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# 14A Diversity in the Face of Adversity: Managing Legal Risks of Affirmative Diversity Efforts

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# DIVERSITY IN THE FACE OF ADVERSITY

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## *Part One:*

### *A Primer on Title VI and Title IX Requirements as They Impact Diversity Efforts*

Programming that focuses on expanding and retaining diversity at universities has increasingly been the target of both litigation and administrative complaints with the Department of Education’s Office for Civil Rights (“OCR”). Challenges often focus on allegations that certain programs with racial and/or gender membership requirements, preferences, or even stated goals, may violate federal anti-discrimination laws by excluding non-underrepresented populations and/or male students. The laws forming the basis for those attacks are Title VI of the Civil Rights Act of 1964 (“Title VI”), which generally prohibits recipients of federal funding from discriminating based on race, national origin, or color, and Title IX of the Education Amendments of 1972 (“Title IX”), which generally prohibits discrimination based on sex in federally funded education programs and activities. Because Title VI and Title IX form the basis for a majority of the challenges discussed above, the following is intended to provide a general overview with regard to how each statute’s implementing regulations function.

## **Title VI**

Title VI prohibits discrimination “on the grounds of race, color, or national origin . . . under any program or activity receiving Federal financial assistance.”<sup>1</sup> Programs that use race, color, or national origin-based classifications or conditions for participation, or as part of financial aid<sup>2</sup> or employment decisions, must pass legal muster under a strict scrutiny analysis. As a result, such programs must be supported by a compelling interest in the educational benefits of diversity<sup>3</sup> and applied in a narrowly tailored fashion.<sup>4</sup> Courts and OCR only infrequently conclude that race-conscious programs pass muster under such a strict scrutiny analysis, however.

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<sup>1</sup> 42 U.S.C. § 2000d; 28 C.F.R. § 42.104.

<sup>2</sup> 28 C.F.R. § 42.104.

<sup>3</sup> In a series of cases focused on race-conscious admissions, the Supreme Court has concluded that the educational benefits of diversity can be a compelling interest. *See e.g., Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198 (2016).

<sup>4</sup> U.S. Department of Justice and Department of Education Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary School, 2011, *available at*

When inquiring whether a university's use of race, color, or national origin in programming or financial aid is narrowly tailored, OCR, like courts, weighs each of the following considerations: whether the use of race (1) is flexible; (2) is of limited extent and aligned with the university's diversity interest; (3) is of limited duration, including whether the institution regularly reexamines such use; (4) does not impose an undue burden on the educational opportunities of those students who are not direct beneficiaries of the use of race; and (5) was adopted only after the institution reviewed race-neutral means and determined they were unworkable to achieve the educational benefits of diversity.<sup>5</sup> While activities and financial aid programs that limit eligibility based on race are rarely upheld, in 2012 OCR determined that the University of Missouri-Columbia's use of race and national origin as a factor (among other factors such as merit) in granting scholarships did not violate Title VI. After an investigation and an analysis of the University's extensive data, OCR concluded that the use of race as a criterion in the scholarships yielded higher enrollments of underrepresented minorities and was associated with improved retention rates. OCR further concluded that these educational benefits supported the use of race, particularly given that the University had shown that less restrictive means were unworkable.<sup>6</sup>

The Department has also advised that mentoring and support programs targeted to benefit specific races or national origins should nonetheless be *open to all* enrolled students.<sup>7</sup> As an example of a mentoring or support program that is permissible under Title VI, the Department has explained:

An institution could sponsor retention or support programs open to all students that offer content that the institution believes might be of particular interest to a group targeted for retention. Such programs could, for example, hold motivational lectures (*e.g.*, highlighting the accomplishments of Latino business leaders or the artistic achievements of Pacific Islanders), and could include small group follow-up workshops with mentors.<sup>8</sup>

Similarly, in a 2012 resolution agreement with City University of New York ("CUNY"), OCR discussed the legality of CUNY's Black Male Initiative ("BMI"), which intended to increase,

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<https://www2.ed.gov/about/offices/list/ocr/docs/guidance-pse-201111.pdf>. Although now rescinded, there is reason to believe the current administration will adopt a similar view.

<sup>5</sup> See Letter from Department of Education Office for Civil Rights, Chief Attorney William J. Dittmeier to University of Missouri-Columbia, Chancellor Brady J. Deaton, November 26, 2012, available at <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/07052028-a.pdf>.

