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Roadmap to Diversity and Educational Excellence: Key Legal and Educational Policy Foundations for Medical Schools

Second Edition

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Roadmap to Diversity and Educational Excellence: Key Legal and Educational Policy Foundations for Medical Schools

Second Edition, 2014

Including Updates Based on the U.S. Supreme Court's 2013 Decision
in *Fisher v. University of Texas*

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About this Publication

This publication, *Roadmap to Diversity and Educational Excellence: Key Legal and Educational Policy Foundations for Medical Schools*, is the second edition of the first *Roadmap* publication in the series that addresses enrollment and admission issues related to holistic review, student diversity, and evaluation. Produced by the AAMC Advancing Holistic Review Initiative, this document has been developed to help medical schools establish and implement institution-specific, diversity-related policies that will advance their core educational goals with minimal legal risk. It includes new guidance associated with the U.S. Supreme Court's June 2013 decision in *Fisher v. University of Texas*.

Achieving the educational and health care-related benefits that come from a diverse student body requires concerted, school wide efforts. Therefore, the AAMC encourages medical schools to use this publication as a tool to guide collaboration and discussions among their institution's leadership; faculty; admissions, diversity affairs, financial aid, and recruitment officers; legal counsel; students; and others engaged in and affected by diversity-related issues.

The content of this publication should not be construed as institution-specific legal advice, and readers should not act on information contained in this publication without professional counsel.

Other Publications in This Series

Roadmap to Diversity: Integrating Holistic Review Practices into Medical School Admissions Processes (2010).

Roadmap to Excellence: Key Concepts for Evaluating the Impact of Medical School Holistic Admissions (2013).

Acknowledgments

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We also thank The College Board. Segments of this policy guide are adapted from three publications of The College Board's Access & Diversity Collaborative (of which the AAMC is a sponsor), with express permission of The College Board: *Admissions and Diversity After Michigan: The Next Generation of Legal and Policy Issues* (The College Board 2006); *An Action Blueprint: Model Practices for Achieving Diversity in Higher Education* (The College Board 2008); and *Understanding Fisher v. the University of Texas: Policy Implications of What the U.S. Supreme Court Did (and Didn't) Say About Diversity and the Use of Race and Ethnicity in College Admissions* (The College Board 2013). Information on the Access & Diversity Collaborative can be found at www.collegeboard.com/diversitycollaborative.

This publication is also available free of charge on the AAMC's Web site at: www.aamc.org/holistic-review.

For more information about this publication, please email the Advancing Holistic Review Initiative at holisticreview@aamc.org.

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FOREWORD

The legal and policy guidance provided in this publication are as important today as they were when it was first produced in 2008. In an era of physician shortages, unequal access to health care, and corresponding disparate health outcomes, a culturally competent, inclusive physician workforce is a key driver for high-quality health care for all Americans. Educating that workforce depends on the teaching and learning occurring in our medical schools, which, in turn, is influenced by the interaction among student peers and faculty. Indeed, as Justice Powell observed in the landmark case of *Regents of the University of California v. Bakke*, in 1978:

Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.

Nearly 40 years later, these words still ring true. If we are serious about creating and sustaining diversity in medical education, biomedical research, and the physician workforce, we must build on our critical admissions work and transform our learning environments to maximize the benefits of diversity and inclusion for teaching, learning, and optimal patient care. In other words, throughout the medical school enterprise, we must focus intentionally on the students we want to educate and the physicians we want to produce.

The reissuance of this important resource, with significant input by the AAMC's Advisory Committee on Advancing Holistic Review and staff, continues a focus on the legal and policy underpinnings essential for developing sustainable, mission-based diversity policies and programs that materially further the mission-driven excellence our medical schools seek. While prompted by the U.S. Supreme Court's decision in *Fisher v. University of Texas* in June 2013, this guide reflects more than just a legal update. The authors' intent is to provide additional insights into all facets of law, policy, and research in light of developments since 2008 so that the guide is up-to-date and as relevant to the current challenges that medical schools face as possible.

This work demands the affirmative commitment and coordination of medical school leadership, enrollment officials, legal counsel, faculty, and all others charged with enhancing the student learning experience. Through our collective action, we can build and leverage learner diversity to realize each medical school's unique institutional mission and address our nation's health care needs. Thank you for joining us in this essential effort.

Alicia D. H. Monroe, M.D.
Chair, AAMC Advisory Committee on Advancing Holistic Review
September 2014

EXECUTIVE SUMMARY

A shared objective of the majority of U.S. medical schools is to arrive at a destination where a diverse class—including a racially and ethnically diverse class—enhances teaching and learning for all students and contributes to graduates’ capacity to provide comprehensive, high-quality medical care in all communities. This *Roadmap to Diversity and Educational Excellence* describes important policy-development foundations for successfully achieving that objective.

Medical school officials should be able to affirm five fundamental points if those foundations are sufficiently in place:

1. Enrolling and educating a diverse class of medical students is central to our medical school’s educational mission.
2. Our medical school has developed policy statements that articulate the precise benefits (including educational and workforce outcomes) associated with a diverse student body—including with respect to race and ethnicity, but *not solely* with respect to race or ethnicity.
3. In cases where our medical school considers race or ethnicity when making enrollment decisions (such as selection in admissions and awarding scholarships), we strive to ensure that
 - the consideration of race and ethnicity is demonstrably necessary to achieve our access and diversity goals,
 - the consideration of race and ethnicity occurs via a process by which race and ethnicity are used in sufficiently flexible ways and without an undue burden on nonbeneficiaries (for example, as part of an authentically individualized, holistic review admissions process), and
 - the consideration of race and ethnicity materially advances the achievement of our diversity goals.
4. Our medical school has a well-managed, routine process for evaluating the ways school policies are designed (and actually work) to achieve diversity goals, consistent with all core mission objectives.
5. As medical school policymakers and faculty members, we are equipped to talk to internal and external stakeholders about the importance of diversity in medical education and its association with achieving core institutional aims, such as producing a well-qualified physician workforce.

The *Roadmap to Diversity and Educational Excellence* incorporates key facets of those fundamentals into the following key principles:

- A medical school’s leadership is vital for efforts to achieve mission-based diversity goals, along with a commitment to action throughout the school—including admissions, financial aid, recruitment, student affairs, diversity affairs, academic affairs, and legal offices. Successful medical school efforts to promote mission-related goals associated with a diverse student body require hard work by many.
- The key to success for any medical school seeking to enroll and graduate a broadly diverse class is the connection the school makes between the diversity it seeks and the *educational, mission-driven* goals to which it aspires.

- Diversity is not a “one-size-fits-all” concept. To the extent that diversity-related efforts are mission-driven (as they should be), diversity objectives should reflect the unique goals, settings, and cultures of the various medical schools with which they are associated.
- Correspondingly, diversity should not be viewed as an end goal, but as a means to achieving core educational goals as defined by the medical school.
- The effective development and implementation of diversity-related policies depends in part on
 - clear policies designed to advance those goals,
 - sound evidentiary bases that support those policies, and
 - a process of continual examination of the educational goals medical schools seek and the ways relevant policies (individually and as a whole) advance those goals.

Through elaborating on these legal and policy principles, along with illustrations and tools, this publication offers medical school officials a roadmap that can help them chart a course toward achieving their school-specific, mission-driven diversity goals.

As medical schools “plan their journey,” they should be aware of one of the underlying points of intersection that helps explain the structure and substance of this resource: The guide focuses on mission-driven diversity goals including, but not limited to, race and ethnicity interests. That focus, however, must be informed by relevant legal guidance from the courts, which (in this setting) centers on issues of race and ethnicity largely because of their relevance to admissions issues and the corresponding rigorous scrutiny imposed by federal courts on claims of racial and ethnic discrimination. Therefore, even where some of the discussion that follows centers very precisely on issues of race and ethnicity, that particular focus is not intended to suggest that discussions of diversity, broadly, should be so limited.

In the materials that follow

- **Chapter 1** provides an overview of key legal and policy trends associated with diversity efforts in higher education over the past several decades as a foundational framework for medical schools to consider as they establish (or refine) their diversity-related goals.
- **Chapter 2** defines key terms that are frequently integral to diversity-related policies and that have the potential of becoming a source of confusion or challenge.
- **Chapter 3** describes and explains diversity-related goals along with the benefits of diversity, which may be associated with race- or ethnicity-conscious policies.
- **Chapter 4**, which is entirely new, discusses the question of “necessity” under federal law, illustrating the importance of considering race- and ethnicity-neutral policies and practices in the context of prospective or ongoing race- and ethnicity-conscious policies and practices that medical schools may pursue.

- **Chapter 5** provides, in more operational terms, an institutional policy self-assessment guide designed to support medical school officials working to enhance student diversity to achieve their schools' mission-driven goals.
- The **Appendices** (1) present an action plan for using the information and concepts presented throughout the document; (2) examine operational questions that should be explored by medical schools as they consider and pursue race-neutral strategies as part of their enrollment regimes; and (3) include references and sources by chapter.

Finally, to have a comprehensive “map” of the key policy and legal issues associated with medical school diversity efforts, medical school officials should also review the other *Roadmap* publications in this series, which expand on and provide a more robust examination of the following:

- The process and underlying elements associated with the implementation of an individualized holistic review process in medical school admissions—in *Roadmap to Diversity: Integrating Holistic Review Practices into Medical School Admissions Process* (2010); and
- The key issues associated with a meaningful evaluation of a holistic admissions approach toward achievement of desired institutional outcomes—in *Roadmap to Excellence: Key Concepts for Evaluating the Impact of Medical School Holistic Admissions* (2013).

CHAPTER 1

“Rules of the Road”: Key Points Your School Needs to Know about Access and Diversity Policies

Mapping This Chapter: Major Legal and Educational Developments

This chapter provides an overview of education and legal developments that have a direct bearing on the ways medical schools articulate and pursue their mission-aligned diversity goals. This information is central to institutional policy development, aspects of which are discussed in subsequent chapters.

Never underestimate the power of a disappointed would-be medical student.

In 1974, Alan Bakke was denied admission to the medical school at the University of California, Davis, despite his record as a Vietnam veteran with a master’s degree in engineering and high scores on three of the four parts of his Medical College Admissions Test (MCAT) and in two of three UC-Davis admissions interviews. He challenged his rejection, alleging that the medical school’s admissions policy—which reserved 16 of 100 spaces for underrepresented minority students, defined by the school as “Negroes, Mexican-Americans, American-Indians, and Asians”¹—constituted unlawful discrimination. And, in 1978, he won.

At the same time, for the first time in its history, the U.S. Supreme Court acknowledged that institutions of higher education *might* consider race as part of their admissions process. That decision—and the single “compromise” opinion of Justice Powell, in particular—has become the guiding principle for higher-education leaders for nearly four decades. The principle that higher-education institutions could consider race and ethnicity in appropriately circumscribed ways (“narrowly tailored,” in legal terms) to promote the educational benefits of diversity became the central basis for developing higher-education enrollment policies, including those related to admissions, financial aid, recruitment, and outreach. That principle, in an admissions context, was reaffirmed by the U.S. Supreme Court in 2003 when the Court upheld a law school’s individualized, holistic review of applicants that included a consideration of race and ethnicity. Since then, it was affirmed again in 2007 (in an elementary and secondary education setting) and, most recently, in June 2013.² (See Exhibit 1.1 for summaries of the relevant cases.)

Indeed, Justice Powell’s *Bakke* opinion in 1978 set the stage for a set of evolving, mutually reinforcing trends in education and law, which must be understood if medical schools are to continue to meet their diversity goals in lawful—and educationally sound—ways.

