

Legal Update

HACU

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- Status of Affirmative Action, *Jose Padilla*
 - Title IX Regulations, *Janine DuMontelle*
 - Undocumented Students, *Michael Melendez*
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Status of Affirmative Action

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“Good news...the door’s still open to affirmative action...”

Abigail Fisher

- White Female
- Denied admission
- Wasn't eligible for 10% rule
- Wasn't admitted under Supplemental Plan

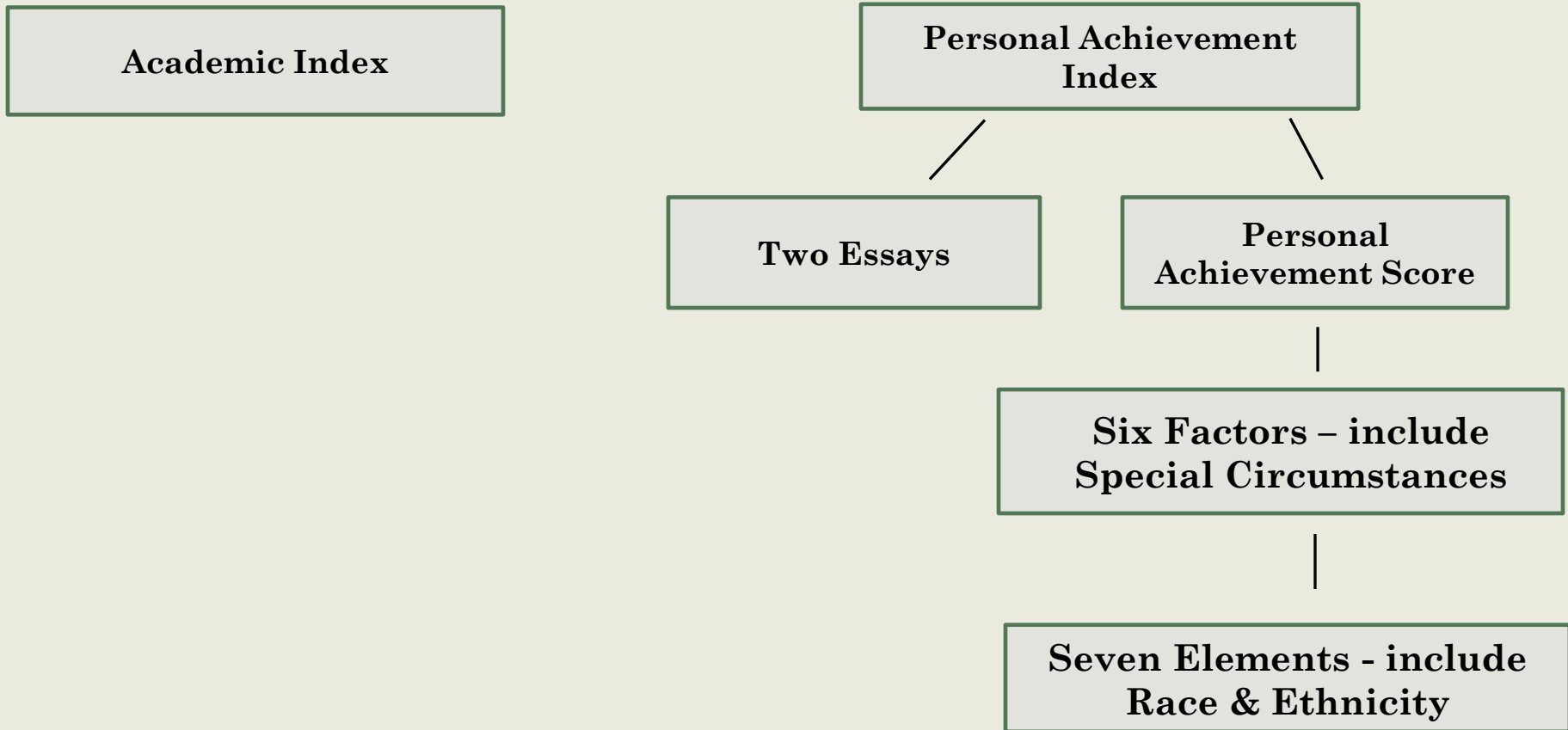
Supplemental Plan – Race & Ethnicity are Buried Deep

- Two numerical indices:
 - Academic Index
 - Personal Achievement Index
- Personal Achievement Index
 - Three Components, including Personal Achievement Score

Personal Achievement Index

- Personal Achievement Score
 - Six sub-factors
 - Last one: Special Circumstances
- Special Circumstances
 - Seven possible elements
 - Race & Ethnicity

Supplemental Plan Criteria



The Issue Before the Supreme Court

- Did Texas' consideration of race violate the Equal Protection Clause of the 14th Amendment?
- More practically, would the court uphold its 2003 decision in *Grutter vs. University of Michigan*?

