define the available and qualified recruitment pool, which is consequential to the determination of whether a remedial condition exists. And general awareness of whether a remedial condition exists in academic and research departments can help to focus efforts to provide EEO for, and diversify, the faculty. See **Amplification of Underutilization**, <https://www.aas.org/programs/diversity-and-law>, for more detail.

^{xxxiii} Regarding the governing board, see Morgan, D.L., LePeau, L.A., Commodore, F. (2021). *Observable Evidence and Partnership Possibilities for Governing Board Involvement in Diversity, Equity, and Inclusion: A Content Analysis Res High Educ.* <https://doi.org/10.1007/s11162-021-09651-x> (Researchers conducted a qualitative content analysis to investigate the observable involvement of twenty-two Governing Boards with Diversity, Equity, and Inclusion (DEI) efforts at colleges and universities. The study highlights the nature and potential of governance partnerships to advance DEI work.).

Regarding population demographics, the Brookings Institute reports that a majority of the children in the U.S. under the age of 18 are children of color and a minority of that population are Non-Hispanic White, based on analysis of the 2020 U.S. Census data. See Brookings Institute. (Aug. 2021). *New 2020 census results show increased diversity countering decade-long declines in America's white and youth populations.* <https://www.brookings.edu/research/new-2020-census-results-show-increased-diversity-countering-decade-long-declines-in-americas-white-and-youth-populations/> (based on 2020 U.S. Census data, non-Hispanic White youth comprise 47.3%, Latino or Hispanic youths comprising 25.7% and Black youths at 13.2%; links to U.S. Census Bureau reports are included with other analyses that find the split to be closer to 50%).

^{xxxiv} See, e.g., UC Berkley transparency of student data <https://diversity.berkeley.edu/reports-data/diversity-data-dashboard> and *Initiative to Advance Faculty Diversity, Equity and Inclusion in the Life Science at UC Berkeley* https://ofew.berkeley.edu/sites/default/files/life_sciences_initiatve.year_end_report_summary.pdf.

^{xxxv} The Supreme Court has prohibited individual race- and gender-conscious conferral of opportunities and benefits to remedy general societal inequities, with limited exceptions for Congressional authority under the Constitution. See *Wygant*, 476 U.S. at 275; *Adarand*, 515 U.S. at 225. See also *supra* notes ii, v, vi, viii, x.

^{xxxvi} Id. Presumed discrimination is another remedial justification; this warrants particularly close work with your IHE's counsel.

^{xxxvii} See also Keith, *supra* note vi.

^{xxxviii} See, 41 C.F.R. § 60-2.15 (comparing incumbency to availability); 41 C.F.R. § 60-2.16 (discussing placement goals, "Placement goals may not be rigid and inflexible quotas, which must be met, nor are they to be considered as either a ceiling or a floor for the employment of particular groups. Quotas are expressly forbidden"); The Office of Federal Contract Compliance Programs (OFFCP), Functional Affirmative Action Program Compliance Evaluations, <https://www.dol.gov/agencies/ofccp/manual/fccm/chapter-5-functional-affirmative-action-program-compliance-evaluations>, and OFFCP, Employment Discrimination Remedies at <https://www.dol.gov/agencies/ofccp/manual/fccm/chapter-7-employment-discrimination-remedies>, sample Affirmative Action plans <https://www.dol.gov/agencies/ofccp/compliance-assistance/sample-affirmative-action-programs>.

^{xxxix} The regulation codifies the holding of *Weber*, 443 U.S. 193 (1979). The regulation, 29 C.F.R. Part 1608(3)(c) (2008), provides: "(c)...Because of historic restrictions by employers, labor organizations, and others there are circumstances in which the available pool, particularly of qualified minorities and women, for employment or promotional

opportunities is artificially limited. Employers...may, and are encouraged to take affirmative action in such circumstances, including, but not limited to the following: (1) Training plans and programs, including on-the-job training, which emphasize providing minorities and women with the opportunity, skill, and experience necessary to perform the functions of skilled trades, crafts, or professions; (2) Extensive and focused recruiting activity; (3) Elimination of the adverse impact caused by invalidated selection criteria; (4) Modification through collective bargaining where a labor organization represents employees, or unilaterally where one does not, of promotion and layoff procedures.”

