

STRENGTHENING DIVERSITY IN MARYLAND COLLEGES AND UNIVERSITIES:



A LEGAL ROADMAP

THE OFFICE OF THE ATTORNEY GENERAL OF MARYLAND
MARCH 2009

Dear College President:

This year marks a very important time for our nation as we celebrate the 80th birthday of Dr. Martin Luther King, Jr. and the 100th birthday of the NAACP. In addition to those milestones, we have witnessed one of the most significant developments in the history of race relations in our country – the election of Barack Obama, our first African-American President.

It is against this backdrop that I am pleased to present to you this report, *Strengthening Diversity in Maryland Colleges and Universities: A Legal Roadmap*. We call it a roadmap because we hope it will provide guidance and assistance to institutions of higher education as they work to achieve diversity among their students and workforce. Last year, our General Assembly passed legislation requiring that higher education institutions adopt diversity plans which include an implementation strategy for achieving the identified diversity goals. We hope this roadmap will help higher education institutions navigate as they work to implement their diversity plans.

As you review this document, you will see that the case law on what can and what can't be done to advance diversity is still not fully developed and, indeed, is not always easy to interpret and to apply. I hope that our analysis of this law and of the general principles to be derived from the cases will be a useful resource as you and your affiliated institutions work to develop a roadmap to fit your unique situation. I know that many, if not all, of our clients are already well on the road toward achieving the desired diversity among their students, faculty and staff. The report also includes references to specific programs at our institutions and at others across the country that I hope may be adaptable to your institution, or at least provide a framework or a starting point for your efforts. And, as always, to the extent that legal advice is needed or legal issues arise, my experienced staff will be available to provide that guidance and assistance.

I would like to thank all of the members of my Office who contributed to the production of this document. They, as I, are convinced that expanding the programs in our institutions and even pushing the envelope of current law so long as we have a good faith legal basis for doing so, is the proper philosophy.

Sincerely,

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[E]ducation is the very foundation of good citizenship...[and, as a result,] the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity. . . . Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if one Nation, indivisible, is to be realized. . . . Moreover, universities . . . represent the training ground for a large number of our Nation's leaders . . . [and] it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.

Grutter v. Bollinger, 539 U.S. 306, 331-32 (2003) (internal citations omitted).

Introduction

In a 2003 landmark case, *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Supreme Court upheld the University of Michigan's consideration of race as part of a narrowly-tailored program designed to foster educational diversity by holding that "student body diversity is a compelling state interest that can justify the use of race in university admissions." *Id.* at 325. Deferring to the university's judgment that diversity is essential to its educational mission, the Court held that that the law school had a compelling interest in attaining a diverse student body. 539 U.S. at 327, 343. The Court's deference recognized that universities occupy a "special niche" in the country's constitutional traditions because of the "important purpose of public education and the expansive freedoms of speech associated with the university environment." *Id.* at 329.

The Supreme Court's decision was anything but a foregone conclusion, and it was particularly important to Maryland. For decades, the Court had given mixed signals to public higher education institutions that considered diversity an important educational goal, and efforts to promote racial, ethnic and other types of diversity were fraught with legal uncertainty.¹ In Maryland, that uncertainty was heightened by a 1994 federal court of appeals decision, *Podberesky v. Kirman*, 38 F.3d 147 (4th Cir. 1994) *cert. denied*, 514 U.S. 1128 (1995), that harshly rejected a University of Maryland College Park scholarship program for African American students on equal protection grounds and, in the process, limited efforts by Maryland institutions to promote diversity on their campuses.

The Supreme Court's proclamation that fostering diversity can be a legitimate justification for affirmative action efforts on public campuses eliminated the worst of those uncertainties. The

¹ More recently, the Supreme Court found in the public school context that assignment plans in Seattle, Washington, and Louisville, Kentucky, which used race as a "tie-breaker," violate the Equal Protection Clause. *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S.Ct. 2738 (2007). In doing so, the majority reiterated that racial classifications are subject to strict scrutiny by the courts, requiring the government to demonstrate that the classification is narrowly tailored to achieve a compelling governmental interest. *Id.* at 2752. The Court noted that two interests have been found to meet the compelling interest standard: "remedying effects of past discrimination," *Id.* and "diversity in education," *Id.* at 2753. In the Court's view, neither were served by the plans under scrutiny. Nonetheless, the case provides support for a diversity plan that takes race into consideration if it is narrowly-tailored and part of a broader assessment of diversity.

Grutter opinion, however, has raised other questions and challenges that have defied resolution since 2003. Most importantly, the Court set tough standards for the development and implementation of race- or ethnicity-based measures intended to advance an institution's diversity goals. These guidelines will refer to those standards as "the *Grutter* principles." How they may be used to shape campus diversity plans and programs is the primary focus of this document. In addition, while the *Grutter* decision applies directly to student admissions, other institutional initiatives are critical to a diverse campus, including financial aid, academic support programs, the campus environment and the composition of faculty and staff. How the *Grutter* principles should inform diversity initiatives in those areas has not been addressed by the courts. Still, we believe that these principles must play a role in areas other than admissions and, in some instances, can be applied in a way that significantly enhances campus diversity opportunities.

In its analysis, the Court noted that a racially diverse education "promotes cross racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races." 539 U.S. at 308. The Court noted positively that the university's policy did not "limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity" and gave "substantial weight to diversity factors besides race." 539 U.S. at 338.

The Court also concluded that it was permissible for universities to make deliberate efforts to admit enough minorities to prevent isolation and allow their voices to be heard--as long those efforts complied with standards to ensure that an individualized evaluation process was followed and there was no set number of enrollment slots reserved for minorities. 539 U.S. at 333. The Court clarified that while universities should seek race-neutral options to reach diversity goals, they need only explore workable solutions. 539 U.S. at 339. Race-conscious policies must be time-limited and universities must constantly evaluate other options: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." 539 U.S. at 343.

Thus, with the *Grutter* decision, the Court acknowledged the importance of diversity in higher education and offered institutions a narrow path for using affirmative action measures in their quests to achieve a diverse campus.

The Supreme Court is not alone in recognizing the importance of diversity in higher education. In 2008, the Maryland General Assembly joined in affirming the need for diversity in Maryland's higher education institutions with the enactment of legislation requiring cultural diversity plans at every public higher education institution in the State. Education Article, § 11-406. Before enactment of this legislation, higher education institutions were not statutorily obligated to develop or maintain a diversity plan, although many institutions had such plans. *See* Fiscal Notes to House Bill 905 and Senate Bill 438 (2008).

Thus, the time is right for each Maryland institution to consider the meaning of diversity in its overall mission and to establish measures to achieve the diversity goals that best advance that mission. To aid in that effort, these guidelines will first examine the requirements of the new diversity planning legislation, and then discuss ways in which institutions may take actions in specific areas—student admissions and recruitment, financial aid, student support programs and faculty and staff employment—to make those plans a reality within the law.

Cultural Diversity Plans Required by Maryland Law

Under the 2008 legislation, each cultural diversity plan must include an implementation strategy and time line for meeting the goals within the plan. Education Article, Annotated Code of Maryland, § 11-406 (b)(1)(iii). Additional required elements include:

- ❑ a description of the way the institution addresses cultural diversity among its students, faculty and staff populations;
- ❑ a description of how the institution plans to enhance cultural diversity, if improvement is needed;
- ❑ a process for reporting campus-based hate crimes;
- ❑ a summary of resources needed to effectively recruit and retain a culturally diverse student body; and
- ❑ the enhancement of cultural diversity programming and sensitivity to cultural diversity through instruction and training of the student body, faculty, and staff of the institution.

Education Article, §§ 11-406 (b)(2) and (3).

Each year by May 1, each public institution must submit the plan to its governing board for its review. Education Article, § 11-406 (c)(1). Thereafter, the governing board must submit a progress report on the institution's implementation of the plan to the Maryland Higher Education Commission (MHEC) by August 1. Education Article, § 11-406 (c)(2).

MHEC must review the progress report and monitor compliance with the diversity goals of the State Plan for Higher Education. Education Article, § 11-406 (d)(1). MHEC must report to the General Assembly on the extent to which the institutions are in compliance with the diversity goals of the State Plan for Higher Education.

The legislation defines “cultural diversity” to mean “the inclusion of those racial and ethnic groups and individuals that are or have been under-represented in higher education.” Education Article, § 11-406 (a). In order to be consistent with the *Grutter* principles, however, campus diversity plans should embrace an expansive definition that is consistent with the institution's educational mission, the kinds of student backgrounds and experiences that would enhance the achievement of that mission, and the means the institution determines are appropriate to achieve its goal. *See* Letter to Governor Martin J. O'Malley from Attorney General Douglas F. Gansler (May 15, 2008).

As institutions develop their diversity plans, it is important to meet two overarching *Grutter* principles:

- 1- The plan must meet a “**compelling state interest**”—based upon the institution’s own, campus-specific, clearly articulated diversity needs.
- 2- The plan must be “**narrowly tailored**”—providing advantages based on race, ethnicity or gender only under the limited circumstances spelled out by the Court.

The Case for Promoting a Diverse Campus:

“*Compelling State Interest*”

While it is difficult to imagine a public institution that would not be enriched by efforts to enhance diversity, the reasons why diversity is an important interest will vary from institution to institution. To meet the Supreme Court’s “compelling interest” requirement each institution should consider and document the value of diversity to its campus.

