Handbook on Diversity and the Law

Navigating a Complex Landscape to Foster Greater Faculty and Student Diversity in Higher Education
for consideration, although not necessarily according them the same weight in every case. All applicants are able to compete for all spots under the same criteria.

I. Inclusive Conduct and Multi-cultural Skills

As used in this guidance, inclusive conduct and multi-cultural skills refers to demonstrated success -- through conduct in classroom, research, mentoring and/or other work activities -- in including and fostering participation by individuals of different cultures, socio-economic backgrounds, races, genders, and life experiences in pursuit of increased understanding and exploration of a broad range of perspectives. This is not a proxy for any one viewpoint and instead focuses on the workplace conduct of an individual. Inclusive conduct provides opportunities to identify and utilize understanding of differences and broad perspectives in teaching, learning, research and mentoring. Inclusive conduct and multi-cultural skills create an inclusive environment in which individuals of a broad range of cultures, backgrounds, experiences and perspectives, including but not limited to different races and genders, can fully participate and work productively and creatively together. Inclusive conduct and multi-cultural skills provide opportunities to break down stereotypes that assume all individuals of a particular race, ethnicity, gender, or socio-economic group or who have a disability share the same views, personal qualities, and experiences. These are race- and gender-neutral qualities that individuals of any race or gender may possess -- or lack.

Inclusive conduct and multi-cultural skills should be understood to relate to criteria associated with workplace conduct desired by some higher education institutions to achieve their educational mission. Notably, these criteria do not regulate viewpoint, diminish principles of academic freedom that apply in public and private institutions, or violate rights protected under the First Amendment that apply in public institutions.53

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53 Thus, in making various decisions, a higher education institution may consider whether a faculty member, regardless of his or her viewpoint on race or gender -- through his or her conduct in classroom, research, mentoring or other relevant activities -- has a record of successfully fostering participation by colleagues and students who have broadly diverse perspectives, experiences and backgrounds including, without limitation, racial minorities, women and people from low socio-economic backgrounds or with disabilities. Individuals of any race or gender may possess or lack this attribute, which provides opportunities to enhance educational and research outcomes through broad and multi-cultural issue identification, collaboration, and problem-solving. This attribute is inclusive and non-discriminatory. See Appendix IV, Section 1, infra, for a related discussion of First Amendment and academic freedom.
B. Inclusive Conduct and Multicultural Skills as a Criterion

1. Definition and Use of Inclusive Conduct and Multi-cultural Skills Criterion

Inclusive conduct and multi-cultural skills refer to demonstrated success -- through conduct in classroom, research, mentoring and/or other work activities -- in including and fostering participation by individuals of different cultures, socio-economic backgrounds, races, genders, and life experiences in pursuit of increased understanding and exploration of a broad range of perspectives. This is not a proxy for any one viewpoint and focuses instead on the workplace conduct of an individual. Inclusive conduct and multi-cultural skills provide opportunities to identify and utilize broad perspectives in teaching, learning, research and mentoring. Inclusive conduct and multi-cultural skills create an inclusive environment in which individuals reflecting a range of cultures, backgrounds, and experiences, including but not limited to different races and genders, can fully participate and work productively and creatively together. Inclusive conduct and multi-cultural skills provide opportunities to break down stereotypes that assume all individuals of a particular race, ethnicity, gender, or socio-economic group or who have a disability share the same views, personal qualities, and experiences. These are race- and gender-neutral qualities that individuals of any race or gender may possess -- or lack.55

Position and program descriptions, selection criteria, and selection processes for employment, fellowships, assistantships, admissions, funding, participation in mentoring and other programs and their related advertisements may include, as a preferred or required criterion, a record of utilizing inclusive conduct and multi-cultural skills as defined above. This means that an individual -- through his or her conduct in classroom, research, mentoring or other relevant workplace activities -- has a record of successfully including and fostering participation by colleagues and students with broadly diverse perspectives, experiences and backgrounds including, without limitation, racial minorities, women and people from low socio-economic backgrounds or with disabilities. Individuals of any race or gender may possess or lack a record of inclusive conduct and multi-cultural skills, which provide opportunities to enhance educational and research outcomes through broad and multi-cultural issue identification, collaboration, and problem-solving. Performance evaluations, promotion evaluations, program selection and admissions decisions may include consideration of the presence or absence of a record of such inclusive conduct and multi-cultural skills. In doing so, it is important that this criterion is evaluated on the basis of inclusive conduct that provides opportunities for multi-cultural collaboration, issue identification, creativity and problem-solving in classroom, research, laboratory, mentoring and other workplace activities, not on the basis of personal viewpoint.

