

**QUESTIONS? Contact Office of Counsel**

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**UNIVERSITY OF ROCHESTER**

**Legal Framework and Advice for Fulfilling our  
Educational Mission of Diversity and Inclusion**

**Sue S. Stewart  
Sr. Vice President and General Counsel  
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## **I. Fundamental Relevant Laws**

### **A. U.S. Constitution 14<sup>th</sup> Amendment, §1**

“No State shall ... deny to any person within its jurisdiction the equal protection of the laws.”

### **B. Title VI of Civil Rights Act of 1964, 42 U.S.C. §2000d**

“No person in the United States shall, on the ground of race ... be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.”

### **C. Title VII of Civil Rights Act of 1964, 42 U.S.C. §2000e-2**

‘It shall be an unlawful employment practice for an employer to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because or such individual's race, color, religion, sex, or national origin.”

### **D. New York Human Rights Law, NY Exec. Law § 296**

“It shall be an unlawful discriminatory practice “[f]or an employer . . . , because of the age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.”

### **E. New York State Constitution, Section 11**

“No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution ...”

### **F. Title IX of the Education Amendments of 1972**

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

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## II. U.S. Supreme Court on Race-Based Decision-Making

### A. Evolving interpretation reflects societal change – student admissions - US Supreme Court cases

1. *Brown v. Board of Education* (1954) – dealt with desegregation and required desegregation in public K-12; separate but equal is not good enough; concept of the color blind constitution.
2. *UCA v. Bakke* (1978) – dealt with charge of reverse discrimination or whether “affirmative action” to admit minority students to medical school illegally discriminated against majority students. Specific program declared illegal, but Justice Powell’s separate opinion said that promoting diversity as a part of educational philosophy is a compelling interest that allows race to be considered as one factor among many in making admission decisions; no quotas allowed; deference to higher education’s determination of its educational philosophy and what is necessary to achieve it.
3. *Grutter v. Bollinger; Gratz v. Bollinger* (2003) –dealt with charge of reverse discrimination in higher education - U. Michigan law school and undergraduate admissions. Slim majority (5 to 4) upheld law school’s use of race as one factor, among many, in making admission decisions to promote educational benefits law school believed came from diversity; Court struck down undergraduate admission policy; held diversity must be broadly defined; no quotas or mechanical methods allowed (i.e., no bonus points to students of a particular race), but individualized consideration of each applicant; Court said institution must first consider race-neutral alternatives and find they are not sufficient to achieve goals before allowing race to be considered in decision-making, must use a method that minimizes the burden or harm to majority (non-preferred by their race) students and program must be limited in time and periodically reviewed.
4. *Seattle School District & Jefferson County Board of Education* (2007) - dealt with charge of reverse discrimination in K-12 school assignment of students. Slim majority (5 to 4 with Justice Kennedy, although voting with the majority, writing an opinion that also agreed with several points of the dissenting Justices) found that the specific methods used were discriminatory and illegal because decisions for access to schools were made in some cases solely on racial classification of the students; also found the school districts had not fully first considered race-neutral alternatives. All 9 justices acknowledged *Grutter* as the law for higher education. The case emphasized –

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(1) Diversity must mean more than race and more than black vs. white or minority vs. white.

(2) Educational purpose justifying consideration of race must be more than racial balancing (more than seeking to have individual schools have students that reflect generally the racial composition of the students in the school district as a whole).

(3) Diversity seeking policies and practices must have coherence; the methods used must materially advance the educational goals.

(4) Need for individualized decision-making in admissions – one factor weighed with others – racial classification cannot be determinative.

(5) Race-neutral alternatives must be considered seriously and in good faith and be found unable to achieve the educational goals before race conscious decision-making can be used.

(6) Periodic review required to determine if necessary to continue race-based decision-making.

(7) Critical mass permitted, but no quotas or set aside of slots.

### **B. Employment Decisions are not treated the same as Student Admission Decisions**

1. Employment court decisions originally allowed affirmative action, but evolved over time to become more restrictive than the student admission cases. Most employment cases do not involve educational institutions but a variety of non-educational employers.