This is not a difficult task. The Supreme Court itself in *Grutter* identified many key interests served by higher education diversity, and there is rich research supporting those conclusions and others. Here are some of the justifications for working toward campus diversity:

- Our nation is becoming more diverse each day.
- Americans will need to become increasingly culturally competent in their communities and workplaces.
- The nation will need to meet the needs of a multicultural public.
- Business and military leaders demand culturally-literate employees.
- Exposure to persons who are of different cultures, heritage, and traditions promotes opportunities to learn and understand about other cultures. For example, medical students who attended schools with diverse student populations report that they are better equipped to care for patients in a diverse society.
- Because an individual’s background affects the way the individual sees the world, there is a benefit in having a multiplicity of intellectual perspectives.
- Diversity within the classroom and higher education institutions promotes a robust exchange of ideas.
- Greater racial diversity is associated with enhanced critical thinking ability, openness to diversity and challenge, racial and cultural awareness, and satisfaction with the college experience.
- Compositional diversity, interactional diversity, and diversity-related initiatives work interactively to improve educational outcomes.

- ❑ Rooming with a student of another race has a generally positive impact on the roommates (largely by developing emotional friendships, not just the exchange of information).²

Educators, researchers and lawyers recommend that a comprehensive diversity initiative or plan include the consideration, in admissions and elsewhere across the university, of those factors likely to lead to an enriching campus environment. A diversity plan should expressly further the mission of the university. It should also serve as an overarching blueprint to coordinate, track and evaluate at regular intervals the myriad of diversity activities on campus in such areas as – recruitment, admissions and support of students, faculty and staff; welcoming and sustaining campus climate; campus image and the like. The plan should be revised as necessary to address the results of the regular evaluations and to meet changing needs.

To be sure the institution can demonstrate that its diversity plan addresses a compelling interest, the plan should be mission-driven and educationally focused. Consider the following:

- ❑ Diversity should be viewed as a means to an end, and that end should be grounded in the institution’s formal mission.
 - Consider diversity one goal among many other institutional goals.
 - Align goals, objectives and strategies.
- ❑ Seek input from a range of sources in developing the plan.
 - Survey businesspeople and representatives of relevant government agencies about the importance of diversity in the workforce.
 - Involve the faculty, staff and students.
- ❑ Focus on your institution, community and state.
 - Consider how diversity will enhance the institution’s mission related to serving all residents of the State.
 - Tailor the plan to actual institutional experience. Articulate that experience and how it informs the plan.
- ❑ Define diversity in terms of *educational* diversity.
 - Link elements of the plan directly with educational goals.
 - Establish diversity related goals that include access goals.
 - Think how the classroom environment will benefit from diverse student viewpoints in deciding what kinds of diversity to seek out.

Finally, the Supreme Court emphasized that the need for a “critical mass” of individuals with varying backgrounds and perspectives underlies the justification for diversity measures. *Grutter v. Bollinger*, 539 U.S. at 322 – 44. Thus, the achievement of such a critical mass of various groups of students is a worthy objective in an institution’s diversity plan, and may be thought of as follows:

² This partial list is derived from various research studies and the Supreme Court’s opinion in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

- ❑ Critical mass is neither a number nor an amorphous concept; it occurs when there are sufficient numbers to foster the robust exchange of ideas.
- ❑ Critical mass helps create a campus in which race-based assumptions dissipate, behaviors shift, and a more robust learning environment is established.
- ❑ Critical mass analysis should identify under-represented groups for whom there are insufficient numbers to create a catalyst that will advance the educational benefits of diversity.
- ❑ The size of a particular minority group will help change the character of relations between minority and non-minority students.
- ❑ Generally it will take a certain number of students to avoid the likelihood of isolation in dorms, class, and student activities.
- ❑ Strive for sufficient numbers so an individual does not feel like a “spokesperson” for his or her group.³

“Narrow Tailoring”

The *Grutter* Court also held that measures used in admissions decisions to further the “compelling interest” of diversity must be “narrowly tailored.” As your institution develops its diversity plan and implements measures to enhance diversity, the *Grutter* principles for “narrow tailoring” of those measures may be crucial.

In designing a policy to increase student body diversity, one of the steps to achieve that goal could be to increase the number of minority students on campus. However, in evaluating applicants for admission, an applicant’s race or ethnicity can only be one of the many factors considered. Race or ethnicity cannot be the defining feature in a student’s application. Each applicant must be individually evaluated.

Quotas, percentages or fixed numbers of minority admissions are not permissible. An institution cannot isolate a category of applicants who are members of groups determined to be under-represented from competing with all other applicants for admission.

If student body diversity is the goal, then institutions should consider all the ways each applicant can contribute to the desired diverse student body. For example, weight could be given to the fact that a student has lived in another country, or is fluent in several languages, or has overcome personal hardships, or has worked in a coal mine. In the same way, weight can be given to the fact that an otherwise qualified applicant is African American. For example, any of these factors, including race and ethnicity, can be a plus in a particular applicant’s file. *Id.* at 324, 333-339.

³ This information is derived in part from various articles which can be provided by the Office of the Attorney General. The information also comes from a conference sponsored by The College Board: From Theory to Action (May 6-7, 2008) as part of The College Board’s Collaborative on Access & Diversity Policies and Practices in Higher Education.

Narrow tailoring does not require that every conceivable race-neutral alternative be exhausted. However, narrow tailoring does require serious good faith consideration of workable race-neutral alternatives that will achieve the desired diversity. Nevertheless, these alternatives do not have to be adopted if they would “require the institution to become a much different institution and sacrifice a vital component of its educational mission.” *Id.* at 340. For this reason the Court rejected the argument that the University of Michigan Law School could achieve its diversity goals by using a lottery system for admissions or decreasing the emphasis on undergraduate grade point averages or Law School Aptitude Test scores.

The remaining Chapters will discuss how the *Grutter* principles and other relevant case law apply to the following areas: admissions, financial aid, academic support programs, faculty and staff employment and campus environment.

Student Access to Public Higher Education

Admissions

From Bakke to the Michigan Cases: Achieving Diversity Within the Law

The Supreme Court has considered the issue of race and ethnicity in higher education on two occasions in its history. In the first, *Regents of California v. Bakke*, 438 U.S. 265 (1974), the Court struck down a medical school admissions program under Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause, finding that the reservation of 16 spaces out of 100 for under-represented minority students was unlawful. Nevertheless, the Court did not forbid the University of California at Davis Medical School from considering race as part of its admission process in the future. As Justice Powell stated in recognizing that race and ethnicity may be considered to achieve the benefits of diversity:

The atmosphere of speculation, experiment and creation— so essential to the quality of higher education— is widely believed to be promoted by a diverse student body...it is not too much to say that the “Nation’s future depends upon leaders trained through wide exposure” to the ideas and mores of students as diverse as this Nation of many peoples...

Id. at 312, citing *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957). While striking down the program’s overly rigid consideration of race, the split decision in *Bakke* preserved the right of the University to consider it in appropriate cases. The more recent Supreme Court decisions in *Grutter v. Bollinger*, (discussed *supra*), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), in certain critical respects, mirror *Bakke*.

Grutter: Critical Mass in the Context of Higher Education Admissions

In *Grutter*, the admissions policies of the University of Michigan Law School from 1995 to the present were challenged. The plaintiff, Barbara Grutter, a white resident of Michigan who applied for and was denied admission to the law school in 1996, alleged that the law school used race as a factor in admissions in violation of the Equal Protection Clause, 42 U.S.C. §1981, and Title

VI of the Civil Rights Act of 1964. A 5-4 majority of the Supreme Court ultimately held that student body diversity in higher education is a compelling state interest that can justify race-conscious policies. It further found that the law school's admission policy was sufficiently narrow to achieve that interest.

In reaching this decision, the Court stated that “[a]s part of its goal of ‘assembling a class that is both exceptionally academically qualified and broadly diverse,’ the Law School seeks to ‘enroll a ‘critical mass’ of minority students.’” *Id.* at 329. Unlike an unconstitutional use of “critical mass” to “assure some specified percentage of a particular group” merely because of its race or ethnic origin’, the Law School’s concept of “critical mass is defined by reference to the educational benefits that diversity is designed to produce.” *Id.*

Gratz: Individualized Considerations in Admissions Programs

In *Gratz v. Bollinger*, the plaintiffs challenged the policy used for undergraduate admissions at the University of Michigan’s School of Literature, Science and the Arts (LSA) for the years 1995-2000. The plaintiffs, Jennifer Gratz and Patrick Hamacher, white residents of Michigan, applied for admission to LSA in 1995 and 1997, respectively. Although both applicants were told by LSA admission that their credentials were in the “qualified” range, neither candidate was admitted on first review of their applications and ultimately both were denied admission. In 1997, both filed a federal lawsuit claiming that LSA violated the Equal Protection Clause, Title VI and Section 1981 by considering race as a factor in its admissions policies. The district court agreed and held that from 1995-1998 the LSA’s admissions program had violated the Equal Protection Clause, but its revised 1999 program, the one eventually reviewed by the U.S. Supreme Court, was constitutional. *Id.* at 256. Beginning in 1999, the LSA used a 150-point scale for admissions by which students could receive 20 points for being a member of an under-represented minority group. The same 20 points were available to applicants for socio-economic status, participation in intercollegiate athletics, attendance at a predominantly minority high school, or at the Provost’s discretion. *Id.* Unlike its earlier policy, the 1999 version did not protect seats for consideration of minorities at the end of the process or automatically reject non-minorities based on point scores. *Id.*

By a 6-3 majority, the Supreme Court in *Gratz* held that the LSA undergraduate admissions system was not narrowly tailored to achieve student diversity and was, therefore, unconstitutional. *Id.* at 275. While noting the holding in *Grutter* that diversity is a compelling state interest, the Court found that the LSA’s existing policy “[did] not provide... individualized consideration.” *Id.* at 276. After *Gratz*, the LSA adopted a new process for undergraduate admissions with several new questions designed to elicit more information about a student’s background, personal achievement, and ways in which that student may contribute to the intellectual vibrancy and diversity of the student body.⁴

⁴ See *New University of Michigan Undergraduate Admissions Process to Involve More Information, Individualized Review*, <http://www.umich.edu/news/index.html/Releases/2003/Aug03/admissions>.