An individual's specific life experiences and conduct that are valued under this criterion include the following experiences, and how the individual has responded to and uses these experiences in teaching, research and mentoring, and, for students, learning:

55 The inclusive conduct and multi-cultural skills criterion concerns a person's workplace conduct of inclusion and non-discrimination on the basis of race, gender, other specified bases, and perspective, not a person's viewpoint. See Appendix IV, Section 1, infra ("Diversity Considerations, the First Amendment and Academic Freedom").
• a record of demonstrated success in removing barriers for, and including and fostering participation by, broadly diverse individuals in classroom, research, mentoring or other relevant workplace activities;
• experiences of discrimination or barriers to achievement on any basis or a record of removing such barriers for others;
• experiences of isolation in residential, educational and/or professional/work settings or a record of eliminating such isolation for others;
• a record of experiences living, working, teaching or learning with individuals of different perspectives, cultural or socio-economic backgrounds, races, ethnicities, and/or genders;
• a record of experiences and conduct increasing understanding of individuals of different cultural or socio-economic backgrounds, races, ethnicities, and/or genders and different perspectives;
• a record of experiences and conduct using understanding of such different backgrounds, attributes, and perspectives to enhance collaboration, problem-solving, learning, research and/or mentoring;
• experiences as the first in the individual's family to pursue a STEM (or other relevant) field and/or any academic career;
• a record of experiences and conduct enabling collaborative work among individuals whose primary languages are different.

Seeking individuals who have a record of inclusive conduct and multi-cultural skills is a race- and gender-neutral consideration, as individuals of any race or gender may possess (or lack) such a record. Inclusive conduct fosters participation by broadly diverse individuals, providing opportunities for multi-cultural collaboration, issues identification, and problem-solving in the learning and research environment. For example, a person of African descent who grew up in the Caribbean as a member of the majority race and a Caucasian who grew up in the Caribbean as a member of a minority race; an African American male or female who grew up in an upper middle income family in a primarily Caucasian suburb; a female of any race or a person who is from an under-represented minority group who majored in a STEM field in college or graduate school; any individual who grew up in a lower income family in an inner city; an African American individual who grew up in a primarily Hispanic neighborhood (or vice versa); an African American male or female who grew up in a rural area -- whether primarily minority or not -- who succeeded in navigating college; a U.S. born individual who spent significant years living in another country; and a person of any race or gender with a record of creating an inclusive and productive environment for colleagues of every race, gender, culture, background and perspective, may have multi-cultural skills and experiences and may utilize inclusive conduct to create a more inclusive and better learning and research environment.

2. **Relevance to Institutional and Academic Unit Mission and Goals and Value of Inclusive Conduct and Multi-cultural Skills.**

An institution may have an authentic, mission-critical interest in building a faculty and student body that possess multi-cultural skills and exhibit inclusive conduct, recognizing that individuals with these abilities and conduct are needed to expand opportunities for excellence in research and teaching in a broadly diverse society. Such individuals create a more robust intellectual environment and a more broadly welcoming academic community for research and learning by
broadly diverse individuals. In furtherance of its mission, the institution may also have a non-discrimination policy that prohibits discriminatory conduct in university work on the basis of race, gender, ethnicity, religion, age, sexual orientation, etc. It is a good practice to be explicit about the institution's and unit's multi-pronged mission and related multi-cultural and broad diversity needs.

