

DEI Design Parameters Under Federal Law for Public IHEs & *Federally Funded* Private IHEs, Societies, & Entities

1. When do federal race and gender nondiscrimination laws apply to public and private IHEs and private Societies and other entities? For some laws, that depends on whether the entity receives federal funding. For other laws, it depends on an entity’s number of employees, federal contract amount, or nature of contracting. **The attached table highlights some typical Society, other private entity, and IHE activities, noting certain key factors for whether the entity and its activities are covered by key federal nondiscrimination laws. Even when such a law applies, there are many avenues available to advance racial, ethnic, gender and other equity and diversity without triggering the law’s limitations or to design initiatives to satisfy legal design parameters.**

2. Federal nondiscrimination laws generally prohibit differential treatment of individuals wholly or in part due to their race, ethnicity or gender status when conferring benefits—with limited exceptions. Exceptions require (a) a *legally sufficient aim*; (b) evidence of need to consider such individual identity status (“*neutral*” strategies are used but are alone insufficient) as the **means** to achieve the aim; and (c) a policy **design** that is both precisely tailored (measurable, not overbroad, time limited) and effective to achieve the aim, without unduly burdening others. **In its 2023 Harvard/ UNC ruling, the Supreme Court held that educational benefits of diversity for all students—if defined as enhanced learning, leadership, civic/workforce readiness, or reduced stereotyping—are not legally compelling enough to justify considering a person’s race/ethnic status.** It is undecided whether any interest (beyond remedying an entity’s own intentional discrimination) could be *legally* sufficient, but that is to be explored in the future. **However, the Court says that educational diversity is a worthy and commendable interest and holds that an IHE can define its mission as it sees fit. It also explicitly permits consideration of a person’s skills, content knowledge, and character qualities relevant to mission—whether these attributes are gained from the person’s own experience of race in their life journey or in other ways and experiences.**

3. What can public IHEs and *federally funded* private IHEs, Societies, and entities do—likely without triggering federal race and gender non-discrimination laws in the first place?

Mission-tied aims and avoiding status-conscious means are key. Generally the following do not trigger exacting federal nondiscrimination law standards—if the *authentic aim* is tied to mission AND is not a proxy for conferring or withholding a benefit from people based (in whole or in part) on their bare racial status:

- (A)** Establishing that—and articulating why—DEI (including but not only race, ethnicity, and gender) is core to the mission and societal role of a Society, other private entity, or IHE;
- (B)** Collecting backward-looking data on compositional diversity—and tracking current trends—and giving these data to those who are building an applicant pool (but best not to give the data to decision-makers while they are deciding who gets a benefit, for clarity that individual decisions aren’t aimed at racial status composition);¹
- (C)** Designing and marketing programs with explicit race/ethnicity/gender-based *subject matter* focus (e.g., on community-building or a race’s contributions), without peoples’ identity status considered in who may attend;
- (D)** Conferring opportunities and benefits on individuals who satisfy authentic *neutral criteria*;
- (E)** Inclusive outreach to build a broadly diverse applicant pool (which is separate from selection decisions);
- (F)** Other *identity status-neutral* system changes/removing barriers affecting a race and **anyone** else affected by them, without another race shedding its advantage. (With an authentic inclusive aim, expert law-attentive design, and entity-specific data, removing barriers that pose an unfair advantage to some and disadvantage to others based on race, should also be possible, although the Supreme Court hasn’t ruled on all nuances.)

¹ Backward-looking data collection should be legally sustainable to assure an entity is reaching and serving all audiences. It is distinguished from racial balancing of a class or setting specific numerical quotas or fixed racial or gender race-, ethnicity- and gender- conscious goals for the future—which the Supreme Court generally finds discriminatory.

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Neutral policies (criteria, strategies) are key. They **do not**—on their face, in their driving intent, or in practice:

- consider any individual’s bare race, ethnicity or gender status when conferring opportunities or benefits;
- can be (and are) satisfied by people of all races, ethnicities and genders;
- serve an entity’s **authentic** priority interest other than increasing racial, ethnic or gender compositional diversity; and would be pursued even if they did not also increase such diversity (but they may have that welcome effect).

Examples of neutral criteria. These criteria favor a person (without considering their bare race, ethnic or gender status) who has attributes that are authentically relevant to Mission and valued, not a proxy for identity status:

- **character qualities** (grit, courage, leadership) **and/or inspiration/aspiration**, or **content knowledge** (including about race, gender, other DEI—as well as other relevant content), or **skills**
(any of these qualities, knowledge, or skills may be gained by lived experience—including a person’s lived experience of race, without making race-based assumptions about that experience—and also may be gained by other relevant experience, including through dedicated personal learning or service);
- **formal DEI expertise** (gained by, e.g., training, coursework, research, or inclusive pedagogy focus);
- **action-based commitment** (to ameliorate injustice or record of creating inclusive communities/activities);
- **first generation and socio-economic status** (to advance socioeconomic diversity, mobility);
- **geographical experience** (not national origin—for geographic diversity or to cover your service region);
- **talents and interests.**

