Diversity and the Law: 2021

A 5-Step Guide to
Effective, Law-Attentive Design of
Diversity and Equity Policies-Students[1]

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Part I—Introduction

This guide helps institutions of higher education (IHEs) in their efforts to successfully maintain a strong commitment to educational diversity and equity by pursuing effective and legally sustainable policies, systems, programs, strategies and practices (policies) that are effective, while also demonstrating fealty to existing federal legal standards. It seeks to facilitate and equip functional collaborations among policymakers and lawyers in this work for impact and sustainability.

Race-, ethnicity- and gender-conscious policies to advance broad student body diversity and equity goals trigger exacting legal design standards, that must be met to further—and to avoid undermining—diversity, equity, and inclusion (DEI) priorities.   Consequently, this guide is particularly focused on racial, ethnic,[2] and gender[3] diversity. This focus is an imperative in science, technology, engineering, mathematics and medical (STEMM) fields, among some others, where high structural barriers exist for people of color, women and LGBTQ+ people, and which are critical to the health, prosperity, and security of life, the planet, and the economy.

This guide also distinguishes between broad diversity interests (associated with desired educational experiences and outcomes for all students) and equity interests (addressing longstanding systemic educational and other societal inequities that burden students who are black, Indigenous Peoples, and other people of color, women, LGBTQ+ individuals, and some others). These interests can be mutually re-enforcing, but are distinct.

Finally, this guide addresses what IHEs *can* do to pursue diversity and equity interests, largely

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[2] Race and ethnicity are distinct identities. However, federal nondiscrimination law treats them in the same manner, and we use "race" to encompass both throughout this guide for brevity.

[3] 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 is against an individual 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 LBGTQ+ 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 women would not suffer such treatment if she were to have such relationship with a man).

The Supreme Court has established this interpretation of "sex" in the context of Title VII, the main federal non-discrimination in employment law. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020))("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 on the basis of sex in education law. *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.* 86 FR 32637 (June 22, 2021). *See* **Definition of Sex,** https://www.aaas.org/programs/diversity-and-law, for elaboration and additional citations. We use the term "gender" throughout this resource to mean the broadest definition of "sex" permitted by law in the circumstance.

unconstrained by federal law when possible, satisfying law when it applies, and avoiding action (or inaction) at odds with law that could result in worse law and undermine diversity and equity efforts across the national higher education endeavor. 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.

Toward these ends, the guide offers a 5-step approach that IHEs can follow in their diversity and equity policy design and review processes.

The guide has three parts:
- **Part I**—This Introduction, provides an overview of the guide along with an outline of related Diversity and the Law Project (Project) resources, tools and models, and reference materials.

- **Part II**—Background includes—
    o **Part A**—Foundations, which introduces the need to achieve diversity and equity-related mission while maintaining fealty to legal design parameters—recognizing the challenging legal landscape as well as the opportunities presented for advancing aims; and
    o **Part B**—Summary of the Current Legal Landscape, which outlines the basic "design parameters" established by federal law for sustainable diversity and equity systems and policies.

- **Part III**—5-Step Approach to Designing Effective and Sustainable DEI Systems and Policies — Provides a sequence of integrated steps to design successful, law-attentive diversity and equity policies:
    o **STEP 1**— Get Ready: Process Leadership & Design
    o **STEP 2**—Determine & Document Diversity/Equity-Associated Mission-Aims
    o **STEP 3**—Determine Whether Evidence of Need Exists for Race- & Gender-Conscious Means**;** Evaluate Aims & Means Continually
    o **STEP 4**—Design Considerations for Race- & Gender-Conscious Policies
    o **STEP 5**—Advance Equity 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 definitional or 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-Students** (*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 diversity and equity aims*) *https://www.aaas.org/programs/diversity-and-law*
- **Beyond Federal Law: Trends and Principles Associated with State Laws Banning the Consideration of Race, Ethnicity and Sex Among Public Education Institutions, 2nd Edition** (State Law Bans Guide) (*summary of Arizona, California, Florida, Idaho, Michigan, New Hampshire, Nebraska, Oklahoma, Washington State constitutional provisions, statutes and an executive order, with associated state attorney general and court rulings, 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*)

- **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 DEI efforts, 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)*

Tools and Reference Materials

- **Big Picture Fundamentals & Staircase Diagram For DEI Policy Design-Students** (Big Picture Fundaments & Staircase Diagram-Faculty) (*top-line 2-page chart and diagram of a progression of actions that are conditions to pursuit of individual race and gender- conscious student DEI policies—key actions within STEPs 2, 3 and 4 of this guide*)
- **Big Picture Fundamentals & Staircase Diagram for DEI Policy Design-Faculty** (Big Picture Fundaments & Staircase Diagram-Students) (*top-line 2-page chart and diagram of progressive actions that are conditions to pursuit of individual race and gender -conscious faculty EEO/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 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 STEMM, 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 seachange@aaas.org .

Part II – Background

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

The 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, and attention to removing structural barriers and engaging process management and data-backed evaluation to be successful. They may be accomplished via a range of means (policies). Many IHEs seek to consider individuals' race and gender, in limited ways, when determining certain benefits and opportunities to advance their diversity and equity goals.

The context for this guide includes a challenging legal landscape, both now and in the foreseeable future, as well as a body of Supreme Court decisions spanning 40 years. That longstanding Court precedent permits limited consideration of race and gender of individuals in enrollment programs—*when there is legally adequate evidence of the need for such individual identity status-conscious means to achieve educational aims of sufficient importance*. The Court's precedent requires this evidence base to be assembled and evaluated on an ongoing basis, with changes made to the aims and any race and gender- conscious means when warranted by changed internal and external circumstances, or by the availability of administratively feasible race and gender- neutral means with sufficient effect. Below in Part B, we provide a Summary of the Legal Landscape. The Project's **Key Definitions** and **Brief Legal Overview,** https://www.aaas.org/programs/diversity-and-law, provide a more detailed summary of key legal principles and associated definitions. We urge users of this guide to read these resources for a grounding *before* engaging fully in diversity and equity policy design. Those resources will also aid the reader in using this guide.

B. The Current Legal Landscape

In its 2013 and 2016 University of Texas admissions decisions (*Fisher I* and *Fisher II*), the U.S. Supreme Court let stand the federal law of Equal Protection, as articulated in the Court's college admission decisions since 1978.[4] However, in *Fisher I and II*, the Court put renewed emphasis on what IHEs must do—with a focus on evidence—to satisfy the two strands of "strict judicial scrutiny." IHEs must:
- Establish authentic, specific, and compelling legally recognized aims and articulate how broadly defined student body diversity is associated with achieving those aims; and
- Adhere to narrow tailoring of the design of any race-conscious means of achieving these aims (to assure that such means are used only if it is necessary to consider race of individuals at all; and, if so, that race of individuals is considered flexibly, holistically/contextually, and as little as possible, for as short a time as possible, to avoid over-burdening those who are not members of the targeted race). Any consideration of race must be reviewed on an ongoing basis (so-called, periodic review) to determine whether evidence supports continued necessity of such consideration, with changes made as warranted and an orientation of working toward an end point.

