

## Diversity and the Law: 2021

### **Key Definitions<sup>1</sup>**

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*This document provides a number of definitions of key terms relevant to institutional diversity and equity aims. They reflect a practical synthesis of concepts reflected in research, practice, and relevant case law, along with practice-related amplifications where relevant. They should be considered as foundational for institution-specific policy development efforts, where they may be adaptable to satisfy particular institutional interests in specific contexts. These definitions complement the **Brief Legal Overview** at <https://www.aaas.org/programs/diversity-and-law>.*

1. **Diversity** means the many interests, experiences, talents, perspectives, and identities (self- and societally-defined) that combine uniquely in individuals to enable a person to both contribute to and benefit from engaging in an institution. Experiences and identity associated with race, ethnicity and gender are part of diversity but do not fully define it. When a broad diversity of individuals combines in the student body, faculty, and staff of an institution of higher education (IHE) to create a diverse group, everyone can benefit from enriched educational, research and work experiences and outcomes.
  - ◆ Among other benefits, such diversity can enrich engagement and break down stereotypes; enhance problem-solving, creativity, new ideas; contribute to cognitive and personal development from diverse perspectives; prepare students for the workforce, civic engagement and leadership; and elevate faculty, staff and student understanding of, and readiness and commitment to help dismantle, race-, ethnicity- and gender-based societal inequities. Diversity in the faculty, research staff and student body (educational diversity) enhances teaching, learning, research, civic engagement, leadership, and contributions to the workforce/economic strength and the security of society and democracy.<sup>i</sup>
  - ◆ From both policy and legal perspectives, educational diversity is a concept of universal benefit—not of remedying wrongs on the basis of race, ethnicity, or gender. The Supreme Court has found that universally beneficial educational diversity is a sufficiently compelling or important aim that can justify race-, ethnicity-, and gender- conscious action, when needed, in the student context.
  - ◆ Educational diversity may supplement remedial justifications for race-, ethnicity-, and gender-conscious affirmative action in faculty and academic staff employment, but educational diversity has not been ruled to be a legally sufficient aim for such action.
  
2. **Equity** means recognizing individuals of all races, ethnicities, genders, and other identities as individuals—not as representatives of a societally-defined group—and enabling all individuals to start on equal footing to compete for benefits, resources, and opportunities.
  - ◆ People of all races, ethnicities and genders may face enormous challenges and work extraordinarily hard to realize their promise and aspirations—and all those who overcome challenges should be recognized for that accomplishment. However, due to longstanding and deeply embedded systemic inequity in American society based on race, ethnicity, and gender, treating everyone “equally” or through “color or gender blind” eyes perpetuates inequity. Inequity exists because people of some identities must face the challenges of life—whatever they are—bearing the additional burden of systemic racism, sexism, or both, in society and others do not.<sup>ii</sup> Equity is an aim that requires remedial action—including elevating truths and understanding of systemic inequities and taking “affirmative action” to disrupt those inequities that burden individuals (whatever their education level, socio-economic status, or accomplishments) based on their societally-imposed group stereotypes and identity. However, as interpreted by the Supreme Court, societal equity aims do not

justify considering individuals' race, ethnicity and gender when conferring opportunities and benefits.<sup>iii</sup>

3. **Inclusion** means a climate that is key to realizing the full benefits of diversity by welcoming all talent and enabling everyone to fully participate as individuals, meaningfully engage with one another, and thrive—and that requires a foundation of equity. Inclusion connects diversity and equity, at their intersection. The educational missions of most IHE's require both, but each IHE must determine why and articulate its reasons—some unique to it and others common in higher education, as required for legally sustainable identity-conscious diversity policy.
4. **Compositional diversity** means diversity by racial, ethnic and gender group.
  - ◆ **Compositional diversity** is relevant under federal non-discrimination law in the **student context**, which focuses on achieving educational benefits for all students that are associated with broadly diverse learning experiences, to establish the necessary setting where those positive experiences and outcomes can occur. Sufficiency of compositional diversity is determined by a backward-looking assessment of the quality of all students' experience in the context of exiting levels of compositional diversity over time, however, not by a forward-looking specific and singular numerical goal.
  - ◆ **Compositional diversity** is relevant under federal non-discrimination law in the **employment context** for two purposes. First is to determine whether there is inadequate employment equal opportunity that may be voluntarily remedied. Second is to determine if there is an indication of discrimination that, if proven, must be remedied. To make this determination racial, ethnic and sex group representation in an institution's relevant workforce is compared to group representation in the available and qualified labor pool from which an institution could recruit for a position (both on a percentage basis). Law determines whether any disparities are significant enough to be defined as underutilization or presumed or actual discrimination.
  - ◆ **Compositional diversity**, considering general and field population demographics, is relevant in **both contexts** for two main purposes. First is to determine an individual's knowledge/expertise and commitment on issues of race and gender in education and society, as two qualification criteria for hiring, promotion and other program participation. (These criteria do not consider an individual's race or gender, but rather their knowledge or commitment.) Second is for designing curriculum subject matter and content, as well as pedagogy. These criteria and subject matter and design focus contribute to well-serving all students and advancing an institution's societal equity interests, elevating understanding of, and inspiring commitment to ameliorate, inequities. However, federal non-discrimination law rejects policies that consider an **individual's** race or gender status/identity in conferring opportunities and benefits to advance general societal racial and gender equity.
5. **Race-, ethnicity-, gender- conscious policies, systems, practices, programs, strategies (policies):** These are policies that, on their face or in practice, consider an individual's race, ethnicity, or gender (in addition to other factors) in conferring individual benefits or opportunities.

