Race-Conscious Financial Aid:

After Michigan

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The following discussion is not legal advice. Pertinent legal standards are evolving and far from fully settled. Student aid administrators and other responsible college and university personnel should consult their institution's legal counsel concerning particular race conscious financial aid programs.

It has been more than a year since the June 2003 U.S. Supreme Court decisions in *Grutter v. Bollinger* and *Gratz v. Bollinger* addressed consideration of race in admissions at the University of Michigan. Although these cases did not address race-conscious programs other than admissions, colleges around the country are considering the implications of those cases for other programs, including race-conscious student aid.

This article is the first in a two-part series addressing some—but far from all—questions frequently asked by student financial aid administrators and other college and university personnel concerning race-conscious financial aid. The discussion is based on the current federal law under Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution as applicable to higher education institutions. It does not address state or local law, which may be more restrictive than federal law, or legal aspects of race-conscious financial aid relevant to donors.

The Supreme Court's Rulings in *Grutter* and *Gratz*

In *Grutter* and *Gratz*, the Supreme Court held that obtaining the educational benefits of a diverse student body was a compelling governmental interest justifying consideration of race in admissions to the University of Michigan's undergraduate college and law school. The Court upheld the law school's race-conscious admissions policy because it was "narrowly tailored" to achieve that objective, but struck down the undergraduate admissions policy because it considered race too mechanically.

To determine whether a race-conscious admissions policy is "narrowly tailored" to achieve diversity, the Court in *Grutter* identified four relevant principles:

(1) The institution must give each application "individualized consideration";

(2) The institution must give "serious, good faith consideration" to "workable race-neutral alternatives" to race-conscious measures;

(3) The institution may not "unduly burden individuals who are not members of the favored racial and ethnic groups"; and

(4) The institution must review the policy periodically and cease consideration of race when no longer necessary to achieve student body diversity.

ED's Policy Guidance

The U.S. Department of Education (ED) issued a policy guidance on minority-targeted financial aid in 1994 (the "1994 Policy Guidance"). The 1994 Policy Guidance expressed ED's view that race-targeted scholarships may be a lawful means of promoting minority student access to higher education, and identified the circumstances in which ED considered such programs to comply with Title VI of the Civil Rights Act of 1964 ("Title VI"), which prohibits discrimination on the basis of race, color, and national origin by recipients of federal financial assistance.

The 1994 Policy Guidance, however, is not a regulation and thus lacks the force of law, nor has it received judicial review. Courts may give the 1994 Policy Guidance some deference as an interpretation of Title VI by the agency responsible for its enforcement, but would likely give less weight to the 1994 Policy Guidance in a challenge on legal grounds other than Title VI. It is possible, moreover, that ED will modify the principles set forth in the 1994 Policy Guidance in light of the University of Michigan cases, either through review of complaints concerning race-conscious scholarship programs or through revision of the 1994 Policy Guidance itself.

Yes, No, and It Depends

In both setting policy and administering aid, student aid administrators can confront questions about race-conscious aid daily. Some of the most frequently heard questions include the following.

1. In light of the University of Michigan cases, what steps should my institution be taking to continue to foster diversity through its financial aid program while endeavoring to minimize the institution's legal risks?

Whether public or private, the institution should consider, in consultation with its legal counsel, both the purpose and the structure of race-conscious financial aid. First, the institution should consider whether it has identified a legally permissible objective for the program. As we will discuss in question 3, even if the institution believes in the educational benefits of a diverse student body, the institution is likely to be better served in the event of a legal challenge if it has carefully articulated and documented such educational benefits in the academic units that offer race-conscious aid, and has identified the types of diversity that it needs to foster in order to achieve those benefits.

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Second, the institution should consider the structure of the program, including such questions as:

Individualized consideration

- Does the institution give individualized consideration to each applicant for each scholarship?
- To what extent are the institution's scholarships limited to members of certain racial groups?

Race-neutral alternatives

- Would scholarships based on financial need or other non-racial criteria enable the institution to achieve the level of student body diversity needed to realize the desired educational benefits?
- Would scholarships in which race is a consideration in making an award, rather than an eligibility criterion, enable the institution to achieve that diversity?

Effect on non-minorities

- What impact does the race-conscious scholarship have on individuals who are not members of the favored group?
- Are individuals who are not members of the favored group able to finance their education at the institution in other ways?
- How do the terms of the race-conscious scholarship compare to the terms of financial aid available to students who are not members of the favored group?
- Is the amount of race-conscious financial aid appropriate in light of the total aid of the same type offered by the institution?

Duration

- How long is the race-conscious scholarship intended to last?
- If a private donor contributed the funds for the scholarship to the college or university, does the institution have the right to modify the terms of the gift if the restriction is deemed unlawful?
- How frequently does the institution review its race-conscious financial aid programs to evaluate whether they continue to be needed to foster student body diversity?

2. Are the legal standards applicable to a college the same regardless of whether a race-conscious scholarship is being offered by the college, through the college foundation, or by an independent organization, or whether the recipient is selected by the college's scholarship committee?

