

## Chapter 6

# Diversity in Higher Education: A Continuing Agenda

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### Introduction

Affirmative action in higher education has seized center stage in recent years, with a plethora of federal court decisions regarding college and university admissions practices and the value of “diversity,”<sup>2</sup> as well as countless headlines that emphasize the politicization of the issue and the surrounding debate. The extremes of the political divide on this issue are as unwarranted as they are distracting. They distract the dialogue from a more meaningful and important conversation and agenda that could:

- Highlight the distinction between the largely indisputable value of diverse learning environments for all students and the means of achieving that diversity, which include race-conscious programs;
- Emphasize the need to explore and highlight various ways of achieving that diversity, including through race-neutral means; and
- Call attention to the critically important role of race in higher education financial aid decisions.

The U.S. Department of Education has played a central and balanced role with

regard to affirmative action in higher education. Through its outreach, policy, technical assistance, research, enforcement, and advocacy-related activities, the Department has the potential to continue its balanced and strategic focus on this issue — one that is aligned with the educational interests and research related to the consideration of race or national origin in higher education. With a series of steps that reflect this alignment, the Department can continue to establish a position of reasoned leadership that rejects the polarity and the politics of the issue, just as it reinforces principles of educational soundness in its effort.

### I. Highlight the Value and Importance of Diverse Learning Environments

Amid the debate about affirmative action, one of the frequently overlooked points that has generated relatively little dispute is the fact that a diverse learning environment generates positive benefits for all students from all walks of life.<sup>3</sup> In fact, the rapidly growing body of research on the subject confirms that there are teaching and learning, civic, and employment benefits (among others) that inure to students in higher education.<sup>4</sup> Diversity can improve

teaching and learning, both inside and outside the classroom, by exposing students to multiple perspectives on a range of issues and by challenging their existing perspectives, thereby strengthening their critical thinking and problem solving skills. Diversity can also enhance students' civic values by bringing students together across lines of difference, real or perceived, and teaching students how to be good neighbors and citizens in our multicultural, democratic society. Finally, diversity can promote economic benefits by teaching students the value of diverse perspectives and how to function most effectively in diverse business environments and the expanding global marketplace.<sup>5</sup>

Notably, an increasingly strong voice in favor of pursuing strategies to promote campus diversity is that of corporate America. Supported by empirical evidence that “consistently” demonstrates that “more diverse work teams produce ideas and solutions that are more creative and of higher overall quality than homogenous groups,”<sup>6</sup> America's business community justifies the pursuit of higher education diversity as supporting both educational and business interests. In a report issued in January of 2002, for instance, the Business-Higher Education Forum emphasized the *economic* power of bringing different ideas and backgrounds to the table, particularly in a world in which global markets demand that employers focus on obtaining workers who “have studied and lived with people from a range of racial, ethnic, and cultural backgrounds [who] are better prepared to collaborate with colleagues around the globe, as well as to perceive and respond to world-wide business opportunities.”<sup>7</sup>

With this foundation of broad-based support, the Department of Education should, in its policy pronouncements, public statements, and work with the Department of Justice related to possible amicus and case intervention decisions, ensure that the

public record accurately captures the body of research on the subject and reflects the consensus view (even among those who might disagree about the means of achieving diversity) that diversity in higher education is of educational and economic importance to our institutions of higher education and to our national well-being.

## II. Explore and Highlight Various Ways of Achieving That Diversity, Including Through Race-Neutral Means

Despite the broad-based support for diversity in higher education, race-conscious policies that have been designed to promote that goal have been under attack in recent years, both as to the question of whether the education-related diversity goals are “compelling” under federal constitutional standards, and irrespective of this issue, with regard to whether the means for obtaining the educational benefits of diversity are appropriately tailored to meet those goals. Again, the unnecessary politicization of the latter issue masks the opportunity for greater consensus. Given the benefits of diversity, not to mention the benefits of greater access for minority students, the focus should be on developing and supporting strategies that can achieve diversity while respecting to the fullest extent possible competing values. In part, this means “mending, not ending” affirmative action programs, and this should be clear. But it also means developing race-neutral strategies that can be successful over time, as well as strengthening the education pipeline. This implies a series of questions that should be a focus of research and related outreach efforts by the Department of Education:

- Are there race-neutral policies that can materially advance diversity interests in higher education?
- What are the ramifications of the use of these policies and how are diversity interests affected?
- What are the tradeoffs involved with respect to the multiple higher education admissions goals and related mission-driven objectives?