The Concept of “Critical Mass” After *Grutter & Gratz*

The Supreme Court in *Grutter* explicitly refrained from setting a cap on what could constitute a critical mass. Justice O’Conner in *Grutter* simply stated that it meant “meaningful numbers” or “meaningful representation” or “a number that encourages under-represented minority students to participate in the classroom and not feel isolated.” While the Supreme Court in the Michigan cases did not mandate that higher education institutions establish their diversity goals based on the theory of critical mass, it gave credence to the theory that critical mass is one legally acceptable way to give meaning to diversity-related goals.

In *Smith v. University of Washington*, 392 F.3d 367 (9th Cir. 2004), *cert. denied*, 546 U.S. 813 (2005), the Ninth Circuit upheld a preference in admissions by the University’s law school in order to achieve diversity among its Asian American students. In doing so, the Court rejected the plaintiffs’ argument that the law school could have attracted a “critical mass” of such students without a preference. *Id.* at 378. The Ninth Circuit reasoned that plaintiffs’ argument assumed that the category “Asian American” was homogenous when, in reality, the school’s Asian law program was designed to achieve diversity within the general category of Asian Americans. *Id.* It is noteworthy that the Ninth Circuit criticized the reliance on percentages to define critical mass and called it “distortive, particularly when dealing with small numbers.” *Id.* at 379. *See also Comfort v. Lynn School Committee*, 418 F.3d 1, 20-21 (1st Cir.), *cert denied*, 546 U.S. 813 (2005) (defining critical mass as the point at which educational benefits begin to accrue...as the racial composition of school population creeps closer to being balanced, racial stereotyping and tension is reduced and racial harmony and understanding increase.)

As instructed by the Supreme Court’s seminal decisions in *Grutter* and *Gratz*, colleges and universities should frame their critical mass goals in light of their educational mission; critical mass should not be tied to a numerical target. Critical mass benchmarks should be established based on the many facets of each institution’s diversity objectives—not limited to rigid numbers or solely to race and ethnicity.

Recruitment and Outreach Programs

Recruitment and outreach programs can provide a legally acceptable method for increasing the pool of minority and under-represented applicants to institutions seeking to increase diversity on campus. In *Grutter*, for example, the record reflected that the University of Michigan Law School's pre- and post-admission recruiting activities did not raise any constitutional issues. Such recruiting efforts as hosting targeted social events on or off campus have allowed institutions to recruit based on race or ethnicity without risk of legal challenge. The issue becomes whether the activity confers a tangible benefit to some individuals to the exclusion of others. Recruitment social events have not been deemed to confer such a benefit.

Chapter 3 on employment issues contains a thorough discussion of recruitment efforts which would likely pass muster under current law. Those same principles would likely apply to student recruitment efforts intended to enhance diversity on campus. For example, targeting secondary schools with high percentages of minority students for stepped up recruiting efforts would most likely not be judged to have disadvantaged non-minority applicants for admission so long as each applicant was judged on an individual basis in accordance with the principles in this chapter.

- ❑ The University of Baltimore, through the Coordinated Community Outreach Group recently sponsored a HEROES Academy. Through the HEROES (Higher Education Readiness and Orientation for Exceptional Student) Academy, UB Staff provided selected Baltimore City High School students a half-day of learning and mentoring experiences on campus.

- ❑ St. Mary's College works closely with the College Bound Foundation in Baltimore City. The College Bound Foundation is an independent, non-profit program designed to work exclusively with city students to help them achieve a post-secondary education. The activities sponsored by College Bound and St. Mary's College have resulted in increased number of Baltimore City students enrolling at St. Mary's over the past six years.

Similarly, efforts to increase diversity by targeting particular groups of individuals, or even particular individuals after they have been admitted, would most likely not run afoul of federal or state law so long as these students were not given any specific benefit to constitute preferential treatment. Likewise, providing campus tours to guidance counselors from high schools with large percentages of minority students would most likely not be prohibited so long as campus tours were provided for other guidance counselors as well.

There is an excellent discussion of permissible recruitment and outreach programs contained in the U.S. Department of Education Office for Civil Rights 2004 publication, *Achieving Diversity: Race-Neutral Alternatives in American Education*, which can be accessed at the following hyperlink: <http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html>.

Promoting Student Diversity Through Financial Aid and Scholarships

Applicable Law and Legal Guidance Regarding Financial Aid Policies that Consider a Student's Race, Ethnicity, or National Origin

There are no U.S. Supreme Court cases that specifically consider the issue of diversity in the provision of student financial aid. However, the principles enunciated by the Court in *Grutter* and *Gratz* certainly provide some relevant guidance for Maryland universities attempting to structure financial aid programs in a manner that will have a positive effect on the recruitment, admission, and retention of a diverse student body. In addition, Maryland's experience in the case of *Podberesky v. Kirwan*, discussed above, which challenged the University of Maryland College Park's Benjamin Banneker Scholarship Program, is instructive.

The Banneker program was established in 1978 to provide scholarships only to students of African American heritage. It was intended to provide a partial remedy for past discriminatory action by the State of Maryland, *i.e.*, the State's historic maintenance of a system of higher education consisting of racially-segregated institutions. Mr. Podberesky, who was not of African American descent, sued the University in 1990 because he was not eligible for the program.

At the time the case began, the scholarships provided funds to cover tuition, room, board and mandatory fees for the recipients. In order to legally justify a scholarship program limited to African American students, the University was required to prove both that the program served a compelling governmental interest, such as remedying the present effects of past racial discrimination, and that it was narrowly tailored to achieve this goal. The University argued that past discrimination had resulted in the following "present effects" at the University: the University had a poor reputation among African Americans in the community; the campus climate was hostile to African American students; and African American students were under-represented in the University population and had lower retention and graduation rates than white students.

The Fourth Circuit Court of Appeals held that the University's poor reputation and hostile climate did not constitute "present effects of past discrimination," and found that there were too many factual disputes regarding the claims of under-representation and lower retention and graduation rates to permit summary judgment in favor of the University. Furthermore, the Court stated that even if present effects of past discrimination did exist at the University, the Banneker program was unconstitutional because it was not narrowly tailored to remedy these problems. It stated that the program "more resembles outright racial balancing than a tailored remedy program...The University has not made any attempt to show that it has tried, without success, any race-neutral solutions." The Appeals Court ruled in the plaintiffs favor, and the University subsequently restructured its scholarship programs to meet the constitutional requirements articulated by the *Podberesky* decision.

Today, the Banneker/Key Scholarship is the University of Maryland's most prestigious scholarship program. The purpose of the scholarship is to attract students who demonstrate exceptional academic achievement and academic potential. Race and ethnicity are two of more than twenty factors that may be considered in evaluating students for these scholarships. Some of the other criteria include: high school transcripts, results of standardized test scores, letters of recommendation, extracurricular activities, awards, honors, family educational background, and the application essay. Semifinalists are invited to campus for an interview before final selections are made. Consistent with its mission, the University considers the diversity of its students an integral component of the educational process and of academic excellence, and therefore diversity is a part of the scholarship award process.

The U.S. Department of Education issued policy guidance in 1994 regarding the use of race in awarding financial aid.⁵ This policy was issued well before the Court's decisions in *Grutter* and *Gratz* and has not been specifically addressed by the Court. It remains in effect, however, and likely represents principles the Department of Education's Office for Civil Rights might apply in investigating a complaint alleging race discrimination in a university's financial aid program. That policy guidance permits universities to consider race and national origin as "one factor, with other factors, in awarding financial aid if necessary to promote diversity."

One question often asked by financial aid administrators is whether or not "strict scrutiny" of race-conscious policies applies to privately funded scholarships. These scholarships are not subject to the same strict scrutiny as institutional aid programs unless the institution administers or supports such programs. This would include situations where the institution sets the criteria for selection, helps select the students eligible for the program, or provides significant financial or administrative support to the external entity providing the scholarship.

Where an institution does wish to administer or support an otherwise prohibited scholarship limited to members of a particular race or ethnicity, one potential method for "neutralizing" strict scrutiny is to pool funds from such programs with funds from programs that do not contain such limitations. The recipients of scholarships from the "pool" must be selected without regard to race or national origin. If a selected recipient matches the designated race or ethnicity, that recipient can be awarded one of the race-limited scholarships. However, no student selected to receive a scholarship from the pool may be denied one because of race or ethnicity, so if funds from the pool are not sufficient to award scholarships to all recipients, the institution must find alternative funds to support each student selected. Although it would require careful structuring, including appropriate input from legal advisors, establishing such a "pool" could allow university students to benefit from scholarship funds that otherwise might not be available.

⁵ <http://www.ed.gov/print/about/offices/list/ocr/docs/racefa.html>

Best Practices

- Establish the importance of student diversity to your university's educational mission, seeking input from faculty, students and employees. Gather as much documentary evidence as possible.
- Determine whether your university is meeting its diversity goals.
- Consider how financial aid and scholarships could be used to help meet such goals.
- Review existing financial aid policies and scholarship programs that consider race, national origin, or ethnicity as factors in making awards and seek legal advice regarding any potential concerns.
- Consider whether use of race, national origin, or ethnicity as factors, among others, to award scholarships and financial aid will assist in meeting established student diversity goals.
- If so, consider and document whether there are any race-neutral methods available to achieve student diversity goals. If not, amend policies and programs to employ race, national origin, and ethnicity as necessary to achieve such goals.
- Carefully document outcome of such policies and programs and evaluate their effectiveness in achieving goals.
- Periodically evaluate continued necessity of such policies and programs in achieving goals and end them when no longer necessary.

In summary, judicial guidance concerning voluntary race-conscious financial aid programs is limited. It is therefore prudent for colleges and universities operating race-or ethnicity-conscious financial aid programs to monitor legal developments closely and to consider reevaluating their financial aid programs regularly in light of further clarifications in the law.

Supporting Student Success

Much of the standards and advice contained in the financial aid section applies to crafting legally defensible non-academic programs and outreach efforts for minority students and will not be repeated here.

