



Navigating the Post-SFFA Landscape: Advancing Equity-Minded, Law-Attentive Priority Actions in Graduate, Undergraduate and Professional Higher Education

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Suggested Citation: Keith, JL and Coleman, AL. (2024). *Navigating the Post-SFFA Landscape: Advancing Equity-Minded, Law-Attentive Priority Actions in Graduate, Undergraduate and Professional Higher Education*. Washington, DC: EducationCounsel LLC.

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Acknowledgments

This resource was made possible by the generous support of the Alfred P. Sloan Foundation in projects of the Council of Graduate Schools and American Academy of Arts & Sciences, partnering with EducationCounsel LLC. The authors also express our gratitude to Dr. Lorelle Espinosa of the Sloan Foundation, Drs. Suzanne Ortega, Julia Kent, and Brian McKenzie of CGS, and Dr. Kimberlee Eberle-Sudré of the American Academy, as well as colleagues from the higher education field, whose wisdom and experience provided valuable contributions. Finally, we are grateful to the many higher education and civil rights legal counsel and researchers who provided valuable insights and contributions to this project in its development, and in reviews of final drafts.

Introduction and Overview

In June of 2023, in *SFFA v. President and Fellows of Harvard College* and in *SFFA v. University of North Carolina*,¹ the U.S. Supreme Court radically altered the federal non-discrimination law landscape affecting the consideration of an applicant's race in higher education admissions, including graduate, undergraduate, and professional school admissions. The Court now prohibits the consideration of an applicant's racial status to achieve the education benefits of diversity for all students under the strict legal standard that applies to that status. However, it expressly permits considering what an applicant gains from their *experience* of race. While the traditional "strict scrutiny" standard hasn't changed, the educational diversity benefits—as long defined—are no longer *legally* compelling enough to justify considering racial status of students in admissions under that standard.

Recognizing that the relevant legal landscape has been materially changed, and that many of the practical questions for higher education leaders and policymakers remain unresolved, this guidance has been developed in collaboration with legal and policy experts as a resource for higher education leaders, policymakers, and their legal counsel. It is a tool that elevates issues and considerations for individuals engaged in policy development and implementation and focuses on: (1) helping to expand perspectives on viable diversity, equity, and inclusion [DEI]-advancing avenues, consistent with relevant federal non-discrimination law, and (2) evaluating legal risks of various DEI policies and programs in light of their mission-focused aims and impacts. This resource is not intended to substitute for institution-specific legal advice, which is inherently context-, institution-, and program-specific.

More specifically, in light of the many avenues of action that remain viable following the Court's *SFFA* ruling, and in light of other remaining longstanding precedent, this resource provides examples of priority actions that institutions of higher education (IHEs) can take to advance equitable and diverse learning communities. It covers graduate and professional education, as well as undergraduate education, with principles that can apply to departments and programs within IHEs. Its principal aim is to address key design elements for policies and programs (including systemic barrier removal) that remain available and places them on a spectrum of green, yellow and red risk that is explained in the next section.

As a practical matter, our focus in this resource is on actions that fall in a green or yellow legal risk zone under federal non-discrimination law. While we assess legal risk on its own here, we view legal risk as one factor to be weighed within the context of total mission risk. Institutional leaders and policymakers may want to consider this resource as they and their legal counsel conduct their

¹ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (and v. Univ. of N. Carolina)*, 600 U.S. 181 (2023).

own evaluation of legal and total mission risks of DEI-advancing policies and programs. Notably, state laws and system policies that apply to public IHEs may affect these institutions' analysis, as informed by this resource's distillation of relevant federal principles. State relations may also put pressure on private IHEs. States may impose more restrictive standards than federal law, shifting a green or yellow characterization to red in particular contexts.

Baselines from the SFFA Decision

In June of 2023, the U.S. Supreme Court ruled in a 6-3 decision that Harvard's and the University of North Carolina's (UNC) holistic review admission policies that included consideration of an applicant's racial status to achieve the educational benefits of diversity were unlawful. According to the majority decision,

- The diversity-associated benefits for all students—enhanced learning and teaching, leadership, empathy, cross-racial understanding, civic and workforce readiness, and reduced stereotyping—were not *legally* compelling interests *because* they did not reflect “sufficiently focused and measurable objectives” for a court to meaningfully evaluate;² and
- The universities' policies were not designed with precision (to achieve a *legally* compelling aim, if there were one) in that their policies: impermissibly employed race in a negative, mechanical manner, which resulted in “zero sum” decision-making where a benefit for one race was a detriment for others; resulted in racial stereotyping; and lacked “meaningful end points” for the consideration of racial status.

