Knowing the Basics: Understanding Fundamentals of Law and Policy Regarding Access and Diversity Goals

The College Board's Access and Diversity Collaborative
Boston MA and Raleigh NC National Seminars
2009
Arthur L. Coleman
EducationCounsel LLC
Session Background and Introductions
Session Introduction

- Session goals
- The Access and Diversity Collaborative history and goals
- Introductions of attendees...and burning issues
Knowing the Basics Session Overview

I. Federal and State Law Fundamentals
II. Lessons Learned from Michigan regarding Goals and Objectives
III. Enrollment Management Policy Fundamentals
IV. The Process of Policy Change
V. Wrap-Up
I. Federal and State Law Fundamentals Affecting Policy Judgments
Major Legal and Educational Trends

**Movement from...**

1. Remedial, “social justice” focus
   - Numbers, inputs driven
2. Centralized and “stovepipe” policy development and implementation
   - System-/institution-wide focus
   - Minimal integration among facets of enrollment management

**To...**

1. Educational, accountability focus
   - Outcomes driven
2. Integrated policy development
   - Among all facets of enrollment management and programmatic objectives
   - Between enrollment management and programmatic objectives
**Principles that Matter**

- **Goals Matter.** Effective policies cannot be developed and implemented without clarity regarding institutional goals and benchmarks for determining success.

- **Context Matters.** Ultimate decisions about the lawfulness of any race- or ethnicity-conscious policy depend on degree and context. There are few categorical bright lines.

- **Evidence Matters.** Despite limited federal court deference to academic judgments by higher education institutions, educational decisions relating to race-/ethnicity-conscious policies must be supported by evidence.

- **Process Matters.** Embedded in specific legal standards—and a facet of policy development that can promote good decision-making—is the establishment of a comprehensive, strategic process: Ensuring that the right questions are asked in the right way by the right people at the right time...to reach the right result (educationally and legally).

- **Key Resource:** *Admissions and Diversity After Michigan...*(2006)
Key Landmarks for Assessing Legal Risk

**Constitutional**

- Admissions Individualized Review

**Unconstitutional**

- Admissions Point System
- K-12 Student Assignment
- Seattle/Louisville S.D. Plans (2007)
- Admissions Quota System
Other Legal Landmarks

<table>
<thead>
<tr>
<th>Federal Initiatives</th>
<th>State Initiatives</th>
</tr>
</thead>
<tbody>
<tr>
<td>1994: Race-conscious financial aid policy—USED, Title VI</td>
<td>Voter Initiatives/Executive Orders banning the use of race in higher education admissions (and other areas) among public institutions</td>
</tr>
<tr>
<td>Mid-1990s:</td>
<td>California—Proposition 209</td>
</tr>
<tr>
<td>“Mend it, don’t end it”—Administration-wide review of</td>
<td>Washington—I-200</td>
</tr>
<tr>
<td>“affirmative action programs”</td>
<td>Florida—“One Florida Plan” [executive order]</td>
</tr>
<tr>
<td>Litigation support for diversity-related policies</td>
<td>Michigan—Proposal 2</td>
</tr>
<tr>
<td>2002: Administration brief vs. the University of Michigan</td>
<td>Nebraska</td>
</tr>
<tr>
<td>Administration in <em>Grutter</em> and <em>Gratz</em></td>
<td></td>
</tr>
<tr>
<td>2003-05: USED Race-neutral alternatives publications</td>
<td></td>
</tr>
<tr>
<td>2009-... ???</td>
<td></td>
</tr>
</tbody>
</table>

Key Resource: *From Federal Law to State Voter Initiatives...*(March 2007)
The U.S. Supreme Court

2003

GINSBURG  STEVENS  SOUTER  BREYER  O'CONNOR  KENNEDY  REHNQUIST  SCALIA  THOMAS

GRUTTER MAJORITY

GRATZ MAJORITY

2007

GINSBURG  STEVENS  SOUTER  BREYER  ALITO  KENNEDY  ROBERTS  SCALIA  THOMAS

Seattle S.D. Majority

connect to college success™
www.collegeboard.com
Key Concepts and Definitions

Affirmative Action. Passé. Period. (This isn’t what we’re talking about...)