Inclusive conduct and multi-cultural skills help faculty to include, and to provide opportunities to work creatively and productively with (and to foster learning by students to work creatively and productively with), individuals of different perspectives, experiences, cultures, socio-economic backgrounds, races, ethnicities, and genders. Such conduct and skills help all faculty and students to identify the needs of a diverse society, to solve problems more collaboratively and effectively, to ask a broader range of questions, to pursue a broader range of paths to solutions (which are particularly important in STEM and certain other fields), and to create solutions, products and services that serve the needs of a diverse society. Such conduct and skills help faculty and students to shed stereotypes and to foster a more inclusive campus, which in turn supports broad (including but not limited to racial, gender and socio-economic) diversity with its corresponding educational benefits. Inclusive conduct and multi-cultural skills and broad diversity enhance learning, teaching, research and service. If some aspects of broad diversity have been achieved in the faculty and graduate and undergraduate student bodies, but the racial, gender and socio-economic aspects of broad diversity have not been adequately achieved, considering inclusive conduct and multi-cultural skills in securing and retaining faculty members and students may provide the ancillary benefit of increasing racial and gender diversity.

While consideration of inclusive conduct and multi-cultural skills is race and gender-neutral, as long as race and gender still affect the life experiences of individuals, minorities and women are likely to have different and more difficult experiences than many others and are likely to have to overcome these experiences to succeed. In some cases, it may be that a person's race or gender put the person in a position to acquire multi-cultural skills and utilize inclusive conduct. However, it is an individual's experience (of discrimination, isolation, breaking down barriers and eliminating isolation for others, etc.), how the individual used the experience, overcame barriers (or helped others to do so), and how the individual applies the experience, through inclusive conduct, to teaching, research and mentoring now, that are considered -- not the individual's race or gender. It is recognized that anyone, regardless of race or gender, may have a record of creating an inclusive learning, research and mentoring environment and may have acquired multi-cultural skills and be able to provide opportunities for multi-cultural interactions and experiences at the institution. See D.4 below for how to apply this criterion.

C. Low Socio-economic Background/First In Family To Four-Year College As A Criterion

1. Definition of Low Socio-economic Status and Use as a Criterion

A more comprehensive definition of low socio-economic background than is typically used considers total wealth, including but not limited to family income and concentration of poverty
in the family's residential area and school district. This formulation provides a more complete reflection of low socio-economic status, which alone is an authentic and important aspect of broad diversity, and also has the ancillary effect of increasing racial diversity. In a country with a history of slavery, residential and school segregation and discrimination on the basis of race, individuals who are members of racial minority groups tend to have less total wealth than other individuals with equal annual income. Of course, higher socio-economic status is also important to broad diversity, but may be easier to achieve.

Employment opportunities and benefits for faculty members (e.g., hiring, promotion, retention, community building and mentoring in support of preparation for tenure, supplemental compensation, research funding and facilities, participation in other programs, etc.); selection of students for post-doctoral fellowships and research and teaching assistantships; admission of students; and selection of students to participate in other programs or to receive other educational benefits may be based on low socio-economic background, without considering race and gender, sometimes in combination with being the first in one's family to graduate from a four-year college, to pursue a STEM career, and/or to pursue any career in academia. Socio-economic (or "class") diversity within all groups is also required to achieve mission-critical broad diversity. Consideration of a student's low socio-economic background relates to a student's family's socio-economic status. If this criterion is a consideration for faculty, it relates to family background.

2. Relevance to Institutional and Academic Unit Mission and Goals and Value of Socio-economic Status

If the institution and each academic unit have determined that achievement of their educational, research and service mission (including excellence) in STEM (or other) fields requires a broadly diverse faculty and student body, the institution and its units may find that this requires inclusion of individuals from a broad range of socio-economic backgrounds, including those who are from lower socio-economic backgrounds. Many institutions of higher education recognize the important role of college and graduate school in providing access for individuals to a better quality of life and to an opportunity to fully participate in our society and democracy. The ability of all students to identify and serve the needs of our diverse society may depend in part on their understanding of the role of poverty in many societal challenges. Including individuals on the faculty and in the student body who come from lower socio-economic backgrounds is critical to such understanding. It is a good practice to be explicit about the institution's and unit's multi-pronged mission and related socio-economic and broad diversity needs.

