Understanding the Role of Race-Neutral Strategies in Advancing Higher Education Diversity Goals

An Access and Diversity Collaborative Webinar

In collaboration with EducationCounsel, LLC

October 10, 2019
Introductions

• Wendell Hall, Moderator
  • 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
Disclaimers
Lawyers…just sayin’

It depends.

It’s a question of evidence.

Facts matter.

(Nothing in this discussion constitutes institution-specific legal advice.)
Harvard just won!
Why are we talking about neutral alternatives???

Good question!

Harvard doesn’t discriminate against Asian-Americans in admissions, judge rules

Harvard Won This Round, but Affirmative Action Is Weak
A judge ruled that the university’s use of race in admissions was not discriminatory. But decades of race law have already severely limited the scope of such policies.

Judge Rules Harvard’s Race-Conscious Admissions Policy Constitutional
Federal judge finds university doesn’t intentionally discriminate based on race in admissions

‘Everything Is Not Sunshine’: What the Harvard Decision Means for Race-Conscious Admissions
Webinar Overview & Major Themes

Sections

I. The Legal Landscape
II. Mapping the “Plays”
III. The Fundamentals for Taking Action
IV. The “Plays”
V. Moving Forward

Major Themes

▪ Strong Legal Foundations
▪ Imperative of Focus on Neutral Strategies as Part of Enrollment Design and Implementation
▪ Not as Hard as it Seems
I. The Legal Landscape
Focus of Discussion: Federal Law

Equal Protection Clause/Title VI

- Discrimination on the basis of race and ethnicity

Equal Protection Clause/Title IX

- Discrimination on the basis of sex
  - Emerging body of law to extend to discrimination based on sexual orientation and gender identity

*Note:* Many other factors are central to diversity interests, but federal law imposes heightened scrutiny (including requirements for evidence) when race, ethnicity, and sex are considerations in decisions where individual benefits or opportunities are conferred.
Strict Scrutiny

The Key Issues

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
Federal Case Law

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?
State Laws May Be Relevant

Voter Initiatives/Executive Orders

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

Race-Conscious v. Race-Neutral: What’s the Difference?

Race Conscious: Explicit Classifications

• But generally ok when involving inclusive recruitment and outreach (with no material benefit or opportunity conferred)

Race Neutral: Facially Neutral

• But unlikely neutral in legal sense if principal motivation associated with opportunity or benefit to individual students is race/ethnicity-related.
...But What About Proxies?

“...only an ostrich could regard the supposedly neutral alternatives as race-unconscious...”

Underlying principle cited by Justice Kennedy in majority opinion in Fisher II.
SFFA v. Harvard

Judgment in favor of Harvard on all counts.

Appropriate consideration of race in admissions
- No goals associated with racial balancing
- Race not considered as a mechanical factor in the admissions process
- Tracking race in process is not fatal

No intentional discrimination against Asian American applicants
- Absence of evidence of racial animus, no pattern of stereotyping, etc.
- Statistical models inconclusive; bias could surface from other sources--indeterminate

No failure to pursue viable race-neutral alternatives
- Ample investment in outreach, recruitment, aid and consideration of neutral admission criteria
- Harvard is justified to reject SFFA’s proposed alternatives
Summary judgment denied on all counts to all parties. On to trial...

- SFFA: Failure to articulate with sufficient clarity and precision diversity objectives
- SFFA: Any consideration of race in admissions is unlawful
  - If 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
II. Mapping the “Plays”
List of Plays

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
## The Cross-Walk: Core Design Elements

<table>
<thead>
<tr>
<th>Plays</th>
<th>UT</th>
<th>Harvard</th>
<th>UNC</th>
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</thead>
<tbody>
<tr>
<td>Recruitment/Outreach</td>
<td>Significant investment/Relevant</td>
<td>Significant investment/Relevant</td>
<td>TBD</td>
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<td></td>
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<tr>
<td>Admission Criteria Including Test Use</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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</table>
### The Cross-Walk: Criteria

