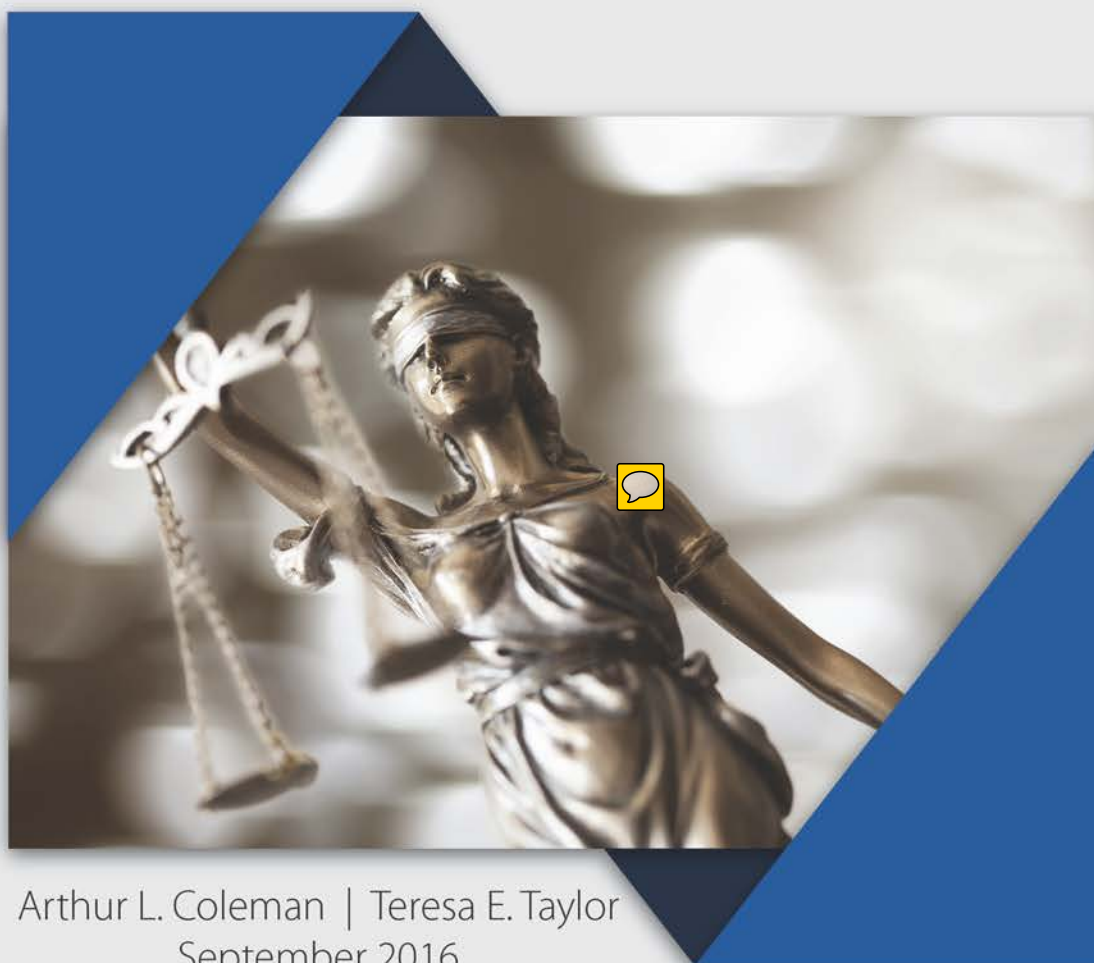


A Federal Legal and Policy Primer on Scholarships

Key Non-discrimination Principles and Actionable Strategies for Institutions of Higher Education and Private Scholarship Providers



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Foreword

Institutions of higher education face a host of opportunities and challenges as they seek to enhance postsecondary access and success for all students. It is essential that institutions — along with key partners like private scholarship providers — understand important enrollment-related “rules of the road” established by federal law in their efforts to ensure the educational soundness and legal sustainability of their access and diversity policies and practices.

Judging solely by the headlines about claims of higher education discrimination in enrollment, one could be forgiven for thinking that the issues were only about race- and ethnicity-conscious *admission* practices. Indeed, all of the cases in this area that have been heard by the U.S. Supreme Court over the past four decades have involved claims of discrimination in the admission process. The Court has not squarely addressed federal discrimination claims associated with financial aid or scholarships — nor has it fully analyzed enrollment practices associated with facets of diversity beyond race and ethnicity that may implicate federal law.

These facts, however, do not change a fundamental, sometimes unnoticed reality: the rules that govern admission at public and private institutions of higher education are also highly relevant to their scholarship and financial aid decisions. And a complementary set of guiding federal principles applies to private scholarship providers. Given the predominance of federal challenges involving claims of race and ethnicity discrimination, it is worth noting that federal law can also apply when other personal characteristics are considered, such as gender, sexual orientation, religion, age, and disability.

This primer is intended to help institutions and private scholarship providers sort through existing federal law and identify factors that may surface related to scholarship efforts to expand access, create a diverse student body, and/or provide financial supports for students. Though some guidance on this topic exists from different sources, we do not believe that there is a single, comprehensive guide that reviews the many issues associated with claims of nondiscrimination and corresponding rules regarding tax-exempt status for private scholarship providers. This primer attempts to help fill that void.

The primer has two purposes: (1) to inform institutions and scholarship providers about the federal legal nondiscrimination principles and authorities that should inform scholarship decisions; and (2) to outline strategies that should be considered in light of those principles in order to meet legal obligations *and* broader institutional goals.

This primer focuses primarily on federal nondiscrimination law, but includes a brief discussion of relevant federal tax law and unique constitutional provisions related to religious affiliation. State and local law and policy also play a significant role, and we encourage readers to engage with local counsel to connect federal principles with state and local requirements.

I. Introduction

The use of scholarships and financial aid in higher education is a dynamic field, driven by the growing focus on the cost of college and students' ability to pay. As college has grown more expensive and state funding has been reduced, students and their families are shouldering more of the financial burden.¹ The availability of scholarships and grants to offset borrowing is an increasingly important concern for most students and families. A 2016 study showed that the scholarships and grants funded 34 percent of college expenses in the 2015-16 school year, up from 30 percent the year before.²

Scholarships are awarded in many different ways through a variety of institutional and external means. Most colleges and universities use scholarships to reinforce their mission and core educational goals, including those related to access, diversity, and inclusion. Such awards typically serve as one step in a broader enrollment process; thus, making strategic financial awards essential for an institution to attract and yield its desired class of students from those it has recruited and admitted. Private foundations and other organizations that award scholarships as an extension of their own charitable purposes often play a key role in achieving those institutional aims.

This guidance is not intended to proscribe or dictate particular actions by any institution or scholarship provider. After all, whether a policy or practice complies with the law is often not a question of black or white, but of gray – in a zone where institutional tolerance for risk (in light of prospective attainment of goals and other factors) will significantly affect judgments about which courses of action to pursue (or not). This guidance is intended to inform those fact- and context-specific deliberations.

The following core principles should inform institutional and organizational decision making:

- **Public and private institutions of higher education are both subject to federal nondiscrimination law.** Federal constitutional principles can be triggered for public institutions and federal statutory principles can be triggered for public and private institutions that receive federal funding. In many cases, including those involving claims of race, ethnicity, and sex discrimination, the general constitutional and statutory standards of review for particular claims are identical (or nearly so). Thus, in these cases, there is generally no material difference between the legal standard of compliance governing public and private institutions of higher education.
- **Though not subject to the same nondiscrimination principles as institutions, private philanthropies are subject to federal statutory law similar to that governing institutions of higher education when different treatment claims may be present.** Federal tax law also comes into play for private entities that are seeking or have received federal tax exempt status. High

1. *E.g.*, INST. FOR RESEARCH ON HIGHER EDUC., PENN GRADUATE SCH. OF EDUC., COLLEGE AFFORDABILITY DIAGNOSIS: NATIONAL REPORT 1 (2016) (observing, "Even in the best-performing states, college is less affordable than it was in 2008 . . . Even at many public community colleges – long an entryway into higher education – students would have to work more than 20 hours a week to cover the costs of attending full time . . . Low- and middle-income families face significant economic barriers that limit their ability to invest in education. Many of these same families are already burdened with living expenses that consume most, if not all, of their annual incomes."), available at http://www2.gse.upenn.edu/irhe/sites/gse.upenn.edu.irhe/files/Natl_Affordability2016.pdf.

2. *More Scholarships, Less Borrowing: Sallie Mae Study*, INSIDE HIGHER ED (June 29, 2016), <https://www.insidehighered.com/quicktakes/2016/06/29/more-scholarships-less-borrowing-sallie-mae-study>.

hurdles nevertheless exist to show that a higher level of scrutiny should apply to a private actor's actions, given the general presumption of legality that courts have for private action.

Reviewing courts use a "sliding scale" regarding the level of scrutiny when addressing claims of discrimination involving various characteristics that may be considered when awarding scholarships. Differing levels of scrutiny implicate different demands — both as a matter of questions posed and the level of evidence required to satisfy legal review. 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 rational basis review (the least rigorous level of review) does not mean that the practice in question is automatically lawful.

A mix of federal case law and U.S. Department of Education Office for Civil Rights (OCR) policy guidance and case resolutions shape these principles and inform the analysis that follows. Although the U.S. Supreme Court has not rendered definitive judgments in cases that specifically apply to postsecondary scholarships, many of the Court's nondiscrimination principles set forth in related cases — including its 2016 *Fisher v. University of Texas* decision — are likely applicable in the scholarship setting, as decisions of lower federal courts and OCR already suggest.

Finally, though this primer aims to clarify a wide range of legal issues related to federal nondiscrimination law, it is not perfectly comprehensive. It does not, for example, closely examine the important differences in institutional policy related to need-based and need-blind aid programs, nor does it directly address all of the state laws that may impact scholarship decisions by institutions and private organizations. Moreover, context plays a significant role in any court analysis of a particular scholarship program. A fact-based analysis of institutional or organizational policies and practices is required to fully assess the question of likely lawfulness in the event that a particular policy or practice is challenged, regardless of the standard of review. As discussed in Section IV below, this inquiry in many cases will likely be shaped by many facets of an institution's overall set of scholarships and financial aid opportunities as well as other related enrollment policies and practices. There are seldom one-size-fits-all analyses or solutions, but common elements shaping good practice can inform institution-specific deliberations.

II. Legal Foundations

A. Federal Nondiscrimination Law Overview

1. The federal framework generally

The Equal Protection Clause of the U.S. Constitution – the foundation for federal nondiscrimination law – appears in the Fourteenth Amendment and provides that states and state actors (e.g., public colleges and universities) may not deny to any person within their borders “the equal protection of the laws.”³ Congress and federal courts alike have extended the principles of the Equal Protection Clause to provide more specific protections for individuals with certain backgrounds or characteristics. This section focuses on laws passed by Congress; federal court decisions are explored later in this guide in the context of different student characteristics.

Federal nondiscrimination law is generally triggered when a policy or practice confers a tangible benefit or opportunity (such as a scholarship) to an individual based on some consideration that distinguishes students or categories of students.

Federal laws prohibit two types of conduct on the basis of a particular characteristic: intentional discrimination (“disparate treatment”) and use of a facially neutral policy that disproportionately harms individuals because of a particular characteristic (“disparate impact”).⁴ Disparate impact claims are often harder to prove because statistical disparities alone do not necessarily reflect discrimination – and the U.S. Supreme Court has not been as friendly to these claims. Also, the U.S. Supreme Court has specifically denied that they can be the basis of a challenge in federal court by a plaintiff under Title VI (described in the next paragraph).⁵ They are not the focus of this guidance.

A number of federal statutes prohibit the recipients of federal funds from discriminating against individuals on certain bases, including several that apply specifically to educational institutions. These laws apply to all public and private institutions of higher education that receive federal funding.⁶ Specific statutes include:

3. U.S. CONST. amend. XIV, § 1.

4. *E.g.*, U.S. DEP’T OF JUSTICE, TITLE VI LEGAL MANUAL ch. VIII (1998), <https://www.justice.gov/crt/title-vi-legal-manual>. But the U.S. Supreme Court has held that individuals can only bring claims under Title VI that allege intentional discrimination. *Alexander v. Sandoval*, 532 U.S. 275 (2001). Still, federal agencies can investigate and take enforcement action (which may include the withholding of federal funds) where the agency determines that a recipient’s policy results in impermissible disparate impact.

5. To evaluate disparate impact claims, courts use a three part test: (1) Does the policy result in a significant disparity in the distribution of benefit or harms based on a certain characteristic (*e.g.*, race, national origin, or sex)? (2) If so, is the policy reasonably related to the policy in question and consistent with a legitimate purpose? (3) If so, is there an alternative policy that would equally serve the policy’s goals with less disparity in effect?

