Key Definitions

A Diversity and the Law Resource Accompanying An Overview of Federal Law on Educational Diversity, Employment Equal Opportunity, and Equity Policies – October 2020

- **Diversity** means the many interests, experiences, talents, perspectives and identities (self- and societally-defined) that combine uniquely in each individual to enable a person to both contribute to and benefit from engaging in an institution. Experiences and identity associated with race, ethnicity and gender are part of diversity but do not fully define it. When a broad diversity of individuals combine in the student body, faculty and staff of an institution of higher education (IHE) to create a diverse group, everyone can benefit from enriched educational, research and work experiences and outcomes.
    - Among other benefits, such diversity can break down stereotypes; enhance problem-solving, creativity, new ideas; contribute to cognitive and personal development from diverse perspectives; prepare students for the workforce, civic engagement and leadership; and elevate faculty, staff and student understanding of, and readiness and commitment to help dismantle, race-, ethnicity- and gender-based societal inequities. Diversity in the faculty, research staff and student body (**educational diversity**) enhances teaching, learning, research, civic engagement, leadership, and contributions to the workforce/economic strength and the security of society and democracy.[i]
    - From both policy and legal perspectives, educational diversity is a concept of universal benefit—not of remedying wrongs on the basis of race, ethnicity or gender (i.e., **not "affirmative action"**). The Supreme Court has found that **universally beneficial educational diversity** is a sufficiently compelling or important aim to justify race-, ethnicity-, and gender- conscious action (means toward the aim), when needed, in the student context.
    - Educational diversity may **supplement** remedial justifications for race-, ethnicity-, and gender-conscious affirmative action in faculty and academic staff employment, but educational diversity is not alone a legally sufficient aim for such action.

- **Equity** means recognizing individuals of all races, ethnicities, genders and other identities as individuals—not as representatives of a societally-defined group—and enabling all individuals to start on equal footing to compete for benefits, resources and opportunities. People of all races, ethnicities and genders may face enormous challenges and work extraordinarily hard to realize their promise and aspirations—and all those who overcome challenges should be recognized for that accomplishment. However, due to longstanding and deeply embedded inequities in American society based on race, ethnicity and gender, treating everyone "equally" or through "color or gender blind" eyes is inequitable. That is because people of some identities must face the challenges of life—whatever they are—bearing the additional burden of racism, sexism, or both, and others do not. Equity is an aim that requires remedial action—including elevating truths and understanding of inequities, and taking "affirmative action" to disrupt inequities that target individuals based on group stereotypes and identity. Federal law generally prohibits consideration of individuals' race, ethnicity and gender to address general societal inequities; although other court-labeled "neutral" action (see below) may be taken to address these harms.

- **Inclusion:** To realize the full benefits of diversity, all talent must be welcomed and able to fully participate as individuals, meaningfully engage with one another, and thrive—and that requires a foundation of

equity. Inclusion connects diversity and equity, at their intersection. Most IHEs' educational mission requires both, but each IHE must **determine why and articulate its reasons**—some unique to it and others common in higher education, as required for legally sustainable identity-conscious diversity policy.

- **Race-, ethnicity-, gender- conscious strategies:** Strategies that, on their face or in practice, **consider** an **individual's** race, ethnicity, or gender (in addition to other factors) in conferring benefits or opportunities. If only individuals of specified races, ethnicities or gender can qualify for a benefit, a strategy is identity-**exclusive** and hardest to justify under law. Race- and ethnicity- exclusive actions, such as quotas or reserved seats for individuals of one race or ethnicity, are prohibited in admissions for all public IHEs (under the Equal Protection Clause of the U.S. Constitution) and for public and private IHEs that accept federal funding (under Title VI). Similar concepts apply to gender (under the Equal Protection Clause and Title IX), but with some nuances noted in the overview of law.

