Taking Action and Achieving Success After Fisher v. the University of Texas

Colloquium and Regional Forums
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This presentation was developed for informational and policy planning purposes only and does not constitute specific legal advice. Legal counsel should be consulted to address institution-specific legal issues.

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Session Agenda

I. Knowing Who's in the Room -- and What Matters

II. The Policy and Legal Framework

III. Points of Focus (Discussion Options)

IV. Closing

Note: Nothing in this discussion is intended to reflect institution-specific legal advice; counsel should be consulted on all fact-/context-specific inquiries. As Justice O'Connor admonished: "Context matters."
Session Objectives

- Understand the relevant legal and policy context
- Focus on key practical implications of the Court's decision
- Examine and discuss issues of access and diversity that matter most to practitioners
Points of Focus...TBD

Three Options for Your Consideration:

1. Assessing Race-Neutral Strategies
2. Benchmarks for Success: Critical Mass - Quantitative and Qualitative Considerations
3. Communications Strategies and Issues: The Language We Use

Workshop time frame will allow for up to two facilitated discussions, with relevant slides that follow, based on result of poll.
I. Knowing Who's in the Room
Q1: My work is predominantly in...

A. Admissions
B. Financial Aid/Scholarships
C. Outreach and Recruitment
D. Diversity or Student Affairs
E. Other
Q2: I attended the ADC session at the College Board Forum

A. Yes
B. No
Q3: The consideration of race and ethnicity in enrollment decisions at my school is:

A. Very important
B. Important
C. Not important/not considered
D. I'm not sure
E. Not allowed
Q4: I am most interested in more information on:

A. Assessing Race-Neutral Strategies

B. Benchmarks for Success: Critical Mass

C. Communications Strategies and Issues: The Language We Use
II. The Policy and Legal Framework
Educationally sound and legally defensible race-/ethnicity-conscious practices must be the product of a well-designed, institutionally aligned, and integrated process.

A Paradigm for Institutional Focus

Goal . . . . . . . .

Objectives. . .

Strategies. . . .

Educational Benefits of Diversity

Critical Mass/ Structural or Compositional Diversity

Improved Teaching & Learning/Skills Development

Enrollment

Academic & Student Affairs

Retention

Supporting Evidence

Admissions

Financial Aid

Recruitment

Outreach/Collaboration with Partners
The Legal Standard: Strict Scrutiny

- Strict scrutiny
- Compelling interest
- Narrow tailoring
The Legal Standard: Strict Scrutiny

- Strict Scrutiny
  - Compelling Interest
  - Narrow Tailoring
- Remedying Past Discrimination
The Legal Standard: Strict Scrutiny

Strict Scrutiny

Compelling Interest

Narrow Tailoring

Remedying Past Discrimination

Educational Benefits of Diversity
The Legal Standard: Strict Scrutiny

- Compelling Interest
  - Educational Benefits of Diversity
- Narrow Tailoring
  - Necessity
  - Flexibility
  - Minimal Adverse Impact on Non-Beneficiaries
  - Periodic Review / Limited in Time
Fisher: The Holding

- Narrow decision (7-1, authored by Justice Kennedy)
  - No ruling on the merits of UT admissions plan; remanded to Fifth Circuit; key questions left open

- Grutter framework preserved - but clarified
  - Educational benefits of diversity remain a compelling interest
  - Some deference to educational institutions is appropriate for compelling interest analysis but not for narrow tailoring
  - For narrow tailoring, emphasis on necessity, with IHEs showing that, "before turning to racial classifications . . . available, workable race-neutral alternatives do not suffice"
    - Key issue — Necessity: the justification for using race at all
    - Related issue — Impact: buried but present in the Court's opinion
Fisher in the Broader Legal Context

Strict Scrutiny

Compelling Interest
- Educational Benefits of Diversity

Narrow Tailoring
- Necessity
- Impact
- Flexibility
- Minimal Adverse Impact on Non-Beneficiaries
- Periodic Review / Limited in Time

Minimal Adverse Impact on Non-Beneficiaries
**Fisher in the Broader Legal Context**