2. Employment cases have been decided interpreting Title VII and other federal anti-discrimination laws, as opposed to the equal protection clause of the Constitution whose interpretation is the backbone of the student admission cases.

3. In almost all the employment cases, the courts permit race to be considered in hiring, promotion or other employment decisions only if designed to eliminate a manifest imbalance that reflects under representation of specific groups in certain jobs. Goals must be “remedial”

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or aimed to fix the racial imbalance at the employer in certain job categories.

4. Primary permitted way under Title VII to justify use of race in employment decisions is to document the percentage of minorities among existing faculty (or staff) compared to the available people with those qualifications in the relevant labor pool (for example, Ph.D. chemists or pediatricians) not the general US population, the local community or even the employer's total workforce.

5. Race conscious employment policies also must be temporary and not designed to remedy societal discrimination.

6. *Ricci v. DeStefano* (US Supreme Ct. 2009) – dealt with a charge of reverse discrimination in the promotion of firefighters after test results in which minority firefighters scored disproportionately lower than white firefighters were thrown out by the City employer due to a fear of potential litigation under Title VII. Title VII has an inherent conflict that prohibits race-based personnel actions but simultaneously requires employers to invalidate a test that produces disparate results among racial groups. A slim majority of the Supreme Court (5 to 4) held that the employer violated Title VII by throwing out the tests. The Court found under Title VII that the fear of lawsuits alone did not justify the City's reliance on race to the detriment of other employees. The Court, relying on the language of the statute and regulations (not the Constitution's equal protection clause) said the City would have been justified in throwing out the test results only if there were a "strong basis in evidence" before the City when it made its decision that (1) the use of the test and the test itself were not job related and consistent with business necessity and (2) an equally valid, but less discriminatory in effect, alternative test existed that served the needs of the Fire Department but was rejected by the City. The difference in the opinions by the majority 5 and the minority 4 of the Justices turn on their interpretation of the quality of the evidence from experts who had advised the City about the objectivity of the test, the creation of the test and the reasons for using this type of test.

Because this case turned on the interpretation of Title VII rules about testing and the judgment about the quality of the evidence before the employer decision makers in this particular situation, it appears to have limited applicability to the greater legal debate about the constitutionality of affirmative action.

7. There is not yet court agreement on special deference to the needs of educational institutions to take race into account in hiring to achieve

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educational goals similar to the goal recognized in admissions cases. Educational goals of diversity have succeeded before one court and lost before another; both lower courts and not in our jurisdiction. It is possible in the right higher education case that educational goals will be allowed by an appellate court to support race-conscious employment decisions, particularly for faculty, but it is not established law now.

**C. Changing Political Environment may affect governmental enforcement but not necessarily the law that applies to the University**

When there is a change in Presidents governing philosophy or governmental enforcement goals often shift in important legal areas. Expectations are that the Obama administration will be more supportive of the concept of affirmative action than the previous administration. The Office of Civil Rights in the U.S. Department of Education may turn from investigating allegations of reverse discrimination to investigating allegations of disparate impact on minorities.

The difference in government enforcement priorities will not necessarily translate into different legal standards for University liability. When constitutional legal principles are involved, the ultimate determination of the law is made by the U.S. Supreme Court. Under our legal system, the courts rely heavily on precedent or the legal principles decided in earlier cases. Courts, particularly the Supreme Court, move slowly in changing legal interpretations. This is true even if more than one new Justice is appointed to the Supreme Court who has a more liberal view of the proper interpretation of the Constitution.

**III. Key Take-A-Ways:** (a) Decisions that give benefits or impose burdens on individuals based on race, gender or any legally protected classification raise serious legal issues and are constrained by the courts and the Constitution. (b) Employment decisions are more constrained by the courts and the law than are student admission decisions. (c) If you want to consider any legally protected classification talk to counsel first.

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## IV. Legal Advice for Good Decision-Making

**A. Increasing the pool** of potential applicants or offering non-tangible support or encouragement to particular groups or individuals is allowed, even if you are consciously targeting a particular attribute such as race or gender so long as the hiring decision is made according to race- and gender-neutral criteria. **Mentoring** of student or employees or otherwise helping to make the environment inclusive and people successful is not a problem. If expanding the applicant pool, mentoring or giving non-tangible assistance is what you want to do, you need not consider the legal issues discussed in the rest of this memo.