At the same time, the Court expressly endorsed two critical avenues essential to advancing diversity and equity goals.

First, recognizing the “tradition of giving a degree of deference to a university's academic decisions,” the Court reaffirmed that “[u]niversities may define their mission as they see fit” within constitutional limits. Notably, the Court recognized the diversity interests advanced by Harvard and UNC, which align with the long-held diversity interests of many institutions, to be “worthy” and “commendable”—even as it ruled them not legally compelling and, so, insufficient to support the consideration of an applicant's racial status in admissions decision-making.

Second, the Court ruled that “nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.” The Court expressly permitted considering the lessons learned (which should include knowledge), skills and character qualities (such as leadership and courage), that an individual student may gain from their own lived experience of race. At the same time, the Court cautioned institutions not to make assumptions about what a student's experience of race is, or what a student gained, based on their racial status. For example, favorable consideration of “a student who overcame racial discrimination must be tied to that student's courage and determination.” Similarly, the Court advised that “a benefit to a student

² The Court also found it impossible to assess how much leadership, courage or other diversity benefits would be “enough” in order to permit meaningful evaluation under law. The Court thus found Harvard's and UNC's diversity interests to be unlike the only interests that the Court has found to be compelling (i.e., temporarily addressing personal safety threats in prison riots and remedying the continuing effects of an institution's own intentional discrimination).

whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to that student’s unique ability to contribute to the university”—not to “the color of their skin.” Thus, while rejecting the ability of IHEs to consider an applicant’s racial status in admissions as Harvard’s and UNC’s admissions policies did, the Court did not eliminate the ability to consider issues of race from all consideration. Indeed, it expressly endorses considering what a student gained from their experience of race if relevant to the institution’s or a program’s mission.³

In addition, many policies supported by longstanding tenets of federal non-discrimination law were untouched by the Court’s opinion and should remain available to institutions to advance diversity and equity. The Court did not address the definitional parameters of race-neutral policies, which are not subject to strict legal standards. And, the Court did not specifically address pathways, recruitment and outreach, financial aid and scholarships, or mentoring programs (where principles of strict scrutiny applicable to admissions also generally apply when policies confer material benefits with consideration of students’ racial or ethnic status).

In broad terms moving forward, IHEs’ evaluation of admissions and other DEI-advancing policy and program designs that confer benefits and opportunities on individual students should be guided by three sets of principles:

1. **Legally compelling interests.** The SFFA decision did not change the basic strict legal requirements that there must be a “legally compelling” interest and precise policy design to achieve that aim (“narrow tailoring” in legal terms)⁴ whenever any policy or program confers an opportunity or benefit to some students (and not others) based on consideration of a student’s racial or ethnic status.⁵ (Of course, many program design options do not trigger these strict standards.)

3 As the U.S. Department of Justice and U.S. Department of Education, pointedly stated: “The court in SFFA limited the ability of institutions of higher education to consider an applicant’s race in and of itself as a factor in deciding whether to admit the applicant. But, “universities may continue to embrace appropriate considerations through holistic application-review processes... and assess how applicants’ individual backgrounds and attributes [including those related to their race]... position them to contribute to campus in unique ways.” <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-questionsandanswers-tvi-20230814.pdf>.

4 Narrowly tailoring has traditionally included an analysis of (a) whether workable race-neutral alternatives have been effectively pursued, (b) the level of overbreadth and harm to students who are not targeted for a benefit when any policy confers benefits on students of some races and not others or uses a student’s race as a factor when conferring benefits, and (c) whether the race-conscious policy has an end point. The Court in the SFFA decision did not specifically address that full breadth of analysis, focusing instead on the harm that it deemed stems from stereotyping when a student’s racial status is considered in admissions, the belief that the challenged universities’ policies resulted in “zero sum” decision-making (where a gain for one race is a loss for another), and lacked a very specific date on which the consideration of racial status would end.

5 This principle affects, e.g., admissions; stipends, scholarships, and financial aid; pathways; and mentoring programs where policies confer benefits or opportunities that are influenced by an applicant’s racial status. Many viable DEI-focused programs (particularly in the recruitment and outreach realms) tend not to trigger the court’s “strict scrutiny” standard that demands this kind of evidence—if they do not confer material benefits tied to a student’s racial status (e.g., no paid campus visits or application waivers based in whole or in part on a student’s racial status).