**Race-, ethnicity-, gender- exclusive policies** are those where only individuals of specified races, ethnicities or genders can qualify for a benefit. Such policies are hardest to justify under federal law. Race- and ethnicity- exclusive policies, such as reserved seats for individuals of one race or ethnicity, are prohibited in admissions for all public IHEs (under the Equal Protection Clause of the U.S. Constitution) and for public and private IHEs that accept federal funding (under Title VI).

Similar concepts apply to gender (under the Equal Protection Clause and Title IX), but with some nuances

noted in the **Brief Legal Overview** at <https://www.aaas.org/programs/diversity-and-law>.

6. **“Neutral” policies (including inclusive barrier removal):** These are policies that on their face and in practice (1) do not consider an individual’s race, ethnicity or gender when conferring individual benefits or opportunities *and* (2) have an aim that is authentically important to the IHE, apart from increasing racial, ethnic or gender compositional diversity. So long as those two criteria are satisfied, a policy may also have a known, welcome, even intended (as an alternative to identity-conscious policies), ancillary effect of increasing compositional diversity, without losing its “neutrality.”<sup>iv</sup> (E.g., socioeconomic access and diversity for students; a record of inclusive conduct such as using effective pedagogy for a diverse student body and a research focus on race for faculty, etc.)
- **Targeted but inclusive action.** A policy may be neutral in effect if it targets individuals of a particular race, ethnicity, or gender, but does not provide material benefits to anyone on the basis of race, ethnicity or gender and has inclusive effects. (E.g., a combination of robust general outreach to encourage applications from all potentially qualified and interested applicants, as well as targeted outreach to a particular racial group or gender, that together: (1) ensure meaningful communication of the same consequential information about opportunities to everyone, (2) help to welcome applications from those who might not feel welcome by the general outreach, to build a broadly diverse pool, (3) do not provide material benefits to individuals of some races or gender and not others [e.g., paid campus visits are not provided only or preferentially to candidates of color], and (4) are not part of a winnowing or selection process.)
  - **“Workable” neutral policies.** “Workable” neutral policies are those that do not require a change in the character or quality/competitiveness of an IHE, and would achieve its educational goal “about as well [as a race- or ethnicity- conscious policy] and at tolerable administrative expense.”<sup>v</sup> While not definitively addressed by the Supreme Court, such expense would likely need to be very consequential, as some additional expense or administrative inconvenience would likely be expected, considering the importance of equal protection interests.
  - **Context regarding the fallacy of “neutrality.”** Until we can eliminate the added burdens of racism and sexism in society, people of all races and genders are not on equal footing to compete for opportunities, and true equality or neutrality under law remains elusive. However, prevailing Supreme Court precedent and state bans adopt a faulty neutrality formulation; and IHEs must wisely navigate it to advance their diversity- and equity-related educational missions in ways that are both effective and legally sustainable.
7. **Societal Inequity.** Societal inequity means systems of race-, ethnicity- and gender- based inequity in the norms of American society, that have helped to build many American institutions, but have not generally been acknowledged by the courts as continuing discrimination or as having a current effect. Societal inequity has been regarded by the courts, at least since *Bakke* (1978), as distinct from any IHE’s own race-, ethnicity- or gender- based discrimination or harm. The law generally prohibits race-, ethnicity- and gender-conscious affirmative action (in education and employment) to remedy general societal inequities. The law allows race-, ethnicity- and gender-conscious policies only when necessary to remedy an IHE’s own discrimination with current effects or, in the employment context, when necessary to remedy an IHE’s own legally-defined, persistent “underutilization” or “presumed (or actual) discrimination” and in the education context when necessary to provide *all* students the benefits of educational diversity.<sup>vi</sup>