Institutions of higher education must incorporate the guidance gleaned from the admissions and financial aid cases, *Grutter* and *Podberesky*, into a process for creating effective academic support, retention and outreach programs that ensure sustaining their educational goal of diversity on campus. Although the strict scrutiny standard applies to any program that confers benefits based on race or ethnically conscience requirements, the current law does not categorically prohibit such programs. To meet the standard, programs are required to be narrowly tailored to meet the stated goals and confer the educational benefit of diversity.

Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and sincerity of the reasons advanced by the governmental decision-maker for the use of race in that particular context. *Grutter*, 539 U.S. at 327.

This section sets out a model for assisting institutions in developing programs to achieve diversity on campus through retention and outreach programs that pass legal muster.⁶ The process begins with clearly articulated institutional diversity goals, continues with carefully designed programs and concludes with thorough outcome assessment and future planning based on the outcomes.

⁶ This model is referred to in “Policy Parameters and Model Practices: A Blueprint for Achieving the Benefits of Diversity in Higher Education.” Arthur L. Coleman, Scott R. Palmer and Elizabeth Sanghavi, NACUA 47th Annual Conference, June 2007. The chart on page 11 is used with permission from the author.

Institutional Goals

The first step in the process is to have clearly stated institutional goals that **demonstrate the value of diversity on campus**. The institutional value could be contained in a mission statement, a diversity statement or be part of a strategic plan. Under the direction of its Chancellor, the University System of Maryland has also publicly joined with the National Association of System Heads to make “Closing the Achievement Gap” a priority for the system institutions. Each member of the University System of Maryland has developed a plan for increasing the retention and graduation rates for historically underserved populations, such as African American, Hispanic, low income and first generation students. As one example, the University of Maryland has a diversity statement that makes clear the educational benefits of diversity on campus and the need for structured programs and policies to support its goal.

Institutions must be able to demonstrate the connection between the proposed program or policy and educational goals. There must be quantifiable and clear benchmarks articulating how the program will meet the goals, achieve the expected outcomes, and how it will wind down when the goals have been met. Retention efforts and programs which are not race-based must have a rational basis to the institutional goals, but are not subject to the same strict scrutiny as race-based programs.

Each institution should begin the process of program assessment and development by conducting an inventory of all diversity-related policies and practices, including those funded by outside sources. If race or ethnicity is a factor in participation in the program, the institution must be able to justify this determination. It will be important to be able to explain whether race-neutral programs were tried and, if not, why not.

- Does a program that is race-neutral and open to all students, such as Towson University’s Students Achieve Goals through Education (SAGE)⁷, succeed in increasing retention, improving diversity on campus and closing the graduation gap enough to meet institutional goals?
- Does creation of a program to support and follow a cohort of low resource students, which would consider race as a factor in assignment to the cohort, provide for a more successful experience for these students?
- Careful assessment of each program will ensure that the program has been constructed as narrowly as possible to meet the educational goal.

Verifiable Educational Outcomes

The second step of the process, ensuring educational viability, is perhaps the most important. If it is a retention program such as a peer mentoring program, it must have demonstrated value to students in the learning process. Academic support programs can be

⁷ SAGE provides a peer mentor to each student participant and holds activities that enhance budget management, academic and decision-making skills.

evaluated by the increased number of students in the targeted population who attend and graduate from the institution.

The results of any race-based or ethnically conscious program must be verifiable with results from inside and outside the institution.

For example:

At the conclusion of every semester in which a group of students participates in a program that focuses on the needs of Hispanic students, the institutional research department can report statistics on increased retention as a result of the program. Programs that work to retain African American males in college by creating cohorts with designated mentors can be assessed by reviewing grades, pass rates and time spent on remediation for these students compared with those outside of the cohort.

Student participation in nonacademic programs, such as community service sponsored by the Black Student Union, could be supported by research that would demonstrate educational benefits that resulted from participation.

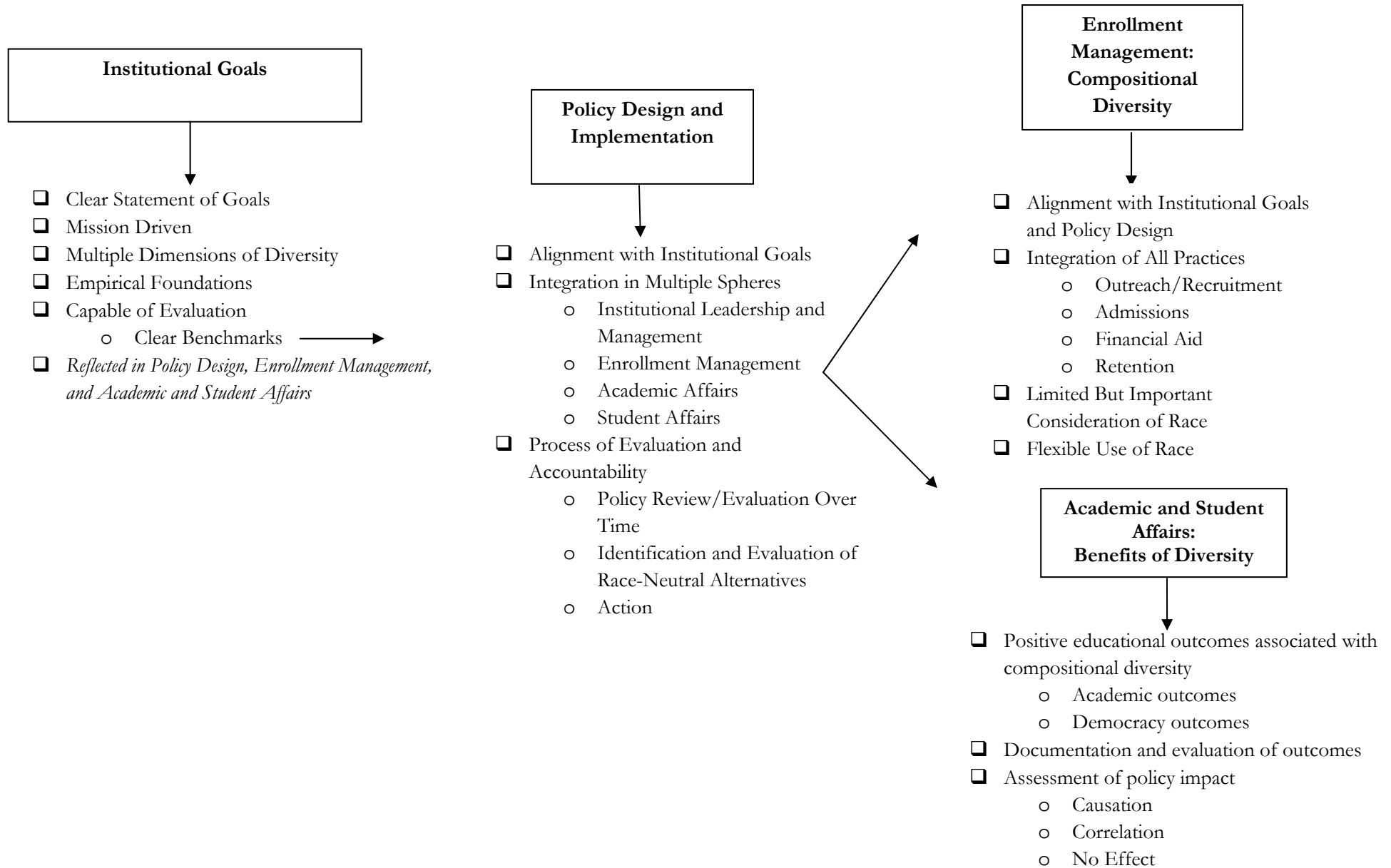
Flexibility

An evaluative process that begins with the demonstration of the educational benefit of the program should go on to detail how it has been tailored to the desired outcome. When a program is targeted to a particular race or ethnic group, it must be designed in the least restrictive manner to achieve its goal. Consideration of race-neutral programs must be accomplished before establishing a program that uses race as a criterion. For example, an analysis of the reasons why some older minority students do not graduate may highlight the challenges faced by this group of students to keep up with their studies while working full time to support themselves and their families. A Working Adult Support Center, such as the one created by the University of Baltimore to provide support to older, transfer students who hold full time jobs, may make significant inroads to keep this group of students enrolled and to assist them in graduating from the University in a race-neutral program.

This process requires constant refinement and evaluation of programs and their results. The duration of the programs must also be assessed. With each cohort, it must be considered whether there remains a need to restrict the program to one race or ethnic group, or whether that limitation is no longer required to support the institution's mission. There must also be opportunities for all students to participate in some kind of general retention programs, such as early warning advising, summer bridge programs and small classes, regardless of whether they are part of a targeted population.

Diversity Policy Development:

A Model Blueprint for Achieving Educational Goals Associated with Diversity



Conclusion

All of the programs that take race or ethnicity into consideration created by an institution to achieve its diversity and retention goals must undergo regular and meaningful evaluation. Changes should be made to these programs whenever possible to make them less restrictive and shorter in duration, as long as they can continue to achieve the desired results.

Key to the process is the training and buy in from a team of institution administrators and instructors. Throughout this process, of program creation and evaluation, the team should question whether the goals of a diversity program can be achieved by less restrictive means. Perhaps targeting outreach efforts to low income students would confer the desired educational benefit of diversity on campus. Collaborations with area high school programs may serve to bridge the gap needed to decrease the amount of remediation required for some students. An educated and committed team, including legal counsel, can use the information gleaned from each cycle of a program to determine how it can be improved to enhance the institutional goals while still remaining within the required legal parameters.⁸

⁸ For further information please refer to: Federal Law and Recruitment, Outreach, and Retention: A Framework for Evaluating Diversity-related programs, developed as part of the College Board Access and Diversity Collaborative and written by Arthur L. Coleman, Scott R. Palmer and Femi S. Richards, 2005 and Great Expectations, U.S. Department of Education, January 2009.