D. How Inclusive Conduct and Multi-cultural Skills And/Or Socio-Economic Status Are Considered With Other Eligibility Considerations

Academic accomplishments, intellectual capacity and, if applicable, particular discipline expertise, are baseline requirements. A strong record -- in classroom, research, mentoring or other relevant workplace activities -- of including and fostering full participation by individuals of different cultures, socio-economic backgrounds, races, genders, experiences, and perspectives,

and/or an individual's socio-economic background, is one factor among many that may "tip the balance" in a holistic assessment of an individual, or may be a prerequisite, when making a decision concerning hiring, compensation, promotion, research support, mentoring, participation in fellowships, admissions, participation in other programs, and/or conferring other employment or educational benefits. Whether an individual is first in his or her family to attend a four-year college, enter a STEM field, or pursue any academic career may also be considered.

1. **Significance of Institutional Resources Committed**

Significant, or not very significant, funding, staffing and other resources may be provided to those rated highly for inclusive conduct and multi-cultural skills and/or low socio-economic status, either alone or in combination with other attributes. It should not matter to the legal sustainability of the approach.

2. **Assessment of Impact**

These are race- and gender-neutral approaches that are based on authentic institutional needs apart from race and gender. These neutral approaches should result in an environment that is inclusive and productive for everyone, including racial minorities and women -- as well as in an increase in the numbers of individuals from such groups coming to the institution and succeeding there.

Measures of the impact the approach has in achieving the institution's and unit's mission may include:

1. **Annual evaluation of faculty** includes consideration of their record of inclusion of broadly diverse people and perspectives in workplace activities.
2. **Student evaluations** of faculty include a question on whether the faculty member includes and fosters participation by broadly diverse individuals and/or whether opportunities for considering multi-cultural perspectives and socio-economic experience are included in learning experiences.
3. **Surveys or focus groups** explore the ways in which inclusive conduct and multi-cultural skills and socio-economic diversity are brought to bear on teaching, research, learning experiences, and mentoring of junior faculty and students.
4. **Data are collected to track increases** in racial, ethnic, gender and socio-economic diversity.
5. **Climate studies** test whether there is an environment of inclusiveness.

3. **Commentary and Examples**

If these approaches are properly applied, race and gender and individual viewpoint (as distinguished from inclusive workplace conduct that provides opportunities for multi-cultural interactions, experience, problem-solving and issue identification to strengthen research, teaching, learning and advising) are not considered in employment or educational decisions and
benefits. These inclusive conduct/multi-cultural skills and socio-economic approaches also are not used as a proxy for race or gender because these criteria fulfill separate authentic institutional needs. Strict judicial scrutiny should not apply and the prohibition against racial and gender discrimination in hiring and in the terms and benefits of employment under Title VII of the Civil Rights Act of 1964, the Equal Protection Clause, Title IX of the Education Amendments of 1972, and any state law or executive order should not be invoked. See Section VI, infra. Also, academic freedom and First Amendment rights should not be impinged upon. See Appendix IV, Section 1, infra and Section VIII, infra.

Similarly, use of these approaches for student programs, fellowships and graduate teaching or research assistantships should not trigger strict judicial scrutiny or be prohibited under Title VI, Title IX, the Equal Protection Clause, or any state law or executive order. See Sections VI and VII, infra.

Under the "rational basis" standard of judicial review, decisions that take inclusive conduct and multi-cultural skills and/or socio-economic background into account need only avoid being arbitrary and capricious. That standard should be met if there is any relationship between the institution's mission and fostering an environment of inclusiveness for individuals of different socio-economic backgrounds, cultures and perspectives, including race and gender.57

Although a compelling interest is not necessary to satisfy the "rational basis" standard of review, noting such an interest may be helpful where there might be a disparate impact on race or gender that requires an educational necessity to be sustainable. See Sections VII. A and B. Inclusive conduct and multi-cultural skills or socio-economic background contribute to broad diversity, apart from race and gender diversity, but also may have the ancillary benefit of increasing the racial and gender components of broad diversity.

These approaches do not disparately burden non-minorities and men if the same criteria (including consideration of record of inclusive conduct/multi-cultural skills and socio-economic background) and the same process are applied, and as long as the same opportunity to compete for positions and benefits are afforded to all candidates -- regardless of race and gender. (See Section VII.A.2, infra (undue burden)).