6. *E.g.*, *Guardians Ass’n v. Civil Service Comm’n*, 463 U.S. 582 (1983); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003); see generally ARTHUR L. COLEMAN, SCOTT R. PALMER, & FEMI S. RICHARDS., FEDERAL LAW AND FINANCIAL AID: A FRAMEWORK FOR EVALUATING DIVERSITY-RELATED PROGRAMS (2005), available at http://diversitycollaborative.collegeboard.org/sites/default/files/document-library/diversity_manual.pdf.

- **Title VI** of the Civil Rights Act of 1964 prohibits discrimination based on race, ethnicity, and national origin in programs and activities receiving federal financial assistance, including at educational institutions.⁷
- **Title IX** of the Education Amendments of 1972 prohibits discrimination on the basis of sex in education by institutions that receive federal financial assistance from USED.⁸
- **Section 504** of the Rehabilitation Act of 1973 prohibits discrimination on the basis of handicap or disability in several contexts including education.⁹

Private individuals or organizations that do not benefit from federal funding are clearly not subject to all of the same federal laws as public and private institutions that benefit from federal funding.¹⁰ But federal law can impact private action. For example, tax-exempt private educational institutions must file an annual certification of racial nondiscrimination to continue to receive tax-exempt status from the IRS.¹¹

More broadly, private providers' actions are governed by a set of federal laws associated with discrimination claims that are similarly motivated but different from those for recipients of federal funding.¹² For the award of scholarships, two of these federal statutes that relate to both public *and* private actors may be especially applicable:

- **Section 1981** of the Civil Rights Act of 1866 protects the right to make and enforce contracts free of discrimination.¹³ In some cases, scholarships may be described as “contracts” when both parties are expected to perform a certain task (e.g., payment of scholarship in exchange for participating on an athletic team and/or maintaining good academic standing).¹⁴

7. 42 U.S.C. § 2000d et seq. The U.S. Department of Justice, citing federal court precedent, has explained that “analysis of [intentional] discrimination under Title VI is equivalent to analysis of disparate treatment under the Equal Protection Clause of the Fourteenth Amendment.” U.S. DEP’T OF JUSTICE, TITLE VI LEGAL MANUAL, *supra* note 4, at ch. VII (citing *Elston v. , 997 F.2d. Guardians Ass’n*, 463 U.S. 582, *Alexander v. Choate*, 469 U.S. 287 (1985); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.3d 1403, 1417 (11th Cir. 1985)).

8. 20 U.S.C. § 1681; U.S. Dep’t of Educ., Title IX and Sex Discrimination, http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (revised April 2015).

9. 29 U.S.C. § 701.

10. Office for Civil Rights, U.S. Dep’t of Educ., *Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964*, 59 Fed. Reg. No. 36, FR Doc No: 94-4010 (Feb. 23, 1994), available at <http://www.gpo.gov/fdsys/pkg/FR-1994-02-23/html/94-4010.htm> (“Title VI does not prohibit an individual or an organization that is not a recipient of Federal financial assistance from directly giving scholarships or other forms of financial aid to students based on their race or national origin. Title VI simply does not apply.”).

11. Internal Revenue Serv., Form 5578, <https://www.irs.gov/uac/Form-5578,-Annual-Certificate-of-Racial-Nondiscrimination-for-a-Private-School-Exempt-From-Federal-Income-Tax> (updated Nov. 17, 2015).

12. See 42 U.S.C. §§ 1981, 1981A, 1983, 1985[3], and 1988; see also *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003) (applying § 1981).

13. 42 U.S.C. § 1981(a).

14. For example, the U.S. Supreme Court has held that a contract for educational services (e.g., parents paying tuition at a private school) is a contract for purposes of Section 1981. *Runyon v. McCrary*, 427 U.S. 160 (1976) (holding that a private, nonsectarian school could not deny admission to prospective African American students because of their race). Notably, on the same day it announced *Runyon*, the Court released a different decision that found that Section 1981 applies to discrimination on the basis of *any* race or ethnicity, including discrimination against whites. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). See also *Pryor v. Nat’l Collegiate Athletic Ass’n*, 153 F. Supp. 2d 710 (E.D. Pa. 2001) (finding that Section 1981 could

- **Section 1985** of the Civil Rights Act of 1866 prohibits private and public conspiracies to discriminate intentionally on the basis of race by interfering with civil rights created by other laws.¹⁵

For application of all of these federal nondiscrimination laws, however, context matters. The next section explores one potentially important factor for scholarships: which entity bears responsibility for compliance?

2. Responsibility for legal compliance

Institutions of higher education sometimes work in partnership with private providers to award scholarships, which can raise a unique set of questions about prospective legal responsibility, which can surface under any law or combination of laws described above. Few court decisions address this situation directly, but OCR has issued relevant guidance. OCR explains that federal nondiscrimination statutes *do* apply to institutional actions, even when funds come from a private source, if the education institution is involved in “administering or providing significant assistance to” the process of awarding the privately donated aid.¹⁶

Institutions may “participate” in the awarding of private aid to students in different ways, not all of which would necessarily trigger heightened legal scrutiny under federal nondiscrimination law. Considerations to determine whether an institution might be legally responsible for funds supplied by a private donor include:

- 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; and
- Whether the institution provides resources or information to the private program that it does not generally make available to other outside providers of financial aid.¹⁷

To illustrate these ideas, in 1996, OCR found that Northern Virginia Community College (NVCC) was subject to strict scrutiny under Title VI for five race-conscious scholarship programs administrated by a private foundation because NVCC officials had created the foundation to support the institution and the foundation was located on campus.¹⁸ These conditions suggested that NVCC had close ties with the scholarship program; in other words, the private funder did not exercise complete control over the program.

be implicated by an athletic scholarship, even though the claim at issue failed because the plaintiffs did not meet the minimum academic eligibility standards).

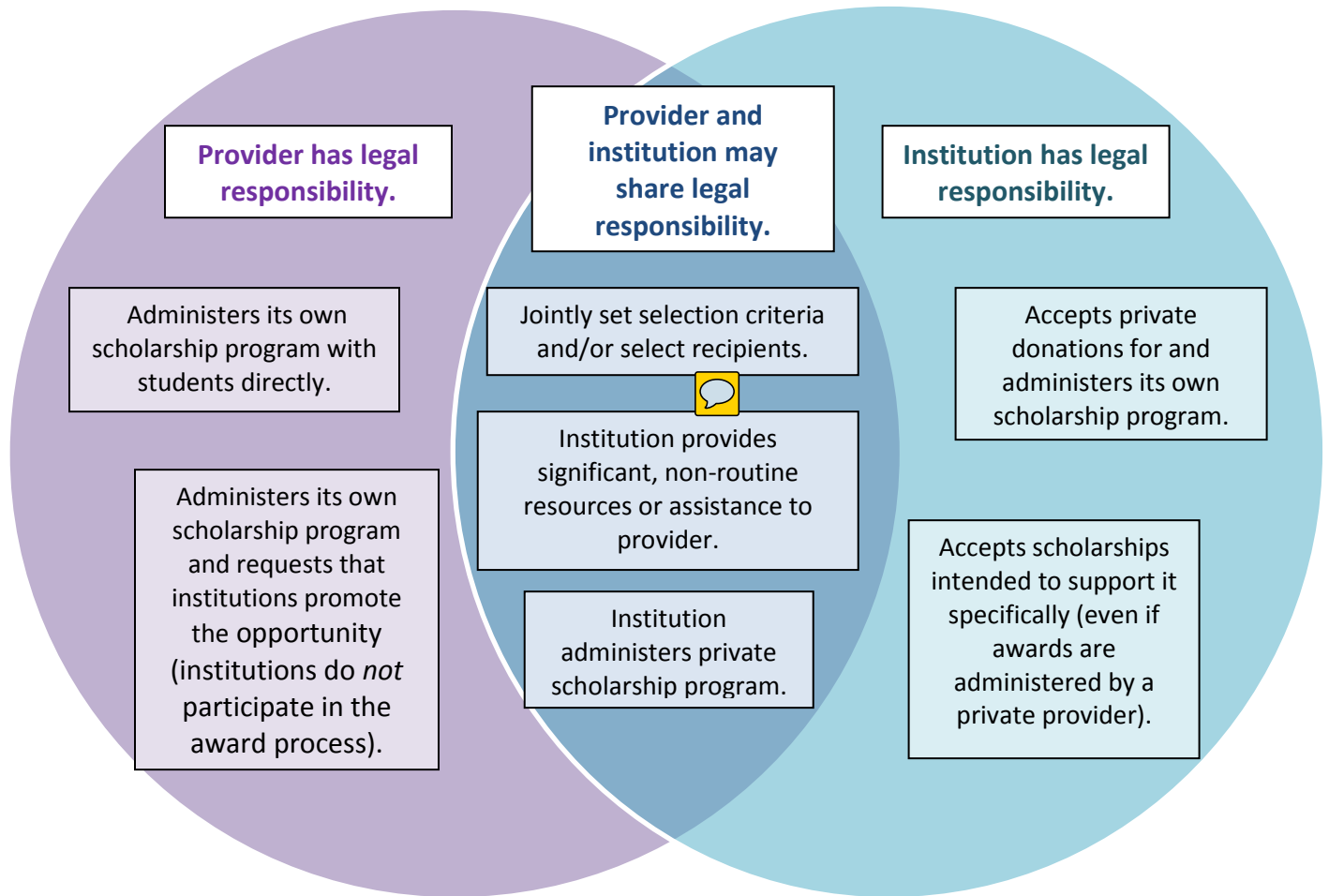
15. 42 U.S.C. § 1985(3).

16. Jonathan Alger and Donna Snyder, Nat’l Ass’n Coll. and Univ. Att’ys, *Donated Funds and Race-Conscious Scholarship Programs After the University of Michigan Decisions*, 13–14 (2004).

17. *Id.* at 13–14.

18. See Patrick Healy, *Education Department Sends Strong Warning on Race-Exclusive Scholarships*, CHRON. HIGHER EDUC. (Oct. 31, 1997), <http://chronicle.com/article/Education-Department-Sends/98041/>; see also Alger and Snyder, *supra* note 16, at 13.

But, as with most facets of nondiscrimination law, determination of legal responsibility depends on the specific facts. The graphic below (derived principally from OCR guidance and case resolutions) illustrates how responsibility may be assigned by a reviewing court.



B. Federal Tax Law Overview

Several provisions of federal tax law establish restrictions on scholarships that stem from a concern that private foundations would use nontaxable funds in pursuit of private interests under the cover of “scholarships” and “grants.”¹⁹ As a result, scholarships can be the rare form of charitable giving that may be subject to federal tax liability both for the provider and the recipient.²⁰

Internal Revenue Service (IRS) guidance defines “scholarship” as including “any amount paid to, or for the benefit of, a graduate or undergraduate student for the pursuit of his/her studies” as a “no strings educational grant, with no requirements of any substantial quid pro quo from the recipient such as any rendering of future services.”²¹ **Scholarships under this definition are generally taxable expenditures for the organization and awardee, unless they qualify for one of several exceptions,**²² including:

- Scholarships awarded through a process approved in advance by the IRS.²³ To receive such approval, the provider must show that the scholarship meets four conditions: (1) awarded on “an objective and nondiscriminatory basis;”²⁴ (2) constituted a scholarship or fellowship award that was not includable as gross income and was used to study at an educational organization; (3) constituted a prize or award not includable as gross income and the recipient was selected from the general public; (4) was designed to achieve a specific objective, produce a report or other similar product, or improve or enhance a literary, artistic, musical, scientific, teaching, or other similar capacity, skill, or talent of the grantee.²⁵

19. Internal Revenue Serv., N. IRC 4945 – Grants to Individuals 1–2 (1980 EO CPE Text) (quoting legislative history from 1969 that scholarships were being used “to enable people to take vacations abroad, to have paid interludes between jobs, and to subsidize the preparation of materials furthering specific political viewpoints”), available at <https://www.irs.gov/pub/irs-tege/eotopicn80.pdf>; see also Internal Revenue Serv., Publication 970: Tax Benefits for Education (Jan. 29, 2016), available at: <http://www.irs.gov/pub/irs-pdf/p970.pdf>.

20. MARK KANTROWITZ, EDVISORS, HISTORY OF THE TAX STATUS OF SCHOLARSHIPS 1 (2013), available at <https://www.edvisors.com/media/files/student-aid-policy/20130913-history-of-the-tax-status-of-scholarships.pdf>.

21. Internal Revenue Serv., 7.27.19.5.1 (02-22-1999), https://www.irs.gov/irm/part7/irm_07-027-019.html#d0e747.

22. 26 U.S. Code § 4945(d)(3).

23. 26 U.S. Code § 4945(g).

