Appendix 1

OCR Criteria of Ingredients of Acceptable Plans to Desegregate State Systems

rounding the valuation and inclusion of in-kind income on income and poverty statistics.

The study first reviewed definitions of income that have been used in the economic literature and found that most include many types of in-kind income, private as well as governmental. The next objective was valuing the income to the recipient. When income is received in money, recipient families are free to purchase goods they desire at market prices. However, when income is received in-kind, particularly when price subsidies or constraints on amounts are involved, there is no market to which one can turn for a value. The study thus evaluated several valuation possibilities, primarily valuation at government or employer cost and cash equivalent or utility terms (defined as the money that would leave a recipient as well-off as the in-kind income). The study found that no valuation alternative is fully consistent with money income, further results show that government or employer cost may bear little relationship to recipient values.

Precise mathematical formulas were derived for cash-equivalent values and approximations to cash equivalent values were developed. Finally, using recently available data from the 1972-73 Consumer Expenditure Survey, values were estimated for food stamps, low-rent public housing, Medicaid and employer-provided health insurance using various valuation alternatives. While these estimates are extremely crude, they do show that in-kind income can, in some cases, provide sizeable additions to money income but also that values to the recipient can be far below government and employer costs.

A copy of this report will be filed and available as soon as possible, from the National Technical Information Service, U.S. Department of Commerce, Springfield, Va. 22151

Dated: February 10, 1978.

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Assistant Secretary for Planning and Evaluation.

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REVISED CRITERIA SPECIFYING THE INGREDIENTS OF ACCEPTABLE PLANS TO DESEGREGATE STATE SYSTEMS OF PUBLIC HIGHER EDUCATION

In late 1969 and early 1970, the Department of Health, Education, and Welfare (HEW) notified ten states that they had not dismantled their statewide dual systems of public higher education. The letters sent by HEW at that time advised each state of its failure to adopt measures necessary to overcome the effects of past segregation and notified the states of their obligation to file a statewide plan for the desegregation of their public systems of higher education.

For the past seven years the Court reviewed HEW's efforts to desegregate these systems of higher education. In 1977, this Court found that the Department's effort had not been adequate and ordered the Department to require six of the original ten states to submit new desegregation plans and to set specific standards for those plans.

The Court found that "specific commitments (were) necessary for a workable higher education desegregation plan . . . concerning admission, recruitment and retention of students, concerning the placement and duplication of program offerings among institutions, the role and the enhancement of black institutions, and concerning changes in the racial composition of the faculties involved.

Specifically, this Court entered a Second Supplemental Order on April 1, 1977 directing the Department to transmit to the six states of Arkansas, Florida, Georgia, North Carolina, Oklahoma, and Virginia as well as the Court and the plantiffs criteria specifying the ingredients of acceptable desegregation plans for their institutions of public higher education. Accordingly, on July 5, 1977, the Department published criteria which were amended one month later to take into account suggestions offered by some of the states.

The Court further directed that HEW require each state to submit, within 60 days of receipt of the criteria, a revised desegregation plan and to accept or reject such plans within 120 days thereafter. In September 1977, in response to HEW's request, the six states submitted desegregation plans. After months of intensive negotiations, the Department announced on February 2, 1978, that it was accepting the plans of Arkansas, Florida, and Oklahoma and not accepting plans submitted by Georgia, North Carolina, and Virginia. On the same date, the Department announced that it would publish in the FEDERAL REGISTER, revised criteria which are substantially similar to the criteria published in July.

Where HEW has found that a state has not eliminated the remaining vestiges of segregation in its formerly dual system of public higher education, and is, therefore, in violation of Title VI of the Civil Rights Act of 1964, it is required first to attempt to secure compliance by voluntary means. When those efforts fail, HEW is required to seek enforcement either administratively or through the courts. 42 U.S.C. 200-1; 45 CFR 2000d-1, 45 CFR 80.7(d)(1), 80.8. These revised criteria are issued to assist such states in the preparation of desegregation plans as part of the process of securing voluntary compliance.

HEW originally developed the criteria mindful of the instructions of the Court that they comply with constitutional standards and Title VI, conform with sound educational practices, and take into account the unique importance of black colleges. Based on its experience in applying the criteria to six state systems of higher education over the past months, HEW has determined that the criteria provide specific and effective guidance to the states and at the same time, are sufficiently flexible to provide for circumstances which may vary from state to state.

PREAMBLE

I. HISTORY OF LEGAL PROCEEDINGS

The criteria set forth below initially were developed by the Department of Health, Education, and Welfare (HEW) pursuant to the specific direction of the United States District Court for the District of Columbia in *Adams v. Califano*, Civil Action No. 3095-70, Second Supplemental Order (D.D.C. April 1, 1977). The Court's Order arose from a lawsuit initiated in 1970 to require HEW to take action to enforce the provisions of Title VI of the Civil Rights Act of 1964.[1]

In 1969, the Office for Civil Rights (OCR) determined that ten States[2] were continuing to operate segregated higher education systems in violation of Title VI of the 1964 Civil Rights Act. Although the States were notified of this finding and were requested to submit corrective plans, no administrative enforcement actions were taken when the States failed to submit plans or submitted plans unacceptable to HEW. In February 1973, the *Adams* litigation resulted in a ruling requiring that HEW take appropriate enforcement action. *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973). That ruling was unanimously affirmed by the full United States Court of Appeals for the District of Columbia Circuit, although the Court of Appeals modified the District Court's order and directed HEW to attempt to secure acceptable desegregation plans from the ten States before commencing enforcement proceedings. *Adams v. Richardson*, 480 F. 2d 1159 (D.C. Cir. 1973).

[1] Title VI of the Civil Rights Act of 1964 provides: "No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. 42 U.S.C. 2000d.

[2] Arkansas, Florida, Georgia, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, Pennsylvania, and Virginia.

In 1974, HEW accepted desegregation plans from eight of the ten States.[4] Reports covering the first year of implementation were submitted to HEW in 1975. Subsequently, the plaintiffs in the *Adams* case sought further relief and on April 1, 1977, the Court ruled that the 1974 plans did not comply with the criteria previously announced by HEW and that as implemented the plans had failed to achieve significant progress toward higher education desegregation. Based on these findings, the Court ordered HEW to develop and issue within 90 days specific criteria to guide the six States in the preparation of revised desegregation plans.

II. LEGAL AND EDUCATIONAL PRINICIPLES

A. *De jure segregation*

These criteria will be applied to a state which formerly operated a dual system of public higher education under state law, if the Office for Civil Rights determines after investigation that the state has failed to remove the vestiges of racial segregation in its system in violation of Title VI.

B. *Affirmative duty to take effective steps to eliminate de jure segregation*

Where there has been past de jure segregation, states are required to take affirmative remedial steps and to achieve results in overcoming the effects of prior discrimination. HEW's regulation implementing Title VI provides that:

> In administering a program regarding which the recipient has previously discriminated against persons on the ground of race * * *, the recipient must take affirmative action to overcome the effects of prior discrimination. 45 CFR 80.3(b)(6)(i).

The 14th Amendment also calls for more than mere abandonment of discrimination through the state's adoption of passive or neutral policies. The United States Supreme Court has held that public school officials have "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which discrimination would be eliminated root and branch." *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 437-38 (1968).

The affirmative duty to desegregate applies with equal force to higher education. *Norris* v. *State Council of Higher Education*, 327 F. Supp. 1368 (E.D. Va. 1971), *aff'd per curiam*, 404 U.S. 907 (1971); *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458 (M.D. Ala. 1967), *aff'd* 369 U.S. 215 (1967); *Geier* v. *Dunn*, 337 F. Supp. 573 (M.D. Tenn. 1972). Additionally, the Supreme Court has made it clear that desegregation plans are not adequate unless they are effective. *See Green* v. *County School Board of New Kent County*, *supra*; *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

Consistent with the requirements of Title VI these criteria set forth the elements of a desegregation plan which would eliminate the effects of past discrimination.

C. *Statewide approach*

The Court of Appeals in its en banc opinion in *Adams* directed HEW to undertake a statewide approach and noted the serious problem created by the lack of viable statewide coordinated planning in higher education:

> The problem of integrating higher education must be dealt with on a statewide rather than a school-by-school basis.*

> *It is important to note that we are not here discussing discriminatory admission policies of individual institutions. To the extent that such practices are discovered, immediate corrective action is required, but we do not understand HEW to dispute that point. This controversy concerns the more complex problem of systemwide racial imbalance. *Adams* v. *Richardson*, *supra*, 480 F. 2d at 1164-1165 (footnote in original).

The Department has followed this approach since 1969 because we believe statewide planning is consistent with sound educational policy. Thus, these criteria require not only that each institution pursue nondiscriminatory student admission and faculty and staff employment practices, but also that the state system as a whole develop a comprehensive and coordinated statewide desegregation plan embodying those specific affirmative remedial steps which will prove effective in achieving significant progress toward the disestablishment of the structure of the dual system and which address the problem of "systemwide racial imbalance."

D. *Specificity—goals and timetables*

The District Court in *Adams* concluded that the plans previously adopted by the states had failed to achieve adequate desegregation progress and lacked specific commitments for change as concerns the desegregation of student bodies and faculties, enhancement of traditionally black institutions, and desegregation of the governing boards in higher education systems.

The District Court directed HEW to prepare criteria which would identify for the states the specific elements to be included in their revised desegregation plans. As the District Court stated in response to plaintiffs' oral argument on January 17, 1977:

> What I do want them to do though is be under the compulsion of a court order to submit to the states certain *specific* requirements which the states must respond to and they should be given a timetable for communicating with the states, and the states should be given some kind of timetable within which to make response. (Transcript, January 17th ruling; emphasis supplied.)

In *Geier* v. *Blanton*, 427 F. Supp. 644 (M.D. Tenn. 1977), the Court quoted its Order of December 23, 1969, expressing its dissatisfaction with a state submitted desegregation plan in that the plan as submitted "lacks specificity, in that there is no showing of funds to be expended, no statement of the number of students to be involved, and most importantly, no time schedules for either the implementation of the projects or the achievement of any goals." 427 F. Supp. at 646.

The Supreme Court has maintained that in a system with a history of segregation there is a need for remedial criteria of sufficient specificity to assure compliance with the law. See *Swann*, supra at 25-28.

In keeping with the Court's view that the Department should submit specific requirements to the states, numerical goals and timetables are set forth in the criteria. The goals are established as indices by which to measure progress toward the objective of eliminating the effects of unconstitutional de jure racial segregation and of providing equal educational opportunity for all citizens of these states. They are benchmarks and provide the states the clear and specific guidance called for by the Court.

These goals are not quotas. The Department is opposed to arbitrary quotas. Failure to achieve a goal is not sufficient evidence, standing alone, to establish a violation of Title VI. In addition, the Office for Civil Rights upon a showing of exceptional hardship or special circumstances by a state, may modify the goals and timetables. Nevertheless, the states are under a statutory obligation to devise and implement plans that are effective in achieving the desegregation of the system.

Most importantly, under these criteria and the goals they set, all applicants must be able to compete successfully. States' efforts under these criteria need not and should not lead to lowering academic standards. States may need to innovate in seeking out

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[4] Louisiana refused to submit a plan and was referred to the Department of Justice, which filed a lawsuit, (*United States* v. *Louisiana*), Civil Action No. 74-68 (M.D. La.) in January 1974. The plan submitted by Mississippi was deemed unacceptable by HEW and the matter was referred to the Department of Justice, which filed a lawsuit, *Ayers* and *United States* v. *Finch*, Civil Action No. D.C. 75-9-K (N.D. Miss.), in March 1975.

[5] The April 1, 1977, Order excludes Pennsylvania (by agreement of the parties to the *Adams* lawsuit) and Maryland, which commenced a separate injunctive suit against HEW's enforcement proceedings now pending in the United States Court of Appeals for the Fourth Circuit (*Mandel* v. *HEW*, No. 76-1494), as well as Louisiana and Mississippi.

talented students who will profit from higher education. They may need to broaden definitions of potential; to discount the effects of early disadvantage on the development of academic competence; and to broaden the talents measured in admissions tests. But new and different yardsticks for measuring potential are not lower standards. They can be more valid measures of true potential and talent. taken as a whole, these criteria seek to preserve and protect academic standards of excellence.

E. *Special considerations in developing criteria for desegregation in higher education*

A state system of higher education, as with an elementary and secondary school district, is held to an affirmative duty to take remedial action to correct past practices of segregation and discrimination. However, the nature of the remedial action required of a higher education system will differ from that required of a local education district. The court of Appeals in *Adams* noted:

> However, we are also mindful that desegregation problems in colleges and universities differ widely from those in elementary and secondary schools, and that HEW admittedly lacks experience in dealing with them.* * * As regrettable as these revelations are, the stark truth is that HEW must carefully assess the significance of a variety of new factors as it moves into an unaccustomed area. 480 F. 2d at 1164.

In *Norris* v. *State Council of Higher Education*, 327 F. Supp. 1368, 1373 (E.D. Va. 1971, aff'd per curiam, 404 U.S. 907 (1971), the court held:

> The means of eliminating discrimination in public schools necessarily differ from its elimination in colleges, but the state's duty is as exacting.

And in *Sanders* v. *Ellington*, 288 F. Supp. 937, 943 (M.D. Tenn. 1968), the court stated:

> Now in considering the time element for presentation of a plan, I have thought of the complexities of the problem. I recognize that the simple remedies which might be available to a county school board where there is involved a compulsory system of education, a free system of education, and assignment of students, are not available here. Colleges are not compulsory and everyone can testify that they're not free.

Higher education differs from elementary and secondary education in many other ways. Besides being voluntary rather than compulsory, higher education operates on a statewide or regional basis, not local; there are no "attendance zones" in higher education; higher education programs vary from institution to institution and are not uniform; students are free to leave the state or to attend private colleges in pursuit of a higher education.

Furthermore, from state to state significant differences are to be found and must be taken into consideration. In some states strong centralized "system" exists including four year and two year institutions; in others, the four year and two year institutions report to separate boards; in yet others, each institution operates under its own independent board. While none of these differences relieves a state of its obligations under Title VI or its constitutional duties, they must be taken into account in fashioning an appropriate set of criteria to be applicable to six states.

Accordingly, while desegregation cases involving individual elementary and secondary school districts are a guide to a state's duty to take corrective action, they are not dispositive of the particular methods to be designed for the dismantling of a dual system of higher education, for the desegregation of a statewide system, for the removal of the vestiges of racial segregation, and for the correction of "systemwide racial imbalance." As the courts in *Adams* have noted, these are indeed "complex" issues. These criteria are designed specifically for the higher education systems of these six states based on a careful consideration of relevant statutes and court opinions and with due consideration to the unique characteristics of higher education.[4]

F. *The unique role of the traditionally black colleges*

In keeping with the instructions of the Court, the criteria recognize the unique importance of traditionally black colleges in meeting the educational needs of black students. More than 80 percent of all black college graduates have been trained at black colleges. In the mid-seventies, black colleges continue to graduate almost forty percent of all blacks who receive college degrees.[7]

Thus it is with good reason that the Court of Appeals in *Adams* recognized the need to take into account "the special problems of black colleges."

> Perhaps the most serious problem in this area is the lack of state-wide planning to provide more and better trained minority group doctors, lawyers, engineers and other professionals. A predicate for minority access to quality post-graduate programs is viable, co-ordinated state-wide higher education policy that takes into account the special problems of minority students and of Black colleges. * * * (T)hese Black institutions currently fulfill a crucial need and will continue to play an important role in Black higher education. 480 F. 2d at 1164-1165.

Again in 1977, the District Court in its Second Supplemental Order, p. 4, quoted the above language of the Court of Appeals and went on to state:

> The process of desegregation must not place a greater burden on Black institutions or Black students' opportunity to receive a quality public higher education. The desegregation process should take into account the unequal status of the Black colleges and the real danger that desegregation will diminish higher education opportunities for Blacks. Without suggesting the answer to this complex problem, it is the responsibility of HEW to devise criteria for higher education desegregation plans which will take into account the unique importance of Black colleges and at the same time comply with the Congressional mandate.

The Department does not take this language to mean that the traditionally black institutions are exempt from the Constitution or the requirements of Title VI. To the contrary, traditionally black and traditionally white institutions are subject to the same constitutional and congressional mandate to provide an education to all citizens without discrimination or segregation. White and black institutions are to function as part of a unitary system free of the vestiges of state imposed racial segregation. However, as the Court has instructed, the transition to a unitary system must not be accomplished by placing a disproportionate burden upon black students, faculty, or institutions or by reducing the educational opportunities currently available to blacks.

To achieve the objectives of Title VI, precise methods will need to be fashioned for institutions within a state, each appropriate to the task of overcoming the effects of prior discrimination in the particular instance. Each method will be enforced with equal force and determination. Each method is designed to achieve the same constitutional standard.

III. CONSULTATION PROCESS

In the preparation of the criteria originally promulgated pursuant to court instruction, the Department undertook an extensive consultation process within the Department and with interested outside parties. In an effort to assure that these criteria were both legally and educationally sound, a departmental task force was established to guide their development. The task force combined the multiple disciplines and varied expertise needed to resolve the complex issues and educational policies involved in this desegregation process. Serving on the task force were the General Counsel, the Director of the Office for Civil Rights, the Assistant Secretary for Education, the Commissioner of Education, and

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[4] For a useful discussion of these issues see Note, "The Affirmative Duty To integrate Higher Education," 70 *Yale Law Journal* 666 (1970).

[5] See Elias Blake, Public Policy and the Higher Education of Black Americans," Staff Report, Subcommittee on Constitutional Rights of the Committee on the Judiciary, 94th Cong. 2d Sess. 1976.

[7] National Center for Education Statistics, Earned Degrees Survey, 1975-76.

the Assistant Secretary for Planning and Evaluation.

The Department also embarked on a program of open dialogue and consultation with parties of interest. The task force members conferred with representatives of the six states collectively and individually. The representatives included college presidents, education officials, and aides to Governors. A special meeting was held with students who attend the public colleges in the six states and representatives of several national student organizations. Four meetings were held with officials of the amicus curiae, National Association for Equal Opportunity in Higher Education, an association of the presidents of 110 predominantly black colleges and universities, both state supported and private. Two panels of nationally recognized educators met for half day sessions to advise the Department.

Finally, plaintiffs' representatives devoted many hours to reviewing and commenting on drafts of the criteria. They also convened a meeting for the Department with 28 citizens from these six states who are most familiar with the higher education desegregation efforts in their respective states.

The Department assumes full and sole responsibility for the content of these criteria. The consultations enumerated above were exceedingly helpful to the Department in the preparation of these criteria, but these discussions do not imply concurrence in the criteria in whole or in part by other parties.

Higher educational systems in these and other states are undergoing difficult adjustments caused by fiscal and demographic trends beyond the control of individual states. Accordingly, the criteria developed for the six states under the *Adams* Order, focused on desegregation efforts to be undertaken within the next five years. Similarly, OCR will seek plans that contain five-year goals from other states which are found to have a duty to eliminate the vestiges of duality in their systems of higher education.

As each state attains the goals set forth in its plan, OCR will assess, in cooperation with that state, the progress thereby made in order to determine what additional steps, if any, are necessary to complete the desegregation process. Furthermore, OCR will periodically review these criteria to assure their adequacy in meeting constitutional requirements, their consistency with rulings of the courts in higher education desegregation, and the mandate of Title VI.

Elements of a Plan

I. Disestablishment of the Structure of the Dual System

An acceptable plan shall commit the state to the goal of organizing and operating the system and institutions of higher education in a manner that promises realistically to overcome the effects of past discrimination and to disestablish the dual system, and which assures that students will be attracted to each institution on the basis of educational programs and opportunities uninhibited by past practices of segregation.

To achieve the disestablishment of the structure of the dual system, each plan shall:

A. *Define the mission of each institution within the state system on a basis other than race.*

Each mission statement shall include at a minimum:

1. The level, range and scope of programs and degrees offered;

2. Geographic area served by the institution; and

3. The projected size of the student body and staff, for each year of the life of the plan.

B. *Specify steps to be taken to strengthen the role of traditionally black institutions in the state system.*

In support of the specific steps required by I.B., the plan shall include:

1. Commitments that necessary improvements will be made to permit the traditionally black institutions to fulfill their defined mission. These improvements will extend to physical plant and equipment; quality and range of program offerings; number and quality of faculty; student, faculty and professional staff services; student financial assistance, and other financial support;

2. Commitments that traditionally black institutions will have the resources (including those enumerated in item 1 above), which are at least comparable to those at traditionally white institutions having similar missions.

3. An assessment of the physical plant at traditionally black institutions; and

4. A detailed discription of the resources, expressed in dollars and in numbers of personnel to be assigned, which the state system will provide (and the source for such funds) in order to implement the steps specified in I.B. reported by year for the life of the step or activity.

C. *Commit the state to take specific steps to eliminate educationally unnecessary program duplication among traditionally black and traditionally white institutions in the same service area.*

To this end, the plan shall identify existing degree programs (other than core curricula) among institutions having identical or overlapping service areas and indicate specifically with respect to each area what steps the state will take to eliminate such duplication. The elimination of such program duplication shall be carried out consistent with the objective of strengthening the traditionally black colleges.

D. *Commit the state to give priority consideration to placing any new undergraduate, graduate, or professional degree programs, courses of study etc., which may be proposed, at traditionally black institutions, consistent with their missions.*

E. *Commit the state to withhold approval of any changes in the operation of the state system or of any institutions that may have the effect of thwarting the achievement of its desegregation goals.*

F. *Commit the State to advise OCR of proposed major changes in the mission or the character of any institution within the state system which may directly or indirectly affect the achievement of its desegregation goals prior to their formal adoption.*

Such proposed changes include but are not limited to: the establishment or major expansion of programs of study, of departments, or institutions; the alteration of two year to four year institutions; the conversion of a private to a public institution; or the closing or merger of institutions or campuses.

G. *Specify timetables for sequential implementation of the actions necessary to achieve these goals as soon as possible but no later than within five years (by the close of the fifth full academic year after the plan is accepted) unless compelling justification for a longer period for compliance is provided to and accepted by the Department.*

The plan shall include interim benchmarks and goals from which progress toward these objectives may be measured. These timetables and benchmarks shall be appropriate to the nature of the action to be taken. For example, studies of physical plant and resources comparability should be completed promptly; corrective actions (including capital construction) will require longer time periods.

H. *Commit the state and all its involved agencies and subdivisions to specific measures for achievement of the above objectives.*

Such measures may include but are not limited to establishing cooperative programs consistent with institutional missions; reassigning specified programs, course offerings, resources and/or services among institutions; realigning the land grant academic programs so that research, experiment and other educational services are redistributed on a nonracial basis; and merging institutions or branches thereof, particularly where institutions or campuses have the same or overlapping services areas. The measures taken pursuant to this section should be consistent with the objective of strengthening the traditionally black colleges. A detailed description

of these measures need not be submitted at the time the plan is filed, but should be filed as a supplementary statement within 30 days thereafter for review and comment by OCR. Measures that offer no reasonable possibility of achieving the goals listed above will be rejected by OCR. Revised measures will be required before the plan can be accepted.

II. DESEGREGATION OF STUDENT ENROLLMENT

An acceptable plan shall commit the state to the goal of assuring that the system as a whole and each institution within the system provide an equal educational opportunity, are open and accessible to all students, and operate without regard to race and on a desegregated basis.

To achieve the desegregation of student enrollment, each plan shall:

A. *Adopt the goal that for two year and four year undergraduate-public higher education institutions in the state system, taken as a whole, the proportion of black high school graduates throughout the state who enter such institutions shall be at least equal to the proportion of white high school graduates throughout the state who enter such institutions.*

B. (1) *Adopt the goal that there shall be an annual increase, to be specified by each state system, in the proportion of black students in the traditionally white four year undergraduate public higher education institutions in the state system taken as a whole and in each such institution; and*

(2) *Adopt the objective of reducing the disparity between the proportion of black high school graduates and the proportion of white high school graduates entering[a] traditionally white four year and upper division undergraduate public higher education institutions in the state system; and adopt the goal of reducing the disparity by at least fifty per cent by the final academic year of the plan. However, this shall not require any state to increase by that date black student admissions by more than 150% above the admissions for the academic year preceding the year in which the plan is requested by HEW.*[b]

[a] For the purposes of this subsection, the term entering includes first-time transfers from two year and other institutions.

[b] Thus, where the present entry by black students in four year traditionally white institutions is at a rate of 1,000 students per year and a fully proportional rate would be 3,000 students per year, the state's goal would be an entry rate of 2,000 students per year five years thereafter. A state where the present entry is at a rate of only 500 students per year and full proportionality would be 3,000 students per year would not by that date have to close half the gap (by a rate of 1,750 per year) but only achieve an entry rate of 1,250 students, which is 150% over its present rate of 500.

C. *Adopt the goal that the proportion of black state residents who graduate from undergraduate institutions in the state system and enter graduate study or professional schools in the state system shall be at least equal to the proportion of white state residents who graduate from undergraduate institutions in the state system and enter such schools.*

This goal (and interim benchmarks or goals) shall be separately stated for each major field of graduate and professional study. To assure that this goal can be met in the immediate future special recruitment efforts should be considered at traditionally black institutions. Particular attention should be given to increasing black student enrollment and graduation from those traditionally white four year undergraduate institutions which serve as the feeder institutions for the graduate and professional schools. Achievement of this goal is of particular importance in light of the specific concern expressed by the Court of Appeals in Adams. In assessing progress toward this goal, OCR will give consideration to the number of blacks from each state who enroll in graduate and professional schools outside the state system.