- 8. Discrimination**—Discrimination in education and employment is an IHE’s differential treatment of individuals on the basis of their race, ethnicity, or gender. Discrimination may be deemed:
- ◆ **Intentional**—meaning there is intent to treat individuals differentially based on their racial, ethnic or gender identity status. This may be shown with direct evidence (e.g., on the face of a policy or in practice). It also may be shown without direct evidence if a qualified person in a protected group is adversely affected by an policy and evidence of a legitimate business-education reason is lacking—or if a legitimate reason is articulated, additional evidence shows that the reason is a pretext for identity-based discriminatory intent.
  - ◆ **Unintentional, but causing a disparate impact** on individuals of particular race(s), ethnicit(ies), or gender—meaning data show a racial, ethnic or gender disparity in impact of a policy where there are workable alternatives that would meet the IHE’s “business-educational” need with less such impact. However, a policy that is demonstrably necessary to meet an authentic and compelling educational goal that benefits all students, may unavoidably have a disparate impact on some racial, ethnic or gender groups, and should not be deemed discriminatory. (E.g., to achieve its educational aims benefiting all students, an IHE may seek faculty and students [of any race, ethnicity or gender] who are deeply knowledgeable about issues of race and gender in society, and are willing and able to elevate knowledge of others in the academic community (or in the faculty context, have expertise on such issues and a strong record of inclusive pedagogy and practices)—**or** who are committed to eliminating societal inequities—**or** whose research and study areas of focus are on issues of race or gender in society. If so, such “neutral” criteria may be considered, e.g., in admissions, hiring or funding research, even though they may result in admitting or hiring, or providing more favorable scholarships or start-up or supplemental research packages for, people of some races or genders at a higher rate than others.)<sup>vii</sup>
- 9. Discrimination in Employment**-- A presumption of discrimination is measured as a 2 or more standard deviation disparity between (1) representation of individuals of a particular race, ethnicity or gender in the **IHE’s relevant workforce** (i.e., position(s) at an IHE in a job type/category, seniority/level, and discipline or cluster of disciplines in the same relevant recruitment market ) and (2) their representation in the qualified pool from which the IHE could recruit for that workforce (considering the particular IHE’s local, regional, national or international reach). This can be rebutted by evidence of a legitimate, non-discriminatory reason, unless further evidence shows that such reason is a pretext.
- 10. Underutilization in Employment**— Defined by the Office of Federal Contract Compliance (OFCCP) of the Department of Labor, not as presumptive discrimination, but as less representation of a particular race, ethnicity or gender in an IHE’s relevant workforce than would be expected based on its availability in the relevant qualified pool from which the IHE could recruit—signaling inadequate equal opportunity.
- The most common and prudent measure of underutilization is a representation of the racial, ethnic or gender group in an IHE’s relevant workforce that is less than 80% of the group’s representation in the available, qualified pool from which the IHE could recruit (on a percentage basis, not a comparison of absolute numbers but of percentages). See the **Amplification of Underutilization** at <https://www.aas.org/programs/diversity-and-law>.<sup>viii</sup>
  - Federal contractors are required to make good faith efforts to remedy underutilization, but are not required or justified by OFCCP to discriminate in order to do so.