Higher-education trends toward educational outcomes. In general, higher education’s diversity focus has evolved from efforts to remedy the effects of past discrimination (and, correspondingly, to pursue a “social justice” agenda, such as broadly addressing population disparities) to more clearly articulated, forward-looking educational strategies associated with the achievement of the educational benefits associated with a diverse student body. In part driven by the difficulty of actually establishing court-acceptable connections between past discriminatory practices and present race-conscious policies and in part by an understandable institutional reluctance to publicly air past histories of discrimination, the clear evolution of higher education—and medical school—policies has been toward a

forward-looking *educational* framing. As a result, corresponding to the efforts of their higher-education counterparts, medical schools are increasingly devoting more attention to the relevance of a diverse student body and to their ability to achieve their core mission aims of producing highly qualified graduates who will be able to effectively serve all segments of society. (A central component of this shift has been the use of individualized, holistic review in many medical schools' admissions processes.³)

Exhibit 1.1. The United States Supreme Court, Race, and Education: Key Admission Cases

- *Regents of the University of California v. Bakke*, 1978. The Court rules that the University of California, Davis, medical school's "two-track" admissions policy (16 of 100 admissions spots reserved for minorities, who were evaluated against different standards) is unlawful. Justice Powell in a key swing vote agrees with the result but refuses to rule out the prospect of any consideration of race in higher-education admissions. In a critical passage, Justice Powell recognizes that the educational benefits of diversity constitute a "compelling interest" that can support the limited consideration of race in higher-education admissions.
- *Grutter v. Bollinger* and *Gratz v. Bollinger*, 2003. The Court rules simultaneously on two University of Michigan admissions policies, concluding that the educational benefits of diversity are a "compelling interest" that can justify the limited use of race in higher-education admissions. Then, with respect to the means of achieving that interest, the Court approves (in a law school setting) the individualized, holistic review of applicants, where race is one factor among many considered, and it strikes down (in an undergraduate setting) the overly mechanical and rigid process of awarding 20 of 150 possible admissions points based on the status of students as "underrepresented minority students."
- *Parents Involved in Community Schools v. Seattle School District No. 1*, 2007. In a set of splintered opinions, the Court strikes down two separate race-conscious student-assignment policies in K-12 settings, concluding that the interests advanced by the districts did not align with previously recognized "compelling interests" and that the districts had not established the necessity of their respective uses of race to achieve their goals (in particular, by showing demonstrable impact of their race-conscious policies toward the achievement of their goals). At the same time, a majority of the Court (four dissenting justices and Justice Kennedy, through a key swing vote opinion) recognizes compelling interests in achieving the educational benefits of diversity and avoiding the harms of racial isolation.
- *Fisher v. University of Texas*, 2013. In a narrow opinion, the Court in a 7-1 vote reaffirms the tenets of *Grutter* and *Gratz* in a challenge to the University of Texas's (UT) undergraduate admissions policy. In the case, centered on a challenge to the consideration of race for applicants not receiving automatic admission through a statewide percentage plan, the Court sends the case back to the Fifth Circuit for further action. It rules that the lower court had improperly deferred to the University of Texas about the race-conscious means by which it sought to achieve the educational benefits of diversity and focuses its analysis on the question about the "necessity" of UT's pursuing a race-conscious policy in light of the racial diversity that could follow implementation of "race-neutral" policies.

This movement from a historical, remedial perspective to a forward-looking, educational focus has had major policy-development implications for medical schools. First, as a result of that shift, the central questions of focus have become more accountability- and outcome-driven: What actual benefits might I generate by assembling and educating a diverse class of aspiring doctors? How might I better prepare all students to be physicians through a diverse learning environment? How can a more diverse class of students improve my school's ability to enhance the delivery of medical services to all populations, with a particular focus on serving historically underserved populations? What is my rationale? What information supports my position?

Second, and correspondingly, this movement toward educational outcomes has shifted the institutional focus from rigid, "numbers"-oriented, system wide input measures to specific school-based *outcomes* within an institution of higher education. For instance, the focus on outcomes and benefits directly associated with student diversity in a medical school may (and should) be broadly aligned with the outcomes and benefits framed more generally by the university with which it is associated. However, given inherent contextual differences, the *precise* benefits associated with diversity are certain to be unique to the medical school setting. In short, the emerging central questions regarding a diverse student body have become more narrowly, programmatically framed within the context of institution-wide goals.

Third, this trend has begun to force a more robust alignment among various segments associated with enrollment—from all facets involved in recruitment, selection, and financial aid (elements focused on the matriculation of a class of students) to academic and other efforts centered on the student experience once the class of students is admitted. With these connections has emerged a renewed sense (building on Justice Powell's reasoning in *Bakke*) that diversity is about more than numbers; it necessarily includes a focus on the educational dimensions of any institutional program. Medical schools must, then, consider not only enrollment-related functions but also how instructional strategies and curriculum align with articulated diversity goals and how schools explain that alignment.⁴

Federal legal directions affirming educational interests. These educational trends have occurred at the same time that federal decisions amplifying Justice Powell's *Bakke* opinion have affirmed and explained the key elements that

As higher education's diversity focus shifts from a historical, remedial perspective to a forward-looking, educational one, the central questions of focus have become more accountability- and outcome-driven:

- What actual benefits might I generate by assembling and educating a diverse class of aspiring doctors?
 - How might I better prepare all students to be physicians through engagement in a diverse learning environment?
 - How can a more diverse class of students improve my school's ability to enhance the delivery of medical services to all populations, with a particular focus on serving historically underserved populations?
 - What is my rationale?
 - What information supports my position?
-

... diversity is about more than numbers; it necessarily includes a focus on the educational dimensions of any institutional program.

can support race- and ethnicity-conscious policies and practices, which remain of central concern under federal law.⁵

In 2003, the U.S. Supreme Court addressed the lawfulness of race-conscious admissions policies at the University of Michigan, in its law school and in its undergraduate program. The Court upheld the law school admissions policy, which involved an individualized, holistic review of applicants in which race was but one factor considered among many, concluding, in part, that the educational benefits that the university sought to achieve through student body diversity—improving teaching and learning, enhancing civic values, and preparing students for a 21st-century workforce—were, indeed, “substantial,” “real,”

and “compelling.” The Court’s conclusion that, as a matter of federal law, the benefits of diversity could support appropriately designed and implemented race-conscious admissions policies was affirmed by *all nine* members of the Court in 2007 in a case involving race-conscious K-12 student assignment policies. And in 2013, all eight justices who took part in *Fisher* reaffirmed this framework when reviewing a challenge to the University of Texas’s undergraduate admissions policy.⁶

Thus, the Court’s legal conclusion with respect to the University of Michigan’s law school has set the stage for medical schools to work confidently to articulate and establish core educational goals associated with diversity that may, in appropriate circumstances, support institution-specific, mission-aligned race-conscious policies. As Exhibit 1.2 illustrates, it is important that relevant enrollment policies be aligned with each other as they individually and collectively support the achievement of core objectives, which serve as benchmarks for gauging success with respect to mission-driven goals. And, along the way, collecting, evaluating, and understanding relevant evidence regarding what may be yielding success (or not) is essential.

Beyond the issue of diversity, standing alone, a majority of the Court in 2003 and a different majority of the Court in 2007⁸ expressly recognized the key relationship between principles of access and equal opportunity on the one hand, and those associated with the core educational benefits of diversity on the other. Thus, although the Court has not definitively ruled on the circumstances in which opportunity-related principles might independently support race-conscious practices in a higher-education setting, the door remains open for medical schools to incorporate core access and equal opportunity principles into their enrollment-related policies, particularly as they address issues of critical access to high-quality health care that are so central to the schools’ mission-driven aims.

In concrete terms, this means that medical schools might justify interests distinct from (although related to) improved teaching and learning, such as interests in the workforce goals of effectively serving a racially diverse patient population and addressing pervasive racial disparities in health care.⁹ Medical schools play a vital role in eliminating health disparities by developing a workforce composed of people of all backgrounds to bridge current differences between providers and patients. (The benefits associated with a diverse medical class that may advance medical school mission-driven goals are the focus of Chapter 3.)

Federal legal directions requiring rigorous review and evaluation. Just as the U.S. Supreme Court has recognized core educational and equal opportunity interests that may be “compelling” and therefore justify race-conscious

Exhibit 1.2. The Alignment Between Medical School Mission and Diversity: An Institutional Paradigm⁷

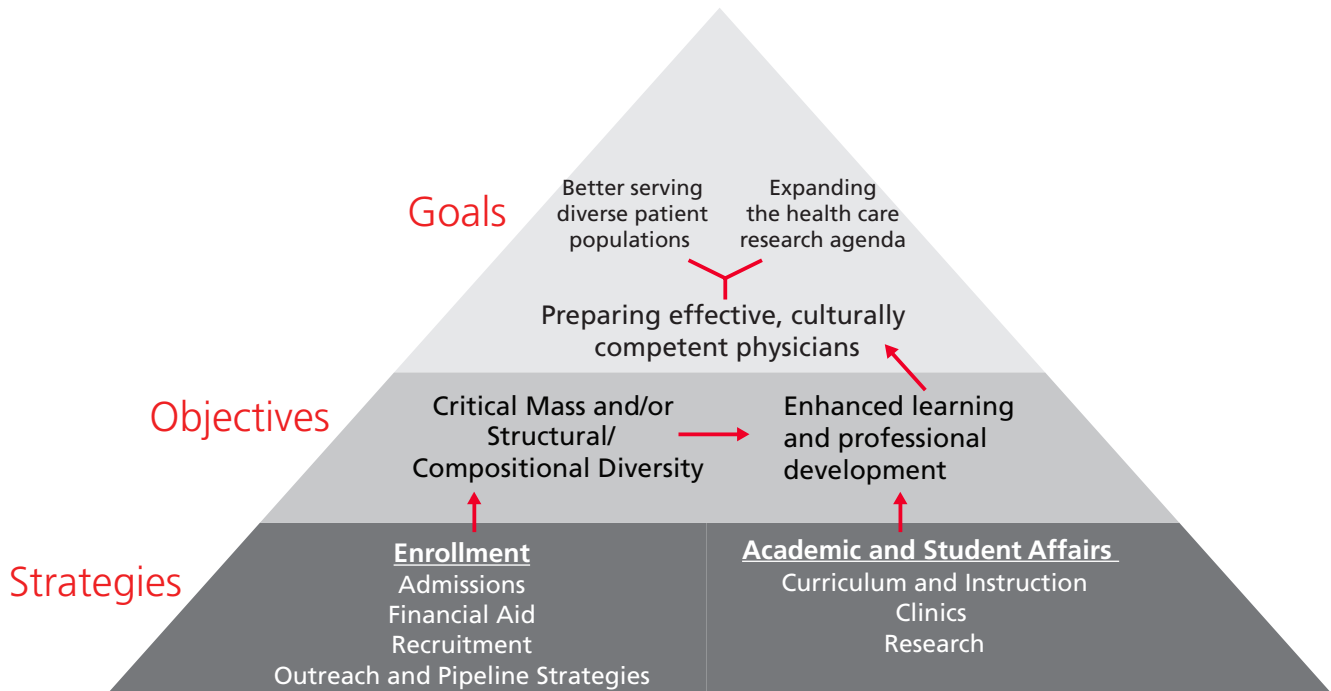


Exhibit 1.3. Diversity Is More Than Race and Ethnicity

The concept of diversity as it is associated with achieving educational goals cannot relate solely to race or ethnicity, nor can it be just about “the numbers.” Otherwise, the concept will likely reflect more of an interest in racial balancing—a forbidden focus under prevailing federal case law.

As used by medical schools in establishing student-related goals and objectives, the term “diversity” should be defined in a broadly inclusive manner, which may include personal attributes, experiential factors, demographics, and other considerations. It may also include a focus on race and ethnicity, to be sure, but it must do so in the context of broader, diversity-related educational interests and goals that the school clearly explains in its policies.

SOURCES: *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

practices, it has also explained, operationally, the ways those policies must be designed and implemented if they are to be upheld under federal law.

While the Court has indicated that limited deference may be appropriate to higher-education institutions in establishing their mission-driven educational goals, it demands a rigorous evaluation of any race-conscious means designed to achieve those goals. Stated differently, the Court has explained that to survive its “strict scrutiny” analysis, race-conscious policies advancing compelling interests must be “narrowly tailored”—they must reflect a clear and fundamental coherence between ends and means. This requires that institutions be able to demonstrate that the use of race is necessary to achieve their compelling interests. In addition, policies should be well-calibrated, materially advancing goals without an overreliance on or overly mechanical consideration of race (such as the University of Michigan’s undergraduate policy under which 20 out of 150 possible admissions points were awarded categorically to its underrepresented minority student applicants). Those policies must also be the product, over time, of rigorous review and evaluation in which viable race-neutral alternatives are evaluated and, as appropriate, tried, and in which the overall operation of the policies is evaluated in light of mission-driven goals, changing circumstances, and prevailing law.

Key elements of this “narrow tailoring” inquiry, outlined in Exhibit 1.4, are explained in lay terms in Chapters 4 (identifying key points associated with the question of necessity) and 5 (addressing issues of evidence and process associated with evaluation).

State legal directions. Legal trends have not been the exclusive province of federal courts. Since 1996, eight states have adopted partial or total bans on the consideration of race, ethnicity, and sex in public higher-education enrollment decisions (six through voter initiatives, one through a governor’s executive order, and one through legislative action). (See Exhibit 1.5 for a U.S. map identifying the status of different states.) Therefore, for public medical schools in California, Washington, Florida, Michigan, Nebraska, Arizona, New Hampshire, and Oklahoma, issues regarding the soundest ways to achieve diversity goals must be informed not only by federal nondiscrimination principles, but also by specific state laws that address those issues. For those institutions, more-restrictive state rules apply, in most instances barring race-conscious policies, such as those that include the consideration of race in admissions or financial aid decisions. Collectively, the laws of these eight states bring to the fore the central question of what, if any, race-neutral avenues might effectively achieve the student diversity medical schools seek.¹⁰

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must also be the product,
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Before turning to questions of a medical school’s diversity-related goals and the methods it employs to achieve those goals, particular attention to terminology and concepts—which frequently cause confusion and invite unnecessary challenge—is warranted. Clarity on key legal and policy concepts is the central topic of Chapter 2.