- **"Neutral" strategies (including inclusive barrier removal):** Supreme Court-labeled strategies that on their face and in practice (1) do not consider an individual's race, ethnicity or gender at all *and* (2) have an aim that is authentically important to the IHE, apart from increasing racial, ethnic or gender compositional diversity. So long as those two criteria are satisfied, a strategy may also have a known, welcome, even intended (as an alternative to identity-conscious strategies), ancillary effect of increasing compositional diversity, without losing its "neutrality."[ii] (E.g., socioeconomic access and diversity for students; a record of inclusive conduct such as using effective pedagogy for a diverse student body and a research focus on race for faculty, etc.)
  - **Targeted but inclusive action.** A strategy may be neutral in effect if it targets individuals of a particular race, ethnicity or gender, but does not provide material benefits to anyone on those bases and both aims and effects are inclusive. (E.g., a combination of robust general outreach to encourage applications from all potentially qualified and interested applicants, as well as targeted outreach to a particular racial group or gender, that together: (1) ensure meaningful communication of the same consequential information about opportunities to everyone, (2) help to welcome applications from those who might not feel welcome by the general outreach, to build a broadly diverse pool, (3) do not provide material benefits to individuals of some races or gender and not others [e.g., paid campus visits are not provided only or preferentially to candidates of color], and (4) are not part of a winnowing or selection process.)
  - **"Workable" neutral strategies.** "Workable" neutral strategies are those that do not require a change in the character or quality/competitiveness of an IHE, and would achieve its educational goal "about as well [as a race- or ethnicity- conscious strategy] and at tolerable administrative expense."[iii] While not definitively addressed by the Supreme Court, such expense would likely need to be very consequential, as some additional expense or administrative inconvenience would likely be expected, considering the importance of equal protection interests.
  - **Fallacy of "neutrality."** Until we can eliminate the added burdens of racism and sexism in society, people of all races and genders are not on equal footing to compete for opportunities, and equality or neutrality under law is impossible. However, prevailing Supreme Court precedent and state bans adopt a faulty neutrality formulation; and IHEs must wisely navigate it to advance their diversity- and equity- related educational missions in ways that are both effective and legally sustainable.

- **Societal Inequity.** Societal inequity means systems of race-, ethnicity- and gender- based inequity in the norms of American society, that have helped to build many American institutions, but have not generally been acknowledged by the courts as continuing discrimination or as having a current effect. Societal inequity has been regarded by the courts, at least since *Bakke* (1978), as distinct from any IHE's own race-,

ethnicity- or gender- based discrimination or harm. (That view lacks appreciation of the nature of normative systems of inequity in which government, financial, religious, educational and other institutions participate, even unconsciously, *because* they are societal norms.) The law generally prohibits race-, ethnicity- and gender-conscious affirmative action (in education and employment) to remedy general societal inequities. **The law allows race-, ethnicity- and gender-conscious action only when necessary to remedy an IHE's own discrimination or, in the employment context, when necessary to remedy an IHE's own legally-defined, persistent "underutilization."**

- **Discrimination—**Discrimination in education and employment is an IHE's differential treatment of individuals on the basis of their race, ethnicity or gender. It may be:
    - **Intentional—**meaning there is intent to treat individuals differentially based on their racial, ethnic or gender identity status. This may be shown with direct evidence (e.g., on the face of a policy or in practice). It also may be shown without direct evidence if a qualified person in a protected group is adversely affected by an action/policy and evidence of a legitimate business-education reason is lacking—of if a legitimate reason is articulated, additional evidence shows that the reason is a pretext for identity-based discriminatory intent.
    - **Unintentional, but causing a disparate impact** on individuals of particular race(s), ethnicit(ies), or gender—meaning data show a racial, ethnic or gender disparity in impact of an action/policy where there are workable alternatives that would meet the IHE's "business-educational" need with less such impact. However, a practice that is demonstrably necessary to meet an authentic and compelling educational goal that benefits all students, may unavoidably have a disparate impact on some racial, ethnic or gender groups, and should not be deemed discriminatory. (E.g., to achieve its educational aims benefiting all students, an IHE may seek faculty and students [of any race, ethnicity or gender] who are knowledgeable about issues of race and gender in society, and are willing and able to elevate knowledge of others in the academic community—**or** who are committed to eliminating societal inequities—**or** whose research and study areas of focus are on issues of race or gender in society. If so, such "neutral" criteria may be considered in admissions, hiring or funding research, even though they may result in admitting or hiring people of some races at a higher rate than others.)