Amplifying on the question of strict scrutiny, however, the Court has now ruled that neither educational diversity benefits (as advanced by Harvard and UNC and as long defined), nor remedying general societal discrimination (as past cases ruled), is a legally compelling aim that can justify considering a student's racial status. Thus remedying an IHE's own intentional discrimination (a strictly remedial aim) is the only presently recognized interest affirmed by the Court as legally compelling in the education context. The establishment of other legally viable compelling interests is possible but will require strategic efforts, at the right time and on the right facts, with support of research and evidence. Pending federal litigation is already elevating these issues and will begin to inform how higher education may successfully articulate defensible, new legally compelling interests.⁶

2. ***Evaluation of applicant-specific race experience.*** The Court endorsed the use of legally neutral criteria relevant to institutional mission that don't trigger strict legal scrutiny standards—knowledge, skills, qualities, and inspirations—that an applicant may have gained from their race-related experience, even when tied to their own racial identity. The Court's express permission to consider issues of race in this context of a student's experience is a positive that deserves institutional focus. It opens the door to obtaining such student-specific information from application and interview questions for admissions, scholarships and aid, research opportunities, and other program participation. Notably, however, evaluations of such information must not be based on assuming that societal inequities affect any applicant's experience or ability to contribute; rather, evaluations must be grounded in the actual information submitted by or on behalf of applicants about what they've gained from their own experiences.⁷ In making authentic inquiries with consequence, IHEs may focus on posing questions that allow students to describe the assets that their lived experience brings, including when related to their race. For example, an IHE may value a student's inspirations and aspirations related to race, including celebration of their heritage consistent with the express language of the Court. In addition, it is important that IHEs avoid posing questions that require students to describe negative or traumatic experiences related to race, though some who wish to do so may.
3. ***The race-neutral landscape.*** Finally, as Justice Kavanaugh forecast in the SFFA oral arguments,⁸ the vast majority of the relevant legal landscape regarding DEI efforts is now a "race-neutral" landscape. That arena of still available policy and practice is vast—and in many ways, can be more fully leveraged by IHEs in furtherance of their DEI goals.⁹ With respect to the longstanding, basic legal standards that define what constitutes a legally race-neutral policy, new anti-DEI litigation (principally, for the moment, in high school settings) seeks to materially narrow those parameters to include all DEI-motivated policies and programs, regardless of the mix of motivating factors and the actual impact on students.¹⁰ The details of these claims and court resolutions should be carefully monitored.

6 See, e.g., *Students for Fair Admissions v. United States Military Academy West Point* (No.7:23-cv-08262, S.D.N.Y. 2023).

7 See Keith and Coleman, Example DEI Application and Interview Questions (AAAS Diversity and the Law, 2024 in press).

8 Addressing the core of SFFA's counsel's claim that the Court should reject as lawful the consideration of an applicant's racial status, Justice Kavanaugh observed: "Your position will put a lot of pressure going forward, if it's accepted, on what qualifies as race-neutral in the first place." Transcript of oral argument, pp. 43-44.

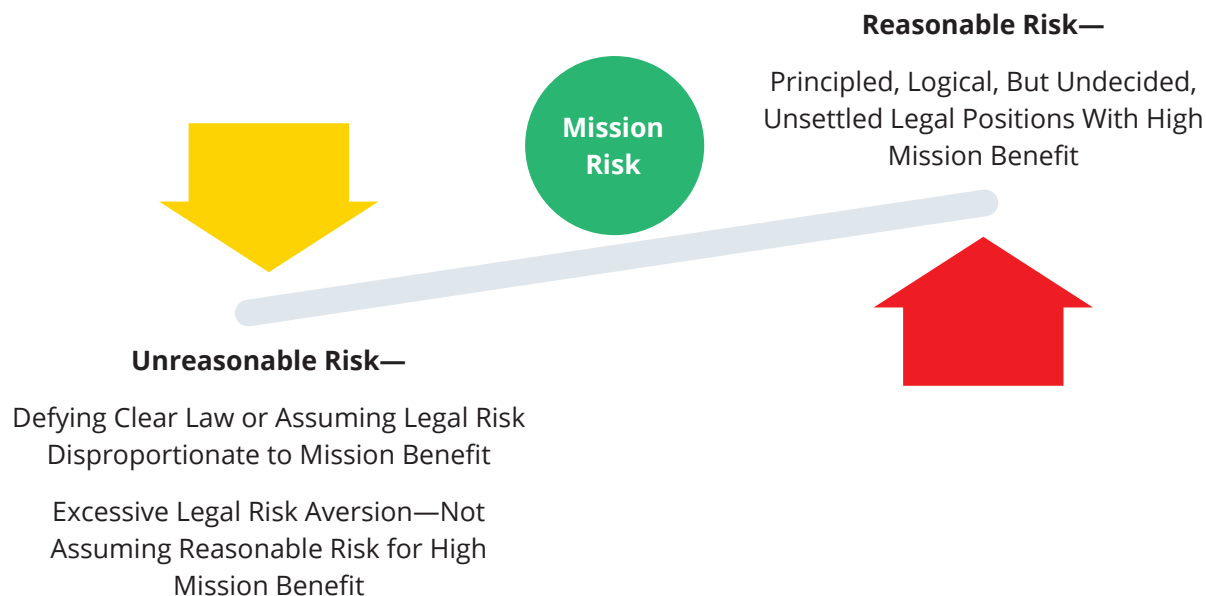
9 E.g., Coleman and Smith, "Understanding Key Diversity and Equity Strategies in the Wake of the Supreme Court's Decision on Race-Conscious Admissions in Higher Education," (Campaign for College Opportunity, November, 2023). <https://collegecampaign.org/wp-content/uploads/2023/11/110923-Understanding-Key-Diversity-and-Equity-Strategies-FINAL-small.pdf>

