The Role of Race-Neutral Strategies in Advancing Higher Education Diversity Goals: Legal Imperatives and Policy Choices

An Access and Diversity Collaborative Presentation

In collaboration with EducationCounsel, LLC

May 28, 2020
Introductions

• Wendell Hall, Moderator  whall@collegeboard.org
  • Senior Director, Higher Education, The College Board

• Art Coleman  art.coleman@educationcounsel.com
  • Managing Partner, EducationCounsel, LLC.
  • Former U.S. Department of Education Deputy Assistant Secretary for Civil Rights

• Jamie Lewis Keith  jamie.keith@educationcounsel.com
  • Partner, EducationCounsel, LLC
  • Former Primary Counsel, MIT; Vice-President, General Counsel and Secretary, University of Florida
Session Overview

I. Legal Baselines: Rules of the Road

II. Litigation Landscape: Takeaways from UNC and Harvard Cases

III. The Playbook: A Resource to Guide Action

IV. ADC Services & Resources
Reflections on COVID-19 Implications

The pandemic shines a light...

Key Resources:

Impact on Inequities

- Educational, career opportunities
- The impact of income/wealth
- Housing and environmental conditions
- Healthcare
- Mental health
- Family/community support
- Criminal justice

A Teachable Moment

- Elevate understanding
- Emphasize mission-necessity and relationship of diversity initiatives
- Emphasize moral imperative
- Inspire commitment to ameliorate inequity

Impact

Reflections on COVID-19 Implications

The pandemic shines a light...

Key Resources:
Snapshot of Cases

Common points of focus emerge...

HARVARD
Appeal to 1st Circuit Court of Appeals

UNC
November 9, 2020 Trial

District Court Ruling in Favor of Harvard on All Counts

District Court Denial of Summary Judgment to All Parties

BOTH:
Significant focus on the necessity of considering race and viable race-neutral alternatives
I. Legal Baselines: Rules of the Road
Disclaimers
Lawyers…just sayin’

It depends.

It’s a question of evidence.

Facts matter.

(Nothing in this discussion constitutes institution-specific legal advice.)
Equal Protection Clause/ Title VI

• Discrimination on the basis of race and ethnicity

Many other factors are central to diversity interests, but federal law requires strict scrutiny when race and ethnicity of individuals are considerations in decisions that confer benefits or opportunities.

Strict in Theory ≠ Fatal in Fact
Strict Scrutiny: The Elements

Strict Scrutiny

Compelling Interests
- Educational benefits of diversity

Policy Tailored Design to Advance Interests Precisely
- Necessity
  - Neutral Strategies
- Impact
  - Flexibility
    - Minimal adverse impact on non-beneficiaries
  - Periodic review
Is the Consideration of Race Necessary? Key Questions

1. Is existing diversity adequate to produce the desired educational experience/outcomes for all students?

2. How has the institution seriously considered race-neutral alternatives?

3. Could a workable alternative (or alternatives) achieve the same results as race-conscious policies about as well and at tolerable administrative expense?

4. If neutral strategies alone are inadequate, could the institution use a combination of neutral strategies and a lesser consideration of race in other policies?

5. Are the race-conscious strategies in use effective to increase diversity as needed to create beneficial educational experiences for all students?
Relevant State Laws

Voter Initiatives/Executive Orders


Race-Conscious v. Race-Neutral: Threshold Questions

Intent
- Is the policy sufficiently motivated by race? (Related: Does it have other substantial, authentic aims?)

Effect
- Does the policy confer material benefits or opportunities based on the beneficiary’s race?
II. The Litigation Landscape

The UNC and Harvard Cases & Takeaways
**SFFA v. UNC**

Summary judgment denied on all counts to all parties. On to trial...

- **SFFA: Failure to articulate with sufficient clarity and precision diversity objectives**
  - Questions authenticity of the compelling interest

- **SFFA: Any consideration of race in admissions is unlawful**
  - If consideration of race allowed, failure to use race as a plus factor in admissions

- **SFFA: Failure to pursue viable race-neutral alternatives**
  - Sufficient diversity could be achieved without race
What We Know

- UNC Process
  - UNC’s establishment of working group and formal committee to examine neutral alternatives

- UNC Record
  - UNC’s documented consideration of various alternatives, including underlying analyses and research of national scope

- SFFA Claims
  - 8 viable alternatives, not pursued
### SFFA v. Harvard

Judgment in favor of Harvard on all counts. Decision has been appealed; briefs have been filed.

