
The New DEI Legal Landscape: Emerging Challenges and Avenues of Opportunity

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Session Overview



The SFFA Decision: Key Takeaways

- Historical Recap
- What's Changed
 - New Challenges
 - New Opportunities

The SFFA Decision: Implications and Fallout

- Beyond Admissions
- The Political Fallout
- The New Litigation Landscape

Implications for Societies: Key Considerations for DEI Leadership

- Articulating Goals and Objectives
- Assessing Policy and Program Designs

SFFA Guidance and Analysis



Nothing in this presentation should be construed as legal advice, which is highly fact- and context-specific. To review EducationCounsel's preliminary SFFA guidance and analysis, please visit:

<https://highered.collegeboard.org/media/pdf/sffa-case-preliminary-summary-analysis.pdf>

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**Preliminary Guidance Regarding the U.S. Supreme Court's Decision in
SFFA v. Harvard and SFFA v. UNC
July 6, 2023**

This preliminary working draft has been developed to provide initial guidance regarding the Supreme Court's SFFA opinions. We offer this draft, directional guidance to support understanding and leadership within the higher education community in light of immediate enrollment issues with which institutional leaders are grappling. Given the complexity of the decision and the issues implicated, this draft will be reviewed and supplemented in the coming weeks.¹

INTRODUCTION AND OVERVIEW

On June 29, 2023, the U.S. Supreme Court issued its decision in the *Students for Fair Admissions v. Harvard/UNC* cases regarding the universities' consideration of race as one factor among many in undergraduate admissions to advance their interests in promoting the educational benefits of diversity for all students. In a consolidated opinion (reflecting a 6-2 decision in the Harvard case, with Justice Jackson recused; and a 6-3 decision in the UNC case) the Court ruled that Harvard's and UNC's admissions programs violated federal non-discrimination law.² While the Court did not expressly overrule past decisions that established a framework permitting the limited consideration of an applicant's race to advance diversity interests, it significantly undercut that precedent to a point of eviscerating its continuing vitality—impeding efforts at many institutions to fully advance the research- and experience-demonstrated benefits of diversity that inure to all students in terms of educational, workforce, and civic aims.

This initial analysis provides a synthesis of the key points of the majority's opinion in the two cases, followed by important actions for higher education institutions and leaders to take, which include policy and practice implications derived from the Court's ruling. As part of the synthesis, we also offer commentary on each of the key segments of the Court's opinion that

¹ Nothing in this document should be construed as providing institution-, organization-, or individual-specific legal advice. This guidance has been prepared to provide information to inform those conversations and judgments, which are inherently fact- and context-specific.

The SFFA Decision: The Key Takeaways



Before the SFFA Decision: Over Four Decades of Aligned Precedent

1978: Bakke

- J. Powell
- EBD = Compelling Interest **Concept**

1994: USED

Title VI Aid
Policy

Rescinded in 2020

2013: Fisher I

- Majority
- Rigor on Inquiry/ **Evidence** re Necessity/Race-Neutral Strategies

1980: USED
Title VI
Regulations

2003: Grutter/ Gratz

- Majority
- EBD=
- Compelling Interest
- Strict Scrutiny **Framework**

2016: Fisher II

- 4-3 Majority
- Emphasis on **Evidence**

The SFFA Decision: Revisionism at Its Worst

Law Upended

- **Court:** The conclusion that Harvard/UNC lack compelling interests in diversity is consistent with precedent.
- **Reality check:** It is not. The interests advanced by Harvard/UNC mirror those upheld in prior cases.

Facts Created

- **Court:** Harvard's/UNC's consideration of racial status reflects a mechanized, exclusive status determination.
- **Reality check:** It does not. The consideration of race was nuanced and integrated as part of authentic holistic review principles associated with mix of factors.

Constitutional Principles Undone

- **Court:** The Constitution is color-blind.
- **Reality check:** Demonstrably wrong. Text and legislative activity contemporaneous with 14th Amendment debunk this articulated view.

The SFFA Decision: Practical Takeaways

Deference on Mission

- “Universities may define their missions as they see fit.”
- Harvard’s and UNC’s missions are “worthy” and “commendable.”