Essentially, this question asks if there is any difference to a higher education institution between the institution funding and/or administering a race-conscious scholarship and an outside party or outside committee funding and/or administering the scholarship. Both for public institutions and for private institutions that receive federal financial assistance, the legal standards applicable to the institution are the same whether the institution funds a race-conscious financial aid program or is involved only in administration of the program. Both public and private institutions may have substantially less legal risk if they neither fund the program nor are involved in administration of the program, but merely receive checks from independent organizations that select the recipients and award the scholarships.

Public institutions are subject to the

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Constitution, which generally does not apply to the actions of private parties, but only to "state action." The determination of whether state action exists is made on a case-by-case basis and involves "sifting facts and weighing circumstances," according to the U.S. Supreme Court's decision in *Burton v. Wilmington Parking Authority*. Thus, the first question a public institution must ask is whether it engages in state action by funding the scholarship, selecting the recipients, or receiving funds on behalf of students pre-selected by a related entity or an independent organization. When a public institution chooses to restrict some of its funds to a scholarship program, the institution's allocation of its resources in a particular way constitutes governmental decision-making. Similarly, when a public institution selects the recipients of scholarships, it engages in state action.

If, however, a public institution merely receives funds on behalf of students chosen by an independent organization, that limited role may not constitute state action. Whether a public university foundation that administers financial aid would be considered a state actor may depend on the foundation's relationship with the university and the nature of the university's involvement in the scholarship program.

Both public and private colleges and universities that receive federal financial assistance, such as federal student financial aid, are subject to Title VI. In *Grutter* and other cases, the Supreme Court has held that Title VI prohibits racial discrimination to the same extent and under the same standards as the Equal Protection Clause. The non-discrimination obligation of Title VI applies to "all of the operations" of a "a college, university, or other postsecondary institution, or a public system of higher education . . . any part of which receives federal financial assistance."[20 U.S.C. 2000d-4a]. An institution subject to Title VI may not discriminate on the basis of race in financial aid programs "directly or through contractual or other arrangements." [34 CFR 100.3(b)].

In the 1994 Policy Guidance, ED took the position that if a private donor is not itself a recipient of federal financial assistance, Title VI does not apply to race-conscious scholarships awarded directly to students by that donor. In other words, if an independent organization that does not receive federal financial assistance selects students for scholarship awards on a race-conscious basis and writes a check to the student and/or the institution that the student decides to attend, Title VI would not apply to that scholarship.

On the other hand, in the 1994 Policy Guidance ED also took the position that Title VI would apply if a college or university that receives federal financial assistance administers a race-conscious scholarship funded by a private donor.

3. My institution believes in diversity. Is that policy enough to justify race-conscious scholarships?

Most colleges and universities with race-conscious financial aid programs have adopted them as a method of achieving student body diversity. In *Grutter* the Supreme Court made a number of general statements concerning the educational value of a diverse student body. The Court found that the benefits of student diversity are "substantial," citing evidence that diversity advances education by breaking down stereotypes, improving classroom discussion, and preparing students for the workforce and citizenship. While race does not necessarily determine viewpoint, the Court found, being a member of a minority group is "likely to affect an individual's views." The Court also seemed to recognize societal benefits of keeping higher education opportunity open to all races, to enable "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation" and permit universities to "cultivate a set of leaders with legitimacy in the eyes of the citizenry."

At the same time, the Court in *Grutter* gave deference to the University of Michigan Law School's judgment—an extensively expressed analysis in a thorough faculty committee report—that student body diversity is essential to its educational mission. The Court said that it would presume the university's good faith. A college or university is likely to be in a better position to defend race-conscious programs, including race-conscious financial aid, if, before any legal challenge, the institution documents the importance of student body diversity to its own mission and explains the meaning of "diversity" in the context of its own circumstances.

The Court in *Grutter* accepted the University of Michigan's argument that it sought to admit a "critical mass" of minority students to its law school. The Court indicated that the critical mass of students from various backgrounds that the institution seeks to admit should be "defined by reference to the educational benefits that diversity is designed to produce." In other words, the institution should evaluate the presence of minority students needed in the student body to achieve the educational benefits of diversity. The extent of that presence may differ from the presence of minori-

ties in the general population or in the institution's applicant pool.

4. My institution has a reputation of inhospitality to minorities and a racially hostile campus climate. Minority students are underrepresented on campus and graduate at lower rates than non-minority students. We want to overcome these problems by attracting minority students through targeted financial aid. Are those facts enough to justify race-conscious scholarships?

Some colleges and universities seek to use voluntary race-conscious financial aid programs not as a method of achieving the educational benefits of diversity, but as a means of rectifying past discrimination. In a 1989 decision (*Richmond v. J.A. Croson Co.*), the Supreme Court ruled that an institution that is not under court order must show "a strong basis in evidence for concluding that remedial action [is] necessary" to overcome the present effects of its own past discrimination. In legal challenges to voluntary race-conscious admissions and financial aid programs to date, colleges and universities have not been able to persuade courts that they have such a "strong basis in evidence."