24. To be “objective and nondiscriminatory,” (1) the process must be led by a tax exempt organization; (2) donations for the scholarship must be tax deductible; and (3) the scholarship process must meet specific rules for the pool of potential grantees, selection criteria, and award decision makers. Internal Revenue Service, 7.27.19.5.7.1 (02-22-1999). For the third requirement,

- The potential awardee pool must (1) “be selected on criteria reasonably related to the purposes of the grants;” “be sufficiently broad to ensure that the giving of grants would be in furtherance of a [charitable] purpose;” and (3) “be sufficiently large to constitute a charitable class.” Internal Revenue Service, 7.27.19.5.7.2 (02-22-1999). But the IRS allows for “reasonable restrictions on the pool” if the awardees are “exceptionally qualified” to carry out the scholarship provider’s purpose or the selection is “particularly calculated to accomplish the charitable purpose of the grant rather than to benefit particular persons or a particular class of persons.” *Id.*
- The selection criteria should be “related to the purposes of the grant.” Internal Revenue Serv., 7.27.19.5.7.3 (02-22-1999); compare Internal Revenue Serv., Rev. Rul. 76–340, 1976–2 C.B. 370 (in an approved scholarship process, two factors among many included the cost of the program the applicant intended to pursue and whether the recipient was likely to finance it with the scholarship funds) with Internal Revenue Serv., Rev. Rul. 85–175, 1985–2 C.B. 276 (in a rejected scholarship process, criteria gave preference to family members and relatives of contributors to the foundation).
- Those decision makers who select the scholarship recipients “should not be in a position to derive a private benefit, directly or indirectly from selection of grant recipient.” Internal Revenue Serv., 7.27.19.5.7.4 (02-22-1999).

25. Internal Revenue Serv., 7.27.19.5.7 (02-22-1999).

- Scholarships for purposes other than travel, study, or similar activity (e.g., grants to low-income students to purchase furniture).²⁶
- Scholarships that do not finance any future activity of the grantee and have no conditions for how recipients use the funds (e.g., grants in recognition of past accomplishments).²⁷
- Scholarship awards from a private foundation are sent to a tax exempt organization (such as an educational institution) that supervises the projects for which the grants are used and controls the selection process. (Private charities may play a limited role in the selection process, e.g., suggesting candidates as long as the other organization has an “objective manifestation of control” over the process.)²⁸
- Scholarship awards from a private foundation are granted to a governmental agency for use by an individual as long as the agency satisfies the IRS in advance that the award furthers a charitable purpose, the agency requires the individual grantee to submit reports to the agency, and the agency will investigate any jeopardized grants.²⁹

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.³⁰ The IRS has described those conditions only by way of example:

X company has organized a private foundation which, as its sole activity, provides 100 college scholarships per year to children of X company’s employees. It also provides 20 college scholarships per year to a certain ethnic minority group. All members of this ethnic minority group (other than disqualified persons with respect to the private foundation) living in State Z are eligible to apply for these scholarships. It is estimated that at least 400 persons will be eligible to apply for these scholarships each year. Selection of the recipients is based on prior academic performance, performance on certain tests designed to measure ability and aptitude for college works, and financial need. Under these circumstances, the operation of this scholarship program by the private foundation: (1) is consistent with the existence of the private foundation’s exempt status under IRC 501(c)(3); (2) utilizes objective and nondiscriminatory criteria in selecting scholarship recipients from among the applicants; and (3) utilizes a selection committee which appears likely to make objective and nondiscriminatory selections of grantees.

It is also important for scholarship providers to keep in mind that scholarship recipients may bear some tax liability if scholarship funds are used in certain ways. Baseline rules from the IRS include:

- Scholarships and grants are tax-free for the recipient if: (1) the recipient is a candidate for a degree at an educational institution that maintains a regular faculty and curriculum and normally has a regularly enrolled body of students in attendance at the place where it carries on its educational activities; and (2) the amounts received are used to pay for tuition and fees

26. Internal Revenue Serv., 7.27.19.5.2 (02-22-1999).

27. *Id.* But see Internal Revenue Serv., Rev. Ruling 76-461, 1976-2 C.B. 372 (a private foundation’s grant to a high school senior for winning a science fair was taxable because the award was conditioned on the recipient attending college, and thereby intended to finance the student’s future activities).

28. Internal Revenue Serv., 7.27.19.5.4 (02-22-1999).

29. Internal Revenue Serv., 7.27.19.5.5 (02-22-1999).

30. Internal Revenue Serv., 7.27.19.5.7.5 (02-22-1999).

required for enrollment or attendance at the educational institution, or for fees, books, supplies, and equipment required for courses at the institution.

- Scholarships and grants are taxable for the recipient if: (1) the amounts received are used for incidental expenses, such as room and board, travel, and optional equipment; or (2) the amounts received are payments for teaching, research, or other services required as a condition for the fellowship grant (unless received as part of federal programs for health professions).³¹

III. Legal Considerations Associated with Different Student Characteristics³²

Section II described federal legal foundations for institutions and scholarship providers to consider as they structure scholarship eligibility and award criteria. This section examines more closely the federal treatment of different student characteristics and backgrounds. Part A provides a conceptual overview of the various standards of review. Part B then discusses with more specificity individual characteristics that likely implicate a heightened level of judicial review, followed by Part C's discussion of individual characteristics that do not implicate a heightened level of review.

A. Standards of Review

Determining the applicable standard of review in a claim of discrimination in a scholarship decision based on federal law requires a court to assess several factors. Two considerations predominate in court analyses:

- The **type of distinctions** that the scholarship program makes among applicants when conferring scholarship awards. If the scholarship program includes consideration of characteristics that implicated heightened judicial scrutiny (e.g., race and ethnicity, gender and sex), then it faces a higher burden in justifying those practices if challenged in court.
- The **type of actor** that oversees the scholarship program. As discussed above, public and private actors are governed by similar but distinct federal laws, regulations, and court decisions.

All standards of review derived implicate some form of inquiry into ends and means: Are the goals of the policy or practice sufficiently strong? And, if so, are relevant design and implementation elements appropriately designed to achieve those goals? Higher standards of review require more evidence to support an institution or provider's answers to these questions.

U.S. Supreme Court cases have created "a continuum of judgmental responses to differing classifications . . . ranging from 'strict scrutiny' at one extreme to 'rational basis' at the other," represented in the graphic below.³³ The Court has also explained that the default standard for reviewing a policy is "rational basis," the least rigorous standard of review that presumes state legislation or other official action to be valid and will be sustained by a court "if the classification . . . is rationally related to a legitimate state

31. Internal Revenue Serv., Topic 421: Scholarships, Fellowship Grants, and Other Grants, <https://www.irs.gov/taxtopics/tc421.html> (last reviewed or updated March 22, 2016).

32. By "student characteristics," we mean all background and demographic traits and statuses that a student represents at a given moment in time. Some characteristics are immutable (e.g., race), while others may change over time (e.g., income).

33. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 451 (1985) (Stevens, J., concurring).

interest.”³⁴ Under this lenient standard, the Court has gone so far as to uphold a law because the *Court* found a legitimate state interest for a policy, even when the state defending the policy did not supply it on its own.³⁵ This is largely due to judicial respect for the separation of powers and limits on courts to reverse legislative decisions. As the Court has explained, “where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued.”³⁶

But the Court has also instructed that the default standard “gives way” when a classification implicates certain characteristics.³⁷

- The most rigorous level of scrutiny — strict scrutiny — applies when a policy or practice “classifies by race, alienage, or national origin.”³⁸ As the Court has explained, “the purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the legislative body [or public institution or recipient of federal funds] is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen ‘fit’ this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.”³⁹
- Heightened judicial review – “intermediate scrutiny” (somewhat less rigorous than strict scrutiny) — applies to classifications based on gender or sex.⁴⁰ As the Court has explained, “[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.”⁴¹ But the Court has not revisited the intermediate scrutiny standard in some time, which has created some uncertainty about the nature and scope of the standard today. Still, though not completely settled in the courts, the logic of the cases involving sex discrimination suggest a likely extension of the intermediate scrutiny standard to distinctions based on gender identity and sexual orientation, as well.⁴²

Though the U.S. Supreme Court has declined to extend heightened scrutiny to other characteristics such as age and disability⁴³ and has not yet spoken to other characteristics such as religious affiliation (though some lower courts have), Congress has provided additional protections and grounds for legal action beyond the baselines laid out by the Supreme Court.

34. *Cleburne*, 473 U.S. at 440.

35. *E.g.*, *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

36. *Cleburne*, 473 U.S. at 441.

37. *Id.* at 440-41.

38. *Id.* at 440.

39. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

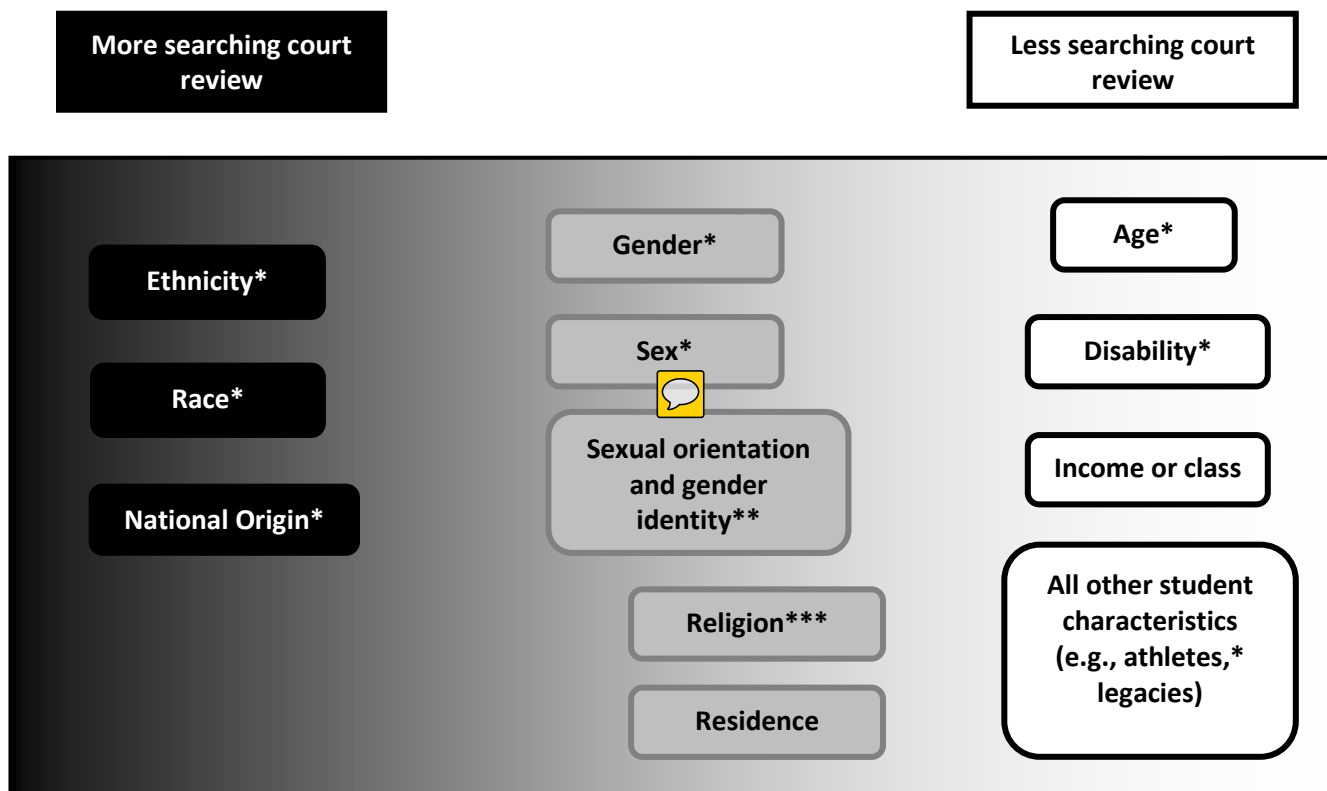
40. *Cleburne*, 473 U.S. at 440..

41. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

42. See discussion on pages 22–23, *infra*.

43. *Cleburne*, 473 U.S. at 441-42.

This array of factors that may come into play in scholarship award decisions is summarized in the graphic below. Characteristics on the left side — shaded black — likely trigger the highest level of review, “strict scrutiny.” Distinctions along these lines tend to prompt a reviewing court to take a more searching look at evidence supporting the scholarship program. Those on the right side — not shaded — trigger the lowest level of review, “rational basis.” Those in the gray middle area trigger some level of review between strict scrutiny and rational basis. Each characteristic is described in detail later in this section.



Legend:

- * At least one federal nondiscrimination statute focused on this characteristic exists.
- ** A number of recent federal agency and lower court decisions suggest that federal protections associated with gender and sex discrimination claims have been extended to sexual orientation and gender identity; but this issue should not be viewed as firmly resolved.
- *** Claims involving religion are a special case and implicate a unique analysis derived from First Amendment principles.