Exhibit 1.4. Key Federal Legal Terms: Strict Scrutiny Review

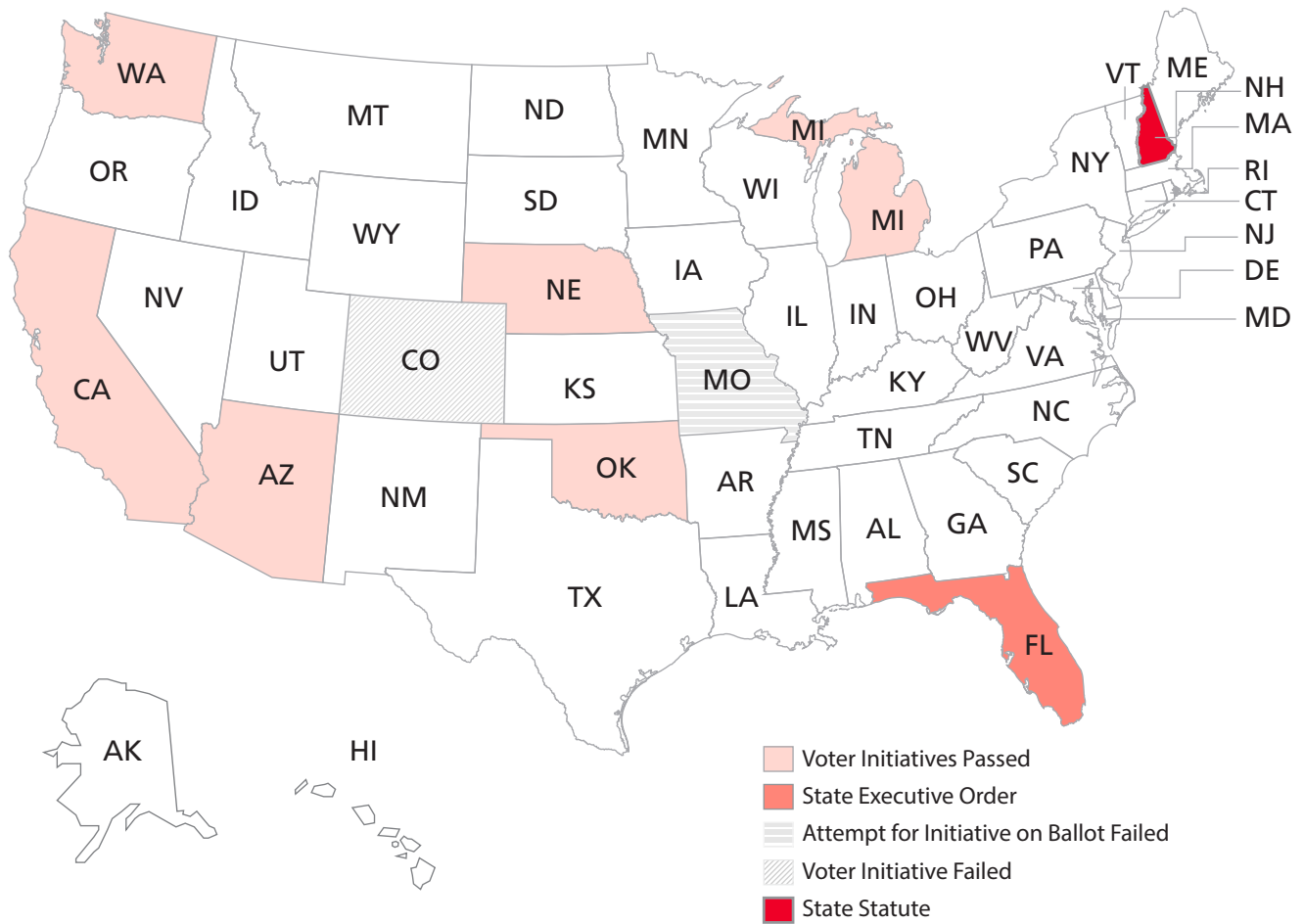
Strict scrutiny is a legal term referring to the most rigorous standard of judicial review. It applies to policies that treat students differently on the basis of race or ethnicity (“race-conscious” policies). Such policies are “inherently suspect” under federal law, and to satisfy strict scrutiny, they must serve a “compelling interest” and be “narrowly tailored” to achieve that interest. This requirement is derived from federal constitutional principles (which apply to public higher-education institutions) and identical principles of Title VI of the Civil Rights Act of 1964 (which apply to any recipient of federal funding, public or private).

According to the U.S. Supreme Court, the strict scrutiny legal standard is neither “strict in theory but fatal in fact” nor “strict in theory but feeble in fact. In striking a balance, it requires that an institution demonstrate the following when justifying race-conscious policies:

1. A **compelling interest**, which is the end that must be established as a foundation for maintaining lawful race- and ethnicity-conscious programs that confer opportunities or benefits. Federal courts have expressly recognized a limited number of interests that can be sufficiently compelling to justify considering race or ethnicity in a higher-education setting, including a university’s interest in promoting the educational benefits of a diverse student body.
2. **Narrow tailoring**, which refers to the requirement that the means used to achieve the compelling interest must “fit” that interest precisely, with race or ethnicity considered only in the most limited manner possible. Federal courts examine several interrelated criteria in determining whether a given program is narrowly tailored, including
 - the necessity of using race or ethnicity,
 - the flexibility of the program,
 - the burden imposed on nonbeneficiaries of the racial/ethnic preference, and
 - whether the policy is subject to periodic review and has an end point.

SOURCES: *Assessing Medical School Admissions Policies: Implications of the U.S. Supreme Court’s Affirmative-Action Decisions* (AAMC 2003); Coleman and Palmer, *Admissions and Diversity After Michigan: The Next Generation of Legal and Policy Issues* (College Board 2006).

Exhibit 1.5. State Bans on the Consideration of Race, Ethnicity, and Sex in Public Higher-Education Enrollment Decisions¹¹



Endnotes

- 1 *Regents of the University of California v. Bakke*, 438 U.S. 265,310 n. 45 (1978).
- 2 See *id.* at 311-315; *Grutter v. Bollinger*, 539 U.S. 306, 328, 333 (2003); *Parents Involved v. Seattle Sch. Dist.*, 551 U.S. 701, 722 (2007); *Fisher v. Univ. of Texas*, 133 S. Ct. 2411, 2418 (2013).
- 3 See, e.g., AAMC, *Roadmap to Excellence: Key Concepts for Evaluating the Impact of Medical School Holistic Admissions* (AAMC 2013), available at <https://members.aamc.org/eweb/upload/Holistic%20Review%202013.pdf>; Addams et al., *Roadmap to Diversity: Integrating Holistic Review Practices into Medical School Admissions Processes* (AAMC 2010), available at <https://members.aamc.org/eweb/upload/Roadmap%20to%20Diversity%20Integrating%20Holistic%20Review.pdf>.
- 4 See *Roadmap to Excellence: Key Concepts for Evaluating the Impact of Medical School Holistic Admissions*, *supra* note 3.
- 5 The terms “race” and “ethnicity,” despite their different meanings, are used interchangeably throughout this guide, given that the relevant “strict scrutiny” analysis required by federal nondiscrimination law (discussed later in this chapter) treats them the same. Therefore, for example, references to “race” throughout this guide should be understood to refer to “ethnicity” as well.
- 6 In addition, following the Court’s 2013 *Fisher* decision, the U.S. Departments of Education and Justice issued joint guidance on the use of race in higher-education admissions adhering to the established framework. (Samuels, Jocelyn, and Catherine E. Llamon, “Dear Colleague Letter,” and “Questions and Answers about *Fisher v. University of Texas at Austin*” (Sept. 27, 2013), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201309.html>.) This guidance did not provide new substantive insights, but it reaffirmed previous positions by the Departments related to admission and financial aid practices and compliance with Title VI of the Civil Rights Act of 1964. See Ali, Russlynn, and Thomas E. Perez, “Dear Colleague Letter,” “Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education,” and “Guidance on the Voluntary Use of Race to Achieve Diversity in Elementary and Secondary Schools” (Dec. 2, 2011), available at <http://www.ed.gov/news/press-releases/new-guidance-supports-voluntary-efforts-promote-diversity-and-reduce-racial-isol>; and U.S. Department of Education, Nondiscrimination in Federal Programs, 59 Fed. Reg. 36 (Feb. 23, 1994), available at <http://www2.ed.gov/about/offices/list/ocr/docs/racefa.html> (providing landmark guidance about race- and ethnicity-conscious financial aid and scholarship policies under Title VI).
- 7 Reproduced, with permission, from The College Board, “*Taking Action and Achieving Success after Fisher v. University of Texas*,” Colloquium Presentation (The College Board 2014), available at <http://diversitycollaborative.collegeboard.org/sites/default/files/document-library/ad-taking-action-achieving-success-after-fisher-university-texas.pdf>.
- 8 In its 2007 decision involving K-12 race-conscious student assignments, a majority of the Court (four dissenting justices and Justice Kennedy) agreed that efforts to promote equal opportunity were underpinnings of recognized “compelling interests” in elementary and secondary education settings. See *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S.701 (2007).
- 9 See *Bakke*, 438 U.S. at 310 (“It may be assumed that in some situations a State’s interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification [like race].”).
- 10 See generally Coleman, Art, Kate Lipper, and Jamie Keith, *Beyond Federal Law: Trends and Principles Associated with State Laws Banning the Consideration of Race, Ethnicity, and Sex Among Public Education Institutions* (AAAS 2011) at <http://www.aaas.org/report/beyond-federal-law>. On April 22, 2014, in a fragmented 6-2 decision, the Supreme Court upheld Proposal 2, Michigan’s constitutional amendment—passed via a state voter initiative—that prohibits the consideration of race and sex in public education, employment, and contracting decisions. The Court’s decision generally enables voters to deprive public institutions of higher education of their otherwise available discretion to consider race in admissions so long as the voters’ purpose (and the likely impact of their vote) is not to inflict harm to individuals on the basis of race. *Schuette v. Coalition to Defend Affirmative Action*, No. 12-682 (April 22, 2014), available at http://www.supremecourt.gov/opinions/13pdf/12-682_j4ek.pdf; see also Schuette v. BAMN: *What the Supreme Court’s Decision Means for Higher Education Institutions Pursuing Diversity Goals* (The College Board 2014), available at <https://secure-media.collegeboard.org/digitalServices/pdf/diversity/schuette-bamn-supreme-court-diversity.pdf>.
- 11 Reproduced, with permission, from The College Board, “*Taking Action and Achieving Success after Fisher v. University of Texas*,” Colloquium Presentation (The College Board 2014), available at <http://diversitycollaborative.collegeboard.org/sites/default/files/document-library/ad-taking-action-achieving-success-after-fisher-university-texas.pdf>.

CHAPTER 2

Staying the Course: Clarity and Consistency on Key Policy Concepts

Mapping This Chapter: Key Foundational Concepts for Effective Policy Development

Well-developed and well-articulated mission and policy statements are vital to legal success. This chapter highlights key terms that are typically integral to institution-specific policy development—and which, without sufficient attention—can create confusion and invite challenge. Efforts to develop mission statements and other policies that include these concepts should focus on establishing clear definitions framed in light of key legal and policy principles.

The parties to the *Bakke* litigation agreed on little. Indeed, merits of the arguments aside, they couldn't even agree on the concepts at the heart of the dispute. Was the case about “benign affirmative action” or “reverse discrimination”? Did the policy of the medical school result in an unlawful “quota,” or did it merely establish permissible goals?

A retrospective on the dispute in *Bakke*, with parallels in the University of Michigan and the University of Texas cases that came decades later, illustrates the central importance of having a clear understanding of key policy concepts. In particular, as illustrated by the University of Michigan in its successful defense of its law school policy in *Grutter*, developing and implementing a clear mission statement and relevant policies associated with student diversity can be a critical foundation for legal success (just as it is for educational success). Important terms must be well-defined, understood, and consistently used as foundations for truly effective medical school mission statements and policies on issues of access and diversity—and to help avoid unwarranted confusion or legal challenge along the way.

“Diversity” is inherently institution-specific
... its meaning is to be derived from the
goals the school establishes for itself.

Affirmative Action. Historically, “affirmative action” has referred to *remedial* efforts, such as race- and ethnicity-conscious practices, often mandated by courts or government agencies, designed to address the effects of past discrimination. While the distinction has not been expressly acknowledged by the Court, strong arguments can be made that affirmative action is not the best characterization of mission-driven, forward-looking, diversity-related policies that include some consideration of race or ethnicity with respect to students. (In fact, neither majority opinion in the University of Michigan cases in 2003 referred to the challenged policies as affirmative action policies; Justice Kennedy’s *Fisher* opinion referred to the University of Texas policy as an affirmative action policy once.) In any event, the ambiguities inherent in the term “affirmative action” as well as the politicization associated with its use should promote institution-specific discussions about the value of maintaining a label that means very different things to different people and that, in any event, tends to be a lightning-rod term generating more heat than light on campus. Medical schools should exercise great caution when using the term “affirmative action.”