<sup>6</sup> See *id.*

<sup>7</sup> See *id.*; See also Letter from Department of Education Office for Civil Rights, Team Leader David Rolandelli to Ontario-Montclair School District, Superintendent James Q. Hammond, July 3, 2012, available at <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/09091241-a.html>. In a resolution letter with Ontario-Montclair School District, OCR opined that "[a] race-themed mentoring and support program would fall within the category of [permissible approaches] if it did not admit or exclude students on the basis of their race."

<sup>8</sup> See U.S. Department of Justice and Department of Education Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary School, 2011, available at <https://www2.ed.gov/about/offices/list/ocr/docs/guidance-pse-201111.pdf> (emphasis added). Although now rescinded, there is reason to believe the current administration will adopt a similar view.

encourage, and support the inclusion and educational success of under-represented groups in higher education, particularly Black males. OCR stated that higher education institutions could legally take action to promote diversity so long as the action “does not exclude students on the basis of their race or sex and does not use race- or sex-exclusive recruiting.”<sup>9</sup>

Importantly, Title VI does not just prohibit a recipient from directly engaging in discrimination on the basis of race; under 34 C.F.R. § 100.3(1), institutions may not discriminate “through contractual or other arrangements” either. As a result, partnering with outside organizations that discriminate on the basis of race as a pass-through can also in some cases impose legal risks on institutions.

## **Title IX**

Title IX prohibits recipients from excluding participation in or denying the benefits of any academic, extracurricular, research, occupational training, or other education program or activity based on sex.<sup>10</sup> As such, programming that limits membership or participation to one gender and excludes others violates the facial mandate of Title IX.

On January 14, 2021, OCR provided guidance on Title IX and single-sex scholarships, clubs, and other programs through a Questions and Answers document (“Q&A”). The Q&A explains that programs intended to increase, encourage, and support the inclusion of students of a specific sex do not violate Title IX so long as it is clear that such programs are open and available to all students regardless of sex. For example, a course with a sex-specific title (*i.e.*, Women’s Studies) does not violate Title IX so long as the course is open equally to all students. When the title of a program or activity raises an inference of a sex-based preference, however, OCR requires that the university communicate effectively to the campus community that such activities are in fact available to all students.<sup>11</sup>

The January 2021 Q&A is (mostly) consistent with earlier OCR guidance that colleges and universities are not precluded from having “gender themed” mentoring and support programming (such as programming designed to support and mentor women) so long as such programming is not sex-exclusive and does not use sex-exclusive recruiting.<sup>12</sup> In its 2012 resolution agreement with CUNY, for example, OCR opined that BMI did not violate Title IX (or Title VI) because none of the BMI programs or activities excluded persons who were not black and/or male from

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<sup>9</sup> See Letter from Department of Education Office for Civil Rights, Compliance Team Leader Erin Gimbel to City University of New York, Chancellor Dr. Matthew Goldstein, November 23, 2012, *available at* <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/02062094-a.html>.

<sup>10</sup> See 34 C.F.R. § 106.31(a).

<sup>11</sup> See Department of Education, Office for Civil Rights, Questions and Answers Regarding OCR’s Interpretation of Title IX and Single Sex Scholarships, Clubs, and other Programs, January 14, 2021, *available at* <https://www2.ed.gov/about/offices/list/ocr/docs/qa-single-sex-20210114.pdf>. Note, however, that this guidance document preceded the changeover from the Trump to the Biden administration, and so may not fully reflect the view of the current administration on the nuances of compliance and enforcement.

<sup>12</sup> See Letter from Department of Education Office for Civil Rights, Compliance Team Leader Erin Gimbel to City University of New York, Chancellor Dr. Matthew Goldstein, November 23, 2012, *available at* <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/02062094-a.html>.

participating. Further, the CUNY website and BMI’s promotional materials expressly stated that the programs were open to all, regardless of race, color, national origin, or sex. OCR clarified that including statements on promotional materials that a program is open to all is not a *per se* legal requirement, but can be helpful in proactively clarifying that such a program is not discriminatory.<sup>13</sup>