Diversity. A term that is inherently institution- and school-specific; demands sufficient framing to guide institutional action and justify any consideration of race/ethnicity.

Underrepresented Students. A meaningful concept only with regard to your point of reference. In policies that track Court-approved language: Underrepresented with respect to groups of students for whom there are insufficient numbers to establish a critical mass that will advance the educational benefits of diversity.

Race-conscious. In federal legal terms, the same as “ethnicity-conscious.” Refers to policies that trigger strict scrutiny because they treat students differently based on race; and (likely) because they are predominantly motivated by race (even if facially neutral).
The Relevant Legal Standard:
Strict Scrutiny = Compelling Interest + Narrow Tailoring

☑ Strict scrutiny defines the federal inquiry applicable to all public institutions and all private institutions that receive federal funds when they treat persons unequally because of their race or ethnicity or confer benefits based on race or ethnicity.
  - 14th Amendment to the U.S. Constitution (public institutions)
  - Title VI of the Civil Rights Act of 1964 (public and private institutions)

☑ The strict scrutiny standard establishes key questions—regarding ends and means—that must be addressed when pursuing race-/ethnicity-conscious practices:
  - [1] Is there a compelling interest?
  - [2] Is the practice in question narrowly tailored?

Strict in theory does not mean fatal in fact!
### The Relevant Legal Standard:
**Strict Scrutiny = Compelling Interest + Narrow Tailoring**

<table>
<thead>
<tr>
<th>1. Do you have a compelling interest justifying race/ethnicity-conscious preferences?</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Mission driven</td>
</tr>
<tr>
<td>- Educational interest</td>
</tr>
<tr>
<td>- Evidence</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>2. Is any consideration of race/ethnicity “narrowly tailored?”</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Need.</strong></td>
</tr>
<tr>
<td>- Necessary to achieve goals</td>
</tr>
<tr>
<td>- Yields desired, material impact</td>
</tr>
<tr>
<td><strong>Limited Use.</strong></td>
</tr>
<tr>
<td>- Flexible in application</td>
</tr>
<tr>
<td>- With minimal adverse impact on non-preferred students</td>
</tr>
<tr>
<td><strong>Periodic review.</strong> Reviewed and evaluated, with end goal in mind</td>
</tr>
</tbody>
</table>
The Context for Understanding Strict Scrutiny

Strict Scrutiny

Intermediate Scrutiny

Rational Basis

Other

Gender

Race and Ethnicity
Potential Institutional Liability: Administration/Funding of Race-Conscious Programs

When a university funds, administers or significantly assists in the administration of a race-conscious program, that institution is likely to be subject to Title VI.

Specific Practices

- Privately/externally funded but university-administered or assisted
  - When evaluating the potential for meeting the “significant assistance” threshold, consider:
    - Assistance in setting criteria or selecting students
    - Assistance in advertising
    - Other use of institutional resources

- Privately and externally funded and administered
  - No federal liability for a college or university likely attaches in cases where program is funded and administered without any university involvement
Four Cases in Four Years: What We Know About Goals and Objectives

✓ Diversity-related goals can be compelling and support race-conscious policies.
  – They must be mission-driven and educationally focused.
  – They may (likely) address issues of access and equal opportunity—if appropriately framed, and limited in scope and time.

✓ Objectives by which success is gauged must be established.
  – Critical mass objectives can support diversity-related goals.

Four Cases in Four Years:
What We Know About Means to Achieve Goals

- Race-conscious policies must reflect coherence between ends and means. Policies must be well-calibrated, materially advancing goals without an over-reliance on race.
  - Least use of race possible to advance goals
  - Minimal adverse impact of use of race on non-qualifying students (based on race)
  - Appropriately flexible consideration of race

- Policies must be the product of rigorous review and evaluation over time
  - Viable race-neutral alternatives must be evaluated, and when appropriate, tried.
  - Race-conscious policies must be examined in light of changing circumstances, mission-driven aims, and results.