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[4] *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297 (2013) (*Fisher I*); *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198 (2016) (*Fisher II*); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978). The Equal Protection Clause of the 14th Amendment to the U.S. Constitution applies to public IHEs, and similar principles apply through federal statutes, Title VI (re: race and ethnicity) and Title IX (re: sex), to public and private IHEs that receive federal funding.

Strict scrutiny applies whenever race-conscious means/policies are used, and intermediate (heightened) scrutiny applies whenever gender-conscious means/policies are used, in conferring admission and other opportunities and benefits on individuals, such as financial aid and mentoring support.[5] (Both standards are exacting; the extent of the difference in the weight of evidence of need required to justify individual race- vs. gender- conscious strategies is unclear).[6] *Fisher I and Fisher II* emphasized that federal law requires evidence (not mere opinion) of a need to consider individuals' race to achieve a legally-recognized compelling aim, in order to justify such consideration. IHEs are being challenged in the federal courts[7] and at the U.S. Department of Education, Office of Civil Rights (OCR), with claims that their diversity policies are not meeting the exacting legal design standards that apply to race- and gender- conscious policies. See **Brief Legal Overview** and **Federal Non-Discrimination Law on Sex and Gender**, https://www.aaas.org/programs/diversity-and-law.

Forty years of consistent Supreme Court decisions should carry considerable weight, particularly considering the higher education endeavor's active reliance on these decisions in their enrollment programs. However, the newly constituted Supreme Court is dominated by a so-called "conservative"

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[5] *Bakke*, 438 U.S. 265; *Grutter*, 539 U.S. 306; *Gratz*, 539 U.S. 244; *Fisher I*, 570 U.S. 297; *Fisher II*, 136 S. Ct. 2198; *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *United States v. Virginia*, 518 U.S. 515 (1996).

[6] To justify individual gender-consciousness, the Supreme Court requires an "exceedingly persuasive justification," an important aim, and means that are substantially related to achieving it. *Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); United States v. Virginia, 518 U.S. 515, 516 (1996).* The Court hasn't precisely defined what it means, though. First level federal appeals courts covering Alabama, Florida and Georgia/11th Circuit; Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming/10th Circuit; Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington and Guam/9th Circuit; Pennsylvania, New Jersey, and Delaware/3rd Circuit; and Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico/1st Circuit interpret the Supreme Court's requirements to recognize some difference in the weight of evidence required of need for gender vs. race consciousness. IHEs in these states must have evidence of substantial need, but not that gender-consciousness is the "last resort," as is required for individual race-consciousness. Federal appeals courts covering Kentucky, Ohio, Michigan, and Tennessee/6th; Wisconsin, Illinois, and Indiana/7th; and the District of Columbia and all states on certain special federal issues (e.g., patents and customs)/D.C. Circuit, do not recognize a meaningful difference between the evidentiary standards for gender- and race- consciousness. The rest of the Federal Circuits have not ruled on the issue at all, leaving uncertainty in the states they cover. In practice, it may be hard to operationalize a difference in design of strategies, although all IHEs are well-advised to document that they reserve the right to assert that the Supreme Court has established a distinction.

[7]*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. Univ. of North Carolina*, Case No. 1:14-cv-00954-LCB-JLW (N.C.M.D. filed Nov. 14, 2017); *Students for Fair Admissions v. Yale Universit*y, Case No. 3:21-cv-00241-KAD (filed Feb. 25, 2021); *Students for Fair Admissions, Inc. v. University of Texas,* 338 F.R.D. 364, (W.D.Tex., Jan. 2021), *dismissed* 2021 WL 3145667, (W.D.Tex., July 2021), *appeal filed* Case No. 1:20-cv-00763 (5th Cir. August 5, 2021); *Faculty, Alumni, and Students Opposed to Racial Preferences v. New York University Law Review et al.*, Fac. v. New York Univ., 11 F.4th 68 (2d Cir. 2021). *See, e.g.,* Korn, M. (May 23, 2018). *Do Pro-Women Groups on Campus Discriminate Against Men.* WALL STREET JOURNAL. https://www.wsj.com/articles/do-pro-women-groups-on-campus-discriminate-against-men-1527067800; Slagter, M. (Jan. 26, 2019). *Department of Education Investigating Whether UM Discriminates Against Men.* MLIVE. https://www.mlive.com/news/ann-arbor/2019/01/department-of-ed-investigating-whether-um-discriminates-against-men.html; Simone C. Chu, S.C., Lewis, I.M. (Jan. 23, 2019). *Activists File Title IX Complaint Against Harvard Alleging Discrimination Against Men.* THE HARVARD CRIMSON. https://www.thecrimson.com/article/2019/1/23/title-ix-complaint-discrimination-against-men/.

majority. The same Justices who expressed skepticism, if not hostility, as dissenters to prior Supreme Court decisions that permit limited race-conscious admission policies at IHEs to achieve the educational benefits of broad student body diversity, may become the leaders of the majority that decides a new case.

The Court has discretion on whether to accept a new case; and, if it does, it is impossible to predict the outcome. While additional Court decisions are more likely to amplify and evolve existing law, than to overrule 40 years of precedent, the factual context for a decision may invite a more or a less favorable decision. In this challenging legal landscape, avoiding bad facts (i.e., where existing legal standards are not met) as the context for new Court decisions is critical to preserving the imperfect, but vital, principles of existing law. The overarching goal is to enhance diversity and advance equity, while minimizing further constraints on the pursuit of important diversity and equity policies—not only at the IHE that is sued, but also at IHEs across the nation that have similar policies.

Part III - *5-Step Approach to Designing Effective and Sustainable DEI Systems and Policies*

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

STEP 1—Get Ready: Process Leadership and Design
STEP 2—Determine & Document Diversity/Equity-Associated Mission-Aims
STEP 3—Determine Whether Evidence of Need Exists for Race- & Gender-Conscious Means; Evaluate Aims & Means Continually
STEP 4— Design Considerations for Race- & Gender-Conscious Policies
STEP 5—Advance Equity Interests Without Triggering Exacting Legal Standards

The Project's **Big Picture Fundamentals & Staircase Diagram-Students**, https://www.aaas.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.