Diversity. “Diversity” is a term that is inherently institution-specific. As a concept embodying the various qualities and characteristics a medical school may seek in its students, its meaning is to be derived from the goals the

school establishes for itself. With this framing lens, a medical school should define diversity in an inclusive and multidimensional way. This approach empowers the medical school to identify the various attributes and experiences of individual applicants that can enhance the school's learning environment and aid the school in achieving its mission-aligned goals. For example, depending on a school's context and objectives, attributes such as an applicant's family status, languages spoken, socioeconomic status, geographical origin, fields of interest, and leadership qualities and experiences such as health care internships, community service, and education background may be diversity characteristics a particular school considers. There is no one-size-fits-all template for conceptualizing diversity, but each medical school should be deliberate when putting diversity-related policies into practice, clearly linking considerations and preferences to broader institutional goals.

And to the extent that diversity encompasses student characteristics of race or ethnicity, then as a matter of federal law, we know at least two additional things. First, the concept of diversity cannot relate solely to race or ethnicity (otherwise, it reflects more of an interest in racial balancing than in educational diversity). Second, the objectives reflected by the concept are a means to an end, not the end in itself. In other words, diversity for diversity's sake is likely to be viewed as little more than an effort to achieve certain numerical goals, divorced from educational objectives—and as a result, unlikely to survive legal review.

Individualized, holistic review. As a concept embodying the mission-based admissions process endorsed by the U.S. Supreme Court in *Grutter*, “individualized, holistic review” refers to a process by which, with respect to any applicant's file, “serious consideration” is given “to all the ways an applicant might contribute to a diverse educational environment.” It is a process involving “applicants of all races,” without an “automatic acceptance or rejection based on any single ‘soft’ variable” (for example, without any “mechanical, predetermined diversity ‘bonuses’ based on race or ethnicity”). Such a process, according to the U.S. Supreme Court, is also “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.” (See Exhibit 2.1 for more detail on the AAMC's framing of a holistic admissions process.)

Aligned with the Court's framing, the AAMC has defined “individualized, holistic” review as “a flexible, individualized way of assessing an applicant's capabilities by which balanced consideration is given to experiences, attributes, and academic metrics and, when considered in combination, [to] how the individual might contribute value as a medical student and physician.”¹² As further explained in the AAMC's amicus brief in *Fisher*, “Holistic review precludes any single criterion becoming the deciding factor for interviewing and selecting candidates for admission.... To the extent that race is considered, it is never considered in isolation. Instead, it is considered flexibly as just one of the many characteristics and pertinent elements of each individual's background.”¹³ Using a holistic review process enables medical schools to be “better able to appreciate the individual merits of each candidate to be a successful student and, ultimately, physician.”¹⁴

Critical Mass. Social science research has found that individuals from minority groups (especially those that have historically been discriminated against) are easily marginalized when their presence in a larger population is small. “As the group's presence and level of participation grows, at a particular point the perspective of members of the minority group and the character of relations between minority and non-minority changes qualitatively.... The discrete point [at which this occurs] is known as ‘critical mass.’”¹⁵ Critical mass is an institution-specific concept, dependent on context and goals. In the University of Michigan cases, critical mass was framed by the law school as “neither a rigid quota nor an amorphous concept defying definition.” Justice O'Connor accepted the University of

Exhibit 2.1. The AAMC's Definition and Core Principles of Holistic Review

Definition: A flexible, individualized way of assessing an applicant's capabilities by which balanced consideration is given to experiences, attributes, and academic metrics and, when considered in combination, to how the individual might contribute value as a medical student and physician.

Four Core Principles of a Holistic Admissions Process:

1. In a holistic admissions process, selection criteria are broad-based, are clearly linked to school mission and goals, and promote diversity as an essential element to achieving institutional excellence.
2. A balance of experiences, attributes, and academic metrics (E-A-M) is
 - a. Used to assess applicants with the intent of creating a richly diverse interview and selection pool and student body;
 - b. Applied equitably across the entire candidate pool; and
 - c. Grounded in data that provide evidence supporting the use of selection criteria beyond grades and test scores.
3. Admissions staff and committee members give individualized consideration to how each applicant may contribute to the medical school learning environment and the practice of medicine, weighing and balancing the range of criteria needed in a class to achieve the outcomes desired by the school.
4. Race and ethnicity may be considered as factors when making admission-related decisions only when such consideration is narrowly tailored to achieve mission-related educational interests and goals associated with student diversity, and when considered as part of a broader mix of factors, which may include personal attributes, experiential factors, demographics, or other considerations.*

*Under federal law (and where permitted by state law).

Michigan's articulation of critical mass objectives, observing that the law school defined critical mass "by reference to the educational benefits that diversity is designed to produce," in contrast to the medical school objectives described in *Bakke*, where the school aimed to enroll "some specified percentage of a particular group merely because of its race or ethnic origin."¹⁶

Understood in the Michigan setting as a "contextual benchmark that allows the law school to exceed token numbers within its student body and to promote the robust exchange of ideas and views that is so central to the law school's mission,"¹⁷ the concept of critical mass was (and remains, as of the date of this publication) a central (if not yet resolved) issue in the *Fisher* litigation. The U.S. Supreme Court's *Fisher* opinion did not address the issue, despite extensive briefing of the parties. On remand to the Fifth Circuit Court of Appeals, arguments centered on the applicability of the concept to classroom levels (for UT, "classes of participatory size") and not just to a university setting overall, as well as to whether critical mass objectives are appropriately framed with respect to individual subgroups among underrepresented students rather than with respect to a combination of subgroups of students as a whole.¹⁸

Ultimately, using critical mass as the operational benchmark for measuring whether educational benefits of diversity are being realized requires some attention to student numbers, but, as Justice O'Connor cautioned, equally important is the school's focus on the educational experience and outcomes that all students enjoy by virtue of its diversity-related policies. And as institutions—and courts—continue to grapple with these questions, the need for practice-based research and evaluation on critical mass remains ever present. (See Exhibit 2.2 to learn more about the social science research on critical mass.)

Exhibit 2.2. Background on Critical Mass, As Explained to the Supreme Court

- **American Educational Research Association's *Grutter* amicus brief:** Critical mass focuses on the need for students to feel safe and comfortable and serves as a counter to the lack of safety or comfort felt when one finds oneself a solo, or minority of one. In other words, critical mass implies: enough students to overcome the silencing effect of being isolated in the classroom by ethnicity/race/gender. Enough students to provide safety for expressing views.
- **American Educational Research Association's *Fisher* amicus brief:** Isolation, subordination, and negative stereotyping are common problems that arise in a wide range of settings when minority numbers are especially low and the norms and behaviors of majority groups dominate.
- **American Social Science Researchers' *Fisher* amicus brief:** The dynamics of diversity are contextual, interdependent, participatory, and cross-racial. Therefore, an institution can know when there is interactive diversity—i.e., opportunities for both students of color and white students to reap the educational benefits of diversity—only by assessing students' experiences of classroom participation or of racial isolation in the classroom and other learning environments on campus.

Underrepresented students. As a general rule, issues of student diversity tend to focus on “underrepresented students”—with a typical institutional goal of working to increase the numbers of those students to achieve some diversity-related objectives. This is also a context-specific term, with differences possible across institutions and even within them (for example, within different disciplines). Federal law recognizes—and affirms—this point. In *Grutter*, the University of Michigan's law school successfully defended a race-conscious admissions policy aimed at achieving a critical mass of historically underrepresented students (defined as African Americans, Hispanics, and Native Americans at that institution) *in order to achieve the campus-specific educational benefits of diversity—a mission-driven, internal, and educationally focused goal*. The Court approved of the critical mass objective established with respect to these underrepresented students.

By contrast, the term “underrepresented students” within the higher-education community is frequently used in at least two problematic ways:

- without a clear articulation regarding the point of reference that triggers a designation for some students as underrepresented; or
- with specific reference to the percentages of groups of students within a larger, relevant population (e.g., for a state flagship institution, with reference to state populations).

In some cases, the aim of enrolling more underrepresented students can translate into the rough equivalent of a goal of proportionality or statistical parity—historically, a death knell under federal law.

With respect to medical schools, in particular, it is important to recognize the critical distinction between the AAMC’s definition of underrepresented students, which is focused on general population numbers, and medical school–specific definitions that are drivers of enrollment policies. As explained in its March 19, 2004, statement, the AAMC Executive Council in June 2003 adopted a definition of “underrepresented in medicine,” meaning “those racial and ethnic populations that are underrepresented in the medical profession relative to their numbers in the general population.”

Although this definition may be an appropriate benchmark for progress regarding access and diversity nationally or regionally, the AAMC explained that this definition cannot serve the purpose as the “driver of *institutional* admissions policies.” Instead, “medical schools should base their admissions policies on an explicit articulation of legitimate aspirations: to achieve the educational benefits of a diverse student body, including enhancing the cultural competency of all physicians it educates and improving access to care for underserved populations.”¹⁹ (See Exhibit 2.3 for the full AAMC definition of “underrepresented in medicine.”)

Exhibit 2.3. Key Points about the AAMC’s “Underrepresented in Medicine” Definition

According to the AAMC, “underrepresented in medicine,” refers to “those racial and ethnic populations that are underrepresented in the medical profession relative to their numbers in the general population.” Although this definition may be an appropriate benchmark to gauge progress regarding access and diversity nationally or regionally, the AAMC has cautioned that this definition cannot serve the purpose as the “driver of *institutional* admissions policies.” Instead, “medical schools should base their admissions policies on an explicit articulation of legitimate aspirations: to achieve the educational benefits of a diverse student body, including enhancing the cultural competency of all physicians it educates and improving access to care for underserved populations.”

SOURCE: AAMC, “Underrepresented in Medicine Definition,” available at <https://www.aamc.org/initiatives/urm/>.

Race-conscious and race-neutral. Federal law establishes two types of policies with respect to race that may bear on a medical school’s access and diversity goals: “race-conscious” policies, which trigger a heightened review by courts, and “race-neutral” policies, which do not.

Generally, race-conscious policies are those that (1) involve explicit racial classifications, as well as those that may be neutral on their face but are sufficiently motivated by a racial purpose, and (2) confer particular individual benefits or opportunities. Race-neutral enrollment policies are those that, with respect to both language and intent, take no position on students’ race or ethnicity, as well as those that expand efforts to generate additional applicant interest (e.g., outreach efforts), which may be “race conscious” in intent but do not confer material individual benefits or opportunities to the exclusion of nontargeted students. Race-neutral strategies can include a wide variety of policies and practices, such as using factors other than race and ethnicity when making decisions about individual students (such as in admissions) and employing broader programmatic efforts at an aggregate level, such as developing pipeline partnerships with undergraduate institutions.²⁰

This chapter's focus on definitional clarity takes us back in interesting ways to 1978 and the case in which Alan Bakke prevailed. UC-Davis correspondence to Mr. Bakke—"[i]t seems ... that the eventual result of your next actions will be of significance to many present and future medical school applicants" was, indeed, prescient. A central objection pressed by Mr. Bakke to the 1974 UC-Davis medical school admissions policy is the underpinning of the ongoing national dialogue about race in education and the subject of continuing litigation, including *Fisher*: When is it necessary to consider race when making admissions, financial aid, and other enrollment decisions to achieve access and diversity goals?

From both educational and legal vantage points, it is clear that this question can never be answered in isolation and, more to the point, cannot be resolved unless the goals the medical school seeks to achieve are clear. Thus, as a foundation for shaping medical school policy development, attention must first center on: What are your school's goals, and what is your school trying to achieve? This is the central issue addressed in Chapter 3.