Lessons Learned: Red Lights

 Practices to avoid:

- Defining diversity only with respect to race and ethnicity
- Using separate admissions standards or processes for minority applicants—in policy or in practice
- Weighting race/ethnicity in admissions through an automatic or mechanical point system that precludes meaningful, nuanced comparisons among applicants
Lessons Learned: Yellow Lights

~ Practices that will likely trigger strict scrutiny and merit rigorous evaluation:

- The consideration of race/ethnicity as part of the admissions process
- Race-/ethnicity-conscious financial aid, recruitment, outreach and retention practices
  - Blinking orange: race-/ethnicity-exclusive practices
Lessons Learned: Green Lights

☑ Practices that are less likely to trigger strict scrutiny (but that merit ongoing review/evaluation):
  - Establishing diversity-related goals
  - Pursuing race-neutral, diversity-related strategies
  - Conducting broad-based recruitment and outreach activities, including racially/ethnically targeted action
  - Monitoring student data based on race/ethnicity
Baselines: Where Claims May Surface

- Federal or state courts
  - “Standing” requirements; plaintiff typically must be victim of harm or associated with victim of harm.
  - Potential injunctive relief and recovery of damages
  - Extensive and formal discovery/typically lengthy process

- U.S. Department of Education Office for Civil Rights
  - No “standing” requirements; any person or entity can file a claim.
  - Legal obligation to resolve by agreement, if possible
  - Potential withholding of federal funds under Title VI, or referral to U.S. Department of Justice for court action
  - More informal discovery/typically shorter process (but not always!)
The Federal Court System

Federal Judicial Circuits
II. Policy Goals and Objectives: Lessons Learned from Michigan
Key Spheres of Policy Influence

- Public Will
- Policy
- Research & Experience
- External Rules
The Evaluation of Legal Risk: Not a One-Dimensional Exercise

- **HIGH RISK**
  - Don’t Achieve Goals
  - Achieve Goals

- **LOW RISK**
  - Don’t Achieve Goals
  - Achieve Goals

Success in Achieving Goals
## Aligned Legal and Policy Questions

### Legal Inquiries

1. **Do you have a compelling interest?**
   - Mission driven
   - Educational interest
   - Evidence

2. **Is any consideration of race “narrowly tailored?”**
   - *Need.* Necessary to achieve goals
   - *Limited Use.*
     - Flexible in application
     - With minimal adverse impact on non-preferred students
   - *Periodic review.* Reviewed and evaluated, with end goal in mind

### Policy Questions

1. **Do you have clearly defined educational goals** associated with diversity policies, and can you define success with respect to those goals?
   - Enhanced learning in classroom/clinical settings
   - Access and equal opportunity goals

2. **Are your policies and programs effectively implemented and materially advancing efforts to reach stated goals?**
   - Multi-disciplinary Policy Development, Implementation, and Evaluation
Institutional Policy Design: The University of Michigan Model

Goal

Objectives

Strategies

Benefits of Diversity

Enhanced learning outcomes; Expanded quality workforce

Compositional Diversity

Recruitment

Admissions

Retention

Financial Aid

Academic Affairs

Student Affairs

Supporting Evidence

Supporting Evidence

www.collegeboard.com
Institutional Policy Design: The University of Michigan Model +++

Goal
Enhanced Access for Underserved Students and Communities

Objectives
"Pipeline" investments that yield:
- More/better qualified graduates
- More diversity among cohorts of targeted students that enroll
- More...