Unlawful Consideration of Racial Status

- Harvard’s and UNC’s consideration of an applicant’s racial status lacks a compelling interest and appropriate policy design (“zero sum” consideration of race & no specific end date)

Permissible Valued Qualities Associated with Race

- Universities may consider valued qualities relevant to an applicant’s discussion of how race affected their life—“through discrimination, inspiration, or otherwise.”

The SFFA Decision: Implications and Fallout



Breadth of Key Issues in the Enrollment Landscape

Recruitment

Generally permissive landscape re: “inclusive” practices; provides strategic DEI opportunities. But details matter.

Selection

Clarity of SFFA decision should be baseline for policy and practice, reflecting the prohibition and permission:
“No” to racial status;
“Yes” to qualities relevant to racial experience/perspective.

Yield

Longstanding nondiscrimination principles remain intact; apply with fidelity. High risk if SFFA implications are not fully considered—e.g. what compelling interest will support race status-conscious aid?

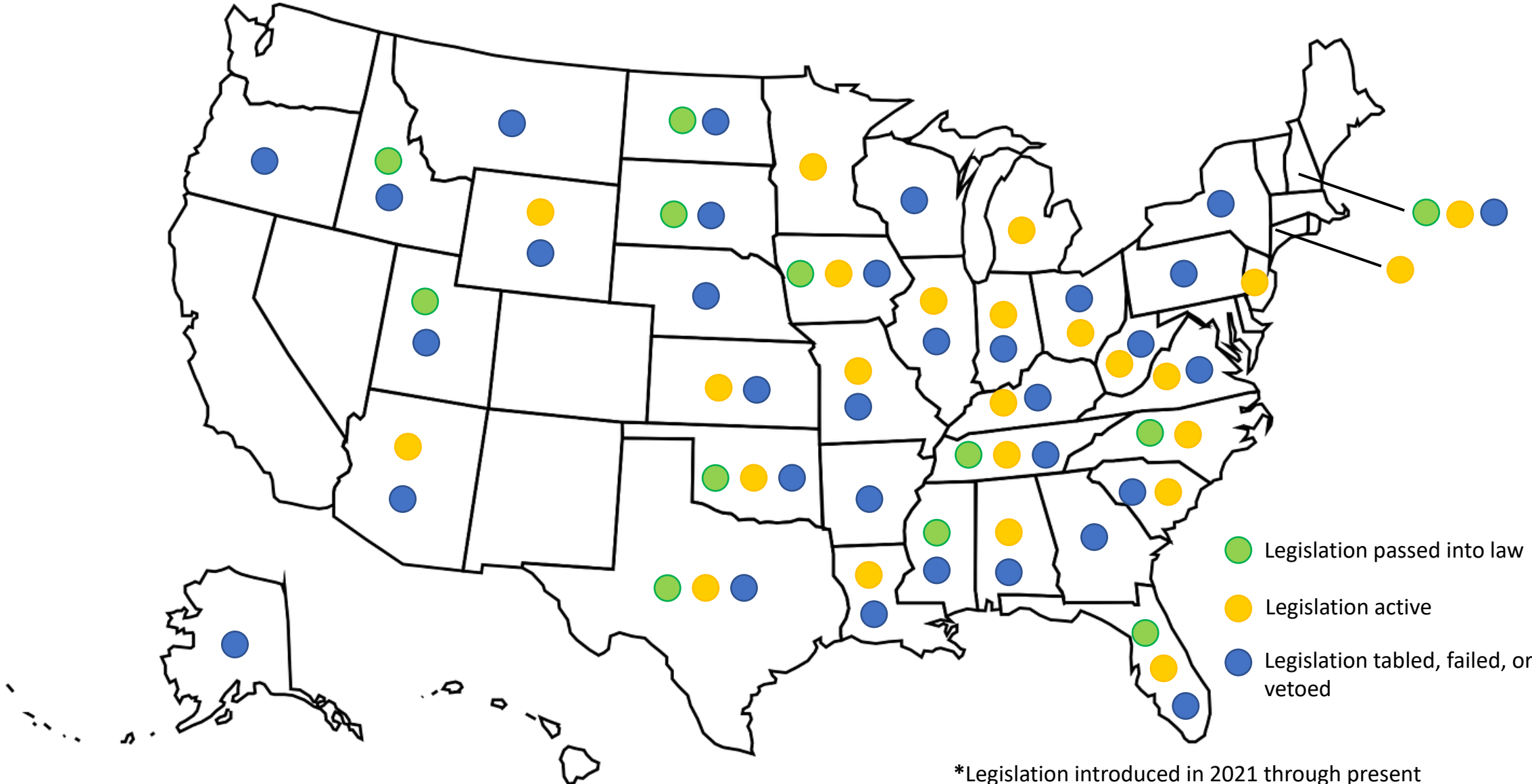
Key Practice Points

- Pursue inclusive, targeted (information/networking) practices.
- Focus on any individual opportunity/benefit provided if informed by student’s racial status; some legal risk.
- Design comms and website with big picture: Show connectivity of all related programs.

- Establish clear statement of valued qualities that are mission aligned.
- Probe the ways in which racial experience/perspective may inform evaluation of those qualities, & assure that inquiries elicit relevant information

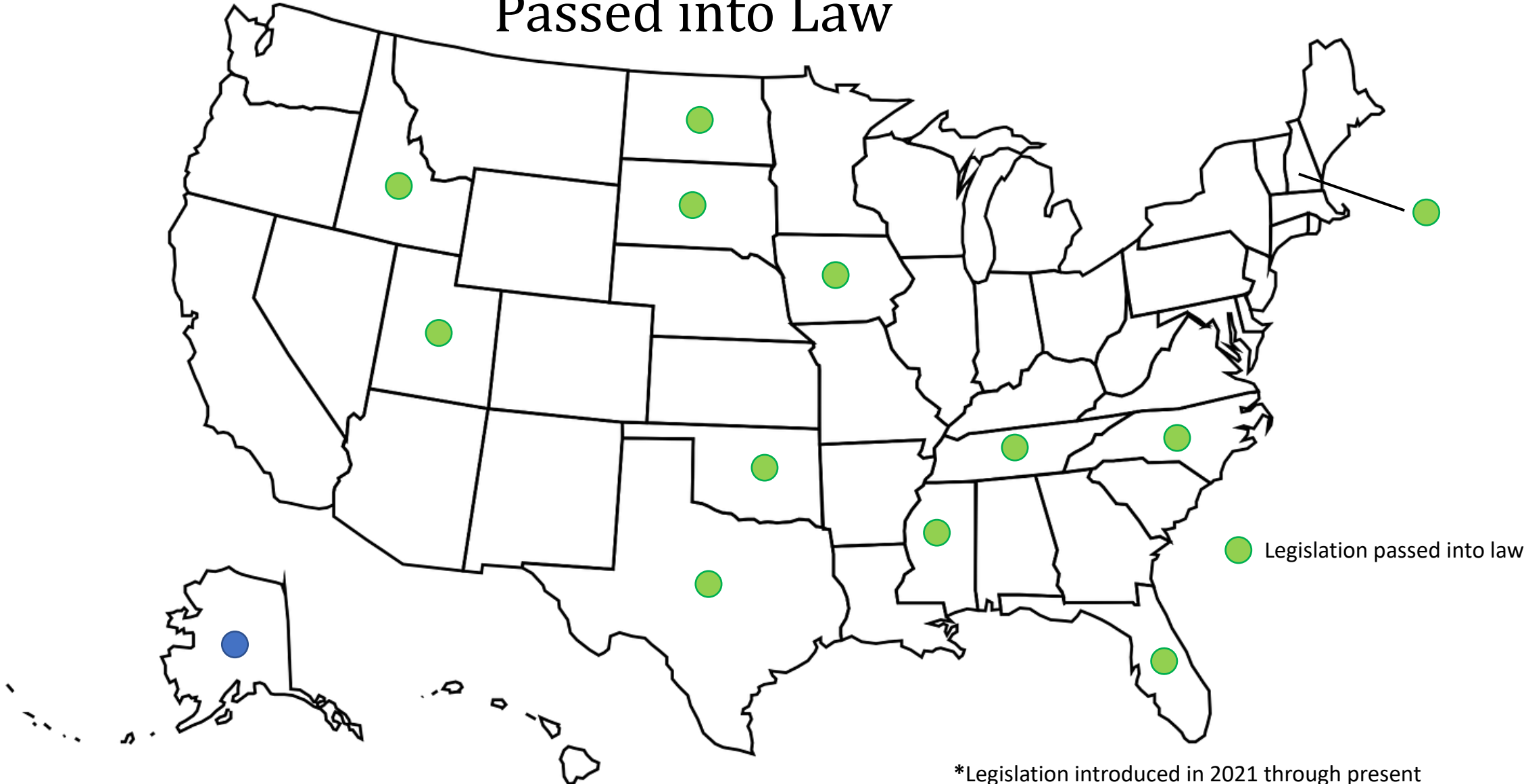
- Adapt policies & practices to align with SFFA framework where feasible, maintaining focus on avenues for permissible consideration of relevant student background, experience & goals.
- Recognize aid-admission distinctions: e.g., no zero sum.
- Consider pool & match