D. *Adopt the goal of increasing the total proportion of white students attending traditionally black institutions.*

Increased participation by white students at traditionally black institutions must be a part of the process of desegregation of the statewide system of higher education. However, pursuant to the admonition of the courts in *Adams*, "The desegregation process should take into account the unequal status of the Black colleges and the real danger that desegregation will diminish higher education opportunities for Blacks." Civil Action No. 3095-70, Second Supplemental Order at p. 4. The following steps are designed to guard against the diminution of higher educational opportunities for black students, to take into account the unique importance of traditionally black colleges and to comply with the mandate of Title VI. Establishment of numerical goals for the enrollment of white students at traditionally black institutions must be preceded by an increasing enrollment of black students in the higher education system and at the traditionally white institutions, as is required by Section II of these criteria. It must also be preceded by the accomplishment of specific steps to strengthen the role of traditionally black institutions, eliminate program duplication, locate new programs at black institutions, and by such other measures as are set forth in Section I.

OCR shall annually review the progress made by each state in increasing participation by black students in higher education and in the disestablishment of the dual school system. Two years after the commencement of the plan, and consistent with such progress, each state system shall specify annual numerical goals for increasing the participation of white students attending the traditionally black institutions.

E. *Commit the state to take all reasonable steps to reduce any disparity between the proportion of black and white students completing and graduating from the two year, four year and graduate public institutions of higher education, and establish interim goals, to be specified by the state system for achieving annual progress.*

F. *Commit the state to expand mobility between two year and four year institutions as a means of meeting the goals set forth in these criteria.*

G. *Specify numeric goals for II. A, B, and C, and timetables for sequential implementation of actions necessary to achieve these goals as soon as possible but not later than within five years unless another date is specified in this section.*

H. *Commit the state and all its involved agencies and subdivisions to specific measures to achieve these goals.*

Such measures may include, but are not limited to reviewing, monitoring, and revising, as necessary, procedures for student recruitment, admissions, compensatory instruction, counseling, financial aid, and staff and faculty development programs. The detailed description of these measures need not be submitted at the time the plan is filed, but should be filed as a supplementary statement within 30 days thereafter for review and comment by OCR. Measures that offer no reasonable possibility of achieving the numerical goals will be rejected by OCR. Revised measures will be required before the plan can be accepted.

III. DESEGREGATION OF FACULTY, ADMINISTRATIVE STAFFS, NONACADEMIC PERSONNEL, AND GOVERNING BOARDS

An acceptable plan shall commit the state system to the goal of increasing the number and proportion of black employees, academic and non-academic, throughout the system and of increasing representation of black citizens among appointive positions on the governing boards of the state system and of individual institutions.

To achieve the desegration of faculty, administrators, other personnel, and governing boards, each plan shall:

A. *Adopt the goal that the proportion of black faculty and of administrators at each institution and on the staffs of each governing board, or any other state higher education entity, in positions not requiring the doctoral degeee, shall at least equal the proportion of black students graduating with mas-*

ters degrees in the appropriate discipline from institutions within the state system, or the proportion of black individuals with the required credentials for such positions in the relevant labor market area, whichever is greater.

B. *Adopt the goal that the proportion of black faculty and of administrators at each institution and on the staffs of each governing board or any other state higher education entity, in positions requiring the doctoral degree, shall at least equal the proportion of black individuals with the credentials required for such positions in the relevant labor market area.*

C. *Adopt the goal that the proportion of black non-academic personnel (by job category) at each institution and on the staffs of each governing board or any other state higher education entity, shall at least equal the proportion of black persons in the relevant labor market area.*

D. *Assure hereafter and until the foregoing goals are met that for the traditionally white institutions as a whole, the proportion of blacks hired to fill faculty and administrative vacancies shall not be less than the proportion of black individuals with the credentials required for such positions in the relevant labor market area.*

E. *Specify numeric goals and timetables for sequential implementation of the actions necessary to achieve these objectives including interim benchmarks from which progress toward the objectives may be measured.*

These goals, timetables, and benchmarks shall be established in light of, and shall specify, the current and projected rates of vacancies in the various job categories, present and projected labor market availability, and other relevant factors.

F. *Commit the state system to take specific measures to achieve these objectives.*

Such measures may include, but are not limited to employment programs providing centrilized recruitment, vacancy and applicant listings; transfer options; faculty development programs permitting release time for black faculty to attain the terminal degree; and the interchange of faculty on a temporary or permanent basis among traditionally white and traditionally black institutions within the state system. The detailed description of these measures need not be submitted at the time the plan is filed, but should be filed as a supplementary statement within 30 days thereafter for review and comment by OCR. Measures that offer no reasonable possibility of achieving the goals listed above will be rejected by OCR. Revised measures will be required before the plan can be accepted.

G. *Adopt the goal of increasing the numbers of black persons appointed to systemwide and institutional governing boards and agencies so that these boards may be more representative of the racial population of the state or of the area served.*

IV. SUBMISSION OF PLANS AND MONITORING

A. After HEW has determined that a state has not eliminated the vestiges of desegregation in its former dual system of public higher education, the state shall submit to OCR a desegregation plan for its system of public higher education to implement the foregoing criteria.

1. The plan shall commit the state to substantial progress toward each of the goals in the first two years of the plan.

2. The plan shall be signed by the governor and by each official or designated person representing the agencies, associations, commissions, offices, and/or institutions responsible for adopting the systemwide and insitutional goals described therein. Such persons or entities must be authorized under state law to perform all actions necessary to achieve these goals.

3. The plan shall certify that achievement of the goals and interim benchmarks specified therein has been adopted as official policy of each official or agency.

B. It is recommended that each state establish a biracial citizens advisory/monitoring committee to assist the state in monitoring the implementation of the plan.

C. Each state shall submit to OCR by August 15 of each year after a plan's acceptance, a comprehensive narrative assessment of its desegregation efforts in the most recent academic year. This narrative assessment shall include:

1. A description of the specific measures which have been taken to achieve the objectives enumerated in the plan and in the criteria;

2. A description of the results achieved, including quantitative indices where appropriate or required;

3. An analysis of the reasons why any steps taken proved inadequate or insufficient; and

4. A description of the steps the state will take to achieve progress and to maintain the timetables set forth in the plan.

D. OCR shall review such narrative reports. If good cause for the failure to meet interim goals is not demonstrated, OCR may impose more stringent requirements, including advance approval by OCR of desegregation methods, in order to assure achievement of the goals of the plan. In the alternative, the Department may initiate enforcement proceedings under Title VI of the Civil Rights Act of 1964, if compliance with Title VI cannot be achieved by voluntary means.

E. Each plan shall provide that the state will furnish to OCR statistical reports, assessments, and such other information as OCR may deem necessary from time to time in order to determine the effectiveness of the state's efforts to achieve the goals described in these criteria. Such information shall include annual statistical reports in substantially the same format used previously by the affected states pursuant to earlier desegregation plans. Specific dates for the submission of the reports will be established by OCR. In the event that subsequent developments call for the submission of additional data, such requirements will be announced after consultation with the states, and the states and institutions shall have sufficient time to develop the system needed for the gathering of additional data.

V. DEFINITIONS

As used in these criteria:

A. "Department" refers to the U.S. Department of Health, Education, and Welfare. In instances where the "Department" is to take certain actions, they may be performed by the Office for Civil Rights or the Director, Office for Civil Rights, on behalf of the Department.

B. "Institution" means any school, college, junior or community college, university, professional or graduate school, administered by or as an agency of the state government. Four year institution means any school, college, or university that offers a baccalaureate or graduate degree. For the purpose of these criteria, "institution" does not refer to private schools or colleges.

C. "State system" means the aggregate of all state public institutions of higher education within the state, whether or not under the governance of the same state agency or board.

D. "Student" means any person enrolled in an instructional program, whether full-time or part-time, subject to exceptions to be specified by the Office For Civil Rights.

E. "Faculty" means all persons employed by an institution as full-time instructional personnel.

F. "Labor market area" means the geographical area in which an institution or campus traditionally recruits or draws applicants possessing the requisite credentials for vacancies in faculty, administrative, or non-academic personnel positions.

G. "Governing board" means that appointed or elected body, whether or not responsible to the governor of a state or to the state legislature, which is charged under state law with the ultimate responsibility for the administration and operation of institutions within the state system of public higher education. A "governing board" may be responsible for the entire

system, for a single campus or institution thereof, or for a specified group of campuses or institutions.

Dated: February 2, 1978.

DAVID S. TATEL,
Director, Office for Civil Rights.

[FR Doc. 78-4091 Filed 2-14-78; 8:45 am]

[4210-01]

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary

[Docket No. N-78-841]

FEDERAL EQUAL HOUSING OPPORTUNITY COUNCIL

Establishment and Functioning

AGENCY: Department of Housing and Urban Development.

ACTION: Notice.

SUMMARY: The purpose of this notice is to place in the public record information regarding the establishment and functioning of the Federal Equal Housing Opportunity Council.

FOR FURTHER INFORMATION CONTACT:

Lloyd Davis, Director, Office of Voluntary Compliance, 451, 7th Street SW., Room 5228, Washington, D.C. 20410, Phone, 202-755-5904.

Section 1—Establishment of the Council

The provisions of Executive Order 11063 (27 FR 11527, effective November 20, 1962, and section 808 of Title VIII of the Civil Rights Act of 1968, as amended (42 U.S.C. § 3608) set forth requirements that Federal agencies function in a manner that deters housing discrimination and affirmatively promotes fair housing and equal opportunity. Further, under Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d) each agency is responsible for assuring nondiscrimination in programs involving Federal financial assistance. In accordance with these authorities, and in an effort to assist Federal agencies in fulfilling their fair housing and equal opportunity responsibilities, the Department of Housing and Urban Development (hereafter HUD), established the Federal Equal Housing Opportunity Council ("Council").

Section 2—Functions

The Council is chaired by the HUD Assistant Secretary for Fair Housing and Equal Opportunity, and is open to all Federal agencies and departments. The Council has developed three primary goals to be achieved by each member agency:

A. Planning federal facilities in locations where there is shown to exist, on a nondiscriminatory basis, an adequate supply of low and moderate income housing with adequate access by public transportation from other areas of the urban center and adequate parking facilities.

B. Establishing and maintaining an Equal Housing Locator Service, either separately or in cooperation with agencies in close proximity, available to all agency employees, in headquarters and field offices.

C. Making affirmative use of agency funding authority with respect to government sponsored projects to further the purposes of Title VIII of the Civil Rights Act of 1968 (as amended).

To institutionalize the process of agency pursuit of Council goals, HUD negotiates and executes Interagency Fair Housing Agreements with member agencies. In view of HUD's leadership role under Title VIII, primary staff responsibility for the Council rests with the HUD Assistant Secretary for Fair Housing and Equal Opportunity and the Office of Voluntary Compliance.

Section 3—Meetings, Procedures and Reports

The Council meets quarterly during the fiscal year. The time and place of each meeting and the matters to be considered will be published in advance of the meeting. HUD requests biannual progress reports on agency activities to achieve Council goals, with updates as required. HUD issues an annual report on the accomplishments of the Council, titled The Federal Agencies and Fair Housing. HUD also submits reports to OMB relative to estimated cost incurred for the Council to function. Interagency Fair Housing Agreements signed with HUD will be published in the FEDERAL REGISTER and made available through the mail to interested public and private organizations.

Section 4—Council Members

HUD has requested that the head of an agency or department commencing its participation on the Council appoint a representative and an alternate to attend Council meetings and work with HUD in pursuit of the Council goals. As an appointee for the agency or department head, each representative has decisionmaking authority with respect to matters under consideration. The level of appointment allows for timely implementation of Council efforts.

Section 5—Travel Expenses, Administrative Support, Financing

Financial and administrative support for the Council is provided by the Department of HUD, Office of Fair Housing and Equal Opportunity. Travel expenses incurred by representatives in attending quarterly meetings is borne by the individual agencies.

AUTHORITY: (Section 7(d) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(d)).

Issued at Washington, D.C., January 31, 1978.

CHESTER C. MCGUIRE,
Assistant Secretary for Fair Housing and Equal Opportunity.

[FR Doc. 78-4087 Filed 2-14-78; 8:45 am]

[4310-84]

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

STATE DIRECTOR, CALIFORNIA

Redelegation of Authority

Under the authority of Secretarial Order No. 3003, dated April 26, 1977, subject to limitations of section 4(b) of that order, the State Director, California, is authorized to issue all initial grants, permits, and amendments thereto, across public and other appropriate Federal lands for the SOHIO pipeline and associated ancillary facilities in the States of Arizona, California, New Mexico, and Texas. This authorization is pursuant to section 28 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. 185.

The California State Director shall not redelegate this authority.

GEORGE L. TURCOTT,
Acting Director.

FEBRUARY 3, 1978.

[FR Doc. 78-4134 Filed 2-14-78; 8:45 am]

[4410-01]

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 77-34]

ROOSEVELT P. JACKSON

Hearing

Notice is hereby given that on November 9, 1977, the Drug Enforcement Administration, Department of Justice, issued to Roosevelt P. Jackson, M.D., Atlanta, Ga., an Order to Show Cause as to why his DEA Certificate of Registration, AJ1172472, should not be revoked.

Thirty days having elapsed since the said Order to Show Cause was received by the Respondent, and written request for a hearing having been filed with the Drug Enforcement Administration, notice is hereby given that a hearing in this matter will be held commencing at 10 a.m. on Wednesday, March 1, 1978, in Courtroom No. 205, State Court of Fulton County Courthouse, 160 Pryor Street SW., Atlanta, Ga.

Dated: February 9, 1978.

PETER B. BENSINGER,
Administrator,
Drug Enforcement Administration.

[FR Doc. 78-4131 Filed 2-14-78; 8:45 am]

Federal Register
Vol. 58, No. 212
Thursday, November 4, 1993

Presidential Documents

Title 3—

The President

Executive Order 12876 of November 1, 1993

Historically Black Colleges and Universities

By the authority vested in me as President by the Constitution and the laws of the United States of America, in order to advance the development of human potential, to strengthen the capacity of historically Black colleges and universities to provide quality education, and to increase opportunities to participate in and benefit from Federal programs, it is hereby ordered as follows:

Section 1. There shall be established in the Department of Education the President's Board of Advisors on Historically Black Colleges and Universities ("Board of Advisors" or "Board"), a Presidential advisory committee. The Board of Advisors shall issue an annual report to the President on participation by historically Black colleges and universities in federally sponsored programs. The Board of Advisors will also provide advice to the Secretary of Education ("Secretary") and in the annual report to the President on how to increase the private sector role in strengthening historically Black colleges and universities, with particular emphasis on enhancing institutional infrastructure and facilitating planning, development, and the use of new technologies to ensure the goal of long-term viability and enhancement of these institutions. Notwithstanding the provisions of any other Executive order, the responsibilities of the President under the Federal Advisory Committee Act, as amended (5 U.S.C. App. 2), which is applicable to the Board of Advisors, shall be performed by the Secretary, in accordance with the guidelines and procedures established by the Administrator of General Services.

Sec. 2. The members of the Board of Advisors shall be appointed by the President. The Board shall include representatives of historically Black colleges and universities, other institutions of higher education, business and financial institutions, private foundations, and secondary education.

Sec. 3. The White House Initiative on Historically Black Colleges and Universities, housed in the Department of Education, shall: (1) provide the staff, resources, and assistance for the Board of Advisors; (2) assist the Secretary in the role of liaison between the executive branch and historically Black colleges and universities; and (3) serve the Secretary in carrying out his responsibilities under this order.

Sec. 4. To carry out the purposes of this order, each executive department and each agency designated by the Secretary shall, consistent with applicable law, enter into appropriate grants, contracts, or cooperative agreements with historically Black colleges and universities. The head of each agency subject to this order shall establish an annual goal for the amount of funds to be awarded in grants, contracts, or cooperative agreements to historically Black colleges and universities. Consistent with the funds available to the agency, the goal shall be an amount above the actual amount of such awards from the previous fiscal year and shall represent a substantial effort to increase the amounts available to historically Black colleges and universities for grants, contracts, or cooperative agreements. In order to facilitate the attainment of the goals established by this section, the head of each agency subject to this order shall provide technical assistance and information to historically Black colleges and universities regarding the program activities of the agency and the preparation of applications or proposals for grants, contracts, or cooperative agreements.

Sec. 5. Each executive department and designated agency shall appoint a senior official, who is a full-time officer of the Federal Government and who is responsible for management or program administration, to report directly to the department or agency head or designated agency representative on department or agency activity under this order and to serve as liaison to the Board and White House Initiative. To the extent permitted by law and regulation, each executive department and designated agency shall provide appropriate information requested by the Board and the White House Initiative staff pursuant to this order.

Sec. 6. Each executive department and designated agency shall develop an annual plan for, and shall document, the agency's effort to increase the ability of historically Black colleges and universities to participate in federally sponsored programs. These plans shall describe the measurable objectives for proposed agency actions to fulfill this order and shall be submitted at such time and in such form as the Secretary shall designate. In consultation with participating agencies, the Secretary shall review these plans and develop, with the advice of the Board of Advisors, an integrated Annual Federal Plan for Assistance to Historically Black Colleges and Universities for consideration by the President. The Secretary shall ensure that each president of a historically Black college or university is given the opportunity to comment on the proposed Annual Federal Plan prior to consideration by the President. Each participating agency shall submit to the Secretary and the Director of the Office of Management and Budget, an Annual Performance Report that shall measure each agency's performance against the objectives set forth in its annual plan. The Director of the Office of Management and Budget shall be responsible for overseeing compliance with the Annual Federal Plan.

Sec. 7. Each year the Board of Advisors shall report to the President on the progress achieved in enhancing the role and capabilities of historically Black colleges and universities, including findings and recommendations on the Annual Performance Reports, described in Section 6, submitted by the participating agencies. The Secretary shall disseminate the annual report to appropriate members of the executive branch and make every effort to ensure that findings of the Board of Advisors are taken into account in the policies and actions of every executive agency.

Sec. 8. The Department of Education, along with other Federal departments or agencies, shall work to encourage the private sector to assist historically Black colleges and universities through increased use of such devices and activities as: (1) private sector matching funds to support increased endowments; (2) private sector task forces for institutions in need of assistance; and (3) private sector expertise to facilitate the development of more effective ways to manage finances, improve information management, strengthen facilities, and improve course offerings. These steps will be taken with the goals of enhancing the career prospects of graduates of historically Black colleges and universities and increasing the number of such graduates with degrees in science and technology.

Sec. 9. In all its recommendations, the Board of Advisors shall emphasize ways to support the long-term development plans of each historically Black college and university. The Board of Advisors shall recommend alternative sources of faculty talent, particularly in the fields of science and technology, including faculty exchanges and referrals from other institutions of higher education, private sector retirees, Federal employees and retirees, and emeritus faculty members at other institutions of higher education.

Sec. 10. The Board of Advisors, through the White House Initiative, shall provide advice on how historically Black colleges and universities can achieve greater financial security. To the maximum extent possible, the Board of Advisors shall consider how such institutions can enlist the resources and experience of the private sector to achieve such security.

Sec. 11. The Director of the Office of Personnel Management, in consultation with the Secretary and the Secretary of Labor, shall develop a program to improve recruitment and participation of graduates and undergraduate students of historically Black colleges and universities in part-time, summer and permanent positions in the Federal Government.

Sec. 12. Administration: (a) Members of the Board of Advisors shall serve without compensation, but shall be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law for persons serving intermittently in the Government service, (5 U.S.C. 5701–5707).

(b) The Board of Advisors and the White House Initiative shall obtain funding for their activities from the Department of Education.

(c) The Department of Education shall provide such administrative services for the Board as may be required.

Sec. 13. Executive Order No. 12677 of April 28, 1989, is hereby revoked.

William J. Clinton

THE WHITE HOUSE,
November 1, 1993.

[FR Doc. 93–27309
Filed 11–2–93; 2:30 pm]
Billing code 3195–01–P

Editorial note: For the President's remarks on signing this Executive order, see the *Weekly Compilation of Presidential Documents* (vol. 29, Issue 44.)

Presidential Documents

Executive Order 12677 of April 28, 1989

Historically Black Colleges and Universities

By the authority vested in me as President by the Constitution and laws of the United States of America, in order to advance the development of human potential, to strengthen the capacity of historically Black colleges and universities to provide quality education, and to increase opportunities to participate in and benefit from Federal programs, it is hereby ordered as follows:

Section 1. There shall be established in the Department of Education, an Advisory Commission, the President's Board of Advisors on Historically Black Colleges and Universities. The members of the Board shall be appointed by the President. The Secretary of Education, with the advice of the Board of Advisors, shall supervise the annual development of a Federal program designed to achieve an increase in the participation by historically Black colleges and universities in federally sponsored programs. The Board of Advisors will also provide advice on how to increase the private sector role in strengthening historically Black colleges and universities. Particular emphasis shall be given to facilitating technical, planning, and development advice to historically Black colleges and universities, with the goal of ensuring the long-term viability of these institutions.

Sec. 2. The Board of Advisors shall include appropriate representatives of historically Black colleges and universities, of other institutions of higher education, of business and finance, of private foundations, and of secondary education.

Sec. 3. The White House Initiative on Historically Black Colleges and Universities, housed in the Department of Education, shall provide the staff, resources, and assistance for the Board of Advisors on Historically Black Colleges and Universities; shall assist the Secretary of Education in the role of liaison between the Executive branch and historically Black colleges and universities; and shall serve the Secretary of Education in carrying out his responsibilities under this order.

Sec. 4. Each Executive department and those Executive agencies designated by the Secretary of Education shall establish an annual plan to increase the ability of historically Black colleges and universities to participate in federally sponsored programs. These plans shall describe measurable objectives for proposed agency actions to fulfill this order and shall be submitted at such time and in such form as the Secretary of Education shall designate. In consultation with participating Executive agencies, the Secretary of Education shall review these plans and develop an integrated Annual Federal Plan for Assistance to Historically Black Colleges and Universities for consideration by the President.

Sec. 5. The Secretary of Education shall ensure that each president of a historically Black college or university is given the opportunity to comment on the proposed Annual Federal Plan prior to its consideration by the President.

Sec. 6. Each participating agency shall submit to the Secretary of Education a midyear progress report and at the end of the year an Annual Performance Report that shall specify agency performance against its measurable objectives.

Sec. 7. Every third year, the Secretary of Education shall oversee a special review by every designated Executive department and agency of its programs

to determine the extent to which historically Black colleges and universities are given an equal opportunity to participate in federally sponsored programs. This review will examine unintended regulatory barriers, determine the adequacy of announcements of program opportunities of interest to these institutions, and identify ways of eliminating inequalities and disadvantages.

Sec. 8. The Board of Advisors, working through the White House Initiative, shall provide advice on how historically Black colleges and universities can achieve greater financial security through the use of improved business, accounting, management, and development techniques. To the maximum extent possible, the Board of Advisors shall enlist the resources and experience of the private sector in providing the assistance. To this end, historically Black colleges and universities shall be given high priority within the White House Office of National Service.

Sec. 9. The White House Office of National Service, along with other Federal offices, shall work to encourage the private sector to assist historically Black colleges and universities through increased use of such devices and activities as: (1) private sector matching funds to support increased endowments, (2) private sector task forces for institutions in need of assistance, and (3) private sector expertise to facilitate the development of more effective ways to manage finances, improve information management, strengthen faculties, and improve course offerings. These steps will be taken with the goals of enhancing the career prospects of their graduates and increasing the number of those with careers in science and technology.

Sec. 10. In all its endeavors the Board of Advisors shall emphasize ways to support the long-term development plans of each historically Black college and university. The Secretary of Education, with the advice of the Board of Advisors, shall develop alternative sources of faculty talent, particularly in the fields of science and technology, including faculty exchanges and referrals from other institutions of higher education, private sector retirees, Federal employees and retirees, and emeritus faculty members at other institutions of higher education.

Sec. 11. The Director of the Office of Personnel Management, in consultation with the Secretary of Education and the Secretary of Labor, shall develop a program to improve recruitment and participation of graduates and undergraduate students of historically Black colleges and universities in part-time and summer positions in the Federal Government.

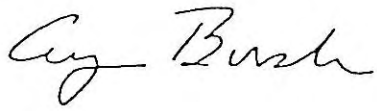
Sec. 12. Each year the Board of Advisors shall report to the President on the progress achieved in enhancing the role and capabilities of historically Black colleges and universities, including an Annual Performance Report on Executive Agency Actions to Assist Historically Black Colleges and Universities that appraises agency actions during the preceding year. The Secretary of Education shall disseminate the annual report to appropriate members of the Executive branch and make every effort to ensure that findings of the Board of Advisors are taken into account in the policies and actions of every Executive agency, including any appropriate recommendations for improving the Federal response directed by this order.

Sec. 13. Participating Executive agencies shall submit their annual plans to the Secretary of Education not later than January 15 of each year. The Annual Federal Plans for Assistance to Historically Black Colleges and Universities developed by the Secretary of Education shall be ready for consideration by the President not later than April 30 of each year.

Sec. 14. The Secretary of Education is directed to establish an Advisory Commission entitled the President's Board of Advisors on Historically Black Colleges and Universities. Notwithstanding the provisions of any other Executive order, the responsibilities of the President under the Federal Advisory Committee Act, as amended (5 U.S.C. App. 2), which are applicable to the Advisory Commission to be established by this order, shall be performed by

the Secretary of Education, in accordance with the guidelines and procedures established by the Administrator of General Services.

Sec. 15. Executive Order No. 12320 of September 15, 1981, is revoked.



THE WHITE HOUSE,
April 28, 1989.