Educational diversity interests—beneficial educational experiences and outcomes for all students that are associated with learning in a broadly diverse setting—are the focus of STEPs 1 through 4. Remedying societal race and gender inequity is not the focus because the Supreme Court has long held that IHEs may consider individuals' race and gender when conferring educational opportunities and benefits only if educational diversity interests or remedying the IHE's *own* currently impactful discrimination (not remedying societal inequity) is the aim. However, there is still much that an IHE can do—without individual race- or gender- consciousness—to advance societal and institutional equity interests; and that is the focus of STEP 5.

Federal non-discrimination law does not generally constrain diversity and equity subject matter or aims alone. An IHE may adopt and articulate any diversity and equity mission and aims it values—including helping to ameliorate societal inequities related to race and gender. It is only when the means to achieve those equity aims involve considering an individual's race or gender in conferring opportunities and benefits that federal non-discrimination law governs both the aims and the means of achieving them. Consequently, references to equity interests in STEPs 1 through 4 identify where both diversity and equity interests can—and to achieve many IHEs' mission priorities effectively, should—be served by the same governance, mission, processes and so-called neutral selection and participation criteria.

To streamline the burden of gathering required evidence of need to consider race or gender to advance educational diversity interests, and design effective and legally sustainable student diversity and equity policies, the *process* for doing the design and evaluation work, including assembling the right *participants* in that process, is key. Creating a unified process for the design and evaluation of policies that apply to student and faculty diversity and equity interests is a wise practice because being aware of key institution-wide efforts, cross-pollinating ideas, and coordinating related initiatives across student and faculty realms can maximize the beneficial impact of efforts across the board. All participants in a unified process need not engage to the same extent in both realms.[8]

1. **Assuring leadership commitment and accountability systematically at all levels of an IHE is a key foundation for achieving institutional diversity and equity goals broadly, as well as in departments and units**.

Effective leadership to advance an IHE's educational diversity and equity aims requires the knowledgeable commitment of senior level administrators, who establish and clearly communicate the reasons why diversity and equity are critical for the integrity, excellence, and contributions of the IHE. Also required are leaders who establish expectations for themselves and those positions and units that report to them. *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 diversity and equity efforts that have impact. The establishment of metrics to evaluate the effectiveness of efforts to achieve student experience-based diversity and equity goals in a systematic process can be a key component of achieving impact. Metrics provide an evidentiary foundation for making resource allocation decisions that can best achieve the IHE's diversity and equity-associated priorities. Some IHEs also consider demonstrated actions to advance diversity and equity goals as a metric in unit budget decisions.[9] By allocating adequate resources to support diversity and equity 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 governance models to drive their diversity and equity efforts effectively. At some IHEs, the President/Chancellor or Provost assumes an active role in

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[8] 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.

[9] The reward should relate to actions taken and their effects—i.e., policies created, and efforts made to advance positive diversity-associated educational experiences for all students, as well as equity interests. While increasing compositional diversity may be necessary to provide an adequate setting for those experiences, it is the actions taken and experiences made possible, not the numbers in and of themselves, that are the goal and should be rewarded—see STEP 2.

establishing and advancing institutional diversity and equity-related goals. Other IHEs add or substitute a group of senior level administrators representing many functions–e.g., academic, student life, research, operations, athletics, and more–who agree upon and establish goals, and hold 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 DEI 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. 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, advancing DEI interests is important for the IHE's future and societal role.[10] Tracking, evaluating, and sharing the aims and results of diversity and equity efforts with the IHE's governance board, academic and administrative leaders, and community are common principles for transparency, accountability, and continuous improvement.

Communications. By its active engagement, senior leadership conveys the importance of the work and the relationship of diversity and equity to the IHE's and various disciplines' aligned educational missions and priorities. Continuously communicating this commitment in words and deeds is fundamental to effective leadership.[11]

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

Multidisciplinary expertise. Leveraging the expertise, factual knowledge, and data held by multiple offices to obtain and deploy already existing qualitative and quantitative data and systematically guide and support the design, evaluation and justification of diversity and equity policies across an IHE, eases the burden of evidence collection. Forming a team of key offices not only can provide the best access to existing data, but also can facilitate utilization of already existing activities and processes to gather any needed additional data to fill information gaps. A multi-office team's collective effort can also enhance

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[10] 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 22 Governing Boards with 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, based on analysis of the 2020 U.S. Census data, 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. *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%).

[11] *See* Coleman, A. L., Keith, J. L., Webb, E. L. (2020). *Engaging Campus Stakeholders on Enrollment Issues Associated with Student Diversity: A Communications Primer*. College Board. https://professionals.collegeboard.org/pdf/engaging-campus-stakeholders-enrolmment-diversity.pdf

positive outcomes by coordinating policies and leveraging investments to maximize impacts.
Inventory and evidence. A multidisciplinary team can best develop a comprehensive inventory of DEI policies at an institution. Inventories are key to understanding the universe of DEI efforts at an institution so that information can be collected about their design, and evaluations can be conducted of their impact. Not only is that evaluation key to guiding continuous improvement, but evidence-based decision-making is also a legal requirement for race- and gender-conscious diversity efforts.[12]

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 programs, HR) and of each advisory office (e.g., diversity and equity, institutional research, legal, compliance);
♦ Create a norm of multi-office collaboration to share ideas and knowledge and align each operational office's aims with the IHE's overarching diversity- and equity-associated mission, while respecting the distinct function of each office;
♦ 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 these advisors 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 the pursuit and foster the alignment of institutional and discipline-specific efforts on a regular basis, by, e.g.—
♦ Consulting to offices across the IHE that are pursuing 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 an 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 to DEI and conduct their own 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 diversity-associated educational experiences for all students, occurring in a setting created by compositional diversity, as well as equity in access, experience, and outcomes.

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

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[12] The Supreme Court has prohibited individual race- and gender-conscious conferral of opportunities and benefits by IHEs to remedy general societal inequities. *See, Bakke*, 438 U.S. 265; *Fisher I*, 570 U.S. 297; *Fisher II*, 136 S. Ct. 2198; *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

The establishment of mission-related diversity and equity aims requires care in articulation of those aims, as well as in assuring their authenticity, as reflected in strategic investments throughout the institution.

As provided in more detail below, determine and document the IHE's articulation of:
- ✓ Its diversity-associated mission/aims—the connection between the IHE's educational mission and specific goals and broad student (and faculty) diversity;
- ✓ If advancing societal equity is part of the IHE's mission, the connection between the IHE's educational mission/goals and equity interests; and
- ✓ The aligned, but tailored, diversity- and equity-associated mission/aims and specific goals of each of the IHE's major disciplines (e.g., by school/college or major relevant academic unit).