Higher Education Anti-DEI Bills



*Legislation introduced in 2021 through present

Higher Education Anti-DEI Bills Passed into Law



*Legislation introduced in 2021 through present

Enforcing the Law on Colorblind Admissions: Stop Unconstitutional Discrimination and Fund Better Alternatives

Dan Morenoff

Adjunct Fellow
Manhattan Institute

Executive Director
American Civil Rights Project

Asian parents claim NY STEM program discriminates against their kids in favor of black, Hispanic students: suit

By [Carl Campanile](#)

Published Jan. 17, 2024, 6:23 p.m. ET

Federal judge orders minority-business agency opened to all races

The ruling sides with White plaintiffs in finding the Minority Business Development Agency's presumption of disadvantage is unconstitutional

[an Mark](#) and [Taylor Telford](#)

d March 6, 2024 at 6:33 p.m. EST | Published March 6, 2024 at 9:58 a.m. EST

Thomas Jefferson high school escaped the Supreme Court — and others are eager to follow

Everything from ZIP code-center recruiting to dropping application fees is being used to replace metrics explicitly about an applicant's race.

The New, Emerging Litigation Landscape



New compelling interests justify race status-conscious action

- New compelling interests can be established: distinguishable from Harvard/UNC; distinct disciplines (e.g., healthcare); sufficiently measurable/capable of evaluation

IHEs aren't following SFFA

- Enrollment data re race are “too good”
- Opinion extends to non-admissions practices

Expanded attacks on DEI policies and programs

- Advocates have leveraged a higher ed admission decision to challenge other race status-conscious programs—employment, philanthropy, and more

Facially neutral policies are race-conscious and unlawful.

- “Race-neutral” policies & practices mask unlawful intent & impact. Neutrality is a ruse. Ex: Thomas Jefferson High School case

Key Considerations for Leadership



Key Areas of Focus for Societies

Narrative

Articulation of goals and objectives should be carefully considered—avoid painting an unnecessary target on your back with overly mechanical or quota-like language

Consider refinements that align with core DEI interests, with inclusivity

Policy Design

Ground decisions in mission, institutional/ organizational experience, and general research (key data, trends, projections)

Explore design options that mirror the permissible avenues set forth by SFFA—including the vast array of legally race-neutral, DEI framed avenues

Risk Management

Consider innovative ideas that advance DEI goals in strategic ways with awareness of relevant legal risk

Mission is the north star; law is the design parameter

Important Baselines for Societies

Articulation of Goals and Objectives

- Enhance articulation to fully describe value of DEI strategies—including with connectivity to principles of excellence and merit
- Avoid jargon—define concepts and value of programs fully, with explanations that make sense to non-experts (and skeptics!)

Establishment of Policy/Program Design Parameters

- Consider expressly inclusive criteria that support core education aims
- Evaluate prospects for ‘mapping’ SFFA frame regarding permissible student experience, perspectives and goals regarding race

Thank You!

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