Inclusive identity-targeted outreach is key. Building an inclusive, broadly diverse candidate pool—within a robust general outreach effort—to assure effective communication of the same consequential information and encouragement to all potentially qualified people, including those who might not otherwise know of the opportunity or feel welcome to apply, is generally considered inclusive and neutral in effect. This should not trigger federal nondiscrimination law limitations. To be considered inclusive, such outreach may not confer material benefits (e.g., no funding, travel/lodging, enrichment) based on a person’s racial, ethnic, or gender status. **But a program or event focused on race/gender topics is neutral and *may* confer material benefits, if attendance is open to anyone who is interested** (or who satisfies an authentic neutral criterion) and the program is broadly marketed as open—even if there is also some identity- or other targeted outreach for effective communication (e.g., a communication to people of particular races that are the focus of the topic or Spanish marketing materials to serve regional catchment areas).

4. Private entities that do not receive federal funding are not subject to the law that the Court was addressing in Harvard and UNC, but may be subject to federal contracting or employment nondiscrimination laws. Recipients of federal funding for education programs broadly defined (research, training, professional development, not just degree-granting programs) are subject to federal sex/gender nondiscrimination laws. See the attached Table to help identify the kinds of activities that are covered by key federal nondiscrimination laws, and the triggers that apply these laws to activities of an IHE, Society, or other entity.

TABLE OF FEDERAL NONDISCRIMINATION LAW TRIGGERS			
<p>Society, Other Private Entity, or IHE Role/Activity Covered & Related Law</p>	<p>Fed. Law Prohibits Considering an Individual’s Race & Ethnicity as Criteria for Conferring Opportunities/ Benefits—unless exceptions apply</p>	<p>Fed. Law Prohibits Considering an Individual’s Sex/Gender as Criteria for Conferring Opportunities/ Benefits—unless exceptions apply</p>	<p>Notes: Even if federal nondiscrimination law generally prohibits considering an individual’s race/ethnicity or gender when conferring opportunities and benefits, that doesn’t necessarily mean a DEI-dependent, mission-relevant initiative can’t be pursued. Work with your lawyer to determine if the initiative can be designed to legitimately avoid application of such federal law and achieve the mission.</p>
<p>1. Honors and Awards</p>	<p>N/A to race if:</p> <ul style="list-style-type: none"> * the honor/award is a privilege or gift, not contractual and not an employment right or benefit; <p>and</p> <ul style="list-style-type: none"> * the Society, other private entity, or IHE is not a recipient of federal funds for any activity and is not a public entity. <p>Otherwise, see the note at the right.</p>	<p>N/A to gender if:</p> <ul style="list-style-type: none"> *the honor/award is not an employment right or benefit; <p>and</p> <ul style="list-style-type: none"> *the Society or other private entity is not a recipient of federal funds for any education program broadly defined for Societies (including any of the following: research, professional development, training, workshops, etc., certificate program, degree program)—or 	<p>Whether or not the Society, other private entity, or IHE is a federal funding recipient, if an honor/award or a volunteer appointment is contractual, see #5 below. If the honor/award is an employment right or benefit or if a volunteer appointment is legally classified as employment, see #3 (re: societies, other private entities, or IHEs as employers of ≥15 employees) and #4 (re: societies, other private entities, or IHEs as employers that are also federal contractors).</p> <p>If the Society, other private entity, or IHE is a federal funding recipient, confer with your lawyer. With limited exceptions, under the Civil Rights Restoration Act of 1987 (CRRRA), if an entity that receives federal funds is in the “principal business” of education (even if it is not a college, university or state system), or if the federal funds are provided to the entity as a whole, the CRRRA:</p> <ul style="list-style-type: none"> (1) applies Title VI (prohibiting race/ethnicity discrimination by recipients of federal funding for <i>any activity</i>) entity-wide to all activities (not just to the federally funded activity); and

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		<p>the IHE is not a recipient of federal funds for anything.</p> <p>Otherwise, see the note at the right.</p>	<p>(2) applies Title IX (prohibiting gender discrimination by recipients of federal funding for any broadly defined <i>education program</i>) entity-wide, at least to all education programs (not just to the federally funded education program). All activities of a public, or any federally funded, IHE are covered. All activities of a federally funded private Society or other entity are covered, if education is its “principal business.”</p>
<p>2. Volunteer Board Appointments</p>	<p>N/A to race if:</p> <ul style="list-style-type: none"> * the appointment is not contractual or an employment relationship; <p>and</p> <ul style="list-style-type: none"> * the Society, other private entity, or IHE is not a recipient of federal funds for any activity. <p>Otherwise, see the note under</p>	<p>N/A to gender if:</p> <ul style="list-style-type: none"> *the appointment is not legally classified as an employment relationship; <p>and</p> <ul style="list-style-type: none"> *the Society, other private entity, or IHE is not a recipient of federal funds for any 	