10 See n. 11, below regarding mixed motives (authentic, primary neutral aims with subordinate race-based DEI aims).

The framing of general legal risk described in the examples below is informed by an analysis of principles described above and based on a substantive analysis of these federal legal principles, not the risk of being sued. It is also important to recognize that none of the risk zones outlined below are static. To the contrary, shifts in underlying facts relating to mission, design, or implementation can easily alter the risk profile. If, for example, green- and yellow-zone design elements, as described, are altered to include a consequential benefit or opportunity conferred on some students, and not others, based in whole or in material part on their racial status, the design would most likely shift into the red legal risk zone (until new legally compelling interests, with narrow tailoring, justify such action). Variations in design or in implementation can also move an action from the green to yellow legal risk zone.

Finally, it is important to contextualize yellow legal risk within an IHE’s total mission risk, including risk to the IHE’s achievement of its equity- and diversity-dependent educational mission and societal role. Action in the red legal risk zone, however, may affect not only one IHE but the entire higher education endeavor. Taking action that is clearly at odds with governing law risks establishing even worse legal precedent. But there is much room to act in the green and yellow zones—leverage both to advance mission priorities.

Framework for Assessing Total Risk—Contextualize Legal Risk Within Mission Risk



Legal Risk Zones

The criteria that served as the basis for the categorization of the general guidance offered with various policy options described in the body of this resource are explained below.

Green Risk Zone Criteria

- Policy advances educational mission.
- Clear affirmation or endorsement of a policy by the U.S. Supreme Court; or by a Federal appeals court in an IHE's federal circuit if the Supreme Court has not yet ruled, or its rulings are unclear.
- Strong implication that a policy is subject to and satisfies legal parameters decided by the Supreme Court or relevant appeals court, which are grounded in principles decided and logic (though the specific facts/issues haven't been considered or decided).
- There is **uncertainty** about the legal parameters, but any "benefit" conferred with race-status consciousness is so de minimis that:
 - it can reasonably be asserted to be inclusive in effect or
 - it is of little consequence to anyone who might not be an intended recipient and easy to rectify if someone objects
- A policy has an inclusive design and impact—all races' needs are met, but in a range of ways that aim to effectively serve all. Material benefits are not allocated to individuals differently based on racial status, and no one is excluded based on racial status if they want to be included in a particular policy.

Yellow Risk Zone Criteria

- While a legally principled, logical rationale can be asserted that the policy falls within legal parameters:
 - Neither the Supreme Court nor the relevant federal appeals court has ruled on the specific policy or related principles/issues that are applicable to a policy's design;
 - If such court has ruled on the related principles/issues, its ruling is unclear; or
 - There are inconsistent or developing appeals court decisions (possibly with unclear Supreme Court rulings).

- The legal principles/issues related to a policy are **relatively clear** but any “benefit” conferred with race-status consciousness is so de minimis that:
 - it can reasonably be asserted to be inclusive in design and effect, or
 - it is of little consequence to anyone who might not be an intended recipient and easy to rectify if someone objects.
- Note: The line between yellow and red can depend on nuance in policy design and/or implementation; maintaining yellow status may depend on adequate training of faculty and staff.

Red Risk Zone Criteria

- The Supreme Court or the relevant federal appeals court has ruled on the specific policy, which is clearly (or highly likely to be) at odds with the ruling.
- Neither the Supreme Court nor the relevant federal appeals court has ruled on the facts of the specific policy, but they have ruled clearly on principles that relate to design parameters that also apply to the policy. (E.g., Title VI, once it applies, applies to the entire IHE and all of its activities.) The policy, as designed, is clearly (or highly likely to be) at odds with those principles and design parameters, taking into account any consequential contextual distinctions.
- Policies in the red zone do not necessarily need to be abandoned in their entirety. Design refinements can frequently shift the policy from the red zone to the yellow or green zone. (In exploring those possibilities, attend to authentic, mission driven, legally supportable, reasons for the change—reject racial proxies.)
- Where it is likely that a policy is at odds with legal design parameters, it is reasonable to consider whether the benefit being conferred is material or di minimis when determining whether the policy belongs in the red or yellow legal risk zone—factoring in the related question of likelihood of being sued.