Strategies
Outreach
Recruitment
Counseling
Financial Aid
K12 Enhancement
Admissions
Enrichment/Retention

Supporting Evidence
Supporting Evidence

connect to college success™
www.collegeboard.com
<table>
<thead>
<tr>
<th>Mission or similar policy statements should reflect:</th>
</tr>
</thead>
<tbody>
<tr>
<td>- That the educational benefits of diversity are a core institutional value and priority</td>
</tr>
<tr>
<td>- Concrete educational, economic and other benefits</td>
</tr>
<tr>
<td>- The importance of multiple facets of diversity—not just race and ethnicity</td>
</tr>
<tr>
<td>- Any unique institutional history of relevance</td>
</tr>
<tr>
<td>- A process involving faculty and student input</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Management plans should:</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Explain the connection between core goals, objectives and strategies</td>
</tr>
<tr>
<td>- Ensure that a responsible team is in charge—and accountable</td>
</tr>
<tr>
<td>- Help eliminate “stovepipe” decision-making and facilitate more broad-based access and diversity efforts.</td>
</tr>
<tr>
<td>- Include criteria and benchmarks by which success can be gauged</td>
</tr>
</tbody>
</table>

Key Resources: University of Maryland Policy on Diversity in Educational Programs (April 5, 2005).
From Mission to Admissions: Substantive Issues and Policy Pitfalls

Key Issues

- Level of detail in describing goals and objectives
- Clarity regarding objectives—with an educational focus
  - The extent to which critical mass theory applies
- Evidence demonstrating the linkage between desired educational outcomes and diversity among students
- Ways to incorporate diversity assessments and evaluations into ongoing assessments

Policy Pitfalls

- The tendency to think of diversity in terms of numbers, only—and to judge success, accordingly
- Framing numerical objectives in absolute terms (rather than, e.g., in terms of progress or ranges)
- The failure to provide benchmarks or criteria for evaluating success, at all
- References to the term “underrepresented”
From Mission to Admissions: Process Issues and Policy Pitfalls

Key Issues

- Institutional leadership in “walking the talk”
- The team in charge—and connections to the top
- Integration within all facets of the institution
  - Faculty and administration support

Policy Pitfalls

- A well-developed plan that collects dust
- Failure to include all relevant segments of the institution in the process
- Failure of outreach among stakeholders
- Lack of attention to what may not be working well
III. Enrollment Management Policy Fundamentals
## Admissions: Key Issues and Policy Directions

### Key Issues
- The anchor of all enrollment management decisions
- Limited but important consideration of race
- Comprehensive focus on “merit”

### Policy Directions
- Integrate admissions policies with other relevant policies along the enrollment management
- Consider the race of students only as necessary and in ways that are precisely calibrated to achieve goals.
- Reflect:
  - Student-centric and school-centric bases for evaluating candidates
  - A process that distinguishes between who is academically prepared and who should be admitted
  - Care in using test scores

[CollegeBoard] www.collegeboard.com
The Harvard Plan: Key Elements

☑️ The Admissions Plan APPROVED by Justices Powell (Bakke), O’Connor (Grutter) and Rehnquist (Gratz):

- The admissions decision involves the evaluation of the student and consideration of how best to create the desired educational experience for all students.

- Academic criteria for determining who is academically qualified are necessary but not sufficient criteria for admissions
  - Test scores, high school records, and teacher recommendations are determinative of who has “the academic ability to do adequate work...and perhaps do it with distinction” but not who should be admitted.

- Factors including student interests, talents, backgrounds and career goals are associated with the effectiveness of students’ educational experience and are relevant considerations.

