A Federal Legal and Policy Primer on Scholarships:
Key Non-Discrimination Principles and Actionable Strategies for Institutions of Higher Education and Private Scholarship Providers

National Scholarship Providers Association & American Savings Foundation Student Success Training
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Goals for the session

• Provide a quick update related to the *Fisher II* case
• Provide an introduction to federal non-discrimination and tax law parameters for scholarship providers and institutions of higher education
• Discuss a few "hot topics" related to race/ethnicity, gender/sex/sexual orientation/gender identity, and religious affiliation
• Identify possible action steps for providers and institutions to take
• Engage in dialogue and Q&A

Note: This session is provided for informational policy planning purposes only. It does not constitute legal advice. Please discuss any provider- or institution-specific issues with your own counsel.
A Policy and Legal "Syllabus" for Diversity Programs at Colleges and Universities
(ACE, College Board, EducationCounsel 2015)

Preparing for Fisher II: An Issue Brief from the Access & Diversity Collaborative
(College Board, EducationCounsel 2016)

Bridging the Research to Practice Gap: Achieving Mission-Driven Diversity and Inclusion Goals
(College Board, EducationCounsel 2016)

Coming soon!

A Federal Legal and Policy Primer on Scholarships
(NSPA, College Board, EducationCounsel 2016)
1. FISHER II UPDATE
**Fisher II**

The big picture

- *Fisher I* (2013) resulted in no decision in favor of either party. 7 of 8 Justices instructed the lower court to hear the case again and to apply a more rigorous standard of review, especially related to race-neutral alternatives.

- U.S. Supreme Court heard oral arguments in *Fisher II* in December 2015. A decision is due by end of term in June 2016.

- The same facts and core arguments were presented in round two, but the emphasis on some issues is different this time around....

Focus on UT's goals as well as the means chosen to achieve them

Race-neutral strategies no longer the headline

How does race really fit into holistic review – and what's its impact?
### Fisher II

The amici landscape

<table>
<thead>
<tr>
<th>Briefs supporting Fisher</th>
<th>Neutral briefs</th>
<th>Briefs supporting UT</th>
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<tr>
<td>17</td>
<td>3</td>
<td>65</td>
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- Business and military leaders
- Civil rights groups
- Governmental actors (e.g., states, legislators)
- Higher education institutions
- Higher education organizations

- Individuals
- Research organizations or groups
- Other organizations (e.g., think tanks, legal or other professional membership organizations, law school clinics, religious organizations)

- 823 scholars plus major research orgs
- 72 institutions
- 49 businesses
- 36 military leaders
- 8 religious orgs
- 18 states + DC
Fisher II
Possible outcomes

- **UT wins and one of the following.**
  - Grutter affirmed
  - Grutter modified
  - Case dismissed based on "standing"

- **Fisher wins and one of the following.**
  - Grutter affirmed
  - Grutter modified

- **The Court punts.**
  - Case sent back for trial
"[P]eople in the universities and elsewhere are worried that we will kill affirmative action by death of a thousand cuts. We promised in Fisher I that we wouldn't. That opinion by seven people reflected no one's views perfectly. But that's what it says: not fatal in fact."

- Justice Breyer during oral arguments

"[Fisher I was] not a big buffet, just a little nosh . . . a little half of a sushi roll [which we'll turn into] a bubbling bouillabaisse [in Fisher II]."

- Edward Blum in the press recently
2. LEGAL BASICS
Sources of Federal Law

Our focus today (POTUS matters, too, but not our concentration for this workshop)

**Constitution**
- Foundation for non-discrimination law
- Applies to everyone

**Supreme Court / Case law**
- Interprets reach of Constitution and appropriateness of Congressional action for everyone
- Governs how other courts will review different kinds of claims for different groups

**IRS**
- Awards tax-exempt status to non-profits
- Determines taxability of scholarship grants and receipts

**Congress / Federal statute**
- Adds specific protections on top of Constitutional guarantees
- Applies to different groups
The "sliding scale" of standards of review

Based on federal non-discrimination law and relevant SCOTUS precedent

- Race
- Ethnicity
- National Origin

- Gender
- Sex
- Sexual orientation and gender identity
- Religion
- Residence
- Age
- Disability
- Income or class
- All other student characteristics (e.g., athletes, legacies)

More searching court review

Less searching court review
The "sliding scale" of standards of review
Based on federal non-discrimination law and relevant SCOTUS precedent

• Just because a characteristic associated with a scholarship may trigger strict scrutiny review (the most rigorous level of review) does not mean that it will be invalidated by a reviewing court.
• By the same token, the fact that a characteristic associated with a scholarship may trigger a lower standard of review does not mean that the practice in question is automatically lawful.

"Strict scrutiny must not be strict in theory, but fatal in fact . . . But the opposite is also true. Strict scrutiny must not be strict in theory but feeble in fact."

