

Higher Education Alert: Navigating Considerations of Race and Sex in Scholarships

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Perhaps now more than ever, colleges and universities are undertaking or rejuvenating diversity, equity, and inclusion (DEI) initiatives across their organizations, and many donors are motivated to support such initiatives, including through gifts to establish scholarships designed to attract and recruit students who will contribute to a vibrant and diverse campus. Inevitably, some donors will want to restrict scholarship funds in a manner that is race- or gender-exclusive or that otherwise takes race or sex into account. However, any college or university that participates in federal financial aid programs must administer such scholarships in a manner that complies with federal nondiscrimination laws — including Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race or national origin in any program receiving federal financial assistance, and Title IX of the Education Amendments Act of 1972, which prohibits discrimination based on sex in any education program or activity offered by a recipient of federal financial aid.

No hard-working college advancement or development officer wants to turn down a gift or annoy an important donor, so there is pressure to accede to the donor's wishes in some fashion despite the application of federal nondiscrimination laws. We frequently receive calls from our college and university clients asking how far they are permitted to go in placing race- and gender-conscious limitations on scholarship awards. Commonly, they begin with the understanding that race- and gender-exclusive scholarships are prohibited and so are seeking guidance regarding what substitute language may be used that will allow them to administer the scholarship in accordance with federal law. It's a very good question; however, it is also impossible to answer in isolation without giving a distorted picture of what the law is, as established by Title VI, Title IX, relevant Supreme Court precedent, and Department of Education guidance.

Take a Step Back

When considering these issues, it is critical to keep the larger context in mind. It is impossible to definitively conclude that any given language stating an eligibility requirement or preference in awarding a scholarship is "acceptable" or "unacceptable" without considering all the relevant facts.

- **Put mission first** — Scholarship programs should reflect and support the institution's articulated educational mission, goals, and values, including commitment to DEI. The financial aid program, including scholarships, should be aligned with the institution's outreach and admissions goals, desired

enrollment, and educational outcomes. When there is a "fit" between the design of the financial aid program and the enrollment and educational philosophies of the institution, it becomes easier to defend the particulars as serving a clear and compelling interest of the institution.

- **Create an inventory of scholarships and look at the big picture** — The compliance analysis for a scholarship program should not focus solely on each scholarship individually, but rather should include consideration of the scholarship program as a whole, in the context of all financial aid opportunities available for the institution's students, and in the broader context of all enrollment practices, including outreach, admissions, and financial aid. Taken together, are there ample opportunities for need- and merit-based aid exclusive of considerations of race or gender? If the answer is yes, a person challenging a race- or gender-conscious practice at the institution will have a harder time demonstrating that they have been injured by it.

- **Assess the effectiveness of the scholarship program in meeting current institutional needs and goals and be willing to make changes** — For scholarships that involve one or more student characteristics that trigger heightened levels of judicial review (race, national origin, gender) if challenged, a court would expect the institution to have assessed the ongoing need to consider those student characteristics in light of current educational goals and progress toward achieving them. A donor's or an institution's notions of what is just or necessary to redress past harms will not, without supportive evidence, pass muster in defending the use of potentially discriminatory eligibility criteria. Furthermore, it is of limited use for an institution to point to national trends in higher education enrollment demographics to justify its localized practices; the relevant trends to track are those at the institution itself. If an institution determines that it has achieved its articulated DEI goals with respect to a particular program (e.g., evidence demonstrates that women are *not* underrepresented in the school of engineering), then it will be hard-pressed to justify continued use of suspect classifications in the awarding of scholarships.

Become Accustomed to a Continuum of Risk

Although it is natural to search for clear lines between what is acceptable and unacceptable, it is better to think of scholarship eligibility criteria on a spectrum from "more difficult to defend" to "easier to defend" if challenged — and to consider how likely it is that a given restriction or preference will invite challenge in the first place. The type of distinctions that the scholarship program makes among applicants when conferring scholarship awards affects how the scholarship program would be reviewed if challenged in court. If the scholarship program includes consideration of characteristics that implicate heightened judicial scrutiny (e.g., race and national origin, gender), then it faces a higher burden in justifying those practices.

Note that bearing a higher burden to justify a practice is not the same thing as that practice being automatically prohibited. By the same token, although a college or university may be able to reduce risk by resorting to facially race-neutral criteria like "first-generation college students" or "members of historically underrepresented groups" to further its DEI interests, that is not the same as eliminating the risk that such

scholarships will attract complaints — the scholarships still must be carefully administered in practice to ensure that they are not awarded in an impermissibly discriminatory manner.

Race and National Origin Classifications

Race and national origin classifications are subject to the highest level of scrutiny (courts refer to it as "strict scrutiny"). Race or national origin may be considered in awarding a scholarship only if "narrowly tailored" and necessary to achieve a "compelling interest" of the college or university. In this context, *narrowly tailored* means:

- Individualized consideration of candidates is required;
- An institution must have given serious and good faith consideration to race-neutral alternatives;
- Race-conscious measures must not unduly burden others; and
- The institution's diversity initiatives must be regularly reviewed and discontinued if no longer needed.

The Supreme Court has said that a college or university has a *compelling interest* in:

- Student body diversity; and
- Efforts to remedy past discrimination by the institution.