<table>
<thead>
<tr>
<th>Plays</th>
<th>UT</th>
<th>Harvard</th>
<th>UNC</th>
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<tbody>
<tr>
<td>SES</td>
<td>Relevant</td>
<td>Relevant</td>
<td>TBD</td>
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<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>
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<tr>
<td>1\textsuperscript{st} 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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<thead>
<tr>
<th>Plays</th>
<th>UT</th>
<th>Harvard</th>
<th>UNC</th>
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<tbody>
<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

<table>
<thead>
<tr>
<th>UT</th>
<th>Harvard</th>
<th>UNC</th>
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<tbody>
<tr>
<td></td>
<td>Eliminate Early Action—tried, rejected. Court accepted as sufficient.</td>
<td>Eliminate Early Action—SFFA raised; TBD</td>
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<tr>
<td>Increase Financial Aid—Strong element of successful defense</td>
<td></td>
<td>Increase Financial Aid—SFFA raised TBD</td>
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III. The Fundamentals for Taking Action
Key Points of Action

Alignment
- Mission
- Merit
- Enrollment

Process
- Multi-disciplinary
- Regular (Annual)
- Research & Experience-Based

Documentation
- Records of Decisions, Rationales, Process & Action
- Process
- Evaluation
Questions
IV. The Plays
Race-Attentive and Inclusive Recruitment and Outreach

What is it?
Expand the pool of qualified applicants for admission through broad-based dissemination of all consequential information, but with targeted communications

Strategic Value
• Broadens pool
• Significant targeting capacity
• Legal flexibility

Key Issues
• Confer material benefit in any associated program?

Note similarity with use of financial aid and scholarships
# Flexible Admission and Aid Criteria and Test Use

## What is it?
Identifying multiple avenues for applicants to demonstrate achievement, talent, and potential, and ensuring that those measures are considered and weighted appropriately.

## Strategic Value
- Reinforces focus on concept and definition of merit
- Advances focus on psychometric soundness and equity

## Key Issues
- Use of assessments consistent with psychometric principles and guidelines of test publishers?
- Fulsome multiple measures consideration?
What is it?
Can involve a number of factors, including applicants' significant financial resource constraints. Other associated factors that may have affected academic performance--e.g., residence and school districts in areas where schools are not well-resourced--may be considered.

Strategic Value
- Typical major mission interest
- Often significant overlap with racial and ethnic diversity (but not coextensive/identical)

Key Issues
- How defined?
  - Income
  - Wealth
  - From communities with concentration of poverty
  - From under-resourced schools
## Geographic Diversity

### What is it?
Can reflect life experiences and perspectives associated with particular areas or kinds of settings (i.e., urban, rural, suburban, different regions of the United States, international).

### Strategic Value
- With certain service area contexts, can generate significant, untapped racial diversity
- Major mission emphasis in public, state-serving institutions

### Key Issues
- Demographics of recruitment area
Geographic Diversity

Legal Lines: Federal Cases on Geographical Interests and Race Neutrality

Justice Kennedy in *PICS* (2007): School boards may consider neighborhood demographics, recruiting in a targeted fashion, and the like, which are “race-conscious but don’t lead to different treatment based on race...[and are therefore] unlikely [to] demand strict scrutiny.”

- Has “some of the earmarks of impermissible racial balancing....”
- Raises question re “whether economics can fairly be considered as proxy for race.”
## Experience or Service Commitment Associated with Race

### What is it?

Students who, regardless of race, have meaningful experiences or deep knowledge involving societal issues of race, demonstrate learning from those experiences or study, and are expected to contribute to elevating understanding of such issues.

This approach may also include a focus on students who demonstrate a commitment to equity and service.