Viable Program Design Interests and Policy Parameters

Outline of Covered Practices

- A. DEI-Dependent Mission
- B. Inclusive Outreach and Recruitment
- C. Neutral Criteria to Select Benefit Recipients and Program Participants
- D. Inclusive Program Design Structures
- E. Inclusive and Remedial Systemic Barrier Removal
- F. Demographic Data
- G. Race Themed Student Groups, Housing, and Community Spaces

A. DEI-Dependent Mission.



[Green] Articulate an IHE's mission and societal role that depend on creating diverse and equitable learning communities, including for students of color and other marginalized students *among all students*. Communicate these mission-dependent values consistently to make clear that all students are valued, welcomed, belong and will be supported. Such communications may be particularly important in the wake of the Supreme Court's Harvard-UNC ruling, reassuring students of color that the institution's commitment to their success is unwavering and affirming for all students that diversity and equity are core to the institution's identity.

B. Inclusive Outreach and Recruitment.



[Green] Within a robust general outreach program, pursue targeted outreach to students of color to build a diverse and inclusive applicant pool. Keep outreach separate from the evaluation and decision-making process. Design the policy and allocate resources logically to effectively convey the same core consequential information about the IHE, program, and process to all audiences. Reach out to faculty or college advisors and visit IHEs, high schools, and cohort programs based on racial demographics of their students. Don't give material benefits (e.g., paid campus visit, opportunity to present research, fee waiver, application-prep support program) to a student based on their racial status or their IHE/school/program racial demographics. Do give material benefits to all interested students of neighboring colleges, including MSIs, or high schools based on town-gown/local relationship. Select students to receive material benefits using legally neutral

criteria. If a program is broadly marketed to all audiences (e.g., on a web page, in general recruitment materials), sending targeted “are you aware” of this recruitment program notices to students of color should be treated as inclusive. Adapt C.3 example.



[Green] For campus visits, create a range of programs—with some visits having explicit race-related themes—and let students self-select their visit. IHEs may also access test score-tied student lists to support outreach but, if score range differs by race, have a good reason for the difference (e.g., document IHE-specific data showing differences in the likelihood that students of a race will apply, not the likelihood they’ll be admitted).



[Yellow] Hold a minor cookies and coffee campus reception inviting only students of color (who come to campus at their own expense); ensure that people of any race who show up may attend.

C. Selection: Neutral Criteria to Select Benefits Recipients and Program Participants.

With respect to selection criteria for admission and other programs (scholarships, stipends, pathways, application-prep support programs, fee waivers, mentoring and research experiences), consider the following:

1. *Value Skills, Lessons Learned/Content Knowledge, Character Qualities, or Inspiration.*



[Green] Value skills, lessons learned/content knowledge, character qualities, or inspiration gained from a person’s lived experience of race (or other lived experience)—however and by whomever gained. Include, among academic and other valued attributes, aspirations, skills, knowledge, and character qualities that advance DEI. Do not consider a person’s racial status in isolation. Use essay questions, interview questions or letters of recommendation for information, whether optional or required, to explore a student’s actions, skills, or knowledge on issues of race or DEI related to mission, not a student’s racial status.

2. *Focus on Race as Subject Matter.*



[Green] Focus on race as a *subject matter* of a program, with people self-selecting to attend, or selected using neutral criteria. Consider race, not as a person’s racial status, but as the subject of a person’s expertise, commitment to ameliorate injustice, content knowledge, skills or aspirations related to mission priorities—gained/demonstrated by any person’s actions (formal training/research/studies, long service activities, dedicated personal learning) or from a person’s lived experience of race. Essay questions (optional or required) may elicit such information.

Example: [Green] The following application question may be posed to applicants:



Working and learning successfully in a diverse educational environment requires awareness of, openness to, and comfort with difference. What lessons have you learned about issues of race, gender, socioeconomic, or other backgrounds that aren't well-represented in your field of study or your other activities and how will you apply those lessons as part of the *[name]* community? Additional examples are provided in the AAAS Diversity and the Law materials at [AAAS EdC D&L Resources](#). These include a Sample Application Questions and a Student DEI Design Slide Deck and Institutional Workbook.

