Race, Sex and Money: Can Colleges and Universities Provide Race or Gender Conscious Scholarships and Financial Aid?

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Overview

- Race or Gender Conscious Financial Aid
  - What Is It?
  - Why Do We Care Now?
- Summary of Law
  - Gender
  - Race
- What Can We Do?
- What Should We Do Next?
Race or Gender Conscious Financial Aid

- **Race/Gender Exclusive Scholarships**
  - Open only to persons of a particular race

- **Race/Gender as a “Plus Factor”**
  - Anyone applies, but advantage to a particular race/gender

- **Race/Gender Neutral**
  - Proxy criteria used
  - Disproportionate impact
Why Do We Care Now?

Changed Legal Landscape -

- 2003 University of Michigan Cases
  - Affirmative Action in Admissions
- Center for Equal Opportunity letters
- Many institutions ending minority-exclusive programs and scholarships
- But – Limited Direct Judicial Guidance
Title IX:

“No person...shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”

20 USC 1681
Title IX regulations prohibit awarding sex-restricted scholarships (34 CFR 106.37(a))

- Institutions may, however, administer scholarships, fellowships, etc. established by wills, trusts, bequests which require awards to a particular sex (34 CFR 106.37 (b))
  - Only if the overall effect of the award does not discriminate on the basis of sex
  - Referred to as “pooling”
“Pooling”

- Select students for awards on non-gender criteria
- Must have funds available for all students selected
- May use gender-restricted funds to satisfy those awards
- Must use non-gender restricted funds to satisfy the remaining awards
- No student may be denied an award for which he/she was selected because of the lack of funds
Legal Summary – Gender Restrictions

• Example:
  – 50 students selected for financial assistance
  – Financial Aid office matches the students to the scholarships and other aid available, gender-restricted or not
  – If the funds run out and only gender-restricted funds are left, must find other equal funding or cease making awards
Special rules for athletic scholarships
Must offer “reasonable opportunities” for awards for members of each sex in “proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics 45 CFR 106.37(c)(1)
Must have “substantial proportionality”
Legal Summary – Gender Restrictions

Equal Protection Clause:

• Gender-based restrictions reviewed under lower standard than race restrictions
  – Must serve “important governmental objectives”
  – And be “substantially related” to those objectives

• But – some lower courts have held that Title IX requires strict scrutiny as language similar to Title VI

• No case law on gender-restricted financial aid
What Can We Do?

• Gender Exclusive Scholarships and Aid
  – Gender restricted scholarships should only be accepted under the terms of a bequest, trust or other legal instrument if administered by pooling
  – No other gender exclusive aid or scholarships are consistent with Title IX
What Can We Do?

• Gender Conscious Scholarship or Aid
  – Use of gender as a “plus” factor for enhancing diversity - uncertain
  – If gender is underrepresented in the specific academic area and award is substantially related to the objective of enhanced diversity – likely defensible

• Gender Neutral Scholarship or Aid
  – If adopted for gender discrimination purposes, could be problematic
What Can We Do?

- Retain flexibility in the gift instruments
  - Require that fund is administered consistent with the requirements of the US Constitution and other applicable non-discrimination laws
    - “The University may modify or disregard any selection criteria if determined to be contrary to law or then-existing University policy”
  - Funds then redirected which are consistent “to the extent reasonably possible” with donor’s original intent
Review Current Aid and Scholarship Programs for Gender Restrictions

• Purpose
  – Why is gender-conscious aid being awarded?
  – Necessary to remedy effects of past discrimination, to achieve a diverse student body, other?
  – Is the purpose an “important governmental objective” and is the restriction “substantially related” to that objective?
Review Current Aid and Scholarship Programs for Gender Restrictions

- **Structure of Program**
  - To what extent are scholarships gender restricted?
  - Are there differing levels or categories of assistance available to members of each sex?
  - Does the organization support other organizations or persons that provide sex-restricted financial aid?
Review Current Aid and Scholarship Programs for Gender Restrictions

• Is pooling being used to administer current gender restricted funds from bequests or trusts?
• Are athletic scholarships being awarded in proportion to the number of athletes of each sex at the school?
Legal Summary – Race Restrictions

Relevant Laws:

• United States Constitution, 14th Amendment: “No state shall … deny to any person within its jurisdiction the equal protection of the laws.” (Public institutions only)

• Title VI, Civil Rights Act of 1964: “No person … shall, on the ground of race color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” (All institutions that receive federal financial assistance)
Legal Summary – Race Restrictions

Relevant Laws (Cont.):

• 42 U.S.C. § 1981 “All persons … shall have the same right … to make and enforce contracts.” (All institutions & foundations)
Legal Summary – Race Restrictions

Case Law

– Main holdings:
  1. “Context matters” when reviewing programs that consider race
  2. Student body diversity is a compelling interest
  3. Race-conscious Policy must be “narrowly tailored” to achieve compelling interest
Department of Education Policy Guidance

- Institutions may consider race and national origin as a condition for aid eligibility in order to promote diversity “if this use is narrowly tailored, or in other words, if it is necessary to further its interest in diversity and does not unduly restrict access to financial aid for students who do not meet the race-based eligibility criteria.” 59 Fed. Reg. 8756, February 23, 1994.
Legal Summary - Race Restrictions

What does “narrowly tailored” mean?

1. The institution must give each applicant “individualized consideration”

2. Institution must give “serious, good faith consideration” to “workable race-neutral alternatives” to race-conscious measures
What does “narrowly tailored” mean?

3. Race-conscious measures must not “unduly burden” individuals who are not members of the favored race and ethnic groups; and

4. Policy must be reviewed periodically and limited in duration.
What does “individualized consideration” mean?

• Program must be flexible enough to consider *all pertinent elements of diversity* in light of the particular qualifications of each applicant and place them on the same footing for consideration, although not necessarily according to the same weight.

• “universities cannot establish quotas for members of certain racial groups.”

• Race must not be the “defining feature” of the application.
Legal summary – Race Restrictions

Consideration of “Race Neutral” Alternatives

- Institution must demonstrate “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”
Must Not Unduly Burden Members of Non-Favored Group.

- Law school admission program did not unduly burden non-minorities because the law school “can (and does) select non-minority applicants who have greater potential to enhance student body diversity over underrepresented groups.”
Legal Summary – Race Restrictions

Race Conscious Policy Must Be Limited In Time

• Sunset Provisions
• Periodic Reviews to determine whether racial preferences are still necessary to achieve student body diversity.
• “Institutions can and should draw on the most promising aspects of these race-neutral alternatives as they develop.”
What Can We Do?

• Race Exclusive Scholarships
  – Difficult to defend
  – Race as a “Plus Factor” - A race restriction, but defensible if narrowly tailored to achieve a compelling interest.
What Can We Do?

• Race-Neutral
  – Acceptable so long as not adopted for racially discriminatory purpose
  – Examples: scholarships aimed at disadvantaged socio-economic groups; scholarships aimed at individuals who have “demonstrated an interest in ....”
Review Current Aid and Scholarship Programs for Race Restrictions

• Purpose:
  – Is there an identified and articulated legally permissible objective for the program?
  – If to foster the educational benefits of a diverse student body –
    • Document the educational benefits in the specific academic unit
Review Current Aid and Scholarship Programs for Race Restrictions

• Identify the types of diversity needed in the specific academic unit
• How are the racial or ethnic groups to be benefited selected?
  – If to remedy past discrimination:
    • Identify specific evidence of past discrimination at your institution (not just in society)
    • Present effects of discrimination at your institution
    • Connection between past discrimination and present effects
Review Current Aid and Scholarship Programs for Race Restrictions

• Program Structure
  – Individualized Consideration
  – Race-Neutral Alternatives
  – Effect on Non-Minorities
  – Duration

• Documentation Critical
Review Current Aid and Scholarship Programs for Race Restrictions

• If Funded by Third-Party
  – Determine involvement in administering or assisting the privately funded program
  – Does institution set criteria for or select recipients
  – Does institution provide resources or information that are not generally available?
What Should We Do Next?

“Problem” Scholarships

• If donor restricted
  – Obtain donor consent to revise gift agreement to comply with law
    • Use “plus factor” or interest in or connection to country of origin as alternatives
  – If donor is unavailable - obtain court approval for revised gift agreement
What Should We Do Next?

“Problem” Scholarships

- If “board” restricted
  - Make changes necessary to comply
Questions?

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