Legal Guidance for Endowment Language

Every effort should be made to encourage donors to achieve their goals by the use of more neutral and non-discriminatory selection criteria. When that effort is unsuccessful the language and suggested background should be used.

Brief Summary of Legal Background

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color and national origin, a prohibition that applies to educational institutions that receive federal funding.

Title IX prohibits discrimination on the basis of sex in any federally funded education program or activity.

Additionally, New York State prohibits discrimination on the basis of age, race, national origin, sex, sexual orientation, marital status, disability, military status, and other specified classes.

Lastly, Stony Brook University’s own Equal Opportunity/Affirmative Action Policy prohibits discrimination “…on the basis of race, sex, sexual orientation, gender identity, religion, age, color, creed, national or ethnic origin, disability, marital status, genetic information, criminal convictions, domestic violence victim status, and/or military status in the administration of its policies, programs, activities, or other Stony Brook University administered programs…”

Recommended Language and Approaches:

Focus on SBU’s diversity goals

“The purpose of this scholarship is to provide support to undergraduate students who have financial need [and other neutral criteria, if desired] and to support Stony Brook’s goal of promoting a diverse student body, which is key to its educational mission. Each applicant’s qualifications will be considered on an individual basis. As part of this process [donor] desires that consideration be given to the applicant’s socioeconomic group, educational background and/or status as a member of an underrepresented group, so long as this consideration is in keeping with the goal of obtaining the educational benefits of diversity.”

Inclusion of others who are committed to diversity

“… and to others who demonstrate commitment to increasing opportunities for members of underrepresented groups, breaking down stereotypes, enabling others to better understand persons of different races, ethnicities or other traits.”

Additional alternatives that may help foster diversity or target students from historically under-represented groups

- Faced challenging social, economic, educational, cultural or other life circumstances;
- Faces similar challenges to the donor;
• Is the first member of his or her family to attend college;
• Demonstrates commitment to bringing diverse people together;
• Demonstrates a commitment to working with underrepresented or disadvantaged populations;
• Demonstrates achievement and determination in the face of personal challenges;
• Attended a high school whose graduates do not typically attend institutions comparable to Stony Brook.

National Origin, Citizenship and Ancestry

• National Origin is a legally protected class, so the overall rules are the same;
• Avoid using the terms “national origin” and “ancestry”;
• If using “citizenship” as a criterion, also include “legal resident”
• Emphasis on the University’s diversity goals: See text from the section above.

Narrative Based on the Donor’s Background

[Description of donor’s circumstances]...“I now wish to extend my hand to help others whose backgrounds are similar to mine and who are coming up the hard way and may be facing similar struggles and challenges to those I encountered. Candidates for this scholarship must be students in need as defined by the federal guidelines of the Federal Financial Aid Application, [who are legal residents or citizens of the United States.] In addition, please give particular consideration to students who self-identify as being in the first generation of family members to attend [college/graduate school] and who demonstrate an interest in using their education for the public good. “

Alternative criteria

• Resident of a particular country or other geographic location;
• Lived for a period of time in a particular country or location;
• Went to school in a particular country or location;
• A particular language, other than English, is spoken in the home, when coupled with need;
• Born in a large geographic region, such as Europe or Asia, when coupled with need
• Interested in pursuing studies in the history or culture of a particular country or location

Gender

• Title IX prohibits institutions that receive federal financial aid from discriminating on the basis of gender in any academic programs or activities;
• A lower level of scrutiny applies, but any restriction must serve an important institutional goal and must be substantially related to that goal;
• Restrictions based on gender are still subject to attack as discriminatory;
• Must be able to demonstrate that the overall effect of a gender-restricted scholarship does not discriminate on the basis of gender (meaning that no student is denied aid because of the absence of an award designated for that student’s gender).
• Recommended that if gender is considered that other nondiscriminatory criteria such as merit or socio-economic status are also criteria, in addition to need.
• Permissible language – gender as a plus factor when the awarding of financial aid is based in part on gender does not limit funds for students not having that gender:

“The purpose of this scholarship is to support students from disadvantaged backgrounds who [add other neutral criteria]. I would prefer that it be awarded to women. In creating this scholarship, it is not my intention to discriminate in favor of women or against any other group of students. I understand that, as Stony Brook now administers its financial aid funds, choosing women as the recipients of this scholarship will not make more financial aid available to women as a group than to any other group of students. If, in the future, circumstances relating to the administration of financial aid funds changes so that giving effect to my preference would cause any form of discrimination, then Stony Brook should disregard my stated preference for women and administer the fund to provide scholarships to undergraduate students.”

• Consideration of gender as a tie-breaker

“This scholarship is intended to provide support for a student having financial need and demonstrating academic excellence and to support Stony Brook’s goal of having a diverse student body. In the event there are two equally qualified candidates, one of whom is a woman, I would prefer that it be awarded to the woman.”

• Extra considerations at the graduate level.
• Financial aid at the graduate level is often awarded in a way that any gender restrictions would have a discriminatory impact;
• The School must be able to administer the gift in such a way that its impact is not discriminatory;
• Gender should only be used as a true plus-factor or tie-breaker and not as a restriction.