- **Discrimination in Employment--** A presumption of discrimination is measured as a 2 or more standard deviation disparity between (1) representation of individuals of a particular race, ethnicity or gender in the **IHE's relevant workforce** (i.e., position(s) at an IHE in a job type/category, seniority/level, and discipline or cluster of disciplines in the same relevant recruitment market) and (2) their representation in the qualified pool from which the IHE could recruit for that workforce (considering the particular IHE's local, regional, national or international reach). This can be rebutted by evidence of a legitimate, non-discriminatory reason, unless further evidence shows that such reason is a pretext.

- **Underutilization in Employment—** Defined by the Office of Federal Contract Compliance (OFCCP) of the Department of Labor, not as presumptive discrimination, but as less representation of a particular race, ethnicity or gender in an IHE's relevant workforce than would be expected based on its availability in the relevant qualified pool from which the IHE could recruit—signaling inadequate equal opportunity.
    - The most common and prudent measure of underutilization is **a representation of the racial, ethnic or gender group in an IHE's relevant workforce that is less than 80% of the group's representation in the available, qualified pool from which the IHE could recruit**. [iv]
    - Federal contractors are required to make good faith efforts to remedy underutilization, but are not required or justified by OFCCP to discriminate in order to do so.

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[i] A number of sources of research substantiating the educational benefits of diversity are cited in *Bridging the Research to Practice Gap, Achieving Mission-Driven Diversity an Inclusion Goals, A Review of Research Findings and Policy Implications for Colleges and Universities,* T. E. Taylor, J. F. Milem, A. L. Coleman, March 2016, published through the Access and Diversity Collaborative of the College Board and EducationCounsel, available at https://educationcounsel.com/?publication=bridging-research-practice-gap-achieving-mission-driven-diversity-inclusion-goals

[ii] If there is a disparate adverse effect on some races, ethnicities, or sex, the neutral strategy must reflect a "business" or "educational" necessity, meaning that another workable strategy would not have less adverse disparate impact. 42 U.S.C. § 2000e; 42 U.S.C. § 2000d; *See, e.g. Elston v. Talladega County Bd. of Educ.,* 997 F.2d 1394, 1413 (11th Cir. 1993). In an education context, the practice must be demonstrably necessary to meeting an important educational goal, *i.e.* there must be an 'educational' necessity for the practice. That can often be established based on the authenticity of an important aim and necessary criteria to achieve the aim that a person of any race, ethnicity or gender could satisfy, even if—based on societal conditions—there may be more individuals of some identity groups who are likely to satisfy the criteria.

[iii] *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297 (2013) ("*Fisher I"*).

[iv] *See Hazelwood Sch. Dist. V. United States*, 433 U.S. 299, 307-308 (1977) (a statistical disparity that just exceeds two standard deviations is sufficient to infer an employer's discrimination); 42 U.S. Code § 2000e *et seq.; See also* OFCCP's Federal Contract Compliance Manual (Oct. 2014) Retrieved from https://www.dol.gov/ofccp/regs/compliance/fccm/FCCM_FINAL_508c.pdf. (A contractor may use a variety of methods to determine what constitutes "underutilization", including: (1) any numerical difference between incumbency and availability, (2) a numerical difference of one person or more, (3) a race, ethnicity or sex incumbency that is less than 80% of availability (i.e., representation in the employer's relevant workforce is less than 80% of their representation in the available and qualified labor pool), (4) a disparity between the actual representation and expected representation for a race, ethnicity or sex that is statistically significant – namely 2.00 standard deviations or more); *See also* U.S. Dep't of Labor, OFCCP, "Technical Assistance Guide for Federal Supply and Service Contractors," at 21-22 (Aug. 2009).

The extent to which a court would uphold measures (1) and (2) is a question. Measures (3) (the 80% test) and (4) (rebuttable presumption of discrimination) are common and should be supportable. While measure (3) (the 80% test) does not require an acknowledgement of discrimination, measure (4) is the first step toward proving discrimination (and is typically used by an employee in asserting a discrimination claim against an employer). The extent to which the 80% test differs from the court-articulated concept of "manifest imbalance" (a significant disparity, but something less than 2 standard deviations) is undecided, but the two standards appear to be conceptually aligned.