- **Strict Scrutiny**
  - Compelling interest
  - Narrow Tailoring
    - Necessity
    - Flexibility
    - Minimal Adverse Impact on Non-Beneficiaries
    - Periodic Review / Limited in Time

- Educational Benefits of Diversity

- Bakke Grutter Fisher

**Notes:**
- Flexibility
- Minimal Adverse Impact on Non-Beneficiaries
- Periodic Review / Limited in Time
Fisher in the Broader Legal Context

Strict scrutiny

Compelling Interest

Narrow Tailoring

Educational Benefits of Diversity

Necessity

Impact

Flexibility

Minimal Adverse Impact on Non-Beneficiaries

Periodic Review / Limited in Time

Holistic, Individualized Review (Grutter/Gratz)

Bakke Grutter Fisher
**Fisher in the Broader Legal Context**

- **Strict Scrutiny**
  - **Compelling Interest**
  - **Narrow Tailoring**
    - **Educational Benefits of Diversity**
    - **Holistic, Individualized Review** *(Grutter/Gratz)*
    - **Flexibility**
    - **Necessity**
    - **Minimal Adverse Impact on Non-Beneficiaries**
    - **Periodic Review / Limited in Time**

- **Bakke**
- **Grutter**
- **Fisher**

*CollegeBoard*
Fisher in the Broader Legal Context

- Strict Scrutiny
  - Compelling Interest
    - Educational Benefits of Diversity
  - Narrow Tailoring
    - Fisher
      - Necessity
      - Flexibility
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Fisher in the Broader Legal Context

Strict Scrutiny

Compelling Interest

Narrow Tailoring

Educational Benefits of Diversity

Fisher

Necessity

PICS

Impact

Flexibility

Minimal Adverse Impact on Non-Beneficiaries

Periodic Review / Limited in Time

Holistic, Individualized Review (Grutter/Gratz)

Bakke Grutter Fisher
Key Takeaways from *Fisher*

- Institutions of higher education that seek to achieve the educational benefits of diversity should focus as deliberately on **race-neutral practices** as they do on the contours of race-conscious practices.

- **Evidence** of institutional practice that exhibits institutional policy should be compiled and evaluated as part of any institution's periodic review of race- and ethnicity-conscious policies.

- The concept of **critical mass** remains embedded in federal law, with many questions still unanswered. A more robust, practice-oriented research and program evaluation is called for.
III. Points of Focus
(Discussion Options)
Q5: I am most interested in more information on:

A. Assessing Race-Neutral Strategies

B. Benchmarks for Success: Critical Mass

C. Communications Strategies and Issues: The Language We Use
A. ASSESSING RACE-NEUTRAL STRATEGIES

Sources:
• Fisher v. University of Texas, 133 S.Ct. 2411 (2013)
• Coleman and Palmer, Race Neutral Policies in Higher Education: From Theory to Action (College Board 2008)
• Coleman et. al., Understanding Fisher: What the Supreme Court Did (and Didn’t) Say About Diversity and the Use of Race and Ethnicity in College Admissions (College Board 2013)
First, some essential points...

- Race-neutral strategies can and should be implement in tandem with race-conscious approaches.

- Most institutions already carry out multiple neutral and conscious strategies. The objective is to use them in aligned and coherent ways.
For decades, federal courts have insisted on 'strict scrutiny' for any policy that treats individuals differently because of their race or ethnicity.

Operationally, the question of strict scrutiny applicability appears to be: Does a policy or practice confer opportunities or benefits that actually amount to something of consequence?

- Is a benefit or opportunity conferred to an *individual* based on his/her race/ethnicity - to the exclusion of others?
Race-neutral policies may:
- Be neutral, both operationally (read: language) and intent; OR
- Are "inclusive" policies that may be race-conscious on their face and/or in intent, but do not confer material benefits to the exclusion of non-targeted students.