[FR Doc. 89-10090
Filed 5-1-89; 11:18 am]
Billing code 3195-01-M

Editorial note: For the President's remarks of Apr. 28 on signing Executive Order 12677, see the *Weekly Compilation of Presidential Documents* (vol. 25, no. 17).

Presidential Documents

Proclamation 4865 of September 29, 1981

High Seas Interdiction of Illegal Aliens

By the President of the United States of America

A Proclamation

The ongoing migration of persons to the United States in violation of our laws is a serious national problem detrimental to the interests of the United States. A particularly difficult aspect of the problem is the continuing illegal migration by sea of large numbers of undocumented aliens into the southeastern United States. These arrivals have severely strained the law enforcement resources of the Immigration and Naturalization Service and have threatened the welfare and safety of communities in that region.

As a result of our discussions with the Governments of affected foreign countries and with agencies of the Executive Branch of our Government, I have determined that new and effective measures to curtail these unlawful arrivals are necessary. In this regard, I have determined that international cooperation to intercept vessels trafficking in illegal migrants is a necessary and proper means of insuring the effective enforcement of our laws.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, by the authority vested in me by the Constitution and the statutes of the United States, including Sections 212(f) and 215(a)(1) of the Immigration and Nationality Act, as amended (8 U.S.C. 1182(f) and 1185(a)(1)), in order to protect the sovereignty of the United States, and in accordance with cooperative arrangements with certain foreign governments, and having found that the entry of undocumented aliens, arriving at the borders of the United States from the high seas, is detrimental to the interests of the United States, do proclaim that:

The entry of undocumented aliens from the high seas is hereby suspended and shall be prevented by the interdiction of certain vessels carrying such aliens.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-ninth day of September, in the year of our Lord nineteen hundred and eighty-one, and of the Independence of the United States of America the two hundred and sixth.

Ronald Reagan

[FR Doc. 81-28828
Filed 9-30-81; 11:37 am]
Billing code 3195-01-M

Presidential Documents

Proclamation 4865 of September 29, 1981

High Seas Interdiction of Illegal Aliens

By the President of the United States of America

A Proclamation

The ongoing migration of persons to the United States in violation of our laws is a serious national problem detrimental to the interests of the United States. A particularly difficult aspect of the problem is the continuing illegal migration by sea of large numbers of undocumented aliens into the southeastern United States. These arrivals have severely strained the law enforcement resources of the Immigration and Naturalization Service and have threatened the welfare and safety of communities in that region.

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NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, by the authority vested in me by the Constitution and the statutes of the United States, including Sections 212(f) and 215(a)(1) of the Immigration and Nationality Act, as amended (8 U.S.C. 1182(f) and 1185(a)(1)), in order to protect the sovereignty of the United States, and in accordance with cooperative arrangements with certain foreign governments, and having found that the entry of undocumented aliens, arriving at the borders of the United States from the high seas, is detrimental to the interests of the United States, do proclaim that:

The entry of undocumented aliens from the high seas is hereby suspended and shall be prevented by the interdiction of certain vessels carrying such aliens.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-ninth day of September, in the year of our Lord nineteen hundred and eighty-one, and of the Independence of the United States of America the two hundred and sixth.

Ronald Reagan

[FR Doc. 81-28828
Filed 9-30-81; 11:37 am]
Billing code 3195-01-M

Federal Register
Vol. 45, No. 157
Tuesday, August 12, 1980

Presidential Documents

Title 3—

The President

Executive Order 12232 of August 8, 1980

Historically Black Colleges and Universities

By the authority vested in me as President by the Constitution of the United States of America, and in order to overcome the effects of discriminatory treatment and to strengthen and expand the capacity of historically Black colleges and universities to provide quality education, it is hereby ordered as follows:

1-101. The Secretary of Education shall implement a Federal initiative designed to achieve a significant increase in the participation by historically Black colleges and universities in Federally sponsored programs. This initiative shall seek to identify, reduce, and eliminate barriers which may have unfairly resulted in reduced participation in, and reduced benefits from, Federally sponsored programs.

1-102. The Secretary of Education shall, in consultation with the Director of the Office of Management and Budget and the heads of the other Executive agencies, establish annual goals for each agency. The purpose of these goals shall be to increase the ability of historically Black colleges and universities to participate in Federally sponsored programs.

1-103. Executive agencies shall review their programs to determine the extent to which historically Black colleges and universities are unfairly precluded from participation in Federally sponsored programs.

1-104. Executive agencies shall identify the statutory authorities under which they can provide relief from specific inequities and disadvantages identified and documented in the agency programs.

1-105. Each Executive agency shall review its current programs and practices and initiate new efforts to increase the participation of historically Black colleges and universities in the programs of the agency. Particular attention should be given to identifying and eliminating unintended regulatory barriers. Procedural barriers, including those which result in such colleges and universities not receiving notice of the availability of Federally sponsored programs, should also be eliminated.

1-106. The head of each Executive agency shall designate an immediate subordinate who will be responsible for implementing the agency responsibilities set forth in this Order. In each Executive agency there shall be an agency liaison to the Secretary of Education for implementing this Order.

1-107. (a) The Secretary of Education shall ensure that an immediate subordinate is responsible for implementing the provisions of this Order.

(b) The Secretary shall ensure that each president of a historically Black college or university is given the opportunity to comment on the implementation of the initiative established by this Order.

1-108. The Secretary of Education shall submit an annual report to the President. The report shall include the levels of participation by historically Black colleges and universities in the programs of each Executive agency. The report will also include any appropriate recommendations for improving the Federal response directed by this Order.

Jimmy Carter

THE WHITE HOUSE,
August 8, 1980.

[FR Doc. 80-24416
Filed 8-8-80; 2:14 pm]
Billing code 3195-01-M

Editorial Note: The President's remarks of Aug. 8, 1980, on signing Executive Order 12232, are printed in the Weekly Compilation of Presidential Documents (vol. 16, no. 32).

Appendix 2

Original Adams Case and Related Cases

THE ADAMS CASES

1. Adams v. Richardson, 356 F. Supp 92 (D.D.C. 1973)
2. Adams v. Richardson, 480 F. 2d 1159 (D.D.Cir. 1973)
3. Adams v. Weinberger, 391 F. Supp 269 (D.D.C. 1975)
4. Adams v. Matthews, 536 F. 2d 417 (D.D.Cir. 1976)
5. Adams v. Califano, 430 F. Supp. 118 (D.D.C. 1977)
6. Adams v. Bell, 711 F. 2d 161 (D.D.Cir. 1983), cert. denied 465 U.S. 1021 (1984)
7. Women's Equity Action League (WEAL) v. Bell, 743 F. 2d 42 (D.D.Cir. 1984)
8. Adams v. Bennett, 675 F. Supp. 668 (1987)
9. WEAL v. Cavazos, 879 F. 2d 880 (1989)
10. WEAL v. Cavazos, 906 F. 2d 742 (1990)

RELATED CASES

1. Council of and for the Blind v. Regan, 709 F. 2d 1521 (D.D.Cir. 1983)
2. Cannon v. University of Chicago, 441 U.S. 677 (1979)
3. Allen v. Wright, 468 U.S. 737 (1984)

Kenneth ADAMS et al., Plaintiffs,
v.
Elliot L. RICHARDSON, Individually, and as Secretary of the Department of Health, Education, and Welfare, et al., Defendants.

Civ. A. No. 3095-70.

United States District Court,
District of Columbia.

Feb. 16, 1973.

Action for declaratory and injunctive relief with respect to functions of Department of Health, Education and Welfare relative to school desegregation. On plaintiffs' motion for summary judgment and defendants' combined motion to dismiss and cross motion for summary judgment, the District Court, John H. Pratt, J., held that continuation of HEW financial assistance to segregated systems of higher education in states which had ignored HEW's requests for desegregation plan or had submitted plans found unacceptable violated rights protected by title VI of the Civil Rights Act, and HEW had duty to commence enforcement proceedings.

Judgment for plaintiffs.

[1] CIVIL RIGHTS k127.1
78k127.1
Formerly 78k9.5
Continuation of HEW financial assistance to segregated systems of higher education in states which had ignored HEW's request for desegregation plan or had submitted plans found unacceptable violated rights protected by title VI of the Civil Rights Act, and HEW had duty to commence enforcement proceedings. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

[2] CIVIL RIGHTS k127.1
78k127.1
Formerly 78k9.5
Failure of HEW to commence enforcement proceedings against school districts which had reneged on prior approved desegregation plans or were otherwise out of compliance with title VI of the Civil Rights Act could not be excused on ground that HEW was seeking voluntary compliance through negotiation and conciliation. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

[3] CIVIL RIGHTS k127.1
78k127.1
Formerly 78k9.5
HEW, before advancing or continuing to advance federal funds to school districts, has a duty to require districts presumptively in violation of Supreme Court decisions to explain or rebut such presumption and, if presumption is not overcome, to commence enforcement proceedings. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

[3] CIVIL RIGHTS k182
78k182
Formerly 78k13
HEW, before advancing or continuing to advance federal funds to school districts, has a duty to require districts presumptively in violation of Supreme Court decisions to explain or rebut such presumption and, if presumption is not overcome, to commence enforcement proceedings. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

[4] CIVIL RIGHTS k127.1
78k127.1
Formerly 78k9.5
HEW has duty under title VI of the Civil Rights Act to implement an enforcement program with respect to racially segregated vocational schools and other schools which are administered or operated by state departments of education and which are receiving federal assistance. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

[5] CIVIL RIGHTS k127.1
78k127.1
Formerly 78k9.5
Although HEW is under no obligation to effectuate provisions of title VI of the Civil Rights Act through administrative or judicial enforcement proceedings against school systems operating under desegregation order of a federal court, to the extent that resources would permit, HEW had duty to monitor such school districts and to report findings to the court concerned. Elementary and Secondary Education Amendments of 1966, § 182 as amended 42 U.S.C.A. § 2000d-5.

[6] CIVIL RIGHTS k127.1
78k127.1
Formerly 78k9.5
HEW does not have power to withhold advancement of federal funds to school districts operating under "continuing" and previously approved desegregation programs nor to recapture funds distributed to a district

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between the notice of hearing and the final determination of ineligibility. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

[7] CIVIL RIGHTS k291
78k291
Formerly 78k13.17
Plaintiffs suing for declaratory and injunctive relief with respect to duties of HEW relative to racially segregated school systems operating in violation of title VI of the Civil Rights Act were entitled to costs of action, including costs of depositions, and were entitled to attorney fees as part of the costs. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.; Act of June 23, 1972, § 718, 86 Stat. 369.

*93 Joseph L. Rauh, Jr. and John Silard, Washington, D. C., for plaintiffs.

Joseph Hannon, Asst. U. S. Atty., Washington, D. C., Robert Beale, Bateman, West & Beale, Newport News, Va., for defendants.

DECLARATORY JUDGMENT AND INJUNCTION ORDER

JOHN H. PRATT, District Judge.

This cause came before this Court upon plaintiffs' motion for summary judgment and defendants' combined motion to dismiss and cross-motion for summary judgment. Upon the entire record before this Court including the pleadings, depositions and affidavits, and upon the Memorandum Opinion of this Court dated November 16, 1972, 351 F.Supp. 636, it is hereby ORDERED that plaintiffs' motion is granted, defendants' motions are denied and plaintiffs are granted the following declaratory *94 and injunctive relief on each of the six separate causes of action: [FN*]

FN* Because of the time lag between the original date of the filing of this action and the date of this order, some of the evidence and specific information relating to compliance or non-compliance with Title VI may be somewhat out-of-date. The order should be read and interpreted with this consideration in mind.

I. HEW's Functions Under Title VI of the Civil Rights Act of 1964 Concerning Public Higher Education

A. Declaratory Judgment

(1) In January, 1969 HEW concluded that the State of Louisiana was operating a racially segregated system of higher education in violation of Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.). Between January, 1969 and February, 1970, HEW made the same administrative determination regarding the systems of higher education of the states of Mississippi, Oklahoma, North Carolina, Florida, Arkansas, Pennsylvania, Georgia, Maryland and Virginia. In letters to the ten states, HEW requested each of them to submit a desegregation plan within 120 days or less. Appendix A gives the dates of letters to each of said states.

(2) The states of Louisiana, Mississippi, Oklahoma, North Carolina and Florida have totally ignored HEW's requests of three to four years ago and have never submitted a desegregation plan.

(3) Although the other five states, Arkansas, Pennsylvania, Georgia, Maryland and Virginia, submitted to HEW between 24 and 38 months ago desegregation plans which were found unacceptable, HEW has failed formally to comment on any of these submissions in the intervening years. Appendix A lists the dates of submission of these five states.

(4) HEW has not commenced an administrative enforcement action against any of these ten states. Nor have these matters been submitted to the Justice Department for the filing of suits against any of the ten states.

(5) HEW has advanced and continues to advance Federal funds in substantial amounts for the benefit of institutions of higher education in the ten states.

(6) HEW has attempted to justify its failure to commence enforcement action on the grounds that negotiations with the ten states are still pending, the desegregation of state-wide systems is complex, and the Supreme Court standard of desegregation "at once" does not apply to public higher education.

[1] (7) The time permitted by Title VI of the Civil Rights Act of 1964 to delay the commencement of enforcement proceedings against the ten states for the purpose of securing voluntary compliance has long since passed. The continuation of HEW financial assistance to the segregated systems of higher education

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in the ten states violates the rights of plaintiffs and others similarly situated protected by Title VI of the Civil Rights Act of 1964. Having once determined that a state system of higher education is in violation of Title VI, and having failed during a substantial period of time to achieve voluntary compliance, defendants have a duty to commence enforcement proceedings.

B. Injunction

(1) Defendants, their successors, agents and employees, are required and enjoined within 120 days from the date of this Order to commence enforcement proceedings by administrative notice of hearing, or to utilize any other means authorized by law, in order to effect compliance with Title VI by the states of Louisiana, Mississippi, Oklahoma, North Carolina, Florida, Arkansas, Pennsylvania, Georgia, Maryland and Virginia.

(2) Defendants, their successors, agents and employees, are required and enjoined to provide in verified form the following data to counsel for the plaintiffs on the dates indicated:

a. Within 150 days of the date of this Order, a report of all steps they ***95** have taken to comply with the injunctive provision set forth in the preceding paragraph, including a description of what action the Justice Department has taken in any public higher education violation defendants may have referred to that Department.

b. Every sixth month after the issuance of this Order for a period of three years, so as to permit evaluation of the reasons for any delays by defendants in bringing enforcement proceedings:

1. A description of each complaint (without identification of complainants) or other information of racial segregation or discrimination in public higher education received by defendants;

2. Whenever within 120 days of receipt of such complaint or other information no administrative determination as to racial segregation or discrimination was made by HEW, an explanation of the specific reasons for the failure to make such determination;

3. Based on each such complaint or or other information, any findings by defendants as to the presence or absence of racial segregation or discrimination and the specific reasons therefor;

4. Whenever enforcement proceedings have not been commenced within 90 days of an HEW finding of racial segregation or discrimination, the specific reasons for the failure by defendants to commence such proceeding.

II. HEW's Functions Under Title VI of the Civil Rights Act of 1964 Concerning Renege or Noncompliance Districts

A. Declaratory Judgment

(1) As of the school year 1970-71, 113 elementary and secondary school districts were found by HEW to have reneged on prior approved desegregation plans or to be otherwise out of compliance with Title VI.

(2) HEW referred eight of the 113 districts to the Justice Department (only three districts have been sued by the Justice Department) and initiated seven administrative enforcement proceedings. But although HEW has known of the noncompliance of most of the remaining 98 districts since early in the 1970-71 school year, some 74 school districts remain out of compliance with Title VI without the commencement of enforcement proceedings against them.

(3) These 74 noncomplying districts have received and continue to receive substantial Federal assistance from HEW.

[2] (4) HEW has attempted to excuse its administrative inaction on the grounds that it is still seeking voluntary compliance through negotiation and conciliation.

(5) The time permitted by Title VI for securing voluntary compliance for these districts before commencing enforcement proceedings has long since passed. The continuation of HEW financial assistance to these noncomplying school districts violates the rights of plaintiffs and others similarly situated protected by Title VI of the Civil Rights Act of 1964. Having once determined that a school district is in violation of Title VI, and having failed during a substantial period of time to achieve voluntary compliance, defendants have a duty to commence enforcement proceedings.

B. Injunction

(1) Defendants, their successors, agents and employees, are required and enjoined within 60 days of the date of this Order to commence enforcement proceedings by administrative notice of hearing or to

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utilize any other means authorized by law, in order to effect compliance with Title VI by each of the school districts HEW found to be out of compliance with Title VI during the 1970-71 school year, unless defendants *96 thereafter and prior to this Court's November 16, 1972 Memorandum Opinion have made an administrative determination of compliance by the school district.

(2) Defendants, their successors, agents and employees, are required and enjoined to provide in verified form the following data to counsel for the plaintiffs on the dates indicated:

a. Within 150 days of the date of this Order, a report of all steps they have taken to comply with the injunctive provision set forth in the preceding paragraph, including a description of what action the Justice Department has taken concerning any school district defendants may have referred to the Department.

b. Every sixth month after the issuance of this Order for a period of three years, so as to permit evaluation of the reasons for any delays by defendants in bringing enforcement proceedings:

1. A description of each complaint (without identification of complainant) or other information of racial segregation or discrimination in public elementary and secondary schools received by defendants;

2. Whenever within 90 days of receipt of such complaint or other information no administrative determination as to racial segregation or discrimination was made by HEW, an explanation of the specific reasons for the failure to make such determination;

3. Based on each such complaint or other information, any finding by defendants as to the presence or absence of racial segregation or discrimination and the specific reasons therefor;

4. Whenever enforcement proceedings have not been commenced within 60 days of an HEW finding of racial segregation or discrimination, the specific reasons for the failure by defendants to commence such proceeding.

III. HEW's Functions Under Title VI of the Civil Rights Act of 1964 Concerning Compliance by Public Educational Institutions With New Supreme Court Desegregation Decisions

A. Declaratory Judgment

(1) In Alexander v. Holmes County Board of Education, 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed.2d 19 (1969), the Supreme Court required desegregation "at once" of all dual school systems. At the time of that decision (October 29, 1969), 87 school districts had HEW-approved desegregation plans which permitted desegregation to be postponed until September, 1970. Despite the Supreme Court's directive, HEW took no steps to compel desegregation in any of these 87 districts during the 1969-1970 school year.

(2) Following the decision of the Supreme Court in Swann v. Charlotte- Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), which enunciated "a presumption against schools that are substantially disproportionate in their racial composition" HEW identified 300 non-court order school districts with one or more schools composed mostly of local minority students.

(3) Initially, HEW eliminated 75 of the 300 districts from further consideration without any on-site investigation or communication with the districts because in HEW's judgment the racial disproportion of the schools in these districts was too small to constitute a violation of Swann. HEW then eliminated 134 of the remaining 225 districts from further consideration still without any on-site investigation or communication with the districts. At least 85 of these districts, which are listed in Appendix B, infra, have one or more schools substantially disproportionate in their racial composition (because at least a 20% disproportion exists between the percentage *97 of local minority pupils in the schools and the percentage in the entire school district; many of these districts actually have a much greater disproportion). Nevertheless, none of these 85 school districts was required by defendants to justify the substantial racial disproportion in its schools.

(4) HEW mailed letters to the remaining 91 school districts in the summer of 1971, notifying them that additional desegregation steps may be required under the Swann decision. Of these 91 districts, HEW received desegregation plans acceptable to HEW from 37 districts, noticed three for administrative hearing, and found Swann "not applicable" to nine.

(5) Thus 42 districts, which are listed in Appendix C, infra, were deemed by HEW to be in presumptive violation of Swann and remain so more than a year later

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while HEW continues to review them. These 42 school districts have been receiving Federal funds from HEW throughout this period of over one year.

[3] (6) With respect to the 85 school districts with one or more schools substantially disproportionate in racial composition, HEW's continuation of financial assistance thereto violates the rights of plaintiffs and others similarly situated protected by Title VI of the Civil Rights Act of 1964. Defendants, before advancing or continuing to advance Federal funds in violation of Title VI, have a duty to require districts presumptively in violation of Swann or other controlling Supreme Court decisions to explain or rebut such presumption.

(7) With respect to the 42 districts which HEW found in presumptive violation of Swann and Title VI in the summer of 1971, the time permitted by Title VI for securing voluntary compliance from these districts before commencing formal enforcement proceedings has long ago elapsed. The continuation of HEW's financial assistance to these school districts violates the rights of plaintiffs and others similarly situated protected by Title VI of the Civil Rights Act of 1964. Having determined that a school district is in presumptive violation of Title VI, and having failed during a substantial period of time to achieve voluntary compliance, then unless the presumption has been overcome by further information defendants have a duty to commence enforcement proceedings.

B. Injunction

(1) Defendants, their successors, agents and employees, are required and enjoined within 60 days of the date of this Order to communicate with each of the 85 districts listed in Appendix B, putting them on notice to rebut or explain the substantial racial disproportion in one or more of the district's schools.

(2) Defendants, their successors, agents and employees, are required and enjoined within 60 days of the date of this Order to commence enforcement proceedings by administrative notice of hearing, or to utilize any other means authorized by law, in order to effect compliance with Title VI by each of the 42 school districts listed in Appendix C, unless prior to this Court's November 16, 1972 Memorandum Opinion defendants have made a final determination of compliance by the school district.

(3) Defendants, their successors, agents and employees, are required and enjoined to provide in verified form the following data to counsel for the plaintiffs on the dates indicated:

a. Within 150 days of the date of this Order, a report of all steps they have taken to comply with the injunctive provisions set forth in III B(1) and (2) above, including a description of what action the Justice Department has taken concerning any school district defendants may have referred to the Department.

b. Every twelfth month after the issuance of this Order for a period of three years, a list of all school districts in the 17 southern and border states whose percentage of local minority pupils in the last academic year was at least 20% disproportionate from the percentage of the *98 local minority pupils in the entire district, and all steps HEW has taken to require these districts to rebut or explain such substantial racial disproportion.

IV. HEW's Functions Under Title VI of the Civil Rights Act of 1964 Concerning Vocational and Other Schools Administered by State Departments of Education

A. Declaratory Judgment

(1) State departments of education in the 17 southern and border states administer or operate numerous vocational and other schools. In the latter category are schools for deaf, blind and mentally handicapped children.

(2) While apparently not a complete list, HEW did provide the names of 205 vocational schools, 28 schools for the blind and the deaf and certain other schools for the mentally handicapped administered by the departments of education in the 17 states.

(3) HEW does not have any student enrollment and faculty data by race for many of these schools but it did provide statistics of students and faculty in Louisiana's vocational schools which show seven schools as overwhelmingly black and 25 schools as overwhelmingly white. Many of the schools operated by state departments of education are obviously segregated.

(4) Prior to the filing of this suit, HEW had no comprehensive program of Title VI enforcement for such schools.

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(5) After the filing of this suit, HEW announced a program to enforce Title VI with respect to state department-administered schools, but the program only affects vocational schools. As yet, HEW has scheduled no on-site reviews of the segregated vocational schools in the south.

(6) Federal funds have been distributed to most of these schools for years and HEW continues to give such Federal assistance.

[4] (7) Defendants have a duty under Title VI of the Civil Rights Act of 1964 to implement an enforcement program adequate to secure Title VI compliance with respect to vocational and other schools administered or operated by State Departments of Education. Defendants have violated the rights of plaintiffs and others similarly situated protected by Title VI of the Civil Rights Act of 1964 by failing to implement such a program.

B. Injunction

(1) Defendants, their successors, agents and employees, are required and enjoined to implement without unreasonable delay an enforcement program adequate to secure Title VI compliance with respect to vocational and other schools administered or operated by State Departments of Education sufficient to assure their compliance with Title VI, including reporting and on-site reviews.

(2) Defendants, their successors, agents and employees, are required and enjoined to provide in verified form the following data to counsel for the plaintiffs on the dates indicated:

a. Within 150 days of the date of this Order, a report of all steps they have taken to comply with the injunctive provision set forth in the preceding paragraph.

b. Every twelfth month, after the issuance of this Order for a period of three years, a listing of:

1. All schools administered or operated by State Departments of Education where HEW has found reason to believe or suspect that racial discrimination or segregation may be practiced;

2. The date of each on-site investigation by HEW compliance officers at each of the schools listed in the preceding paragraph, or the reasons for HEW's failure to make such investigation;

*99 3. The steps taken by HEW to secure compliance by such schools with Title VI and the Constitution.

V. HEW's Functions Under Title VI of the Civil Rights Act of 1964 Concerning School Districts Subject to Court Desegregation Orders

A. Declaratory Judgment

(1) Some 640 school districts which receive HEW aid, including many of the largest school districts, are subject to school desegregation court orders in the 17 southern and border states.

(2) Shortly after the passage of the statute in 1964, HEW issued a regulation which, in effect, deemed a district in compliance if it were subject to a final desegregation order and provided assurance that it will comply with said order including any subsequent modification thereof.

(3) In 1968, Congress in amending § 2000d-5 of the statute, adopted the HEW regulation in part by providing that, for the purpose of determining whether an educational agency is in compliance with Title VI, compliance by such agency with a final court desegregation order shall be deemed to be compliance with said Title.

(4) Once a school district has been placed under a court desegregation order and gives assurance "on paper" that it is in compliance with such order, it is the practice of HEW to regard such school district as in compliance with Title VI. HEW does not monitor said school districts to determine whether or not the court order is being obeyed.

(5) HEW's justification for failure to monitor school districts under court order is allegedly based upon possible conflicts with the courts, possible conflicts with the Justice Department, and HEW's alleged lack of resources to provide systematic monitoring.