### Strategic Value

- Race-attentive at a level of depth to materially advance underlying interests associated with actual experience, skill, interests
- Likely significant overlap with racial and ethnic diversity

### Key Issues

- “Neutrality” in legal terms not yet clearly court-tested
First Generation Students and Other Special Circumstances

<table>
<thead>
<tr>
<th>What is it?</th>
<th>Strategic Value</th>
<th>Key Issues</th>
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<tr>
<td>Students from different backgrounds experience an array of challenges</td>
<td>• Likely to materially advance underlying interests associated with actual</td>
<td>• Overlap in some criteria with SES and ability to pay</td>
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<tr>
<td>that may impede their efforts when preparing for and applying to college</td>
<td>experience, skill, interests</td>
<td>• In many instances, implications for programs of support and acclimation</td>
</tr>
<tr>
<td>— and that may also reflect kinds of diversity an institution seeks</td>
<td>• Likely significant overlap with racial and ethnic diversity, as well as</td>
<td></td>
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<tr>
<td>to attain. Challenges exist due to a variety of factors such as</td>
<td>broader diversity factors of consequence</td>
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<td>first-generation status, experiencing homelessness, undocumented status,</td>
<td></td>
<td></td>
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<tr>
<td>and more.</td>
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CollegeBoard
Students Tell Their Stories in Application Questions

Answers to application questions for admissions, aid, and experiential learning opportunities can provide students an opportunity to make their best case for how they could contribute to the achievement of the institution’s diversity-related goals.

EXAMPLE: Describe specific experiences in which you have meaningfully come to understand differences, hostilities or barriers (e.g., cross-socio-economic, -racial, or -faith); or experiences in which you may have contributed to enhancing understanding and elimination of such challenges. With respect to those experiences:

• How did you respond and, in hindsight, would you have responded differently?
• How would this experience or understanding affect your engagement in and benefits from the university’s programs, and how would they contribute to your peers’ experience at the university?
• How is this experience likely to benefit society and contribute to your personal and work-related satisfaction after graduation?
## Percent Plans

### What is it?

A percent plan is a program, typically mandated by a state legislature, that provides for admission of in-state students to the state's public institutions through an automatic process based on high school class rank, grade point average, and/or standardized test score.

### Strategic Value

- Some value in states where significant demographic variability by region/district/school
- Limited use: Unlikely value for privates, graduate/professional degree programs, etc.

### Key Issues

- Courts question authenticity of underlying interests as “neutral”
Percent Plans

Legal Lines: Percent Plans and Race Neutrality

# Educational Collaboration Agreements

**What is it?**
Voluntary agreements pursued by institutions of higher education that establish new or expanded academic pathways for students through progressive educational levels.

**Strategic Value**
- **Pathways to enhanced student opportunity**
- **Builds multiple institutional relationships**

**Key Issues**
- Capacity for operational coordination
- Faculty buy-in
# Cohort Programs

## What is it?
These programs orient recruitment, admission, financial aid and scholarships, and retention programs around small groups of students who have similar life experience, including those based on neutral considerations such as students who are first in their families to attend college, have the experience of low socio-economic circumstances, etc.

## Strategic Value
- Introduction to what’s possible
- Enhance sense of welcome
- Enhance student retention and success

## Key Issues
- Funding
- Management capacity
- Avoiding stigmatization and advancing integration
V. Moving Forward
New ADC Publication

November 2019

The Playbook: Understanding the Role of Race-Neutral Strategies in Advancing Higher Education Diversity Goals

Will provide a significant update to The Playbook (2014), which will:

• Amplify and expand on the material in the 2014 version, including by providing numerous additional strategies and examples for institutions to consider when setting or revising diversity-aimed, race-neutral policies.

• Expand awareness of the range of effective strategies for increasing diversity that may be considered “race-neutral”.

• Discuss the importance of considering both intent and effect when deciding if a strategy is actually race-conscious or neutral.

• Emphasize the imperative of periodic review of policies that consider race in some aspect of the enrollment process for all IHEs.
Access & Diversity Collaborative

Who We Are & What We Do

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

- **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.

- Almost 60 institutions of higher education and 15 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.

Webinar on Harvard decision takeaways

**October 23: 2:00 p.m.**
Key Resources

Financial Aid

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

Holistic Review

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

Evidence

Building an Evidence Base (College Board, 2017)

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

New

Key Resources
Questions
Thank you!

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