MEMORANDUM

TO: Principal, Ames High School

FROM: Ames School District Counsel

RE: "Ambassadors to the World" Trip

Summary

Ames High School organizes an annual "Ambassadors to the World Trip" each spring; a committee of teachers and administrators chooses twenty students to attend who have distinguished themselves academically and in service. This year, the school altered its selection and funding structure, charging fifteen students a premium so that it could offer five fully-funded spots to "persons of diverse backgrounds including students of color, members of the LGBTQ community, and those with disabilities."[1] A student who was initially offered one of the five targeted slots withdrew. Chandler Terry Smith applied, but was not accepted; while Smith appears to meet the academic and service criteria, she is "not among those eligible for one of the targeted positions based on the identification criteria."[2] Smith, whose family likely cannot afford the trip, has asked that the school reconsider and has complained about "discrimination . . . economically and in terms of her background."[3]

Despite Ames High School's compelling state interest of promoting diversity and inclusion on the trip, the funding and selection structure of the Ambassadors to the World Trip is unconstitutional as applied to Smith, violating the Equal Protection Clause of the Fourteenth Amendment. The process acts as a de facto quota, automatically excluding some students and privileging others based on a few specific attributes, and is therefore not narrowly tailored to the

[1] "Diversity Disagreement" (Attachment A)
[2] Id.
[3] Id.

school's diversity goals. The school should consider doing away with the current five-seat reservation system and adopting a system in line with the recommendation below, which would likely mean including Smith.

Equal Protection in the Educational Context

The Equal Protection Clause of the Fourteenth Amendment provides that no "State shall . . . deny to any person within its jurisdiction the equal protection of the laws," a provision broadly read to ban state-based discrimination based on certain classifications.[4] Different levels of scrutiny apply to different types of classifications, with the more suspect classifications requiring a higher level of scrutiny to pass constitutional muster. When race is used, for example, by a state actor to grant or deny a privilege, that use must survive strict scrutiny analysis; the government must show that the use of race furthers a compelling state interest and that the use of race is narrowly tailored to advance that interest.[5]

The Supreme Court has offered guidance about Equal Protection in the educational context. In Regents of the University of California v. Bakke, the medical school at UC Davis reserved sixteen spots in each entering class of 100 students for qualified minorities. The court indicated that the use of race as a criterion in admissions decisions in higher education is constitutionally permissible, reasoning that diversity is a compelling state interest in education. However, it indicated that by creating a quota system, the school's use of race was not narrowly tailored to achieve its ends.[6] In Gratz v. Bollinger, the Court struck down the University of Michigan's system of assigning points for underrepresented minorities in the admissions process,

[4] Regents of the University of California v. Bakke, 438 U.S. 265, 287 (1978).
[5] Gratz v. Bollinger, 539 U.S. 244, 270 (2003).
[6] Bakke, 438 U.S. at 312, 320.

which would be near dispositive in their application process and therefore not narrowly tailored.[7] In Grutter v. Bollinger, it held that the University of Michigan Law School's use of racial preferences in student admissions did not violate the Equal Protection Clause. The school used race as a plus factor in a holistic review of each applicant in an attempt to create a critical mass of traditionally underrepresented groups. The Court confirmed diversity as a compelling state interest and found that the school's approach was narrowly tailored to those ends. According to the Grutter court, "an admissions program must be 'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.'" It clarified, "a university may consider race or ethnicity only as a " 'plus' in a particular applicant's file," without "insulat[ing] the individual from comparison with all other candidates."[8]

Application to this Case

Ames High School has identified race, LGBTQ membership, and sexual orientation as identifiers that qualify students to fill the targeted, subsidized positions. Although the level of scrutiny is different for each of these factors, it seems most likely that a court would apply strict scrutiny to this case, as race is an independent identifier that qualifies a candidate for one of the targeted spots.

It seems likely that the admissions program here would survive the compelling-state-interest part of the constitutional analysis. Like the University of Michigan in Grutter, Ames has expressed an aim to promote diversity in this educational program, and it is

[7] Gratz v. Bollinger, 539 U.S. at 275.
[8] Grutter v. Bollinger, 539 U.S. 306, 334 (2003) (quoting Bakke).

reasonable to assume that Ames could make an argument as to why diversity is important for this trip.

However, the policy does not appear narrowly tailored to achieve those ends, instead functioning more like the quota systems in Gratz. At Ames, if a student does not fit into one of the three preferred categories, like Smith, she is not eligible for one of the five reserved slots. Conversely, "[t]he selection committee has broad discretion to waive academic and community service requirements, at least to some extent, to make sure the 5 fully-funded, targeted positions are filled."[9] This approach disqualifies certain candidates on the basis of race and insulates others from competition because of race and other factors, running afoul of the clear guidance in Grutter.

Recommendation

The school should pursue a new policy more consistent with the caselaw and the school's stated purpose. Ames should do away with the five reserved, funded spots for students in the targeted diversity categories. Instead, the selection committee could promote diversity through a holistic approach, admitting students to the trip based on academics, service, and other factors that would increase the diversity of the trip cohort, without making any one of those factors dispositive. The trip's price could be set in such a way, like it is now, to create a financial aid pool. After qualified students are identified based on a holistic approach, the committee could then allocate the funds to students based on financial need, knowing that the funding may not be sufficient to extend to all qualified students. In the current model, the five students in the targeted

[9] "Diversity Disagreement" (Attachment A)

positions do not necessarily lack the financial means to pay for the trip themselves, yet their spots are subsidized -- a disconnect between the school's purpose and the effect of the program.

That revised scheme would likely mean that Smith would qualify for the trip and for financial support. Practically, this solution raises concerns, since the place of the nineteen currently enrolled would not be guaranteed. As an alternative, the new set of guidelines could be enacted for the following year, and the selection committee could assess Smith individually, taking into account her socioeconomic status as an aspect of diversity.

Works Cited

Gratz v. Bollinger, 539 U.S. 244 (2003).

Grutter v. Bollinger, 539 U.S. 306 (2003).

Regents of the University of California v. Bakke, 438 U.S. 265 (1978).