Endnotes

- 12 Association of American Medical Colleges, "Holistic Review," available at <https://www.aamc.org/initiatives/holisticreview/>.
- 13 Brief for Association of American Medical Colleges at 23-24, *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013) (No. 11-345), available at <https://www.utexas.edu/vp/irla/Documents/ACR%20Association%20of%20American%20Medical%20Colleges.pdf>. For comprehensive policy guidance on how to develop and integrate holistic review practices into medical school student selection processes, see *Roadmap to Diversity: Integrating Holistic Review Practices into Medical School Admissions Processes*, *supra* note 3.
- 14 Brief for Association of American Medical Colleges, *supra* note 12 at 25.
- 15 Etzkowitz, Henry, et al., "The Paradox of Critical Mass for Women in Science," *Science* 266 (5182): 51-54, 1994. See also Addis, Adeno, *The Concept of Critical Mass in Legal Discourse*, *Cardozo Law Review* 29: 97, Oct. 2007 (examining how the term "critical mass" is used in legal discourse); Coleman and Palmer, *Admissions and Diversity After Michigan: The Next Generation of Legal and Policy Issues*, Chapter 4 (The College Board, 2006).
- 16 *Grutter*, 539 U.S. at 329. *But see id.* at 346-47 (Scalia, J., dissenting) ("the University of Michigan Law School's mystical 'critical mass' justification for its discrimination by race challenges even the most gullible mind. The admissions statistics show it to be a sham to cover a scheme of racially proportionate admissions."); *id.* at 388 (Kennedy, J., dissenting) ("the concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas").
- 17 Brief for American Educational Research Association et al. at 25, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), available at http://www.vpcomm.umich.edu/admissions/legal/gru_amicus-ussc/um/AERA-gru.pdf. In the University of Michigan cases, the expert reports of Patricia Gurin and Stephen W. Raudenbush are most directly relevant to the critical mass issue. See University of Michigan, "Briefs Prepared for the Lawsuits," available at <http://www.vpcomm.umich.edu/admissions/research/#um>.
- 18 *Compare* Supplemental Brief for Plaintiff-Appellant at *22, *Fisher v. Univ. of Texas*, 2013 WL 5885633 (5th Cir. 2013) (No. 09-50822) ("Given the substantial number of minority students admitted through UT's pre-2004 race neutral admissions system, UT effectively achieved critical mass no later than 2003, the last year it employed its race neutral admissions plan..."), available at http://lgdata.s3-website-us-east-1.amazonaws.com/docs/971/939276/Appellant_s_Supplemental_Reply_Brief.pdf, *to* Supplemental Brief for Appellees at *40, 46-49, *Fisher v. Univ. of Texas*, 2013 WL 5885633 (5th Cir. 2013) (No. 09-50822) (citing hard data on student enrollment, including "African-American and Hispanic students were nearly non-existent in thousands of classes," to explain that though it "never pursued classroom diversity as a discrete interest or endpoint ... this palpable lack of diversity in the classrooms—one of many factors UT considered—underscored that UT had not yet fully realized the educational benefits of diversity"), available at http://lgdata.s3-website-us-east-1.amazonaws.com/docs/971/922755/Appellees__Supplemental_Brief.pdf. Critical mass remained an issue of significant debate in the Fifth Circuit's split 2-1 decision of July 2014, which upheld UT's race-conscious admissions policy. See *Fisher v. Univ. of Texas*, No. 09-50822 (5th Cir. July 15, 2014), available at <http://www.ca5.uscourts.gov/opinions/pub/09/09-50822-CV2>.

pdf. For a summary analysis of the Fifth Circuit's decision, see *The Fifth Circuit Court of Appeal's Second Ruling in Fisher v. University of Texas: The Decision and Its Implications* (The College Board, July 31, 2014), available at <http://media.collegeboard.com/digitalServices/pdf/diversity/2014/college-board-summary-analysis-fisher-v-university-of-texas.pdf>. On July 30, 2014, Fisher filed an appeal to the full Fifth Circuit for an "en banc" (full court) review of the 2-1 panel decision.

- 19 AAMC, "The Status of the New AAMC Definition of 'Underrepresented in Medicine' following the Supreme Court's Decision in *Grutter*" (2004), available at <https://www.aamc.org/download/54278/data/urm.pdf>.
- 20 See "Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education," *supra* note 6; see also *Parents Involved*, 551 U.S. at 788-89 (Kennedy, J.) ("If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race."). See generally Coleman, Palmer, and Winnick, *Race-Neutral Policies in Higher Education: From Theory to Action* (The College Board 2008), available at http://advocacy.collegeboard.org/sites/default/files/Race-Neutral_Policies_in_Higher_Education.pdf.

CHAPTER 3

Agreeing on the Destination: Why Student Diversity May Matter at Your Medical School

Mapping This Chapter: Framing Diversity-Related Educational Goals with an Eye Toward Evidence

This chapter describes diversity goals that may support race-conscious practices, which medical schools may pursue as they seek to provide a high-quality medical workforce for an increasingly diverse American society. It also frames important foundations to consider for sustaining any race-conscious enrollment policy of relevance.

Part of Alan Bakke’s legacy is in the way we think about medical school diversity-related goals and objectives. Notably, the cases since *Bakke* have generated headline-grabbing attention to the issue of which access- and diversity-related interests can justify race-conscious admissions practices. As a general rule, the answers regarding possible justifications appear to be

- Yes, to educationally focused diversity interests;
- Potentially yes, to appropriately circumscribed equal opportunity and access interests; and
- Resoundingly no, to interests in remediating past societal discrimination or pursuing racial balancing (or population parity) goals.

Less well developed in the headlines but no less important to effective policy development is the Bakke Court’s legacy regarding the *actual benefits* that justify the pursuit of educationally focused diversity-related interests in the first place. Stated differently, the Supreme Court’s approval of the University of Michigan’s law school admissions policy in *Gutter* (building on Justice Powell’s conceptual framing of those interests in *Bakke*) identified concrete and demonstrable—“substantial” and “real,” to quote Justice O’Connor—educational benefits associated with diversity, reminding us along the way that student diversity is not an end but a means to an end that will vary from institution to institution. And the Court has since recognized that “some, but not complete” deference is due to an institution regarding its “educational judgments that ... diversity is essential to its educational mission” where there is a “reasoned, principled explanation for the academic decision.”²¹

... student diversity is not an end but a means to an end that will vary from institution to institution.

In fact, the University of Michigan Law School successfully asserted that a diverse class of students (including a racially and ethnically diverse class of students) would yield specific mission-driven benefits including the following:

- **Improved teaching and learning** through, among other things, promoting cross-racial understanding, breaking down racial stereotypes, and helping students better understand others of different races—all promoting a “more enlightening and interesting” classroom discussion and better learning outcomes²²;
- **Enhanced civic values and furtherance of a thriving American democracy** through, among other things, providing a training ground for our nation’s leaders and in its student body composition, reflecting full participation of all segments of society; and
- **Preparation of students for the 21st-century workforce and global economy** through, among other things, exposing students to “widely diverse people, cultures, ideas, and viewpoints” necessary in the increasingly global marketplace.

Despite obvious contextual distinctions, these core benefits of improving the educational experience, enhancing civic values, and preparing students to meet the challenges of a changing world are clear foundations for, and directly correspond to, the kinds of access and diversity benefits associated with core mission aims of many medical schools. Certainly, a central function of medical education is to prepare a class of physicians best equipped to serve all of society, including by addressing health care access and outcomes disparities. That being said, each medical school is different, with a different mission, setting, and culture. Therefore, the extent to which these recognized interests may apply to any medical school depends on the unique circumstances associated with the particular school.

Research and experience have established additional connections between typical medical school mission-driven goals and student body diversity. Consistent with broad principles associated with the court-recognized compelling interests just described, these goals also may be central to specific medical school diversity interests. (Again, the relevance of any of these goals to any medical school will depend on that school’s particular mission and setting.) Exhibit 3.1 provides several examples of medical school goals that might be associated with student body diversity, and Exhibit 3.2 explores serving the underserved as a potential “compelling interest” for medical education.

Beyond the issue of goals and pertinent, supporting evidence that establishes their relevance and compelling nature, the means by which a medical school pursues its goals—including its management and oversight of those means—is the point at which (at least legally) the rubber typically meets the road.

Although many of those details, which, having been addressed in other AAMC publications, are beyond the scope of this publication²⁴, it is important to understand one of the key questions associated with the issue of means: Is it *necessary* to consider race at all when making admissions decisions? That question, a central one in Mr. Bakke’s challenge in 1978 and, again, in the *Fisher* case in 2013, is the subject of Chapter 4.

Exhibit 3.1. Examples of Medical School Goals That May Be Associated with Student Diversity

Medical School Mission-Related Goals	The Diversity Connection
<p>The medical profession’s core obligation is to meet our nation’s many health needs as comprehensively as possible. This obligation includes training a sufficient number of able physicians in different practice areas and ensuring that competent medical care is available to all citizens in an increasingly heterogeneous society—an effort often advanced with a diverse medical school leadership and faculty.</p>	<p>Diversity in medical education</p> <ul style="list-style-type: none"> • enhances the quality of education for all students (for example, exposure to diverse perspectives may improve complex thinking skills), and • translates into more effective and culturally competent physicians who are familiar with the connection between sociocultural factors and health beliefs and behaviors and thus are better prepared to serve a varied patient population.
<p>Medical schools must address pervasive racial and ethnic disparities in health care, including unequal access to quality services and disproportionately negative health outcomes for specific populations.</p>	<ul style="list-style-type: none"> • Physicians from groups underrepresented in medicine are more likely to practice in underserved population areas. • Medical schools educate students about disparities in health care to focus on research agendas and policy strategies, as well as on clinical practice.
<p>Medical schools must play active roles in broadening and strengthening our nation’s health care research agenda.</p>	<ul style="list-style-type: none"> • Diversity among biomedical and clinical researchers may more adequately address health issues and diseases affecting different populations in terms of gender, race, ethnicity, sexual orientation, disability, and other characteristics.* • Diverse research teams that work on complex problems and can capitalize on individual and distinct perspectives outperform homogenous teams.
<p>Medical schools must provide the supply of professionals that will meet patients’ needs, which may include preferences for professionals of the same race or those proficient in the patient’s native language.</p>	<ul style="list-style-type: none"> • Physicians from groups underrepresented in medicine can help meet patient preferences in providing high-quality health care. • Physicians proficient in languages other than English can help address linguistic and cultural barriers that may exist.

Source: AAMC Brief in *Fisher* at 8-9, 15-17, 27.

* American medical researchers have historically used Caucasian male subjects for most of their double-blind placebo-controlled trials. This lack of diversity of research subjects is now being criticized because clinical trials may result in different results in different populations of patients. Department of Health and Human Services, National Institutes of Health, *Monitoring Adherence to the NIH Policy on the Inclusion of Women and Minorities as Subjects in Clinical Research* (2013), available at <http://orwh.od.nih.gov/research/inclusion/pdf/Inclusion-ComprehensiveReport-FY-2011-2012.pdf>; available at; Chen et al., “Twenty Years Post-NIH Revitalization Act: Enhancing Minority Participation in Clinical Trials (EMPaCT): Laying the Groundwork for Improving Minority Clinical Trial Accrual.” *Cancer* 120: 1091, April 1, 2014.

Exhibit 3.2. Providing Health Care to the Underserved as a Potential “Compelling Interest”

Despite some public discourse to the contrary, the U.S. Supreme Court has *not* rejected as a matter of law the possible interest that some medical schools may assert in serving underserved populations. The only time the Court expressly addressed this interest was in *Regents of the University of California v. Bakke*, where Justice Powell (in his opinion, which no other justice joined) concluded that the University of California, Davis, medical school had *failed to provide sufficient evidence* in that case that such an interest was compelling. He reasoned, It may be assumed that in some situations a [medical school’s] interest in facilitating the health care of its citizens is sufficiently compelling to support the use of [race in admissions]. But there is virtually no evidence in the record indicating that petitioner’s special admissions program is either needed or geared to promote that goal.... Indeed, [the University of California, Davis, medical school] has not shown that its [race-conscious] preferential classification is likely to have any significant effect on the problem.

The only evidence in the *Bakke* case record regarding the problem of underserved populations was “a newspaper article.”

Since *Bakke*, research results indicate that diversity among physicians improves access for medically underserved populations. This remains a fertile area for research.

Sources: *Regents of University of California v. Bakke*, 438 U.S. 265, 310-311 and n. 47 (1978); *The Rationale for Diversity in the Health Professions: A Review of the Evidence*, U.S. Department of Health and Human Services Health Resources and Services Administration Bureau of Health Professions (October 2006).

Endnotes

- 21 *Fisher*, 133 S. Ct. at 2419.
- 22 See, e.g., Morrison and Grbic, “The Relationship Between Racial and Ethnic Diversity in a Class and Students’ Perceptions of Having Learned from Others,” *Analysis in Brief* (AAMC, Nov. 2013), which found a strong relationship between the racial-ethnic diversity of medical school classes and student perception of having learned from others, with a particularly strong association at schools that are most diverse, available at <https://www.aamc.org/download/362154/data/november2013analysisinbrief-impactofracialandethnicdiversity.pdf>.
- 23 See *Roadmap to Excellence: Key Concepts for Evaluating the Impact of Medical School Holistic Admissions*, *supra* note 3; *Roadmap to Diversity: Integrating Holistic Review Practices into Medical School Admissions Processes*, *supra* note 3.

CHAPTER 4

Navigating Your Route: Ensuring That the Consideration of Race Is Necessary

Mapping This Chapter: Assessing the Question of Necessity and Evaluating “Race-Neutral” Strategies

This chapter examines the key issue of the necessity of pursuing race-conscious policies in light of diversity goals, along with the related questions that center on the viability of race-neutral strategies that may serve as effective alternatives (or complements) to those policies.

Justice Powell in the *Bakke* case observed that “when [an institution’s] distribution of benefits or imposition of burdens hinges on ancestry or the color of a person’s skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest.” That point is one on which the *Fisher* Court elaborated in 2013, and it should be understood as enrollment policies are developed and implemented.²⁴

In circumstances where medical schools are pursuing race-conscious policies (or seriously considering such efforts) as part of their aims to achieve diversity goals, they must give “serious, good faith consideration” to the prospect that race-neutral alternatives to those race-conscious policies may as effectively (or nearly as effectively) serve those goals. Several points should remain front and center as medical schools develop diversity strategies that are both compliant with federal law and appropriate in the medical school context.