<sup>i</sup> See e.g., *Taking a “Hands On” Approach to Diversity in Higher Education: A Critical-Dialogic Model for Effective Intergroup Interaction*, Sorensen, N., Nagda, B., Gurin P., and Maxwell, K., *Analyses of Social Issues and Public Policy*, Vol. 9, No. 1, pp. 3-35 (2009), (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); *The Educational Benefits of Sustaining Cross-Racial Interaction Among Undergraduates*, Chang et al., *The Journal of Higher Education*, (2005), (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), <https://cshe.berkeley.edu/sites/default/files/publications/rop.chang.2.05.pdf>; *Promoting Participation in a Diverse Democracy: A Meta-Analysis of College Diversity Experiences and Civic Engagement*, Bowman, N. A., *Review of Educational Research*, 81(1), 29–68 (2011), <https://doi.org/10.3102/0034654310383047>; *The Long-Term Effects of College Diversity Experiences: Well-Being and Social Concerns 13 Years After Graduation*, Bowman, N. A., Brandenberger, J. W., Hill, P. L., & Lapsley, D. K., *Journal of College Student Development* 52(6), 729-239 (2011), [doi:10.1353/csd.2011.0075](https://doi.org/10.1353/csd.2011.0075); *Racial/cultural awareness workshops and post-college civic engagement: A propensity score matching approach*, Bowman, N. A., Denson, N., & Park, J. J., *American Educational Research Journal*, 53(6), 1556-1587, (2006), <https://doi.org/10.3102/0002831216670510>; *The educational benefits of sustaining cross-racial interaction among undergraduates*, Chang, M. J., Denson, N., Saenz, V., & Misa, K., *The Journal of Higher Education*, 77(3), 430-455 (2006), <https://doi.org/10.1080/00221546.2006.11778933>; *Racial Diversity Matters: The Impact of Diversity-Related Student Engagement and Institutional Context*, Denson, N., & Chang, M. J., *American Educational Research Journal*, 46(2), 322–353, (2009), <https://doi.org/10.3102/0002831208323278>; *A retrospective assessment of the educational benefits of interaction across racial boundaries*, Luo, J., & Jamieson-Drake, D., *Journal of College Student Development*, 50(1), 67-86, (2009), <https://doi.org/10.1353/csd.0.0052>; *Activating Diversity: The Impact of Student Race on Contributions to Course Discussions*, Pitt, R. N. & Packard, J., *The Sociological Quarterly*, 53(2), 295-320 (2012), <https://doi.org/10.1111/j.1533-8525.2012.01235.x>; *Estimating benefits from university-level diversity*, Wolfe, B. L., & Fletcher, J., *National Bureau of Economic Research*, (2013), <https://doi.org/10.3386/w18812>; *Bridging the Research to Practice Gap, Achieving Mission-Driven Diversity an Inclusion Goals, A Review of Research Findings and Policy Implications for Colleges and Universities*, Taylor, T.E., Milem, J.F., Coleman, A.L., *The Access and Diversity Collaborative of the College Board and EducationCounsel*, (March 2016), <https://educationcounsel.com/?publication=bridging-research-practice-gap-achieving-mission-driven-diversity-inclusion-goals>.

<sup>ii</sup> See, e.g., *Does STEM Stand Out? Examining Racial/Ethnic Gaps in Persistence Across Postsecondary Fields*, Riegler-Crumb, C., King, B., & Irizarry, Y. *Educational Researcher*, 48(3), 133–144, (2019), <https://doi.org/10.3102/0013189X19831006>; *Inside the Double Bind: A Synthesis of Empirical Research on Undergraduate and Graduate Women of Color in Science, Technology, Engineering, and Mathematics*, Ong, C. W., Espinosa, L. & Orfield, G., *Harvard Educational Review*, 81(2), 172–209 (2011), <https://doi.org/10.17763/haer.81.2.t022245n7x4752v2>; *Education in a Pandemic: The Disparate Impacts of COVID-19 on America’s Students*, U.S. Department of Education Office of Civil Rights (June 9, 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf>; *Reports on Diversity, Equity, Inclusion and Racism In STEMM Education and Workforce*, National Academies, (June 2021), [file:///C:/Users/JLK/Downloads/summit%20paper%20june%202021%20\(2\).pdf](file:///C:/Users/JLK/Downloads/summit%20paper%20june%202021%20(2).pdf); *Transformation in the U.S. Higher Education System: Implications for Racial Equity*, National Academies, Malcom-Piqueux, L., (October 2020), [file:///C:/Users/JLK/Downloads/malcompiqueux%20symposium%20paper%20\(5\).pdf](file:///C:/Users/JLK/Downloads/malcompiqueux%20symposium%20paper%20(5).pdf); *Assessing and Responding to the Growth of Computer Science in Undergraduate Enrollments*, *Consensus Study Report*, National Academies (2018), <https://www.nap.edu/download/24926>; *Investigating the Potential Impact of COVID-19 on the Careers of Women in Academic Science, Engineering, and Medicine*, NASEM (2021), <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*, National Science Foundation (2021), <https://nces.nsf.gov/pubs/nsf21321/report/executive-summary> (all data is pre-COVID-19 pandemic, but indicates 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); *African Americans: College Majors and Earnings*, Carnevale, A., Fasules, M., Porter, A., and Landis-Santos, J., Georgetown Center on Education and the Workforce, (2016), [https://1gyhoq479ufd3yna29x7ubjn-wpengine.netdna-ssl.com/wp-content/uploads/AfricanAmericanMajors\\_2016\\_web.pdf](https://1gyhoq479ufd3yna29x7ubjn-wpengine.netdna-ssl.com/wp-content/uploads/AfricanAmericanMajors_2016_web.pdf). *Id.* (“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.”); *Does STEM Stand Out? Examining Racial/Ethnic Gaps in Persistence Across Postsecondary Fields*, Riegler-Crumb, C., King, B., Irizarry, Y.,