Two recent OCR resolution agreements further underscore the Department’s position on open access to educational programming. On December 14, 2018, Tulane University entered into a resolution agreement with OCR by which Tulane agreed to review six female-only scholarships and female-only mentoring and internship programs to assure that male students do not face illegal discrimination with regard to financial aid or educational programs.<sup>14</sup> Likewise, on August 14, 2019, OCR resolved a complaint against Clemson University involving three single-sex programs for girls only. Clemson agreed to open the three programs/initiatives to all students, regardless of sex. Further, in its resolution with OCR, Clemson revised references to the programs on its website to clarify that the programs are “available to all qualifying students regardless of their gender or gender identity.”<sup>15</sup>

Title IX’s implementing regulations also prohibit higher education institutions from providing “significant assistance” to any *outside* organization that discriminates on the basis of sex in providing any benefit or service to the recipient’s students.<sup>16</sup> The regulations do not define “significant assistance,” as OCR has stated that such a determination “will turn on the facts and circumstances of each specific situation.”<sup>17</sup> Factors considered include whether the university provides financial support; tangible resources, such as staff, use of facilities, or equipment; or intangible benefits, such as recognition or approval; and whether the relationship is occasional or temporary, or permanent or long-term.<sup>18</sup>

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<sup>13</sup> *See id.*

<sup>14</sup> *See* Letter from Department of Education Office for Civil Rights, Team Leader Attorney Paul Coxe to Tulane University President, Michael A. Fitts, December 14, 2018, *available at* <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/06182230-a.pdf> and accompanying Resolution Agreement *available at* <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/06182230-b.pdf>, *available at* <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/06182230-b.pdf>.

<sup>15</sup> *See* Letter from Department of Education Office for Civil Rights, Team Leader Letisha Morgan-Cosic to Mark Perry, August 14, 2019, *available at* <http://www.saveservices.org/wp-content/uploads/OCR-LETTER-CLEMSON-U-8.14.2019.pdf> (explaining dismissal of administrative complaint).

<sup>16</sup> 34 C.F.R. § 106.31(b)(6).

<sup>17</sup> *See* Department of Education Office for Civil Rights, Dear Colleague Letter: Voluntary Youth Services Organization, December 15, 2015, *available at* <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201512-voluntary-youth-service-organizations.pdf>.

<sup>18</sup> By way of example of what *is* considered “significant assistance,” in a November 19, 2015 resolution agreement with Seattle University, OCR determined that the university provided significant assistance when it hosted an external organization’s conference for middle school aged girls interested in STEM. Although the university did not provide direct financial support to the conference, it indicated on its website that the university’s College of Science & Engineering was the “official sponsor” of the program, provided free use of campus facilities, and served as a fiscal agent for processing participants’ registration fees and conference gifts. According to OCR, this amounted to “significant assistance” in violation of Title IX. *See* Letter from Department of Education Office of Civil Rights,

In addition to prohibiting discrimination in programs, Title IX also prohibits institutions from providing different types or amounts of financial assistance, or limiting eligibility for financial assistance, on the basis of sex.<sup>19</sup> In other words, colleges and universities generally may not administer scholarships or other forms of financial aid that employ selection criteria that limit applicants by gender. The 2021 Q&A clarifies this prohibition with limited exceptions, including recognizing the regulatory provision permitting affirmative action to address specific conditions in the education program or activity that had resulted in limited participation of a particular sex.<sup>20</sup>

Another notable exception exists for scholarships established through wills, trusts, bequests, or other similar legal instruments that require that the award go to individuals of a particular sex. Such awards are permissible if there is not an overall discriminatory effect and they are administered pursuant to procedures that comply with 34 C.F.R. § 106.37(b)(2), often referred to as “pool and match,” whereby the recipient first determines the financial package for each scholarship recipient based on neutral factors, pools the total money from all sources (including any sex-restricted donor gifts) and matches specific scholarships to students based on the scholarship donors’ expressed desires. The end result is that all scholarship recipients receive the monetary amount they would have received without any consideration of the source of funds. Importantly, the regulation does not expressly authorize this approach for funding sources that are not established pursuant to wills, trusts, bequests, and other similar instruments.

Additionally, 34 C.F.R. § 106.37(a)(2) provides that, in administering financial assistance to its students, a university may not, through listing, approving, or soliciting, assist an external organization in a manner that discriminates on the basis of sex. The Q&A clarifies that when a university does promote or advertise an external scholarship, OCR expects that they will take reasonable steps to verify that the scholarship does not discriminate on the basis of sex. Notably, if the title or description of a scholarship may be reasonably perceived as only open to one sex, the Q&A indicates that Title IX may be implicated, and universities must clearly communicate that the scholarship is open to all students regardless of sex.<sup>21</sup>

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Team Leader Kelli Lydon Medak to Seattle University President, Dr. Steogeb V. Sybdorg, November 19, 2015, *available at*

<https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/10152145-a.pdf>.