1. The determination and articulation of institution-specific reasons why diversity and equity are important to the quality of its educational programs and advancement of its institutional mission, with a focus on student experiences and outcomes, are essential.

Principled articulation attentive to legal requirements. An institution that may want to pursue any individual race- or gender-conscious enrollment or student success program must articulate a "reasoned, principled explanation" of the connection between broad diversity in the student body, at the IHE and in related disciplines, and measurable, specific, beneficial educational experiences and outcomes for all students. Race and gender may be missing aspects of diversity, but they should not alone define the breath of diversity that is needed to deliver specific educational benefits to all students and related benefits to society.[13] While also articulating the IHE's equity aims is a good policy, even with a connection to the IHE's educational mission, federal non-discrimination law would prohibit individual race- or gender- conscious programs to advance societal equity. STEP 5 focuses on equity-aimed policies that IHEs *may* pursue under law.

Stakeholder engagement for development. Some reasons for the importance of diversity and equity interests may be common among IHEs, others unique to a particular IHE. There is no single "right" approach to documenting the reasons. Key institution-specific actions and vehicles for making the determination and documenting it may include the following:

- ♦ Engaging key stakeholders to identify specific elements of the IHE's and its main disciplines' aligned educational missions and goals that are advanced by broad student body (and faculty) diversity and equity e.g.:
    - o Governing board;
    - o Institutional (and academic unit) leadership;
    - o Faculty Senate, departmental faculty, visiting committees;
    - o Student mentoring/tutoring and career opportunities offices, affinity communities;
    - o Student government and a diversity of other student organizations' leaders and current students;

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[13] *Fisher I*, 570 U.S. 297; *Fisher II,* 136 S. Ct. 2198; *Grutter*, 539 U.S. 306; *Gratz*, 539 U.S. 244; *Bakke*, 438 U.S. 265.

- o Alumni and donors in leadership positions in the workforce, government, and military, etc.

♦ Including additional stakeholder judgment and experience, which can be achieved by:
- o Creating focus groups or convenings;
- o Adding break-out sessions at already regularly conducted meetings;
- o Adding relevant questions to existing evaluations, surveys, and other feedback mechanisms, etc.;
- o Using survey questions. See **Customizable DEI Statements and Survey Questions,** https://www.aaas.org/programs/diversity-and-law.

Communications platforms. Document and communicate DEI interests and aims. That may be done through a number of platforms, including:
- o Mission statement (which can serve as a clear and powerful hub for other means of articulation);
- o Diversity statements;
- o Strategic plans;
- o Governing board-, cabinet-, faculty senate-, student senate-, college/school/department- endorsed reports, resolutions, or other formal leadership and broad faculty and student statements;
- o Reports of convenings, focus groups, surveys, and other evaluations;
- o Recruitment, outreach, and marketing materials;
- o Enrollment program policies and training materials;
- o Pedagogy goals and training materials;
- o Curriculum policy;
- o "State of the university" speeches;
- o Annual department level and visiting committee updates and reviews;
- o Annual reports of student government and other student groups;
- o Student and alumni testimonials;
- o Reports on diversity-associated initiatives.

In addition, conveying key information about the centrality of diversity and equity interests can be achieved through:
- o Documentation of the importance of equity to the IHE's educational mission and goals, where contributing to the advancement of educational and societal equity are recognized as a mission-critical interest—the societal importance of which are amplified by the COVID 19 pandemic, Black Lives Matter movement, and continuing racial violence and injustice. See the Project's **Research Charts**, https://www.aaas.org/programs/diversity-and-law;
- o Documentation of the active elevation of issues of diversity and equity, as areas of focus for educational and research program content and investments. Examples of customizable definitions are provided in the Project's **Key Definitions**, https://www.aaas.org/programs/diversity-and-law.

Student experience and outcomes. Educational diversity-associated goals should focus on the student experience and specific educational outcomes that are measures of student success associated with educational diversity, to include, e.g.;

♦ Articulation of the necessary conditions to realize student success:

- o All students having a sense of welcome and inclusion that allows each person to fully participate as an individual, not as a representative of a race or gender;
- o Meaningful diverse engagement among students;[14] and
- o Adequate compositional diversity (in clusters of disciplines where students interact and across the IHE) to enable those inclusive and engaging conditions for success. Numbers—compositional diversity and a potential need to increase it—are relevant to creating the **setting** where educational diversity goals can be achieved, but they do not define educational diversity goals.

♦ A focus on and documentation of the specific ways in which broad student body (and faculty) diversity contribute to the quality of all students' educational experiences and outcomes—and, potentially, how diversity-associated student experiences in college contributes to society more broadly. See **Research Charts,** Chart 1, https://www.aaas.org/programs/diversity-and-law. Such efforts may include, among others, at least some of the goals that the Supreme Court and other federal courts have recognized (marked by *):[15]
   - o Excellence and creativity in teaching/learning;*[16]
   - o Expansion of faculty perspectives in teaching and research;*[17]
   - o Readiness to fulfill civic duty and leadership in college and beyond;*
   - o Readiness to contribute and lead in the workforce;*
   - o Support of military and national security needs;*
   - o Cross-racial understanding and disruption of stereotypes;*
   - o Ability to serve a diverse society and contribute to elimination of societal inequities based on race and gender;
   - o Discipline-specific readiness and service to society (e.g., in medicine, to identify and best serve health research, provide effective treatment, and advance overall health in a diverse society; or in business and technology, to identify and best serve the product needs and elevate the quality of life for a diverse society; or in architecture, to reflect the richness of creativity and culture, and advance positive living conditions, for all; or in communications, to effectively message, engage and connect with the breadth of society, etc.).

Practice Tip: Don't let the time it takes to articulate diversity and equity- associated mission at the institutional level and locally, across the IHE, impede action at any one level or in any one area. It is helpful to address the overarching institutional diversity and equity- associated mission early. Then, parallel, but aligned, efforts can be pursued to further refine the articulation at the institutional level and to articulate aligned but tailored mission in individual colleges, schools, and other major institutional components.

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[14] This concerns the educational experiences and outcomes *derived from* broad diversity—not diversity as an end in itself.

[15] *Fisher II*, 136 S. Ct. at 2211; *Grutter*, 123 S.Ct. at 208 (2003).

[16] *President and Fellows of Harvard College*, 397 F.Supp.3d at 140; *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 798 (2007) (Kennedy, J., concurring).

[17] *President and Fellows of Harvard College*, 397 F.Supp.3d at 192 ("These goals include…'broaden[ing] the perspective of teachers[, and] thus tend[ing] to expand the reach of the curriculum and the range of scholarly interests of [its] faculty.'").