Frequently considered to be the third rail by affirmative action proponents, who categorically maintain that no race neutral program can under any circumstances replicate the “success” of race conscious programs, this issue has for too long been at the center of the political vortex.<sup>8</sup> As a result, an honest and straightforward effort to meaningfully evaluate the range of options that may be considered in the context of promoting diversity goals has been unnecessarily hampered.

The Department of Education could promote a comprehensive research agenda devoted to a series of studies in multiple higher education and K-16 contexts. By helping to lead this national conversation and examination, the Department would help put us on a track toward achieving our diversity goals while addressing competing values over time.

### **III. Acknowledge the Critical Role Financial Aid Plays in Students’ Abilities to Pursue Higher Education Goals and the Important but Limited Impact of Race-Conscious Financial Aid in That Context**

The current national debate regarding affirmative action in higher education has centered on the highly visible federal court actions that, with some exceptions, address race in admissions decisions.<sup>9</sup> While critically important for those selective institutions that consider race as part of the admissions process, the affirmative action issue in financial aid has significance — and potential impact — that extends beyond the question of admissions.<sup>10</sup> First, minority students are more likely to come from low-income families.<sup>11</sup> As a result, for most of these students, the availability of financial aid is a significant factor affecting their ability to go to college.<sup>12</sup> Second, at a time of increasing national diversity, and with the recognition that we can “leave no child behind,” we face the prospect that by not providing the necessary financial aid supporting college and university attendance, college campuses “will be missing” 800,000 otherwise qualified minority students between now and 2015, with the commensurate impact of losses of billions of dollars to the national economy.<sup>13</sup> Finally, the indisputable fact is that race-conscious financial aid policies provide opportunities to tens of thousands of students each year who attend our nations institutions of higher education<sup>14</sup> — and it does so with less burden on non-beneficiaries than the consideration of race in higher education admissions decisions.<sup>15</sup>

Given the important and expansive role that financial aid plays with respect to providing opportunities for students to attend institutions of higher education, the issue of financial aid should be central in any discussion about affirmative action. The need to preserve a full range of programs and strategies to promote the educational interests reflected in diversity goals is thus closely associated with the need to ensure that college and universities do not in a time of increasing national diversity unduly restrict the aid that has made the difference for so many minority students in higher education.

The U.S. Department of Education should, therefore, take the necessary steps to affirm its long-standing policy of support for such scholarships, as it works to help institutions of higher education conform their practices to that policy. Importantly, with few exceptions, that policy document represents the work of two administrations—one Republican and one Democratic — in which the U.S. Department of Education closely examined the practice of race-conscious financial aid as well as governing legal principles as a foundation for its final policy guidance.

Following the December 10, 1991, publication of a notice of proposed policy guidance and request for public comment regarding race and national origin-conscious financial aid, and the subsequent study of the General Accounting Office (GAO) regarding such aid, the Department of Education issued final policy guidance on February 23, 1994, which (among other things):

- Acknowledged the GAO finding with regard to the relatively small percentage of such aid, when compared to all scholarships at institutions of higher education;<sup>16</sup>

- Concluded that financial aid was a minimally intrusive method for achieving student body diversity because of the limited impact of such aid on non-minority students; and
- Affirmed many of the principles set forth in the 1991 proposed policy and described in detail the legal foundations allowing for such aid.<sup>17</sup>

With respect to diversity interests, in particular, the 1994 policy recognized the possibility that colleges and universities could use race or national origin in situations other than those in which race or national origin was only a “plus” factor in awarding student aid.<sup>18</sup> Specifically, the Department recognized that such aid might be awarded “as a condition of eligibility . . . if it is narrowly tailored to promote diversity.”