<sup>19</sup> 34 C.F.R. § 106.37(a)(1).

<sup>20</sup> See Department of Education, Office for Civil Rights, Questions and Answers Regarding OCR’s Interpretation of Title IX and Single Sex Scholarships, Clubs, and other Programs, January 14, 2021, *available at* <https://www2.ed.gov/about/offices/list/ocr/docs/qa-single-sex-20210114.pdf>.

<sup>21</sup> See *id.*

***Part Two:***  
***Navigating the Legal and Policy Implications of Campus Initiatives to Increase Diversity***

Since last summer many campuses have activated new efforts to increase diversity, equity, and inclusion, including via hiring practices, the deployment of scholarships and other funding opportunities, support programs, and research opportunities. The following is general guidance that seeks to apply the principles set forth in *Part One* in these various contexts. It is important to acknowledge, however, that the various approaches percolating across campuses are sometimes complicated by potential legal and policy barriers that will differ according to jurisdiction and, often, based on whether an institution is public or private.

**1. General Principles to Consider When Developing Diversity Programs and Activities.**

- For educational opportunities, program goals and corresponding eligibility criteria should be tied to the educational benefits of broad-based diversity. It is also appropriate to acknowledge systemic societal disparities and develop programs seeking to address those disparities. Examples:
  - “This scholarship is provided to students who – by reason of their background, culture, socioeconomic status, race, ethnicity, work, and/or life experiences – contribute to a fuller representation of perspectives within the academic life of the University.” Note, though, that this approach may not be permissible for public institutions in states (like California, Washington, and Michigan, among others, that have adopted ballot initiatives precluding not only discrimination but also “preferential treatment” on the basis of race, ethnicity, or other delineated factors.
  - “Diversity, equity and inclusion are integral to the achievement of excellence in our classrooms and laboratories; therefore we are committed to attracting students from all backgrounds, including in particular those from underrepresented communities, for this opportunity.”
  - “Historically, this program was designed to attract talented African American, Latinx, and Native American applicants to the MBA program. This event is now open to all prospective students, of any race or ethnicity, who have an interest in improving the visibility of underrepresented students in business schools and in management.”
  - “Our programs are designed to support women pursuing degrees and careers in science, technology, engineering and mathematics but are open to students of any gender identity.”
- For employment opportunities, eligibility must be open to all, but it is reasonable to describe the kinds of qualities you are looking for in a candidate in ways that also align with the University’s diversity mission. Examples:
  - “We seek a scholar who will contribute to the University’s commitment to excellence, inclusivity, and diversity.”

- “Faculty candidates should provide concrete examples illustrating how they have contributed to increasing and promoting diversity and inclusion in their field.”
- “Applicants who can demonstrate that they have contributed to expanding the ways in which communication is delivered in order to reach a more diverse audience are welcome.”
- “We are interested in applicants who can demonstrate how they have contributed to expanding diversity in their prior role.”
- “The University is committed to fostering and maintaining a diverse work culture that respects the rights and dignity of each individual, without regard to race, color, national origin, ancestry, religious creed, sex, gender identity, sexual orientation, gender expression, height, weight, marital status, disability, medical condition, age, or veteran status. The University is supportive of the needs of dual career couples and is an Equal Opportunity/ Affirmative Action Employer.”
- “The University is an equal opportunity/affirmative action employer and is committed to increasing the diversity of its faculty. We welcome nominations of and applications from anyone who would bring additional dimensions to the University’s research, teaching and clinical mission, including women, members of historically underrepresented communities groups, protected veterans, and individuals with disabilities.”
- Scholarships, programs, employment positions, or other opportunity that are specifically reserved for candidates or applicants based upon race or gender may face legal challenges, and these challenges are likely to be successful – particularly if brought against public institutions (particularly those in states like California, Washington, and Michigan).