3. Use Traditional Neutral Criteria.

Use Traditional Neutral Criteria that are mission priorities and would be pursued even without racial diversity impact, which they do or may have. When relevant to overall educational mission, benefits (e.g., fee waivers, paid campus visits, application prep programs, opportunities to present research to faculty, etc.) may be provided to students who are economically disadvantaged or who attend an under-resourced IHE or high school; first generation students; students with a first language other than English; students from undergraduate programs or geographical areas not well represented in the program/IHE; admission or other program percent plans aimed to serve a public IHE's service area.

Examples:



[Green] A fellowship program that includes mentoring opportunities and is based on student wealth is in most instances likely sustainable under federal nondiscrimination law, even where there may be secondary beneficial effects for previously underrepresented students based on their race, so long as race is not a selection criterion;



[Green] A program is on advances in medicine by Black researchers; it is prominently marketed and anyone interested may attend, inclusive of notices that are sent to Black students.



[Green] If economic disadvantage is the priority aim, use many means to identify such students without regard to race (recognizing that white poverty is often not as segregated by zip code as Black and Brown poverty is) but pay attention to making sure the range of means used are designed not to exclude or favor any race.

Examples:



[Green] If the policy's design focuses only on maximizing achievement of the neutral aims.



[Should be Green, possibly a strongly positioned Yellow] If subordinate attention is paid to the design's achievement of the race-based aim, without compromising the design's ability to maximize the neutral aim's impact—thereby likely rendering the race aims legally inconsequential or making it hard to demonstrate that they have a material influence in overall design and impact (as the priority neutral aim would be pursued in any event and has the same race impact).



[Should be Green, possibly a strongly positioned Yellow] If any such policy has mixed motives (authentic neutral priority aim—secondary racial diversity aim) and impact, it is important to demonstrate authenticity of the neutral priority aims to IHE mission, e.g., by funding, staffing, board and faculty votes and strategic plans, leader statements.

4. Remedial Criteria.



[Green approaching or in Yellow] Remedial criteria that provide educational benefits as restitution for slavery and involuntary servitude where, for example, if an IHE enslaved people, it documents its history, identifies these people's descendants, and gives them a plus in selection for admission, scholarships, research experience, pathways programs, etc.

5. Scholarships/Stipends.



[Green] Award graduate scholarships, stipends and associated teaching and research training, as well as professional school scholarships, using neutral criteria. (Also see D — pool and match—on awarding the *same* stipend to all students and using race-based funding sources for some.) Provide undergraduate scholarships that are all or predominantly need-based with a demonstration of authentic commitment to economic equity as the priority aim that would be pursued even without a race-based secondary aim.

6. Cohort/Pathways/Community-Based Programs.



[Green] In selection for admission or other benefits, consider the skills, knowledge, and character qualities that any *individual* student reveals they gained from participating in a race-conscious cohort, pathways, or community-based organization (CBO) program, without making assumptions about all students who participate in such a program. Also target outreach to students in these programs to build an inclusive applicant pool for admission, scholarships, research programs, etc.

7. Selection Criteria/Process Design.



[Green] The selection criteria and process are the same for applicants of all races.

D. Inclusive Program Design Structures.



[Green] *In Selection for Mentoring, Research Experience, Enrichment, or Pathways Programs* use neutral criteria. Core academic/skills building content is provided to all; themed programs are also offered in focus groups, including, among others, race-related themes relevant to the IHE's mission (e.g., major field contributions of African American researchers, experience of being Latinx in the program or a field), with students self-selecting groups.



[Green] *Providing Access to 3rd Party Scholarships* involving race status-based qualification criteria that are offered by entities that are not legally part of the IHE (where the IHE provides no funding, design, implementation or unique marketing support) is legally viable from the vantage of the IHE, even though the separate entities may be subject to similar federal nondiscrimination laws (including those relating to non-discrimination in contracting). In the context of marketing efforts, an IHE may list such funding opportunities for students along with other similar outside funding opportunities. IHEs may provide a list of admitted students who might qualify to outside funders if the same list is provided to all such outside funding sources (but check with your legal counsel to satisfy any pre-conditions that FERPA may impose).



[Green to Yellow] *Pool and Match* fungible stipend/aid dollars, with inclusive effect. If the program assures the same stipend to all graduate students, it can fund some with race-based donor funds (as long as that is not tied to the number of students of particular races admitted). Or, create a central pool of grad (multi-field with same stipend) or undergrad research funding/stipends/scholarships, with a high proportion of race-neutral and a low proportion of race status-based funds. Pick students and determine amount, type, and benefits awarded using neutral criteria. Fund all who are selected, but match funds to selected students by first allocating the race-based funds to those who qualify, freeing more unrestricted funds for the rest and expanding funds available to everyone.