An important postscript to this overview should be carefully considered as institutions and organizations assess and manage their legal risk. Most simply, you cannot always judge a book by its cover. The express design of particular policies and practices may well convey the fact that certain benefits or opportunities based on certain factors trigger the kind of scrutiny described above. But, there are important caveats to this general rule.⁴⁴

44. For comprehensive treatment of this issue, see ARTHUR L. COLEMAN, SCOTT R. PALMER, & STEVEN Y. WINNICK, RACE-NEUTRAL POLICIES IN HIGHER EDUCATION: FROM THEORY TO ACTION (2008), available at

A policy can expressly express a principal motivation and operation to create diversity related to one of the characteristics above, but it would likely *not* trigger a heightened judicial review because the benefit conferred through the policy is so small. For example, an outreach strategy may specifically target racial and ethnic minority students, but likely does not justify heightened judicial scrutiny because the only “benefit” target students receive is extra information or special encouragement to apply.

In contrast, policies may be “neutral” on their face but involve an underlying intent to create diversity related to a particular student characteristic. For example, a policy may state an interest in broad diversity or diversity related to income, but the only factor that is actually considered is a student’s race or ethnicity. Such a policy may be using income or broad diversity as a proxy for race and, therefore, might be subject to heightened scrutiny. But not every “neutral” factor will result in such a conclusion. For example, as discussed below, when reviewing a challenge to a school district’s student assignment policy favoring low-income students, OCR concluded that income did *not* serve as a proxy for race.

Finally, we emphasize again that surviving the standard of review for a discrimination claim based on federal law is an inherently context-specific decision. As the U.S. Supreme Court has explained, strict scrutiny should be neither “strict in theory, but fatal in fact” nor “strict in theory, but feeble in fact.”⁴⁵ By the same token, the fact that a scholarship policy does not implicate a heightened level of review does not mean that it will automatically pass judicial scrutiny. A court’s analysis is likely to be shaped by purpose of the scholarship program and nature of the benefit conferred (e.g., the size and character of the benefit or opportunity conferred [and, correspondingly, whether any material benefit or opportunity is denied to others]). As OCR has explained:

The use of race-targeted financial aid, on the other hand, does not, in and of itself, dictate that a student would be foreclosed from attending a college solely on the basis of race. [I]n contrast to the number of admission slots, the amount of financial aid available to students is not necessarily fixed. For example, a college’s receipt of privately donated monies restricted to an underrepresented group might increase the total pool of funds for student aid in a situation in which, absent the ability to impose such a limitation, the donor might not provide any aid at all.

Even in the case of a college’s own funds, a decision to bar the award of race-targeted financial aid will not necessarily translate into increased resources for students from non-targeted groups. Funds for financial aid restricted by race or national origin that are viewed as a recruitment device might be rechanneled into other methods of recruitment if restricted financial aid is barred. In other words, unlike admission to a class with a fixed number of places, the amount of financial aid may increase or decrease based on the functions it is perceived to promote.⁴⁶

<http://diversitycollaborative.collegeboard.org/sites/default/files/document-library/race-neutral-policies-in-higher-education.pdf>

45. *Fisher v. Univ. of Texas at Austin*, 570 U.S. ---, 133 S. Ct. 2411, 2421 (2013).

46. Office for Civil Rights, U.S. Dep’t of Educ., *Nondiscrimination in Federally Assisted Programs*, *supra* note 10.

B. Characteristics That Trigger a Heightened Level of Scrutiny

1. *Race, ethnicity, and national origin*⁴⁷

Highlights on race, ethnicity, and national origin

- Scholarship award processes – whether at public or private institutions or administered by private organizations – must not discriminate on the basis of race, ethnicity, or national origin.
- To the extent that a scholarship program includes race, ethnicity, or national origin as an eligibility criterion or award factor, the program must serve a “compelling interest” through means that are “narrowly tailored” to achieve it. “Compelling interests” that may justify a race-conscious scholarship program include the educational benefits of diversity and the need to address the present effects of the institution’s own past discrimination.
- Institutions may be able to honor donor preferences and adhere to legal restrictions by creating a broad, race-neutral pool of funds for all student financial awards, and then matching students with awards based on donor’s preferences (with any gap in financial need made up through institutional funds).
- Federal law does not prevent a private tax-exempt foundation’s scholarship program from being designed specifically for students of a particular racial, ethnic, or national origin group, though it must meet the IRS guidelines described in Section II.B. above.

Discrimination based on race, ethnicity, or national origin is in violation of the Equal Protection Clause in the Fourteenth Amendment to the U.S. Constitution and prohibited by Title VI of the Civil Rights Act of 1964.⁴⁸ Based on U.S. Supreme Court precedent, including race, ethnicity, or national origin as an eligibility criterion or award factor in scholarship decisions is not in itself unlawful discrimination, but such a practice triggers the highest level of review by courts, “strict scrutiny.”⁴⁹ **This standard requires a showing that there is a “compelling interest” in the use of race or ethnicity and the means chosen to achieve that interest are “narrowly tailored” to achieve it.**⁵⁰

Grounded in Mr. Justice Powell’s landmark opinion in *Regents of the University of California v. Bakke* (1978), a majority of the U.S. Supreme Court ruled in *Grutter v. Bollinger* (2003), and in *Fisher v. University of Texas at Austin* (2013 and 2016), that the educational benefits of student diversity were compelling and could justify appropriately designed race- and ethnicity-conscious higher education

47. This section includes some text that has been adapted with permission from the College Board and EducationCounsel, Financial Aid & Scholarships: An Issue Brief from the Access & Diversity Collaborative (Nov. 2015), available at <http://educationcounsel.com/?publication=college-board-access-diversity-issue-brief-financial-aid-scholarships>.

48. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); 42 U.S.C. § 2000d et seq.

49. COLEMAN, PALMER, & RICHARDS, FEDERAL LAW AND FINANCIAL AID, *supra* note 6, at 26. Though federal law has long included protections against discrimination based on national origin, the Supreme Court has only directly addressed national origin once. Under Supreme Court precedent and the similarly meager legislative history surrounding the purpose of including “national origin,” the term has been deemed to protect individuals from discrimination based on the country where one or one’s ancestors were born, but does not include protection based on citizenship status. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973); Juan F. Perea, *Ethnicity and Prejudice: Reevaluating “National Origin” Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 807 n.10 (1994), available at <http://scholarship.law.wm.edu/wmlr/vol35/iss3/2>; Jacqueline Grace Diaz, *The Divided States of America: Reinterpreting Title VII’s National Origin Provision to Account for Subnational Discrimination Within the United States*, 162 U. PENN. L. REV. 649, 653 (2014).

50. *Grutter*, 539 U.S. at 325, 333 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (“Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.”); see generally COLEMAN, PALMER, & RICHARDS, FEDERAL LAW AND FINANCIAL AID, *supra* note 6.

admission policies.⁵¹ The forward-looking, mission-driven educational benefits associated with diversity in such cases should be distinguished from the remedial interests that may justify (and in some cases demand) race-conscious action. In remedial cases, courts demand a strong basis in evidence demonstrating the need to employ race-conscious policies in order to overcome the present effects of an institution's or system's *own* past discrimination.⁵²

No U.S. Supreme Court cases directly address race-conscious *scholarship* programs, but the U.S. Department of Education's Office for Civil Rights (OCR) Title VI policy guidance continues to ground Title VI administrative enforcement efforts.⁵³ (Those principles and standards, promulgated pursuant to notice and comment rulemaking, may be persuasive in court litigation, as well.) In that guidance, OCR concluded **that institutions of higher education can consider race as (1) "one factor, with other factors, in awarding financial aid if necessary to promote diversity;" and (2) "as a condition of eligibility in awarding financial aid if it is narrowly tailored to promote diversity."**⁵⁴

OCR also concluded that "[a] college may make awards of financial aid to disadvantaged students, without regard to race, ethnicity, or national origin, even if that means that these awards go disproportionately to minority students."⁵⁵ Moreover, "awarding financial aid to disadvantaged students provides a sufficiently strong educational purpose to justify any racially disproportionate effect the use of [such] criterion may entail."⁵⁶ Thus, considerations of race-*neutral* characteristics such as motivation and ability to overcome economic and educational disadvantage can be "educationally justified considerations" that do not trigger strict scrutiny, even if they have a racially disproportionate effect.⁵⁷ (Additional discussion of race-neutral characteristics is provided in Section III.B. below.)

51. *Fisher*, 133 S. Ct. 2411; *Fisher v. Univ. of Texas at Austin*, No. 14-981 (2016), available at http://www.supremecourt.gov/opinions/15pdf/14-981_4g15.pdf.

52. *Podberesky v. Kirwan*, 38 F. 3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995). In *Podberesky*, the U.S. Fourth Circuit Court of Appeals invalidated the Banneker scholarship program at the University of Maryland (UMD), a merit-based program available *only* to African American students. (The program was not designed to achieve the educational benefit of diversity.) UMD sought to remedy what it considered the present effects of its history of segregation: underrepresentation and low retention rates of African American students, a poor reputation in the community, and hostile campus climate. *Id.* at 152.

The Fourth Circuit ruled that the race-exclusive program was not narrowly tailored to remedy such purported interest because it targeted high-achieving students and nonresidents while failing to consider race-neutral alternatives. *Id.* at 157-62. Notably, after the decision, UMD retained the Banneker program as its "most prestigious academic award" but opened it to all applicants. UMD considers the "academic achievement, standardized test scores, letters of recommendation, extracurricular activities, awards, honors and essays" of all students in making its decision, allowing the university to "identify potential academic leaders, who as individuals and as a group, will enrich and benefit from the campus learning environment." University of Maryland Office of Student Financial Aid, Banneker/Key Scholarship Program, http://www.financialaid.umd.edu/scholarships/banneker_info.php (last accessed Aug. 13, 2015).

53. OCR published the guidance in the Federal Register pursuant to notice and comment. U.S. Dep't of Educ., Notice of Nondiscrimination in Federally Assisted Programs, *supra* note 10. For an example of the use of the guidance in an OCR compliance resolution, see Univ. Mo.-Columbia, Docket No. 07052028 (U.S. Dep't of Educ. Nov. 26, 2012) (compliance resolution), <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/07052028-a.html>.

54. Office for Civil Rights, U.S. Dep't of Educ., *Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964*, *supra* note 10.

55. *Id.* We interpret OCR's "disadvantaged" language to include low-income and first-generation students.

56. *Id.*

57. *Id.* OCR recently found that a state merit scholarship program can operate within the bounds of federal law, even if increasing the GPA and test score threshold for eligibility has a statistically *negative* impact on the eligibility of minority students. OCR's 2014 review of the Florida Bright Futures state scholarship program found insufficient evidence that the

Partially justifying this distinction, OCR has explained that the scope of review for a race-conscious scholarship program should be the institution's financial aid program as a whole, not any single scholarship in isolation.⁵⁸ Just because a student does not receive a race-conscious scholarship does not mean that he or she might not receive some other form of financial aid. As OCR observed:

The Department agrees that there are important differences between admissions and financial aid. The affirmative action admissions program struck down in *Bakke* had the effect of excluding applicants from the university on the basis of their race. The use of race-targeted financial aid, on the other hand, does not, in and of itself, dictate that a student would be foreclosed from attending a college solely on the basis of race.⁵⁹

OCR's 2012 resolution related to the University of Missouri's (UM) financial aid system illustrates this point.⁶⁰ In that case, UM's financial aid and scholarship awards for undergraduate and graduate students totaled \$141.7M for almost 2,000 awards in 2009-10 and included grants, scholarships, fellowships, loans, and work-study from a mix of federal, state, UM, and private sources, including:

- Approximately 400 diversity-related scholarship programs totaled over \$46.7M, more than \$39M of which went to low-income students. These scholarships did not limit the definition of "diversity" to race and ethnicity but also included socioeconomic status and need, service and extracurricular accomplishments, veteran or military status, disability, nontraditional age, graduation from certain high schools, home-school experience, degree from a two-year institution, geographical regions in Missouri, out of state status, work status, LGBT or ally, and gender in unrepresented fields.
- Fifty-two scholarships included race or ethnicity as a condition of eligibility (34) or as a plus factor considered with other factors involved in the award of aid (18). These awards represented less than 7 percent of the total aid awarded and affected less than 4 percent of students. But those scholarships had an important impact: Though under-represented minority students represented 9 percent of the UM student enrollment; almost half received one or more of the scholarships at issue.