First, it is important to recognize that not all race-neutral strategies will be appropriate for an individual institution, given its unique mission and context—and its budget constraints. For instance, a race-neutral approach might be unworkable for a number of mission-related reasons: It might be ineffective in achieving the diversity the institution seeks to meet its mission-aligned goals or, in the extreme, because it would require the school to sacrifice mission-aligned priorities (including academic selectivity).²⁵ Correspondingly, the design and implementation of the neutral approach simply might not fit with the medical school’s profile and setting. For example, a percentage plan like the one used by the undergraduate admissions office at the University of Texas at Austin would have no relevance to medical schools.²⁶ In addition, the prospective cost of a race-neutral strategy might be cost prohibitive, precluding effective adoption by an admissions office. (See Exhibit 4.1 for more examples of race-neutral strategies.)

Second, by the same token, a medical school cannot under federal law merely ignore or dismiss prospective neutral alternatives to race-conscious policies without careful consideration and thought. For schools that undertake (or contemplate pursuing) race-conscious policies, the “serious, good faith consideration” required by federal law means that schools must have paid significant attention to the array of potentially viable alternatives and must have a sound basis for judgments resulting in decisions not to pursue certain strategies.²⁷ Indeed, while the law “does not require exhaustion of every conceivable race-neutral” strategy before race-conscious policies are pursued, medical schools must be prepared to show that they have examined and, as appropriate (and feasible), tried race-neutral strategies that may support their efforts to achieve their mission-based diversity goals.

More concretely, the Supreme Court’s 2013 *Fisher* decision reflects the expectation that institutions of higher education have “the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.” And, if race-neutral approaches “could promote the substantial interest about as well [as the race-conscious approach] and at tolerable administrative expense,” those institutions may not use the race-conscious policy. The fact that the Court failed to define any of these key terms and phrases presents both a challenge and an opportunity. Medical schools are well-positioned to define these terms as they are generally understood and apply them within their own unique context.²⁸ (Appendix B contains a resource on race-neutral strategies that also examines these terms.)

...medical schools seeking to achieve the educational benefits of diversity should heed principles of a sound educationally focused deliberation...

Indeed, medical schools seeking to achieve the educational benefits of diversity should heed principles of a sound educationally focused deliberation and avoid viewing race-conscious and race-neutral strategies as the “either-or” proposition that has been popularized in the press (and in politics). Specifically, medical schools should focus as deliberately on race-neutral practices as they do on race-conscious practices. Most institutions that pursue race-conscious strategies, in fact, already include a broad array of race-neutral approaches in their enrollment efforts. The real question is this: Among the full panoply of viable race-neutral and race-conscious policies and practices, how can the right mix of approaches optimally support a medical school’s mission-driven diversity goals?

In the end, the centrality of a medical school’s institutional mission to the overall strict scrutiny framework and federal legal analysis—as well as the Supreme Court’s explicit recognition in *Fisher* of the value of “a university’s experience and expertise...in adopting or rejecting certain admissions processes”—affirm that the educational foundations for policy choices are vitally important on the question of “necessity.” Though medical schools that choose to pursue race-conscious policies must be prepared to demonstrate the clear need for such policies (as well as the unsuitability of pursuing a wholly neutral strategy), they may do so with the knowledge that a reviewing court will examine the record with the institution’s unique mission and goals in mind. As Justice O’Connor observed in *Grutter*, “Context matters.”

Exhibit 4.1. Race-Neutral Strategies: Key Illustrations

Race-neutral strategies may include preferences for diversity characteristics other than race that can help the school drive toward its mission-aligned goals, including goals related to high-quality teaching and learning and to preparing physicians to meet our nation's health care needs. For example, when implementing an individualized, holistic review admissions policy, medical schools may take into account an applicant's socioeconomic status, family status, educational attainment of the applicant's parents, geographic origin, bilingualism, and other dimensions of diversity when offering educational opportunities or benefits (for example, admission, scholarships). Medical schools also might consider selecting students from certain undergraduate institutions, based on elements that might include student demographics and level of academic preparation, and giving applicants from those schools an admission preference.

Medical schools also can employ inclusive strategies to build the pool of qualified applicants, including through inclusive outreach and recruitment efforts, pipeline programs, partnerships with institutions and organizations that serve underrepresented students and students from disadvantaged backgrounds, and academic enrichment programs for applicants who may not have taken traditional premedical courses. Because these types of efforts do not confer benefits on one group at the expense of another, they are less likely to trigger the strict scrutiny analysis. (See Exhibit 1.4 and Appendix B for more information about the strict scrutiny analysis.)

SOURCES: Steinecke, et al., "Race Neutral Approaches: Challenges and Opportunities for Medical Schools." *Academic Medicine* 82(2): 117-26, 2007; OCR Letter of Findings, In re Wake County Public School System, Complaint Nos. 11-02-1044, 11-02-1104, and 11-02-1111 (August 29, 2003); Brian T. Fitzpatrick, Strict Scrutiny of Facially Race-Neutral State Action and the Texas Top Ten Percent Plan. 53 *Baylor Law Review* 289, 2001.

Examining your school's mission-based diversity efforts and amassing evidence to support and inform them requires an investment of time and resources, but it is a worthwhile investment—not only as a matter of legal compliance but also for the development and refinement of sound educational policy. And the medical school's work is not done when it satisfies the "necessity" threshold discussed in this chapter. Medical schools must, on an ongoing basis, focus on, and manage, the school's strategies designed to achieve access and diversity goals. The discussion of effective management of these issues is the focus of Chapter 5.

Endnotes

- 24 *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013). For a case summary analysis of *Fisher*, see *Understanding Fisher v. the University of Texas: Policy Implications of What the U.S. Supreme Court Did (and Didn't) Say About Diversity and the Use of Race and Ethnicity in College Admissions* (The College Board 2013), available at <http://diversitycollaborative.collegeboard.org/sites/default/files/document-library/diversity-collaborative-understanding-fisher.pdf>. The AAMC is a sponsor of The College Board's Access & Diversity Collaborative.
- 25 See *Grutter*, 539 U.S. at 336 (rejecting alternatives that "would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both" and those that would require a school "to become a much different institution and sacrifice a vital component of its educational mission").
- 26 See *Grutter*, 539 U.S. at 340 ("The United States [which advocated for the use of percentage plans] does not, however, explain how such plans could work for graduate and professional schools").
- 27 See Coleman and Taylor, "Emphasis Added: *Fisher v. University of Texas at Austin* and Its Practical Implications for Institutions of Higher Education," Lumina Foundation and Century Foundation, forthcoming.
- 28 *Id.*

CHAPTER 5

Reaching the Destination: A Management Strategy and Plan for Enhancing Diversity at Your Medical School

Mapping This Chapter: Key Process Elements and Medical School Self-Assessment Guide

This chapter addresses key operational elements associated with success in achieving mission-aligned, diversity-related goals—including assembling the right team of people to lead a medical school’s policy efforts and outlining an institutional self-assessment that can guide the work of medical school officials seeking to meet their goals in lawful ways.

Justice Powell’s *Bakke* opinion in 1978 set the stage for decades of debate about the ways higher-education institutions might consider student race and ethnicity to achieve their educational goals. Among the many legacies of that decision (as reflected in numerous cases that have followed) is the federal courts’ emphasis on the importance of higher-education institutions’ having a deliberative, thoughtful process of policy development, implementation, and evaluation over time when the consideration of race or ethnicity is integral to those goals.²⁹

The right people are key to an effective initial inventory and assessment of diversity-related programs. Therefore, a medical school should assemble (both in the short term and as part of a longer-term process) an interdisciplinary team that represents many facets of the school that can effectively evaluate the relevant student diversity-related policies and programs in light of institutional goals (and legal requirements).

The composition of a medical school’s evaluation team should be carefully considered. The team should include

- representatives of the school’s top administrative levels,
- representatives of specific programs and of institutional perspectives that have a bearing on student diversity-related goals and strategies (from the top down),
- people who can help assemble the research bases on which policies can be evaluated,
- lawyers with an understanding of these issues, because the consideration of racial or ethnic origin inevitably raises questions of federal (and frequently state) legal compliance, and, periodically,
- representatives of the larger university community (especially key policy and legal officials), given the connection between medical schools and the larger university they are typically a part of (and which may have their own distinct set of diversity objectives).

Medical school officials also should consider the extent to which decisions regarding the establishment of diversity goals and the corresponding considerations of race or ethnicity merit broader public engagement. A communications expert may be a valuable team addition to facilitate this process. In many cases, broader community input (including, for instance, perspectives of employers of the medical school’s graduates) can be useful as part of the ongoing process of policy development and implementation.

With a multidisciplinary team in place, self-assessment can facilitate ongoing development, evaluation, and refinement of access and diversity policies. As discussed in Chapter 4, if a medical school has race- or ethnicity-conscious policies in place, this exercise must focus on race-neutral strategies as well. To successfully pursue one or more of the mission-based goals set forth above—including the possible consideration of race or ethnicity in enrollment decisions—it is important that medical schools conduct institution-specific research and assemble and retain relevant evidence on a regular, ongoing basis. Although that evidence can take many forms, it should (at a minimum) include the following elements:

1. A clear statement of the **medical school's core educational mission**, including central educational philosophies and aims and the school's view of its role in society;
2. A clear statement that the medical school has reached a deliberative educational judgment that the **student diversity it seeks is essential to its mission-related goals**, with an explanation of the connection between the two;
3. **Institution-specific evidence** through regular, ongoing collection efforts that supports the connection between the medical school's mission and student diversity, including administration, faculty, and student perspectives (e.g., testimony, feedback), as well as data analyzing the connection between medical school student diversity over the course of time (perhaps the recent past) and desired educational (and other) outcomes; and
4. **Evidence from other sources** that affirm and/or correspond to the institutionally aligned interests and evidence associated with diversity, including relevant social science research, documented experiences at similar schools, and broad-based data that correspond to core goals and efforts to achieve those goals.

The following self-assessment is organized around four overlapping segments of analysis—the school's mission, process management, substantive policy, and evaluation of results. Given inherent differences among medical schools—including mission, governance, culture, and politics—this self-assessment should be viewed only as a guide. In some cases, specific elements may make sense; in others, they may not. Ultimately, the destination to success can be charted only with attention to the medical school-specific facts and circumstances that will drive any institution's effective policy development. This self-assessment can provide an important starting point for that conversation. Ultimately, a school with a regular process of review and evaluation is well-positioned to establish that it takes its responsibilities seriously, including legal responsibilities associated with any consideration of race.

...self-assessment can facilitate ongoing development, evaluation, and refinement of access and diversity policies.

Medical School Diversity Self-Assessment Worksheet

Key Element	Status
Medical School Mission-Related Goals	
1. A medical school’s mission should be aligned with (but not necessarily identical to) the parent institution’s mission.	
2. A medical school’s mission statement should be developed and approved by faculty (with review by the institution’s legal counsel). Express references to corresponding broader institutional mission aims are a good idea.	
3. A medical school’s mission statement should express a clear commitment to the benefits of diversity as an institutional priority, including	
<input type="checkbox"/> A focus on multiple, distinct benefits associated with improved teaching and learning, delivery of better health care services to patients (including service to underserved communities), enhancing active participation of students as citizens, and other external institutional interests.	
<input type="checkbox"/> A description of student traits central to the medical school’s ability to achieve its access- and diversity-related educational goals, which may include students’ personal characteristics (including, but not limited to, race and ethnicity), attributes, life experiences, academic background, medical (and related) interests, and professional goals.	
<input type="checkbox"/> An acknowledgment that diversity-related benefits should be pursued throughout all relevant components of the medical school, including admissions and related enrollment efforts, academic affairs, student affairs, institutional research, and classroom and clinical experiences.	
<input type="checkbox"/> A description of any particular history or experience of the medical school (or its parent institution) that may bear on the centrality or quality of the diversity interests essential to the medical school’s mission.	

Key Element	Status
Enrollment Elements	
<p>A medical school should establish a comprehensive plan that ensures key process elements that will support effective and efficient enrollment decision-making aligned with school goals, including</p>	
<ul style="list-style-type: none"> <input type="checkbox"/> Establishing admissions committee membership, as well as membership on other related (recruitment, financial aid) committees, that supports the school’s mission. 	
<ul style="list-style-type: none"> <input type="checkbox"/> Defining clear roles and expectations for relevant committees and staff. 	
<ul style="list-style-type: none"> <input type="checkbox"/> Establishing annual, standardized training for relevant committees and staff, with a curriculum that reflects central school goals and includes relevant psychometric and legal guiding principles. 	
<ul style="list-style-type: none"> <input type="checkbox"/> Disseminating admissions, financial aid, recruitment, and other policies and procedures; promoting transparency with respect to the full breadth of the enrollment process, with particular attention to relevant selection criteria in admissions and financial aid decisions. 	
<ul style="list-style-type: none"> <input type="checkbox"/> Establishing a process of annual, periodic review of the implementation of enrollment policies to ensure that <ul style="list-style-type: none"> ○ Goals are being achieved, and in cases where issues remain, action is being taken to address deficiencies. ○ Key issues of policy implementation are appropriately evaluated for consideration as future policy revisions are considered. ○ Federal and state legal requirements are satisfied, including those related to <ul style="list-style-type: none"> ■ The periodic review and evaluation of race/ethnicity-conscious policies and practices to ensure that they materially advance compelling interests in ways that do not overuse or underuse race and ethnicity; and ■ The ongoing review and evaluation of potentially viable race-neutral strategies that may advance diversity-related goals as effectively as existing race/ethnicity-conscious practices. 	