[Green] *Aggregate Mentoring, Enrichment, or Pathways Programs* that provide the same core academic and skills-building content—some that have had a racial status-based criterion—into a single program. Select all students using authentically neutral criteria. Add focus groups with topical programs, some with race themes, and allow students to self-select the group that interests them. (Adapt C.3 example.)

E. Inclusive and Remedial System Barrier Removal.

IHEs may end or redesign policies, systems, and norms that particularly disadvantage students of color, economically disadvantaged students, first-generation students, and students from under-resourced IHEs and high schools. These actions often can have the greatest impact on equitable educational opportunities and outcomes. Such practices, which may be considered in tandem with others outlined here, include:

1. *Inclusive Barrier Removal*, which ends an offending policy in a way that eliminates a disadvantage for everyone who is affected by the policy (even if most are students of color)—but doesn't end benefits that some races enjoy under it. This barrier removal advances equity with minimal or low legal risk and focuses on readiness to serve all students well.



Examples: [Green] Adopting inclusive pedagogy; creating more flexible degree trajectory schedules and family-related leave policies; aligning timing of admission and scholarship/stipend offers; attending to affordability, food insecurity, homelessness, financial exigency; redesigning mentoring and research experiences to be not only available but accessible and relatable for all students who would benefit; enhancing transparency and access for student exchanges/pathways/transfers with an aim to end barriers for all affected—designing to benefit all students or to be available to all students in need, as applicable.



[Green to Yellow] Open pathways via equitable education/research collaborations among IHEs of different levels or areas of focus, including but not only among predominantly white IHEs (PWI) with historically black colleges and universities and minority serving IHEs (HBCUs/MSIs) to focus on leveraging their equitable learning expertise. In doing so, contextualize and aggregate targeted collaborations with HBCUs/MSIs that provide their students a benefit, within a broad range of pathways programs for all students facing barriers, providing similar benefits to create an inclusive, not race-exclusive effect. Also avoid providing different admission criteria or expedited processes based on students' racial status or a collaborating IHE's racial demographic.



[Green] End participation in national ranking systems that aren't aligned with mission and cause disadvantage to students of some races but do so in a way that doesn't end benefits for students of other races (respecting the changed criteria or systems)

2. *Remedial Barrier Removal Requires Some Law Attentive Design.* This process redesigns or ends an offending policy, ending a race-based disadvantage, but also ending an arguable race-based benefit (e.g., depending on the facts, eliminating tests, recruiting only or heavily from certain programs or limited feeder schools, or revising athletic, legacy, early decision designs/preferences).¹¹ In this context:



- [Green] When the offending policy had an *intentional discriminatory origin* (often in a “de jure” context in legal terms) and there remain current continuing race-based adverse effects that can be linked to that origin, federal law allows for the prospect of race status-conscious remedial action.¹² In this traditional remedial regime, there is no legitimate educational aim because the effect of the policy’s discriminatory intent has not been remedied. To justify a race status-based remedy, however, courts still require that there be no available alternative remedy that would have less impact on students of races that do not benefit from the remedy.

¹¹ Ending or redesigning an offending policy’s race-based benefits to students of white and some Asian identities, and ending its persistent adverse impact on Black and Brown students, as well as students of other Asian identities, is the focus of a new generation of litigation in which anti-DEI advocates challenge the policy change as intentionally discriminatory and unlawful. To date, those challenges have been largely unsuccessful at the federal appeals court level, and the U.S. Supreme Court has declined the first request it received to hear a further appeal. Another request is pending where the Court hasn’t as of March 2024 decided whether to hear that case’s appeal. See *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 872 (4th Cir. 2023), cert. denied, No. 23-170, 2024 WL 674659 (U.S. Feb. 20, 2024); *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for City of Bos.*, 89 F.4th 46, 54 (1st Cir. 2023) (Application to extend the time to file a petition for a writ of certiorari to April 17, 2024 granted). Those policy issues should be navigated with care.

Legal counsel’s attention is directed to the U.S. Supreme Court’s holdings and equal protection rationales in employment and contracting discrimination cases, where the end or redesign of a policy that has an unintentional adverse effect on some races (“disparate impact”), adversely affects other races that were benefited by the original policy. In those cases, where such action is treated as intentional prohibited discrimination against those who benefited from the original policy, rather than as a remedy for an unfair advantage, courts have required a “strong basis in evidence” showing that the defendant must end/redesign the program that statistically disadvantaged some races (but benefited other races) to avoid legal liability for retaining it. See, e.g., *Ricci* (2009) (rejecting a fire department throwing out promotion test results which had a significant race-based disparate impact and elevating the “strong basis in evidence” standard under Supreme Court Equal Protection Clause jurisprudence as influential in cited Title VII employment and Section 1981 contracting cases).