<table>
<thead>
<tr>
<th>Appropriate consideration of race in admissions</th>
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</thead>
<tbody>
<tr>
<td>• No goals associated with racial balancing</td>
</tr>
<tr>
<td>• Race not considered as a mechanical factor in the admissions process</td>
</tr>
<tr>
<td>• Tracking race in process is not fatal</td>
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</table>

<table>
<thead>
<tr>
<th>No intentional discrimination against Asian American applicants</th>
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</thead>
<tbody>
<tr>
<td>• Absence of evidence of racial animus, no pattern of stereotyping, etc.</td>
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<tr>
<td>• Statistical models inconclusive; bias could surface from other sources--indeterminate</td>
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<table>
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<tr>
<th>No failure to pursue viable race-neutral alternatives</th>
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<tr>
<td>• Ample investment in outreach, recruitment, aid and consideration of neutral admission criteria</td>
</tr>
<tr>
<td>• Harvard is justified to reject SFFA’s proposed alternatives</td>
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</table>
The Core of the Court’s Rationales Rejecting SFFA’s Neutral Alternatives

**Sufficient neutral investments**
- Reached or nearly reached “maximum returns”
  - Significant outreach
  - “Exceptionally generous” financial aid

**Alternatives’ negative impact**
- ...on diversity: eliminating early action and tips for ALDC
- ...on mission/academic standards: eliminating standardized testing
- ... on feasibility: Admitting top-ranked HS students or by zip code (over-enrollment)

**Concerns about alternatives’ as “proxies” for race**
- Logistical challenges and proxy questions re “neighborhood cluster” and zip code strategy “seemingly designed to achieve racial diversity based on SES”
## Key Takeaways

<table>
<thead>
<tr>
<th>Points on Appeal re Race-Neutral Alternatives</th>
<th>SFFA</th>
<th>HARVARD</th>
</tr>
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<tbody>
<tr>
<td>Focuses on one alternative—Simulation D</td>
<td></td>
<td></td>
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<tr>
<td>Challenges process re consideration of neutral alternatives</td>
<td></td>
<td></td>
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<tr>
<td>Provides 4-point rebuttal on alternative challenged</td>
<td></td>
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<tr>
<td>Establishes record of consideration/actual pursuit of neutral strategies</td>
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Key Takeaways

The Focus of SFFA’s Appellate Argument

 JA1504:2-1505:18; JA5983; JA5988; JA5789 (Kahlenberg’s Simulation 7).
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<tr>
<th>Key Takeaways</th>
<th>Process &amp; Substance</th>
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<td><strong>The Issue</strong></td>
<td><strong>Important Considerations</strong></td>
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| Process Design & Timing | ▪ Committees established, with academic/faculty input  
▪ Timing as an indicator of authenticity |
| Record of Decision-making | ▪ Documentation of inventory  
▪ Evaluation of inventory & research regarding other alternatives  
▪ Action—including modeling effects |
| Mission Alignment | Evidence that decisions are shaped by mission-based goals and based on evidence |
| Record of Evidence | Maintenance of underlying research and studies informing judgments |
III. “The Playbook”—A Resource to Guide Action
Key Foundations for Making *Your* Case

- Mission
- Merit
- Enrollment Strategy
- Evaluation Over Time
- Multidisciplinary Process
Strategies to Consider

Modeling
- Analysis of actual or hypothetical pools to evaluate diversity if only neutral criteria considered
- See Applications Quest http://www.applicationsquest.org

Aggregation
- Clustering of programs, with elimination of any consideration of race in selection; then establishment of race focus

Pooling
- Fungible resources with same basic purpose pooled for race-blind determination; then matching to already-selected students
The Plays

*Landscape: Additional contextual information about applicants’ high schools and neighborhoods*