^{xi} *C.f.*, *Fisher II*, 136 S.Ct. at 2211; *Fisher I*, 570 U.S. at 298; *Grutter*, 539 U.S. at 749.

^{xlii} *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (Harvard Corp.), 397 F. Supp. 3d 126, 206 (D. Mass. 2019), *aff'd sub nom. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020)),*aff'd* 980 F.3d 157, *cert. docketed* No. 20-1199 (Mar. 1, 2021) (recognizing Harvard’s explanation that a diverse student body enhances faculty perspectives and teaching, which inure to the benefit of all students. Similarly, IHEs may find that a diverse faculty enhances colleagues’ and students’ perspectives).

^{xliii} *See Wygant*, 476 U.S. at 289 (O’Connor, J. concurring in part and concurring in judgment) (explaining that the goal of promoting faculty diversity is a goal that the Court would consider as part of remedial action taken by an employer (“The goal of providing “role models” discussed by the courts below should not be confused with the very different goal of promoting racial diversity among the faculty. Because this latter goal was not urged as such in support of the layoff provision before the District Court and the Court of Appeals, however, I do not believe it necessary to discuss the magnitude of that interest or its applicability in this case.”)). *See also, Wygant*, 476 U.S. at 286 (Stevens., J dissenting) (“Additionally, although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently “compelling,” at least in the context of higher education, to support the use of racial considerations in furthering that interest,” and citing to the benefits to all students of learning from teachers of different races.). *See*, EEOC, Directives Transmittal No. 915.003, Compliance Manual, “Race and Color Discrimination,” at 15-31 – 15-34 (April 19, 2006)(citations omitted), available at www.eeoc.gov/policy/docs/race-color.html. *See also* Brief for the United States as Amicus Curiae, *Piscataway Twp. Bd. Ed. v. Taxman*, 519 U.S. 1089 (1997)(No. 96-679), 1997 WL 33561365, at 9 (in which the Solicitor General opined that non-remedial affirmative action to achieve a diverse faculty does not violate Title VII where there are specific facts, not just broad assertions, that support the government’s compelling need for a diverse workforce to achieve the government’s mission—other than diversity as an end in itself—and where narrowly tailored consideration of race furthers that compelling mission).

^{xliiii} *See Wygant*, 476 U.S. at 267 (holding that race-based layoffs particularly burden vested employment interests of employees and race-consciousness and as such, these types of policies are not legally sustainable, even when there is an aim of remediating past discrimination).

^{xliv} *See, e.g.*, Taylor, T.E., Milem, J.F., Coleman, A. L., (March 2016). *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*, published through the Access and Diversity Collaborative of the College Board and EducationCounsel, <https://educationcounsel.com/?publication=bridging-research-practice-gap-achieving-mission-driven-diversity-inclusion-goals> (“Having faculty members from underrepresented groups on campus can provide students another opportunity for frequent and quality interactions, which have been found beneficial for students’ development and outcomes, including better student recruitment and retention strategies, increased interracial interactions, and improved teaching and learning practices.”).

^{xlv} This tool provides a staircase illustration of the progressive federal law-dictated actions that IHEs should take to demonstrate the need for, and design sustainable, race- and gender-conscious strategies to advance, their EEO, diversity, and equity interests. (That diagram’s staircase refers to “stairs” in the diagram to zero-in on the required actions within this guide’s STEP 3 and STEP 4.) Note that the bottom three stairs—neutral barrier removal, inclusive outreach, and neutral criteria (collectively, neutral policies)—may be pursued simultaneously, and whether or not there is a legal justification for race- and gender- conscious policies. They are important for demonstrating good faith efforts to address underutilization or presumed discrimination under OFCCP regulations. The fourth stair—contextual consideration of individuals’ race and gender when making decisions about conferral of employment benefits and

opportunities—is legally justified only if there is a federally recognized remedial aim (i.e., remedying underutilization or presumed or actual discrimination), sustained use of neutral policies on the first three stairs prove insufficient alone, and pursuit of identity conscious policies is as limited as possible and constrained in time to the period of necessity, to avoid undue burdens on races and genders that are not targeted for the benefit or opportunity. The fifth stair—race- and gender-exclusive policies, providing benefits or opportunities only to individuals of particular races or gender—is rarely justified, is only justified with the strongest evidence that more limited consideration of race or gender, combined with neutral policies, would not suffice, and is never justified to advance educational diversity (alone) or societal inequity.