2. Establishing key foundations for assuring the authenticity of diversity and equity interests is vital.
Faculty and staff engagement. Involve faculty and staff in institutional and departmental actions that will facilitate engagement of existing diversity in particular settings and activities so as to enable students to reap the associated educational benefits. 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 strategies for engaging diversity will be most effective? 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 campus climate issues and explicit and implicit bias at the IHE through means 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 diverse student groupings in residences and co-curricular activities;
- ♦ Creating diverse student groupings in course sections, projects, experiential learning endeavors, etc.;
- ♦ Facilitating engagement of the IHE's enrollment professionals and faculty in admissions processes with leaders of the curricular and co-curricular program to share knowledge of students and the broad diversity they bring, for the purpose of creating opportunities for students to have diverse interactions;
- ♦ See **Research Charts**, https://www.aaas.org/programs/diversity-and-law, Chart 1, for some bases in research for effective action;

Practice Tip: Engaging diversity contributes to demonstrating authenticity of mission and adequacy/inadequacy of existing compositional diversity. It is helpful to have evidence that the IHE is already actively engaging existing diversity to enhance student educational experiences. While not expressly analyzed in the Supreme Court admission decisions, such engagement is one way to indicate authenticity of the diversity-associated mission, establish whether existing diversity is adequate, and demonstrate that the IHE is working toward an end point for race and gender- conscious policies, as required by law. *See* the Project's **Brief Legal Overview**, https://www.aaas.org/programs/diversity-and-law.

Attention to numbers. Know and act with fealty to the purposes for which attention to numbers is both valuable from a policy perspective and sustainable under law as a setting where diversity-associated experiences can occur:

- ♦ Class compositional diversity (at the IHE and in clusters of related disciplines within the IHE where students interact) is important. But it is only important (or relevant) under law as a setting where desirable diversity-associated student experiences and outcomes (the diversity goal) can occur, *not* as a diversity aim in and of itself. Avoid numerical race and gender goals for class composition (tied to population demographics or peer institutions' student body composition). Also do not set caps or fixed numerical goals for any race or gender in the IHE's or any discipline's student body.

These constitute racial or gender balancing, are regarded as discriminatory under federal law, and cannot justify race or gender- conscious diversity efforts.

♦ Attention to population demographics is relevant, appropriate and legally permissible as general context for setting goals of effective communications and pedagogy, as well as for determining needed program content and investments, to recruit and well-serve a student body that is both diverse and can elevate all students' understanding of societal diversity and equity issues. See **Brief Legal Overview** (and within it, *Distinguishing Permissible…from Impermissible Aims),* https://www.aaas.org/programs/diversity-and-law.

Before pursuing individual race or gender- conscious strategies, federal law requires an evidence base for policy-related evaluations of whether there is a need for such strategies to achieve an IHE's diversity aims. See the Project's **Big Picture Fundamentals & Staircase Diagram**, https://www.aaas.org/programs/diversity-and-law, for a graphic overview of federal requirements.[18] Before initiating that need-assessment under federal law, however, public IHEs must make a determination whether their state law creates additional restrictions that may make even the limited authority for identity-conscious action under federal law inapplicable to them.

1. A threshold determination for any public IHE is whether their state constitution, law or executive order prohibits public IHEs in the state from employing individual race- and gender-conscious policies. See the Project's **State Law Ban Guide,** https://www.aaas.org/programs/diversity-and-law.

Public IHEs located in a state that prohibits race and gender "preferences" in education may not consider an individual's race or gender in conferring benefits and opportunities—even when federal law would *allow* but not *require* such consideration (i.e., even when neutral policies[19] would not suffice to achieve compelling educational diversity aims). Importantly:
♦ Except when race- or gender-conscious action is required to remedy an IHE's own discrimination, federal non-discrimination law does not *require* race- or gender- conscious action to advance educational diversity aims.
♦ Some so-called "ban" states provide an explicit exception to their state bans for compliance with a federal requirement to take race- or gender-conscious action (e.g., a federal court order to remedy intentional segregation).[20]

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[18] 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 diversity 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. The fourth stair—contextual consideration of individuals' race and gender when making decisions about conferral of benefits and opportunities—is legally justified only if the neutral policies on the first three stairs are insufficient alone and pursuit of identity conscious policies is as limited as possible and is combined with pursuit of predominant neutral policies. 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 in admission decision-making or to advance societal equity.

[19] Neutral policies do not take any individual's race or gender into account when conferring benefits or opportunities. They have an authentic institutional aim (e.g., enhancing access for first-generation students), apart from increasing racial or gender compositional diversity; however, they also are known and even intended to have that ancillary and welcome effect as an alternative to race and gender- conscious policies. *See* **Key Definitions**, https://www.aaas.org/programs/diversity-and-law.

[20] Consult legal counsel to explore whether there are any special federal laws, contractual obligations, or state laws that need to be considered by your IHE.

◆ In the ban states, only those race or gender- neutral strategies that do not constitute "preferences" under state law limitations may be used by public IHEs.[21] It is important to confer with the IHE's legal counsel for guidance on these limitations as they apply to a particular IHE, state, and diversity strategy.

For public IHEs in states that forbid the consideration of race and sex in enrollment policy and practice, the rest of STEP 3 may be useful for tracking and communicating about the effect of state law, to inform the IHE's neutral efforts and influence state policy changes. Otherwise, STEP 3 is not relevant to these IHEs because it relates to requirements of federal law associated with race- and gender-conscious strategies.

2. For private IHEs, and public IHEs that are not located in states that forbid the consideration of race, ethnicity and gender, federal non-discrimination law requires an evidence-based determination of the need for individual race- or gender-conscious strategies.

To satisfy federal design parameters for policies that consider individuals' races and genders when conferring educational opportunities and benefits, a systematic approach to collecting and evaluating evidence of need for such consideration on an ongoing basis is key. See the Project's **Brief Legal Overview, https://www.aaas.org/programs/diversity-and-law.** This evidence is needed to justify an exception to the general prohibition against race and gender discrimination under federal non-discrimination law.[22]

3. Necessity is measured by four Factors: #1-adequacy of existing diversity; #2-availability and adequacy of neutral policies alone; #3-adequacy of neutral policies combined with limited conscious ones; and #4-effectiveness of conscious policies.

Factor #1: Whether existing levels of compositional diversity are adequate as a setting where the desired educational experiences and outcomes for students can be realized.

An IHE must regularly collect and evaluate data on whether *existing* diversity is *adequate* to achieve their legally recognized educational diversity aims*.*

Central Inquiries on Adequacy. Qualitative and quantitative data are important to making this assessment; all data relate to the student experience.