Grutter vs. University of Michigan

- Public universities have a compelling interest in achieving a diverse student body and the educational benefits that flow from that diversity.
- Therefore universities could consider race in admissions, but in a limited way.

Grutter & Strict Scrutiny

- But use of race had to meet the constitutional standard of “strict scrutiny”:
 - Was it narrowly tailored to achieve the university’s compelling interest in attaining a diverse student body?
 - In *Grutter vs. University of Michigan*, it was narrowly tailored because race was of one of multiple “plus” factors that were considered in admissions.

Fisher's Holding

- In 7-1 decision, Fisher Court didn't change basic principles in Grutter.
 - Attaining student diversity still a compelling governmental interest.
 - Still defer to university's judgment that a diverse student body is necessary to meet its educational goals.

Fisher & Strict Scrutiny

- But no deference to whether use of race meets strict scrutiny, i.e., whether its use is narrowly tailored.
- To use race, university has burden of proving that race-neutral alternatives wouldn't generate student body diversity.
- Court must verify this narrow tailoring through careful examination.

Fisher on Remand

- Court didn't decide the merits. Remanded to the Fifth Circuit Court of Appeals to apply strict scrutiny to the facts here.
- Fifth Circuit has asked parties to address these questions in briefing.
- Oral arguments on November 13th.

ADMISSIONS



DAUGHTER
of ALUM

SON of
BIG DONOR

SOCCER
PLAYER

RAISED in
DISTANT STATE

MINORITY

DIDN'T
GET IN

Overview of Title IX

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History of Title IX

- Part of the Higher Educational Amendments of 1972.
- Amends the Higher Education Act of 1965.
- Early focus was on employment practices of federally financed institutions.

Focus on Sports

- When final enforcement details published in 1975 in the Federal Register this drew attention to the impact on athletics.
 - Towers Amendment – sought to exempt revenue generation sports.
 - Javits Amendment prevailed – sports included “reasonable provisions considering the nature of the sport”.
- 1979 further clarifications in the Intercollegiate Athletics Policy Interpretation.
- 1980 HEW split and oversight for Title IX was given to the Department of Education’s Office of Civil Rights OCR.
- 1994 Equity in Athletics Disclosure Act – required disclosure information on athletic rosters.

More than Sports

- While Early focus was on athletics, Title IX of the Education Amendments of 1972 **prohibits discrimination based on sex in education programs and activities that receive federal financial assistance.**
- Examples of the types of discrimination that are covered under Title IX include:
 - sexual harassment.
 - the failure to provide equal opportunity in athletics.
 - discrimination in a school's science, technology, engineering, and math (STEM) courses and programs.
 - discrimination based on pregnancy.
- Title IX prohibits retaliation for filing an OCR complaint or for advocating for a right protected by Title IX. Title IX also prohibits employment discrimination, but employment discrimination complaints filed with OCR are generally referred to the Equal Employment Opportunity Commission.

Recent OCR Guidance

- Refocus on sexual harassment and sexual violence.
- It has always been about equity and fairness.
- Not really new
 - January 19, 2001 OCR Policy Guidance
 - Stop harassment when it occurs and prevent reoccurrence
 - January 25, 2006 DCL
 - Reminded recipients of standards applicable to sexual harassment
 - October 26, 2010 DCL
 - Bullying and Hazing
 - April 4, 2011 DCL
 - Provides guidance and examples about Title IX requirements and how they relate to sexual harassment and sexual violence
 - Lays out proactive steps institutions can take to prevent sexual violence and educate the university community
 - Provides examples of the types of remedies schools and OCR may use to respond to sexual violence

Actions Following 2011 DCL

- Trained Title IX Coordinators.
- Reviewed and Revised of Grievance Procedures
 - Notice of Procedures – widely distributed
 - Ensure Grievance Procedures Applies to Complaints against Students, Employees and Third Parties
 - Ensure Process is Adequate, Reliable, Impartial and Uses Preponderance of the Evidence Standard
 - Designated and Reasonably Prompt Timeframes
 - Notice of Outcomes
 - Prevention and Remediation

Actions Following 2011 DCL, continued

- Confidentiality
 - Even if the complainant asks that no steps be taken institution must take all reasonable steps to investigate and respond to the complaint.
 - If complainant insists that his or her name not be used or other identifiable information disclosed the institution should inform the complainant that its ability to respond may be limited.

Goals after you Receive a Title IX Complaint

- End the Harassment and Prevent Further Harassment
 - Minimize burden on complainant
 - No contact orders
 - Reassignment of housing
 - Interim suspension of accused
 - Discipline the harasser
- Remedy the Effects of Misconduct
 - Counseling
 - Medical Attention
 - Avoiding negative impact on academic record: late withdraws without penalty, alternate testing, retake exams or classes,
 - Training of students and employees

Recent OCR Investigations and Voluntary Agreements

- Increase in enforcement activities.
- Focus on whether the institution has taken prompt and effective steps to respond to sexual harassment and violence.