Faculty and Staff Diversity

Many institutions work hard to enhance the diversity of their faculties, administration and staff. For good reason, there are many questions about how to accomplish this within legal constraints. Across the board, institutional representatives with whom we have spoken have raised questions about what they can do within the limits of the law to improve diversity in the campus workplace. The law on this question is complex and, in one critical respect, uncertain.

On one hand, detailed, specific laws govern affirmative action in employment, arising out of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and Title VII of the Civil Rights Act. These standards apply to affirmative action in hiring, promotion, firing, lay-off, compensation and other terms, conditions or privileges of employment. 42 U.S.C. §2000 e-2(a)(1).

Case law provides very pointed legal direction to our institutions. These cases do not give institutions much flexibility in their efforts to improve diversity. In this section, we will first look at these established legal boundaries for campus workplace affirmative action. For most of the public institutions in Maryland, they are most clearly—and most expansively—articulated in the standards set by the Office of Federal Contract Compliance Programs (OFCCP).

On the other hand, the possible application of the Supreme Court's *Grutter* diversity principles to higher education employment suggest a promising—but uncharted—path to more flexibility in enhancing workplace diversity on our campuses. In those decisions, the Supreme Court dealt specifically with diversity in higher education admissions. Although it did not say outright that the standards it established for promoting diversity among students would apply with equal force to faculty and staff, we believe that there are good, strong reasons to do just that. We encourage institutions to embrace the *Grutter* principles to enhance campus workplace diversity, and the final section of this chapter provides guidelines for any campus willing to take that initiative.

Seeking Staff Diversity Under Traditional Civil Rights Laws

Under traditional employment discrimination law, public institutions have limited affirmative action options.

Title VII: The first step in developing programs to enhance minority workplace presence.

When trying to attract faculty and staff who are members of racial, ethnic or gender minorities, public higher education institutions are bound by both Title VII of the Civil Rights Act and the Equal Protection Clause of the Constitution.

Title VII applies to virtually all employers—public and private—and, under Title VII, the Supreme Court set the rules for affirmative action activities directed at these minorities decades ago. In essence, the Supreme Court insists that voluntary, Title VII affirmative action can be appropriate if the employer can demonstrate that its affirmative action plan:

1. Is the plan intended to “break down old patterns” of discrimination?

This means that, before an affirmative action plan can be implemented, there must be a history of discrimination that prevented minorities from entering a particular class of jobs.

2. Is the plan “designed to eliminate conspicuous racial imbalance in traditionally segregated job categories?”

Here, that history of discrimination must have resulted in a substantial difference between the number of minority employees in a particular job category and the number of potential employees who qualify for that category.

3. Does the plan not “unnecessarily trammel the interests of the [non-minority] employees?”

Quotas, strict minority set asides, promotion or lay-off plans that give absolute priority to minority employees are rarely, if ever, permitted.

4. Is the plan temporary, only until the racial imbalance is eliminated?

The employer must have a specific plan with time lines for periodically evaluating whether the plan has eliminated the imbalance, and for modifying and eventually terminating the plan when that goal is achieved.

In 1987, the Court suggested that Title VII affirmative action is acceptable even when a racial or ethnic imbalance in the number of employees in a job category is the result of societal discrimination, rather than actual, past discrimination by the employer. *Johnson v. Transportation Agency*, 480 U.S. 616 (1987). This standard provided *private* employers with greater opportunities for using affirmative action to improve workplace diversity, but its precedential value has been called into question by later Court decisions.

Example

As a private institution, H needs to demonstrate that past discrimination in educational and economic opportunities has led to a situation where minorities are substantially under-represented in the institution's faculty. H can use its newly developed and devoted diversity project group's funds to provide incentives and enhancements for minority faculty, at least until the imbalance is corrected.

For Maryland's public higher education institutions, this standard is not particularly instructive, because public agencies are faced with other difficult restrictions on workplace affirmative action. As the next section explains, a public institution that seeks to implement a similar program has to do more than simply justify it.

The Equal Protection Clause: Public employers are tightly constrained.

In addition to the requirements of Title VII, the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution further limits the affirmative action options of public higher education institutions.

In 1986, the Supreme Court interpreted the Equal Protection Clause to impose an additional, much stricter test for public institutions that want to expand opportunities for minority employees.

The basic, very restrictive rule for public institutions is:

Affirmative action in public employment is subject to "strict scrutiny" and can be implemented only:

- to address a "compelling state interest"
- by the "least restrictive means."

The problem arises because of how the Court defined "compelling state interest." It pulled back from its Title VII definition, stating that the only sure "compelling state interest" for race- or ethnicity-based affirmative action is the correction of past discrimination by the public agency.

The Court then went on to say what is **not** a compelling state interest, and thus ruled out two goals that most would consider very important in the campus workplace:

- ❑ Improving racial imbalances that are the result of past discrimination in other areas of society, K-12 education and general economic opportunities; and
- ❑ Providing same-race role models for minority students. *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

The *Wygant* decision has never been overturned, and its harsh restrictions have been the established law for some time. However, in that decision, four justices of the Court made a suggestion that provided a glimmer of hope for more effective affirmative action on public campuses. Although not a majority, those justices all expressed the belief that using race-based measures to improve public workplace diversity may be a “compelling state interest

Options Under Title VII and the Equal Protection Law

Office of Federal Contract Compliance Programs (OFCCP) Affirmative Action Plans

Many higher education institutions must have some kind of affirmation action plan under federal Executive Order 11246 and implementing regulations issued by the Office of Federal Contract Compliance Programs (OFCCP). These regulations, at 41 CFR Ch. 60 Subpart B, apply to any federal government contractor, including a higher education institution, with 50 or more employees and \$50,000 or more in government contracts. The government regulations require each contract to have a written Affirmative Action Plan (AAP). Closely tracking the established law, the regulations provide detailed requirements for what an institution’s AAP can and cannot include. Many of our institutions already must comply with the OFCCP regulations, and others may look to these requirements as they develop and implement AAPs under traditional civil rights laws.

In a nutshell, this is what the OFCCP regulations require:

- The institution must file a written AAP with the OFCCP and implement it, subject to periodic OFCCP audits to insure that equal opportunity is provided in all aspects of their employment.
- “A central premise underlying affirmative action is that, absent discrimination, over time a contractor’s workforce, generally, will reflect the gender, racial and ethnic profile of the labor pools from which the contractor recruits and selects.” 41 CFR Ch. 60-2.10(a)(1).
- The AAP must include “those policies, practices, and procedures that the contractor implements to ensure that all qualified applicants and employees are receiving an equal opportunity for recruitment, selection, advancement, and

every other term and privilege associated with employment.” 41 CFR 60-2.10(a). It must have two broad elements:

- 1) A **diagnostic component** that identifies and analyzes potential problems in the participation and utilization of women and minorities in the institution's workforce, including quantitative analyses that evaluate the composition of the institution's workforce relative to the relevant labor pools.
 - 2) An **action-oriented component** that includes measures to increase the retention of minority faculty and staff and to ensure pay equity as a means of integrating minority faculty and staff.
- If problems are identified then the institution must develop specific procedures and make good faith efforts to provide equal employment opportunity.
 - Affirmative actions include training programs, outreach efforts, and other personnel policies to help members of the protected groups compete for jobs on equal footing with other applicants and employees.
 - The institution must update its AAP annually.

This section only summarizes OFCCP's affirmative action plan requirements briefly. Those requirements are set out in Executive Order 11246 and 41 CFR Ch.60-2.10 *et seq.* Institutions that do substantial federal contracting must comply with them. Please consult the Assistant Attorney General for your institution if you have any questions about these requirements.

Finally, please note that an institution is not insulated from liability if it takes action under an AAP mandated and approved by OFCCP. *Rudebusch v. Hughes and Northern Arizona State University*, 313 F.3d 506 (9th Cir. 2002). The plan may still be challenged under Title VII and the Equal Protection Clause of the Constitution.

Targeted Minority Recruitment is Just Fine.

Some efforts to improve workplace diversity are legally acceptable without regard to the requirements of the Equal Protection Clause—in other words, even if the institution cannot point to imbalances that trace back to past discrimination. In particular, recruitment efforts that aim to increase the number of minority applicants rarely implicate the restrictions of Title VII or the Constitution. Courts have repeatedly concluded that minority recruitment efforts are generally not considered “discrimination” under our civil rights laws.

Recruitment initiatives have been distinguished from other personnel actions such as actual hiring, promotion or firing for a couple of reasons. First, courts have upheld such efforts because they merely ensure that employers assemble an expansive possible pool of qualified applicants and may help to avoid the discriminatory exclusion of minorities. In addition, non-minority applicants are not deprived of opportunities to compete for positions or otherwise excluded based solely upon aggressive minority recruitment.

As one federal court of appeals pointed out, the only possible “harm” to non-minority applicants is having to “compete against a larger pool of qualified applicants.” *Duffy v. Wolle*, 123 F.3d 1026, 1038, 39 (8th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998).

Thus, institutions confidently can go out of their way to recruit minority applicants. Obvious avenues may include:

- ❑ Advertising open positions in minority news outlets using electronic job-posting services and placing advertisements on listservs, websites, and publications aimed at diverse groups;
- ❑ Distributing information regarding openings to organizations that serve and represent under-represented minorities;
- ❑ Actively recruiting at the meetings of associations with strong minority representation or at institutions that enroll large numbers of minority students;
- ❑ Always including the phrase “Equal Opportunity/Affirmative Action Employer” in job announcements and advertisements and otherwise using positive language in position descriptions to indicate a department’s commitment to diversity.