- Diversity “adds an essential ingredient to the educational process” and is a relevant consideration.
  - Race is one factor among many “in some admissions decisions,” and in some cases may “tip the balance” in favor of an applicant. In addition, “critical criteria” that may be “associated with” but not “dependent on” race are considered.
  - “Target-quotas” are not established, although “some attention to numbers” is integral to the admissions process.
The University of Michigan Admissions Policies: Key Elements

✔ The Law School Admissions Policy APPROVED in Grutter in 2003
  - Individual review/evaluation of all applications, with a focus on [1] academic criteria; [2] likely contribution to intellectual/social life of the institution; and [3] contribution to diversity, which can enrich the education of all:
    - Grades, test scores
    - Enthusiasm of recommenders
    - Quality of undergraduate institution
    - Quality of essay
    - Areas/difficulty of undergraduate course selection
    - Diversity factors, including racial/ethnic diversity with a focus on groups that have historically been discriminated against

✗ The Undergraduate Policy REJECTED in Gratz in 2003
  - Individual review/evaluation of all applications
  - Point system
    - Maximum points awarded: 150
    - Points that guarantee admission: 100
      - 95-99: Admit or postpone
      - 90-94: Postpone or admit
      - 75-89: Delay or postpone
      - <75: Delay or reject
    - 20 pts automatically awarded for underrepresented minority, attendance at predominantly minority/disadvantaged HS, athlete
    - 40 points can be assigned for non-academic factors: geography, alumni relationship, essay, leadership, public service
  - Point system constrains meaningful individualized review; “diversity contributions cannot be individually assessed”
  - Race effectively “decisive” for virtually every minimally qualified minority student (vs. Powell on Harvard)
## Financial Aid: Key Issues and Policy Directions

### Key Issues
- ✔ Integration in enrollment management decisions
- ✔ Race-exclusive financial aid
- ✔ Private scholarships
- ✔ Special groups of students

### Policy Directions
- ✔ Financial aid practices may be “linked” with admissions decisions, potentially mitigating legal risk
- ✔ As a general matter, exclusive aid is more difficult to justify than race-as-a-factor aid
- ✔ Privately funded aid must be evaluated in risk assessment if institution “significantly assists in administration” of that aid
- ✔ Limited openings to make the case that Native American and Native Hawaiian student policies should be evaluated differently

### Key Resources:
$25,000 in funding for race-exclusive scholarships
The Relevant Framework of Analysis

$2 million endowment

$25,000
The Relevant Framework of Analysis

One race-conscious recruitment program:
weekend campus activities
Six different sets of recruitment/outreach initiatives that have a diversity focus (on multiple levels)

One program
Private Funding/Support for Institutional Programs

**Major issues**
- Title VI applies when higher education institutions administer or significantly assist in the administration of private funds used for race- or ethnicity-conscious programs

**Policy directions**
- Ensure part of programmatic inventory
- Explore potential to have funds administered by separate entity
- Track admissions-like language ("race as one factor ...") in advancing diversity interests
- Pool funds
- Note potential donor exposure (42 U.S.C. Sec. 1981); leverage to track institutional standards/interests
Conclusion: Enrollment Management Practice Pointers

- Mission/Program Alignment
  - Faculty Involvement
- Comprehensive Criteria Regarding Meritorious Candidates
  - Possible distinctions between who is qualified and who should be admitted
- Clear process design throughout EM, including:
  - Clarity regarding parameters to guide judgments
  - Defined sequence and integration of factors
    - Academic
    - Non-Academic, including
      - Race/ethnicity
IV. The Process of Policy Change
A Roadmap of Policy Development Action Steps

1. Inventory

Strict Scrutiny =

- Race-Conscious?
- Benefit Conferred?
- Funding/Administration?

2. Justify

Compelling Interest +

- Benefits of Diversity?
- Other?

3. Assess

Narrow Tailoring

- Necessary?
- Flexible?
- Impact?
- Periodic Review?