- Justice Kennedy in Fisher I
Federal non-discrimination statutes for educational institutions

Title VI of Civil Rights Act of 1964
- Ethnicity*
- Race*
- National Origin*

Title IX (1974)
- Gender*
- Sex*
- Sexual orientation and gender identity**
- Religion***
- Residence

Title IX (1974)
- Age* (1975)
- Disability*
- Age*
- Income or class

Section 504
- Disability*
- All other student characteristics (e.g., athletes*, legacies)
Federal statutory laws for private actors

- Ethnicity*
- Race*
- National Origin*

Gender*
- Sex*
- Sexual orientation and gender identity**
- Religion***
- Residence

Age*
- Disability*
- Income or class
- All other student characteristics (e.g., athletes, legacies)
Responsibility for legal compliance

Who bears the burden?

Institution receives and administers funds alone

Institution and provider work together

Private provider receives and administers funds alone
Responsibility for legal compliance

When the provider and institution are working together...

The extent to which the institution is involved in administering or providing significant assistance to the privately funded program

Whether the institution sets criteria for or selects recipients of the privately funded aid

Whether the institution provides resources or information to the private program not generally make available to other outside providers of financial aid
3. HOT TOPICS
"No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."

- XIV Amendment to the U.S. Constitution
Race, ethnicity, and national origin

The Strict Scrutiny Framework

- Compelling interest
  - Educational benefits of diversity
- Narrow tailoring
  - Necessity
  - Impact
  - Flexibility
  - Minimal adverse impact on non-beneficiaries
  - Periodic review / limited in time
Race, ethnicity, and national origin

Federal tax law guidelines

IRS guidance specifically allows private foundations to provide scholarships that are "specifically geared toward racial or ethnic minorities" as long as they satisfy certain conditions:

- is consistent with the existence of the private foundation’s exempt status under IRC 501(c)(3);
- utilizes objective and nondiscriminatory criteria in selecting scholarship recipients from among the applicants; and
- utilizes a selection committee which appears likely to make objective and nondiscriminatory selections of grantees.
Race, ethnicity, and national origin
State law considerations
Sex and gender

Constitutional starting point

"No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."

- XIV Amendment to the U.S. Constitution
**Sex, gender, sexual orientation, and gender identity**

Federal non-discrimination law evolution

1971-72: SCOTUS finds sex and gender discrimination unconstitutional. Congress passes Title IX.

1989: SCOTUS finds that discrimination based on sex stereotypes is unconstitutional.

1995: SCOTUS invalidates VMI's all-male admission policy.

2012-16: Federal agencies and courts start to conclude that discrimination based on gender identity or sexual orientation falls under Title IX and other sex/gender non-discrimination laws.
Sex and gender

State law considerations
Religion
Constitutional starting point

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

- 1 Amendment to the U.S. Constitution
Religion
Federal caselaw

SCOTUS

Institutions cannot use religion as a basis for racial discrimination. *(Bob Jones)*

States can prohibit state scholarship $$ from supporting religious study. *(Locke)*

Some federal courts

Classifications based on religious affiliation can trigger heightened scrutiny
Religion
State law considerations

Source: Adapted with permission from College Board (2011)
4. RECOMMENDED STRATEGIES AND ACTION STEPS
### Recommendations for scholarship providers and institutions

A few starting ideas – all of which should be translated for your specific context

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<td>Start with well-articulated goals</td>
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<td>Consider how to communicate with schools and students</td>
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<td>Design eligibility criteria to meet the goals</td>
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<td>Consider whether and how to coordinate with partners</td>
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<td>Make students aware of potential tax implications</td>
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<td>Plan for regular evaluation</td>
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An extra step: Inventory!

Especially those with an array of awards (particularly race-conscious or gender-conscious programs).

Grants Awarded at Mizzou in 2009-10

Less than half of minority students received race-related scholarships. Some minority students received aid intended to increase diversity in other ways (e.g., veterans).
5. Q&A
About EducationCounsel

EducationCounsel, LLC, in Washington D.C., is a mission-based education consulting firm that combines significant experience in policy, strategy, law, and advocacy to make dramatic improvements in education outcomes throughout the United States. EducationCounsel develops and advances evidence-based ideas at the local, state, and national levels to strengthen educational systems and promote expanded opportunities and improved outcomes for all students in order to close achievement gaps and significantly improve education outcomes for all from early childhood through postsecondary education.

Much of EducationCounsel's higher education portfolio centers on issues of institutional diversity and inclusion. As a complement to their institution-focused strategy, legal, and policy support, members of the EducationCounsel team have helped lead the policy, practice and legal work of the College Board's Access and Diversity Collaborative since its inception in 2004. EducationCounsel has also provided legal and policy guidance to other national organizations on diversity and inclusion issues, including the Association of American Medical Colleges, the Law School Admission Council, the National Association for College Admission Counseling, and the National Scholarship Providers Association. Members of the EducationCounsel team have authored three amicus briefs in the U.S. Supreme Court in cases involving legal challenges to higher education diversity policies, as well as numerous policy, practice, legal and research papers and articles on diversity and inclusion issues.

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