The following are examples of evidence that the same criteria, process and opportunities are provided to all candidates, and that race and gender do not define whether a candidate has and can contribute inclusive conduct and multi-cultural skills or socio-economic diversity to the institution:

a. An individualized assessment is made of whether each candidate has a strong record of inclusive conduct that provides opportunities for multi-cultural experiences and interactions. All women and minorities are not automatically determined to have such a record of inclusive conduct or to possess or contribute multi-cultural skills -- at all, in the same way, or to the same extent. Men and non-minorities are also acknowledged to be able to bring a strong record of

57 See Section IV.C.3, infra.
inclusive conduct and to contribute multi-cultural skills. In all cases, it depends on the individual.

b. The numbers or percentages of individuals from different groups who are determined to satisfy this criterion vary over time, depend on the individual candidates, and are flexible. There are no "quotas" for any group -- minority or non-minority, women or men -- which utilizes this conduct, possesses these skills, and contributes the attendant opportunities for multi-cultural collaboration, issue identification, problem-solving and experiences.

c. Considerations of socio-economic background do not include race or gender.

It is critical that Deans, Department heads and the members of search, program and admissions committees understand how to apply these neutral approaches. It takes considerable individualized assessment to determine whether a person, regardless of race or gender, has a record of utilizing inclusive conduct and multi-cultural skills. Socio-economic background also does not denote race or gender. Some institutions require the members of search, program and admissions committees to take a short training program, addressing many important aspects of the hiring or other selection process, including how to consider inclusive conduct and multi-cultural skills and socio-economic background.

4. Examples of How Inclusive Conduct and Multi-cultural Skills and Low Socio-economic Status May be Used in Diversity Efforts

a. Advertisement, Interview and Evaluative Questions

An institution may include in its advertisements and/or position descriptions: "The University seeks to increase the diversity of its professoriate, workforce and undergraduate and graduate student populations because broad diversity (including all aspects of individuals that contribute to a robust academic environment)* is critical to achieving the University’s mission of excellence in education, research, educational access and service in an increasingly diverse society. Therefore, in holistically assessing many qualifications of each applicant—of any race or gender—we would factor favorably an individual’s record of conduct that includes students and colleagues with broadly diverse perspectives, experiences and backgrounds in educational, research or other work activities. Among other qualifications, we would also factor favorably experience overcoming or helping others overcome barriers to an academic career or degree. This workplace conduct of inclusion and experience provide opportunities to enhance educational, research and other work outcomes by increasing opportunities for participation of a broad range of individuals and the potential to expand issue identification, collaboration, and problem-solving.” “*Broad diversity means all aspects of individuals that contribute to a robust academic environment including experience, perspectives, disciplines, geographic background, talent, family socio-economic background, disability, ethnicity, race, gender and other characteristics. Some aspects of broad diversity have been easily achieved, while others—including racial and in some disciplines gender diversity—have been more elusive and require focused efforts."

Sample evaluative questions to assess such conduct include:
Have you either experienced discrimination or barriers to achievement on any basis, felt isolated in your residential setting or educational or professional/work experience--or identified the existence of these or other barriers, and then removed such barriers and created an inclusive community, for others? Describe.

Have you ever mentored or collaborated with a student/faculty member/staff member from a different background, perspective or experience than your own (e.g., a different race, gender, sexual orientation, socio-economic background, political perspective)? Was the collaboration, student/faculty member/staff member successful? Explain.

How much and what kind of contact have you had as an educator/supervisor with students/faculty/staff of different backgrounds, perspectives and experiences than your own? Were you able to achieve equal success with students/faculty/staff of such differences? Explain.

Have you experienced as a student close collaboration with faculty members of different backgrounds, perspectives, or experiences than your own? Were you able to successfully bridge any differences? Explain.

For people applying for higher level positions: Have you helped an undergraduate with a different background, perspectives, experiences than your own get into a Ph.D. program/a junior staffer with a different background advance his or her career? Mentored such a Ph.D. to conclusion? Hired such a post-doctoral associate into your laboratory? Describe.

What is your experience educating people around you about the issues that people of different groups encounter in higher education/academic research?

Are you the first in your family to pursue a STEM field and/or an academic career in any field?