Other, more subtle practices also fall under the broad category of legally permissible “recruitment.” For example, the institution may implement long term strategies for recruiting diverse faculty and staff and be proactive in finding ways to generate lists of potential candidates even before an actual need is identified. These activities can bring greater numbers of minority applicants into consideration without restricting opportunities for non-minority applicants. They may include:

- ❑ Ensuring that published position qualifications are strictly job-related and do not include unnecessary educational and other requirements that may tend to exclude disadvantaged minorities;
- ❑ Ensuring criteria are couched in the broadest terms and not narrowly focused on research interests;
- ❑ Thinking about future needs related to the position and department and how a position may evolve over time;
- ❑ Considering possibilities for interdisciplinary or interdepartmental work, which may broaden the applicant pool;
- ❑ Forming search and screening committees that are free of bias and represent diverse viewpoints;
- ❑ Establishing internships, fellowships and other opportunities with students from particular minority-serving institutions to attract future employees;
- ❑ Establishing opportunities for faculty from particular minority-serving institutions to visit the campus, for example, to give talks and present research or to work as visiting professors or scholars;
- ❑ Identifying institutions with success producing women and minority doctorates and/or post-doctorates in the field and subfield in issue- these constitute an available pool of qualified candidates;
- ❑ Understanding national “pools” of qualified candidates for the field and subfield in question;

- ❑ Actively encouraging undergraduates to consider graduate school and graduate students to consider academic research careers, and offering post-doctoral fellowships;
- ❑ Reviewing past practices in hiring institution-wide to understand factors limiting or contributing to past success and putting in place an evaluation system to see if current strategies are working;
 - This includes researching and compiling information from recent hires to find out why they accepted the positions offered and from past candidates to whom offers have been extended to find out why they turned down the offers;
- ❑ Including in selection criteria requirements that applicants be able to contribute intellectual diversity, work successfully with diverse students and colleagues, or have experience with a variety of teaching methods or curricular perspective;
- ❑ Considering candidates from a wide range of institutions and sending vacancy announcements directly to them;
- ❑ Contacting professional organizations for lists of women and minorities with doctorates in the field;
- ❑ Requesting recommendations from colleagues at other institutions for students nearing graduation;
- ❑ Asking faculty and graduate students for recommendations;
- ❑ Participating in available programs like *The Spectrum Initiative: Advancing Diversity in the College Presidency* to be created by American Council on Education (ACE)⁹ which partners with other higher education associations with the goal of ensuring that searches for presidents and other executive leaders are inclusive, promotes on-campus leadership development and mentor services, and prepares women and racial minority administrators for senior leadership;
- ❑ Effectively communicating opportunities for advancement and professional development to existing faculty and staff and supporting faculty and staff interested in professional development and advancement.

These activities, done in combination with traditional recruiting measures, should not raise any questions under traditional employment discrimination laws. To be sure of that, there is one major pitfall to avoid—the sole use of “homogenous recruitment sources.” *Equal Employment Opportunity Commission Compliance Manual, Section 15: Race and Color Discrimination* (2006). If an institution advertises its openings **only** in newspapers read disproportionately by one race, or recruits **only** from predominantly one-race or single-sex schools, that practice could be considered evidence of racial discrimination in an EEOC or court challenge.

Aggressive minority recruitment initiatives should always be aimed at increasing the applicant pool, not contracting it to exclude non-minority applicants.

⁹ <http://www.acenet.edu/Content/NavigationMenu/ProgramsServices/CAREE/ProgramsInitiatives/Spectrum.htm>

For example, Rutgers University identifies scholars who have just completed their graduate degrees or are still in graduate school and makes available a limited number of Presidential Postdoctoral Fellowships for such scholars. Those selected receive two-year appointments, and are selected according to the extent to which they represent excellence in their scholarship and teaching and can contribute to gender, racial, ethnic, background, experiential, or curricular diversification of departments or programs where diversification is “educationally indicated and would be of benefit” to students.¹⁰

Compensation of Minority Employees

In our experience, Maryland’s public higher education institutions have worked hard for many years to prevent discrimination and promote diversity among employees. The most frequent questions concerning workplace equality deal with questions of salary—on one hand, perceptions of salary inequities in particular groups of employees in particular institutions, and, on the other hand, requests for advice on how affirmatively to use compensation as a minority recruitment or retention tool.

Compensation issues figure into traditional affirmative action remedies in various ways: from back pay for a single minority employee who challenges the salary structure to across-the-board “bonus” payments or salary increases for all minority employees in a job category after a salary survey indicates a pattern of salary imbalance. These compensation measures have received a high degree of scrutiny by the courts, however.

Here are guidelines for using compensation as a form of affirmative action under traditional discrimination laws:

First, be sure that the basic Title VII requirements are met:

- a. **The compensation measure is needed to assist in “breaking down old patterns” of discrimination.**
 - Was there a history of discrimination by the institution that prevented minorities from entering the particular class of jobs?
- b. **The increased compensation is “designed to eliminate conspicuous racial imbalance in traditionally segregated job categories.”**
 - Here, that history of discrimination must have resulted in a substantial difference between the compensation of minority and non-minority employees in a particular job category.
- b. **Does not “unnecessarily trammel the interests of the [non-minority] employees.”**
 - Does the compensation measure reduce the compensation, or potential compensation, of non-minority employees?
- c. **Is temporary, only until the racial imbalance is eliminated.**

¹⁰ <http://www.diversityandequity.rutgers.edu/docs/Faculty%20Diversity%20Initiatives.pdf>

- If a compensation measure is more than a one-time-only adjustment, then a process must be in place to evaluate its impact and end it when the disparity is eliminated.

In addition to these fundamental Title VII requirements, courts insist that any upward salary adjustments to correct imbalances between minority and non-minority employees require an extraordinarily careful, multi-factored analysis of salary patterns within a job category.

That analysis must do the following:

- Be performed according to a well-established, accepted statistical methodology; regression analysis is often used in such salary surveys;
- Establish a “manifest” imbalance in minority and non-minority compensation;
- Then, go beyond the mere statistical imbalance to control for non-discriminatory factors that may have contributed to it, including:
 - Performance: *E.g.*, to what extent has merit pay based upon annual performance evaluations figured into the salaries?
 - Productivity: Do differences in teaching course load, research productivity or service to the institution affect salaries?
 - Other salary factors: Does the fact that an institution has a policy of paying faculty members who once served in an administrative capacity at their higher administrator’s salary affect the analysis?
Smith v. Virginia Commonwealth University, 84 F.3d 672 (4th Cir. 1996).
- Be sure that any adjustments to minority staff salaries do not create a new imbalance in compensation. *E.g.*, *Rudebusch v. Hughes and Northern Arizona University*, 313 F.3d 506, 523 (9th Cir. 2002)

These constraints will minimize an institution’s ability to use compensation measures under traditional affirmative action laws, except in those rare circumstances where substantial statistical imbalances can be traced directly back to past discriminatory practices and where the discretionary evaluation of performance and productivity does not play a significant role in setting and increasing salaries.

Promoting Diversity as a Possible Basis for Affirmative Action in Higher Education Employment

Looking Beyond Traditional Employment Discrimination Law: The Diversity Principles

Under traditional employment discrimination law, any public institution's plan to promote minority employment must address a "compelling interest." The only "compelling interest" for workplace affirmative action unquestionably recognized by the Supreme Court to date has been the need to remedy actual past discrimination by the employer, if that past discrimination has left a serious, long-standing imbalance in minority and non-minority employment or compensation in particular job categories. However, the Court has suggested that for public higher education institutions, there may be another justification for workplace affirmative action measures. For this, we look to the principles that now govern our efforts to enhance diversity in the student body.

The question in this analysis is whether the *Grutter* principles can provide the basis for workplace diversity measures. While the Supreme Court has never ruled one way or the other on this issue, we believe that the Court has at least signaled that we can use the *Grutter* principles for guidance.

The Diversity Rationale in Higher Education Employment

First, as far back as 1986, at the same time that it rejected most justifications for public institutions to use workplace affirmative action—including eliminating racial imbalances resulting from past societal discrimination and the need for same-race role models for minority students-- the Supreme Court left open the possibility that the goal of **improving public workplace diversity** may be a "compelling state interest" which may be advanced through race-based measures. *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986)

Almost a decade later, in the *Grutter* decision on affirmative action in student admissions, the Court set out the rationale for diversity plans in language that could apply with equal force to workplace diversity. It emphasized that universities "occupy a special niche in our constitutional tradition" in light of "expansive freedoms of speech and thought associated with the university environment" 539 U.S. 329. That "constitutional tradition" has always protected not just students, but those who teach them and support their educational pursuits.

Moreover, the reasons cited by the Court when it decided that student body diversity can be a "compelling interest" are not limited to students. The value of academic freedom, the need for exposure to differing perspectives to promote the free exchange of ideas, the globalization of business and military interests, the importance of broad citizen participation in the democratic

process and the elimination of stereotypes are all discussed as justifications for campus diversity measures in the *Grutter* opinion. There is no doubt that a diverse faculty will better enable an institution, and its students, to achieve these goals. Few courts have ruled on initiatives to apply the *Grutter* principles to workplace diversity. In those that have, the results have been mixed.

- ❑ In *Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003), a federal court of appeals decided that those principles did support voluntary affirmative action in the promotion of African American and Hispanic police officers in Chicago.
- ❑ However, another court of appeals has held that diversity principles are inadequate to justify a race-based protocol for Newark, New Jersey firefighter transfer and assignment. *Lomack v. City of Newark*, 463 F.3d 303 (3d Cir. 2006).
- ❑ The EEOC, in its most recent *Compliance Manual*, at 7, acknowledges that *Grutter* suggests the diversity rationale as an alternative basis for affirmative action, but states only that the Supreme Court “has not yet ruled” on its propriety.

The Fourth Circuit federal court of appeals whose decisions govern Maryland, has not yet ruled on this question, and we are not aware of any court that has decided a **higher education** workplace diversity case since *Grutter*. The cases above addressed diversity in municipal public safety departments, not in a university setting. It is noteworthy that, in its recent decision rejecting the application of the *Grutter* principles to voluntary K-12 desegregation plans, the Court repeatedly emphasized the unique importance of diversity in higher education. *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S.Ct. 2738 (2007).

