

Enhancing Diversity
Office of the General Counsel
Guidance on Article I, Section 30 of the State Constitution

Effective December 10, 2008, Article I, Section 30 was added to the Constitution of the State of Nebraska, which provides in part that the state, including the University of Nebraska, “shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” (For simplicity, this guidance will refer to race, color, ethnicity and national origin collectively as “race or ethnicity.”)

In keeping with the pronouncements of the Supreme Court of the United States, the Board of Regents has repeatedly recognized the compelling interests in diversity to provide the quality education required for our students and our state to remain competitive in the global economy. The Board of Regents has recently reaffirmed its support for enhancing diversity (January 2008).

This guidance is a resource for University administrators considering measures intended to promote the compelling interests of diversity in higher education within the parameters allowed by state and federal law. Program administrators are strongly encouraged to consult with the designated campus official when considering specific practices in order that legal advice is secured when needed. Achieving University objectives while minimizing legal risk will require careful planning and consultation because legal analysis in this area is highly dependent on specific facts and details of implementation.

In addition to Article I, Section 30 of the Nebraska Constitution, a considerable body of federal and state law, including constitutional provisions, statutes, agency actions, and court rulings bear upon the measures the University may take with respect to its interest in supporting diversity in education. Prior to the adoption of this state constitutional amendment, the opinions of the United States Supreme Court, provided relatively clear direction to the University concerning what programs did and did not constitute race or gender discrimination. The federal law allows consideration of race or gender in specific ways, in order to promote the importance of educational diversity.

It is the advice of this office that the new constitutional amendment should be read together with the body of law recognizing the importance of diversity to the educational experience of our students and our state’s economy. The University may implement measures and programs designed to increase diversity so long as that diversity goal is not reached by means of illegal discrimination or preferential treatment based on race, ethnicity or gender.

The following examples are programs and practices which the Office of the General Counsel considers as permissible in light of the newly adopted Article I, Section 30 of the Nebraska Constitution.

1. *Data Collection.* The University is permitted (and sometimes required by federal or state law) to collect data on the gender, race or ethnicity of its students, employees, contractors, and of applicants for those positions, in order to determine the effectiveness of its diversity efforts and other legal purposes.

2. *Policies and Statements.* The University, and its campuses, departments, and other units, may adopt policies in support of the compelling interest diversity plays in the University's mission. University leadership and administration are free to publicly discuss and explain the importance of diversity to the University and its mission.

3. *Federal Law.* Article I, Section 30 does not prohibit the University from taking steps required to maintain or establish eligibility for federal funding. Accordingly, the University must continue taking steps, such as the development of employment affirmative action plans, that are required by federal law. Administrators who believe that preferential actions may be required by federal law should consult with General Counsel.

There may be programs that are federally funded in whole or in part and which limit their participation to students or faculty of a certain race, ethnicity, or gender or which require preferential treatment or targeted activities toward persons of a certain race, ethnicity, or gender. The University is permitted to comply with these requirements, if failure to do so would result in ineligibility for these federal funds. In these situations, program directors are strongly encouraged to seek advice from the General Counsel's office.

4. *Private Efforts.* Private, non-University organizations remain free to support such activities as are legally available to them, including scholarship aid and outreach efforts in ways not legally available to the University. University involvement with such private efforts must be limited. The University may provide assistance—such as information, incidental logistical support and access to campus facilities—to private organizations that target efforts on the basis of race, ethnicity or gender if (1) assistance is provided on a non-discriminatory basis (that is, similar private organizations are eligible for similar assistance); (2) the University does not control or administer the private organization; and (3) the University is not involved in choosing recipients of the organization's benefits. Non-University organizations may designate recognition or scholarship assistance to identified racial, ethnic or gender groups which requires the University to administer such recognition or assistance. The University may not designate a recipient of a scholarship if limited to a particular race, ethnicity, or gender.

5. *Outreach.* Outreach programs targeted exclusively to or available exclusively for one gender or for particular racial or ethnic groups are not allowed when such outreach provides informational or other advantages to the target. Nevertheless, the University may, as part of a comprehensive program of outreach, target or increase specific efforts within that program to reach particular groups where the program's benefits are broadly available to other groups and the special efforts are necessary in order to effectively reach the targeted group's members with the same information or benefits available generally under the comprehensive program. Such activities might include, for example, workshops or materials oriented toward specific communities or groups. The benefits of the program must be available on a non-selective basis such that interested individuals from all racial groups and both genders have access to the same benefits.

6. *Programs of Particular Interest to Particular Groups.* The University may lawfully sponsor programs, such as outreach programs and informational events, that may, because of their content, be of particular interest to members of particular racial groups or one gender, if they are open to all. For example, a conference on women's issues in higher education may attract more women due to the nature of the topic, but it may not be offered exclusively to women.

7. *Use of Neutral Selection Criteria.* The University may choose to advance its educational goals, including diversity, by considering gender/race/ethnicity neutral selection criteria in both admissions and employment decisions. Economic disadvantages, first generation college attenders, neighborhood or community circumstances, low-performing secondary schools, and the impact of an applicant's experiences are permissible criteria, which may promote greater diversity. (Note: the University's long tradition of admitting any Nebraska undergraduate student who meets campus academic requirements generally eliminates questions of preferential admission.)

8. *Contributions to a Rich Campus Environment.* The University has a legitimate interest in its students, faculty and staff contributions to a rich and diverse campus environment. How individual candidates' or applicants' cultural experiences, backgrounds, and special talents might lend to a richer campus environment may be evaluated. Evaluation of such contributions should be made on an individualized basis, taking into consideration the actual, demonstrated experiences and talents, and not assumptions (e.g. automatic points) based on gender, race or ethnicity.

9. *Potential Service to Underserved Populations.* The University may, particularly in admissions to professional and graduate schools that are more directly focused on career training, consider applicants' commitment to service of underserved communities. Again, evaluation should be based on candidates' demonstrated commitment to serve these communities and not assumed from the candidates' own gender, race or ethnicity.

10. *"Yield" and Post-Selection Recruitment Activities.* Activities directed at recruiting already-admitted applicants or employees who have been offered positions through non-preferential selection processes likely stand in a somewhat different position than pre-application outreach, since the University's attempt to convince a successful candidate to accept its offer of admission or employment does not necessarily provide the candidate any additional benefits. Therefore, the University may conduct special post-selection "yield" efforts targeted by gender, race or ethnicity, as long as those efforts do not provide tangible benefits (such as travel, lodging, or meals). This might include, for example, targeted telephone or letter-writing campaigns or informational programs and inclusion of "welcome" letters from or links to websites of identity-based student groups in admissions packets.

Reference material and format for this document is credited to the University of California Office of the General Counsel, see: http://www.ucop.edu/ogc/enhance_diversity.html Last visited 1-5-2009.

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