## **2. Increasing Diversity in Employment.**

- It is generally acceptable to:
  - Advertise broadly that you encourage candidates from underrepresented groups, as long as you are clear that these are not the *only* candidates sought.
  - Actively seek or recruit applications or submissions from members of underrepresented groups or otherwise engage in targeted recruitment. For example, institutions might share job postings via listservs of associations targeted toward women and individuals from underrepresented communities. Institutions might also attend job/career fairs held by those associations to share information about specific opportunities and to network generally.



- Explicitly state in job postings the institution’s commitment to diversity, equity, and inclusion. For example, the job posting could include language like the following: “The University seeks to recruit and retain a diverse workforce as a reflection of our commitment to serve the diverse people of our state, to maintain the excellence of the University, and to offer our students richly varied disciplines, perspectives, and ways of knowing and learning.” This should be in addition to the equal employment opportunity language required of federal contractors by Executive Order 11246.
- Consider the diversity of the applicant pool, particularly as compared to the relevant labor pool for the position at issue, before moving forward with a search. That is, if the aggregate racial or gender breakdowns of the applicant pool deviate significantly from those of the relevant labor pool, the search committee/hiring manager may choose to reopen the search and engage in more targeted recruiting (as described above) to increase the diversity of the pool. It is important, however, that the search committee/hiring manager not know the specific identities of the individual applicants in the pool, just the aggregate demographics, to avoid any suggestion that individual identities affected the ultimate hiring decision. It is likewise important for search committees/hiring managers to understand that perfect reflection of the labor force is *not* the desired/required goal, as it raises concerns both practical (the search could be stalled by repeated re-opening of the posting) and legal (the institution could be deemed to have a de facto quota for applicants by race, gender, etc.).
- Consider candidates’ demonstrated commitment to diversity, equity, and inclusion in evaluating them. Institutions should, of course, be careful not to assume such commitment on the part of individuals from underrepresented backgrounds, but would need to equitably apply this criterion to all candidates.
- Train those making selection decisions to ensure they understand the goals you are trying to achieve, including those related to diversity, equity, and inclusion, and how they may (and may not) seek to achieve them. This can include requiring supervisors and search committees to participate in trainings to mitigate unconscious biases in evaluating candidates.
- Review for unintentional structural biases in hiring processes, particularly if job postings regularly result in diverse applicant pools, but never in hires that contribute to workforce diversity. This kind of review is a component of, and in keeping with, the affirmative action expectations of Executive Order 11246.
- Train faculty and staff on how to cultivate a more inclusive and diverse workforce or student body to create a pipeline of qualified and diverse candidates, including through the approaches discussed below.
- Ensure mentoring and resources are available to all members of your community, including those from underrepresented groups.

- As noted above, you may freely and actively recruit underrepresented candidates (among others) to apply for a specific position. But the offer of employment should ultimately be made to the best candidate for the position, without consideration of race or gender, based upon qualifications agreed upon at the beginning of the search and that are related to the role.
- For many campuses, increasing the diversity of the faculty in particular is a high priority.
  - There is some support for the idea of dedicating funds to attract and hire faculty who will contribute to the diversity of a school or department so long as hiring decisions are not made on the basis of race or any other legally protected status. However, in such cases, it would be important to maintain documentation that hiring committees are instructed not to consider race or other legally protected identity characteristics in making their decisions, to help defend against any challenges to such programs. And of course, this approach is less likely to be viewed as permissible if adopted by public institutions in states like California, Washington, and Michigan.
  - Other approaches to increasing faculty diversity could include incentive programs based on intellectual diversity (for example, expanding the research or teaching specialties of a department) or based on commitment to diversity, equity, and inclusion as demonstrated through teaching, service, or scholarship.

### **3. Efforts to Increase Student Body Diversity Through Scholarships or Fellowships.**

The general principles discussed above apply to scholarships and fellowships for students as well. Creating a scholarship, fellowship, or other funding opportunity for students restricted on the basis of race, ethnicity, or sex, or using preference language that includes such criteria could be challenged, and likely successfully, particularly if the challenge is brought against a public institution (and especially one in a state like California, Washington, or Michigan).