**B. Prime examples of decisions** that require you to operate under the more subtle legal rules discussed in this memo are:

1. Decisions to admit to schools or special programs or to give scholarships;
2. Decisions to hire, promote, discipline or terminate faculty and staff; and
3. Decisions to exclude some individuals or groups from participation in a program with tangible benefits – i.e. money and opportunities for significant gain, monetary or intellectual or career import, not simply emotional or developmental support.

**C. Make all decisions on a color blind basis (e.g., not based on protected classes such as race, gender, religion, age or disability)** and document the non-discriminatory reasons for any decision or process that involves distributing tangible benefits or opportunities or involves excluding an individual or a group from same, unless you are implementing an officially approved program that allows these characteristics to be taken into account in decisions.

**D. If you determine that you must take race or gender into account in decision-making that involves tangible benefits/burdens** in order to achieve the University's goals, then you must establish, document and follow a policy that meets the legal guidelines discussed below. You need legal advice to set up such a program correctly, and must call Office of Counsel and let us help before you get beyond the first draft or concept meeting.

**E. Race, gender, religion, ethnicity, age, disability, color, and national origin are treated the same legally** for all practical purposes. (References in this memo are primarily to race or gender but are meant to include all legally protected categories.)

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### F. Prohibited Action:

1. Deciding in advance to hire someone of a particular race or gender or establishing quotas.
2. Giving extra points to persons of particular race or gender.  
Considering candidates separately based on race or gender.

## IV. Legal Advice For Race/Gender-Conscious Decision-Making

**A. Counsel's Guidance.** Before you take race/gender or any protected category into account in making an employment, admission/financial aid or programmatic decision, ask the Office of Counsel for guidance. Before you make a decision, commit to paper or adopt a program or process that gives or limits benefits or burdens by race, gender or any protected category, call or email Office of Counsel. Let Office of Counsel review diversity related goals, mission statements, philosophies, references in strategic plans, references in articles for publication, special programs or minority restricted gift instruments. This legal area is extremely nuanced.

**B. Diversity should be defined as a broader concept than race & gender.** Racial minorities must be defined to include more than African-Americans and Hispanics, and diversity should encompass much more than race.

**C. Track Statistics** for more groups of people than only African-Americans, Hispanics and Native Americans.

### D. Purpose, alignment and language matter.

(1) Goals must be mission-driven and educationally focused. Programs, strategies and reports always should refer to the educational goal(s).

(2) Goals involving employees should be tied both to our educational mission and to documented imbalance in the composition of a specific group of our employees as compared to the relevant, qualified labor pool.

(3) Racial Balancing is not an acceptable reason – numbers, alone, cannot drive race-conscious policies. Do not inadvertently write, make comments or cite statistics that imply racial or gender balancing is our goal.

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(4) Remediating discrimination or social inequity in society (as opposed to at the University) is not an acceptable goal, so do not use or mention it.

(5) Providing role models for students is not an acceptable goal, so do not use or mention it.

**Acceptable reasons to support the University's educational goal of increased diversity are:**

- **Promoting non-discrimination.**
- **Creating a community of inclusion - supporting and encouraging all students, faculty and staff in their learning and research activities, having a supportive workplace to increase performance and job satisfaction, and promoting culturally competent patient care for people from all backgrounds.**
- **Providing an environment that increases learning and excellence by stimulating dialogue, ideas, opinions and critical thinking.**
- **Helping students learn about cultures, languages, customs, music, etc. other than their own.**
- **Helping students learn to work and live in a multi-cultural society, to become culturally competent, so they will be prepared to work and live successfully in the broader multi-cultural society outside the University.**
- **Preparing students to be leaders in their fields and in public life in a multi-cultural society.**
- **Helping to eliminate stereotyping.**
- **Increasing the general public's confidence in the openness, integrity and accessibility of the University of Rochester and our country's institutions of higher education in general.**

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**E. What you do or say matters. What you write in memos or emails matters even more.** It is later called evidence.