- Race-Attentive and Inclusive Outreach and Recruitment
- Flexible Admission and Aid Criteria and Test Use
- Socioeconomic Status
- Geographic Diversity
- Experience or Service Commitment Associated with Race
- First-Generation Students and Other Special Circumstances
- Percent Plans
- Educational Collaboration Agreements
- Cohort Programs

*Landscape: Additional contextual information about applicants’ high schools and neighborhoods*
### The Cross-Walk: Core Design Elements

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<td><strong>Recruitment/Outreach</strong></td>
<td>Significant investment/Relevant</td>
<td>Significant investment/Relevant</td>
<td>TBD</td>
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<td><strong>Admission Criteria Including Test Use</strong></td>
<td>No requirement to alter standards</td>
<td>SFFA raised; No requirement to alter standards</td>
<td>TBD—SFFA raised [Δ SAT cut and use]</td>
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## The Cross-Walk: Criteria

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<tr>
<td>SES</td>
<td>Relevant</td>
<td>Relevant</td>
<td>TBD</td>
</tr>
<tr>
<td>Geography</td>
<td>See % Plan ↓</td>
<td>Relevant Additional “place based quota” not required</td>
<td>TBD</td>
</tr>
<tr>
<td>Experience/Service</td>
<td>Present generally</td>
<td>Present generally</td>
<td>Not apparent</td>
</tr>
<tr>
<td>1st Generation +</td>
<td>Not apparent</td>
<td>Present generally</td>
<td>Not apparent</td>
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# The Cross-Walk: Programmatic Elements

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<tr>
<td>% Plans</td>
<td>Key underlying element; Court refused to require expansion</td>
<td>Not evident</td>
<td>TBD—UNC considered &amp; SFFA raises</td>
</tr>
<tr>
<td>Collaboration Agreements</td>
<td>Not evident</td>
<td>Not evident</td>
<td>TBD—SFFA raises</td>
</tr>
<tr>
<td>Cohort Programs</td>
<td>Not evident</td>
<td>Not evident</td>
<td>Not evident</td>
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## Other Strategies and Criteria

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<tr>
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<th>Harvard</th>
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<td>Eliminate Early Action—tried, rejected. Court accepted as sufficient.</td>
<td>Eliminate Early Action—SFFA raised; TBD</td>
<td></td>
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<tr>
<td>Eliminate Preferences for Legacies—Court accepted Harvard’s judgment rejecting</td>
<td>Eliminate Preferences for Legacies—SFFA raised TBD</td>
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<tr>
<td>Increase Financial Aid—Strong element of successful defense</td>
<td>Increase Financial Aid—“Maximum returns” already reached/nearly reached</td>
<td>Increase Financial Aid—SFFA raised TBD</td>
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IV. Access and Diversity
Collaborative Services & Resources
Established in 2004, the College Board's Access & Diversity Collaborative (ADC) provides national leadership and institutional support focused on higher education diversity goals. The ADC serves as:

- A voice of national advocacy,
- A resource for sophisticated and pragmatic policy and practice guidance and actionable research, and
- A convener for thought leadership and collaborative engagement on policy and practice development.

Over 60 institutions of higher education and 16 national organizations sponsor the ADC, which relies heavily on the support and guidance of its sponsors to identify key “on the ground” issues to address, and make recommendations regarding strategic directions.

For more information on the ADC and on sponsorship, please visit www.collegeboard.org/accessanddiversity or email accessanddiversity@collegeboard.org.
Key Resources

Federal Nondiscrimination Law Regarding Diversity
(College Board, EducationCounsel, NASFAA 2019)

Building an Evidence Base
(College Board, 2017)

Holistic Review
(ACE, College Board, EducationCounsel, 2015)

Understanding Holistic Review in Higher Education Admissions
(College Board, EducationCounsel, 2018)

A Policy and Legal "Syllabus" for Diversity Programs at Colleges and Universities
(ACE, College Board, EducationCounsel, 2015)

Financial Aid

Evidence

Key Resources
Questions and Comments
Thank you!

Wendell Hall | whall@collegeboard.org
Art Coleman | art.coleman@educationcounsel.com
Jamie Lewis Keith | jamie.keith@educationcounsel.com