4. Act

Key Resource: Diversity and Admissions After Michigan, Chapter 2 (2006)
STEP ONE
Inventory and Assemble

- **Organization and Plan of Action**
  - Multi-disciplinary management team in charge
  - Delegate review and preliminary program descriptions—by school, department or program
  - Preliminary assessment of program design, operation and impact—and connections to others

- **Assemble information on ALL diversity-related policies and programs**
  - All facets of enrollment management, academic affairs & student affairs
  - Privately funded, institution administered programs
  - Race-conscious and race-neutral policies and programs
  - Triage, with focus on race-exclusive policies and programs and core admissions policies
STEP TWO: Justify Existence of Race-Conscious Policies and Programs

- Substantive foundations
  - Empirically grounded theories of action
    - The Benefits of Diversity
    - Access and Equal Opportunity
    - Other
  - Ensure
    - Alignment
    - Synergy among policies and programs
    - Supporting evidence

- Evidence
  - Mission and related policy statements
  - Social science research
  - Institution-specific data, research & information aligned with social science research
  - Anecdotal information regarding institutional experience
  - Periodic assessment of premises, based on enrollment management practices
STEP THREE: Evaluate Policies and Programs In Light of Institutional Interests and Legal Principles

- Evaluate use of race-conscious policies individually and collectively with respect to:
  - **Need.** Necessary to achieve goals?
    - No less restrictive use of race
      - No viable, alternative race-neutral alternatives
    - Use of race materially advances achievement of goals
  - **Limited/Refined Use.** Minimal use, given goals?
    - Appropriately flexible in application
    - Minimal adverse impact on non-preferred students
  - **Periodic Review.** Rigorous review with end goal in sight?
    - Policies reviewed and evaluated, annually, including focus on race-neutral strategies that might work
    - Data analysis
STEP FOUR: Take Action

- Key Strategies
  - Setting the stage
    - Legal constraints
    - Evidence of commitment to results
    - Stakeholder outreach and consensus building

- Group Engagement
  - Faculty
  - Students
  - Employers: Business and Military
  - Government
  - Civil Rights
V. Wrap-Up
Central Themes

☑ Alignment between:
  ☑ Federal law and sound institutional policy
  ☑ Institutional mission and enrollment management principles
  ☑ Enrollment management principles and academic/student affairs policies and programs

☑ Well developed theory of action, with:
  ☑ Leadership
  ☑ Clear sense of what you’re trying to achieve, and why
  ☑ Key elements of accountability, including
    ☑ Benchmarks for gauging success
    ☑ Process for review, evaluation, and action
Remaining Issues

- Key Questions
- Resources
- Avenues for Assistance
References

- The College Board Access and Diversity Collaborative
  - www.collegeboard.com/diversitycollaborative
  - Coleman, Palmer and Richards, Federal Law and Recruitment, Outreach and Retention: A Framework for Evaluating Diversity-Related Programs (College Board, 2005)
  - Rigol, Admissions Decision-Making Models (College Board, 2003)
  - Perfetto, et al., Toward a Taxonomy of the Admissions Decision-Making Process (College Board, 1999)
  - Rigol, Selection Through Individualized Review (College Board, 2004)

- The University of Michigan
  - www.umich.edu/~urel/admissions/
Professional Development Opportunities

- College Board Access and Diversity Collaborative 2009 National Seminars
  - **Leading Institutional Change**
      - Former U.S. Secretary of Education Richard W. Riley will participate. EducationCounsel will host reception for attendees.
  - **Knowing the Basics**
    - April 21-22, 2009. Raleigh, NC.
      - Event co-sponsored by the Southern Association for College Admission Counseling, and follows the SACAC Annual Conference, which concludes April 21.

For more information, including registration, visit www.collegeboard.com/diversitycollaborative
Brad Quin, Executive Director, Higher Education Advocacy and Special Initiatives at the College Board, is responsible for managing the Access and Diversity Collaborative. He may be reached at 571-262-5938 or at bquin@collegeboard.org.

Art Coleman and Scott Palmer, founding and managing partners of EducationCounsel LLP, lead the College Board’s Access and Diversity Collaborative national seminars and publication efforts. They previously served as Deputy Assistant Secretaries for Civil Rights in the U.S. Department of Education.

EducationCounsel LLC, affiliated with Nelson Mullins Riley & Scarborough, and with offices in Washington, D.C., Chicago, Atlanta and Greenville, S.C., 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.

Mr. Coleman may be reached at 202-545-2912 or at art.coleman@educationcounsel.com.