**F. Website and Publications matter.** Be sure they are consistent with approved approach. Give Office of Counsel at opportunity to review content about diversity programs. These are the soft underbelly that plaintiff's lawyers search to see if institutions can be sued successfully. More evidence.

**G. Document** the fact that we, the University, and you, the administrator **seriously considered and tried race-neutral alternatives before** adopting race-conscious policies or programs to achieve our goals is crucial.

**H. Periodic** (every year or up to 5 years) **evaluation of the need to continue race-conscious policies** or programs and **sunset dates** in all such plans are required by law.

**I. Use the concept of obtaining a critical mass, not quotas or percentages, as your goal.**

1. The acceptable legal reasons to seek a critical mass of members of a particular race or gender are (a) to break down racial/gender isolation and (b) to allow full participation of members of the underrepresented group by having sufficient numbers (i.e. the critical mass) present in the classroom, workplace or patient care setting to make the individual members of the underrepresented group comfortable.
2. You still must preserve individualized review and decision-making with race or gender as only one factor when admitting or making employment decisions about any individual.
3. Use care to include many groups and treat them essentially equally; it is intellectually hard to defend that one group needs more critical mass than another. Critical mass is a minimum not a maximum concept.
4. Do not try to define critical mass with hard numbers or percentages without credible research that establishes numbers or percentages as valid to achieve the goals (which research is unknown to legal commentators to date).

## **V. University of Rochester's Structure**

**A. Educational Mission & Philosophy** adopted by the Board of Trustees.

**B. School Missions & Philosophies** specific to the discipline have been adopted.

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**C. Provost's Committee on Diversity in Admissions.** The Committee considered and the various race-neutral alternatives, but concluded that taking race and gender into account as one factor was necessary in all of the Schools' admissions policies in order to achieve the University's Educational Mission & Philosophy. Plan has a sunset date and is subject to periodic review.

**D. Vice-Provost for Faculty Development and Diversity, Deputy to the President's** role is to raise the visibility of the University's faculty diversity efforts, to provide leadership on the recruitment and retention of faculty that increase the diversity of the University's schools and departments and to assist the Provost and the Deans in providing faculty development programs and opportunities. With the Provost, the Vice Provost administers the Special Opportunities Fund.

**E. School Diversity Officers'** roles are to raise the visibility of and to coordinate diversity efforts of each school.

**F. Human Resources Manager of Multi-cultural Affairs & Inclusion.** Attention is focused on race/gender-neutral recruitment and support activities.

**G. Harassment and Discrimination – HR Policy 106**

1. Policy 106 prohibits discrimination, harassment and retaliation. It contains the processes by which the University investigates and takes action if violation of the policy has occurred.
2. If anyone complains to you, seeks your advice about or tells you about possible harassment or discrimination immediately become alert and ask follow-up questions to determine if there is a problem, even if you don't think the individual's perceptions are valid or believe that the complained of comment or activity is minor. Always remind the person about the UR Policy against Discrimination and Harassment (HR Policy 106; also in Faculty and Student Handbooks) and say they can file a complaint if they want.
3. Take careful notes or write a summary immediately after the discussion or observation and date it. Include your conclusion and what you told the individual.
4. Call Office of Counsel immediately if you suspect possible harassment or discrimination, are unclear about whether it might be involved or what you should say or do.

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5. As a leader of the University your actions are almost always attributed to the University and notice to you will almost always require University investigation and action.

## **VI. Short-hand Rules for Specific Activities**

### **A. Student Admissions**

1. Articulate need for diversity specific to discipline.
2. Define diversity broadly.
3. Use individualized consideration of each applicant to determine how that student could contribute to the university, including campus diversity. It is acceptable to cull the pool by uniformly applied minimum standards or scores before individualized consideration.
4. Use race or gender as only one factor among many in efforts to further institutional goals, including diversity.
5. Never consider files of applicants separately by race or gender.
6. Do not use different standards for applicants based on race or gender classifications. For example, do not articulate different base scores or add a numerical credit for a particular race or gender.
7. Don't rely heavily on numerical systems because they are prone to being inconsistent with further decisions taking race, gender or other factors into account. Do not use quotas or bonus points or set aside slots for students of specific racial groups.
8. Don't operate separate tracks in admission office that evaluate minority applicants differently from other applicants.