Framed in the context of a still operative legal framework, and grounded in a body of research and public commentary regarding the issue, the U.S. Department of Education’s race-targeted scholarship policy is one that should continue to provide guidance to states and institutions of higher education, and serve as a basis for the Department of Education’s outreach and technical assistance efforts with respect to issues of federal compliance.

## IV. Conclusion

The policy and enforcement responsibilities of the U.S. Department of Education that relate to the issue of affirmative action must continue to be executed in a balanced way that affirms educationally sound policies and practices, and that is research-driven, nuanced, and reflective of stakeholder input. Principles of educational sufficiency lie at the heart of federal

compliance determinations and ultimately depend on context-specific facts and analysis, rather than on rhetoric or hyperbole. To continue to carry the mantle of leadership on the important issue of race in education, the Department should affirm that fact, and act in ways that will ultimately expand opportunities for all of America's youth.

## Endnotes

<sup>1</sup> Counsel with Nixon Peabody LLP in Washington, D.C., Mr. Coleman served as Deputy Assistant Secretary in the U.S. Department of Education Office for Civil Rights during the Clinton Administration, where he led the Department's outreach and technical assistance efforts related to affirmative action. He is the author of the College Board's recent publication, *Diversity in Higher Education: A Strategic Policy and Planning Manual* (2001).

<sup>2</sup> E.g., *Hopwood v. Texas*, 78 Federal Reporter 3d 932 (5th Circuit), *cert. denied*, 518 U.S.C. § 1033 (1996); *Smith v. University of Washington Law School*, 233 Federal Reporter 3d 1188 (9th Circuit 2000), *cert. denied*, 121 Supreme Court Reporter 2192 (2001); *Johnson v. Board of Regents of the University System of Georgia*, 106 Federal Supplement 2d 1362 (S.D. Georgia 2000), *aff'd*, 263 Federal Reporter 3d 1234 (11th Circuit 2001); *Gratz v. Bollinger*, 122 Federal Supplement 2d 811 (E.D. Michigan 2000); *Grutter v. Bollinger*, 2001 U.S. District Lexis 3256 (E.D. Michigan 2001).

<sup>3</sup> For example, the parties in the University of Michigan litigation in which admissions policies related to the undergraduate institution and the law school have been challenged do not debate the existence of educational benefits of a diverse learning environment. They dispute the claim that such benefits amount to a "compelling interest" under prevailing federal standards, and that the programs in question have been appropriately designed and implemented to achieve those goals. See *Gratz v. Bollinger*, 122 Federal Supplement 2d 811 (E.D. Michigan 2000); *Grutter v. Bollinger*, 2001 U.S. District Lexis 3256 (E.D. Michigan 2001). See also *Great Expectations: How the Public and Parents — White, African American, and Hispanic — View Higher Education*, at 13 (Public Agenda 2000).

<sup>4</sup> See, e.g., *Diversity Challenged: Evidence on the Impact of Affirmative Action* (Orfield and Kurlaender, eds., President and Fellows of Harvard College 2001) ("*Diversity Challenged*"); American Council on Education and American Association of University Professors, "Does Diversity Make a Difference? Three Research Studies on Diversity in College Classrooms," <<http://www.aaup.org/divrep.pdf>>; Chang *et al.*, *Compelling Interest: Examining the Evidence on Racial Dynamics in Higher Education* (The American Educational Research Association and the Stanford University Center for Comparative Studies in Race and Ethnicity 1999) ("*Compelling Interest*"). See generally Coleman, *Diversity in Higher Education: A Strategic Planning and Policy Guide* (The College Board 2001) ("*Diversity*") (providing a bibliographic summary of research related to the educational benefits of diversity produced by the U.S. Department of Education in November of 2000); Expert Report of Patricia Gurin in *Gratz v. Bollinger* and in *Grutter v. Bollinger*.

<sup>5</sup> Palmer, “A Policy Framework for Reconceptualizing the Legal Debate Concerning Affirmative Action in Higher Education,” in *Diversity Challenged*. See also *Compelling Interest; Diversity*.

<sup>6</sup> *Crossing the Great Divide: Can We Achieve Equity When Generation Y Goes to College?*, at 39 (“*Crossing the Great Divide*”).