Data collection should focus first on a qualitative assessment of the diversity-related student experience, which may be evidenced by responses to the IHE's questions on the Higher Education Research Institute (HERI), Student Experience in the Research University Consortium (SERU), and other third-party surveys, as well as in periodic institution and college or departmental climate surveys; feedback in formal student evaluations of courses, formal faculty evaluations and judgments; informal student and faculty focus groups; and other existing periodic formal and informal feedback mechanisms.

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[21]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 for educational diversity aims. This is a question that has not been addressed in many of the ban states. Consult your IHE's lawyers. See **State Law Bans Guide**, https://www.aaas.org/programs/diversity-and-law.

[22] *See, supra*, notes 4-6.

- Consider these data points:
  - Whether all students feel welcome to fully participate as individuals or some students are experiencing marginalization and feel they represent or are tokens of a group;
  - Whether all students have opportunities to engage meaningfully in diverse learning, living, work and/or social settings as part of the IHE's academic community;
  - The extent to which learning in a diverse setting adds value to the educational experience.

The extent to which diversity-associated experience is valued by students and faculty may be determined by developing surveys of the first year and graduating classes, graduate students, faculty, and alumni to track a progression of experience and perception at different stages of education and career. Example survey questions can be found in the Project's **Customizable DEI Statements and Survey Questions,** https://www.aaas.org/programs/diversity-and-law.

Quantitative data relevant to whether the IHE is effectively supporting success of a broadly diverse student body is also relevant and includes the following data, disaggregated by race, gender and other aspects of diversity:
- Retention and graduation rates (by major and institution-wide);
- Academic performance (GPA, honors, academic probation);
- Employment, education, and other post-graduation plans realized.

The key question for evaluation in relation to all of these data points is: What is the actual, as compared with the desired, diversity-associated student experience in curricular and co-curricular programs within clusters of related disciplines (where students in one or more majors/minors regularly interact), and across the IHE?

Compositional diversity relevance. Quantitative, compositional diversity should also be evaluated, but only in the context of evaluating the student experience. Focus on the following inquiries:
- How does student experience feedback correspond with compositional diversity?
- Is the IHE actively engaging existing compositional diversity in programs and activities to enhance student experiences and learning outcomes?
- If the diversity-associated student experiences are not of the desired quality and availability for all students and existing diversity is being engaged, an increase in compositional diversity may be needed. How much of an increase is enough? That will depend on regular assessment of the student experience in the context of existing levels of compositional diversity over time—not on a particular numerical goal.

Importantly, the effect and adequacy of composition in relation to the student experience is a backward-facing inquiry—not a forward-facing one. But it does require regular collection of compositional data, which is a good practice. Understanding where in the enrollment process or academic program interventions may be most effective to increase diversity—if there is an educational experience-related need—is key to effective and legally sustainable action. So, it is also important to interrogate what aspects of broad diversity associated with positive educational experiences and outcomes are lacking.

Kind of compositional data needed. It is important to gather data on existing compositional diversity, as well as the trends over prior years, so that student experience over the same period, in the relevant compositional context, can be assessed. Collect and consider disaggregated data by race and gender, as well as other key diversity-related backgrounds (e.g., rural, urban, international, socio-economic, first

generation, etc.), in the key cohorts, e.g.:
  - o The student body as a whole and in related discipline clusters where students interact;
  - o Outreach cohorts;
  - o The recruitment pool;
  - o The interview pool;
  - o The offer pool;
  - o Yield in enrollment;
  - o Academic program cohorts;
  - o Student success and experiential learning program cohorts;
  - o Residential and student life program cohorts.

Timing of data collection. With respect to sources and timing of data collection:
- ♦ The required frequency of data collection is not fixed by Supreme Court decisions. A good practice is to establish a system of regular intervals that are reasonable, considering, e.g., whether the data collection is informal (and can be done at least annually) or formal (which would be less frequent), relevant milestones in turnover of students and faculty, new or amended major initiatives and activities, and other internal and external changes and relevant circumstances, such as diversity-related climate and events. Intervals may need to be different in different parts of the IHE, but there should be an articulable rationale. Establishing and tracking intervals could be a role for the multi-office DEI committee (see STEP 1).
- ♦ Conducting evaluations and documentation of student experience and compositional diversity analyses in concert, in a regular evaluation system with conclusions and rationales documented, is a good practice. Considering the adequacy of compositional diversity as part of a specific admission or other program's selection process is not inherently in conflict with legal design parameters. However, considering compositional diversity in concert with the student experience more broadly, not as part of any specific selection processes, likely raises fewer questions about whether diversity goals are really numerical goals or student experience goals.

Bottom line of data inquiries—what's next. If qualitative and quantitative data show that the diversity-associated student experience is *not* of the desired quality for all students, proceed to Factors 2 to 4 to continue the evaluation of need for race- and gender-consciousness. However, if the data show that the diversity-associated experience is of the desired quality and is available for all students (e.g., in certain majors), a legal justification is likely lacking for race- and gender-conscious policies. Neutral policies, including barrier removal, are likely the only path forward in such case—with potential notable attention to self-identity.

In any event, neutral strategies are available to advance an IHE's equity interests and can make consequential contributions to both diversity and equity aims. [23] See **Neutral Strategies Guide-Students**, https://www.aaas.org/programs/diversity-and-law.

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[23] Coleman, A. L., Keith, J. L., Webb, E. L. (2019). *The Playbook: Understanding the Role of Race Neutral Strategies in Advancing Higher Education Diversity Goals*, 2d Ed. College Board. https://professionals.collegeboard.org/pdf/playbook-understanding-race-neutral-strategies.pdf

*⚖️ **Available actions even if race and gender compositional diversity is adequate in relation to the student experience.*** Even if compositional diversity is adequate in relation to student experience in some areas of the institution, neutral policies are still available to serve authentic institutional aims—including both diversity and equity interests. Consider, among other policies, **the knowledge and commitment criteria.** IHEs have a strong and ongoing interest in recruiting students of any race or gender who have knowledge and ability, however gained (learning, service, personal experience), to elevate others' understanding of issues of race and gender inequities—or who have a strong record of commitment to ameliorating those inequities. Where an IHE has authentic mission-driven equity and diversity interests, these two distinct criteria—knowledge and commitment—should be sustainable as important and consequential neutral plus factors for conferring benefits and opportunities. Either criterion may even reflect a required qualification.