Ultimately, there are no guarantees that a diversity plan applying the *Grutter* principles to employment will be upheld by our courts. Still, the Supreme Court seems to have set the stage for constitutionally acceptable diversity measures in public higher education institutions. We believe that the rationale for doing so is quite strong, especially as it relates to faculty. For an institution that wishes to “push the envelope” in enhancing campus workplace diversity, this approach holds real promise.

Including Faculty Diversity Initiatives in a Campus Diversity Plan

What are the practical implications?

First, institutions may wish to consider including faculty and staff diversity as a goal in their general diversity plans. Just as with student diversity initiatives, a decision to pursue faculty and staff diversity must be supported with a demonstration that campus workplace diversity is a **“compelling educational interest.”**

Then, when considering strategies to enhance faculty diversity, those measures must be **“narrowly tailored”** to meet the institution’s diversity goals. The principles of “narrow tailoring” set by the courts for student diversity and for remedying past employment discrimination are remarkably similar.

Thus, the campus workplace initiative in an institution’s diversity plan might look something like this:

The Employment Section of the Plan Itself

The Dos

- Conduct a comprehensive inventory at the outset of all the institution’s existing diversity related policies and practices and implement an institution-wide and coordinated plan.
- Include faculty and administrator diversity as an element of the institution’s diversity plan.
- Establish the importance of workplace diversity to the mission of the institution with strong support from high-ranking and not just affirmative action officers to reinforce the notion that diversity is a crucial institutional goal.
- Carefully identify areas in faculty and administration where a lack of diversity is an issue.
- Consider and incorporate all genuine kinds of diversity that enhance an institution, not just race and ethnicity.
- Establish time-limits on the current plan, with specific dates for re-evaluation of whether it is needed, or how it may need to be modified.
- Use race-neutral diversity criteria and measures whenever they are feasible.
- Be consistent in following the policies and procedures set forth elsewhere in the plan.
- Be flexible so that the plan will reflect the full range of interests and needs in the institution with less likelihood of bringing criticism of inconsistent adherence.

The Don’ts

- Do not limit sought-after “diversity” to race and ethnicity.
- Do not apply race- or ethnicity- targeted measures without first considering whether race/ethnicity-neutral measures can achieve the plan’s goals.

Recruitment

The Dos

- Recruit diverse candidates aggressively, and in a targeted way.
- Advertise aggressively in publications with large minority readership.
- Target recruitment at meetings of minority professional and academic associations.
- Establish relationships with institutions that educate large numbers of minority graduate students.
- Consider use of financial and other incentives and benefits to increase diversity, as long as they apply to multiple kinds of diversity, and not just race, ethnicity and gender.
- Consider holding academic administration accountable for efforts to promote faculty and staff diversity and making such effort or lack thereof a factor in evaluations.
- Where the surrounding community is predominantly of one race, find opportunities to solidify relationships with the community and influence it to improve services available to minorities and promote diversity so that prospective applicants will feel more likely to fit in and see the community as a desirable place to live.
- Present the institution and community in the best light possible and ensure institution and department websites present a positive, impressive and inviting picture.
- Create a welcoming environment when potential candidates visit, such as ensuring that they meet other minority faculty, staff and students with similar interests so that candidates will be able to envision themselves as part of the college and surrounding community.
- Conduct regular training and ensure awareness institution-wide of the institution's diversity goals and policies.

The Don'ts

- Restrict recruitment for a particular job only to minority publications or associations.
- Avoid adding "diversity candidates" after the search is closed.
- Do not allow the desire to obtain financial incentives to unduly influence the decision to hire a particular candidate. Avoid creating the impression that those hired pursuant to incentive programs are being given special treatment.¹¹

The following examples are gleaned from information institutions' web sites, or campus newspapers and articles in the Chronicle of Higher Education:

- Duke ensures black job applicants meet black faculty members when they visit the campus, and not just members of faculty in the department they are applying to. (The Chronicle of Higher Education, September 26, 2008).
- Harvard has set up a summer program which allows undergraduates to spend ten weeks in the research laboratories of science and engineering faculty members. More than half of the participants in the three years that the program has been in existence have been women and more than sixty percent minority students (The Chronicle of Higher Education, September

¹¹ As The Workplace Turns: Affirmative Action in Employment. Jonathan Alder. June 2005. Published by NACUA.

26, 2008). The program has the potential of increasing the labor pool for minorities and women.

- ❑ Virginia Tech frequently invites professors from historically black universities to deliver lectures on the campus, to increase awareness of the institution among those lecturers. (The Chronicle of Higher Education, September 26, 2008).
- ❑ Cornell showcases the social programs available both on and off-campus that might attract different groups by bringing prospective faculty and staff to the campus during such events in order to assist in overcoming the perception that Cornell is inaccessible as an employer. (The Chronicle of Higher Education, September 26, 2008).
 - To help decrease the isolation felt by and lack of services available to minority groups, Cornell has also made an effort in recent years to ensure the surrounding community shares its focus on diversity by:
 - Patronizing businesses owned by women and minority groups and requiring campus contractors to employ a diverse body of workers. As a result, businesses in the community are paying more attention to the needs of minority customers.
 - Presenting cultural festivals to the community.
- ❑ At the University of Washington, each interviewee is assigned an “ambassador” to keep candidates informed about the search process. (The Chronicle of Higher Education, September 26, 2008).
- ❑ Rutgers University, pursuant to the President’s Faculty Diversity Cluster Hiring recently instituted initiative, invites proposals from deans and provosts for Faculty Diversity Cluster Hires. That is to say groups of three to five faculty of the highest quality who would come to Rutgers as a group or “cluster,” whose addition to faculty ranks “would strategically and significantly increase the diversification of Rutgers’ scholarship and pedagogy,” with hires either being all in one department or crossing departmental, school or campus lines. According to Rutgers, interdisciplinary and multidisciplinary proposals will receive particular consideration. The Office of the President will provide half the salary of each faculty member in the cluster for their first three years at Rutgers.
 - In addition, the University’s Office of Faculty Diversity at Rutgers provides deans and provosts with partial salary support for tenured and tenure-track faculty hires, or one- to two-year postdoctoral appointments, for scholars of excellence whose presence at Rutgers “will increase the diversity of the department, unit, campus, or curriculum.”¹²
- ❑ Johns Hopkins University initiated the Mosaic Initiative in 2008 with a pledge of \$5 million over five years to recruit female and minority professors. The program will make available three-year grants of \$250,000 to departments to recruit faculty. (The Johns Hopkins Gazette, July 21, 2008).

¹² <http://www.diversityandequity.rutgers.edu/president-faculty.shtml>

Appointment

The Dos

- Whenever appropriate, include an applicant's potential contribution to institution diversity as a factor in the hiring process.
- Make sure that contribution to diversity is just one factor in evaluating applicants, and do not exclude applicants solely because they do not contribute to diversity.
- When in the process of negotiating an offer, find ways to encourage the applicant to seal the deal.
- Find out, understand and address where possible the candidate's concerns, such as the need for placement help for spouses. (Consider including a statement in the advertisement for the position to the effect that the department is responsive to the needs of dual career couples.)¹³

The Don'ts

- Do not establish minority quotas or numerical goals or set aside certain positions for minority applicants only.
- Do not establish different qualifications or selection criteria for minority applicants; each candidate must compete against all other qualified candidates.
- Do not use race in a mechanistic manner, for example, by assigning points to achieve a specific weight.
- Do not allow considerations of marital or familial status of a candidate to influence your evaluation of the candidate.

Smith College extends access to other individuals and offers to forward other information about the campus and community to help move negotiations along in a positive manner.¹⁴

Ongoing Employment

Continue to implement the institution's diversity plan with regard to promotion, working conditions and compensation.

The Dos

- Include contribution to diversity as one factor in the selection of employees for promotion—with the same caveats (no quotas, set-asides, etc.)
- Consider use of financial and other incentives and benefits to increase diversity as long as they apply to multiple kinds of diversity.
- Create opportunities for people to share cultural interests, learn about other cultures, socialize, and network with those of similar professional interest.

¹³ <http://www.umich.edu/%7Eadvproj/handbook.pdf>;
http://www.provost.umich.edu/programs/dual_career/index.html

¹⁴ <http://www.smith.edu/oid/FacultyHiring.doc>

- Where the surrounding community is predominantly white, in order to encourage assimilation of faculty and staff into the community, find opportunities to develop relationships with the community and to influence the community to improve services available to minorities and support diversity.
- Provide mentors and other forms of support to new staff and faculty.
- Develop surveys or forums for staff and faculty to determine or discuss the prevailing perception of the campus and community to identify potential problem areas.
- Define and communicate clearly the criteria for scholarship, promotion and tenure to faculty and staff.
- Give credit for important faculty contributions not just in research, publication and funding success, but also in areas like teaching, service on committees, and mentorship of students. Credit should also be given for nontraditional approaches to and forms of research and non-traditional ways of working, such as part-time appointments.
- Limit service responsibilities of pre-tenure faculty to afford more time for research and teaching and find ways to increase exposure of their research effort.
- Establish an exit interview and/or questionnaire for faculty and staff.

The Don'ts

- Race/ethnicity/gender should never be the sole factor in deciding whether to promote an employee.
- In times when reductions in force are required, do not make lay-off decisions based on minority status.
- Do not set compensation for minority employees higher just because of their minority status.