<sup>7</sup> *Investing in People: Developing All of America’s Talent on Campus and in the Workplace*, at 35 (Business and Higher Education Forum 2002). See also Amicus Brief of General Motors Corporation in *Grutter v. Bollinger*, at 1 (concluding that “the future of American business and, in some measure, of the American economy depends upon [racially and ethnically diverse student bodies]”).

<sup>8</sup> See, for example, the U.S. Commission on Civil Rights Report (Apr. 11, 2000) and Dissenting Statement regarding various state percentage plans, which address the elimination of affirmative action in Texas and California and the subsequent enactment of “race neutral” policies designed to promote a more diverse student population in higher education. In Texas, following *Hopwood v. Texas*, 78 Federal Report 3d 932 (5th Circuit), cert. denied, 518 U.S.C. § 1033 (1996), which prohibited the use of race in admissions decisions, the state established a new set of admissions criteria known as the “10 percent plan,” pursuant to which students graduating in the top 10% of their high school classes would be guaranteed admission to any state institution of higher education. In California, following the elimination of affirmative action, the state guarantees college admission to any student ranked in the top 4% of his or her high school class, but unlike the Texas plan, the California plan does not guarantee a student admission to the institution of his or her choice; it guarantees admission only to one of the University of California campuses.

<sup>9</sup> See *supra* n. 2. Compare *Condit v. State of Oklahoma*, CIV-99-2106-W (Western District of Oklahoma) (involving challenge to a statewide scholarship program involving, among other things, scholarships related to the National Achievement Scholars Program and the National Hispanic Scholars Program).

<sup>10</sup> See, e.g., Thomas J. Kane, “Misconceptions in the Debate over Affirmative Action in College Admissions,” *Chilling Admissions: The Affirmative Action Crisis and the Search for Alternatives*, at 28 (Orfield and Miller, eds., President and Fellows of Harvard College 1998) (“While the extent of affirmative action seems to be significant at elite schools, there is little evidence of race-based admissions policies at the institutions that enroll 80 percent of four-year college students”).

<sup>11</sup> *Money Matters* (American Council on Education 1999).

<sup>12</sup> Terenzini *et al.*, *Swimming Against the Tide: The Poor in American Higher Education* (The College Board 2001); see also Carnevale and Fry, *Crossing the Great Divide*, at 29 (ETS 2000) (college enrollment is “sensitive to tuition and fee costs,” and the “correlation between cost and attendance is especially true for low-income youth”).

<sup>13</sup> *Id.*

<sup>14</sup> 56 Federal Register 64,548 (1991) (citing an American Council on Education study finding that 45,000 minority students at four-year colleges received “race-exclusive scholarships” — “scholarships for which students of *only* a designated race or national origin may compete”).

<sup>15</sup> 59 Federal Register 8756 (1994).

<sup>16</sup> The General Accounting Office concluded that “many schools” used minority-targeted scholarships “to some extent” but that those scholarships “were a small proportion of all scholarships” awarded. It determined that despite the “widespread use” of such scholarships, they accounted “for a small share of all scholarships and scholarship dollars,” representing “no

more than 5 percent of all undergraduate and graduate scholarships and scholarship dollars. . . [and] 10 percent of all [professional school] scholarships and 14 percent of scholarship dollars.”

<sup>17</sup> The issuance of the 1991 proposed policy and the subsequent final policy in 1994 followed a turn of events at the Department of Education, where, between 1990 and 1991, Secretary of Education Lamar Alexander reversed his Assistant Secretary for Civil Rights, who had declared that Title VI categorically prohibited the award of scholarships on the basis of race. Secretary Alexander affirmed that the Department would “continue to interpret Title VI as permitting federally funded institutions to provide minority scholarships.” *Washington Legal Foundation v. Alexander*, 984 Federal Reporter 2d 483, 485 (D.C. Circuit 1985). The 1991 proposed policy guidance, providing for the first time in the Department’s history a “clear set of principles” based on a “full policy review” surrounding the use of race-conscious scholarships, 56 Federal Register 64,548 (1991), explained that the Department planned to interpret Title VI “as permitting race-based scholarships in a variety of instances.” Alexander, 984 Federal Reporter 2d 485.

<sup>18</sup> 59 Federal Register 8761.