Race-conscious policies may:
- Involve explicit racial classifications (e.g., race as one factor in a holistic admissions policy); OR
- Be neutral on their face but motivated by a racially discriminatory purpose, which leads to racially discriminatory effects.
Race-Neutral v. Race Conscious

"Race-Neutral"
- Race-Blind
- Race-Aware without Impact
- Actual Race-Neutral but with Racial Impact
- Inclusive Race-Targeted

"Race-Conscious"
- Facial Race-Neutral but with Some Racial Intent
- Express Race Consideration
- Race-Exclusive
## Race-Neutral v. Race Conscious

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<td>Inclusive Race-Neutral but with Some Racial Intent</td>
<td>Strict scrutiny</td>
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**Race-Neutral**
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**Strict scrutiny**
Consistency is not the hallmark of jurisprudence...

Justice Kennedy's *Fisher* opinion presumed that the Top Ten Percent Law was a neutral strategy . . . but other Justices haven't been so sure . . .

"Moreover, even assuming [percent] plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university."

- Justice O'Connor's Majority Opinion in *Grutter*

"The 'percentage plans' are just as race conscious as the point scheme (and fairly so), but they get their racially diverse results without saying directly what they are doing or why they are doing it . . . Equal protection cannot become an exercise in which the winners are the ones who hide the ball."

- Justice Souter's Dissent in *Gratz*

"I have said before and reiterate here that only an ostrich could regard the supposedly neutral alternatives as race unconscious."

- Justice Ginsburg's Dissent in *Fisher*
...questions still exist on the actual dividing line.

The question that the U.S. Supreme Court has not definitively addressed in a higher education enrollment management setting is “how much” of a racially discriminatory motivation is necessary in order for such policies to qualify as race-conscious -- and the trigger for strict scrutiny when an individual benefit is conferred (v. a broader benefit)

But some answers may be emerging:

- Justice Kennedy in PICS
- USED/DOJ Policy
Group Discussion

- Any reactions or questions related to the introduction?

- How well understood are the differences between race-neutral and race-conscious at your institution?

- How (if at all) has *Fisher* changed your understanding of race-neutral strategies? Now 7+ months since the decision, what questions still linger?

- What resources would you find valuable? To what resources do you think you could contribute?
"If a nonracial approach...could promote the substantial interest [in diversity] about as well and at tolerable administrative expense...then the university may not consider race. [Ultimately,] strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice."

- Justice Kennedy's Majority Opinion
What Does the *Fisher* Language Mean?

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An IHE need not absorb undue added cost (time, personnel, resources) in adopting a neutral strategy -- but it is likely that cost-savings alone cannot justify race-conscious policies.
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<td>Demonstrate</td>
<td>An IHE must have sound basis, rooted in evidence and expertise, for deciding not to pursue a strategy. The IHE should document its decision, which must be anchored in its particular context.</td>
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Beyond Percent Plans: Policies and Practices to Consider

Building Blocks for Comprehensive Diversity Strategies

**External Initiatives**
- K-12 school reform
- Federal, state, and independent college-prep and support programs (e.g., TRIO)

**Institution-sponsored initiatives**
- Awareness campaigns
- Pipeline programs
- Campus visits and enrichment programs

**Inclusive, Targeted Outreach and Recruitment Activities** for Prospective Freshmen

**Community Colleges/Inter-institutional Policies**

**Admissions**
- Other preferences (SES, first generation, family status, geography background, community demographics, diversity capital, language proficiency, etc.)
- Removal of certain preferences (legacy)
- Percentage plan [Fisher]
- Lottery

**Financial Aid**
- Information sessions for families
- Need-based financial aid
- Scholarships for graduates of underserved schools

**Retention**
- Mentoring and advising for "at-risk" students
- Targeted retention programs
Remember the Pyramid?

These Neutral "Building Blocks" Are Likely An Important Part of Your Overall Diversity Strategy....
Remember the Pyramid?

...But No IHE Is Likely to Be Exactly the Same.

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B. BENCHMARKS FOR SUCCESS: CRITICAL MASS - QUANTITATIVE AND QUALITATIVE CONSIDERATIONS

Sources:
• Fisher v. University of Texas, 133 S.Ct. 2411 (2013)
• Coleman et al., Admissions and Diversity After Michigan: The Next Generation of Legal and Policy Issues (College Board, 2006)
• Chang, Preservation or Transformation: Where’s the Real Educational Discourse on Diversity?, 25 Rev. of Higher Educ. 125, 131 (2002)
• American Educational Research Association’s Amicus Brief in Grutter (2003)
Group Discussion

- How do you define success on diversity goals at your institution?