### **B. Student Financial Aid**

1. Use the same rules as admissions to be safe.
2. Rules may not be as restrictive as admissions rules, assuming the admission process itself is legal and not discriminatory. Better to use factors that shift focus from race-exclusive scholarships to those that may broadly benefit minority groups, such as scholarships for inner city school

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students, individuals from low-income backgrounds, or persons who are the first in their generation of family to attend college.

3. Sufficient scholarship funds and aid can be argued to reduce any burden that might occur for those precluded by the terms of a few scholarships restricted by race, gender or other protected class.

4. Existing donor restrictions on scholarship recipients by race, gender, etc. may be observed under UR policy until law in the area becomes clearer. With a new gift, try to make any restriction precatory, not mandatory. If that is not acceptable to the donor, let Office of Counsel propose a restatement of the restriction that is more legally acceptable. If that is not possible, we will include a provision that allows UR to change the restriction if it is ultimately determined to be illegal.

### **C. Student Special Support Programs**

1. Don't exclude people from participation by gender or race even though program is aimed at support for women or particular minorities.

### **D. Faculty Hiring, Promotion, Benefits & Job Decisions**

1. Concentrate on increasing the pool of qualified applicants by training search committees on how to expand pool and engage in outreach efforts to encourage candidates who will contribute to diversity to apply.

2. Provide training on unconscious bias.

3. Increase and sustain over time affirmative non-tangible support to new faculty – hospitality, mentoring, affinity groups, etc.

4. If you believe you need to take race or gender into account, work with Office of Counsel to establish an approved policy and procedures for decision-making that articulates appropriate purposes, such as promoting inclusive UR community, quality of student educational experience, and correcting imbalance of women or minorities in specific disciplines.

5. Special Opportunities Fund can be used to help provide market compensation after decision to hire is made without discrimination or to establish new programs in fields likely to promote increased diversity in the faculty with any individual hiring decisions made on a nondiscriminatory basis.

6. Strive for a diverse search committee in the first instance in order to incorporate a variety of perspectives and help filter out potential bias.

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7. Create positions likely to attract underrepresented candidates, but do not limit who can apply for positions and do not conclude that only an applicant of a particular race or gender can fill the slot.

**E. Staff Hiring, Promotion, Benefits & Job Decisions**

1. Concentrate on increasing the pool of qualified applicants.
2. Provide training on unconscious bias.
3. Increase and sustain over time affirmative non-tangible support to new hires – hospitality, mentoring, affinity groups, etc.
4. If you believe you need to take race or gender into account, work with Office of Counsel to establish an approved policy and procedures for decision-making that articulates appropriate purposes such as promoting inclusive UR community, quality of student educational experience, and correcting imbalance of women or minorities in specific job categories.

**F. Faculty & Staff Special Programs and Support Groups**

1. Don't exclude people from participation by gender or race even though program is aimed at support for women or particular minorities.

**G. Goals, Metrics & Measurement of Success**

1. Goals are acceptable, but hard quotas, percentages or numbers are not. This area is dangerous because it can be misinterpreted.
2. Talk about critical mass and increasing presence or participation.
3. Measure more than race and gender and measure more than Caucasian and non-Caucasian.
4. Better to measure, track and talk about increase to reach critical mass (and reduce disparities, if employment) than to set goals.

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**H. Gifts (refer to B.4)**

**I. Records, memos, letters, e-mails, evaluations, and interviews.**

1. Do not refer to someone's race, gender, marital status or other legally protected classification unless the concerned individual has raised an issue that concerns it. (Use of appropriate pronouns is ok.)
2. Stop and correct subordinates or others who makes such comments in your presence or about whose comments you learn. Make clear to all concerned that the UR does not discriminate and that such comments are irrelevant and unacceptable.