The institution bears the burden of proof in establishing that the design of its scholarship program is narrowly tailored to achieve one or more compelling interests of the institution.

Absolute restrictions based on race or national origin alone (e.g., *This scholarship must be awarded to a Black student*), without consideration of other merit or needs-based factors, will be very difficult to defend and in most cases should be avoided — but again, in assessing risk, an institution should review its complete inventory of scholarships to consider the effect of any given facially discriminatory scholarship in the context of other financial aid opportunities at the school. Racial preferences or consideration of race as one factor among others (e.g., *for a computer science major with demonstrated financial need and excellent academic record, with a preference for a Latinx student*) might be somewhat easier to defend in that they likely place less of a burden on the non-preferred group; however, the fact that the suspect classification is stated as a preference rather than an absolute requirement does not, by itself, resolve the issue. The burden of proof would still be on the institution to demonstrate that it has gone through the analysis described above and concluded that this race preference is narrowly tailored and necessary to achieve the institution's DEI initiatives and/or remedy the effects of past discrimination (at the college, not in the U.S. generally). Further, an institution administering scholarships with explicit racial preferences should be mindful that scholarship committees are quite likely to read a stated preference as something closer to a mandate, meaning a preference may in practice be no less burdensome on the non-preferred group than an absolute requirement.

Sex and Gender Classifications

Although gender preferences under Title IX are analyzed in similar fashion to race and national origin preferences under Title VI, there are some key differences. Title IX broadly prohibits awarding scholarships or financial aid on the basis of sex, but for scholarships established "by will, trust, bequest or similar legal instrument" that require award to a specific gender, Title IX permits the use of the "pool and match" method to mitigate the discriminatory effect of classifications based on sex.

- **Pool and match:** Institutions may be able to honor donor preferences and adhere to legal restrictions by creating a broad, gender-neutral pool of funds for all student financial awards, and then matching students with awards based on donors' preferences (with any gap in financial need made up through institutional funds). In the pool and match method:

- Non-gender criteria are used for student eligibility for financial aid generally;
- Gender-restricted funds may be used to satisfy some awards of financial aid;
- Non-gender-restricted funds are used to satisfy the remaining awards;
- No student may be denied an award because of lack of funds; and
- The overall effect of the award of gender-restricted scholarships must not discriminate on the basis of sex.

It is not settled law whether the pool and match method may be used to administer *current* gifts (i.e., those not established by will, trust, or bequest), but many practitioners assume that this is permitted.

The result is that Title IX provides a specific procedure for lawfully administering scholarships with absolute gender restrictions, at least with respect to certain types of gifts; if the pool and match method is not possible or administratively feasible (and it often isn't), then it would be very difficult to defend scholarships with absolute gender restrictions.

Gender preferences are likely easier to defend than outright restrictions, but unlike with respect to Title VI, there are no Supreme Court cases that have said that using gender as a preference in awarding scholarships may, in some cases, pass muster under Title IX — nevertheless, it is reasonable to assume that gender preferences would be treated by a court in analogous fashion to race preferences. As with race and national origin preferences, the burden would be on the institution to show why the preference is well-suited to addressing the institution's interest in maintaining a diverse student body. In addition, the comment above about how racial preferences are administered in practice will matter again with sex-based classifications. For example, if a gender-based preference is truly just a preference, how often does the award go to students of the non-preferred gender, or to non-binary students?

It is also important to note that the U.S. Department of Education in 2021 issued a Notice of Interpretation indicating that it will enforce Title IX's prohibition on discrimination on the basis of sex to include discrimination based on sexual orientation and gender identity. The Department based its interpretation on the Supreme Court's 2020 ruling in *Bostock v. Clayton County*, in which the Supreme Court observed that it is impossible to discriminate against a person based on their sexual orientation or gender identity without discriminating against that person based on sex. As a result, colleges and universities should evaluate scholarships that are restricted on the basis of gender identity or sexual orientation using the same analysis applied to traditional gender-based classifications.

Shifting Landscape

Navigating these Title VI and Title IX issues has long been a challenging proposition for institutions of higher education and has only grown less certain in recent years. For example, Department of Education policy guidance from 1994 that appeared to provide a roadmap for schools to develop a compliant race-conscious financial aid program was pulled back during the Trump administration — and is currently being reconsidered under the Biden administration — illustrating the politically fraught nature of these issues. Further, the Supreme Court recently agreed to hear two cases in its October term — one involving Harvard University and the other involving University of North Carolina — challenging the use of race in admissions decisions. Since the composition of the Court has changed since the last time the Court considered these issues (in 2016) it is widely anticipated that more changes could be ahead related to how colleges and universities may design their admissions and financial aid programs.

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There is no avoiding that race- and sex-conscious scholarships raise thorny questions for colleges and universities and come fully loaded with social and political implications, donor relations challenges, and reputational concerns on top of legal compliance risks. This article has merely touched on some of the more prominent considerations — and omits entirely the related topics of modifications to existing scholarships that have proved problematic as well as best practices in drafting gift agreements for purpose-restricted gifts. If your institution is engaged in the discussion and evaluation of any of the above related to your scholarship and financial aid programs, we would love to help. Please contact Greg Larson at Greg.Larson@lathropgpm.com.