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	<p>#1.</p>	<p>education program broadly defined (including any of the following: research, professional development, training, workshops, etc., certificate program, degree program).</p> <p>Otherwise, see the note under #1.</p>	
<p>3. Employment if the Society, Other Private Entity, or IHE Employs 15 or more employees</p> <p>The main anti- race, national origin, and sex² discrimination</p>	<p>✓ race</p>	<p>✓ gender</p>	<p>Also applies to religion. There are exceptions allowing imposition of very limited gender-based “bona fide occupational qualification” requirements that do not perpetuate stereotypes of roles, interests, or capabilities and are justified by biological and physiological differences required for a job. No such exceptions are justified or apply to race and ethnicity.</p>

² Under Title VII, and likely other federal nondiscrimination laws, “sex” includes biological sex, sexual orientation, gender identity, and gender expression (gender), at least insofar as there is differential treatment of an individual for failing to conform to sex stereotypes or if a person of one biological sex is treated

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in employment federal statute, Title VII, applies to employment applications, hiring, promotion, firing, and other terms, conditions and benefits of employment			There are limited exceptions for limited individual race and gender conscious action to address persistent lack of equal employment opportunity (as defined by federal law) if ongoing neutral remedial efforts fail. Design parameters apply to qualify for an exception.
4. Employment if a Society, Other Private Entity, or IHE is a Federal Contractor Executive Orders and OFCCP regulations apply equal employment opportunity principles to employment entity-wide by contractors with contracts totaling > \$10,000	✓ race	✓ gender	Also requires an annual Affirmative Action Plan (AAP) to protect and advance Equal Employment Opportunity; applies to employers with ≥ 50 employees and any single federal contract of ≥\$50K. Requires good faith efforts to remedy presumed discrimination and underutilization, as defined in OFCCP regulations and policies—but does not authorize race- or gender- discrimination (differential treatment) as a remedy. Also prohibits religion-based

differently than a person of another biological sex would be treated (e.g., based on biological sex, gender identity or sexual orientation) in the same circumstances.

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<i>[EO 11246, as amended by EO 13672, 13665, 13279; administered by the Dept. of Labor, Office of Federal Contract Compliance Programs (OFCCP)]</i>			discrimination. Also prohibits employment discrimination against: (1) disabled individuals if an employer has any federal contract of >\$15K (also an annual AAP if the employer has ≥50 employees and any single contract of ≥\$50K); (2) veterans, if an employer has a federal contract ≥ \$150K (also an annual AAP if the employer has ≥50 employees).
5. Contracts of Any Kind A federal non-race discrimination civil rights law, Section 1981, applies to making (terms, conditions, process) and enforcing all kinds of contracts (including, e.g., contractual arrangements among private parties, employment, grant [with performance/production conditions], and publishing contracts) <i>[42 USC 1981]</i>	✓ race	N/A to gender	May apply to arrangements imposing conditions on, e.g., publications or financial support or employment, whether or not formally called a “contract.” Would not apply to grants, scholarships, and gifts with “no strings-attached” and no contract-like obligations back to the donor/grantor. Also likely would not apply to honors and awards that are granted as a privilege and not under a contractual relationship. (But see #1 re: other nondiscrimination laws that apply to honors and awards.)

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<p>6. Education Programs of a Society or Other Private Entity that is a Recipient of Federal Funding for <i>any</i> Education Program; the Entire IHE is covered if it is a public IHE or Federal Funding Recipient for <i>anything</i></p> <p>The anti-sex discrimination in education federal law, Title IX, applies when federal funding or assistance is provided for any broadly defined education program, including, e.g., research, training, professional development, workshops, etc.—and degree and certificate granting programs.</p>	N/A to race	✓ gender	<p>Applies to all roles and supporting functions (including program delivery and participation, employment, administration) involved in creating and delivering broadly defined education programs.</p> <p>US Dept. of Ed. (USED) regulations and enforcement apply to educational institutions and entities that receive USED funding. Other federal funding agencies’ regulations and enforcement apply to their funding recipients.</p> <p><i>The Civil Rights Restoration Act of 1987 extends application of Title IX beyond the federally funded education program at least to all education programs of the federally funded Society or other private entity (and possibly all of its activities) entity-wide, if the funding is provided to the whole entity, and clearly extends Title IX to all activities of an IHE and of a federally funded Society or other private entity if its principal business is education.</i></p>
<p>7. All Activities of a Society,</p>			US Dept. of Ed. (USED) regulations and enforcement

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<p>other private entity, or IHE that is a Recipient of Federal Funding for Any Purpose</p> <p>The anti- race and national origin discrimination federal law, Title VI applies when federal funding or assistance is provided for <i>any</i> activities.</p>	<p>✓ race</p>	<p>N/A to gender</p>	<p>apply to education institutions and recipients of USED funds; other federal funding agencies’ regulations and enforcement apply to other recipients.</p> <p><i>The Civil Rights Restoration Act of 1987 extends application beyond the funded program to all activities entity-wide of a federally funded Society or other private entity, if its principal business is education or the funding is provided to the whole entity. All activities of an IHE are covered. Employment is covered, overlapping with Title VII, if funds are provided for that purpose.</i></p>