¹² The Supreme Court is not sympathetic to attenuated connections of a discriminatory policy’s origins and current effects, where the original offending policy has been redesigned and no longer has a discriminatory aim. But if uninterrupted substantial race-based disadvantage can be demonstrated, there should be a legally principled position that the discrimination continues and a remedy is needed because the redesign did not achieve a cure. The remedy may be to end the policy and its race-based harms and benefits, but only if no alternative exists, e.g., redesign, that would have less impact on the race-based benefits.



- **[Green]** When the offending policy *has an authentic neutral aim and is not tied to past intentionally discriminatory practices*, but creates a statistically significant *disparate impact* based on students' racial status, a strong basis in evidence of need to end or redesign the offending policy (to avoid liability for maintaining it) may be required and will depend on whether:
 - the offending policy can be justified because it addresses an educational necessity (e.g., advances an authentic mission relevant priority—though it need not have a legally compelling aim); and
 - if so, there is no less racially impactful alternative design that would achieve the policy's neutral mission priority about as well.



Examples: If an IHE eliminates standardized testing (or similar requirements) and the policy change results in material shifts in the impact based on race among subgroups of students, questions like those surfacing in recent K-12 litigation may surface. See n. 12, above, regarding the impact on student racial groups that maintained an historical impact advantage before the change. In such circumstances, examination of the intrinsic validity of such action (i.e., the decisions regarding test use) in light of mission-aligned educational aims, as well as alternatives that might as effectively serve those mission-related purposes (e.g., advancing test-optional policies) are likely to be important baselines on which any new policy should be evaluated.

F. Demographic Data.



Share demographic data provided in a check-box on applications in real-time with staff conducting outreach to build an inclusive and diverse applicant pool. **[Green]** But formally keep those data out of the evaluation and decision-making process while it's underway, by separating staff or, if that's infeasible, **[Yellow]** by documenting and applying protocols and training regarding the prohibition of considering an applicant's racial/ethnic status under the *SFFA* decision. **[Green]** An applicant's racial/ethnic status may be referenced as part of a student's story, revealing valued skills, knowledge, inspiration, and qualities gained from their lived experience of race and known to decision-makers in that context.

G. Race Themed Student Groups, Housing, and Community Spaces.

With respect to these programs that are recognized, regulated, supported, owned, or controlled by the IHE:



1. **[Green]** *If open to all interested students based on neutral criteria*, without considering any student's racial status, but having an express aim to provide welcome, community, and programming related to particular races.

Examples:



[Green] A Black Student Union or Graduate Student Center is created offering programming on race-related current events; programming on experiences of, and issues faced by, Black students at the institution, in various fields and in society; professional and skills development programming featuring Black alumni who are leaders in their fields; social and cultural activities; and leadership opportunities for students to participate in managing the Student Union or Center. The programmatic focus is prominently marketed, with clarity that all interested students or graduate students at the university are welcome.



[Green] Student housing with a race-focused co-curricular program could be similarly structured, with neutral criteria used (e.g., demonstration of formal studies, training, research, dedicated personal learning, or personal lived experience providing unique or deep knowledge of how to identify and address relevant issues of race at the institution or in a field, or a record of action to ameliorate racial injustice) to select students where housing capacity is limited. It is important not to assume that all Black students who apply have the lived experience that would particularly qualify them and that other students do not, however. Focus is on how a student applied their knowledge and skills—however gained—to advance the housing's co-curricular program.



2. [Green] *If leadership positions are also open to all members based on neutral criteria.*



3. [Green] *If leadership position criteria are based on race as a subject of a student's expertise or deep knowledge of issues for students of color at the institution or in society, with clarity in design, aim, and practice that a person of any race may demonstrate that expertise and knowledge by formal training, research, or studies—by dedicated personal learning—by long service to communities of color—by dedicated action to ameliorate injustice—or by the particular student's lived experience of race. If each student is individually evaluated without identity-based assumptions, these are subject matter and experience—not identity-dependent—criteria.*



4. *Student support services.* [Arguably Yellow] *If an affinity group, mental health benefit, or other support benefit is provided only to students who experience race-associated trauma (survivors of specific acts of racial violence or emotional distress caused by societal incidents of racial violence), not on bare racial status.* [Green] *If benefits are provided for students who experience trauma or violence of any kind, including but not limited to such experience based on race.*



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These materials are based on work generously supported by the Alfred P. Sloan Foundation.