Key Element	Status
Admissions Decisions: Substantive Foundations	
A medical school should establish substantive criteria for admissions that	
<input type="checkbox"/> Are aligned with the medical school’s mission and goals.	
<input type="checkbox"/> Are approved by the faculty.	
<input type="checkbox"/> Balance both academic accomplishments and personal factors in applicants designed to achieve mission-related goals, with evidence of how (and why) the selection process considers the following: <ul style="list-style-type: none"> ○ Academic background (e.g., major, grade point average and grade trend, MCAT scores, science background, other academic interests, enthusiasm of recommenders, quality of undergraduate institution, quality of essay, area and difficulty of undergraduate course selection, and coursework loads). ○ Personal attributes (e.g., culture, socioeconomic status, geography, rural/inner city, race/ethnicity, sex, gender identity, sexual orientation, faith, family status, national origin, individual interests, values and beliefs, maturity, leadership, being multilingual, etc.). ○ Personal experiences (e.g., overcoming hardship, work history, community service, health care experience, research experience, success in prior career[s], and life experiences). ○ Other (consistent with your school’s goals). 	
<input type="checkbox"/> Are explained through policies that provide operational definitions of all selection criteria, including defining parameters for selecting applicants for interviews.	
<input type="checkbox"/> Incorporate data analysis in establishing operational elements of admissions policies, including <ul style="list-style-type: none"> ○ Identifying probable location of relevant data and information in various application materials. ○ Ensuring consistent collection of relevant data and information for each applicant (e.g., initial and supplementary application materials, essays, and interviews). ○ Ensuring consistent presentation, discussion, and assessment of those data and information among all applicants. 	

Key Element	Status
Evaluation of Enrollment Decisions	
A well-designed and implemented enrollment process should be periodically evaluated with respect to the major desired outcomes and the particular role and validity of criteria used throughout the process.	
<input type="checkbox"/> Targeted outcomes for graduates may include	
<input type="checkbox"/> Program completion (e.g., attrition rate, professionalism issues)	
<input type="checkbox"/> Time to program completion	
<input type="checkbox"/> Performance on national examinations	
<input type="checkbox"/> Specialty selection (e.g., primary care, specialization)	
<input type="checkbox"/> Career plans (e.g., clinical practice, research, academic medicine)	
<input type="checkbox"/> Location of practice and demographics of patient population served	
<input type="checkbox"/> Impact on achievement of external goals valued by the school (e.g., supporting urban or rural practice, research to address disparities, care of the underserved, other school-specific goals)	
<input type="checkbox"/> Other outcomes (consistent with your school’s goals)	
<input type="checkbox"/> Targeted educational benefits may include	
<input type="checkbox"/> Increased knowledge of culturally driven health benefits and practices	
<input type="checkbox"/> Improved communication with patients who are non-English speakers	
<input type="checkbox"/> Improved knowledge and skills for effective use of interpreters	
<input type="checkbox"/> Improved levels of comfort when working with culturally diverse patient populations	
<input type="checkbox"/> Breaking down stereotypes and forging cross-racial understanding	
<input type="checkbox"/> Enhanced learning and improved student performance	
<input type="checkbox"/> Improved curriculum and instruction	
<input type="checkbox"/> Improved access to medical education for historically underrepresented students	
<input type="checkbox"/> Development of more robust and relevant research agendas and investment	
<input type="checkbox"/> Improved skills in health advocacy for the underserved	
<input type="checkbox"/> Improved skills for promoting health literacy	
<input type="checkbox"/> Acquiring skills to promote research among underrepresented-in-medicine populations	
<input type="checkbox"/> Promoting equal access for all patient populations, regardless of background	
<input type="checkbox"/> Research conducted as appropriate with a broad range of institutional collaborators	
<input type="checkbox"/> Other benefits (consistent with your school’s goals)	

Endnotes

29 For guidance on evaluating whether your institution’s admissions policies, processes, and practices are yielding the diverse student body your school wants to educate and graduate, and the degree to which your school is leveraging that diversity to achieve intended educational and professional outcomes, see *Roadmap to Excellence: Key Concepts for Evaluating the Impact of Medical School Holistic Admissions* (AAMC 2013), available at <https://members.aamc.org/eweb/upload/Holistic%20Review%202013.pdf>. See also Coleman, Milem, and Lipper, *A Diversity Action Blueprint: Policy Parameters and Model Practices for Higher Education Institutions* (The College Board 2010), available at http://advocacy.collegeboard.org/sites/default/files/10b_2699_Diversity_Action_blueprint_WEB_100922.pdf.

APPENDIX A

Action Plan Template: A Process Guide Checklist with Key Questions Derived from Federal Nondiscrimination Law¹

Although the law has not spelled out all the details of what may be involved in the required periodic review of race-conscious policies and practices, medical schools can follow the series of practical steps described below. They were designed to focus on the right questions in the right way with the right people, with the goal of achieving the right result: legal compliance *and* educational soundness.

The Process Guide Checklist	
<input type="checkbox"/> Step 1. Inventory	Gather information about all diversity-related policies and programs, focusing both on those that are race- or ethnicity-conscious and those that are race- or ethnicity-neutral.
<input type="checkbox"/> Step 2. Justify	Ensure that there are very good, institution-specific reasons (“compelling interests,” in legal terms) that justify all identified race- and ethnicity-conscious policies and programs—including supporting evidence.
<input type="checkbox"/> Step 3. Assess	Through a process of periodic review, ensure that race- and ethnicity-conscious policies and programs consider race or ethnicity only to the extent necessary to achieve important goals and, at the same time, that considering those factors materially advances the medical school’s efforts to achieve those goals.
<input type="checkbox"/> Step 4. Act	Take necessary action, based on relevant evidence. When changes need to be made, make them.

STEP 1: INVENTORY—*Know Your Programs.*

The first phase of any effective programmatic review involves collecting and assembling all relevant information related to the issues to be addressed. Individuals who have relevant institutional expertise or history should be included in conversations to ensure the development of a comprehensive, fact-based initial inventory of diversity-related policies and practices. As part of this initial effort, institutions should ensure that the logic of particular uses of race and ethnicity within discrete programs is well understood.

A critical facet of the information-gathering phase will involve the inventory of all diversity-related policies and practices. The law’s demand that institutions evaluate viable race-neutral alternatives (as well as strategies that may achieve the same compelling ends by a less extensive use of race or ethnicity) highlights the need for institutions to cast their nets wide as part of an initial inventory—to include all policies and practices designed to support institutional diversity goals (even when they are race-neutral). Correspondingly, even if an institution’s particular

¹ This section is adapted from Coleman and Palmer, *Admissions and Diversity After Michigan: The Next Generation of Legal and Policy Issues* (The College Board 2006).

focus or concern may relate only to specific race-conscious policies, information about all relevant policies and practices should be included in an initial inventory—including, for instance, all admissions, financial aid, outreach, recruitment, and retention policies that bear on diversity goals associated with the policy in question. Otherwise, the recommended holistic process of review, discussed above, will be incomplete.

Officials should also include externally funded race- or ethnicity-conscious programs in cases where the higher-education institution supports (through, for example, the administration of the program) the operation of those programs. These may include programs funded by private sources, as well as programs authorized by or funded pursuant to federal or state law.

Key Issue for Step 1: What Policies and Programs Are Diversity-Related and Subject to Strict Scrutiny?

- ***Has your school assembled information about all diversity-related policies and programs? And, can you...***
 - *Identify individuals involved in their development and*
 - *Locate copies of documents related to establishing and implementing those policies after their adoption?*

Success in the legal defense of any race- or ethnicity-conscious policy or program begins and ends with evidence. Be sure that appropriate records are maintained to reflect the process, rationales, and support for adopting race- or ethnicity-conscious policies and programs.

- ***Is race or ethnicity a factor in diversity-related policies and programs?***

If the answer to this question is no, then it is less likely that the policies or programs will be subject to strict scrutiny. If the answer to this question is yes, then the question of the probable scrutiny employed by a federal court will in most cases depend on whether tangible benefits are provided to certain students—and not to others—based on their race or national origin. To the extent that race-conscious programs (such as certain recruitment programs) do not provide such benefits and are, instead, designed to expand the pool of qualified applicants, they may be more likely to be viewed as “inclusive” and not subject to strict scrutiny. All other race-conscious policies (even if race is one of many factors), including admissions and financial aid policies, will likely be subject to strict scrutiny.

- ***Is the administration and funding for race- or ethnicity-conscious programs provided by private sources? Does your institution support or administer any facet of the program?***

Purely private support of programs—even where based on race or ethnicity—is not subject to federal constitutional or Title VI prohibitions. (Note, however, that at least one federal statute, 42 U.S.C. § 1981, may apply to such private conduct.) However, if a university helps administer or otherwise provides “significant assistance” to a private entity that supports those efforts (for example, by overseeing the distribution of funds from a private scholarship program), then strict scrutiny standards under the Equal Protection Clause and/or Title VI will likely be triggered (subject to the analysis suggested in the previous bullet).

STEP 2: JUSTIFY—*Ensure the Existence of Clearly Defined, Mission-Driven Diversity Goals, Supported by Evidence.*

As federal law makes abundantly clear, race- and ethnicity-conscious policies will only survive under strict scrutiny if the justifications for those policies are well developed and supported by substantial evidence. In practical terms, this means several things.

First, medical school officials should ensure that their educational goals are clearly stated and understood. With respect to diversity goals in particular, there must be clarity about what kind of student body the institution wants to attract (and why) and how the school conceptualizes (or defines) its goals and objectives. Ultimately, given the obligation to ensure that race- and ethnicity-conscious measures are limited in both scope and time, medical school officials should be able to define success with respect to their goals and know it when they have achieved it.

Second, federal law should affirm sound educational judgments. By definition, those judgments should have a solid empirical foundation, with clear and relevant supporting evidence. The sources of evidence can be (and likely will be) many, including

- Institution-specific policies, including relevant mission statements and strategic goals, and supportive documents that demonstrate deliberation and judgment;
- Process-management documents showing evolution of policies over time;
- Institution-specific research and analysis (e.g., surveys of students, faculty, alumni, health care providers, and employers; student enrollment data (both actual and projected); and performance data), including information that reflects assessments about the relative need for and success of the policies in question;
- Social science research (about, for example, the educational benefits of diversity, critical mass and contextual benchmarks, and race-neutral strategies of relevance) that supports institution-specific goals; and
- Statements or opinions and anecdotal experiences (e.g., testimonials, comments on surveys) by institutional leaders, professors, students, and employers that are based on actual experience, shedding light on the educational foundations and justifications that support the institution's diversity-related goals.

In the end, the totality of the evidence should support conclusions that race- and ethnicity-conscious policies and practices are supported by compelling, mission-driven interests.

Key Issue for Step 2: Why Does a Medical School Consider Race or Ethnicity?

- ***What are the educational justifications for using race or ethnicity as part of diversity-related efforts? Are those policies and programs mission driven?***

Race- or ethnicity-conscious policies and programs must be supported by a compelling interest. According to current case law, this means that the justifications must relate to remedial efforts to eliminate the effects of past or present institutional discrimination,² or they must relate to mission-driven, diversity-related educational goals.

- ***Are educational benefits associated with a diverse student body a foundation for race- and ethnicity-conscious policies and programs?***

If your school's justification for race- or ethnicity-conscious policies and programs is related to the educational benefits of diversity, then your school should have educational foundations that support this position. These foundations should include evidence of mission-related benefits that stem from a diverse student body. The kinds of educational benefits that stem from student diversity that might support your program include improved teaching and learning, better understanding among students of different backgrounds, and enhanced preparation as citizens and professionals for an increasingly diverse workforce and society.

- ***Is there evidence that the educational benefits you have identified flow from your school's race- and ethnicity-conscious policies and programs?***

The justifications for race- or ethnicity-conscious policies and programs should include substantial evidence, such as institution- or program-specific evidence. In this context, evidence is not confined to research and data analysis, although these are very important. Evidence also refers to mission statements, institutional policies, and statements and opinions from professors, students, and others.

- ***Does the medical school work to ensure that its diversity-related education goals are implemented throughout the school?***

The authenticity of the interests articulated as a justification for race- and ethnicity-conscious policies and programs will likely receive scrutiny by those who challenge them. As a consequence, courts can be expected to examine the medical school's commitment to the diversity-related interests that serve as a predicate for race or ethnicity-conscious practices. Therefore, attention to those goals and the across-the-board implementation of diversity policies are important.

- ***How is diversity defined? What are the measurable objectives by which success in achieving diversity goals is evaluated?***

From a federal legal standpoint, the term "diversity" must include more than a reference to race or ethnicity. Moreover, the educational goals associated with diversity should be defined with reference to benchmarks against which their success in helping achieve diversity-related goals can be assessed.