- What does success look like? How is it measured?
  - How do you define critical mass?
  - Are there alternatives to critical mass? Are you using them?

- How do you assess the effects and impact of your diversity enrollment policies?

- How do you know when you have achieved success?
Originally, the term was used in science to refer to the amount of material needed for an event to occur.

- For example: in nuclear physics, critical mass is the smallest amount of a particular type of material needed to sustain a nuclear chain reaction at a consistent, sustainable level. If the mass is too small, material escapes too quickly. As the mass gets bigger, the material has enough space to become self-sustaining.
In the enrollment context, critical mass is ultimately defined with reference to the particular setting in which race-based assumptions dissipate, behaviors shift, and a more robust learning environment is established.

“There is no identifiable magic number that signals that there is ‘enough’ racial diversity in the student composition....”
- Chang et al. (2002)

“Critical mass is thus neither a rigid quota nor an amorphous concept defying definition. Instead, it is a contextual benchmark that allows the Law School to exceed token numbers within its student body and to promote the robust exchange of ideas and views that is so central to the Law School’s mission.”
Examples from the field...

- At the University of Michigan Law School (examined in *Grutter*), the original enrollment goal for minority enrollment was a range of 11-17% of the class. Actual enrollment was 13.5-20.1% -- demonstrating the flexible nature of the concept in the enrollment context.

- At the Virginia Military Institute (VMI), a court in the 1990s determined that 10% of class might be sufficient “to provide the female cadets with a positive educational experience.”

- The University of Texas - a much larger institution than the UM Law School or VMI - looked deeper to see how critical mass appeared at a classroom level, based on UT's arguments. Though ~20% of entering freshmen were African-American or Hispanic, thousands of classes had nearly nonexistent minority representation in thousands of classrooms.
Critical Mass: What the Lawyers Say

Briefs from the Parties in the 5th Circuit's Rehearing of Fisher in Fall 2013 Demonstrate Continuing Disagreements

- Abigail Fisher has focused on **quantitative** nature:
  - "Given the substantial number of minority students admitted through UT's pre-2004 race neutral admissions system, UT effectively achieved critical mass no later than 2003."

- UT-Austin emphasized **qualitative** nature:
  - "As Bakke, Grutter, and Fisher recognize, the constitutional diversity objective is a more nuanced concept—and one that is inherently bound up with educational judgments as well. That interest simply does not lend itself to the kind of numerical precision or bright-line targets that Fisher has in mind."
Group Discussion

- How do you define success on diversity goals at your institution?

- What does success look like? How is it measured?
  - How do you define critical mass?
  - Are there alternatives to critical mass? Are you using them?

- How do you assess the effects and impact of your diversity enrollment policies?

- How do you know when you have achieved success?
Examining and Measuring Progress on Your Diversity Goals

- Critical mass is not the only issue that matters - and institutions should work to create clear mission statements and accompanying goals - and then identify sources of information to determine whether those goals are being met on an ongoing basis.

- Identifying benchmarks and measuring progress against them will likely involve a mix of quantitative and qualitative analysis.
Critical Mass: Parting Thoughts

Key issues related to critical mass in the higher education enrollment context:

1. The relevant unit of evaluation
   - By discipline or other meaningful unit...

2. The relevant populations to assess
   - Individual minority groups v. "all" URMs as an aggregate minority population

3. Qualitative and quantitative evaluations over time
C. COMMUNICATIONS
STRATEGIES AND ISSUES: THE LANGUAGE WE USE

Sources:
• Tool #3 in Access & Diversity Toolkit: A Resource for Higher Education Professionals (College Board, 2009)
Opening Group Discussion

We will start with a series of short questions to gauge your impressions of two big topics:

- How savvy you believe different intra-institution groups to be when it comes to diversity issues and messaging.

- How well you think that other stakeholder groups understand your purpose and strategy for enhancing the educational benefits of diversity for everyone on campus.
Intra-IHE #1: Colleagues in My Office...