The Kahlenberg model for determining socio-economic background is used to identify those from lower socio-economic groups. See Section V.C.1, supra.

b. Target of Opportunity Funding and Positions For Those Having Strong Records of Inclusive Conduct and Multi-cultural Skills

Special target of opportunity funding and/or the creation of a special position are provided through the Provost, a Dean or Department head to hire an individual as a faculty member who not only satisfies the usual academic requirements, but also can especially advance the institution's mission in important ways. Possessing a pronounced talent and distinguished record of inclusion of broadly diverse individuals and perspectives in teaching, research, mentoring or other workplace activities qualifies an individual -- regardless of race or gender -- for target of opportunity funding and positions. (Target of opportunity funding and positions may also be available to those from low socio-economic backgrounds, or who hold Nobel and other top prizes, or who bring another uniquely exceptional accomplishment in service, research or teaching to the institution.)

To the extent permitted in the jurisdiction and generally by law, race and gender may be factors considered, among others, that together enable an individual to contribute exceptionally to the institution.
c. Research Funding

Research funding is made available to individuals who bring a strong record of inclusive conduct/multi-cultural skills to the institution.

Below is an example of how a special endowment may be established to fund the research of individuals who bring a strong record of inclusive conduct and multi-cultural skills to a research center and thereby support greater gender or racial diversity.

The institution inserts the name of the center and the relevant disciplines, but may use the following as a description of the funding program:

The ____ Center at the University has determined that it has a compelling interest in producing excellent research and educational experiences that identify and develop solutions to problems involving _____ disciplines, and that the Center requires a broadly diverse faculty to achieve this compelling interest in an increasingly diverse society. While many aspects of diversity have been achieved at the Center and at the University, racial and gender diversity have not been adequately achieved in the Center's research faculty. Individuals with a strong record of including broadly diverse colleagues and students in research and mentoring activities, providing opportunities for multi-cultural issue identification, problem-solving and analysis, are recognized as employing workplace conduct that will foster greater diversity in all of its dimensions -- including, but not limited to, race and gender.

Donor has contributed a research endowment to stress the importance of and to support increasing racial and gender diversity in the following disciplines at the Center:_________________.

This endowment will be used to support those research faculty at the Center in the relevant disciplines who, individually and as members of the community of researchers and students at the Center, can demonstrate that they actively include broadly diverse colleagues and students in research, mentoring and teaching activities and provide opportunities for multi-cultural issue identification, collaboration, and problem-solving that will enable them, through their research, mentoring and teaching, to foster broad diversity, including greater racial and gender diversity, at the Center and achieve excellence in research outcomes.

It is recognized that individuals of any race or gender may be able to do so.

d. Other Programs

A strong record of inclusive conduct/multi-cultural skills and socio-economic background may be used as criteria or prerequisites for participation in other programs for faculty and students. These may relate to employment, promotion, research support, and other benefits of employment, as well as to admissions, financial aid and mentoring for education and other educational programs.
E. Diversity Considerations, the First Amendment and Academic Freedom

To understand appropriate implementation of diversity efforts in higher education, it is helpful to recognize the generally peaceful co-existence of such efforts with First Amendment rights and academic freedom principles—a co-existence that reflects the necessary balance of academic freedom and responsibility.\(^{58}\) Consideration of diversity in higher education reaches the fundamental purposes of the academic endeavor. Colleges and universities, whose multi-pronged educational missions embrace providing excellent educational experiences for all students, producing excellent research to increase and disseminate knowledge, increasing educational access, and serving the nation's needs for a well-prepared citizenry and workforce, have a compelling interest in creating a broadly diverse student body\(^{59}\) and faculty.\(^{60}\) Public colleges and universities play a special role in society by providing otherwise unavailable broadly affordable access to higher education.\(^{61}\) Many public and private institutions of higher education require a broadly diverse community in order to provide excellent educational experiences and produce excellent research in a global, multi-cultural and diverse society.\(^{62}\) A broadly diverse academic community is fundamental to higher education's endeavor to best serve all students, and to contribute to solutions that will enable our nation and society-at-large to progress and prosper. Many institutions' faculties have found and embraced this necessity.