2 As a practical matter, and as the *Roadmap* suggests, most (if not all) medical schools will likely seek to achieve mission-driven, diversity-related goals in a *non-remedial setting*. Typically, institution- or system-specific federal court orders or U.S. Department of Education Office for Civil Rights findings trigger remedial obligations under federal law. Absent those orders or findings, the burden of legally justifying race- or ethnicity-conscious policies based on remediating discrimination is exceedingly high.

STEP 3: ASSESS—Evaluate the Design and Operation of the Policies in Light of Institutional Goals.

Once relevant information has been gathered about a medical school's race- and ethnicity-conscious policies and institutional goals are clearly defined and grounded in relevant evidence, the design and operation of those programs should be evaluated in light of narrow-tailoring standards, with the overarching aim being to ensure that the use of race or ethnicity is as limited as possible given the compelling institutional interests that those policies promote. This means that race- and ethnicity-conscious policies must be

- **necessary**, in light of possibly viable race-neutral (or less race-restrictive) alternatives;
- as **flexible** as possible with regard to the use of race or ethnicity, given institutional aims;
- **of minimal burden to nonqualifying students**, based on race or ethnicity; and
- **periodically reviewed and evaluated** against legal standards, with the goal of ultimately eliminating the use of race or ethnicity when institutional goals can be met and sustained without such policies.

Key Issue for Step 3: How Have Diversity-Related Policies and Programs Been Designed and Implemented?

- ***Have race-neutral strategies (as supplements to and/or as possible alternatives to your race- or ethnicity-conscious program) been evaluated or tried?***

All race-neutral alternatives, regardless of how likely to achieve institutional goals, need not be exhausted to comply with federal legal standards. However, universities must give “serious, good faith consideration [to] workable, race-neutral alternatives that will achieve the diversity that the [institution] seeks.” That consideration should be the product of evidence-based, reasoned deliberation.

- ***Why were certain race-neutral strategies not tried? What were the conscious educational judgments that supported the decision not to try them?***

There should be an empirical basis for not trying race-neutral strategies. The experiences of similar institutions or programs with race-neutral efforts can provide a basis for considering—and not trying—those strategies. By the same token, lessons derived from such experiences may suggest the need to try similar strategies.

- ***What results were achieved with the race-neutral strategies that were tried? Has a complete evaluation of those strategies been undertaken? To what end?***

An evaluation of race- and ethnicity-neutral strategies that are tried is a critical step in assessing the viability of such programs in light of overall goals and objectives. The failure to evaluate race-neutral strategies limits the credibility of any institutional claim about the real need for any race- or ethnicity-conscious program.

- ***What evidence establishes that the use of race- or ethnicity-conscious policies is necessary to achieve the educational goals associated with diversity objectives?***

The empirical foundation for making the case that such policies are necessary should include institution- or program-relevant research, data, and opinions (based on academic judgments) about the need for race- and ethnicity-conscious policies. The use of race or ethnicity should demonstrably and significantly further diversity-related goals without (unjustifiably) underreaching or overreaching.

- ***What role does race or ethnicity play in the design of diversity-related policies and programs? Is race or ethnicity an explicit condition of eligibility, or is it one factor among many?***

In admissions, race or ethnicity (if considered) must be one factor among many, rather than an automatic qualifier, to withstand “strict scrutiny.” In other contexts, certainly, programs will be more easily sustained where race operates as one factor among many.

- ***What impact does the use of race or ethnicity have on applicants or students who do not receive the benefit of race or ethnicity consideration? Are applicants or students displaced from eligibility because of the use of race or ethnicity?***

If the use of race or ethnicity has the effect of displacing students who do not receive favorable consideration because of their race or ethnicity, the practice is less likely to withstand legal review. If, however, the impact is more diffuse, then the program is, in relative terms, more likely to withstand federal scrutiny.

- ***How frequently is the program’s use of race or ethnicity reviewed to determine the need for the ongoing consideration of race or ethnicity and the viability of race-neutral alternatives that (in conjunction or alone) may as effectively achieve the program’s diversity-related goals?***

Under federal standards, race- or ethnicity-conscious programs are expected to have a “logical end point” once the goals associated with the program are met and can be sustained without the consideration of race or ethnicity, or once it is determined that the program does not materially advance diversity-related goals.

STEP 4: ACT—Take Necessary Action Steps.

Over time, a review of outcomes of race- and ethnicity-conscious efforts (in light of institutional goals) should lead to appropriate adjustments—to ensure that policies and practices are in fact materially advancing goals in appropriate ways and that, when goals are met, relevant policies and practices are modified to reflect changes in circumstances. As part of that process, medical schools should consider ways to address key stakeholder groups to facilitate their understanding about the legal standards that must inform any institutional action.

APPENDIX B

Race-Neutral Strategies: The What, Why, and How of Effective Enrollment Practices

As explained in Chapter 4, medical schools should consider a broad array of race-neutral diversity policies and practices in their efforts to achieve mission-related diversity goals. This appendix expands on that chapter, focusing on operational questions schools should consider as they pursue race-neutral strategies.

1. What Are Race-Neutral Strategies?: Key Guideposts for Definitions

The simple answer to this definitional question is that there *is* no simple answer! But there are important legal and educational guideposts to consider as medical schools address these issues.

Despite often using the term “race-neutral,” the U.S. Supreme Court has not conclusively defined what it means. That said, the Supreme Court’s opinions as well as general trends in lower federal courts and statements from the U.S. Department of Education’s Office for Civil Rights suggest that *race-neutral policies are those that, with respect to both language and intent, confer no individual benefits based on a student’s race or ethnicity.*

In general terms, then, race-neutral strategies can include a wide variety of policies and practices, including

- the use of factors other than race or ethnicity when conferring benefits or opportunities to individual students, such as in offers of admission, and
- broader, inclusive programmatic efforts employed at an aggregate level, such as developing pipeline partnerships and performing targeted outreach.¹

Relevant state also laws should be considered as medical schools contemplate and pursue race-neutral policies. Most notably, an array of state bans (whether introduced via voter initiatives or other avenues) on the consideration of race in certain enrollment practices by public institutions may inform relevant definitions and what constitutes “race-neutral.” The prospect of a patchwork quilt of definitions exists because different courts may render different conclusions about what constitutes a race-neutral practice for legal purposes, based on particular issues that surface in different cases.²

1 See U.S. Departments of Education and Justice, *Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education* (Dec. 2, 2011), available at <http://www.justice.gov/crt/about/edu/documents/guidancepost.pdf> (last accessed July 9, 2014); see generally Coleman, Palmer, and Winnick, *Race-Neutral Policies in Higher Education: From Theory to Action* (The College Board 2008), available at http://diversitycollaborative.collegeboard.org/sites/default/files/document-library/race-neutral_policies_in_higher_education.pdf (last accessed Aug. 14, 2014).

In contrast, race-conscious policies are, as a general rule, those that (1) involve explicit racial classifications as well as those that may be neutral on their face but are sufficiently motivated by a racial purpose and (2) confer material benefits or opportunities to individual students to the exclusion of others. See Tool 3, “Key Terms and Concepts,” in *Access & Diversity Toolkit* (The College Board 2010), available at <http://diversitycollaborative.collegeboard.org/toolkit/key-terms-and-concepts-knowing-the-basics> (last accessed August 19, 2014).

2 See Coleman, Lipper, and Keith, *Beyond Federal Law: Trends and Principles Associated with State Laws Banning the Consideration of Race, Ethnicity, and Sex Among Public Education Institutions* (AAAS 2012), available at <http://www.aaas.org/sites/default/files/BeyondFedLaw.pdf> (last accessed July 9, 2014). See *infra*, Exhibit 1, “Examining Race-Neutral Strategies.”

While the law is undeniably critical in defining what constitutes “race-neutral,” definitions will also be informed by institutional policy. A medical school’s informed judgments, grounded both in its unique experience and expertise and in broader research and evidence, are important guideposts in arriving at clear, consistent terminology. In other words, different contexts may lead to different conclusions about “what’s in” and “what’s out.”

Perhaps the most important rule to follow is that of consistency: Ensure that a well-formed definition of the term “race-neutral” consistently guides the medical school’s policy development and practice, paying attention to relevant state laws.

2. Why Does Context Matter?: Different Roads for Different Schools

Medical schools pursuing mission-based diversity goals do so pursuant to different institutional missions and goals and in different legal contexts.

- *Some medical schools (where allowed under state law) pursue race-neutral policies in concert with race- and ethnicity-conscious policies.* In these instances, schools must follow federal “strict scrutiny” rules. As described in greater detail below, a central component of these rules is the requirement that schools pursuing mission-based diversity goals be as intentional about their race-neutral strategies as they are about their race-conscious strategies as they develop and implement student diversity-related policies and programs.
- *Other medical schools pursue only race-neutral strategies,* either because of institutional choice or pursuant to state mandates that prohibit public actors from certain race-conscious practices. The federal “strict scrutiny” rules likely do not apply in these situations. (Note that even for these medical schools, a number of the “strict scrutiny” rules, discussed in Chapters 1 and 4, may be useful in shaping policies and practices.)

3. How Can a Medical School Make the Right Turns Regarding Race-Neutral Strategies?: Rules of the (Strict Scrutiny) Road

As described in Chapters 1 and 4, when medical schools pursue race- or ethnicity-conscious enrollment practices, federal “strict scrutiny” laws apply. Specifically, medical schools providing opportunities or benefits to individual students based on race or ethnicity must engage in a “serious, good faith consideration of workable race-neutral alternatives” that might as effectively achieve diversity-related goals. And, as the Supreme Court explained in *Fisher*,

If a nonracial approach... could promote the substantial interest [in diversity] about as well and at tolerable administrative expense... then the [medical school] may not consider race.... [The medical school has] the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.³

3 *Fisher v. University of Texas*, 133 S. Ct. 2411, 2420 (2013) (internal quotation marks omitted).

Breaking this language down, a medical school employing race-conscious policies must

- have examined and comprehensively assessed potential race-neutral strategies aligned with mission objectives,
- have used those neutral strategies that it deems workable, and
- have a sound and principled reason, grounded in evidence, for deciding not to pursue other race-neutral strategies.

(See Exhibit A.1 for deeper analysis of the key words and phrases quoted in the Supreme Court’s *Fisher* decision.)

A medical school’s mission and context—as well the full landscape of diversity policies and practices, including strategies being explored and employed by other medical schools—should inform a school’s determination about whether a particular race-neutral strategy is feasible. Each school should draw from the broader medical school field when making its unique judgments on both the viability and likely success of race-neutral policies to achieve mission-driven diversity goals.

Exhibit B.1. Examining Race-Neutral Strategies

The U.S. Supreme Court in *Fisher v. University of Texas* (2013) expanded on earlier Court pronouncements regarding the consideration of race-neutral alternatives, stating,

“If a nonracial approach... could promote the substantial interest [in diversity] about as well and at tolerable administrative expense... then the university may not consider race.... [The institution has] the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.”

Questions have been raised about the meaning of this language (which the Court did not answer), and the discussion below is intended to help guide medical schools’ deliberation on these key points.⁴

Fisher Term	Discussion
“About as well”	The measure by which a race-neutral strategy should be assessed is not whether it will result in the equal educational benefit of a race-conscious strategy, but whether it will lead to roughly similar benefits. This requires a medical school to make and document judgments about possible tradeoffs among available strategies. A school’s ultimate determination must be supported by evidence, and the school should document the process by which it reaches judgments, including with reference to research on practices by other medical schools and institutions.
“At tolerable administrative expense”	A medical school is not required to absorb excessive added cost (time, personnel, resources) in adopting a neutral strategy, though cost-savings alone likely cannot justify race-conscious policies. In examining options, cost should be considered along with a range of other factors.
“Demonstrating”	A medical school need not try every conceivable race-neutral strategy or invest in a full-fledged study of a strategy, but it must have a sound basis, rooted in evidence and its expertise, for deciding not to pursue a particular practice or for deciding that a neutral practice would only be effective in concert with a race-conscious practice. The medical school should document its analysis and ultimate determination, which must be anchored in its specific context (though broader social science research and the experiences in the field can and should inform a school’ assessment).
“Available, workable”	Neutral strategies must be selected and implemented in light of the medical school’s unique mission and context. A medical school need not pursue a strategy that would undermine a central component of the school’s identity (e.g., its mission, academic selectivity, or conception of diversity) or pursue a strategy that is not practicable.

⁴ This matrix is adopted from Coleman and Taylor, “Emphasis Added: Fisher v. University of Texas at Austin and Its Practical Implications for *Institutions of Higher Education*,” in *The Future of Affirmative Action: New Paths to Higher Education after Fisher v. University of Texas* (R.D. Kahlenberg, ed.) (Lumina Foundation and The Century Foundation, 2014), available at http://www.educationcounsel.com/docu depot/4_Emphasis-Added.pdf (last accessed July 10, 2014).

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APPENDIX D

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