- Adopting a scholarship or fellowship program that more broadly advances the school's diversity or anti-racism mission would, however, be appropriate. There are many different ways to frame such a program.
  - For example, the program might simply acknowledge institutional commitment to diversity or the societal barriers that may have precluded such diversity in the past.
    - Example: "Our school is committed to attracting students from underrepresented communities, with a high priority for academic areas where the greatest historical underrepresentation exists."
    - Example: "Historical structural barriers have made access to our field more challenging for women. We are motivated to increase the presence of women because we know that diverse perspectives are specifically connected to the achievement of excellence."
  - Programs could also be named and described in ways that signal their purpose in promoting the institution's diversity, equity, inclusion, and anti-racism missions. For example, a scholarship program that seeks to promote racial diversity might be named for the institution's first African-American alumnus, while another focused on

increasing gender diversity in the STEM fields might be named for a prominent alumna. In general, the more targeted a scholarship program appears to be, the more important it will be for the institution to make clear that the program is *not* limited by race or gender. For example, a Women in Science and Engineering scholarship description should include language indicating that the program is open without regard to gender identity.

- Programs can also include criteria that correspond with, and further, the institution’s diversity and anti-racism efforts. For instance, a scholarship program may require applicants to write an essay explaining the importance of addressing underrepresentation in a particular field, or to demonstrate, via their extracurricular or other activities, a commitment to promoting diversity, equity, or inclusion.
- It is also possible to incorporate language into privately funded scholarship and fellowship agreements to address specific donor sensitivities. Example statements of intent could include:
  - “In creating this scholarship, my hope is to provide scholarship support for students who have faced challenging social, economic, educational, cultural or other life circumstances.”
  - “. . . to provide scholarship support for students demonstrating a commitment to working with underrepresented or disadvantaged populations;”
  - “. . . to provide scholarship support for students who attended a high school that may not have college support or counselling resources that are competitive with other high schools that have historically sent more graduates to highly competitive colleges and universities....”
  - “. . . to provide fellowship support for a student who graduated from an historically Black college or university (HBCU), a historically Hispanic/Latinx serving institution (HHSI) or a tribal college.”
  - “to provide scholarship support for neurodiverse thinkers...”
- Donor-funded, sex-restricted scholarships are permissible only in very narrow circumstances. Careful controls need to be in place to ensure that the financial aid awards are made without regard to sex, and that the scholarship is simply used to fund an award that was previously set without regard to an individual’s sex. This is typically done via a “pool and match” process. Under such a process, an institution (or relevant unit thereof) first determines, using neutral criteria, to which students to award aid and in which amounts. The institution (or unit) then “matches” each aid package to existing institutional or donor-funded accounts. In this way, any donor restrictions would be met – the money would be awarded consistent with the donor’s expressed desires – but the student receives only the amount of aid that the institution had previously determined to be appropriate. To assess whether a “pool and match” approach is possible, a careful and rigorous legal analysis should be performed on an individual basis, taking into account that financial aid

decisions are often decentralized at the unit level, with great variations of approach across units.

#### **4. Mentoring and Retention Programs Focused on Certain Populations of Students or Employees.**

- Mentoring and other retention-based programs should not restrict participation on the basis of race or gender. However, they can still be targeted at particular groups or critical issues.
- Example: It would be appropriate to develop a mentoring program to address issues faced by historically underrepresented students in STEM fields, as long as that program is not limited to students based on race or gender (for example).

#### **5. Affinity Groups, Race-Based Caucuses, and Safe Spaces.**

- Affinity groups are appropriate as long as participation is not limited to a particular race or gender. You can, however, make it clear that the focus of the group is on support for the Asian American Pacific Islander community, for example. In this way, anyone who supports that mission can join, regardless of identity. Having a mission-based focus also permits removal of those who do not support, but instead disrupt, the group's activities in support of that mission.
- Individual meetings and events can have a racially targeted purpose – such as discussing ways in which White students, staff or faculty could discuss issues of race or focusing on ways in which White people can become allies or promote anti-racism --but such meetings and events cannot be limited by race, gender, or other protected identity characteristic. In the example above, for instance, anyone who would like to know more about how White people can become allies would be able to participate, regardless of their individual racial/ethnic identity.

### ***Conclusion***

Promoting diversity, equity, and inclusion, particularly in the current legal landscape, can be daunting, and particularly so for public institutions in states that have limited certain approaches that would further those efforts. Nevertheless, as the events of the past year make clear, it is more important than ever for our institutions to seek to become a true “marketplace of ideas,” where students, faculty, and staff of all backgrounds can come together to learn, work, and thrive. We hope this primer is useful in planning a practical and compliant approach to putting mission-driven diversity goals into action.