A. All communicate very effectively on diversity.
B. Most communicate effectively.
C. It's a mixed bag - some do, some don't.
D. No one (other than me!) communicates effectively.
Intra-IHE #2: My Institutional Leaders...

A. All communicate very effectively on diversity.
B. Most communicate effectively.
C. It's a mixed bag - some do, some don't.
D. No one communicates effectively.

0% 0% 0% 0%
Intra-IHE #3: Faculty at My Institution...

A. All communicate very effectively on diversity.
B. Most communicate effectively.
C. It's a mixed bag - some do, some don't.
D. No one communicates effectively.

0% 0% 0% 0%
Group Discussion

- What surprised you about the results - and what didn't?

- What specific issues do you think are most difficult to communicate (and understand)? Do different groups value different things? Why?

- Are there nuances within groups? Who specifically are you most encouraged by - and worried about?
Stakeholder #1: Students and alumni...

A. All understand why and how we pursue diversity goals.

B. Most understand.

C. It's a mixed bag - some do, some don't.

D. Most (or all) don't understand.
Stakeholder #2: The general public...

A. All understand why and how we pursue diversity goals.
B. Most understand.
C. It's a mixed bag - some do, some don't.
D. Most (or all) don't understand.
Group Discussion

- What surprised you about the results - and what didn't?

- What specific issues do you think are most difficult for stakeholders to understand? Do different groups value different things? Why?

- What connections can you make between the first set of questions on whether your IHE is communicating effectively and issues related to stakeholder engagement? Does this suggest action?
Building support and sustained engagement for diversity goals requires engagement and communication with and among:

- Multiple institutional offices
- Institutional leaders
- Faculty
- Students and alumni
- The public
- The business community
- And beyond...
The Importance of PUBLIC Engagement

Voter Initiatives Passed
State Executive Order
Attempt for Initiative on Ballot Failed
State Statute
Voter Initiative Failed
Problematic terminology

"Affirmative action"

"Race-neutral"

"Race-based"

"Plus-Factor"

"Diversity"

"Race-conscious"

"Admissions hook"
A range of key terms related to diversity policies and practices lack uniform, generally accepted definitions (legal or otherwise) in the field - sometimes, for good, legitimate reasons . . . But sometimes, not so much. Some examples include:

- **Affirmative Action**: 10 people/10 definitions. Murky...and loaded. (At least for student issues, toss it!)
- **Quota**: Ditto.
- **The educational benefits of diversity**: Mission-based, institution-centric - which means that, necessarily, there are thousands of definitions.
- **Critical mass**: Heaven help us all.
- **Race-conscious, race-neutral (and all sub-categories)**: Merit serious discussion.
Race-Neutral v. Race-Conscious

"Race-Neutral"
- Race-Blind
- Race-Aware without Impact
- Actual Race-Neutral but with Racial Impact
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Remember that *how* we say it is as important as *what* we say . . .

Target initiative exclusively for black male students to promote network of support and improved achievement
Remember that how we say it is as important as what we say . . .

Target initiative exclusively for black male students to promote network of support and improved achievement.
Remember that *how* we say it is as important as *what* we say . . .

Institution's Full Range of Multiple Student Support Initiatives for *All*

Target initiative exclusively for black male students to promote network of support and improved achievement
Key Action Steps

- Review all policies, website materials, and other publications to ensure coherence, consistency and transparency on the institution-specific meaning of key terms.

- Ensure that key enrollment and external relations staff are trained on the correct definitions of key terms and concepts — and that they can connect them to their work.
IV. Closing
The Educational Benefits of Diversity: Enhancing and Making Possible 21st Century Learning Goals

Educational benefits of diversity:

• Better cross-group understanding
• Breaking down stereotypes
• Livelier and more enlightening classroom discussion
• Enhanced critical thinking skills
• More student involvement in community service

Source: Jeffrey Milem, *The Educational Benefits of Diversity: Evidence from Multiple Sectors, Compelling Interest: Examining the Evidence on Racial Dynamics in Higher Education* (Chang et al. eds., 2003.)
The Educational Benefits of Diversity: Enhancing and Making Possible 21st Century Learning Goals