(6) HEW has advanced and continues to advance substantial Federal funds to school districts under court order.

[5] (7) Compliance by school districts and other educational agencies under final order of a Federal court for the desegregation of the school or school system operated by such agencies, is by virtue of 42 U.S.C. § 2000d-5, to be deemed compliance with the provisions of Title VI. Until there has been a finding by the Court entering the order that its order has not

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been complied with, defendants are under no obligation to effectuate the provisions of Title VI through administrative or judicial enforcement proceedings. To the extent that their resources permit, defendants have the duty to monitor school districts under court order and to bring their finding to the attention of the court concerned. The responsibility for compliance by a school district and other educational agencies under court order rests upon the court issuing said order.

B. Injunction

(1) Defendants, their successors, agents and employees, are required and enjoined to monitor all school districts under court desegregation orders to the extent that their resources permit and to bring their findings to the attention of the court concerned.

(2) Defendants, their successors, agents and employees, are required and enjoined to provide in verified form the following data to counsel for the plaintiffs on the dates indicated:

Every sixth month after the issuance of this Order, for a period of three years, a listing of all school districts subject to court desegregation orders which were monitored by defendants; the finding of each court order violation; and the date on which the findings were presented to the appropriate court. Where any district subject to a court desegregation order was not monitored, the reasons for the failure of HEW to monitor the district.

VI. Deferral and Recapture

A. Declaratory Judgment

[6] (1) Upon initiating an administrative enforcement proceeding under the Civil Rights Act of 1964, it is the ***100** practice of HEW to defer the school district's application for "new" program funds only. HEW does not withhold its advancement of funds under "continuing" and previously-approved programs, asserting itself powerless under the statute to do so. Defendants are correct in their interpretation of the statute.

(2) HEW makes no attempt after a final determination of Title VI ineligibility to recapture funds distributed to a district between the notice of hearing and the final determination of Title VI ineligibility, against asserting itself powerless under the statute to do so. The statute makes no provision for the recapture of such funds.

(3) Since administrative enforcement proceedings generally consume one or more years, HEW's limited deferral practice allows the continued flow of large Federal aid to the respondent school district.

(4) After the initiation and during the pendency of administrative enforcement proceedings and until action by HEW terminating or refusing to grant or continue Federal assistance, defendants have no authority to withhold Federal payments to school systems or agencies under continuing and previously-approved programs. Under the statute, said termination action is not to become effective (a) until the agency head makes a report to the appropriate Committees of Congress, and (b) thirty days have elapsed after the filing of said report.

B. Injunction

(1) Defendants, their successors, agents and employees, are required and enjoined to provide in verified form the following data to counsel for the plaintiffs as indicated:

Every sixth month after the issuance of this Order, for a period of three years, a listing of each notice of hearing issued to a public educational system or agency under Title VI with date thereof; a listing of each termination action with date thereof; a listing of each report by the head of the agency to the appropriate Committees of Congress containing the basis for said action and date of said report; and the nature and amount of funds paid by defendants after initiation and during pendency of enforcement proceedings until termination actions resulting therefrom become effective as provided by the statute.

[7] Plaintiffs are awarded the costs of this action, including the costs of the depositions taken therein. Plaintiffs are entitled to an attorney's fee as part of the costs, pursuant to Public Law 92-318, Section 718 (86 Stat. 369), in an amount to be specified by further Order of this Court after appropriate proceedings.

APPENDIX A

Public Higher Education Compliance Efforts

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Appendix 3

OCR Guidance on Race-targeted Student Financial Aid

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

THE GENERAL COUNSEL

September 7, 1995

Dear College and University Counsel:

I am writing to confirm that the Department of Education's policy guidance on race-targeted student financial aid has not changed as a result of either the Supreme Court's recent decision not to hear the appeal requested by the University of Maryland in the Podberesky v. Kirwan[1] case or the Supreme Court's decision in Adarand Constructors v. Pena.[2] A copy of our policy guidance is enclosed.

Podberesky Case

In Podberesky, by denying the University's request, the Supreme Court neither ruled against race-targeted scholarships generally, nor affirmed the Fourth Circuit's decision that the University had not submitted sufficient evidence to justify providing such aid. The Supreme Court simply decided not to hear the appeal.

It is important for you to know -- especially in light of some erroneous news reports -- that the Fourth Circuit did not rule that all race-targeted scholarships are impermissible. The Fourth Circuit followed established Supreme Court precedent, as does Principle 3 of the Department's policy, by holding that colleges may establish race-targeted scholarships to remedy the present effects of prior discrimination, provided that such measures are "narrowly tailored" to achieve that objective. The Fourth Circuit did rule -- contrary to the arguments made on behalf of the University by the United States Government in an amicus brief in the case -- that it is not permissible for a college to rely on a poor reputation in the minority community to show that the effects of prior discrimination are continuing. Similarly, a racially hostile environment was held not to be a present effect of a college's past discrimination unless the college shows that this environment was caused by its own past actions and is not the result of general societal discrimination. The Fourth Circuit also ruled that the University's scholarship program was not "narrowly tailored" to cure the present effects of the University's previous discrimination. It found that the University had not convincingly established the composition of its applicant pool and, therefore, the court could not determine whether there was an under representation of African-American students or any need for narrowly tailored remedial action. The court also concluded that, even if there existed a need for remedial action, the scholarship program was not narrowly tailored because its eligibility criteria included students who, in the court's view, were not the type of students subjected to the University's past discrimination.

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[1] 38 F.3d 147 (4th Cir. 1994), cert. den., 115 S. Ct. 2001 (1995).

[2] 115 S. Ct. 2097 (1995).

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In short, the Fourth Circuit's decision was limited to ruling on the nature and weight of the University's factual evidence and the extent to which it met the "narrowly tailored remedy" legal standard established by the Supreme Court in numerous precedents. While we disagree with the result in Podberesky, the decision does not require the Department to modify its policy guidance on remedial race-targeted scholarships. Of course, in applying that guidance, we will follow the evidentiary standards articulated by the Fourth Circuit in Podberesky in states that are subject to the ruling – Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

Finally, the Fourth Circuit's decision in Podberesky did not address the validity of race-targeted scholarships that are consistent with Principle 4 of the Department's policy guidance, which states that a college may consider race as a factor or a condition of eligibility in awarding scholarships in order to promote the racial diversity of its student body, as long as such action complies with the narrow tailoring requirement set forth in Principle 4.

Adarand Case

In the Adarand case, where a federal affirmative action program for the construction industry was challenged, the Supreme Court held that racial classifications established by Congress must be analyzed by a reviewing court under the same strict scrutiny standard that applies to racial classifications established by state or local governments. Such classifications must be narrowly tailored to serve a compelling governmental interest. The Department's policy under Principle 2 states that race-targeted financial aid authorized by Congress would not violate Title VI of the Civil Rights Act. The Supreme Court's decision in Adarand did not change this principle, but it did rule that a strict scrutiny standard must be used by the Federal courts in reviewing any constitutional challenges to Congressionally authorized race-based programs.

The Department of Justice is coordinating a review of federal programs under the strict scrutiny standards made applicable by Adarand. If it is determined that a particular race-targeted financial aid program authorized by Congress does not meet these standards, action will be taken to make appropriate changes in that program. I want to stress, in any event, that Adarand reaffirmed that remedying the effects of past discrimination is a compelling governmental interest that can justify the use of narrowly tailored raced-based measures. Furthermore, Adarand does not foreclose the use of such measures to promote diversity in higher education under Principle 4 of the Department's policy guidance.

Summary

In conclusion, under governing legal standards, race-targeted student aid is legal in appropriate circumstances as a remedy for past discrimination or as a tool to achieve a diverse student body. Scholarships for these purposes are vital to the education of all students.

The Department will continue to implement its financial aid policy under Title VI of the Civil Rights Act and to support race-targeted aid programs that are consistent with our policy. The Department's Office for Civil Rights is continuing to provide technical assistance to institutions in their efforts to develop financial aid programs that comply with the policy and with applicable federal court decisions.

Sincerely,

Judith A. Winston

Enclosure

THESE QUESTIONS AND ANSWERS WERE RELEASED ON FEBRUARY 17, 1994, SIMULTANEOUSLY WITH THE FINAL POLICY GUIDANCE ON RACE TARGETED FINANCIAL AID, BY THE U.S. DEPARTMENT OF EDUCATION. 59 FED. REG. 8756 (FEB 23, 1994)

QUESTIONS AND ANSWERS ON THE DEPARTMENT OF EDUCATION'S POLICY ON THE CONSIDERATION OF RACE AND NATIONAL ORIGIN IN AWARDING FINANCIAL AID

Principle 2 - Financial Aid Authorized by Congress

Q. Can a college limit Federal financial aid to its students based on race or national origin?

A. There are many different statutes authorizing Federal financial aid, each with specific eligibility requirements for students who receive financial aid. Colleges have to apply the eligibility criteria prescribed by these Federal statutes and regulations and cannot add additional limitations.
If the statute for a particular student aid program limits Federal financial aid to students based on race or national origin, then colleges have the authority to do so.

Principle 3 - Financial Aid to Remedy Past Discrimination

Q. Must a college hold a hearing prior to making a determination that it will award race-targeted financial aid to remedy past discrimination at the institution?

A. No. Although a college must have a strong basis in evidence that its past discrimination justifies the use of a race-targeted financial aid program as a remedy, the college need not hold an evidentiary hearing.

Q. Are private colleges permitted to make findings of past discrimination under these principles?

A. Yes. All private colleges that receive federal financial assistance are required to comply with Title VI and are covered by these principles. Private colleges are treated in the same manner as public colleges under these principles. Thus, under Principle 3, a private college may adopt a race-targeted financial aid program if it is narrowly tailored to remedy the college's past discrimination.

Q. What are some examples of evidence a college may have of its past discrimination?

A. A college's evidence of its past discrimination may include documentation of specific incidents of intentional discrimination by the college in the admission of or award of financial aid to students. Alternatively, the college may have evidence of a statistically significant disparity between the percentage of students of a particular race or national origin enrolled at the school and students of that race or national origin who meet its admissions standards in the geographic area served by the college.

Q. May a college that is part of a state system of higher education that has been found by the Office for Civil Rights (OCR) to be in compliance with Title VI because it has implemented fully an OCR-accepted plan to eliminate the vestiges of prior de jure segregation continue to award race-targeted financial aid?

A. Although colleges that have remedied past discrimination and been found to be in compliance with Title VI -- either by a court or by OCR -- cannot use race-targeted financial aid to continue to remedy that discrimination, it would be permissible for these schools, where necessary, to use race-targeted aid to promote diversity. This may be done in accordance with Principle 4 of the policy guidance. In addition, if the school has a strong basis in evidence of discrimination for which it has not undertaken remedial action, it may of course remedy that discrimination, which could involve the use of race-targeted financial aid.

Q. Does the recent Federal district court decision in the case of Podberesky v. Kirwan (decided November 18, 1993), regarding race-targeted scholarships at the University of Maryland, affect the policy guidance? If so, how?

A. The Department has reviewed the district court decision in the Podberesky case and considers it to be consistent with Principle 3 of the policy guidance in permitting race-targeted scholarships to overcome the effects of past discrimination. In that case, the Federal district court concluded that the University had a strong evidentiary basis to support specific findings of present effects of past discrimination by the University against black students, and that the University's race-targeted scholarship program was necessary to remedy the continuing effects of that discrimination. The decision provides guidance on identifying the nature and extent of the effects of past discrimination at postsecondary institutions that may support the use of race-targeted financial aid.

Principle 4 - Financial Aid to Create Diversity

Q. Does the Constitution allow a college to consider a student's race or national origin in awarding financial aid when seeking to enroll a diverse student body?

A. Yes. The Supreme Court in the Bakke case found that a college, as an educational institution, has a compelling interest under the First Amendment in cultivating and maintaining a diverse enrollment of students to foster the robust exchange of ideas. Therefore, the Court held that a college, even apart from affirmative action considerations, has a compelling interest under the First Amendment in recruiting and retaining a diverse student body with a variety of opinions, backgrounds, cultures, and experiences. A college, therefore, may use its financial aid program as a tool to promote its First Amendment interest in diversity in its enrollment, provided that the program is narrowly tailored to conform to the requirements of the Fourteenth Amendment. If a program meets the test under the Fourteenth Amendment, it will also meet the requirements of Title VI.

Q. Does the Department have a definition of "diversity" under Principle 4 to which colleges must adhere?

A. The Department does not have a rigid definition of "diversity." Each college has the primary

responsibility for determining the extent to which underrepresentation of particular races or national origin in its student body implicates its interest in diversity under the First Amendment. Of course, if a complaint is filed with the Department with regard to this aspect of an institution's financial aid program, the Department will review the reasonableness of the institution's determination.

Q. What does consideration of race or national origin as a "plus" factor in awarding financial aid mean?

A. Consideration of race or national origin as a plus factor in the award of financial aid means that race or national origin is considered as one factor with other factors in determining which students receive financial aid. It does not mean that race or national origin is an eligibility requirement for the financial aid (financial aid that uses race or national origin as an eligibility requirement is referred to in the policy guidance as "race-targeted" or "race-based.") When race or national origin is used as a plus factor -- along with, for example, socioeconomic status and geographic origin -- all things being equal, a qualified applicant's race or national origin (or socioeconomic status or geographic origin) may result in that applicant's being selected over a similarly qualified applicant whose enrollment will not contribute to a more diverse student body.

Q. When may a college use race-targeted financial aid, as opposed to using race or national origin as a "plus" factor, in order to promote a diverse student body?

A. A college's consideration of race or national origin in awarding financial aid -- whether as a plus factor or as a condition of eligibility -- must be narrowly tailored to meet the college's interest in promoting diversity. The Department will presume that a college's use of race or national origin as a plus factor, with other factors, is narrowly tailored to further the compelling governmental interest in diversity, so long as the college periodically reexamines whether its use of race or national origin as a plus factor continues to be necessary to achieving a diverse student body. If a college determines -- based, for example, on its past experience or the experience of similar colleges -- that using race as a plus factor with other factors will be ineffective in promoting a diverse student body, it may consider using race-targeted aid for some of its awards.

Q. What must a college show to justify a race-targeted financial aid program adopted to achieve a diverse student body?

A. A college should be prepared to explain the basis for its determination that it has an underrepresentation of students of the race or national origin for which the financial aid is designated. Additionally, the college should be prepared to explain how its use of the race-targeted financial aid is necessary to promote a diverse student body and does not place an undue burden on students who are not eligible for that aid. That is, a college should be prepared to show that alternative approaches that are less intrusive than race-targeted aid have not been or

will not be effective. Additionally, the college should be prepared to show that the race-targeted aid will not significantly affect the availability of financial aid for students who are not eligible for race-targeted aid.

Q. Must a college hold a hearing prior to making a determination that it will award race-targeted financial aid to promote diversity?

A. No. However, as indicated above, a college should be prepared to explain the basis for its use of race-targeted financial aid to achieve a diverse student body.

Q. Even though a college does not have an underrepresentation of minorities in a particular area of study, may a college determine that there is an underrepresentation in a particular profession, such as engineering, and, on that basis, establish race-targeted financial aid for study in that field?

A. No. The Supreme Court, in Bakke, rejected the University's argument that it was permissible to set aside admission slots for minority students in order to remedy societal discrimination. Instead, the Court recognized the University's right to take race or national origin into consideration in furtherance of the University's First Amendment interest in promoting diversity in its student body or in particular programs such as its school of engineering.

Principle 5 - Private Gifts Restricted By Race or National Origin

Q. Under what circumstances may private individuals and organizations operate race-targeted financial aid programs?

A. First, entities that do not receive Federal financial assistance are not covered by Title VI or this policy. Such entities can provide race-targeted financial aid to students directly if they choose. In addition, whether or not an entity receives Federal financial assistance, it can provide race-targeted financial aid to students through recipient colleges or universities which meet any of the principles in the policy guidance.

Transition Period

Q. What will the impact of the transition period be on students who apply for race-targeted financial aid after the effective date of this policy?

A. A college or other recipient will be able to continue to award aid that does not comply with the Principles in the policy guidance during the transition period. While a college or other recipient may award aid to students who apply for aid before the effective date of this policy guidance for the entire period of their enrollment in the academic program for which the aid was awarded, awarding aid that is inconsistent with the guidance after the transition period to students who applied after the effective date of the policy guidance would violate

this guidance. If the Department finds a college or other recipient in violation of Title VI for awarding aid that is inconsistent with this guidance after the transition period, the Department will require the college or other recipient to take corrective action, which may include relief for students who have been denied financial aid on the basis of race or national origin. However, the college or other recipient will not be required as a part of its remedial action to withdraw aid from the students who received it.

Q. How will the Department enforce Title VI during the transition period?

A. The Department is providing colleges and other recipients a reasonable period of time to review and, if necessary, adjust their financial aid programs in an orderly manner that causes the least possible disruption to the expectations of their students. OCR will continue to accept and investigate complaints under Title VI related to financial aid. If OCR determines that a college's or other recipient's financial aid program does not comply with Title VI, it will work with the college or other recipient to revise the program during the transition period. As long as a college or other recipient is working to bring its financial aid program into compliance with Title VI in a timely manner, OCR will not initiate an enforcement action during the transition period.

General Questions

Q. What effect will this new guidance have on existing financial aid programs?

A. We anticipate that most existing financial aid programs will be able to satisfy the requirements of the policy guidance. A recent study by the General Accounting Office (GAO) found that race-targeted scholarships account for a very small proportion of scholarship awards and dollars. It also appears that many schools that use race-targeted aid do so with the purpose of increasing diversity on campus. OCR will work with colleges to ensure that their financial aid programs meet the requirements of Title VI as set out in the policy guidance.

Q. Are there any pending complaints on the issue of race-targeted student aid? If so, how will they be handled?

A. Yes. OCR has received a number of complaints over the past several years, which have been held pending issuance of the final policy guidance. OCR will apply the principles in the final policy guidance to the financial aid programs involved in those cases. Thus, during the transition period, OCR will determine whether the financial aid programs at colleges that are the subject of pending complaints are in compliance with Title VI and will work with these colleges to make any adjustments to their programs that are required by the policy guidance.

Q. Do the same principles apply to race-based financial aid for students at educational institutions other than colleges and universities (e.g., private elementary and secondary schools) that receive Federal financial assistance?

A. Yes, the principles represent general guidance for compliance with Title VI, which applies to educational institutions at all levels, not just colleges and universities.

Q. Are the identified principles the only bases on which a college may support its consideration of race or national origin in awarding financial aid?

A. We do not presume in these principles to have addressed every possible rationale that might be presented for adopting a race-targeted financial aid program. The principles represent the Department's view of the circumstances where the consideration of race or national origin in awarding financial aid is permissible under Title VI. Thus, colleges are not foreclosed from asserting additional justifications for their race-targeted financial aid programs. The Department will consider on a case-by-case basis any such justifications that are presented during the course of a Title VI investigation or in response to a request by a college for technical assistance.

Q. Does the policy guidance cover scholarships that are designated for students with a particular ethnic background, such as Irish-Americans or Italian-Americans?

A. Yes. Because these scholarships are based upon national origin, they are governed by Title VI. Under this guidance, such scholarships may be appropriate under Principle 4 to achieve a diverse student body, or, pursuant to Principle 3, if a college is remedying its past discrimination against Irish-Americans or Italian-Americans.

Q. May a college offer financial aid that is designated for white students?

A. Financial aid designated for white students is permissible under Title VI, if it is consistent with one of the principles in this guidance; i.e., pursuant to Principle 3, if a college is remedying past discrimination or, pursuant to Principle 4, if it is attempting to achieve a diverse student body. For example, financial aid for white students would be permissible at a traditionally black college that is taking remedial action to eliminate the remnants of segregation, under Principle 3, or that is taking action to achieve a diverse student body, consistent with Principle 4.

Q. How does the policy guidance affect financial aid where race or national origin is only one of the requirements for eligibility, e.g., a scholarship where eligibility is based on race and academic achievement?

A. When race or national origin is an eligibility requirement for the award of financial aid, the aid is treated as race-targeted under this policy guidance,

regardless of whether or not there are additional eligibility requirements for the aid.

Q. Will these principles apply to financial aid programs under other civil rights statutes that the Department enforces, i.e., Title IX, Section 504, and the Age Discrimination Act?

A. No. The proposed policy guidance interprets only Title VI, which prohibits discrimination on the basis of race, color and national origin.

Q. May a college provide financial aid that is restricted to persons of a particular religion?

A. Neither Title VI nor the other civil rights statutes enforced by the Department apply to discrimination on the basis of religion in the award of financial aid by colleges. Public colleges and universities should consult with their attorneys concerning limitations that may be imposed by the First or Fourteenth Amendments or by statutes on administering financial aid programs that target aid on the basis of religion.

Q. May a college provide financial aid that is restricted to persons with disabilities?

A. Yes. Section 504 of the Rehabilitation Act prohibits discrimination against individuals with disabilities. Individuals without disabilities are not covered under Section 504. Therefore, programs that designate financial aid for individuals with disabilities are permissible under Section 504.

Q. How does this Title VI policy guidance differ from the treatment of financial aid based on gender under the Title IX regulations? What is the basis for this difference?

A. The Policy Guidance issued today addresses permissible affirmative action in the provision of financial aid only under Title VI. While the Title IX regulations, which prohibit sex discrimination in educational programs receiving federal assistance, are more detailed than the Title VI regulations in describing nondiscrimination requirements related to the provision of financial aid, they do not specifically address the scope of permissible affirmative action in the award of financial aid. The Department is presently considering whether it is necessary to issue additional guidance on affirmative action under Title IX.

UNITED STATES
DEPARTMENT OF EDUCATION NEWS

FOR IMMEDIATE RELEASE
February 17, 1994

Contact: Kathryn Kahler
(202) 401-3026

SECRETARY RILEY ISSUES FINAL POLICY GUIDANCE ON RACE-TARGETED AID

U.S. Secretary of Education Richard W. Riley today announced that the department is clarifying the circumstances under which race-targeted financial assistance may be used.

"We want the doors to postsecondary education to remain open for minority students," Riley said. "This policy helps to achieve that goal in a manner that is consistent with the law. We have taken into account the recent GAO [General Accounting Office] report, as well as extensive public comments, and developed a policy that will help ensure all students access to higher education."

The policy guidance, to be published in the Federal Register, interprets Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color or national origin by recipients of federal funds. The guidelines will be used by the Education Department's Office for Civil Rights (OCR) in reviewing Title VI complaints and conducting compliance reviews related to student financial aid.

Shortly after taking office, Riley expressed support for colleges and universities that have accepted the challenge of providing diversity on their campuses. The secretary directed his staff to prepare a policy that would be fair to all students, would be based on a study of current scholarship practices, and would guide colleges and universities to successful compliance with the civil rights statutes. The new policy accomplishes all three goals.

-MORE-

The GAO study released Jan. 14 [GAO/HEHS-94-77] reported that aid awarded using race or national origin as an eligibility criterion represented about three percent of all scholarship issued by undergraduate and graduate schools, and about eight and one-half percent of scholarships issued by professional schools. The study further reported that some form of minority-targeted aid was offered by nearly two-thirds of postsecondary institutions surveyed and was found to play a vital role in providing access to higher education for minority students.

Riley said his review concluded that colleges can use financial aid to remedy past discrimination and to promote campus diversity without violating federal anti-discrimination laws.

Permissible under the final policy guidance:

-- aid to disadvantaged students, without regard to race or national origin, even if the awards go disproportionately to minority students;

-- aid awarded on the basis of race or national origin when authorized by a particular federal statute such as the Patricia Roberts Harris Fellowship Program;

-- aid on the basis of race or national origin to remedy past discrimination;

-- aid on the basis of race or national origin if it is narrowly tailored to achieve a diverse student body at the college or university;

-- aid accepted by a school from private sources and restricted by race or national origin, if used to remedy discrimination or achieve diversity, consistent with the other principles in the guidance.

-MORE-

The policy guidance replaces a proposed policy published by the department in December 1991. The major changes are:

(1) postsecondary institutions need not wait for a formal finding by a court, legislative body or administrative agency such as OCR before taking steps to remedy their past discrimination;

(2) efforts to achieve diversity need not be limited to using race as one among several competitive factors if the institution can justify that using race as an eligibility criterion is a narrowly tailored part of those efforts;

(3) historically black colleges and universities may participate in third-party programs for black students that are also open to students at other institutions.

The department expects most colleges that target some of their financial aid to minority students will be able to justify their programs under this guidance. However, if a college or university has a student aid program that cannot be justified, it will have up to two years to bring the program into compliance with Title VI.

In addition, no student who has applied for or received race-targeted aid prior to the effective date of the policy (90 days after its publication in the Federal Register) will lose that aid as a result of the policy.

The policy guidance will be published as early as next Wednesday (Feb. 23).

###

Norma V. Cantú

Race-targeted Scholarships Are Still Legal and Vital

As a federal official responsible for enforcing civil rights laws in education, I would like to set the record straight on race-targeted financial aid.

Without stating its reasons, the Supreme Court recently declined to review a lower court's decision involving the University of Maryland's Banneker Scholarship Program for African-American students, and therefore continues to be silent on the propriety of race-targeted aid.

CANTU

Because the Court did not rule in this case, I feel it is important to affirm that race-targeted scholarships continue to be legal, as outlined by principles set forth in policy guidance issued by the Department of Education last year.

In keeping with its mission of ensuring equal access to education and promoting educational excellence, the department in its guidance clarifies how colleges can use financial aid to remedy past discrimination and to promote campus diversity and access of underrepresented groups to postsecondary education.