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{"There is a generally peaceful co-existence of [diversity] efforts with First Amendment rights and academic freedom principles – a co-existence that reflects the necessary balance of academic freedom and responsibility."
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Freedom to express ideas, however controversial and offensive, is also a deeply held value that defines great institutions of higher education, public and private.\(^{63}\) This academic freedom,


\(^{60}\) See Walker v. Bd. of Regents of the Univ. of Wis. Sys., 329 F. Supp. 2d 1018 (W.D. Wis. 2004); Univ. & Comm. College Sys. of Nev. v. Farmer, 930 P.2d 730 (Nev. 1997) (faculty diversity is a compelling interest in a manner similar to student body diversity in higher education that may justify consideration of race in faculty hiring), cert. denied, 523 U.S. 1004 (1998); cf. Rudin v. Lincoln Land Comm. College, 420 F.3d 712, 719 (7th Cir. 2005) (district court had granted summary judgment for the college, which argued that compelling diversity interests justified consideration of race in a faculty hiring decision, but this argument was not made in the appeal).

\(^{61}\) See Grutter, 539 U.S. at 331-32.

\(^{62}\) This is particularly the case in STEM fields because STEM fields are critical to the economic strength and security of the nation. In light of national demographics, which demonstrate that African Americans, Hispanics, Native Americans and women are severely underrepresented in STEM higher education and careers, while their numbers are increasing in the college age and total U.S. populations, there is a national imperative to increase the racial and gender diversity of STEM higher education, business and industry in a short time. If higher education fails to meet this national need, the nation's leadership in higher education, innovation and the global economy, as well as our national security, may be expected to decline. See Section III.A.2, above.

\(^{63}\) See, e.g., YALE UNIVERSITY, REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION AT YALE, 5 (1975) ("The history of intellectual growth and discovery clearly demonstrates the need for unfettered freedom, the right to think
which extends to the institution itself as well as to faculty and students, is a fundamental policy governing academic life. Academic freedom is accompanied by the countervailing policy of academic responsibility, which is also a foundation of academic culture and is embedded in many institutions' internal regulations and, indeed, in federal research funding agencies' requirements. Members of the college and university community have the responsibility, in the exercise of their academic freedom, to act legally, ethically, and with academic honesty (e.g., in scholarship, research, test-taking, and grading); and to not unreasonably interfere with the ability of others in the academic community to participate fully in academic life.

Neither free speech rights protected by the First Amendment to the U.S. Constitution that apply in public educational institutions, nor principles of academic freedom that apply in most public and private institutions of higher education, are offended when the institution appropriately considers whether faculty and students practice conduct of inclusion and non-discrimination on the basis of race, gender, other specified bases and perspectives to achieve essential educational benefits of, and the rich discourse that results from, broad diversity. This tenet is true in the context of employment, the classroom and the research laboratory. Consideration of faculty and student workplace conduct required by the institution to achieve its educational mission does not regulate viewpoint or diminish principles of academic freedom. Hence, the institution may consider whether a faculty member, regardless of his or her viewpoint on race or gender (and regardless of his or her race and gender) -- through conduct in class, research, advising or other relevant workplace activities with students and colleagues -- has a record of success in including and fostering full participation of broadly diverse individuals of different perspectives, socio-economic backgrounds, races, genders, ethnicities and experiences that will provide opportunities for multi-cultural analysis, issue identification, collaboration and problem-solving. This consideration does not judge the viewpoint or subject that a faculty member or student may possess or pursue in research or, in most situations, in didactic pursuits or as a citizen.

The dimensions of First Amendment rights in public institutions of higher education and academic freedom in public and private institutions as they relate to diversity efforts, involves consideration of a number of factors and interests. (Appendix IV, Section I, includes a more complete discussion of this topic.)

64 See, e.g., id.; 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE WITH 1970 INTERPRETIVE COMMENTS ("AAUP 1940 Statement"); COMMITTEE ON A CIVIL, SAFE, AND OPEN ENVIRONMENT, UNIVERSITY OF FLORIDA, FINAL REPORT (2008); NARRATIVE REPORT AND GENERAL RECOMMENDATIONS, TASK FORCE ON ASSEMBLY AND EXPRESSION, UNIVERSITY OF TEXAS AT AUSTIN (2002).

65 The First Amendment applies through the 14th Amendment of state institutions of higher education. See Gitlow v. N.Y., 268 U.S. 652, 666 (1925); see also Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 387 (1993).