As a result, OCR found that UM's scholarship program to advance diversity was: (1) flexible and non-predominant; (2) limited and aligned with achieving the university's diversity interest; (3) of limited duration and subject to periodic review; (4) resulted in no undue burden on non-benefitting students; and (5) included good faith consideration of workable, race-neutral alternatives. In light of all of these factors, OCR concluded that UM presented sufficient evidence to show that its use of race was consistent with the 1994 Guidance and the strict scrutiny standards of *Grutter*.

program had violated federal law through intentional discrimination or unlawful disparate impact, despite the fact that new minimum test score requirements produced "statistically significant disparities, by race, even amongst otherwise qualified applicants." Kathleen McGrory, *Feds: Florida Scholarship Program Does Not Violate Anti-Discrimination Laws*, MIAMI HERALD (Dec. 11, 2014), <http://www.miamiherald.com/news/local/education/article4430296.html>; Fl. Dep't of Educ., Docket No. 04-02-1428 at 11 (U.S. Dep't of Educ. Dec. 10, 2014) (letter of finding), available at <http://www.miamiherald.com/news/local/education/article4433239.ece/BINARY/Read%20the%20Bright%20Futures%20report.pdf>.

58. See also COLEMAN, PALMER, & RICHARDS, FEDERAL LAW AND FINANCIAL AID, *supra* note 6, at 48 ("If, in fact, the amount of the race- or ethnicity-conscious program (when coupled with similar programs, by race or ethnicity) represents only a fraction of the total aid available to all students, then arguments may exist to support the position that the 'burden' on nonqualifying students is small and diffuse, supporting a finding of legal compliance.")

59. Office for Civil Rights, U.S. Dep't of Educ., *Nondiscrimination in Federally Assisted Programs*, *supra* note 10.

60. Univ. Mo.-Columbia, Docket No. 07052028, *supra* note 53.

Special Considerations Related to Race, Ethnicity, and National Origin

State restrictions on the use of race or ethnicity in scholarship decisions at least at the state’s public institutions may be present. Since 1996, voters in six states (Arizona, California, Michigan, Nebraska, Oklahoma, and Washington) have prohibited the consideration and use of race and ethnicity in admission, employment, or other decisions at publicly funded institutions; An executive order in Florida and state statute in New Hampshire have had the same effect.⁶¹

Native American or Native Hawaiian classifications would likely fall under strict scrutiny, given U.S. Supreme Court precedent (and OCR guidance) that suggests that general Native American and Native Hawaiian classifications are likely to be viewed as racial classifications.⁶² Notably in contrast, the Court has permitted a preferences for members of federally recognized tribes, considered as “political, rather than racial in nature,” given the fact that the federal government had recognized those tribes as sovereign nations.⁶³ Thus, to be eligible for federal financial incentives on the basis of Native American heritage, proof of membership in one of 562 federally recognized tribes is typically required.⁶⁴ Some scholarship programs use similar requirements. At least one federal appeals court has ruled that strict scrutiny did not apply to a private school admission program limited solely to students with some Native Hawaiian descent.⁶⁵ Instead, the court subjected the private school to the more lenient standard under Title VI and upheld it because it was aimed at improving the educational opportunities of historically marginalized Native Hawaiians.

61. Arizona Proposition 107 (2010); California Proposition 209 (1996); Florida Executive Order 99-281 (1999); Michigan Proposition 2 (2006); Nebraska Initiative 424 (2008); New Hampshire House Bill 0623 (2011); Oklahoma State Question 759 (2012); Washington Initiative 200 (1998). It is worth noting that California’s Proposition 209 purports to treat *private* gifts and endowments as *public university* funds, which would prevent private funds from being used to increase racial diversity at California’s public institutions, regardless of donor preferences. Though not yet tested in the courts, some observers have concluded that such a restriction could constitute an impermissible restriction on private action, at least on private funds received before Proposition 209 went into effect. FinAid.org, Affirmative Action and Financial Aid, <http://www.finaid.org/educators/affirmativeaction.phtml> (last accessed March 4, 2016).

62. *Rice v. Cayetano*, 528 U.S. 495 (2000) (holding that limiting certain elections to Native American voters created unconstitutional racial classifications); see also *Dawawendewa v. Salt River Project*, 154 F.3d 1117 (9th Cir. 1998) (holding that discrimination on the basis of tribal affiliation falls within the definition of national origin, which includes “the country of one’s ancestors”); see also Office for Civil Rights, U.S. Dep’t of Educ., *Nondiscrimination in Federally Assisted Programs*, *supra* note 10.

63. *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974).

64 *E.g.*, Bureau of Indian Affairs, Certificate of Degree of Indian or Alaska Native Blood Instructions, available at <http://www.bia.gov/cs/groups/public/documents/text/idc-001805.pdf>.

65. *Doe v. Kamehameha Schs/Bernice Pauahi*, 470 F.3d 827 (9th Cir. 2006).

Special Considerations Related to Race, Ethnicity, and National Origin cont'd

Multirace or mixed race students are increasingly common and have prompted questions from colleges and government officials alike about who qualifies for what opportunities. The logic of federal nondiscrimination law suggests that all federal laws related to race apply to individuals of any race, including multiple races.⁶⁶ For consideration of how to determine whether an individual may have a multiracial background, other federal policies may be instructive. Both U.S. Department of Education guidance and U.S. Census have used a policy of allowing individuals to select the racial category or categories with which they identify.⁶⁷ In the 2010 Census, of the 2.9 percent who identified as being of two or more races, about 92 percent reported exactly two races.⁶⁸

2. Sex, gender, gender identity, and sexual orientation

Highlights on sex, gender, gender identity, and sexual orientation

- Scholarship award processes – whether at public or private institutions or administered by private organizations – must not discriminate on the basis of sex or gender. Though not completely settled, it is likely that this prohibition also extends to gender identity and sexual orientation.
- To the extent that a scholarship program uses sex or gender as an eligibility criterion or award factor, the program must “serve important government objectives” through means that are “substantially related to the achievement of those objectives.”
- Federal law does not prevent a private tax exempt foundation’s scholarship program from being designed specifically for students of a particular gender or sex, though it must meet the IRS guidelines described in Section II.B. above.

Applying U.S. Supreme Court precedent, using gender or sex as an eligibility criterion or award factor in scholarship decisions triggers “intermediate scrutiny,” a less rigorous form of judicial review than what is used for race and ethnicity. Under this standard, the use of gender or sex must serve “important governmental interests” and the means employed must be “substantially related to the achievement of

66. *E.g.*, *McDonald v. Sana Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

67. U.S. Dep't of Educ., *New Race and Ethnicity Guidance for the Collection of Federal Education Data* (2008), <http://www2.ed.gov/policy/rschstat/guid/raceethnicity/index.html?exp=6>; U.S. Census Bureau, *2010 Census Briefs: The Two or More Races Population: 2010*, (Sept. 2012), available at <https://www.census.gov/prod/cen2010/briefs/c2010br-13.pdf>.

68. Many researchers agree that this population is growing, but the actual number appears to be inconsistently measured. Compare U.S. Dep't of Educ., *Percent of students Two or more races: 2013-14* (In 2013-14, about three percent of the school age population identified as being of two or more races) <http://eddataexpress.ed.gov/data-element-explorer.cfm/tab/data/deid/5463/> (last accessed May 16, 2016) with Pew Research Center, *Multiracial in America* (Jul 11, 2015) (6.9 percent of U.S. adults identified themselves as having “at least two or more races in their background”), <http://www.pewsocialtrends.org/2015/06/11/multiracial-in-america>; see also U.S. Census Bureau, 2010 Census Briefs, *supra* note 67, at 4.

those objectives.”⁶⁹ As the Court has explained, “Rather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women.”⁷⁰ Moreover, discrimination based on gender or sex is prohibited by Title IX of the Education Amendments of 1972, and “subject to scrutiny under the Equal Protection Clause in the Fourteenth Amendment to the U.S. Constitution.”⁷¹

The Court has also observed:

In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened . . . [But that the] same searching analysis must be made, regardless of whether the State’s objective is to eliminate family controversy . . . to achieve administrative efficiency . . . or to balance the burdens borne by males and females.⁷²

U.S. Supreme Court precedent also forbids discrimination based on sex stereotypes⁷³ and has overturned measures that were based on sex-related stereotypes.⁷⁴ The Court struck down two single-sex admission programs at institutions of higher education that appeared to be based on sexist stereotypes based on “intermediate” scrutiny. In *Mississippi University v. Hogan* (1982), the Court found no evidence “that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field when the [Mississippi University for Women] School of Nursing opened its door, or that women currently are deprived of such opportunities.”⁷⁵ Moreover, MUW already allowed men to audit classes with no negative impact on teaching or learning outcomes for female students. In *United States v. Virginia* (1995), the Court invalidated Virginia Military Institute’s all-male admission policy, concluding, “Women seeking and fit for a VMI-quality education cannot be offered anything less, under the Commonwealth’s obligation to afford them genuinely equal protection.”⁷⁶

Federal nondiscrimination law affecting individuals based on their gender identity or sexual orientation is rapidly evolving, though not yet settled.⁷⁷ Recent federal cases and action by the U.S. Departments of Justice and Education (among other federal agencies) have concluded that discrimination based on

69. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 712 (1982); *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980).

70. *Cleburne*, 473 U.S. at 441.

71. 20 U.S.C. §1681 et seq.; *Reed v. Reed*, 404 U.S. 71, 75 (1971).

72. *Mississippi Univ. for Women*, 458 U.S. at 728.

73. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

74. See William E. Thro, The Use of Racial and Gender Preferences in the Awarding of Financial Aid, presented at Affirmative Action and Discrimination in College and University Admissions and Financial Aid (March 19–21, 2003), available at http://www.nacua.org/nacualert/memberversion/Michigan_Admissions_Case/thro.doc

75. *Mississippi Univ. for Women*, 458 U.S. at 729.

76. *United States v. Virginia*, 518 U.S. 515, 557 (1995).

77. *Videckis & White v. Pepperdine University*, No. CV 15-00298 DDP (JCx), 2015 WL 89116764 at *13 (C.D. Cal. Dec. 15, 2015) (“Other courts have acknowledged the difficulty of distinguishing sexual orientation discrimination from discrimination based on sex or gender stereotypes.” (citations omitted)), available at <https://assets.documentcloud.org/documents/2648492/Pepperdine-Title-IX-Ruling.pdf>.

gender identity is within the ambit of Title IX’s prohibition against sex discrimination.⁷⁸ (As of this guidance’s September 2016 publication date, these federal agencies’ guidance related to transgender students and Title IX is being challenged in federal court, with implementation on hold after a preliminary injunction was ordered by the trial court until a decision can be made on the merits.⁷⁹) These cases generally emphasize that gender identity is to be treated in the same way as a student’s sex is treated under federal law. As a consequence, some form of intermediate scrutiny (already applicable to claims of sex discrimination) is likely applicable to decisions that confer some benefit or opportunity based on an individual’s gender identity.⁸⁰

And, though some courts have ruled that sexual orientation does not fall under the scope of Title IX,⁸¹ other authorities suggest that this may be changing. In 2012, the U.S. Equal Employment Opportunity Commission recognized sexual orientation as covered under Title VII’s sex discrimination provisions related to employment.⁸² In 2014, the U.S. Department of Education considered sexual orientation under the same Title IX requirements as gender and sex in the context of sexual harassment guidance. In December 2015, in a case in the higher education context, a federal district court ruled, “sexual orientation discrimination is a form of sex or gender discrimination, and that the ‘actual’ orientation of the victim is irrelevant Simply put, to allege discrimination on the basis of sexuality is to state a Title IX claim on the basis of sex or gender.”⁸³

Taken together, these legal trends in the law suggest that it would be prudent for institutions or organizations that make awards with some consideration of sex, gender, sexual orientation, or gender identity ensure that their policies and practices satisfy a heightened review, likely intermediate scrutiny.⁸⁴

78. U.S. Dep’t of Justice & Educ., Dear Colleague Letter on Transgender Students (May 13, 2016), *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

79. *Texas v. United States*, No. 7:16-cv-00054-O at *23 (N.D. Tex. Aug. 21, 2016), *available at* [https://www.texasattorneygeneral.gov/files/eypress/Texas_et_al_v._U.S._et_al_-_Nationwide_PI_\(08-21-16\).pdf](https://www.texasattorneygeneral.gov/files/eypress/Texas_et_al_v._U.S._et_al_-_Nationwide_PI_(08-21-16).pdf).

80. See *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir., 2011) (claim of discrimination against “a transgendered individual based on her gender non-conformity is sex discrimination” under Title VII) (citing cases).

81. *E.g.*, *Hoffman v. Saginaw Public Schs.*, No. 12-10354, 2012 WL 2450805 at *8 (E.D. Mich. June 27, 2012) (“while discrimination based on noncompliance with sexual stereotypes may be actionable under federal law, discrimination based on sexual orientation is not” (internal citations removed)).