The principles in the department's guidance are consistent with Supreme Court precedent, and are not affected by the Court's recent silence on the issue. They remain legally sound, and the department stands behind them.

MOST GRANTS ARE PRIVATELY FUNDED

In developing the principles, the department carefully considered the results of a study conducted for the Congress by the General Accounting Office. The study revealed that most colleges (including two-thirds of undergraduate schools) award race-targeted scholarships.

It also showed that these scholarships constitute only a very small percentage of the total aid available to college students (less than 4% of the scholarships and scholarship dollars at undergraduate institutions).

Furthermore, the GAO noted that most race-targeted scholarships are privately funded and take into account criteria such as financial need or academic merit as well as national origin or race.

In light of the widespread support for these scholarships, very few complaints have been filed on this issue and, to my knowledge, there are no court cases pending. If the Department of Education receives complaints, we will consider them on a case-by-case basis to ensure that decisions to offer race-targeted scholarships are grounded in facts and evidence.

In fact, in the decision which the Supreme Court declined to review in the University of Maryland case, the federal appellate court held simply that the university provided insufficient evidence to justify one particular scholarship program for the purpose of remedying past discrimination.

The court did not rule that all race-targeted scholarships are illegal, and at least one other federal court (in Louisiana) has recently approved the use of race-targeted scholarships for addressing the effects of discrimination.

STATISTICS SHOW NEED STILL EXISTS

Thus, colleges need not overreact to the University of Maryland decision by eliminating all race-targeted aid. Hispanics and other students need not be overly alarmed.

The purposes served by such aid have not yet been achieved. College officials across the country have reacted to the Supreme Court's inaction by reiterating that race-targeted scholarships are a valuable and necessary tool for the recruitment and retention of students from underrepresented backgrounds.

Although we have made some progress in recent years, Hispanic students are among those who are still underrepresented in higher education.

According to recent statistics, Hispanics constitute 10% of the general population, but only 7.8% of students attending our undergraduate schools, 3.6% of graduate enrollment and 5.0% of the students at professional schools.

COST INHIBITS HISPANIC ENROLLMENT

A major factor inhibiting Hispanic enrollment in higher education is its cost, coupled with the relatively low incomes of Hispanic families.

In an age of fierce global economic competition in which 89% of new jobs require some form of postsecondary education, our nation cannot afford to retreat from its commitment to maximize every student's potential regardless of national origin or race. It remains our job at the Department of Education to work with colleges to provide access to education using every available tool -- including race-targeted scholarships when necessary.

Now is not the time to retreat from this commitment, and we do not intend to do so.

(Norma V. Cantú serves as Assistant Secretary for Civil Rights, U.S. Department of Education.)

INS Reports that Legal Immigration Declined by 9.3% in 1994

By Joseph Torres

Legal immigration fell 9.3% in 1994, the largest annual drop in 15 years, reported the U.S. Immigration and Naturalization Service.

In a June 29 report, the INS credited the 1990 Immigration Act, which set a flexible cap and limits on immigration, for the reduction. It dropped from 880,014 in 1993 to 798,394 the following year.

Legal immigration decreased in five categories. They were: employment-related admissions, dependents of legalized residents under the 1986 Immigration Reform and Control Act, immigrants admitted as family members, immigrants coming into the country through special programs and asylum applicants gaining permanent legal status.

Juan José Gutiérrez, executive director of One-Stop Immigration in Los Angeles, told Weekly Report he agreed that the 1990 Immigration Act contributed to the decline but added that anti-immigrant sentiment is a signficant reason for the reduction.

"With mass communication, people in Mexico and Latin American countries see how illegal and legal immigrants are being treated and are reluctant to come," Gutiérrez said.

Last month, Rep. Lamar Smith (R-Texas), chair of the House Judiciary subcommittee on immigration, introduced a bill to reduce legal immigration, double the number of U.S. Border Patrol agents to 10,000 and make it easier for employers to verify the status of immigrant job seekers.

Hearings are scheduled later this year.

At 106,995, Mexican immigrants made up the largest number of legal immigrants followed by Chinese immigrants, with 53,976.

Dominican immigrants represented the largest one-year increase at 6,171, up 13.7% from the year before.

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Monday
January 31, 1994

Briefings on How To Use the Federal Register
For information on briefings in Washington, DC, see announcement on the inside cover of this issue.

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For other telephone numbers, see the Reader Aids section at the end of this issue.

THE FEDERAL REGISTER
WHAT IT IS AND HOW TO USE IT

FOR: Any person who uses the Federal Register and Code of Federal Regulations.

WHO: The Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:
1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.
2. The relationship between the Federal Register and Code of Federal Regulations.
3. The important elements of typical Federal Register documents.
4. An introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WASHINGTON, DC
(TWO BRIEFINGS)

WHEN: February 17 at 9:00 am and 1:30 pm

WHERE: Office of the Federal Register, 7th Floor Conference Room, 800 North Capitol Street NW; Washington, DC (3 blocks north of Union Station Metro)

RESERVATIONS: 202–523–4538

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p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: Section 3517 of the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Director of the Information Resources Management Service, publishes this notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Frequency of collection; (4) The affected public; (5) Reporting burden; and/or (6) Recordkeeping burden; and (7) Abstract. OMB invites public comment at the address specified above. Copies of the requests are available from Cary Green at the address specified above.

Dated: January 25, 1994.

Cary Green,

Director, Information Resources Management Service.

Office of Special Education and Rehabilitative Services

Type of Review: New.

Title: Survey of Overall Rehabilitation Needs of Hard of Hearing Individuals.

Frequency: One-time.

Affected Public: Individuals or households.

Reporting Burden:

Responses: 3,200.

Burden Hours: 2,133.

Recordkeeping Burden:

Recordkeepers: 0.

Burden Hours: 0.

Abstract: This survey is designed to document the overall rehabilitation needs of hard of hearing, late-deafened and oral-deaf adults, and any defects in the rehabilitation services delivery system established to meet those needs. This information will identify needs in services in the areas of vocational rehabilitation, education/training, hearing aid and assistive listening device technology, participation in social activities and coping with the effects of hearing loss on interpersonal functioning.

[FR Doc. 94-2049 Filed 1-28-94; 8:45 am]

BILLING CODE 4000-01-M

[CFDA Nos.: 84.123, 84.233A, 84.241A]

Direct Grant Programs and Fellowship Programs

AGENCY: Department of Education.

ACTION: Extension of closing dates.

SUMMARY: On September 24, 1993, the Department of Education published a notice in the Federal Register inviting applications for new awards for fiscal year 1994 for the Drug-Free Schools and Communities Emergency Grants Program, the Drug-Free Schools and Communities Counselor Training Grants Program, and the Law-Related Education Program (58 FR 50141, 50147–51). Detailed information concerning these programs was included in that notice.

The purpose of this notice is to extend the deadline for receipt of applications for these programs. This action is taken in order to allow additional time for applicants to submit their applications.

The deadline for receipt of applications for these programs is extended as follows:

• *CFDA 84.123A.* The deadline date for receipt of applications for the Law-Related Education Program is extended from February 4, 1994 to February 11, 1994.

FOR FURTHER INFORMATION CONTACT: Alice T. Ford, U.S. Department of Education, 400 Maryland Avenue, SW., room 2049, Washington, DC 20202-6245. Telephone: (202) 401-1342.

• *CFDA 84.233A.* The deadline date for receipt of applications for the Drug-Free Schools and Communities Emergency Grants Program is extended from January 26, 1994 to February 11, 1994.

• *CFDA 84.241A.* The deadline date for receipt of applications for the Drug-Free Schools and Communities Counselor Training Grants Program is extended from January 24, 1994 to February 11, 1994.

FOR FURTHER INFORMATION CONTACT: The Drug-Free Schools and Communities Division, Department of Education, 400 Maryland Avenue, SW., room 2133, Washington, DC 20202-6439. Telephone: (202) 401-1258.

Note: Applications must be received (or postmarked) by the extended due date to be considered for funding. Applications postmarked after the extension will not be accepted.

Individuals who use a telecommunications device for the deaf may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

Information about the Department's funding opportunities, including copies of application notices for discretionary grant competitions, can be viewed on the Department's electronic bulletin board (ED Board), telephone (202) 260-9950; or on the Internet Gopher Server at GOPHER.ED.GOV (under Announcements, Bulletins, and Press Releases). However, the official application notice for a discretionary grant competition is the notice published in the Federal Register.

Dated: January 26, 1994.

Thomas W. Payzant,

Assistant Secretary, Elementary and Secondary Education.

[FR Doc. 94-2128 Filed 1-28-94; 8:45 am]

BILLING CODE 4000-01-P

Notice of Application of Supreme Court Decision

SUMMARY: In *United States v. Fordice*, ____ U.S. ____, 112 S.Ct. 2727 (1992), the Supreme Court held that States that operated *de jure* segregated higher education systems have an affirmative duty under the Equal Protection Clause of the Fourteenth Amendment to the Constitution and Title VI of the Civil Rights Act of 1964 to dismantle those systems and their vestiges. This notice is published in response to a number of questions the Department has received concerning the effect of this decision.

EFFECTIVE DATE: January 28, 1994.

FOR FURTHER INFORMATION CONTACT: Jeanette J. Lim, U.S. Department of Education, 400 Maryland Avenue, SW., room 5036 Switzer Building, Washington, DC 20202-1174. Telephone: (202) 205-8635. Individuals who use a telecommunications device for the deaf (TDD) may call the TDD number at (202) 205-9683 or 1-800-421-3481.

SUPPLEMENTARY INFORMATION: Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. 2000d *et seq.*, prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving Federal financial assistance. The Department of Education (Department) has promulgated regulations in 34 CFR part 100 to effectuate the provisions of title VI with regard to programs and activities receiving funding from the Department. Title VI also guides the Department's enforcement policies regarding State higher education systems that were previously

:termined to be segregated pursuant to . ite law. This notice outlines the . ocedures and analysis that the Office tor Civil Rights (OCR) of the Department of Education will follow when i vestigating States with a history of *de* ; e segregated systems of higher c ucation.

This notice is published in response to a number of questions the l partment has received concerning the t ect of the Supreme Court's decision in *United States* v. *Fordice*, ____ U.S. ____, 112 S.Ct. 2727 (1992), on the D partment's enforcement policies u der Title VI regarding State higher education systems that were segregated pursuant to State law.

In *Fordice*, the Supreme Court held t t States that operated *de jure* s gregated higher education systems have an affirmative duty under the Equal Protection Clause of the I urteenth Amendment to the C nstitution and Title VI to dismantle t se systems and their vestiges. The Court, while acknowledging the differences between public higher e ucation systems and elementary or s condary school systems, based this holding on the precedent established in its 1954 decision in *Brown* v. *Board of ucation of Topeka* and its progeny in mentary and secondary school desegregation cases. 112 S.Ct. at 2736.

The Supreme Court also held that before a determination can be made that a tate has discharged its affirmative c y to eliminate the vestiges of its *de jure* system, an examination must be made of a "wide range of factors to c ermine whether [a] State has p petuated its formerly *de jure* segregation in any facet of its institutional system." 112 S.Ct. at 2735. T's holding is consistent with the D partment's policy requiring that the v tiges of *de jure* segregation be eliminated system-wide in State higher education systems, which is reflected in tl Department's published "Revised C eria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education," p lished in the Federal Register on F ruary 12, 1978 (43 FR 6658) ("Revised Criteria"). The "Revised Criteria" specify a broad range of factors, which include those addressed in *Fordice*, that must be included in a st wide higher education desegregation plan to be acceptable under Title VI.

he Supreme Court made clear in F *lice* that (1) a State will not have mplied with its affirmative duty to mantle the vestiges of segregation if erely adopts race-neutral policies n (2) "[i]f a State perpetuates policies and practices traceable to its prior system that continue to have segregative effects—whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system—and such policies are without sound educational justifications and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system." 112 S.Ct. 2735, 2737. The Supreme Court emphasized that the burden of proof falls on each State to establish that it has dismantled its prior *de jure* segregated system. 112 S.Ct. at 2741.

In light of the *Fordice* decision, the Department reaffirms that all States[1] with a history of *de jure* segregated systems of higher education have an affirmative duty to ensure that no vestiges of the *de jure* system are having a discriminatory effect on the basis of race. If OCR receives information indicating that a State has not met this affirmative duty, OCR will take appropriate action.

OCR will apply the standard set out in *Fordice*, requiring the elimination of the vestiges of prior *de jure* segregation, to all pending Title VI evaluations of statewide higher education systems with OCR-accepted desegregation plans that have expired. The States with expired plans are Florida, Kentucky, Maryland, Pennsylvania, Texas, and Virginia. OCR will examine a wide range of factors to ensure that the vestiges of these States' *de jure* systems have been eliminated. The comprehensive array of factors that OCR will consider includes those addressed in *Fordice* and those reflected in the ingredients for acceptable desegregation plans specified in the Department's "Revised Criteria." Accordingly, OCR will ensure that these States have implemented their OCR-approved desegregation plans and have eliminated the vestiges of their *de jure* segregated systems.

Finally, the Department reaffirms its position reflected in the "Revised Criteria," which is consistent with *Fordice*, that States may not place unfair burdens upon black students and faculty in the desegregation process. Moreover, the Department's "Revised Criteria" recognize that State systems of higher education may be required, in order to overcome the effects of past discrimination, to strengthen and enhance traditionally or historically black institutions. The Department will strictly scrutinize State proposals to close or merge traditionally or historically black institutions, and any other actions that might impose undue burdens on black students, faculty, or administrators or diminish the unique roles of those institutions.

Dated: January 26, 1994.

Norma V. Cantú,

Assistant Secretary for Civil Rights.

[FR Doc. 94-2042 Filed 1-28-94; 8:45 am]

BILLING CODE 4000-01-P

[1] Included are the eight States which, in the late 1980's before the Supreme Court rendered its decision in *Fordice*, OCR found in compliance with Title VI. The States OCR found to have complied with Title VI were Arkansas, Delaware, Georgia, North Carolina, Missouri, Oklahoma, South Carolina, and West Virginia. OCR's findings were based on its investigations that showed that these States had implemented their OCR-approved desegregation plans, which were developed pursuant to the "Revised Criteria."

DEPARTMENT OF ENERGY

Proposed Urgent-Relief Acceptance of a Limited Amount of Spent Fuel From Foreign Research Reactors; Meetings

AGENCY: Department of Energy and Department of State.

ACTION: Notice of meetings.

SUMMARY: The Department of Energy and the Department of State plan to co-host a two-part forum to involve stakeholders in a meaningful and constructive dialogue on the proposed urgent-relief acceptance of a limited amount of spent fuel from foreign research reactors. This proposed action was originally described in a draft environmental assessment, prepared under the National Environmental Policy Act, distributed for comment by interested states and organizations in October 1993; the Department is revising the environmental assessment in response to comments and intends to reissue the draft for comment in early February. The Department proposes to transport this spent fuel to the United States as part of an effort to minimize the use of highly enriched uranium in civil programs worldwide. Under this program, the Department is proposing that highly enriched uranium spent fuel be shipped by sea to a southeastern port (several alternative ports are proposed) and then by truck to the Department's Savannah River site near Aiken, South Carolina, for interim storage.

The first part of the forum will be a preparatory meeting on February 10, 1994, involving invited stakeholders from State and local governments, Congress, environmental and non-proliferation public interest groups, other private sector interests, foreign research reactor operators, and key affected communities. Key issues related to the proposed acceptance of the spent fuel will be explored with the

Federal Register

Wednesday
February 23, 1994

Part VIII

Department of Education

Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964; Notice

DEPARTMENT OF EDUCATION

Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964

AGENCY: Department of Education.

ACTION: Notice of final policy guidance.

SUMMARY: The Secretary of Education issues final policy guidance on Title VI of the Civil Rights Act of 1964 and its implementing regulations. The final policy guidance discusses the applicability of the statute's and regulations' nondiscrimination requirement to student financial aid that is awarded, at least in part, on the basis of race or national origin.

EFFECTIVE DATE: This policy guidance takes effect on May 24, 1994, subject to the transition period described in this notice.

FOR FURTHER INFORMATION CONTACT: Jeanette Lim, U.S. Department of Education, 400 Maryland Avenue, SW., room 5036–I Switzer Building, Washington, DC 20202–1174. Telephone (202) 205–8635. Individuals who use a telecommunications device for the deaf (TDD) may call the TDD number at 1–800–358–8247.

SUPPLEMENTARY INFORMATION: On December 10, 1991, the Department published a notice of proposed policy guidance and request for public comment in the **Federal Register** (56 FR 64548). The purpose of the proposed guidance and of this final guidance is to help clarify how colleges can use financial aid to promote campus diversity and access of minority students to postsecondary education without violating Federal anti-discrimination laws. The Secretary of Education encourages continued use of financial aid as a means to provide equal educational opportunity and to provide a diverse educational environment for all students. The Secretary also encourages the use by postsecondary institutions of other efforts to recruit and retain minority students, which are not affected by this policy guidance.

This guidance is designed to promote these purposes in light of Title VI of the Civil Rights Act of 1964 (Title VI), which states that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The Department has completed its review of this issue, taking into account the results of a recent study by the General Accounting Office (GAO) and public comments submitted in response to the proposed policy guidance. The Secretary has determined that the proposed policy guidance interpreted the requirements of Title VI too narrowly in light of existing regulations and case law. While Title VI requires that strong justifications exist before race or national origin is used as a basis for awarding financial aid, many of the rationales for existing race-based financial aid programs described by commenters appear to meet this standard.

The recent report by GAO on current financial aid programs does not indicate the existence of serious problems of noncompliance with the law in postsecondary institutions. That report found that race-targeted scholarships constitute a very small percentage of the scholarships awarded to students at postsecondary institutions. The Secretary anticipates that most existing programs will be able to satisfy the principles set out in this final guidance.

The Department will use the principles described in this final policy guidance in making determinations concerning discrimination based on race or national origin in the award of financial aid. These principles describe the circumstances in which the Department, based on its interpretation of Title VI and relevant case law, believes consideration of race or national origin in the award of financial aid to be permissible. A financial aid program that falls within one or more of these principles will be, in the Department's view, in compliance with Title VI.[1] This guidance is intended to assist colleges in fashioning legally defensible affirmative action programs to promote the access of minority students to postsecondary education. The Department will offer technical assistance to colleges in reexamining their financial aid programs based on this guidance.

This notice consists of five simply stated principles and a section containing a legal analysis for each principle. The legal analysis addresses the major comments received in response to the notice of proposed policy guidance.

[1] In identifying these principles, the Department is not foreclosing the possibility that there may be other bases on which a college may support its consideration of race or national origin in awarding financial aid. The Department will consider any justifications that are presented during the course of a Title VI investigation on a case-by-case basis.

Summary of Changes in the Final Policy Guidance

Almost 600 written responses were received by the Department in response to the proposed policy guidance, many with detailed suggestions and analysis. Many additional suggestions and concerns were raised in meetings between Department officials and representatives of postsecondary institutions and civil rights groups. The vast majority of comments expressed support for the objective of clarifying the options colleges have to use financial aid to promote student diversity and access of minorities to postsecondary education without violating Title VI. Many comments, however, took issue with specific principles in the proposed policy guidance and questioned whether those principles would be effective in accomplishing this purpose.

As more fully explained in the legal analysis section of this document, after reviewing the public comments and reexamining the legal precedents in light of those comments, the Department has revised the policy guidance in the following respects:

(1) Principle 3—"Financial Aid to Remedy Past Discrimination"—has been amended to permit a college to award financial aid based on race or national origin as part of affirmative action to remedy the effects of its past discrimination without waiting for a finding to be made by the Office for Civil Rights (OCR), a court, or a legislative body, if the college has a strong basis in evidence of discrimination justifying the use of race-targeted scholarships.

(2) Principle 4—"Financial Aid to Create Diversity"—has been amended to permit the award of financial aid on the basis of race or national origin if the aid is a necessary and narrowly tailored means to accomplish a college's goal to have a diverse student body that will enrich its academic environment.

(3) Principle 5—"Private Gifts Restricted by Race or National Origin"—has been amended to clarify that a college can administer financial aid from private donors that is restricted on the basis of race or national origin only if that aid is consistent with the other principles in this policy guidance.

(4) A provision has been added to permit historically black colleges and universities (HBCUs) to participate in race-targeted programs for black students established by third parties if the programs are not limited to students at HBCUs.

(5) Provisions in the proposed policy guidance for a transition period have

been revised to provide that, as far as the Department's enforcement efforts are concerned—

(a) Colleges and other recipients of federal financial assistance will have a reasonable period of time—up to two years—to review their financial aid programs and to make any adjustments necessary to come into compliance with the principles in this final policy guidance.

(b) No student who has received or applied for financial aid at the time this guidance becomes effective will lose aid as a result of this guidance. Thus, if an award of financial aid is inconsistent with the principles in this guidance, a college or other recipient of Federal financial assistance may continue to provide the aid to a student during the course of his or her enrollment in the academic program for which the aid was awarded, if the student had either applied for or received the aid prior to the effective date of this policy guidance.

Principles

Definitions

For purposes of these principles—

College means any postsecondary institution that receives federal financial assistance from the Department of Education.

Financial aid includes scholarships, grants, loans, work-study, and fellowships that are made available to assist a student to pay for his or her education at a college.

Race-neutral means not based, in whole or in part, on race or national origin.

Race-targeted, race-based, and *awarded on the basis of race or national origin* mean limited to individuals of a particular race or races or national origin or origins.

Principle 1: Financial Aid for Disadvantaged Students

A college may make awards of financial aid to disadvantaged students, without regard to race or national origin, even if that means that these awards go disproportionately to minority students.

Financial aid may be earmarked for students from low-income families. Financial aid also may be earmarked for students from school districts with high dropout rates, or students from single-parent families, or students from families in which few or no members have attended college. None of these or other race-neutral ways of identifying and providing aid to disadvantaged students present Title VI problems. A college may use funds from any source to provide financial aid to disadvantaged students.

Principle 2: Financial Aid Authorized by Congress

A college may award financial aid on the basis of race or national origin if the aid is awarded under a Federal statute that authorizes the use of race or national origin.

Principle 3: Financial Aid To Remedy Past Discrimination

A college may award financial aid on the basis of race or national origin if the aid is necessary to overcome the effects of past discrimination. A finding of discrimination may be made by a court or by an administrative agency—such as the Department's Office for Civil Rights. Such a finding may also be made by a State or local legislative body, as long as the legislature has a strong basis in evidence identifying discrimination within its jurisdiction for which that remedial action is necessary.

In addition, a college may award financial aid on the basis of race or national origin to remedy its past discrimination without a formal finding of discrimination by a court or by an administrative or legislative body. The college must be prepared to demonstrate to a court or administrative agency that there is a strong basis in evidence for concluding that the college's action was necessary to remedy the effects of its past discrimination. If the award of financial aid based on race or national origin is justified as a remedy for past discrimination, the college may use funds from any source, including unrestricted institutional funds and privately donated funds restricted by the donor for aid based on race or national origin.

A State may award financial aid on the basis of race or national origin, under the preceding standards, if the aid is necessary to overcome its own past discrimination or discrimination at colleges in the State.

Principle 4: Financial Aid To Create Diversity

America is unique because it has forged one Nation from many people of a remarkable number of different backgrounds. Many colleges seek to create on campus an intellectual environment that reflects that diversity. **A college should have substantial discretion to weigh many factors—including race and national origin—in its efforts to attract and retain a student population of many different experiences, opinions, backgrounds, and cultures—provided that the use of race or national origin is consistent with the constitutional standards reflected in Title VI, *i.e.*, that it is a narrowly tailored means to achieve the goal of a diverse student body.**

There are several possible options for a college to promote its First Amendment interest in diversity. First, a college may, of course, use its financial aid program to promote diversity by considering factors other than race or national origin, such as geographic origin, diverse experiences, or socioeconomic background. Second, a college may consider race or national origin with other factors in awarding financial aid if the aid is necessary to further the college's interest in diversity. Third, a college may use race or national origin as a condition of eligibility in awarding financial aid if this use is narrowly tailored, or, in other words, if it is necessary to further its interest in diversity and does not unduly restrict access to financial aid for students who do not meet the race-based eligibility criteria.

Among the considerations that affect a determination of whether awarding race-targeted financial aid is narrowly tailored to the goal of diversity are (1) whether race-neutral means of achieving that goal have been or would be ineffective; (2) whether a less extensive or intrusive use of race or national origin in awarding financial aid as a means of achieving that goal has been or would be ineffective; (3) whether the use of race or national origin is of limited extent and duration and is applied in a flexible manner; (4) whether the institution regularly reexamines its use of race or national origin in awarding financial aid to determine whether it is still necessary to achieve its goal; and (5) whether the effect of the use of race or national origin on students who are not beneficiaries of that use is sufficiently small and diffuse so as not to create an undue burden on their opportunity to receive financial aid.

If the use of race or national origin in awarding financial aid is justified under this principle, the college may use funds from any source.

Principle 5: Private Gifts Restricted by Race or National Origin

Title VI does not prohibit an individual or an organization that is not a recipient of Federal financial assistance from directly giving scholarships or other forms of financial aid to students based on their race or national origin. Title VI simply does not apply.

The provisions of Principles 3 and 4 apply to the use of race-targeted privately donated funds by a college and may justify awarding these funds on the basis of race or national origin if the

college is remedying its past discrimination pursuant to Principle 3 or attempting to achieve a diverse student body pursuant to Principle 4. In addition, a college may use privately donated funds that are not restricted by their donor on the basis of race or national origin to make awards to disadvantaged students as described in Principle 1.