^{xlvi} See 42 U.S.C. § 2000e, et seq.; Keith, *supra* note vi, at 7, *She*, *supra* note xvi.

^{xlvii} See Executive Orders 11246, 11375, 13672; 41 C.F.R. § 60-2.18(c). Consult your legal counsel to explore whether there are any special federal laws or contractual obligations that need to be considered by your IHE in light of a state law ban.

^{xlviii} California and Michigan attorneys general have found that strategies that do not take race or gender of individuals into account are not preferences and are permissible under their states' bans, even if the goal of these strategies is to increase racial or gender compositional diversity. This is a question that has not been addressed in many ban states. See the **Project's State Law Bans Guide**, at § 3(B) at <https://www.aas.org/programs/diversity-and-law>.

^{xliv} See Part II.B. of this guide—for the definitions text box. Confer with your IHE's legal counsel to determine appropriate action in response to presumed or actual discrimination before determining the remedy.

^l See Keith, *supra* note vi, at 8; *supra* note xvi.

^{li} 42 U.S.C. § 2000e-12(b). See also *Ricci*, 557 U.S. at 631 n. 9 (Ginsburg, J., dissenting) (referencing this Title VII provision and the EEOC's affirmative action guidelines).

^{lii} *C.f.*, the Supreme Court in *Fisher II* looked favorably upon limited race-conscious admission policies used in combination with race-neutral outreach and aid policies. 136 S.Ct. at 2212. Together, these policies produced “meaningful” percentage increases, with small numerical increases in racial composition. See *id* at 2212 (it is “not a failure of narrow tailoring for the impact to be minor” in absolute numbers but meaningful in percentage, as that “should be a hallmark of narrow tailoring, not evidence of unconstitutionality” and too large numerical increases may indicate undue weight on consideration of race). See also *Adarand*, 515 U.S. at 276 (1995).

^{liiii} See, e.g., *Shea*, 796 F.3d at 65 (2015); *Adarand*, 515 U.S. at 225 (1995); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492, 503-04 (1989); *Johnson*, 480 U.S. at 632-34, 642; *Wygant*, 476 U.S. at 275 (1986); *La Riviere v. E.E.O.C.*, 682 F.2d 1275, 1279-80 (1982); *Steelworkers*, 443 U.S. at 194-95 (1979).

^{liv} Federal non-discrimination in employment law does permit gender-consciousness when physiological differences in the sexes are relevant to bona fide qualifications for limited specialized positions. See *supra* note xii.

^{lv} See, e.g., the University of California, Berkeley's DEI statement and scoring rubric, which has been customized by other UC system campuses, including UC Davis and Irvine. UC Berkeley Office for Faculty Equity & Welfare, *Contributions to Diversity, Equity, Inclusion, and Belonging*, <https://ofew.berkeley.edu/sites/default/files/summary>, (last visited Oct. 8, 2021); <https://ofew.berkeley.edu/recruitment/contributions-diversity/rubric-assessing-candidate-contributions-diversity-equity> (last visited Oct. 8, 2021).

^{lvi} See *Ricci*, 557 U.S. at 593 (2009).

^{lvii} See *supra* note xiii (discussing the distinctions in standards for public vs. private IHEs).

^{lviii} Necessity requires evidence of a persistent and substantial racial or gender underutilization or other foundational remedial condition at the IHE or in a department and that sustained use of neutral policies are inadequate alone to remedy that condition. The measures of inadequate EEO compare composition of the relevant workforce at the IHE⁴²

to the composition of the qualified and available labor pool from which the IHE could recruit for a position; the comparison is not to the composition of the general population or a field. *See Adarand*, 515 U.S. at 270; *Johnson*, 480 U.S. at 637; *Wygant*, 476 U.S. at 281; *Weber*, 443 U.S. at 208-09. *See* the definitions in Part II.B. of this guide.

^{lix} *Supra* note xlii.

^{lx} Public IHEs that are subject to the Equal Protection Clause of the Constitution, as well as Title VII are well-advised to assure that their neutral policies also aim to advance a substantial institutional interest other than only increasing racial or gender compositional diversity. *See* Part II.B. of this guide.

^{lxi} *See* "Regarding high barriers," *supra* note i.