Examples:

- Harvard committed \$7.5 million in 2006 to improve child care on the campus, which had been a primary concern of female faculty members (The Chronicle of Higher Education, September 26, 2008).
- Cornell provides new employees with information about a resource guide that lists minority-serving businesses and establishments in the area, providing, for example, familiar foods, hairdressing and places of worship. (The Chronicle of Higher Education, September 26, 2008).
- Slippery Rock University of Pennsylvania hosts an annual “International Dinner,” attended by local residents, where each ethnic group and student association on the campus prepares a native dish (The Chronicle of Higher Education, September 26, 2008).
- Pennsylvania State University joins with school districts to hold an annual Native American powwow. (The Chronicle of Higher Education, September 26, 2008).

The Campus Environment

Free Speech Guarantees under the First Amendment of the United States Constitution and Diversity on Campus.

Freedom of speech is guaranteed under the First Amendment regardless of the content of speech, except in limited circumstances, such as the use of fighting words or words that create imminent danger. Free speech in the university setting is of great importance because it contributes to what has been described as the “marketplace of ideas.” *Keyisian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). The guarantee of free speech under our Constitution frames the discussion about efforts to create a campus environment free from intolerance and harassment based on race, sex, national origin and the like. By addressing the First Amendment rights of some, as discussed briefly here, an institution can have an impact on issues of intolerance and harassment.

The University campus is a limited public forum for expressive activity.

A university can designate certain areas of the campus for expressive activity as long as the restrictions are viewpoint neutral and reasonable in light of the objective purposes served by the forum. The United States Supreme Court has said:

A university differs in significant respects from public forums, such as streets or parks or even municipal theaters. A university’s mission is education, and decisions of this Court have never denied a university’s authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings. *Widmar v. Vincent*, 454 U.S. 263 (1981).

In *ACLU v. Mote*, 423 F. 3d 438 (4th Cir. 2005), a member of the public challenged the University of Maryland College Park’s facilities use policy because it restricted use of its campus and facilities to members of the public who were sponsored by a member of the university community. The Fourth Circuit expressly recognized University of Maryland College Park as a limited public forum entitled to enact reasonable time, place and manner restrictions that are viewpoint neutral.

Facilities use policies that give unlimited discretion to a university administrator to grant or deny access to the campus or facilities have been challenged as unconstitutionally broad. Drafting a facilities use policy that sets forth the reservation process, any limitations on using particular spaces, such as size of the display, and circumstances under which an approved event can be moved, such as for infrastructure emergencies, etc., will most likely assure that the restrictions are content neutral and reasonable.

Expressive Activity

Speech, including symbolic speech, is protected by the First Amendment unless there is an actual or imminent threat of substantial disruption.

In *Tinker v. DeMoines Independent Community School District*, 89 S. Ct. 733 (1969), the Supreme Court determined that the school district violated the First Amendment when it banned students from wearing arm bands in protest of the Vietnam war because there was no showing of the threat of actual substantial disruption as a result of the symbolic speech.

Hate speech, such as racial or ethnic epithets, that is “merely” offensive is likely to be protected speech unless coupled with incidents such as vandalism, rock-throwing, stalking, death threats, arson or physical intimidation.

Person-to-person harassment may be protected speech unless it constitutes unlawful conduct, such as physical intimidation.

Student codes of conduct prohibiting sexual harassment have been subject to First Amendment challenges, but there are no Supreme Court decisions that address the interplay between the First Amendment and codes of conduct that prohibit sexual harassment.

In *DeJohn v. Temple University*, 537 F. 3d. 301 (3^d Cir. 2008), the Court enjoined enforcement of the university’s sexual harassment policy that prohibited “hostile, offensive and gender-motivated speech” because it was overly broad.

However, in a recent challenge to University of Maryland Baltimore County’s sexual harassment policy and its code of student conduct which prohibits sexual harassment, the U.S. District Court for the District of Maryland refused to enjoin the sexual harassment policy, citing the important public policy issues embodied in Title VI, EEOC regulations and Office for Civil Rights (OCR) guidelines that define sexual harassment.

General prohibitions, such as prohibiting “acts of intolerance” have been found to be in violation of the First Amendment.

In *Bair v. Shippensburg University*, 280 F. Supp. 2d 357 (M.D. Pa. 2003), the federal district court enjoined Shippensburg University from enforcing parts of its student code of conduct, including the provision that prohibited “acts of intolerance,” and the requirement that students communicate their beliefs in non-provoking manner.

First Amendment Challenges to Speech Codes and Equal Educational Opportunity

Legal commentators have expressed concern that the First Amendment is being used to challenge the constitutionality of the anti-discrimination laws like Title VI, thereby undercutting the legal protections afforded students and staff against unlawful discrimination. The result of such challenges could be a loss of diversity and/or diversity of views on campuses if protected classifications of students or staff (for example, based on race, gender, religion) believe they are being denied an equal educational opportunity.

Drafting Student Conduct Codes with the Goal of Protecting Free Speech and Promoting Diversity

A carefully drafted student conduct code will foster diversity when it balances free speech with the rights of students to pursue the education of their choice. A student conduct code can prohibit student-on-student conduct that denies the victim equal education opportunity because of race, gender, religion, sexual orientation or other protected classifications, without limiting free speech. While there is no “model” code of conduct, some of the ideas expressed below may facilitate drafting a code of conduct that protects students from unlawful behavior but also does not infringe on free speech rights.

- Student conduct codes must be viewpoint neutral.
- Unlawful or illegal conduct can be prohibited.
- Use of the terminology “acts of intolerance” has been held to be unconstitutionally overbroad in *Bair v. Shippensburg University*, 280 F. Supp. 2d 357 (M.D. Pa. 2003).
- Speech that consists of **offensive religious, ethnic or racial epithets** is protected speech unless accompanied by some unlawful conduct, such as unlawful physical aggression, vandalism or stalking.
- Hate based behavior that meets the definition of “Hate Incidents” under Md. Code Ann., Criminal Law § 10-301 is criminal conduct that can be prohibited.

A person may not “because of another’s race, color, religious beliefs, or national origin...
(1) harass or commit a crime against that person;
(2) damage the real or personal property of that person;
(3) deface, damage, or destroy, attempt to deface, damage, or destroy the real or personal property of that person; or
(4) burn or attempt to burn an object on the real or personal property of that person.”

- Student-on-student verbal conduct that meets the legal definition of sexual harassment can be prohibited.

The EEOC Guidelines state:

“Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when

- (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment,
- (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment.”

- ❑ For sexual harassment to be actionable under Title IX of the Education Amendment of 1972, the sexual harassment must be **“so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”** *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).
- ❑ Harassment that constitutes criminal conduct under Md. Ann. Code , Criminal Law § 3-803 can be prohibited.

A person may not, in a public place “maliciously engage in a course of conduct that alarms or seriously annoys the other:

- (1) with the intent to harass, alarm, or annoy the other;
- (2) after receiving a reasonable warning or request to stop by or on behalf of the other; and
- (3) without a legal purpose.”

Md. Code Ann., Criminal Law § 3-803.

- ❑ Speech directed to inciting or producing imminent lawless action and likely to incite or produce such action is not protected speech.

Recommendations

Whether it be through admissions, outreach, financial aid, retention, faculty hiring or campus environment, Maryland public institutions of higher education are continually seeking to enhance the educational experience for all students by strengthening diversity on their campuses. The guidance in this publication, as summarized below, can serve as a roadmap toward that goal.¹⁵

- ***Establish clear goals and objectives.***

Justify race- and ethnicity-conscious programs with compelling interests, clearly defined and central to the achievement of each institution's educational mission. There must be a strong connection to the core institutional mission—without such a link, federal courts are less willing to find a compelling state interest.

- ***Devise appropriate strategies.***

Demonstrate that the means used to achieve compelling goals are in fact designed and implemented in ways that materially advance those goals. Obtain strong institutional support for diversity goals and plans. Unless there is adequate institutional support, it will be extremely difficult for higher education institutions to administer rigorous, periodic review of race-and ethnicity-conscious policies.

- ***Review and evaluate results.***

Periodically evaluate programs to ensure continued compelling interests and the implementation of appropriate race or ethnicity-conscious strategies advancing those interests. As institutional goals change or as evidence surfaces that the policies are not having the desired effect, the program will need to change to address this. To be effective, all policies and practices that support diversity goals must be able to support the claim that a particular race-conscious element of that policy is narrowly tailored.

- ***Know your programs.***

Evaluate viable race-neutral alternatives. Inventory all policies and practices designed to support institutional diversity goals.

- ***Establish an interdisciplinary team.***

Assemble a team that includes representatives from the university's top administrative levels, from specific programs that have a bearing on the diversity-related goals, those who can give meaning to the data upon which the policies are being evaluated (or created), and legal counsel. Broader involvement of the outside community may be helpful.

- ***Define mission-driven diversity goals.***

Policies should be well developed and supported by substantial evidence. This means: 1) goals are clearly stated and understood; 2) the educational judgment is sound (based on solid empirical data with supporting evidence such as mission statements, strategic goals, institution-specific research and analysis, and relevant social science research.)

- ***Evaluate policies in light of narrow-tailoring standards.***

Policies should be as flexible as possible with regard to the use of race or ethnicity, given the mission and goals of the higher education institution and deemed necessary in light of race-neutral alternatives and minimally burdensome to those students who would not qualify under the policy. Policies should be reviewed and evaluated periodically with the goal of eliminating such policies when institutional goals are met.

¹⁵ See Coleman, et al., *Admissions and Diversity After Michigan: The Next Generation of Legal and Policy Issues* (The College Board).

The Office of the Attorney General of Maryland is pleased to have provided this Roadmap to its clients and to other interested parties. We hope that the legal discussion and the suggestions and examples will help University System of Maryland institutions and others achieve the benefits that come with a diverse student body and a diverse working environment. Attorneys in the Educational Affairs Division and Maryland Higher Education Commission of the Office are knowledgeable about the issues discussed in this document and can provide assistance in developing diversity plans and analyzing potential programs designed to achieve greater diversity. Please feel free to just give us a call.

STRENGTHENING DIVERSITY IN MARYLAND'S COLLEGES AND UNIVERSITIES

A Legal Roadmap

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