Sample Terms to Resolve Complaints

- Revise and publish grievance procedures.
- Designate Title IX Coordinators with central oversight.
- Train Title IX Coordinators, Law Enforcement, Resident Assistants, Coaches, Faculty and Staff with high student contact.
- Develop ongoing training programs.
- Develop and distribute materials concerning sexual harassment and sexual violence.

Sample Terms, continued

- Create campus focus groups to provide input on strategies to ensure students understand their rights.
- Host information sessions.
- Revise Freshman Orientation to include information on how to report sexual harassment and sexual assault and find support services.
- Develop on-call contacts for victims of sexual assault.
- Coordinate with local law enforcement to ensure school meets its obligation to promptly investigate.

Recent Activism

- It is not just your students who are filing complaints
 - Faculty – Occidental College
 - Alumni – Yale, Oberlin and others
- Social Media Organizing
 - <http://knowyourix.org/>
- High Media Interest
 - Consider adding to your Crisis Communication Plan
- Retaliation July 2013

Immigration Reform and Higher Ed

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Deferred Action for Childhood Arrivals (DACA) Enacted June 5, 2012

- Under deferred action, the Department of Homeland Security (DHS) exercises its prosecutorial discretion to forego immigration enforcement (deportation) against particular individuals for a specific period of time.
- Deferred action for childhood arrivals (DACA) provides for a two-year grant of deferred action to certain individuals who are not in lawful immigration status and entered the United States as minors.

DACA, continued

- DACA does not confer lawful immigration status upon recipients, nor does it provide a pathway to citizenship.
- DACA, as well as one's work authorization, may be renewed at the end of the two-year period pending fulfillment of certain criteria. **It is important to note that DHS retains the authority to renew, or even terminate, a DACA grant at any time.**

DACA Requirements

- Entry into the U.S. before the age of 16;
- Five years of continuous residence and actual physical presence in the U.S. since June 15, 2007, and on June 15, 2012;
- Enrollment in or graduation from high school or other qualifying educational program or obtained GED certificate;
- No convictions for felonies, significant misdemeanors, multiple misdemeanors, and no national security or public safety threats; and
- At least 15 years of age at the time of application, but not more than 30 years of age on June 15, 2012.

DACA-No End in Sight

- Reelection of President Obama most likely means DACA program will continue for the foreseeable future.
- No application deadlines have been announced.

DACA & Higher Ed

- DACA does not confer an immigration status, as result, recipients:
 - May not be eligible for financial aid
 - Not eligible for work-study.
 - Should not study abroad without consulting an experienced immigration attorney
- DACA is no DREAM!



DREAM ACT

Development, Relief, and Education for
Alien Minors

DREAM SUMMARY

- **THE DREAM ACT IS BIPARTISAN LEGISLATION** that addresses the plight of young people who grew up in the United States and have graduated from our high schools, but whose future is uncertain as a result of our current immigration laws.

DREAM Act of 2011

- Would permit certain undocumented students who have grown up in the U.S. to apply for temporary legal status.
- If those students go to college or serve in the U.S. military, they would become eligible for U.S. citizenship.
- Would eliminate a federal provision that penalizes states that provide in-state tuition to undocumented students.

DREAMing of Citizenship

- Conditional Permanent Resident Status
 - Allows undocumented students to:
 - Work, drive, attend school and otherwise participate in most activities available to U.S. citizens, except:
 - Traveling abroad may be limited
 - Not eligible for Pell Grants or other federal financial aid grants, BUT they would be eligible for work study, federal student loans, and state financial aid.

Still DREAMing

- Unrestricted lawful permanent resident status may be conferred if one of the following is met during the conditional period:
 - Graduated from a 2 year college or certain vocational colleges, or studied for at least 2 years towards a B.A. or higher degree; or
 - Served in the U.S. armed forces for at least 2 years.

In-State Tuition

- DREAM Act would repeal section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).
- 12 states have enacted laws permitting anyone who attended and graduated from high school in the state to pay the in-state rate at public colleges and universities.



DREAM States

California

Illinois

Kansas

Maryland

Nebraska

New Mexico

New York

Oklahoma

Texas

Utah

Washington

Wisconsin

S. 744

- S. 744 has incorporated some key aspects of the DREAM Act:
- Permit students who have grown up in the U.S. to apply for registered provisional immigrant (RPI) status and eventually to obtain LPR status (a “green card”) if they go to college or serve in the U.S. military.
- Provide an expedited pathway — it would take 5 years — from RPI status to LPR status and citizenship.
- Allow young people who have been deported to apply to reenter the U.S. if they meet the eligibility requirements of S. 744’s DREAM provisions.
- Improve college affordability for DREAMers and other immigrants by changing rules that limit their access to in-state tuition and college loans.



What's next?

- Congress must act.
- The House of Representatives must pass a bill that can be merged with S.744.
- The House Democrats proposed a bill in October 2013, but its status is uncertain.

Questions