Importantly, race and gender never become irrelevant for those students whose **self-identity** is associated with their race or gender. Race and gender influence life experiences of many individuals, whether as a benefit or a burden, due to longstanding societal systems and structures of privilege and inequity associated with race and gender. See **Research Charts**, https://www.aaas.org/programs/diversity-and-law. These experiences can contribute to race and gender becoming important elements of *self*-identity for certain students of all races and genders. The law is not settled on this point. However, a credible position can be taken that it is permissible for an IHE to consider the connection that an applicant draws between their full multi-dimensional self-identity and contributions they can make to the IHE's academic community and to society after graduation. There is an indication in Supreme Court decisions that the "dignity of the individual" is within the penumbra of equal protection interests protected by federal non-discrimination laws. At least one federal trial court has indicated that individuals have a "right" to express, and to have considered, all dimensions of their self-identity, including race if that aspect of self-identity is important to them, when an IHE evaluates their potential to benefit from and contribute to the academic community.[24] It would be antithetical to the dignity of the individual to deny a person the ability to express and be valued for all dimensions of their self-identity.

Factor #2: Whether neutral barrier removal, inclusive outreach, and neutral criteria (collectively, neutral policies) are identified, used, and adequate alone to achieve the needed compositional diversity that will enable universally beneficial educational experiences and outcomes to occur.

Regularly evaluate data on the availability of workable race- and gender-neutral policies (i.e., those that are administratively feasible and have positive effect—including removal of unnecessary barriers to DEI) and their adequacy alone to achieve any needed increase in compositional diversity as a setting for the desired student experience. See **Neutral Strategies Guide-Students** at https://www.aaas.org/programs/diversity-and-law for guidance on some options for neutral systems and polices and how to design them for effectiveness and neutrality.

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[24] *Fisher II*, 136 S. Ct. at 2214 ("But still, it remains an enduring challenge to our Nation's education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity); *Parents Involved*, 551 U.S. at 746 (Kennedy, J., concurring); *see also, Rice v. Cayetano*, 528 U.S. 495, 517 (2000); *President and Fellows of Harvard College*, 397 F.Supp.3d at 194 (Removing considerations of race and ethnicity from Harvard's admission process entirely would deprive applicants of their "right to advocate the value of their unique background, heritage and perspective and would likely also deprive Harvard of exceptional students who would be less likely to be admitted without a comprehensive understanding of their background.")

Factor #3: If not adequate alone, whether neutral policies combined with limited race- and gender-conscious policies are adequate together—and reduce consideration of race and gender as much as possible to avoid unduly burdening others.

If inadequate alone, regularly evaluate whether use of neutral policies could reduce the degree to which race and gender of individuals needs to be considered in order to increase compositional diversity as the necessary setting for beneficial student experiences.   See **Big Picture Fundamentals & Staircase Diagram,** https://www.aaas.org/programs/diversity-and-law.

Factor #4: If race- or gender-conscious policies are needed, based on the first three factors, whether the particular race and gender- conscious policies that are used are effective (because ineffective policies are not necessary).

Regularly evaluate the effect of any race- and gender-conscious policies to assure effectiveness over time. At regular, frequent intervals, collect and update critical baseline data. Using inventories of any race- and gender-conscious and neutral policies, determine their separate and collective effects on compositional diversity in relation to the student experience. Any race- or gender-conscious policies that are not effective, should be amended or discontinued.

Evaluate the universe of diversity policies at an IHE; and do not assess race and gender- conscious policies in isolation. It is the full bundle of efforts across the continuum of programs in enrollment and education that yields results. Inventory neutral policies, as well as race- and gender-conscious policies, updating the inventory on an ongoing basis (at least every year or so is a good practice), and track their effects on compositional diversity. These data are important in an ongoing evaluation process. They help to identify what needs to be evaluated, as well as to view each policy in the context of the bigger picture. The Supreme Court in *Fisher II* recognized the importance of not evaluating a single race-conscious policy (e.g., an admission program) in isolation, and viewed a race-conscious policy in the context of the many neutral policies that also are being pursued. Considering the big picture can demonstrate that predominant neutral policies in enrollment programs (e.g., outreach and recruitment and financial aid, as well as identification and elimination of unnecessary barriers) have minimized both the need for race- and gender-consciousness and the burden of limited race and gender- conscious policies on those who are not members of the targeted races or genders.

Modeling: Important analytical support associated with conclusions regarding issues of necessity.

To provide analysis related to Factors #2, #3 and #4, institutions should consider tracking efforts and effects of policy over time, as well as modeling.

When determining the adequacy of neutral policies alone, an IHE has two choices: abstain from any consideration of race or gender and track the effect[25]—or model those effects instead. Key steps associated with modeling include:

o Gathering data from actual prior admission or other program selection cycles or creating hypothetical data that are representative of the IHE's typical recruitment, offer and yield pools' demographics and academic and personal characteristics.

o Using these data and the IHE's experience in the relevant selection process as the foundation to assess what the compositional diversity of such pools would be if available and workable neutral strategies were used, both with and without consideration of individual applicants' race and gender, along with consideration of all other decision-making criteria.

o Documenting these assessments and related conclusions as to why race and gender- conscious strategies are or are not needed.

▪ The assessment should reveal, but not be limited to, the racial and gender compositional results.

▪ The assessment also should reflect and explain the influence of holistic consideration of the full bundle of criteria that factor into admission or other program selection decision-making.

Modeling may be pursued in a labor-intensive fully manual process, although that may be infeasible for all but the smallest IHEs. Because compositional diversity is not the only relevant consideration, all modeling will require some manual effort. However, there is automation software that may aid an IHE in the modeling process.[26] In any event, bare compositional diversity is not the measure of adequacy of diversity; the student experience is. Even when modeling software is used, IHEs are well-advised to holistically review a sample of applications to infuse the many kinds of institutional judgments that factor into decisions.

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[25] The U.S. Supreme Court in *Fisher I* and *Fisher II* considered that University of Texas abstained from race-conscious admissions for seven years, when the U.S. Court of Appeals for the 5th Circuit, the first level federal appeals court whose jurisdiction includes Texas, held such considerations to be unconstitutional. *Fisher I*, 570 U.S. at 312; *Fisher II*, 136 S. Ct. at 2202; *Hopwood v. Texas*, 78 F.3d 932 (5th Cir., 1996). When the Supreme Court decided *Grutter v. Bollinger* in 2003, UT undertook a year-long study of the effects of such abstention, including qualitative student experience and quantitative compositional data, to determine the need to resume limited consideration of race in admissions, along with robust neutral strategies in programs across the enrollment continuum (e.g., financial aid and outreach). Abstention should not be required, if modeling can provide an evidentiary basis for the determination of need for a combination of conscious and neutral strategies. However, the Supreme Court has not specifically ruled on this.