21st century skills

- Collaboration
- Skilled communication
- Global awareness
- Real-world problem-solving
- Knowledge construction
- Self-regulation
- Technology used in learning

Educational benefits of diversity:

- Better cross-group understanding
- Breaking down stereotypes
- Livelier and more enlightening classroom discussion
- Enhanced critical thinking skills
- More student involvement in community service

Sources: Partnership for 21st Century Skills (supported by USED; AOL/Time Warner Foundation; Apple Computer, Inc.; Cable in the Classroom; Cisco Systems, Inc.; Dell Computer Corp.; Microsoft Corp.; NEA; SAP); Gallup (in partnership with Microsoft Partners in Learning and the Pearson Foundation).

A Paradigm for Institutional Focus

Educationally sound and legally defensible race-/ethnicity-conscious practices must be the product of a well-designed, institutionally aligned, and integrated process.

Goal . . . . . .

Objectives. . .

Strategies. . . .

Educational Benefits of Diversity

Critical Mass/Structural or Compositional Diversity

Improved teaching & learning/skills development

Enrollment

Retention

Academic & Student Affairs

Outreach/Collaboration with Partners

Admissions

Financial Aid

Recruitment
Educationally sound and legally defensible race-/ethnicity-conscious practices must be the product of a well-designed, institutionally aligned, and integrated process.

A Paradigm for Institutional Focus

21st Century Learning/Workforce & Citizenship Readiness

Educational Benefits of Diversity

Critical Mass/Structural or Compositional Diversity

Improved teaching & learning/skills development

Enrollment

Admissions

Financial Aid

Recruitment

Outreach/Collaboration with Partners

Retention

Academic & Student Affairs

Goal . . . . .

Objectives. . .

Strategies. . .
**A Final Charge: A Focus on Access**

Policy leaders must understand that **access and diversity** are linked but distinct—and frame policy objectives and strategies accordingly. Even as no "bright line" distinctions between the two concepts exist, institutional efforts should be assessed/framed through both lenses.

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<tr>
<th>Diversity</th>
<th>Access</th>
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<tr>
<td>★ Inward-facing</td>
<td>★ Outward-facing</td>
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<tr>
<td>★ Focused on mission-driven educational objectives</td>
<td>★ Driven by institutional goals related to broader service aims</td>
</tr>
<tr>
<td>★ Multi-dimensional (but with race/ethnicity/gender focus)</td>
<td>★ Multi-dimensional</td>
</tr>
<tr>
<td>★ Institutionally measurable</td>
<td>★ Measurable in some ways</td>
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Additional Resources

Available (with more coming!)

Please visit the College Board’s Access & Diversity Collaborative's website:
http://diversitycollaborative.collegeboard.org

- Understanding *Fisher v. the University of Texas*: Policy Implications of What the U.S. Supreme Court Did (and Didn’t) Say About Diversity and the Use of Race and Ethnicity in College Admissions (College Board, 2013),

- Beyond Federal Law: Trends and Principles Associated with State Laws Banning the Consideration of Race, Ethnicity, and Sex Among Public Education Institutions (AAAS, 2012),

- Access & Diversity Toolkit: A Resource for Higher Education Professionals (College Board, 2009),

- Race-Neutral Policies in Higher Education: From Theory to Action (College Board, 2008),

Bradley J. Quin is Executive Director, Higher Education Advocacy and Special Initiatives at the College Board. He provides key project management for the purpose of advancing the College Board’s advocacy initiatives and College Completion Agenda on a national basis. He coordinates several important activities focused on issues such as access, recruitment, outreach, admissions, and retention. Mr. Quin can be reached at 571-485-3438 or bquin@collegeboard.org.

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EducationCounsel LLC, affiliated with Nelson Mullins Riley & Scarborough, LLP, provides higher education institutions and organizations with a wide variety of educational services, including diversity-related strategic planning, policy counseling and program evaluations; litigation support (including representation in OCR investigations); and staff/member training. It was an author of the College Board’s amicus brief in the Fisher v. University of Texas case.