Additional Guidance

Financial Aid at Historically Black Colleges and Universities

Historically black colleges and universities (HBCUs), as defined in Title III of the Higher Education Act (Title III), 20 U.S.C. 1061, are unique among institutions of higher education in America because of their role in serving students who were denied access to postsecondary education based on their race.[2] Congress has made numerous findings reflecting the special role and needs of these institutions in light of the history of discrimination by States and the Federal Government against both the institutions and their students and has required enhancement of these institutions as a remedy for this history of discrimination.

Based upon the extensive congressional findings concerning HBCUs, and consistent with congressional and Executive Branch efforts to enhance and strengthen HBCUs, the Department interprets Title VI to permit these institutions to participate in student aid programs established by third parties that target financial aid to black students, if those programs are not limited to students at the HBCUs. These would include programs to which HBCUs contribute their own institutional funds if necessary for participation in the programs. Precluding HBCUs from these programs would have an unintended negative effect on their ability to recruit talented student bodies and would undermine congressional actions aimed at enhancing these institutions. HBCUs may not create their own race-targeted programs using institutional funds, nor may they accept privately donated race-targeted aid limited to students at the HBCUs, unless they satisfy the requirements of any of the other principles in this guidance.[3]

Transition Period

Although the Department anticipates that most financial aid programs that consider race or national origin in awarding assistance will be found to be consistent with one or more of the principles in this final policy guidance, there will be some programs that require adjustment to comply with Title VI. In order to permit colleges time to assess their programs and to make any necessary adjustments in an orderly manner—and to ensure that students who already have either applied for or received financial aid do not lose their student aid as a result of the issuance of this policy guidance—there will be a transition period during which the Department will work with colleges that require assistance to bring them into compliance.[4]

The Department will afford colleges up to two academic years to adjust their programs for new students. However, to the extent that a college does not need the full two years to make adjustments to its financial aid programs, the Department expects that the adjustments will be made as soon as practicable.

No student who is currently receiving financial aid, or who has applied for aid prior to the effective date of this policy guidance, should lose aid as a result of this guidance. Thus, if a college determines that a financial aid program is not permissible under this policy guidance, the college may continue to provide assistance awarded on the basis of race or national origin to students during the entire course of their academic program at the college, even if that period extends beyond the two-year transition period, if the students had either applied for or received that assistance prior to the effective date of this policy.

Legal Analysis

Introduction

The Department of Education is responsible for enforcing Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, at institutions receiving Federal education funds. Section 601 of Title VI provides that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. 42 U.S.C. 2000d.

The Department has issued regulations implementing Title VI that are applicable to all recipients of financial assistance from the Department. 34 CFR part 100. The regulations prohibit discrimination in the administration of financial aid programs. Specifically, they prohibit a recipient, on the basis of race, color, or national origin, from denying financial aid; providing different aid; subjecting anyone to separate or different treatment in any matter related to financial aid; restricting the enjoyment of any advantage or privilege enjoyed by others receiving financial aid; and treating anyone differently in determining eligibility or other requirements for financial aid. 34 CFR 100.3(b)(1); see also 34 CFR 100.3(b)(2).

In addition to prohibiting discrimination, the Title VI regulations require that a recipient that has previously discriminated "must take affirmative action to overcome the effects of prior discrimination." 34 CFR 100.3(b)(6)(i). The regulations also permit recipients to take voluntary affirmative action "[e]ven in the absence of such prior discrimination * * * to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin" in the recipient's programs. 34 CFR 100.3(b)(6)(ii); see 34 CFR 100.5(i).

The permissibility of awarding student financial aid based, in whole or in part, on a student's race or national origin involves an interpretation of the preceding provisions concerning affirmative action. The Supreme Court has made clear that Title VI prohibits intentional classifications based on race or national origin for the purpose of affirmative action to the same extent and under the same standards as the Equal Protection Clause of the Fourteenth Amendment.[5] *Guardians Ass'n* v. *Civil Service Commission of the City of New York*, 463 U.S. 582 (1983); *Regents of the University of California* v.

[2] Title III states a number of requirements that an institution must meet in order to be considered an historically black college or university, including the requirement that the college or university was established prior to 1964. 20 U.S.C. 1061. In regulations implementing Title III, the Secretary has identified the institutions that meet these requirements. 34 CFR 608.2(b).

[3] For example, an HBCU might award race-targeted aid to Mexican American students or to white students to promote diversity under Principle 4.

[4] This transition period also applies to recipients of Federal financial assistance that are not colleges, e.g., a nonprofit organization that operates a scholarship program.

[5] Some commenters suggested that Native Americans and Native Hawaiians—because of their special relationship with the Federal Government—should be exempt from the restrictions outlined in the policy guidance. The Department has found no legal authority for treating affirmative action by recipients of Federal assistance any differently if the group involved is Native Americans or Native Hawaiians. Thus, the principles in this policy guidance—including Principle 2, which states that a college may award financial aid on the basis of race or national origin if authorized by Federal statute—apply to financial aid that is limited to Native Americans and Native Hawaiians. However, the policy does not address the authority of tribal governments or tribally controlled colleges to restrict aid to members of their tribes.

Bakke, 438 U.S. 265 (1978). Thus, the Department's interpretation of the general language of the Title VI regulations concerning permissible affirmative action is based on case law under both Title VI and the Fourteenth Amendment.

The following discussion addresses the legal basis for each of the five principles set out in the Department's policy guidance.

1. Financial Aid for Disadvantaged Students

The first principle provides that colleges may award financial aid to disadvantaged students. Colleges are free to define the circumstances under which students will be considered to be disadvantaged, as long as that determination is not based on race or national origin.

As some commenters noted, the Title VI regulations prohibit actions that, while not intentionally discriminatory, have the effect of discriminating on the basis of race or national origin. 34 CFR 100.3(b)(2); see *Guardians Ass'n v. Civil Service Commission of the City of New York*, *supra*; *Lau v. Nichols*, 414 U.S. 563 (1974). However, actions that have a disproportionate effect on students of a particular race or national origin are permissible under Title VI if they bear a "manifest demonstrable relationship" to the recipient's educational mission *Georgia State Conference of Branches of NAACP v. State of Georgia*, 775 F.2d 1403, 1418 11th Cir. (1985). It is the Department's view that awarding financial aid to disadvantaged students provides a sufficiently strong educational purpose to justify any racially disproportionate effect the use of this criterion may entail. In particular, the Department believes that an applicant's character, motivation, and ability to overcome economic and educational disadvantage are educationally justified considerations in both admission and financial aid decisions. Therefore, the award of financial assistance to disadvantaged students does not violate Title VI.

2. Financial Aid Authorized by Congress

This principle states that a college may award financial aid on the basis of race or national origin if the use of race or national origin in awarding that aid is authorized by Federal statute. This is because financial aid programs for minority students that are authorized by a specific Federal law cannot be considered to violate another Federal law, *i.e.*, Title VI. In the case of the establishment of federally funded financial aid programs, such as the Patricia Roberts Harris Fellowship, the authorization of specific minority scholarships by that legislation prevails over the general prohibition of discrimination in Title VI.[6] This result also is consistent with the canon of construction under which the specific provisions of a statute prevail over the general provisions of the same or a different statute. See 2A N. Singer *Sutherland Statutory Construction* section 46.05 (5th ed. 1992); *Radzanower v. Touche Ross and Co.*, 426 U.S. 148, 153 (1976); *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974); *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 225, 228–29 (1957).

Some commenters argued that the existence of congressionally authorized race-targeted financial aid programs supports the position that all race-targeted financial aid programs are permissible under Title VI. However, the fact that Congress has enacted specific Federal programs for race-targeted financial aid does not serve as an authorization for States or colleges to create their own programs for awarding student financial aid based on race or national origin.

3. Financial Aid To Remedy Past Discrimination

Classifications based on race or national origin, including affirmative action measures, are "suspect" classifications that are subject to strict scrutiny by the courts. *Regents of the University of California v. Bakke*, 438 U.S. at 292. The use of those classifications must be based on a compelling governmental interest and must be narrowly tailored to serve that interest. *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

The Supreme Court has repeatedly held that the Government has a compelling interest in ensuring the elimination of discrimination on the basis of race or national origin. To further this governmental interest, the Supreme Court has sanctioned the use of race-conscious measures to eliminate discrimination. *United States v. Fordice*, ____ U.S. ____ (1992); *United States v. Paradise*, 480 U.S. 149, 167 (1987); *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 15–16 (1971); *McDaniel v. Barresi*, 402 U.S. 39 (1971); *Green v. County School Board of New Kent County*, 391 U.S. 430, 438 (1968). Most recently, in *United States v. Fordice*, *supra*, the Court found that States that operated *de jure* systems of higher education have an affirmative obligation to ensure that no vestiges of the de jure system continue to have a discriminatory effect on the basis of race.

The implementing regulations for Title VI provide that a recipient of Federal financial assistance that has previously discriminated in violation of the statute or regulations must take affirmative action to overcome the effects of the past discrimination. 34 CFR 100.3(b)(6)(i). Thus, a college that has been found to have discriminated against students on the basis of race or national origin must take steps to remedy that discrimination. That remedial action may include the awarding of financial aid to students from the racial or national origin groups that have been discriminated against.

The proposed policy guidance provided that a finding of past discrimination could be made by a court or by an administrative agency, such as the Department's Office for Civil Rights. It also could be made by a State or local legislative body, as long as the legislature requiring the affirmative action had a strong basis in evidence identifying discrimination within its jurisdiction for which that remedial action is required.

A number of commenters argued that colleges should be able to take remedial action without waiting for a formal finding by a court, administrative agency, or legislature. The Department agrees. The final policy guidance provides that, even in the absence of a finding by a court, legislature, or administrative agency, a college—in order to remedy its past discrimination—may implement a remedial race-targeted financial aid program. It may do so if it has a strong basis in evidence for concluding that this affirmative action is necessary to remedy the effects of its past discrimination and its financial aid program is narrowly tailored to remedy that discrimination. Permitting colleges to remedy the effects of their past discrimination without waiting for a formal finding is consistent with the approach taken by the Supreme Court in *Wygant v. Jackson Board of Education*, *supra*. In *Wygant*, the Court clarified that a school district's race-conscious voluntary affirmative action plan could be upheld based on subsequent judicial findings of past discrimination by the

[6] Of course, an individual may challenge the statute under which the aid is provided as violative of the Constitution. The statute would then be evaluated under the constitutional standards for racial classifications authorized by Federal statute that were established in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) and *Fullilove v. Klutznick*, 448 U.S. 448 (1980). However, as explained previously, such a suit would not be viable under Title VI, for which the Department has enforcement responsibility.

district. *Wygant* v. *Jackson Board of Education*, 476 U.S. at 277.

In the *Wygant* case, teachers challenged their school board's adoption, through a collective bargaining agreement, of a layoff plan that included provisions protecting employees from layoffs on the basis of their race. The school board contended, among other things, that the plan's race-conscious layoff provisions were constitutional because they were adopted to remedy the school board's own prior discrimination. *Id.*, at 276, 277. Justice Powell, in a plurality opinion, stated that a public employer must have "convincing evidence" that an affirmative action plan is warranted by past discrimination before undertaking that plan. *Id.*, at 277. If the plan is challenged by employees who are harmed by the plan, the court must then make a determination that the employer had a "strong basis in evidence for its conclusion that remedial action was necessary." *Id.*

In a concurring opinion, Justice O'Connor agreed that a "contemporaneous or antecedent finding of past discrimination by a court was not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan." *Id.*, at 289. She explained that contemporaneous or antecedent findings were not necessary because "A violation of Federal statutory or constitutional requirements does not arise with the making of findings; it arises when the wrong is committed." Moreover, she explained that important values would be sacrificed if contemporaneous findings were required because "a requirement that public employers make findings that they engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations." *Id.*, at 289, 290 (citations omitted).

In *Richmond* v. *J.A. Croson*, *supra*, the Court again emphasized that remedial race-conscious action must be based on strong evidence of discrimination. That case involved the constitutionality of a city ordinance establishing a plan to remedy past discrimination by requiring prime contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to minority-controlled businesses. The Court found that the city council had failed to make sufficient factual findings to demonstrate a "strong basis in evidence" of racial discrimination "by anyone in the Richmond construction industry." *Richmond* v. *J.A. Croson*, 488 U.S. at 500.

Evidence of past discrimination may, but need not, include documentation of specific incidents of intentional discrimination. Instead, evidence of a statistically significant disparity between the percentage of minority students in a college's student body and the percentage of qualified minorities in the relevant pool of college-bound high school graduates may be sufficient. Such an approach is analogous to cases of employment discrimination where the courts accept statistical evidence to infer intentional discrimination against minority job applicants. See *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977).

Based on this case law, Principle 3 provides that a college may award race-targeted scholarships to remedy discrimination as found by a court or by an administrative agency, such as the Department's Office for Civil Rights. OCR often has approved race-targeted financial aid programs as part of a Title VI remedial plan to eliminate the vestiges of prior discrimination within a State higher education system that previously was operated as a racially segregated dual system. As indicated by the *Croson* decision, a finding of past discrimination also may be made by a State or local legislative body, as long as the legislature has a strong basis in evidence identifying discrimination within its jurisdiction. The remedial use of race-targeted financial aid must be narrowly tailored to remedy the effects of the discrimination.

As revised, Principle 3 also allows a college to award student aid on the basis of race or national origin as part of affirmative action to remedy the effects of the school's past discrimination without waiting for a finding to be made by OCR, a court, or a legislative body, if the college has convincing evidence of past discrimination justifying the affirmative action. The Department's Title VI regulations, like the Fourteenth Amendment, do not require that antecedent or contemporaneous findings of past discrimination be made before remedial affirmative action is implemented, as long as the college has a strong basis in evidence of its past discrimination. Allowing colleges to implement narrowly tailored remedial affirmative action if there is strong evidentiary support for it—without requiring that it be delayed until a finding is made by OCR, a court, or a legislative body—will assist in ensuring that Title VI's mandate against discrimination based on race or national origin is achieved.

4. Financial Aid To Create Diversity

The Title VI regulations permit a college to take voluntary affirmative action, even in the absence of past discrimination, in response to conditions that have limited the participation at the college of students of a particular race or national origin. 34 CFR 100.3(b)(6)(ii); see 34 CFR 100.5(i). In *Regents of the University of California* v. *Bakke*, *supra*, the Supreme Court considered whether the University could take voluntary affirmative action by setting aside places in each medical school class for which only minority students could compete.[7]

The Court considered four rationales provided by the University of California for taking race and national origin into account in making admissions decisions: (1) To reduce the historic deficit of traditionally disfavored minorities in medical schools and the medical profession. (2) To counter the effects of societal discrimination. (3) To increase the number of physicians who would practice in communities lacking medical services. (4) To obtain the educational benefits of a diverse student body. Similar arguments have been advanced in response to the Department's proposed policy guidance on student financial assistance awarded on the basis of race or national origin.

The Court rejected the first three justifications. The first reason was rejected as facially invalid because setting aside a fixed number of admission spaces only to ensure that members of a specified race are admitted was found to be racial "discrimination for its own sake." *Regents of the University of California* v. *Bakke*, 438 U.S. at 307. In rejecting the second contention that the effects of societal discrimination warranted the racial preferences, the Court recognized that the State had a substantial interest in eliminating the effects of discrimination, but that interest was found to be limited to "redress[ing] the wrongs worked by specific instances of discrimination." *Id.* The third contention, concerning the provision of health care services to underserved communities, was rejected by the *Bakke* Court as an evidentiary matter because the State had "not carried its burden of demonstrating that it must prefer members of particular ethnic groups over all other individuals in order to

[7] The Court noted that the University "does not purport to have made" a determination that its affirmative action plan was necessary to remedy any past discrimination at the medical school. *Regents of the University of California* v. *Bakke*, 438 U.S. at 309.

promote better health-care delivery to deprived citizens." *Id.*, at 311.

With respect to the final objective, the "attainment of a diverse student body," Justice Powell found that—

> This clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.

Id., at 311, 312. Thus, colleges have a First Amendment right to seek diversity in admissions to fulfill their academic mission through the "robust exchange of ideas" that flows from a diverse student body. *Id.*, at 312–313.[8] However, the means to achieve this "countervailing constitutional interest" under the First Amendment must comport with the requirements of the Fourteenth Amendment. The Medical School's policy of setting aside a fixed number of admission spaces solely for minorities was found not to pass the Fourteenth Amendment's strict scrutiny test, because the policy's use of race as a condition of eligibility for the slots was not necessary to promote the school's diversity interest. *Id.*, at 315–316. Justice Powell found that the Medical School could advance its diversity interest under the First Amendment in a narrowly tailored manner that passed the Fourteenth Amendment's strict scrutiny test by using race or national origin as one of several factors that would be considered as a plus factor for an applicant in the admissions process. *Id.*, at 317–319.

Following the *Bakke* decision, the Department reexamined its Title VI regulations to determine whether any changes were necessary. In a policy interpretation published in the **Federal Register** (44 FR 58509), the Department concluded that no change was warranted. The Department determined that the Title VI regulatory provision authorizing voluntary affirmative action was consistent with the Court's decision and that the provision would be interpreted to incorporate the limitations on voluntary affirmative action announced by the Court.[9] Thus, if a college's use of race or national origin in awarding financial aid meets the Supreme Court's test under the Fourteenth Amendment for permissible voluntary affirmative action, it will also meet the requirements of Title VI.

In the Department's proposed policy guidance on financial aid, a principle was included permitting the use of race or national origin as a "plus" factor in awarding student aid. The basis for the principle was the *Bakke* decision and the Department's assessment that using an approach that had been approved by the Supreme Court as narrowly tailored to achieve diversity in the admissions context also would be permissible in awarding financial aid.[10]

In response to the proposed policy, many colleges submitted comments arguing that the use of race or national origin as a plus factor in awarding financial aid may be inadequate to achieve diversity. They contended that, in some cases, it may be necessary to designate a limited amount of aid for students of a particular race or national origin. According to those commenters, a college's financial aid program can serve a critical role in achieving a diverse student body in at least three respects: First, the availability of financial aid set aside for members of a particular race or national origin serves as a recruitment tool, encouraging applicants to consider the school. Second, it provides a means of encouraging students who are offered admission to accept the offer and enroll at the school. Finally, it assists colleges in retaining students until they complete their program of studies.

The commenters argued that a college—because of its location, its reputation (whether deserved or not) of being inhospitable to minority students, or its number of minority graduates—may be unable to recruit sufficient minority applicants even if race or national origin is considered a positive factor in admissions and the award of aid. That is, the failure to attract a sufficient number of minority applicants who meet the academic requirements of the college will make it impossible for the college to enroll a diverse student body, even if race or national origin is given a competitive "plus" in the admissions process. In addition, a college that has sufficient minority applicants to offer admission to a diverse group of applicants may find that, absent the availability of financial aid set aside for minority students, its offers of admission are disproportionately rejected by minority applicants.

Furthermore, commenters were concerned that, while there may be large amounts of financial aid available for undergraduates at their institutions, there may be insufficient aid for graduate students, almost all of whom are able to demonstrate financial need. Thus, it is possible that a college that is able to achieve a diverse student body in some of its programs using race-neutral financial aid criteria or using race or national origin as a "plus" factor may find it necessary to use race or national origin as a condition of eligibility in awarding limited amounts of financial aid to achieve diversity in some of its other programs, such as its graduate school or particular undergraduate schools.

The Department agrees with the commenters that in the circumstances they have described it may be necessary for a college to set aside financial aid to be awarded on the basis of race or national origin in order to achieve a diverse student body. Whether a college's use of race-targeted financial aid is "narrowly tailored" to achieve this compelling interest involves a case-by-case determination that is based on the particular circumstances involved. The Department has determined, based on the comments, to expand Principle 4 to permit those case-by-case determinations.

The Court in *Bakke* indicated that race or national origin could be used in making admissions decisions to further the compelling interest of a diverse student body even though the effect might be to deny admission to some students who did not receive a competitive "plus" based on race or ethnicity.[11] However, the use of a set-aside of places in the entering class was impermissible because it was not necessary to the goal of diversity. In cases since *Bakke*, the Supreme Court has provided additional guidance on the factors to be considered in determining whether a classification based on race or national origin is narrowly tailored to its purpose. These factors will be

[8] The Secretary believes that a college's academic freedom interest in the "robust exchange of ideas" also includes an interest in the existence of a diverse faculty and, more generally, in diversity of professors nationally, since scholars engage in the interchange of ideas with others in their field, and not merely with faculty at their particular school. A university could contribute to this interest by enrolling graduate students who are committed to becoming professors and who will promote the overall diversity of scholars in their field of study, regardless of the diversity of the students who are admitted to the university's own graduate program.

[9] The present policy guidance on student financial assistance supplements the 1979 policy interpretation.

[10] The Department will presume that a college's use of race or national origin as a plus factor, with other factors, is narrowly tailored to further the compelling governmental interest in diversity, as long as the college periodically reexamines whether its use of race or national origin as a plus factor continues to be necessary to achieve a diverse student body.

[11] *Bakke* was the Supreme Court's first decision in an affirmative action case. Since that time, the Court has decided a number of affirmative action cases, none of which have invalidated Justice Powell's opinion in *Bakke* that the promotion of diversity in the higher education setting is a compelling interest.

considered by the Department in assessing whether a college's race-targeted financial aid program meets the requirements of Title VI.

First, it is necessary to determine the efficacy of alternative approaches. *United States* v. *Paradise*, 480 U.S. at 171. Thus, it is important that consideration has been given to the use of alternative approaches that are less intrusive (*e.g.*, the use of race or national origin as a "plus" factor rather than as a condition of eligibility). *Metro Broadcasting, Inc.* v. *F.C.C.*, 497 U.S. at 583; *Richmond* v. *J.A. Croson*, 488 U.S. at 507. Financial aid that is restricted to students of a particular race or national origin should be used only if a college determines that these alternative approaches have not or will not be effective.

Second, the extent, duration, and flexibility of the racial classification must be addressed. *Metro Broadcasting, Inc.* v. *F.C.C.*, 497 U.S. at 594; *United States* v. *Paradise*, 480 U.S. at 171. The extent of the use of the classification should be no greater than is necessary to carry out its purpose. *Richmond* v. *J.A. Croson*, 488 U.S. at 507. That is, the amount of financial aid that is awarded based on race or national origin should be no greater than is necessary to achieve a diverse student body.

The duration of the use of a racial classification should be no longer than is necessary to its purpose, and the classification should be periodically reexamined to determine whether there is a continued need for its use. *Metro Broadcasting, Inc.* v. *F.C.C.*, 497 U.S. at 594. Thus, the use of race-targeted financial aid should continue only while it is necessary to achieve a diverse student body, and an assessment as to whether that continues to be the case should be made on a regular basis.

In addition, the use of the classification should be sufficiently flexible that exceptions can be made if appropriate. For example, the Supreme Court in *United States* v. *Paradise* found that a race-conscious promotion requirement was flexible in operation because it could be waived if no qualified candidates were available. 480 U.S. at 177. Similarly, racial restrictions on the award of financial aid could be waived if there were no qualified applicants.

Finally, the burden on those who are excluded from the benefit conferred by the classification based on race or national origin (*i.e.*, non-minority students) must be considered. *Id.*, at 171. A use of race or national origin may impose such a severe burden on particular individuals—for example, eliminating scholarships currently received by non-minority students in order to start a scholarship program for minority students—that it is too intrusive to be considered narrowly tailored. See *Wygant* v. *Jackson Board of Education*, 476 U.S. at 283 (use of race in imposing layoffs involves severe disruption to lives of identifiable individuals). Generally, the less severe and more diffuse the impact on non-minority students, the more likely a classification based on race or national origin will address this factor satisfactorily. However, it is not necessary to show that no student's opportunity to receive financial aid has been in any way diminished by the use of the race-targeted aid. Rather, the use of race-targeted financial aid must not place an undue burden on students who are not eligible for that aid.

A number of commenters argued that race-targeted financial aid is a minimally intrusive method to attain a diverse student body, far more limited in its impact on non-minority students, for example, than race-targeted admissions policies. Under this view, and unlike the admissions plan at issue in *Bakke*, a race-targeted financial aid award could be a narrowly tailored means of achieving the compelling interest in diversity.

The Department agrees that there are important differences between admissions and financial aid. The affirmative action admissions program struck down in *Bakke* had the effect of excluding applicants from the university on the basis of their race. The use of race-targeted financial aid, on the other hand, does not, in and of itself, dictate that a student would be foreclosed from attending a college solely on the basis of race. Moreover, in contrast to the number of admissions slots, the amount of financial aid available to students is not necessarily fixed. For example, a college's receipt of privately donated monies restricted to an underrepresented group might increase the total pool of funds for student aid in a situation in which, absent the ability to impose such a limitation, the donor might not provide any aid at all.

Even in the case of a college's own funds, a decision to bar the award of race-targeted financial aid will not necessarily translate into increased resources for students from non-targeted groups. Funds for financial aid restricted by race or national origin that are viewed as a recruitment device might be rechanneled into other methods of recruitment if restricted financial aid is barred. In other words, unlike admission to a class with a fixed number of places, the amount of financial aid may increase or decrease based on the functions it is perceived to promote.

In summary, a college can use its financial aid program to promote diversity by considering factors other than race or national origin, such as geographic origin, diverse experiences, or socioeconomic background. In addition, a college may take race or national origin into account as one factor, with other factors, in awarding financial aid if necessary to promote diversity. Finally, a college may use race or national origin as a condition of eligibility in awarding financial aid if it is narrowly tailored to promote diversity.

5. Private Gifts Restricted by Race or National Origin

The fifth principle sets out the circumstances under which a recipient college can award financial aid provided by private donors that is restricted on the basis of race or national origin.