82. U.S. Equal Employment Opportunity Comm’n, Strategic Enforcement Plan FY 2013–2016, *available at* <http://www.eeoc.gov/eeoc/plan/upload/sep.pdf>; *Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012); *David Baldwin v. Department of Transportation*, EEOC Appeal No. 0120133080 (July 15, 2015).; *see also* Waddell Cole & Jones, Current State of the Law Regarding Workplace Protections for LGBT Employees, http://www.wcjfirm.com/current-state-law-regarding-workplace-protections-lgbt-employees#_ftn14 (last visited April 28, 2016).

83. *Vikeckis*, No. CV 15-00298 CCP (JCx) at *15. Notably, at least one other federal district court has ruled similarly that sexual orientation falls under Title VII. *Isaacs v. Felder Servs., LLC*, Case No. 2:13-cv-693-MHT, 2015 WL 6560655 (M.D. Ala. Oct. 29, 2015).

84. Though the U.S. Supreme Court has not definitively established the standard of review, federal appellate courts have applied varying forms of heightened scrutiny to claims of discrimination based on sexual orientation. *See, e.g.*, *SmithKline Beecham Corp v. Abbott Laboratories*, 740 F.3d 471 (9th Cir. 2014) (“In its words and its deed, [the Supreme Court’s decision in] *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review. In other words, *Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation.”); *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *aff’d on other grounds* 570 U.S.—(2013) (Docket No. 12-307) (“laws that classify individuals based on sexual orientation are subject to intermediate scrutiny”).

Special Considerations Related to Sex and Gender

State restrictions on the use of gender or sex in scholarship decisions at least at the state's public institutions may be present. Since 1996, voters in six states (Arizona, California, Michigan, Nebraska, Oklahoma, and Washington) have prohibited the consideration and use of sex and gender in admission, employment, or other decisions at publicly funded institutions.⁸⁵ An executive order in Florida and state statute in New Hampshire have had the same effect; the New Hampshire statute also includes sexual orientation.⁸⁶

Pregnant and parenting students are protected from discrimination, meaning that these students cannot be treated differently in the scholarship award process on the basis of their pregnancy or status as a parent.⁸⁷

Gender-related athletic scholarships are specifically addressed in Title IX regulations.⁸⁸ Colleges must provide reasonable opportunities for scholarships to be awarded to both sexes in proportion to the number of students of each sex participating in athletic programs; separate scholarships for members of each sex may be provided as part of separate athletic teams.

85. Arizona Proposition 107 (2010); California Proposition 209 (1996); Michigan Proposition 2 (2006); Nebraska Initiative 424 (2008); Oklahoma State Question 759 (2012); Washington Initiative 200 (1998).

86. Florida Executive Order 99-281 (1999); New Hampshire House Bill 0623 (2011).

87. See Office for Civil Rights, U.S. Dep't. of Educ., Supporting the Academic Success of Pregnant and Parenting Students Under Title IX of the Education Amendments of 1972 (June 2013), available at <http://www2.ed.gov/about/offices/list/ocr/docs/pregnancy.pdf>.

88. 34 CFR §37(c).

3. Religious affiliation

Highlights on religious affiliation

- Scholarship award processes must not prevent an individual’s free exercise of religion.
- Though not completely settled, courts have ruled that a state can forbid the use of its state scholarship funds for religious academic programs or for study at sectarian institutions, under the theory that such use breaches the line between church and state.
- Private religious institutions and organizations may not violate federal nondiscrimination law by arguing that such discrimination is in service of the free exercise of their religion.
- Federal law does not prevent a private tax-exempt foundation’s scholarship program from being designed specifically for students of a particular religious group, though it must meet the IRS guidelines described in Section II.B. above.

Although no U.S. Supreme Court decision clearly settles the issue, an emerging trend among federal courts is to consider classifications based on religious affiliation as “suspect discriminations that trigger heightened scrutiny under federal Equal Protection law.”⁸⁹

More broadly, scholarship awards reflecting consideration of an individual’s religious background or affiliation implicate a complex body of federal law based on the Establishment and Free Exercise clauses in First Amendment.⁹⁰ As one federal appeals court has noted, “It has long been clear that there is some ‘play in the joints’ between what is constitutionally required and what is constitutionally forbidden under the two parts of the First Amendment protecting religious freedom.”⁹¹ These issues span many different contexts and are continuing to evolve over time.⁹²

In addition, Federal court precedents instruct that institutions and scholarship providers should pay particularly careful attention to the use of *public* (federal or state) funds for religious study.⁹³ For example, the U.S. Supreme Court ruled that states may be able to prohibit state scholarship funds for religious study as long as no animus against any particular religion or program of devotional study has

89. *E.g., Hassan v. City of New York*, No. 14-1688 (3d Cir. Oct. 13, 2015) (citing trends in U.S. Supreme Court language and numerous holdings from federal appellate and state courts to hold, “intentional discrimination based on religious affiliation must survive heightened equal-protection review”).

90. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”).

91. *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1254 (10th Cir. 2008) (citing the leading U.S. Supreme Court case, *Walz v. Tax Comm’n of New York*, 397 U.S. 664, 669 (1970)).

92. Indeed, the U.S. Supreme Court agreed to hear a new case in the 2015-16 term expanding the scope of existing Court precedent in this area. Specifically, it has agreed to consider “whether exclusion of churches from an otherwise neutral and secular state aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern.” *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, No. 15-577. And a new lawsuit has been filed to block a Montana Department of Revenue regulation that would bar religiously affiliated schools and their students from participating in Montana’s new Scholarship Tax Credit program. *Armstrong et al. v. Kasas*, No. 6:15-cv-00114-SEH (D. Mont.).

93. In 2004, the U.S. Supreme Court held in *Locke v. Davey* that Washington was permitted to prohibit the use of its state-funded Promise Scholarship Program to fund a devotional theology degree. *Locke v. Davey*, 540 U.S. 712, 719 (2004). The Court could find no “animus” toward religion in the operation of the scholarship program or in the Washington Constitution, which includes strict prohibitions against “even indirectly funding religious instruction that will prepare students for the ministry.” *Id.* at 719, 725.

motivated the program.⁹⁴ But the Tenth Circuit found that the *Locke* decision did not apply to a state scholarship program that only forbid the use of funds at “pervasively sectarian” institutions (thus “expressly discriminat[ing] among institutions”) and did so through “intrusive governmental judgments regarding matters of religious belief and practice.”⁹⁵

Though there is little precedent or scholarship on the use of *private* funds for religious study, it is likely that fewer restrictions apply (outside the IRS rules described in Section II.B. above).

But religious institutions and organizations are not permitted to violate other aspects of federal nondiscrimination law in service of the exercise of their religion. For example, in 1983, the Supreme Court held in *Bob Jones University v. United States* that the IRS appropriately revoked the tax-exempt status of Bob Jones University for its racially discriminatory admission policies.⁹⁶

Finally, it is worth noting that, for federal programs, the Higher Education Act prohibits the use of federal funds to discriminate directly or indirectly on the basis of religion.⁹⁷ And certain federal programs have specific restrictions (e.g., the Federal Perkins Loan program has special rules for determining “financial need” when a student is a member of a religious order and pursuing a course or study at an institution.⁹⁸ But these laws control only federal funds, so would only be applicable to institutional or private scholarship programs adopting federal eligibility criteria for their own programs.

Special Considerations Related to Religious Affiliation

State restrictions on the use of religion in scholarship decisions at the state’s public institutions may be present. The voter initiative in Michigan prohibited the consideration and use of religion in admission, employment, or other decisions at publicly funded institutions.⁹⁹ An executive order in Florida (which used “creed,” not religion) and state statute in New Hampshire have had the same effect.¹⁰⁰

94. *Id.* at 719, 725. The Supreme Court also noted that there are limits to how far states can go; for example, the state was not permitted to require “students to choose between their religious beliefs and receiving a government benefit.” *Id.* at 713.

95. *Colorado Christian University*, 534 F.3d at 1256. Notably, the U.S. Department of Justice filed an amicus brief in support of the plaintiffs, arguing:

Defendants here ask the Court to over-read *Locke* to insulate state programs that exclude students attending religiously-affiliated entities, regardless of whether a student is pursuing devotional or secular studies. Because in recent years states and the federal government have enacted programs to provide lower income students access to quality educational opportunities offered by secular and sectarian schools, the United States has a significant interest in ensuring that *Locke* is properly interpreted so as not to impede these nascent educational reforms. Brief for U.S. Dep’t of Justice as Amicus Curiae in Support of Plaintiff’s Motion for Summary Judgment, *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008) (Civ. Action No. 04-cv-02512-MSK-BNB), at *2.

96. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

97. There are also a number of regulations about specific federal programs that have recitals of nondiscrimination, including: 29 CFR 34.4 (regarding the Job Training and Partnership Act); 24 CFR 6.4 (Housing and Community Development Act).

98. 34 CFR 674.9(c).

99. Michigan Proposition 2 (2006).

100. Florida Executive Order 99-281 (1999); New Hampshire House Bill 0623 (2011).

4. *Residence*

Highlights on residence

- Though the federal legal standard of review is somewhat unclear, the U.S. Supreme Court has recognized that a state may have legitimate interest in in-state tuition for state residents. A “permanent irrebuttable presumption of nonresidence,” however, did not pass Court muster several decades ago.
- State and local law and policy govern residence requirements and definitions for domestic students that may affect scholarship eligibility or award decisions.
- Federal law and policy govern residence requirements for international students that may affect scholarship eligibility or award decisions.
- Federal law does not prevent a private tax-exempt foundation’s scholarship program from being designed specifically for students from a particular area, though it must meet the IRS guidelines described in Section II.B. above.

Though residency does not trigger heightened scrutiny on its own, there are a few legal considerations related to protections for out-of-state citizens that scholarship providers should understand. As a starting point, the U.S. Constitution provides, “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”¹⁰¹ From this provision, the U.S. Supreme Court has found that there are important protections for American citizens moving from one state to another (particularly having to do with interstate commerce, over which the federal government has oversight).¹⁰² At the same time, the Court has not consistently applied the same standard of review to lawsuits challenging a state’s limitation of certain programs to its own residents; the nature of the in-state benefit and the process used to award the benefit often play important roles in a court’s analysis.¹⁰³

In the context of a public institution’s admission policy that favored in-state students, the U.S. Supreme Court “fully recognize[d] that a State has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis.”¹⁰⁴ But, at the same time, the Court used heightened scrutiny to look at the program (without ruling that all residency classifications would trigger such scrutiny) and decided that the problem with the program was procedural because the institution used “a permanent irrebuttable presumption of nonresidence.”¹⁰⁵ Though the public institution was allowed to prioritize admission of the state’s own residents, it had to allow students the opportunity to correct any mistakes about their residency status. Scholarship programs and institutions should similarly provide an opportunity for applicants to prove their residency status or rebut a mistaken classification.

101. U.S. const. art. IV § 2

102. *Saenz v. Roe*, 526 U.S. 489, 501-02 (1999).

103. It is also worth noting that the Court’s standards seem to have evolved over time. Despite a charge that the majority applied “strict scrutiny” in the in-state tuition case, see *Vlandis v. Kline*, 412 U.S. 441, 460 (White, J., dissenting), the Court did not include residency in the list of “suspect classifications” a decade later in *Cleburne v. Cleburn Living Center*, 473 U.S. 432 (1985).

104. *Vlandis v. Kline*, 412 U.S. 441, 453 (1973).

105. *Id.*

But states still retain significant discretion in this area, and in-state residency requirements vary state by state. Generally, a dependent student can qualify for in-state tuition when at least one parent has been a state resident for at least one full year before the student matriculated in college, though the duration varies significantly from state to state.¹⁰⁶ These residency requirements can also be used for certain scholarship eligibility requirements and/or award factors, as well.

Special Considerations Related to Residence

Undocumented students do not qualify as a “suspect class” under prevailing Supreme Court precedent.¹⁰⁷ And they are not eligible for federal financial aid, but many are eligible for in-state tuition and, in some case, state financial aid.¹⁰⁸ For states with these policies, eligibility is based not on “residence” (because these students cannot prove residence with official papers) but on the location of the high school from which they have graduated.¹⁰⁹ Categorizing undocumented students as “international” students for purposes of scholarships or college admission can create logistical challenges for students, as such programs often require the student-applicant to provide an address in or other evidence from their country of citizenship, which most undocumented students do not have.

For **international students**, federal law often governs scholarships decisions. With a few exceptions, international students are not eligible for federal financial aid programs, including Pell grants and federally-backed loans.¹¹⁰ Moreover, “Minimal scholarship aid is available to international students, and

106. FinAid.org, In-State Tuition and State Residency Requirements, <http://www.finaid.org/otheraid/stateresidency.phtml> (last accessed March 9, 2016).