[26] One example is Applications Quest, which is designed as an admissions process software tool, but can be used for modeling; and that is the purpose for which it is cited here. It provides IHEs with the ability to analyze large data sets to efficiently model whether there would be a significant difference in compositional diversity outcomes when neutral policies alone—or in combination with conscious policies—are used. http://www.applicationsquest.com

If the evaluations in STEP 3 evidence a justification for race- and gender-conscious strategies to achieve broad diversity-associated educational aims, the design of such strategies requires attention to key design elements**.**

1. IHEs must adhere to key design parameters when pursuing enrollment policies that involve any consideration of individuals' race or gender in conferring opportunities and benefits.[27]

♦ Generally speaking, any consideration of individuals' race or gender in conferring benefits or opportunities must be minimal but sufficient to achieve desired educational goals; and be considered in a flexible, non-mechanical fashion;

♦ Race and gender considerations in the admissions (and other enrollment) processes should be part of a holistic review of all aspects of the unique bundle of qualities, experiences, accomplishments and perspectives of individuals that bears on the decision about who will receive a benefit or opportunity, by helping to reveal how an individual will both benefit from and contribute to the educational experience offered by the IHE (or a particular discipline);[28]

   o Race and gender as distinct characteristics should not be assigned any numerical value and should not have the same impact for all members of the same race or gender;

   o Race and gender alone should not be determinative of the decision, although their influence (individually and intersectionally) on an individual's life experience, assessed in a contextual, holistic manner, may render them meaningful considerations in some cases;

   o It is a good practice for such consideration to not be about a student's bare identity status, but rather be contextual, reflecting the life experience of each individual;

   o Contextual consideration of race and gender is not about stereotypes or assumptions. Thus, it is important to ask for relevant information from applicants and not to rely on group stereotypes or assumed experience. See **Example Application Questions, https://www.aaas.org/programs/diversity-and-law**;

   o In admissions decision-making, racial status may not be a requirement for any seat in the class; in other enrollment programs, such exclusive criteria are exceedingly difficult to justify but may be possible with strong evidence of need (including evidence of the inadequacy of lesser consideration or race or gender) if ample similar opportunities and benefits are available to others under neutral criteria. Similar requirements apply to gender exclusivity,

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[27]Forty years of Supreme Court admission decisions establish legal design parameters for any needed race-conscious strategies to advance the educational benefits of diversity for all students. The Court has provided less but still instructive guidance for any needed gender-conscious strategies. Such identity-conscious strategies should not be unduly burdensome on students who are not members of the targeted races or gender. *See, supra,* notes 4-6.

[28] For robust guidance on conducting holistic review, *see* Coleman, A. L., Keith, J. L. (2018). *Understanding Holistic Review in Higher Education Admissions: Guiding Principles and Model Illustrations,* at 3, note 3. College Board. https://professionals.collegeboard.org/pdf/understanding-holistic-review-he-admissions.pdf

with some nuance. [29]

♦ Students of all races and genders should be able to compete in the same process and under the same criteria;

♦ Clear, documented, and appropriately transparent selection criteria, including the definition and dimensions of "merit"—and training and calibration of those who evaluate applications under the criteria—are critical to the integrity and fairness of holistic review.

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[29] Under the federal statute prohibiting discrimination on the basis of gender in education, Title IX, single sex private undergraduate institutions are permitted. However, once an institution offers co-educational programs, it must not discriminate on the basis of gender in conferring opportunities and benefits without an exceedingly persuasive, evidence-based, justification, with an important objective and any gender-conscious means being substantially related (not overbroad) to achieving that objective. *See, supra,* note 6; **Federal Non-Discrimination Law on Sex and Gender**, https://www.aaas.org/programs/diversity-and-law.

The predominant focus of STEPs 1-4 concerns legal and policy issues associated with consideration of race and gender of individuals when conferring benefits and opportunities on students, where the aim is to advance universally beneficial educational diversity interests. The Supreme Court has determined that remedying general societal inequities is not a substantial enough interest to justify consideration of race and gender of individuals when conferring opportunities and benefits under federal non-discrimination law—and, consequently, individual race- and gender-conscious means may not be pursued to achieve equity aims. However, STEP 5 makes clear that the law does not foreclose meaningful opportunities for IHEs to pursue racial and gender equity interests and provides guidance on what *can* be done toward equity aims. This STEP does not repeat guidance in STEPs 1-4 where equity interests are also raised, as relevant to an IHE's mission, governance, and comprehensive DEI-focused systems. These actions also advance diversity interests by creating a more welcoming, inclusive, and interactive community.

1. Colleges and universities have significant latitude to pursue equity aims in a wide range of court-labeled "neutral" systems, policies, and practices.

IHEs are free to determine and articulate any mission-related diversity and equity aims they value without triggering federal non-discrimination law (see STEP 2), so long as they do not use means that involve consideration of individuals' race or gender. Indeed, IHEs can play a critical role, largely unencumbered by federal non-discrimination law, to advance their racial and gender equity interests by creating a more equitable climate and culture, encouraging welcoming, inclusive conduct, and elevating knowledge about and inspiring commitment to equity interests. Creating a more equitable and welcoming climate and culture for all students, enhances an IHE's attractiveness to people of color, women, and LGBTQ+ individuals, and elevates all students' understanding of race- and gender-based (as well as other bases of) societal inequities.

2. A wide array of policies may advance institutional equity interests, including, e.g.:

♦ Developing pedagogy that is effective for all students in a diverse student body, and providing incentives to faculty and teaching assistants to participate in related professional development;

♦ Hiring, investing in, and giving voice 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 equity issues—or who are otherwise committed to elevating understanding of or ameliorating societal inequities;

♦ Engaging faculty, and students whose areas of academic focus are on race, gender, and other equity issues, to help identify and inform efforts to systematically remove the IHE's structural barriers to equity in pursuit of a more inclusive and equitable academic community and broader society;

♦ Sponsoring regularly scheduled town hall meetings, symposia, 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 equity and privilege issues and to encourage a commitment to eliminate inequity;

♦ Engaging a faculty committee, including "star" faculty in any area 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 (a) ways in which the IHE's research portfolio may be excluding effects and interests of groups targeted for bias and unwittingly perpetuating inequity and (b) how faculty could be made more aware of the merit of equity-focused research, and incentivized to broaden the focus of their research to address, the inequity;

♦ Examining 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;

♦ Identifying and eliminating barriers to equitable higher education opportunities, experience and outcomes in enrollment, curricular and co-curricular programs (see barrier removal strategies in **Neutral Strategies Guide-Students**, https://www.aaas.org/programs/diversity-and-law) and pursue other neutral policies toward equity goals.

Being able to directly address systemic societal inequities based on race and gender by considering individuals' race and gender to level-set opportunities and benefits is a necessary foundation for equality under the law in higher education. However, with gaps in evidence of need for such level-setting undergirding the Supreme Court's admission 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.