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Educational Researcher, Vol. 48 No. 3, pp. 133-144 (April 2019); *See also*, the Project’s **Research Charts**, available at <https://www.aaas.org/programs/diversity-and-law>.

<sup>iii</sup> *See, e.g., Steelworkers v. Weber*, 443 U.S. 193 (1979); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *Johnson v. Transportation Agency*, 480 U.S. 616 (1987); *Adarand Constructors v. Peña*, 515 U.S. 200 (1995); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 732 (2007); *Fisher v. University of Texas at Austin*, 570 U.S. 297, 311 (2013) (“*Fisher I*”) (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978)); *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198, 2225, (2016), (“*Fisher II*”).

<sup>iv</sup> If there is a disparate adverse effect on some races, ethnicities, or sex, the neutral strategy must reflect a “business” or “educational” necessity, meaning that another workable strategy would not have less adverse disparate impact. 42 U.S.C. § 2000d; 42 U.S.C. § 2000e; *See, e.g. Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1413 (11<sup>th</sup> Cir. 1993). In an education context, the practice must be demonstrably necessary to meeting an important educational goal, *i.e.* there must be an ‘educational’ necessity for the practice. That can often be established based on the authenticity of an important aim and necessary criteria to achieve the aim that a person of any race, ethnicity or gender could satisfy, even if—based on societal conditions—there may be more individuals of some identity groups who are likely to satisfy the criteria.

<sup>v</sup> *Fisher I*, U.S. 570 at 314.

<sup>vi</sup> *See supra* note iii.

<sup>vii</sup> The Supreme Court has not considered this neutral policy. However, federal nondiscrimination law generally does not regulate race, ethnicity, or gender subject matter (e.g., of courses or the focus of research or an event); such focuses on consideration of *individuals’* identity-status in the conferral of opportunities and benefits. Criteria for opportunities and benefits that focus on the knowledge, expertise, or commitment of individuals (of any and all race) related to race, ethnicity or gender issues in society do not consider the identity of any individual; they consider the subject matter of an individual’s knowledge and expertise, however gained, or commitment.

<sup>viii</sup> *See Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-308 (1977) (a statistical disparity that just exceeds two standard deviations is sufficient to infer an employer’s discrimination); 42 U.S. Code § 2000e *et seq.*; *See also* OFCCP’s *Federal Contract Compliance Manual* (Oct. 2014), [https://www.dol.gov/ofccp/regs/compliance/fccm/FCCM\\_FINAL\\_508c.pdf](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) a race, ethnicity or sex incumbency that is less than 80% of availability (*i.e.*, representation of the group in the employer’s relevant workforce is less than 80% of the group’s representation in the available and qualified labor pool from which the employer could recruit—on a percentage basis, not based on absolute numbers), (4) a disparity between the actual representation and expected representation for a race, ethnicity or sex 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*, at 21-22 (Aug. 2009), [https://www.dol.gov/sites/dolgov/files/OFCCP/SupplyService/files/508\\_OFCCP\\_SS\\_TAG.pdf](https://www.dol.gov/sites/dolgov/files/OFCCP/SupplyService/files/508_OFCCP_SS_TAG.pdf).

The extent to which a court would uphold measures (1) and (2) is a question. Measures (3) (the 80% test) and (4) (rebuttable presumption of discrimination) are common and should be supportable. While measure (3) (the 80% test) does not require an acknowledgement of discrimination, measure (4) is the first step toward proving discrimination (and is typically used by an employee in asserting a discrimination claim against an employer). The extent to which the 80% test differs from the court-articulated concept of “manifest imbalance” (a significant disparity, but something less than 2 standard deviations) is undecided, but the two standards appear to be conceptually aligned.