Recommended Fail-Safe Language

“If at any time the selection criteria of the [gift/scholarship] become contrary to law or University policy, as determined at the discretion of the University, the University may modify these criteria as necessary, while keeping them as closely aligned as possible with the selection criteria described [above/in this gift agreement].”
Recent Supreme Court Rulings in College Admissions Cases:

It’s not clear to what extent the recent admissions cases may be analogous to the financial aid arena. At the very least, however, the admissions cases provide a window on current legal thinking on the use of individual traits such as race in higher education institutional decision-making. Institutions would be well served to follow these decisions and use the principles outlined in them as guidance in formulating their financial aid policies.

In *Grutter v. Bollinger et al.* (June 2003) the Supreme Court held that diversity is an important institutional interest, which may be pursued through affirmative action programs at colleges and universities consistent with their mission. The holding was limited by requiring any admissions program that uses race or ethnicity in its decision-making be subject to: 1) strict scrutiny (a compelling institutional interest and narrow tailoring to fulfill that interest); and 2) the (undefined) concept of “critical mass” – indicating that it was expected that race-conscious admissions programs would be limited in time, once such “critical mass” was achieved.

Under Grutter, “narrow tailoring” requires an individualized consideration of all factors leading to admission and the prohibition of race or ethnicity being the primary goal. Race or ethnicity could only be considered as a “plus” factor.

In *Fisher v. University of Texas* (2013) the Supreme Court reinforced the requirement of strict scrutiny and indicated that a school must show that it has tried other neutral methods to achieve diversity. This case was sent back to the 5th circuit which upheld the University’s policy as constitutionally sound for it to apply the stricter standard of scrutiny. However, the Supreme Court has agreed to take a second look at the constitutionality of the admissions policy, and will shortly be hearing arguments.

There are other cases making their way through the system. A case against Harvard claims that the college discriminates by limiting the number of Asian Americans it will admit each year, and a case against the University of North Carolina charges that it failed to follow the strict scrutiny test mandated by the Fisher decision. Organizations such as Students for Fair Admissions, whose position is that the use of any racial classifications are unfair and unconstitutional, are seeking other cases and funding litigation to that end.

Federal Guidance for Awarding Financial Aid Based on Race and National Origin:

In 1994, the Department of Education published policy guidance on Title VI of the Civil Rights Act, discussing the applicability of the statute’s and regulation’s nondiscrimination requirement to student financial aid that is awarded, at least in part on the basis of race and national origin.

The 1994 guidance outlined 5 principles for the permissible awarding of financial aid:

1. Financial Aid for Disadvantaged Students (even if it means that these awards go disproportionately to minority students). Financial aid earmarked for low-income families, from school districts with high dropout rates and similar race-neutral criteria are permissible.

2. Financial Aid Authorized by Congress. If financial aid is awarded under a Federal statute that specifically
It authorizes the use of race or religion as selection criteria, it is permissible.

3. Financial Aid to Remedy Past Discrimination. This principle only applies when “the college can demonstrate that there is a strong basis in evidence for concluding that the college’s action was necessary to remedy the effects of its past discrimination.”

4. Financial Aid to Create Diversity. This is the category that has been turned to most frequently. However, today it is highly likely to face strict scrutiny in a legal challenge and the decisions in recent admissions cases (Grutter; Fisher) should be taken into consideration when deciding whether to use this principle as a basis for restricted financial aid. The guidelines provide that race-targeted financial aid must be narrowly tailored to the goal of diversity and that a number of factors must be considered:

   a. Whether race-neutral means have been or would be ineffective;
   b. Whether a less extensive or intrusive use of race or national origin has been or would be ineffective;
   c. Whether the use of race or national origin is of limited extent and duration and applied in a flexible manner;
   d. Whether the institution regularly reexamines its use of race or national origin in awarding financial aid and whether it is still necessary to achieve its goal;
   e. Whether the effect of the use or race or national origin on students who are not beneficiaries of that use is sufficiently small and diffuse so as not to create an undue burden on their opportunity to receive financial aid.

5. Private Gifts Restricted by Race or National Origin. An individual or an organization that is not a recipient of federal funds may give scholarships or other forms of financial aid to students based on race or national origin under Title VI, as it simply does not apply.

Alternative Ways to Achieve Donor Goals with Neutral Selection Criteria:

In the past, educational institutions used preferences based on race, ethnicity, religion or other protected traits. Today, the term “preference” may be viewed as restrictive language in disguise, so the use of this word offers no safe harbor. The more prudent approach is to use only neutral selection criteria in gift agreements, and avoid language that pertains to protected traits such as national origin, citizenship, ancestry, ethnicity, race and the like.

Race, Color, Ethnicity

• Consideration must be in the context of the University’s diversity mission, including fact-based evidence
• Requires application of the strict scrutiny test and a showing that neutral methods have not achieved the goal;

• Race or ethnicity can only be a “plus factor” and not the primary goal

• Refer to factors in the 1994 guidance to Title VI and also to the Grutter and Fisher factors.

• Examples of Alternative Neutral Language