107. But the U.S. Supreme Court has ruled that states may not forbid undocumented students from accessing free public K-12 education. *Plyler v. Doe*, 457 U.S.202 (1921) (“Although undocumented resident aliens cannot be treated as a ‘suspect class,’ and although education is not a ‘fundamental right,’ so as to require the State to justify the statutory classification by showing that it serves a compelling governmental interest, nevertheless the Texas statute imposes a lifetime hardship on a discrete class of children not accountable for their disabling status.”)

108. Federal Student Aid, U.S. Dep’t of Educ., Non-U.S. Citizens, <https://studentaid.ed.gov/sa/eligibility/non-us-citizens#can-i-get-aid> (last accessed March 9, 2016). At least 18 states allow undocumented students to receive in-state tuition at public institutions: California, Colorado, Connecticut, Florida, Illinois, Kansas, Maryland, Minnesota, Nebraska, New Mexico, New Jersey, New York, Oklahoma, Oregon, Rhode Island, Texas, Utah, and Washington). At least three more states (Massachusetts, Ohio, and Virginia) allow undocumented students to receive in-state tuition at public institutions if they are DACA beneficiaries. Public institutions within other states sometimes have their own policies about granting in-state tuition to undocumented students. Three states (Arizona, Georgia, and Indiana) bar undocumented students from receiving in-state tuition; two states (Alabama and South Carolina) do not allow undocumented students admission to at least some state flagship institutions. Nat’l Conference of State Legislatures, Undocumented Student Tuition: State Action (Oct. 29, 2015), <http://www.ncsl.org/research/education/undocumented-student-tuition-overview.aspx>; Dream Educational Empowerment Program, Tuition and State Aid Equity for Undocumented Students and DACA Grantees: Access by State (Jan. 2015), available at http://unitedwedream.org/wp-content/uploads/2014/05/DEEPTuitionEquityMap-Notes-Merged_Jan2015.pdf.

109. This theory of eligibility has been tested in state courts. In the leading case, the Supreme Court of California ruled unanimously against out-of-state students enrolled in California institutions who claimed discrimination against them because undocumented students received the in-state tuition benefit, even though they could not prove legal residency. The court found that the “fatal flaw” in the plaintiff’s arguments was that the state’s in-state tuition benefit was not based on California residence, but on whether students attended and graduated from a California high school. *Martinez v. Regents of the University of California*, 241 P.3d 855 (Cal. 2010).

110. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 makes undocumented students ineligible for federal financial aid and prevents them from using the FAFSA form. Pub. L. 104-208 § 505 (1996).

“Eligible noncitizens” for federal student aid programs include: U.S. nationals and U.S. permanent residents; those with an Arrival-Departure Record (I-94) showing Refugee, Asylum Granted, or other special status; T-visa holders or their parents (i.e.,

most of it is reserved for graduate study. Generally, U.S. institutions offer little, if any, discount on tuition, although both private and public institutions may waive application fees in some situations.”¹¹¹

C. Characteristics That Are Subject to the Least Rigorous Level of Judicial Review

1. Age

Highlights on age

- Scholarship award processes must not discriminate based on an individual applicant’s age or against members of a particular age group, though the standard of review is lower than for “suspect” classes such as race and gender.
- Factors in scholarship decisions need not impact all age groups in exactly the same way, if the purpose for the factors is not to discriminate against an individual or a particular age group.
- Federal law does not prevent a private tax-exempt foundation’s scholarship program from being designed specifically for students from a particular age group, though it must meet the IRS guidelines described in Section II.B. above.

The U.S. Supreme Court declined to make age-based distinctions subject to heightened scrutiny, observing, “While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a ‘history of purposeful unequal treatment’ or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.”¹¹²

At the same time, discrimination based on age is prohibited by the Age Discrimination Act of 1975, which states that no recipient of federal funds – including institutions of higher education – may exclude, discriminate against, or otherwise deny the benefits of its program or activity to persons on the basis of age.¹¹³ The Act also provides that discrimination claims against an institution of higher education must first be pursued and exhausted with the Department of Education’s Office for Civil Rights before they can be brought in court.¹¹⁴ This means that an institution or provider may include age within its definition of broad diversity – or even structure a scholarship to value different age groups – but should be aware that individuals have a venue to bring age discrimination claims based on federal law.

Courts have ruled, however, that the Age Discrimination Act is not violated when entities distinguish among reasonable factors other than age that bear a direct and substantial relationship to the normal

victims of human trafficking); “battered-immigrant qualified aliens;” citizens of Micronesia, the Marshall Islands, or Palau; or certain Native Americans born in Canada. Federal Student Aid, U.S. Dep’t of Educ., Non-U.S. Citizens, *supra* note 108.

111. Nat’l Ass’n of Foreign Student Advisers (NAFSA), Financial Aid for Undergraduate International Students, http://www.nafsa.org/Explore_International_Education/For_Students/Financial_Aid_For_Study_Abroad/Financial_Aid_for_Undergraduate_International_Students/ (last accessed March 9, 2016).

112. *Massachusetts Board of Retirement v. Murgia*, 427 U. S. 307, 313 (1976).

113. 42 U.S.C. § 6101-6107; 34 C.F.R. Part 110. Another similarly-named statute, the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (known as the “ADEA”), deals only with employment.

114. 42 U.S.C. § 6104(e)(2).

operation of the program or activity even if there is some impact on individuals based on their age.¹¹⁵ For example, in *Kamps v. Baylor University*, the Fifth Circuit Court of Appeals held that GPA is a reasonable factor for admission and institutional scholarship awards, even though it may not adequately reflect older applicants' accomplishments, observing, "knowing that GPA disadvantages older applicants does not mean Baylor used GPA *in order to* disadvantage an older applicant."¹¹⁶ In *Kamps*, the court observed with approval that the scholarship committee determined eligibility criteria with no specific animus against a particular applicant.¹¹⁷

2. Disability

Highlights on disability

- Scholarship award processes must be inclusive of students with disabilities, and not contain any eligibility barriers that reasonable accommodations could help remove.
- Federal law does not prevent a private tax exempt foundation's scholarship program from being designed specifically for students with disabilities, though it must meet the IRS guidelines described in Section II.B. above.

The U.S. Supreme Court has declined to subject classifications based on disability to heightened review, noting the difficulty of lumping together the "large and amorphous group" of individuals with disabilities.¹¹⁸ The Court also observed,

But the appropriate method of reaching [instances of discrimination against the disabled] is not to create a new quasi-suspect classification and subject all governmental action based on that classification to more searching evaluation. Rather, we should look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before us. Because [disability] is a characteristic that the government may legitimately take into account in a wide range of decisions, and because both State and Federal Governments have recently committed themselves to assisting the [disabled], we will not presume that any given legislative action, even one that disadvantages [individuals with disabilities], is rooted in considerations that the Constitution will not tolerate.¹¹⁹

Discrimination based on disability is prohibited by the Americans with Disabilities Act (ADA), which defines such discrimination "as a failure to make reasonable modifications in policies, practices, or procedures that are necessary to afford . . . privileges, advantages, or accommodations to individuals with disabilities[,] or a failure to take such steps as may be necessary to ensure that no individual with a disability is . . . treated differently than other individuals because of the absence of auxiliary aids and services."¹²⁰ In other words, individuals with disabilities cannot be denied an opportunity when reasonable accommodations to help them access it are available. At the same time, these statutes do

115. *Kamps v. Baylor Univ.*, 592 F. App'x 282, 285 (5th Cir. 2014) cert. denied, 135 S. Ct. 2380, 192 L. Ed. 2d 166 (2015) reh'g denied, 136 S. Ct. 14, 192 L. Ed. 2d 984 (2015).

116. *Id.* at 285 (emphasis in original).

117. *Id.*

118. *Cleburn*, 473 U.S. at 442, 445.

119. *Id.* at 446.

120. *Argenyi v. Creighton Univ.*, 703 F.3d 441, 447-48 (8th Cir. 2013) (quoting the ADA at 42 U.S.C. § 12182(b)(2)(A)(ii), (iii)).

not affect the standard of review that a court would use for any claims of discrimination based on the U.S. Constitution; that means that such claims would be reviewed under the least strict judicial review standard, rational basis.

Few court decisions about the ADA have focused specifically on access to scholarships, though a few cases exist to illustrate these principles.¹²¹ For example, a federal district court has held that eligibility criteria for scholarships should not automatically exclude students from consideration because they have fulfilled their core course work through special education classes.¹²²

3. *Income or class*

Highlights on income or class

- Scholarship award processes must not discriminate based on income or class, though the standard of review is lower than for “suspect” classes such as race and gender.
- Federal law does not prevent a private tax-exempt foundation’s scholarship program from being designed specifically for students with disabilities, though it must meet the IRS guidelines described in Section II.B. above.

The U.S. Supreme Court “has held repeatedly that poverty, standing alone, is not a suspect classification.”¹²³ As a result, a scholarship program that conferred aid to students based on their income or class would be subject to under “rational basis” review, the least rigorous standard. The same standard would apply to a student’s income (individual or family), family wealth, and socioeconomic status – or any combination of these factors.

Low-income students are eligible for certain special federal financial aid (e.g., Pell scholarships), which often also serves as a factor for the awarding of state, institutional, or private scholarships and other aid. Need is also a common consideration within many scholarship programs.

A 2003 OCR case resolution illustrates these ideas. In response to a complaint that socioeconomic status (SES) was being used as a discriminatory proxy for race in a district’s school assignment policy, OCR concluded that the policy instead furthered “legitimate educational goals” and did not operate “as a proxy or racial definition, or for a racial purpose.”¹²⁴ OCR noted with approval that district administrators “acted on the basis of educational research showing the relationship between student and school performance and the results of concentrations of economically disadvantaged students” and that all local school board members denied that SES was adopted as a “racial balancing technique.”¹²⁵

OCR also identified factors that might show intentional racial discrimination, even if a policy was race-neutral on its face:

- Impact of the official action (i.e., whether it impacts more heavily upon one racial group than another);

121. *Argenyi*, 703 F.3d at 451.

122. *Bowers v. Nat’l Collegiate Athletic Ass’n*, 563 F. Supp. 2d 508, 515 (D.N.J. 2008).

123. *Harris v. McRae*, 448 U.S. 297, 323 (1980).

124. *Wake County Public Sch. System*, Compl. Nos. 11-02-1044, 11-02-1104, 11-02-1111 (U.S. Dep’t of Educ. Aug. 29, 2003).

125. *Id.*

- A pattern of discrimination unexplainable on grounds other than race;
- The historical background of a decision, particularly the specific sequence of events leading to the challenged policy;
- Departure from the normal procedural sequence; and
- The legislative or administrative history, particularly contemporaneous statements of members of the decision-making body.¹²⁶

For institutions and scholarship providers, the most important lesson here is that considerations of income should be motivated by the goal of supporting income diversity (particularly in assisting low-income students in accessing higher education), not attempting to use income to reach a goal related to racial or ethnic diversity.

Beyond income alone, institutions of higher education may also consider factors relating to “disadvantage” in awarding aid, and are “free to define the circumstances under which students will be considered to be disadvantaged, as long as that determination is not based on race or national origin.”¹²⁷ And, as discussed above, the sufficiently strong educational purpose that exists in providing disadvantaged students with aid can justify any racially disproportionate effect such practice may have.

4. **Other characteristics**

Highlights on other characteristics

- Most other student characteristics not described elsewhere in this guide are unlikely to trigger special federal protections and/or heightened level of judicial review.
- Federal law does not prevent a private tax-exempt foundation’s scholarship program from being designed specifically for students with other characteristics, though it must meet the IRS guidelines described in Section II.B. above. Special attention should likely be paid, however, to scholarships that preference the children or relatives of scholarship providers’ employees.

All other characteristics that may influence particular scholarship awards – such as special talents, and legacy or veteran status – would likely be subject to rational basis review. Such characteristics may include:

- Academic interest
- Artistic ability
- Athletic ability
- “Conduct of inclusion” (behaviors and experiences of seeking out and interacting with a diverse group of people that may indicate an applicant’s potential to contribute to the achievement of the institution’s diversity goals¹²⁸)
- Hobbies or personal interests
- Leadership experiences
- Legacy status

126. *Id.*

127. Office for Civil Rights, U.S. Dep’t of Educ., *Nondiscrimination in Federally Assisted Programs*, *supra* note 10.

128. ARTHUR L. COLEMAN, TERESA E. TAYLOR, & KATHERINE E. LIPPER, COLL. Bd., *THE PLAYBOOK: A GUIDE TO ASSIST INSTITUTIONS OF HIGHER EDUCATION IN EVALUATING RACE- AND ETHNICITY-NEUTRAL POLICIES IN SUPPORT OF THEIR MISSION-RELATED DIVERSITY GOALS 42-43 (2014)*, available at <http://diversitycollaborative.collegeboard.org/sites/default/files/document-library/adc-playbook-october-2014.pdf>.