For example, in *Podberesky v. Kirwan*, the U.S. Court of Appeals for the Fourth Circuit held unconstitutional the University of Maryland at College Park's Banneker scholarship program, which was restricted to high-achieving African-American students. The University of Maryland initially adopted the program as part of a compliance plan with the Department's Office for Civil Rights (OCR) to overcome the history of legal segregation in public higher education in the State. The university identified four lingering effects of past discrimination at the university:

- its poor reputation in the African-American community
- a racially hostile campus climate
- underrepresentation of African-Americans in the student body, and
- disproportionately low retention and graduation rates of African-American students at the University.

The Fourth Circuit ruled that these facts did not present "a strong basis in evidence" for the race-conscious scholarship program. The court reasoned that evidence of poor reputation and hostile climate were not sufficient to justify the program, as reputation might reflect "mere knowledge of historical facts" and hostile climate could be attributable to general societal conditions rather than circumstances specific to the campus. The Fourth Circuit agreed with the district court that for purposes of determining underrepresentation of African-Americans at the university, the appropriate reference pool was not the general population, but the Fourth Circuit disagreed with the district court as to how to define the relevant, smaller pool of qualified applicants. The court also concluded that the university had failed to prove that the differential graduation rates between minority and non-minority students were caused by past discrimination.

Similarly, in *Hopwood v. Texas*, the U.S. Court of Appeals for the Fifth Circuit concluded that the University of Texas Law School had failed to demonstrate that its race-conscious admissions program addressed present effects of past discrimination. The court noted that the law school was part of a state educational system with a history of legal segregation and was operating under an OCR-mandated compliance plan favorably targeting Mexican-American and African-American applicants. The court, however, rejected evidence of the law school's reputation in the minority community and the perception of the law school as a hostile environment for minorities as a means of demonstrating the present effects of the law school's past discrimination. Relying on *Podberesky*, the court also rejected the law school's argument that underrepresentation of minorities in the student body constituted a present effect of past discrimination, again concluding that the law school failed to demonstrate that any discriminatory acts on its part caused that result.

5. My institution has a number of scholarships for which membership in a particular minority group is required as a condition of eligibility. We also give graduate tuition waivers and fellowships where eligibility is limited to minority students only. Can we continue to do so after the University of Michigan cases?

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Essentially, this question asks whether an institution can have a scholarship or a graduate fellowship that is open only to members of a particular race. In other words, persons are excluded from the competition because of their race.

Race-exclusive scholarships are like-

ly to be substantially more difficult to defend than other types of scholarship programs. In the context of race-conscious admissions to foster student diversity, the Supreme Court in *Grutter* stated that institutions may not "insulate applicants who belong to certain racial or ethnic groups from the competition for admission." Thus, the Court explained, in admissions "universities cannot establish quotas for members of certain racial groups," and a program may not reserve "a certain fixed number or proportion of the available opportunities... exclusively for certain minority groups." Moreover, in the admissions context the Court said that "a race conscious admissions program must not unduly burden individuals who are not members of the favored racial and ethnic groups." The Court elaborated that the University of Michigan Law School met that test because it "considers all pertinent elements of diversity" and "can (and does) select non-minority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants."

On the other hand, in some circumstances a college or university may be able to demonstrate that it can achieve its compelling interest only by using race-exclusive scholarships, but the argument will be far from easy. The 1994 Policy Guidance indicated that institutions might have more flexibility in considering race in financial aid than in admissions because racial preferences in admissions may place greater limitations on educational opportunities of the non-favored group than race-conscious financial aid. The 1994 Policy Guidance stated that ED may approve race-exclusive scholarships as "narrowly tailored" to achieve diversity if

(1) race-neutral means of achieving diversity have been or would be ineffective,

(2) a less extensive or intensive use of race or national origin has been or would be ineffective,

(3) the use of race or national origin is limited in extent and duration and applied in a flexible manner,

(4) the policy is periodically reviewed, and

(5) the effect on students who are not beneficiaries is sufficiently small and diffuse so as not to create an undue burden on their opportunity to receive financial aid.

Very few courts have addressed whether race-exclusive scholarships are lawful, and none has done so since the Supreme Court decided the University of Michigan cases. In *Podberesky*, the Fourth Circuit concluded that the Banneker scholarship program was not narrowly tailored to the stated purpose of overcoming the past segregation of Maryland higher education. Because the University of Maryland had not, in the court's opinion, used appropriate methodology in establishing its enrollment goals for minority students, the court viewed the program as establishing a racial quota. The court also stated that the high-achieving African-American students who received the scholarships did not represent a category of persons who had historically suffered discrimination. Finally, the court commented that, insofar as the University of Maryland awarded scholarships to African-American students from other states, the program exceeded its necessary scope by benefiting persons outside the category it purported to redress.

Since the University of Michigan cases, a range of complaints have been filed with OCR claiming violations of Title VI by institutions allegedly operating race-conscious admissions, financial aid, and other programs. A number of institutions reportedly have opened race-exclusive financial aid programs to students of all races.

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The next issue of Transcript will include Part 2 of this article, addressing additional questions about race-conscious financial aid. We encourage readers to discuss questions about particular race-conscious financial aid programs with their institution's legal counsel.

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