As noted by many commenters, pursuant to the Civil Rights Restoration Act of 1987, all of the operations of a college are covered by Title VI if the college receives any Federal financial assistance. 42 U.S.C. 2000d-4a(2)(A). Since a college's award of privately donated financial aid is within the operations of the college, the college must comply with the requirements of Title VI in awarding those funds.[12]

A college may award privately donated financial aid on the basis of race or national origin if the college is remedying its past discrimination pursuant to Principle 3 or attempting to achieve a diverse student body pursuant to Principle 4. In other words, Principles 3 and 4 apply to the use of privately donated funds and may justify awarding these funds on the basis of race or national origin in accordance with the wishes of the donor. Similarly, under Principle 1, a college may award privately donated financial aid that is restricted to disadvantaged students.

Some commenters were uncertain whether it is permissible under Title VI for a college to solicit private donations of student financial aid that are restricted to students of a particular race or national origin. If the receipt and award of these funds is permitted by Title VI, that is, in the circumstances

[12] Similarly, other organizations that receive Federal financial assistance must comply with Title VI in their award of student financial aid. On the other hand, individuals or organizations not receiving Federal funds are not subject to Title VI. They may thus, as far as Title VI is concerned, directly award financial aid to students on the basis of race or national origin.

Previously described, it is similarly permissible to solicit the funds from private sources.

Financial Aid at Historically Black Colleges and Universities

To ensure that the principles in this policy guidance do not subvert congressional efforts to enhance historically black colleges and universities (HBCUs), these institutions may participate in student aid programs established by third parties for black students that are not limited to students at the HBCUs and may use their own institutional funds in those programs if necessary for participation.[13] See 20 U.S.C. 1051, 1060, and 1132c (congressional findings of past discrimination against HBCUs and of the need for enhancement).

This finding is based upon congressional findings of past discrimination against HBCUs and the students they have traditionally served, as well as the Department's determination that these institutions and their students would be harmed if precluded from participation in programs created by third parties that designate financial aid for black students. That action would have an unintended negative effect on their ability to recruit excellent student bodies and could undermine congressional actions aimed at enhancing these institutions

Congress has repeatedly made findings that recognize the unique historical mission and important role that HBCUs play in the American system of higher education, and particularly in providing equal educational opportunity for black students. 20 U.S.C. 1051, 1060, and 1132c Congress has created programs that strengthen and enhance HBCUs in Titles II through VII of the Higher Education Act, as amended by Public Law 99–498, 20 U.S.C. 1021–1132i-2. It has found that "there is a particular national interest in aiding institutions of higher education that have historically served students who have been denied access to postsecondary education because of race or national origin . . . so that equality of access and quality of postsecondary education opportunities may be enhanced for all students." 20 U.S.C. 1051. "A key link to the chain of expanding college opportunity for African American youth is strengthening the Nation's historically Black colleges and universities." House Report No. 102–447, 1992 U.S. Code Cong. and Adm. News p. 353.

Congress has found that "the current state of HBCUs is partly attributable to the discriminatory action of the States and the Federal Government and this discriminatory action requires the remedy of enhancement of Black postsecondary institutions to ensure their continuation and participation in fulfilling the Federal mission of equality of educational opportunity." 20 U.S.C. 1060. See also, House Report No. 102–447, 1992 U.S. Code Cong. and Adm. News p. 353; House Report No. 99–383, 1986 U.S. Code Cong. and Adm. News 2592–2596. This includes providing access and quality education to low-income and minority students, and improving HBCUs' academic quality. 20 U.S.C. 1051.

For these same reasons, every Administration in recent years has recognized the special role and contributions of HBCUs and expressed support for their enhancement. See "Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education." 43 FR 6658 (1977); Exec. Orders Nos. 12232, 45 FR 53437 (1980); 12320, 46 FR 48107 (1981); 12677, 54 FR 18869 (1989); and 12876, 58 FR 58735 (1993). The Department's own data indicate that HBCUs continue to play a vital role in providing higher education for many black students. In 1989 and 1990, more than one in four black bachelor's degree recipients received their degree from an HBCU (26.7%). See, "Historically Black Colleges and Universities, 1976–90" (U.S. Department of Education, Office of Educational Research and Improvement, July 1992)

This policy guidance is not intended to limit the efforts to enhance HBCUs called for by Congress and the President The Department recognizes, however, that Principle 3 (remedying past discrimination) and Principle 4 (creating diversity) may not provide for HBCUs the same possibility of participating in race-targeted programs of financial aid for black students established by third parties as are provided for other colleges and universities. As some commenters pointed out, HBCUs continue to enroll a disproportionate percentage of black students and need to be able to compete for the most talented black students if they are to improve the quality and prestige of their academic environments and, therefore, enhance their attractiveness to all students regardless of race or national origin.

HBCUs' abilities to recruit, enroll and retain talented students will be undermined unless HBCUs are permitted to attract talented black students by participating in aid programs for black students that are established by third parties in which other colleges, *i.e.*, those that meet Principle 3 or 4, participate. Limiting or precluding HBCUs' participation in private programs, such as the National Achievement Scholarship program, would have an unintended negative effect on their ability to recruit a talented student body. Under this scholarship program, which is restricted to academically excellent black students, one type of National Achievement Scholarship is funded by the institution. If HBCUs were unable to participate in this program, some top black students might be forced to choose between (1) receiving a National Achievement Scholarship to attend a school that met Principle 3 or 4 and (2) attending an HBCU. For these reasons, the Department interprets Title VI to permit HBCUs to participate in certain race-targeted aid programs for black students, such as the National Achievement Scholarship program.

The Department reads Title VI consistent with other statutes and Executive orders addressing the special needs and history of HBCUs. In particular, the Department notes congressional findings of discrimination against black students that are the basis for enhancement efforts at HBCUs. Additionally, the Department interprets Title VI to permit limited use of race to avoid an anomalous and absurd result, *i.e.*, penalizing HBCUs and students who seek admission to HBCUs, and putting HBCUs at a disadvantage with respect to other schools precisely because of the special history and composition of the HBCUs.

The use of race-targeted aid by HBCUs that the Department is interpreting Title VI to permit under this provision is narrowly tailored to further the congressionally recognized purpose of enhancement of HBCUs. HBCUs may not discriminate on the basis of race or national origin in admitting students. They may not create their own race-targeted financial aid programs using their own institutional funds unless they satisfy the requirements of any of the other principles in this guidance. Nor may they accept private donations of race-targeted aid for black students that are limited to students at the institution unless otherwise permitted by the guidance. Because HBCUs have traditionally enrolled black students, it should not subvert the goal of enhancing the institutions to require

[13] This provision is limited to HBCUs as defined in Title III of the Higher Education Act It does not apply generally to predominantly black institutions of higher education. The reason for this distinction is that Congress has made specific findings concerning the unique status of the HBCUs that serve as the basis for this provision.

that they not restrict aid to black students if using their own funds or funds from private donors that wish to set up financial aid programs at these institutions. However, because the applicant pool that is attracted to HBCUs presently consists primarily of black students, HBCUs would be placed at a distinct disadvantage with regard to other colleges in attracting talented students if they could not participate in financial aid programs set up by third parties for black students. Thus, the Department interprets Title VI to permit an HBCU to participate in race-targeted financial aid programs for black students that are created by third parties, if the programs are not restricted to students at HBCUs.

The participation by HBCUs in those race-targeted aid programs will be subject to periodic reassessment by the Department. The Department will regularly review the results of enhancement efforts at HBCUs, including the annual report to the President on the progress achieved in enhancing the role and capabilities of HBCUs required by Section 7 of Executive Order 12876. If an HBCU has been enhanced to the point that the institution is attractive to individuals regardless of their race or national origin to the same extent as a non-HBCU, then that institution may participate in only those race-targeted aid programs that are consistent with the other principles in this policy guidance.

Transition Period

The proposed policy guidance would have provided a four-year transition period for individual students to ensure that they did not lose their financial aid as a result of the guidance. Commenters pointed out that, in some cases, four years may not be a sufficient time for a student to complete his or her academic program at a college. In addition, commenters expressed concern that revising the policies and procedures used in recruiting minority students and in providing student financial assistance would require time to develop and implement. The revisions that have been made to the final policy guidance should result in far fewer instances in which colleges will be required to change their financial aid programs. However, the Department recognizes that colleges may need to conduct extensive reviews of their current programs and that in some cases adjustments to those programs may be necessary. As a result, the Department is expanding the proposed transition period.

The Department is providing colleges a reasonable period of time to review and, if necessary, adjust their financial aid programs in an orderly manner that causes the least possible disruption to their students. Colleges must adjust their financial aid programs to be consistent with the principles previously set out no later than two years after the effective date of the Department's policy guidance. However, colleges may continue to provide financial aid awarded on the basis of race or national origin to students who had either applied for or received that assistance prior to the effective date of this guidance during the full course of those students' academic program at the college, even though, in many cases, this will extend beyond the two-year period and, in some cases, the four-year period identified in the proposed policy.

Although some commenters questioned the Department's authority to create a transition period, such a period for adjustments is consistent with the Department's approach in the past under other civil rights statutes it enforces. See 34 CFR 106.41(d) (transition period to permit recipients to bring their athletic programs into compliance with Title IX of the Education Amendments of 1972); 34 CFR 104.22(e) (transition period to permit recipients to make facilities accessible to individuals with disabilities, as required by Section 504 of the Rehabilitation Act of 1973). It is based on the Department's recognition of the practical difficulties that some colleges may face in making changes to their recruitment and financial aid award processes.

The transition period also is consistent with the Department's policy, in approving plans for the desegregation of State systems of higher education, that students who have been the beneficiaries of past discriminatory conduct not be required to bear the burden of corrective action. For example, while the Department requires State higher education systems to take remedial action to increase the enrollment of previously excluded students, it does not require the expulsion of any student in order to permit admission of those previously excluded. See *Wygant* v. *Jackson Board of Education*, 476 U.S. at 282–85.

Finally, the transition period is consistent with the Department's obligations under Title VI to seek voluntary compliance by recipients that have been found in violation of the statute. 42 U.S.C. 2000d–1. During the transition period, the Department will provide colleges with technical assistance to help them make any necessary changes to their financial aid programs in order to achieve compliance with Title VI.

Program Authority: 42 U.S.C. 2000d.

Dated: February 17, 1994.

Richard W. Riley,

Secretary of Education.

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Appendix 4

Guidance on Affirmative Action in Federal Employment

[¶ 17,702] Post-*Adarand* Guidance on Affirmative Action in Federal Employment

U.S. Department of Justice, Office of the Associate Attorney General, February 29, 1996.

MEMORANDUM TO GENERAL COUNSELS

I. *Introduction.*

In *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995), the Supreme Court held that federal affirmative action programs that use racial and ethnic criteria as a basis for decisionmaking are subject to strict judicial scrutiny. Under strict scrutiny, such programs must serve a compelling governmental interest and must be narrowly tailored to serve that interest.

On June 28, the Justice Department's Office of Legal Counsel (OLC) issued preliminary legal guidance on the implementation of *Adarand*. As indicated in the OLC memorandum, although *Adarand* was a challenge to a Department of Transportation contracting program, its holding applies to race-based decisionmaking in all areas of federal activity, including employment.

The purpose of this memorandum is to provide guidance on the use of affirmative action in federal employment. In order to assure that race is used in a manner consistent with *Adarand* principles, each agency will be expected to utilize this guidance, and communicate it as necessary throughout the agency.

A number of overarching points merit attention at the outset. First, the federal government is firmly committed to fair employment practices that open opportunities to all Americans. It is also committed to ensuring that its workforce draws on the full range of the nation's talent. Affirmative action efforts can advance those vital objectives. Thus, to the extent that they comport with *Adarand*, such efforts should be continued.

Second, the Supreme Court in *Adarand* did not establish a constitutional bar on the use of race-based affirmative action measures by the federal government, but rather held that such action requires strict scrutiny. Moreover, a majority of the Court rejected the proposition that "strict scrutiny" of affirmative action measures means "strict in theory, fatal in fact," and agreed that such measures may be permissible even under strict scrutiny. The Court in *Adarand* did not decide the constitutionality of the program at issue in the case, but rather remanded the case to the lower courts so they could determine, in the first instance, whether the program satisfied strict scrutiny. No program was held unconstitutional in *Adarand*.

Third, *Adarand* itself does not provide specific guidance on application of the strict scrutiny standard. Some principles can be gleaned from the Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), in which a majority of the Court held for the first time that race-based affirmative action by state and local governments is subject to strict scrutiny. In large measure, the standards by which federal affirmative action in employment will be judged generally will track the standards used in *Croson*. Post-*Croson* lower court cases, including some in the employment setting, also help to flesh out what strict scrutiny means in practice.

Fourth, *Adarand* left open the question whether, even under strict scrutiny, Congressionally authorized affirmative action measures undertaken by federal agencies are entitled to particular deference from the courts, given Congress' broad powers to remedy discrimination. In our view, that deference should remain, and so affirmative action programs directed by Congress may have more force than those created solely by agencies.

Fifth, at this time, strict scrutiny does not apply to gender-based affirmative action measures of the federal government. Under current Supreme Court authority, such action is subject to intermediate scrutiny. Therefore, the guidance set forth in this memorandum does not apply in all respects to gender-based affirmative action programs in federal employment. However, applying this guidance to gender-based programs should ensure that those programs meet applicable legal standards.

Sixth, *Adarand*'s application of strict scrutiny is premised on the limitations equal protection principles place on governmental action. *Adarand*, therefore, does not apply directly to employment actions of private employers. Both public and private employers are subject to Title VII of the 1964 Civil

Rights Act. The Supreme Court has held that the Title VII standards governing affirmative action in the workplace are less stringent than the constitutional standards, and so in some circumstances, measures taken by governmental entities that would satisfy Title VII might not meet the *Adarand* requirements. See *Johnson v. Transportation Agency*, 480 U.S. 616, 627 (1987).

Finally, agencies should be aware that when legal challenges to the use of affirmative action plans are made, they will arise in cases filed under Title VII. Although *Adarand* is premised on constitutional standards, under *Brown v. GSA*, 425 U.S. 820 (1976), most lawsuits alleging race discrimination in federal employment must be brought pursuant to Section 717 of Title VII, 42 U.S.C. § 2000e-16.[1] The federal government, nevertheless, is obligated to act in accordance with the Constitution, and, therefore, use of race-based decisionmaking in federal employment must comport with the *Adarand* standards.

II. *Scope of Adarand.*

Adarand established that any governmental action that uses race or ethnicity as a basis for decisionmaking will be subject to strict scrutiny. In the employment setting, such action encompasses race-based measures that the federal government adopts on its own initiative, through legislation, regulations, internal agency procedures, or even individual employment decisions. This is to be contrasted with race-based employment decisions that agencies undertake pursuant to court-ordered remedial directives in race discrimination lawsuits against the government, or pursuant to court-approved consent decrees settling such suits. The Supreme Court has not definitively resolved the standard of review for court-ordered or court-approved affirmative action. See *United States v. Paradise*, 480 U.S. 149 (1987) (court order); *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986) (consent decree). It is unclear to what extent *Adarand* applies to such actions. Accordingly, this memorandum does not address race-based employment decisions that agencies make under court orders or consent decrees.[2]

The scope of race-based employment decisions that are subject to *Adarand* is quite broad. *Adarand* applies to both the final judgment as to a particular decision, as well as to the various steps leading to that judgment. Race-based decision-making includes situations where race is one of several factors as well as those in which race is the only factor.

The kinds of employment decisions covered by *Adarand* also are very broad. *Adarand* applies both to the agency's decisions creating and implementing formal and informal affirmative action programs, as well as to the decisions of individual supervisors. It applies to the use of race in decisions regarding hiring, promotion, training, and scholarships, just as it applies to race-based decisions regarding reductions in force and reassignments.

Adarand does not apply, however, to actions in which race is not used as a basis for making employment decisions about individuals. For example, action to increase minority applications for employment is not subject to *Adarand*. Outreach and recruitment efforts—such as attending job fairs and minority professional association meetings, and making vacancies known at schools with substantial minority enrollment—which merely seek to expand the pool of qualified applicants generally would not be subject to strict scrutiny under *Adarand*. As long as non-minorities are well represented in the applicant pool, the courts of appeals have held that efforts to expand the number of qualified minorities in the applicant pool do not involve race-based decisionmaking and hence do not raise constitutional issues. See, *e.g.*, *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1557-1558 (11th Cir. 1994) (presentations at job fairs and career days designed specifically to apprise minorities of career opportunities deemed to be race-neutral); *Billish v. City of Chicago*, 962 F.2d 1269, 1290 (7th Cir. 1992), vacated on other grounds, 989 F.2d 890 (7th Cir.) (en banc), cert. denied, 114 S. Ct. 290 (1993); *Coral Constr. Co. v. King County*, 941 F.2d 910, 923 (9th Cir. 1991), cert. denied, 502 U.S. 1033 (1992). To the extent that efforts designated as "outreach and recruitment" might also involve providing temporary or summer employment to interns, however, the use of

[1] One notable exception to this rule is for claims of discrimination asserted by uniformed members of the armed forces, who are excluded from the coverage of Title VII. See, *e.g.*, *Doe v. Garrett*, 903 F.2d 1455, 1461 (11th Cir. 1990), cert. denied, 499 U.S. 904 (1991). Such claims may be brought directly under the Constitution.

[2] We are available to provide specific guidance to any agency in that situation.

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race in deciding who will receive these internship positions is subject to *Adarand*.

Other race-neutral action not subject to *Adarand* would include reviewing qualification standards to ensure that unnecessary criteria that have a disproportionate impact on minorities are eliminated. Agencies should review their current practices to determine whether any are unnecessarily excluding minorities. Agencies may also define selection criteria in ways that give an applicant credit for overcoming social and economic disadvantage, which may include barriers posed by discrimination based on race or ethnicity. As long as race or ethnicity is not used to define social and economic disadvantage, *Adarand* will not apply. Indeed, agencies should regularly examine their recruitment practices to ensure that they are effective and productive. Agencies should also determine whether minority applicants have been deterred as a result of past discriminatory practices or the agency's reputation for discrimination, whether deserved or not. *Adarand* also does not preclude tracking minority participation in the agency's workforce through the collection and maintenance of statistics or the filing of reports with the Equal Employment Opportunity Commission.

At this time, strict scrutiny does not apply to gender-based affirmative action measures in employment. Under current Supreme Court authority, such action is subject to intermediate scrutiny.[3] Nevertheless, the same sort of analysis described below, when applied to gender-based programs, should ensure that those programs meet applicable legal standards. In addition, *Adarand*'s strict scrutiny neither applies to employment programs based on age or disability, nor to measures that use membership in a Native American tribe or residence in an Alaskan Native village as a basis for decisionmaking. Such action is subject to the more lenient "rational basis" standard of scrutiny. See *Morton v. Mancari*, 417 U.S. 535 (1974), in which the Supreme Court held that strict scrutiny did not apply to hiring preferences for tribal members at the federal Bureau of Indian Affairs.

Finally, the establishment of numerical goals for minority participation should not raise concerns under *Adarand* where race-based decisionmaking is not used to achieve the goal and the goal is commensurate with availability of minorities in the qualified and appropriate labor pool. This use of goals is consistent with Executive Order 11246, 30 Fed. Reg. 12319, (Sept. 24, 1965), as amended, under which the federal government requires federal contractors in the private sector to set goals where minorities are underutilized in the contractor's workforce. Regulations that the Department of Labor has promulgated to enforce the Executive Order, which are published at 41 C.F.R. Part 60, provide guidance as to the manner in which federal contractors may properly use such goals. See further discussion at pp. 16-17.

III. *Elements of Strict Scrutiny.*

Under *Adarand*, federal programs that use race or ethnicity as a basis for decisionmaking must be strictly scrutinized to ensure that they promote "compelling" governmental interests, and that they are "narrowly tailored" to serve those interests. The "compelling interest" prong of the strict scrutiny standard focuses on the purpose of the classification; the "narrow tailoring" prong focuses on the method by which the government seeks to meet the objective of the racial or ethnic classification.

A. *Compelling Governmental Interests.*

1. *Remedial Predicate.*

a. *Historical evidence.* Standing alone, the fact and history of racial discrimination in society at large is not a sufficient predicate for race-based affirmative action. Under *Adarand*, however, the government does have a compelling interest in acting to remedy the identified effects of its own discrimination, or of its own practices that unintentionally extend the effects of discrimination by others. See *Croson*, 488 U.S. at 486 (plurality opinion); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality opinion).[4] Race-based remedial action may be aimed at ongoing patterns and practices of exclusion, or at the lingering effects of prior discriminatory conduct that

[3] The appropriate standard of scrutiny for gender-based programs may be considered by the Supreme Court in *United States v. Commonwealth of Virginia*, No. 94-1941, which addresses the male-only admission policies of the Virginia Military Institute.

[4] In *Croson*, which involved affirmative action in public contracting, the Court said that the government may act on the basis of race or ethnicity to remedy the effects of discrimination committed by private contractors, where the government becomes a "passive participant" in that conduct, and thus helps to perpetuate a system of exclusion. *Croson*, 488 U.S. at 492 (plurality opinion); *id.* at 519 (Kennedy, J., concurring in part and concurring in the judgment).

has ceased. See *Adarand*, 115 S. Ct. at 2133 (Souter, J., dissenting) ("The Court has long accepted the view that constitutional authority to remedy past discrimination is not limited to the power to forbid its continuation, but extends to eliminating those effects that would otherwise persist and skew the operation of public systems even in the absence of current intent to practice any discrimination.").

The federal government today is quite proud of its record of fair employment for persons of all races. However, its record has not always been one of fair practices. Beginning in the 1940s, a series of Executive Orders and statutes was adopted to address a long history of employment discrimination by the federal government. Although progress was made after those actions, it was insufficient; Congress in 1972 determined that discrimination against federal employees continued, and that it was necessary to provide federal employees the protection against employment discrimination that Congress previously afforded to other employees. Congress stated that extending Title VII to federal employees was necessary to "correct this entrenched discrimination in the Federal Service." H.R. Rep. No. 238, 92d Cong., 1st Sess. 84 (1971).

While discrimination in federal employment may not now be the pervasive problem it once was, instances of discrimination still persist in federal employment, as elsewhere. The President's July, 1995 Affirmative Action Review noted that one of the lingering effects of historical practices has been that minorities and women are still underrepresented at higher grade levels. Eliminating this disparity is made more difficult by the time lag necessary for new hires to reach senior ranks. In addition, according to the Equal Employment Opportunity Commission (EEOC) and the Merit Systems Protection Board, the federal sector equal employment process still produces a significant number of decisions in which agencies are found to have discriminated against minorities and women. Where agencies identify current discriminatory practices, or the lingering effects of past practices, affirmative action is an effective remedial measure.

A prior judicial, administrative, or legislative determination of discrimination by the government is not required before the government may voluntarily choose to use affirmative action efforts. *Croson*, 488 U.S. at 500. An agency must have a "strong basis in evidence," however, for its determination that its practices have resulted in a significant exclusion or underutilization of minorities or have perpetuated exclusion perpetrated by others and that a race-based remedial effort is appropriate. *Id.* (quoting *Wygant*, 476 U.S. at 277). See also *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1553 (11th Cir. 1994); *Concrete Works v. City and County of Denver*, 36 F.3d 1513, 1521 (10th Cir. 1994), cert. denied, 115 S. Ct. 1315 (1995); *Donaghy v. City of Omaha*, 933 F.2d 1448, 1458 (8th Cir.), cert. denied, 502 U.S. 1059 (1991), *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 424 (D.C. Cir. 1992); *Stuart v. Roache*, 951 F.2d 446, 450 (1st Cir. 1991) (Breyer, J.); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915 (11th Cir.), cert. denied, 498 U.S. 983 (1990).

This does not mean that an agency must admit that it has discriminated, either intentionally or inadvertently, before adopting affirmative action measures. See *Johnson v. Transportation Agency*, 480 U.S. at 652-653 (O'Connor, J., concurring); *Wygant*, 476 U.S. at 290 (O'Connor, J., concurring). Furthermore, the fact that an agency has adopted some affirmative action measures does not imply that the agency has discriminated against minorities. In certain circumstances, agencies may voluntarily use race in employment actions if there is a "gross statistical disparit[y]" between the level of minority participation in a particular job category and the percentage of qualified minorities in the applicable labor pool for the relevant geographic market. *Croson*, 488 U.S. at 501, 509. While the Supreme Court has never established a bright line test by which to judge the significance of a statistical disparity, the Court has stressed that statistical disparities must be substantial enough to suggest that minorities are being excluded from consideration because of factors related to race. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 995 (1988).

b. *Statistical evidence.* Establishing the prerequisite for affirmative action does not have to be complicated. Statistics alone may form a sufficient predicate for race-conscious measures. Cf. *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). In *Hazelwood v. United States*, 433 U.S. 299 (1977), the Supreme Court stated that the "standard deviation analysis" can be used to demonstrate that a significant underrepresentation of minorities in a particular job category could be the result of a factor in the selection process that was eliminating minority candidates. The Court stated that

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"a fluctuation of more than two or three standard deviations would undercut the presumption that decisions were being made randomly with regard to race." *Hazelwood*, 433 U.S. at 311 n.17. See also *Casteneda v. Partida*, 430 U.S. 482, 496-497 n.17 (1977), for a further discussion of "standard statistical deviations" and an explanation of how they are calculated.

Standard deviation analysis is less probative with respect to smaller sample sizes. In those situations, other means of statistical analysis may be necessary to determine whether the disparity between the percentage of qualified minorities in the available labor pool and the jobs at issue is sufficiently large to permit the adoption of race-conscious efforts. There are statistical analyses available for small sample sizes,[5] but it is preferable to use the largest justifiable sample size.