- Life experiences and adversities overcome
- Military personnel or veterans¹²⁹
- Point of view

Assessing subtle, highly individualized characteristics, however, depends on the scholarship program providing clear opportunities for students to share information related to those characteristics – and training for application readers and reviewers on how to look for that information and include it in their admission decisions.¹³⁰

Notably, these characteristics can be important complements to each other and to other scholarship factors such as race, ethnicity, national origin, gender, sex, and other student characteristics that can trigger special protections or heightened levels of judicial review. When shaping scholarship decisions, these characteristics can demonstrate the institution’s or organization’s commitment to broad diversity, and can demonstrate that the scholarship decision does not rely too heavily on consideration of race, ethnicity, national origin, gender, or sex.¹³¹

IV. Recommended Strategies and Action Steps

Creating effective, legally sustainable scholarship programs involves a complex mix of policy, legal, and practice decisions. A collective effort is required to meet all possible requirements. First and foremost, scholarships should provide financial support to students who can help advance the purpose and goals of the program, as well as the institution or school that it serves. Thus, scholarship programs should have clear goals and be supported by a well-defined process. And, for those that trigger a heightened level of judicial review (e.g., race and ethnicity) or other prescriptive rules, care must be taken to ensure that the exacting standards of federal law are satisfied. Moreover, private scholarship providers that are tax-exempt organizations must meet their own set of requirements from federal tax law, as well as generally applicable federal nondiscrimination rules.

This section outlines recommended strategies and action steps for institutions and private providers to take to meet these goals. It opens with discussion of a strategy that may be helpful for both institutions and providers – pooling – then moves into specific recommendations for each group.

A. Pooling

To help balance donor preferences and potential legal requirements, one strategy that may be helpful for institutions and private providers alike is called “pooling.”¹³² When an organization pools funds, it places each individual donor gift in the same general scholarship pool with all other comparable aid. Later, when making awards to students, the organization matches individual students with awards – and

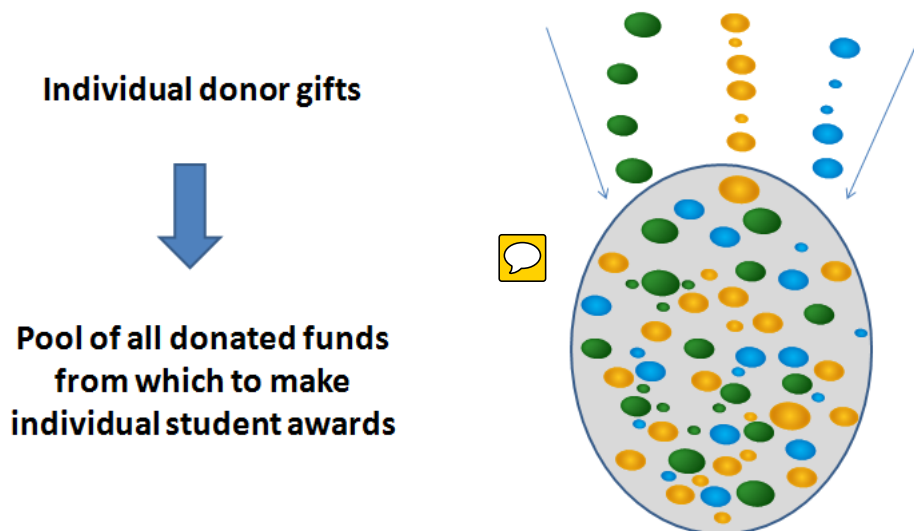
129. There are several scholarships available from nonprofit organizations and the federal government for military veterans, future military personnel, active duty personnel, or those related to veterans or active duty personnel. See Fed. Student Aid, U.S. Dep’t of Educ., Grants and Scholarships: Aid for Military Families, <https://studentaid.ed.gov/sa/types/grants-scholarships/military> (last accessed March 1, 2016).

130. COLEMAN, TAYLOR, & LIPPER, *THE PLAYBOOK*, *supra* note 128, at 42.

131. *Id.* at 10–14.

132. COLEMAN, PALMER, & RICHARDS, *FEDERAL LAW AND FINANCIAL AID*, *supra* note 6, at 48.

strives to do so in a way that aligns with the preferences of the original donor. The graphic below illustrates how the process works.



Although not settled as a legal matter, the prospect exists that this may reduce the potential vulnerability of any scholarship that is specifically focused on a particular demographic (especially if it concerns race, gender, or another characteristic that may trigger heightened judicial review). There is a strong argument that such use places a minimal burden on nonrecipients of the specific scholarship because a larger pool of broadly available funds is also available. Moreover, as the U.S. Department of Education in its Title VI policy guidance observed, “[A] decision to bar an award [intended for a specific group of students]. . . will not necessarily translate into increased resources for students from non-targeted groups.”¹³³

B. For Institutions

For colleges and universities, **the starting point should always be mission.** All scholarship programs over which the institution has some involvement or control – no matter how large or small – should relate to the institution’s unique mission, goals, and values. For many institutions, scholarship programs can help them achieve goals related to student body diversity and the educational benefits that diversity brings. And research confirms that scholarships can play this role. For example, a 2015 study found that, as tuition increases by \$1,000 for full-time, undergraduate courses at *nonselective* public institutions, campus racial and ethnic diverse enrollment fell by almost 6 percent.¹³⁴ And a landmark 1994 federal study of race-exclusive scholarships at four-year institutions found that only 5 percent of college-controlled scholarships awarded in 1991-92 were restricted to minority students, but that institutions

133. Office for Civil Rights, U.S. Dep’t of Educ., *Nondiscrimination in Federally Assisted Program*, *supra* note 10.

134. Drew Allen & Gregory C. Wolniak, *Exploring the Effects of Tuition Increases on Racial/Ethnic Diversity at Public Colleges and Universities*, 20 (presented at Am. Educ. Res. Ass’n Annual Meeting, April 2015), available at <http://www.aera.net/Portals/38/Newsroom%20-%20Recent%20Research/Exploring%20the%20Effects%20of%20Tuition%20Increases%20on%20Racial-Ethnic%20Diversity%20at.pdf>.

believed these scholarships to have significant impact on the recruitment and retention of minority students.¹³⁵

Creating an inventory of all scholarship programs at the institution can be an important step for policy planning and legal compliance. After all, the appropriate unit of legal analysis for a scholarship program is not the program on its own, but the scholarship in context of all financial aid opportunities available for that institution's students. This inventory should include both scholarships supported by the institution's own funds and those supported by private organizations. It is likely that the inventory will require input from several offices across the campus, including enrollment, development, and individual departments and schools. It is important that the inventory capture a brief description of the purpose, intended recipients, and monetary award level for each scholarship. (Further, institutions should link the scholarship inventory to a broader inventory of all enrollment practices, including financial aid, admission, and recruitment and outreach.¹³⁶)

Institutions should plan to support a multidisciplinary, ongoing process of review and evaluation. For scholarships that involve one or more student characteristics that trigger heightened levels of review, a court would expect institutions to have assessed the ongoing need to consider those student characteristics in light of current goals and progress toward achieving them. Moreover, a longer term view of the impact of scholarship programs, what's working, what may need to be reassessed, and what may need to be added, should accompany this work. Private scholarship providers should be included in these conversations, as appropriate. Just as the Banneker Scholars program (described on page 14, footnote 35) was able to reset its eligibility criteria to suit a shifting legal environment but remain able to achieve its goals, so should other institutions be willing to let programs evolve to suit the needs of the day.

Finally, institutions should clearly communicate scholarship opportunities, eligibility rules, and selection criteria for scholarship programs to students and families. For example, a comprehensive, regularly updated list of scholarship opportunities can be an important tool to help students and families plan. It also can be an important opportunity for the institution to reflect the mission-driven goals that motivate the scholarship programs.

C. For Private Scholarship Providers¹³⁷

Private scholarship providers should start with well-articulated scholarship goals. For tax-exempt organizations, the scholarship purpose in name and execution should relate to charitable purposes. And, for all private providers, establishing clear goals that all stakeholders understand will set the stage for the short- and long-term success of the program.

Scholarship providers should consider how to share their goals and policies with institutions attended by their students. These policies should include any restrictions on the use of the award, policies

135. Linda G. Morra, U.S. Government Accountability Office, Higher Education: Information on Minority-Targeted Scholarships, HEHS-94-77 (Jan. 14, 1994), available at <http://archive.gao.gov/t2pbat4/150617.pdf>.

136. See, e.g., COLEMAN, TAYLOR, & LIPPER, THE PLAYBOOK, *supra* note 128; ARTHUR COLEMAN & SCOTT PALMER, ADMISSIONS AND DIVERSITY AFTER MICHIGAN: THE NEXT GENERATION OF LEGAL AND POLICY ISSUES 11 (2005), available at http://diversitycollaborative.collegeboard.org/sites/default/files/document-library/acc-div_next-generation.pdf.

137. These recommendations were informed by NAT'L SCHOLARSHIP PROVIDERS ASS'N, IMPACT OF AWARD DISPLACEMENT ON STUDENTS AND THEIR FAMILIES: RECOMMENDATIONS FOR COLLEGES, UNIVERSITIES, POLICYMAKERS AND SCHOLARSHIP PROVIDERS 27–28 (2013).

concerning deferment or the return of funds if the student is overawarded, requirements for renewal of the award in subsequent years, and policies concerning the disbursement of the award (e.g., in one lump sum or in multiple installments) and any other donor requirements, such as academic progress. The policy summary should include contact information in case the college financial aid administrator has questions.

Scholarship providers might want to consider coordinating their efforts with institutions, though such coordination may come with tradeoffs. This can help minimize the collective burden of private scholarship programs on student financial aid administrators and reporting requirements. Concrete strategies may include establishing a common award notification date or dates, streamlining their award notifications with the National Candidates Reply Date of May 1, and building relationships with institutional financial aid offices. At the same time, closer coordination may subject certain scholarship practices to expanded federal requirements that are not triggered by purely private, nonrecipient action, as discussed above.

When working with institutional partners, private scholarship providers should design eligibility criteria and selection processes aligned with and in service of those goals. Flexibility can be important to meet both donor preferences and institutional needs, but there are nearly as many possible scholarship program design strategies as there are scholarship programs. Still, care should be taken to ensure that eligibility criteria and the selection process will provide a reasonable expectation that the goals for the scholarship will be achieved in a legally sustainable way. A clear, comprehensive agreement between donor and institution can be an essential tool to set clear parameters for the award itself as well as the approach to making the awards. Section II.A.2. above describes how different arrangements for race- or ethnicity-conscious programs may change the institution's level of legal responsibility for the program.

Private scholarship providers should make students aware of potential federal tax implications if the provider has more flexible policies for the use of scholarship funds (e.g., allowing scholarships to be used for expenses beyond tuition and textbooks or to be deferred to a subsequent year when a student will not be overawarded). Baseline rules from the IRS are:

- Scholarships and grants are tax-free for the recipient if: (1) the recipient is a candidate for a degree at an educational institution that maintains a regular faculty and curriculum and normally has a regularly enrolled body of students in attendance at the place where it carries on its educational activities; and (2) the amounts received are used to pay for tuition and fees required for enrollment or attendance at the educational institution, or for fees, books, supplies, and equipment required for courses at the institution.
- Scholarships and grants are taxable for the recipient if: (1) the amounts received are used for incidental expenses, such as room and board, travel, and optional equipment; or (2) the amounts received are payments for teaching, research, or other services required as a condition for the fellowship grant (unless received as part of federal programs for health professions).¹³⁸

138. Internal Revenue Serv., Topic 421: Scholarships, Fellowship Grants, and Other Grants, <https://www.irs.gov/taxtopics/tc421.html> (last reviewed or updated March 22, 2016).

Finally, privately funded scholarships should be subject to planned review for impact, sustainability, and legal compliance. This task can be undertaken by the institution, the private donor, or both in collaboration, depending on the circumstances of the relationship.

V. Conclusion

Scholarships provide an essential service toward the achievement of broad and institution-specific goals for college access and success. Without financial support, many students – particularly those from low-income and underrepresented communities – may not be able to attend the college of their choice (or even attend at all). And scholarships can be essential tools for institutions to attract the student body needed to achieve their mission. Private scholarship providers can be essential partners to help institutions fund more opportunities for more students.

But creating effective and sustainable scholarship programs involves much more than writing a check and handing out an award. Institutions and private providers alike must be cognizant of federal, state, and local requirements that may come into play when certain student characteristics are used as eligibility criteria or award decision factors. Wrapping these legal questions is likely most effective when part of a broader approach that links scholarships to broader institutional and organizational goals as well as a regular process of evaluation of impact and effectiveness in meeting those goals.

This manual provides an overview of several federal requirements (mostly in nondiscrimination law) that may come into play. We hope that it will be a helpful tool for institutions and private scholarship providers, working with their own counsel, to create strong programs that support college access and success for today's widely diverse population of students.