



## **Prohibiting Proxy Discrimination—Model Policy**

**Summary:** Individuals should be treated as individuals and not discriminated against because of their skin color, race, ethnicity, ancestry, or national origin. This important principle has been enshrined into American law through the Constitution, major federal civil rights statutes, and many state and local civil rights laws.

The Constitution and many of these laws prohibit facial discrimination, including such infamous examples as racially segregated schools. These laws also forbid discrimination that is undertaken covertly through race-neutral proxies. Proxy discrimination is not new. In the 1880s the Supreme Court struck down San Francisco's attempt to discriminate against Chinese immigrant through race-neutral means. Governments in the Jim Crow south tried to evade legal prohibitions on race discrimination by using proxies for race, such as grandfather clauses or literacy tests intended to prevent Black citizens from voting. One by one, the Supreme Court struck down these tools of proxy discrimination, holding that states could not do indirectly what they could not do directly.

Today, selective colleges, universities and even some academically selective high schools have been up front about their intent to use proxies for race in admissions. Although there are lawsuits in progress challenging some of these proxy discrimination schemes, state laws making clear that such discrimination is illegal play an important complementary role in making sure that individuals are treated as individuals and are not treated differently based on their race.

The Proxy Discrimination Prohibition Act makes it more difficult for public schools to use proxy factors to discriminate based on race, sex, color, ethnicity, ancestry, and national origin by: 1. Requiring a school to publish all the factors it uses in its decision-making process; 2. Defining and prohibiting the use of proxy discrimination; and 3. Creating a cause of action to challenge proxy discrimination practices.

### **Proxy Discrimination Prohibition Act**

#### **Section 1: Definitions**

1. "Public schools" in this act refers to any institution of primary, secondary, or post-secondary education that receives public funding and operates as a state-owned or state-controlled entity.

2. "Proxy discrimination" means the use of a facially neutral factor in student admissions that correlates with race, sex, color, ethnicity, ancestry, or national origin for the purpose of discriminating against or granting a preference to any individual or group on the basis of race, sex, color, ethnicity, ancestry, or national origin. "Proxy discrimination" includes the use of regional or feeder school caps, quotas, or bonuses; zip codes; other geographic or socioeconomic factors; and peer-group characteristics within feeder or other zoned schools, if such factors are used individually or in combination with other factors for the purpose of discriminating against or granting a preference to any individual or group on the basis of race, sex, color, ethnicity, ancestry, or national origin.
3. "Traditional academic success factors" means the following student admissions factors: standardized test results that are not normed for different student groupings, academic grades and similar academic records, extracurricular activities and achievements that are relevant to academic success, and academic recommendations by teachers and other school officials.

## **Section 2: Disclosure of Admission Factors**

1. Public schools with a selective admissions process shall publish a comprehensive list of all factors and criteria that the public school, the admissions committee, and any other employee or representative of the public school may consider or use in the admission decision-making process. This list shall include, but not be limited to, any of the following that may be considered or used:
  - a. Academic qualifications, including GPA, standardized test scores, and class rank.
  - b. Extracurricular activities, community service, and leadership experiences.
  - c. Personal essays, statements of purpose, or other written submissions.
  - d. Letters of recommendation from teachers, counselors, or other relevant individuals.
  - e. Special talents, achievements, or awards.
  - f. Socioeconomic background or other diversity-related considerations.
  - g. Legacy status.
  - h. Financial or in-kind donations made by the applicant, the applicant's family, or any person or business associated with the applicant.
  - i. Any other factors that may be considered during the evaluation process.

2. The list of factors and criteria shall be made publicly available on the official website of each public school, easily accessible to prospective students, parents, and other interested parties.

### **Section 3: Annual Reporting**

1. Each public school with a selective admissions process shall submit an annual report to the state education authority, detailing all the admission factors used during the previous academic year. The report should include the weight or significance assigned to each factor, if applicable, and any changes made to the admission criteria.
2. The state education authority shall compile the reports received from public schools and publish a consolidated report that provides an overview of the admission factors and their respective importance across all institutions in the state. This consolidated report shall be made available to the public on the authority's website.

### **Section 4: Non-Discrimination**

1. No public school board member, director, administrator, employee, or any person making admission decisions for the public school shall:
  - a. Discriminate against or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, ancestry, or national origin;
  - b. Engage in proxy discrimination; or
  - c. Seek information on students' race, sex, color, ethnicity, ancestry, or national origin during the application process for admission to such school unless expressly required by federal law, and to the extent it is required by federal law, such information shall be withheld to the maximum extent practicable from any individual involved in admissions decisions to the end that admissions decisions are blind as to the applicants' race, sex, color, ethnicity, ancestry, and national origin.
2. In any cause of action in a court of competent jurisdiction to challenge an instance of proxy discrimination in violation of Section 4(1)(b), the plaintiff has the burden to establish a prima facie case of proxy discrimination through statements, statistical evidence, projections, or other evidence, that a particular factor or combination of factors other than traditional academic success factors was selected at least in part for the purpose of discriminating against or granting a preference to any individual or group on the basis of race, sex, color, ethnicity, or national origin. To rebut such a prima facie case of proxy discrimination, the defendant has the burden to prove that the selection of the challenged factor or combination of factors was solely for a lawful

purpose and not for the purpose of discriminating against or granting a preference to any individual or group on the basis of race, sex, color, ethnicity, or national origin.

3. Any public school board member, director, administrator, or employee thereof may use traditional academic success factors and such use presumptively does not constitute proxy discrimination. In any cause of action in a court of competent jurisdiction to challenge the use of traditional academic success factors, the plaintiff has the burden to prove that the factors were manipulated, weighted, or otherwise used with the specific intent of discriminating against or granting a preference to an individual or group on the basis of race, sex, color, ethnicity, or national origin and not simply with knowledge that such use has or may have a disparate impact on such individual or group.

### **Section 5: Implementation**

1. This legislation shall take effect [insert date] and apply to all admission decisions made after its effective date.
2. Public universities shall have a grace period of [insert number of months] to comply with the disclosure requirements outlined in Section 2.
3. Non-compliance with this legislation may result in penalties, including fines and potential loss of public funding, as determined by the state education authority.