Anecdotal and documentary evidence is always relevant. In determining whether race-based remedial measures are warranted, an agency may use other types of evidence to supplement the statistical comparisons between current minority availability and current minority representation. For example, anecdotal or documentary evidence showing historical underrepresentation (or the virtual absence) of minorities at an agency over a long period of time may put a gloss on an existing statistical disparity, and thus provide further support for race-based remedial action.

Indeed, there may be some occasions where the number of jobs at issue is so small that no reliable statistical analysis is possible. In those circumstances, agencies may rely on anecdotal evidence that there has been discrimination, or that there has simply been no, or exceedingly few, minority personnel despite the fact that hiring has occurred over a sustained period. This sort of evidence could indicate that the absence of minority hiring is unlikely to be due solely to lack of qualified candidates, justifying race-conscious remedial action.

Whenever an agency establishes an affirmative action plan, based on statistical comparisons or anecdotal information, it is important that agencies carefully match the job qualifications in the jobs at issue with those in the relevant applicant pool as closely as possible. It would not be sufficient for an agency to have only a general sense that its EEO profile indicated minority underrepresentation. The agency must go through the process of comparing minority representation in the job category at issue to the relevant pool in the civilian labor force to determine whether there is a sufficiently substantial disparity and, therefore, a predicate for affirmative action.

Depending on the circumstances, the relevant labor pool is measured either by applicant flow data or the civilian labor force. An underrepresentation of minorities when compared to the general population or the general civilian labor force, however, would not be a sufficient predicate for the use of racial criteria in employment decisions when special skills or qualifications are required to perform the job. *Croson*, 488 U.S. at 501 (internal quotations omitted). See also *Johnson v. Transportation Agency*, 480 U.S. at 632; *Hazelwood Sch. Dist. v. United States*, 433 U.S. at 308. There are many entry-level jobs, however, for which comparisons to the general labor market are appropriate.

For example, if an agency or office sought to determine whether it had an underrepresentation of African-American engineers, it would not compare the percentage of African-American engineers that it employed with the percentage of African-Americans in the civilian labor force generally, or with the percentage of African-Americans in a "proffessionals" category of which engineers may be only a part. Since engineers possess unique qualifications not shared by the population or professionals at large, the comparison should be between the percentage of African-American engineers employed by the agency or office and the percentage of African-American engineers in the civilian labor force. Where the fit cannot be so precise, the agency should use the qualified labor force that most closely matches the agency's qualifications for the jobs at issue.[6]

[5] See, *e.g.*, Fisher's Exact Test, discussed at *Jurgens v. Thomas*, 29 FEP Cases 1561, 1568 n.15 (N.D. Tex. 1982); *Sims v. Montgomery County Comm'rs*, 766 F. Supp. 1052, 1100-1101 & n.136 (M.D. Ala. 1990).

[6] The 1990 Civilian Labor Force (CLF) census data would provide a source for these comparisons. It reflects the racial and ethnic distribution of the civilian labor force by major occupations. The Office of Personnel Management also maintains a Central Personnel Data File that provides work force information by occupational code. EEOC uses a Cross Classification Table that can assist agencies in matching OPM and CLF classifications. EEOC can make this table available to agencies. Finally, OPM and the Census Bureau have agreed to conduct preliminary statistical studies to help

If an agency were going to fill SES positions and wanted to know if it had an underrepresentation of Hispanics in its SES ranks, the agency would compare the number of its Hispanic GS-15s, and others of similar qualifications eligible for placement into an SES positions, to the number of Hispanic SESers it employs.

This analysis should be performed at whatever level within the agency that the employment decisions are made. The fact that there are sufficient disparities to justify race-based action by one component of an agency does not mean that other components may take such action, when employment decision are made by individual components.

Similarly, evidence that particular employment practices at the agency have dissuaded minorities from applying for jobs or accepting offers can serve to buttress statistical disparities on which the use of racial criteria in employment decisions is predicated. By contrast, if it is clear that minority underrepresentation stems from the agency's inability to compete for minority candidates with other agencies and private corporations that simply can make more attractive job offers, the statistical disparity alone may not justify the use of race-based remedial measures (although, in such circumstances, the agency still may be able to show that it has a non-remedial operational need to increase minority representation, a concept that is discussed below).

It is important that the statistical evidence on which the decision to use racial and ethnic criteria is made be thorough and accurate. The use of sound statistics will enable an agency to establish a justification for the use of race if challenged. The use of race in the affirmative action context will be upheld where there is a sound basis for its use; absent such sound support, a non-minority disadvantaged by the use of race could successfully challenge the use of an affirmative action plan.

2. *Operational Needs Of The Agency.*

While both *Adarand* and *Croson* make clear that remedial interests can be sufficiently compelling to justify race-based measures, they did not explore the full range of interests that might be found compelling. Efforts to advance an agency's operational objectives may also supply a predicate sufficient to permit race-conscious employment actions, apart from any remedial objective the agency may have. There has never been a majority opinion for the Supreme Court that addresses the question whether and in what circumstances such objectives can constitute a compelling interest. Some members of the Court and several lower courts, however, have suggested that, under appropriate circumstances, an agency's operational need for a diverse workforce could justify the use of racial considerations. This operational need may reflect an agency's interest in seeking internal diversity in order to bring a wider variety of perspectives to bear on the range of issues with which the agency deals. It also may reflect an interest in promoting community trust and confidence in the agency.

The courts will require a convincing basis for the conclusion that the use of race and ethnicity are necessary to promote an operational need. The Supreme Court requires that the articulated need be based on a "legitimate factual predicate." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 278 n.5 (1986). Thus, even prior to *Adarand*, public employers could not rely solely on broad assertions of operational need to justify the use of race and ethnicity as criteria in decisionmaking. See, *e.g.*, *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207 (4th Cir. 1993) (opinion of police chief that effective law enforcement required racial diversity was insufficient alone to create a compelling state interest; city was required to support its contention with objective evidence as well). Thus, any agency relying upon non-remedial justifications for race-based action should have a well-reasoned basis—be it statistical, anecdotal, expert opinion, or other—for concluding that there is a compelling operational need for increased minority representation in its workforce.

In the controlling opinion in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978), Justice Powell stated that a university could take the race of applicants into account in its admission process to foster the diversity of its student body. This greater diversity, he reasoned, would bring a wider range of perspectives to the university and would contribute to a more robust exchange of ideas, which is the central mission of higher education. In short, Justice Powell recognized that diversity among the student body serves the operational needs of a university. Along the same lines, in a concur-

(Footnote Continued)

agencies match job requirements and appropriate applicant pools.

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ring opinion in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286, 288 (1986), Justice O'Connor also suggested that fostering racial and ethnic diversity among faculty in public schools may be a compelling interest. See also discussion in *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992), in which now-Justice Ginsburg, in a concurring opinion, stated her agreement with Justice Stevens' position "that remedy for past wrong is not the exclusive basis upon which racial classifications may be justified."

Individual federal agencies may have operational objectives that can be served by a diverse workforce that brings an array of backgrounds and perspectives to the issues that these agencies confront and the choices that they must make. The same robust exchange of ideas that was deemed essential by Justice Powell in *Bakke* to further the educational objectives of a university may also be vital to sound decisionmaking at certain agencies. For example, under Justice Powell's reasoning regarding the value of diversity at college campuses, federal agencies that have educational missions may themselves have a legitimate interest in fostering diversity in their own workforces. Similarly, a racially diverse range of views and perspectives among its workers may substantially enhance the performance of an agency that is charged with handling matters that particularly affect minorities and minority communities (*e.g.*, public housing and urban policy; economic dislocation in minority communities; immigration; health care in underserved, predominantly minority communities; conditions in tribal reservations or villages).

It would, therefore, not necessarily be inconsistent with *Adarand* for race and ethnicity to be taken into account in employment decisions in order to assure that decisionmakers will be exposed to the greatest possible diversity of perspectives. However, the goal of affirmative action in the federal workplace cannot be diversity for diversity's sake. It must be rooted in an identifiable and articulated operational need for diversity of opinion in the agency's workforce. The agency, moreover, cannot rely on racial or ethnic stereotypes to obtain a diversity of opinion. Rather, the agency must have some basis to believe that, in the aggregate, diversification of its workforce will make a difference in the array of perspectives communicated at the agency, and that this greater diversity will significantly enhance the performance of the agency's functions. Furthermore, if an agency's articulated reason for the use of affirmative action is the need for diversity of opinion, the use of racial and ethnic criteria should not be the only means by which the agency obtains a diversity of opinion. In addition, other factors that bear on diversity—such as geography, education, work and life experience—should also be considered.

There are also areas of governmental activity where, in order to be effective and have the cooperation and confidence of the community, an agency must be representative of the community. This form of operational need has been recognized in the law enforcement context by members of the Supreme Court, and by lower courts, and focuses on an agency's ability effectively to address the needs of the communities it serves. See *Wygant*, 476 U.S. at 314 (Stevens, J. dissenting) ("[I]n law enforcement * * * in a city with a recent history of racial unrest, the superintendent of police might reasonably conclude that an integrated police force could develop a better relationship with the community and thereby do a more effective job of maintaining law and order than a force composed only of whites."); *United States v. Paradise*, 480 U.S. 149, 167 n.18 (1987) (plurality opinion) (noting, but not reaching, argument that race-conscious hiring can "restore[] community trust in fairness of law enforcement and facilitate[] effective police service by encouraging citizen cooperation"); *Detroit Police Officers' Assoc. v. Young*, 608 F.2d 671, 696 (4th Cir. 1979) (argument "is not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police"); *Talbert v. City of Richmond*, 648 F.2d 925 (4th Cir. 1981).

In the federal employment context, the Federal Bureau of Investigation, the Drug Enforcement Administration, the Bureau of Alcohol, Tobacco, and Firearms and other federal law enforcement organizations are dependent on this kind of community support to function effectively. Law enforcement organizations also may have particular diversity needs quite apart from their need for community support. For example, undercover operations are likely to require the availability of agents of diverse racial and ethnic backgrounds.

The military is another segment of the government that clearly has a compelling

and widely-recognized need for diversity. In order to maintain combat readiness, the armed forces have an unusually strong need to maintain morale and cohesiveness. Its cohesiveness could be threatened if personnel did not have visible evidence that advancement within the military is possible for members of all racial and ethnic groups. Federal policies with regard to military affairs have traditionally received significant deference from the judiciary, see, *e.g.*, *Weiss v. United States*, 114 S. Ct. 752, 769 (1994), and we do not anticipate *Adarand* affecting that deference.

Other examples of organizations that might have a compelling interest in using race-based employment measures to help ensure trust would include EEO offices that must gain the confidence of current or former employees who already feel that they have been subject to discrimination, and community relations offices that are called upon to quiet racial tensions in troubled neighborhoods. This list is by no means exhaustive. Depending on its mission, an agency may have a compelling interest in fostering community trust, unique to the agency, or to an office within the agency, that would justify the consideration of racial and ethnic factors.

B. *Narrow Tailoring Inquiry.*

Once an agency identifies a compelling interest for using race or ethnicity in its decisionmaking, the inquiry shifts to whether the manner in which these criteria are used is narrowly tailored to achieve that interest. The narrow tailoring analysis ensures that the use of the racial or ethnic criteria is the result of careful deliberation and is the least intrusive means to obtain the desired result.

In determining whether race-based employment action is narrowly tailored to serve a compelling interest, the courts have usually considered the following factors: 1) whether the government considered race-neutral alternatives before using the racial or ethnic criteria, 2) the manner in which race or ethnicity is used in making decisions—*e.g.*, is it one of many factors to be considered, or is it the sole or dominant factor, 3) the comparison of any numerical target to the number of qualified minorities in the labor pool, 4) the scope of the program, 5) the duration of the program, and 6) the impact of the program on nonminorities. *United States v. Paradise*, 480 U.S. 149, 171 (1987); *Hayes*, 10 F.3d at 216. [7]

All of these factors will not be relevant in every case. However, examining an agency's use of race and ethnicity in light of these factors will ensure that any race-based employment activity is narrowly tailored to meet the agency's legitimate objective.

1. *Race-Neutral Alternatives.*

In *Croson*, the Supreme Court held that a Richmond, Virginia ordinance that required prime contractors who received city contracts to subcontract at least 30 percent of the dollar amount of those contracts to minority businesses was not "narrowly tailored," in part, because the city had not considered race-neutral means to increase minority participation in municipal contracting. While the Court made clear that race-neutral measures had to be considered, it did not specify the extent to which such measures had to be considered—or actually used—before the government may resort to race-conscious action.

The most common race-neutral method of increasing minority participation in federal employment is recruiting and outreach. [8] Other race-neutral methods would include training programs open to all employees, diversity seminars, and eliminating unnecessary selection criteria that have a disproportionate impact on minorities. In some instances, race-neutral measures might be sufficient to serve the agency's objectives. In other cases, they may not. If an agency documents a compelling interest in remedying discrimination, it will not have to rely solely on race-neutral action to meet its objective. Cases suggest that although an agency will be required to give the race-neutral options serious consideration and use them to the extent feasible, use of race-neutral action need not be exhausted before race may be used more directly in decisionmaking. As the Ninth Circuit said in *Coral Constr. Co. v. King County*, 941 F.2d at 923, "while strict scrutiny requires serious, good

[7] Some of the factors that make up the narrow tailoring requirement have essentially been applied in challenges to affirmative action plans filed under Title VII. See *Johnson*, 480 U.S. at 637-638 and *Steelworkers v. Weber*, 443 U.S. 191, 197, 208 (1979), in which the Court stated that affirmative action measures must not "unnecessarily trammel" the interests of nonminorities.

[8] As indicated above, (at pages 3-4), such action is considered race-neutral because it does not involve the use of racial criteria in employment decisionmaking.

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faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every such possible alternative." *See also Paightal*, 26 F.3d at 1557. This approach gives the agency a measure of discretion in responding to its articulated need and allows the agency to draw on its prior experience as to the efficacy of race-neutral options.

It is also essential that agencies review both existing and contemplated selection practices and devices to ensure that they are job-related and minimize disparate impact to the extent practicable [9] Traditional standardized tests can result in severe disparate impact, and often can be shown to be only marginally job related at best. These examinations are very susceptible to challenge under Title VII and should be carefully scrutinized and reformed as part of any serious effort in affirmative action. [10]

2. *The Manner In Which Race And Ethnicity Is Used.*

Of critical importance in the narrow tailoring analysis is the manner in which race and ethnicity are used in decisionmaking. Once a compelling interest has been identified and documented, and race-neutral options considered, race can be used along with other factors when evaluating the qualifications and breadth of experience that an applicant brings to a job. However, race should not become the sole or dominant factor.

In *Bakke*, Justice Powell rejected a system in which the university reserved a set number of places for minority applicants. He contrasted that program, which based decisions solely on race and ethnicity, with other programs in which race or ethnic background is simply one factor among many in the admissions decision. Justice Powell noted that in the latter type of program "race or ethnic background may be deemed a 'plus'" but does not "insulate the individual from comparison with all other candidates * * *." 438 U.S. at 317. Such programs, he suggested, would be deemed sufficiently flexible to meet the narrow tailoring requirement.

Similarly, in *Johnson*, the Supreme Court upheld an affirmative action plan under which a state agency considered the gender of applicants in making promotion decisions. The Court noted that the plan did not set aside positions for women but only established goals for their representation "which were not 'construed' by the agency as 'quotas.'" The Court stressed that in the promotion decisions at issue "sex * * * was but one of numerous factors [that were] taken into account." 480 U.S. at 638.

As these cases suggest, there are two kinds of race-based employment actions that, because of their rigidity, would be particularly vulnerable to constitutional challenge under strict scrutiny. The first is the use of quotas. Unlike goals, which establish only a numerical objective to be attained through an agency's best efforts, quotas require the selection of specified numbers of minorities without regard to relative qualifications, availability, or application rates. The second is a program in which race or ethnicity is the sole or dominant requirement for eligibility for a particular employment opportunity. Under the standard established by the Court, race can be an appropriate consideration in employment decisions only as long as it is not the exclusive or dominant factor. Flexibility is the key.

In his July 19, 1995, Directive to the Executive Departments and Agencies, the President stated that any program that creates a quota must be reformed or eliminated. Consistent with this guidance, agencies should ensure that the use of numerical goals are not converted into rigid requirements.

In sum, where an agency uses race in employment decisions, race should be only one factor of the many that go into both the assessment of a candidate's accomplishments and potential as well as the assessment of what the candidate may bring to the agency. Under *Adarand*, such measures must be flexible and fair—race can be used as one of a number of factors in evaluating an applicant's credentials, but it cannot be the sole

[9] Title VII prohibits the use of an employment practice or devices, such as a written examination, physical agility test or minimum height/ weight requirement, that is neutral on its face but causes a disparate impact on the basis of race, color, religion, sex or national origin, unless the employer can demonstrate that such practice or device is job related for the position for which it is used and is consistent with business necessity. Title VII also prohibits the use of an employment practice or device that causes a disparate impact but is job related, if there exists an alternative selection practice or device that will cause less of a disparate impact and will equally serve the employer's legitimate business needs.

[10] In fact, over the past several years, an increasing number of employers have begun to use testing mechanisms that have less of a disparate impact than traditional cognitive-only examinations. Agencies that need information about such tests should contact the Employment Litigation Section of the Civil Rights Division of the Department of Justice.

factor, or so outweigh all other considerations that it effectively defines who will receive consideration.

3. *Comparison Of Numerical Target To Relevant Labor Market.*

Any numerical objectives for minority representation must be reasonable. In those cases where an affirmative action program is justified on remedial grounds, any numerical goal must have a reasonable relation to the extent of the demonstrated disparity, the number of vacancies, and the availability of candidates. Both the disparity and the availability of candidates will be judged in relation to the relevant labor market. Where a targeted position requires special skills or training, the comparison must be to the *qualified* labor market; that is, the real market of persons with qualifications that match those of the agency. Broad comparisons to general population statistics will not suffice where agency qualifications require specific educational qualifications or levels of specific experience. See *Croson*, 488 U.S. at 507 (30% minority subcontracting requirement not narrowly tailored because it was tied to the minority population of Richmond and not the pool of qualified subcontractors); *Edwards v. City of Houston*, 37 F.3d 1097, 1114 (5th Cir. 1994) (race-based promotion goals narrowly tailored because tied to number of minorities with required skills).

As stated before (see, *infra* page 5), when taking race-based remedial action, an agency may establish as its ultimate goal the achievement of minority representation in a particular type of job similar to the percentage of minorities in the available, qualified applicant pool. The selection of that goal is based on the legitimate assumption that fair employment practices, over time, would result in a selection rate for minorities that essentially tracks the availability of minorities in the qualified labor market. It also establishes a benchmark by which the employer can measure whether its practices are somehow foreclosing opportunities for minorities. The use of this goal also helps to demonstrate that opportunities for non-minorities will not be unfairly diminished.

An agency may, under certain circumstances, use short-term goals that are somewhat higher than that percentage in order to eliminate significant underrepresentation of minorities. However, the use of such higher short-term goals should probably be limited to circumstances of extraordinarily severe underrepresentation that may justify a more concerted effort to remedy that level of underutilization. See, *e.g.*, *United States v. Paradise*, 480 U.S. 149 (1987). Use of higher short-term goals may be appropriate, for example, where an agency has engaged in actions that have discouraged minorities from seeking employment with the agency. Agencies contemplating the use of such goals should consult with the Justice Department.

While the use of goals for minority participation that match the level of minority representation in the relevant labor pool is required when an agency is pursuing a remedial effort, that is not necessarily the case when an agency sets a goal for non-remedial operational interests. In those circumstances, the goal may be tied to a level of minority representation that the agency considers necessary to achieve those interests.

4. *Burden On Nonminorities.*

Affirmative action efforts will necessarily affect nonminority employees and applicants who were not themselves responsible for the problem that those efforts seek to address. The Supreme Court has indicated that while some degree of impact on these individuals is constitutionally permissible, that burden cannot be too onerous. See *Wygant*, 476 U.S. at 280-81. The nature and extent of the burden is an integral part of the narrow tailoring analysis.

Racial or ethnic classifications that "unsettle * * * legitimate, firmly rooted expectation[s]," *Johnson*, 480 U.S. at 638, are likely to be viewed as more burdensome than those that do not. For example, in *Wygant*, the Court recognized that race-based layoffs may impose a more substantial burden than race-based hiring, because "denial of a future employment opportunity is not as intrusive as loss of an existing job," and because where affirmative action is achieved through hiring, "the burden to be borne by innocent individuals is diffused to a considerable extent among society generally." 476 U.S. at 282-283. [11]

Agencies therefore should give careful consideration to the way in which nonminori-

[11] *Wygant* addressed race-based layoffs by a local public school system that resulted in the displacement of more senior and more qualified nonminority teachers in favor of junior, less qualified minorities. It is our understanding that federal agencies historically have not used race in making layoff decisions. Any agency contemplating a change from the current practice should discuss the circumstances specifically with the Justice Department.

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ties are affected by employment practices when determining whether specific practices are constitutional. As affirmative action advances beyond hiring, the effect on third parties may shift onto those specific individuals competing for a limited promotion. The same kind of consideration of race might satisfy constitutional standards when used in the hiring context but be somewhat more vulnerable when used for promotions.

The time within which an agency will be able to eliminate a significant underrepresentation of minorities in its workforce will depend not only on the rate at which minorities are selected, but also on the overall number of hires or promotions an agency makes each year. As the number of hires decreases, as is likely during this era of government downsizing, the speed at which underutilization can be eliminated may be reduced. When using race-based affirmative action to remedy underrepresentation of minorities, agencies must be careful to do so at a rate that does not unfairly trammel the interests of non-minority applicants.

5. *The Scope Of The Program.*

In *Croson*, the Supreme Court criticized the Richmond minority subcontracting program on the ground that it extended the benefit of a racial classification to minority groups as to whom there was no evidence of discrimination. The Court concluded that the plan was not narrowly tailored because although the program was intended to remedy discrimination against African-American contractors, it included among its beneficiaries Hispanics, Asian-Americans, Native-Americans, Eskimos and Aleuts—groups for which Richmond had proffered "absolutely no evidence of discrimination." 488 U.S. at 506. Apart from operational needs, if an agency's statistics were to reveal underutilization only in its hiring and promotion of African-Americans, the agency would be justified in focusing remedial action on African-Americans, but not on Hispanic-Americans, Native-Americans, or Asian-Americans. Treating "minorities" as a single group raises concerns; remedial action in federal employment usually can be targeted only at specific groups determined to have a need for a special focus. Similarly, where an agency can only demonstrate an operational need for diversity in some offices, racial and ethnic criteria cannot be considered in employment decisions throughout the agency; narrow tailoring will require limiting the use of such criteria to the offices and positions determined to have an operational need for diversity.

Croson also imposed a geographic limitation on the scope of remedial action. Although the program at issue in that case was intended to remedy discrimination against African-American subcontractors in Richmond, it was also open to minorities elsewhere in the country. The Court held that it was not narrowly tailored because it conferred the benefit on persons from outside the relevant geographic market. This geographic limitation does not apply to affirmative action in employment by the federal government with respect to jobs for which agencies advertise or hire nationally.

6. *Duration Of The Program.*

A race-based measure should last only as long as it is needed. See *Fullilove*, 448 U.S. 448, 513 (1980) (Powell, J. concurring). The use of race should either be of limited duration or subject to periodic review. See *Hayes*, 10 F.3d at 11. In employment, this periodic review would normally be performed when the agency submits its yearly affirmative action reports to the Equal Employment Opportunity Commission. At that time, it can be determined whether the objectives of race-based actions have been met. If race-based measures that were justified when adopted are no longer needed, they should be discontinued.

In addition, there may be instances in which agencies are continuing to use non-job-related selection criteria, such as a test, that have a disparate impact on minorities while developing new selection criteria that do not have such a disparate impact. In those situations, an agency can continue to use race-conscious selection methods to overcome the effects of the exclusionary criteria until new selection procedures are in place that no longer exclude disparate numbers of minorities or that are job-related.

Racial and ethnic criteria cannot be used after remedial objectives have been satisfied merely to maintain a statistical balance. See *Johnson v. Transportation Agency*, 480 U.S. at 640; *Sheet Metal Workers v. EEOC*, 478 U.S. at 477-478; *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207 (4th Cir. 1993). But that does not necessarily mean that the use of such criteria must be abandoned the moment that minority representation in a particular job category at an agency equals minority representation in the qualified labor market. The agency may be able to use the criteria for a reasonable period thereafter to ensure that its remedial objectives have been fully satisfied. And if the use of the criteria is suspended for some period of time because disparities appear to

have been corrected, an agency may re-institute them if it subsequently finds that its policies, or its unrepaired selection devices, are again leading to a significant disparity.

IV. *Conclusion.*

As the President emphasized in his July 19, 1995, statement, the Administration is committed to the vigorous enforcement of the laws prohibiting discrimination as well as to the elimination of barriers to opportunity. The Administration thus supports affirmative action measures that promote employment opportunities for Americans subject to discrimination or its continuing effects. Nothing in *Adarand* requires a retreat from this effort. Moreover, because federal agencies have long been subject to Title VII standards in their employment practices, the application of strict scrutiny should not require major modifications in the way federal agencies have been properly implementing affirmative action policies.

In sum, what *Adarand* requires is that in order for race or ethnicity to be used as a basis for decisionmaking, an agency must have a demonstrable factual predicate for its actions. That predicate could be the agency's interest in remedying the effects of its past discriminatory practices or the effects of employment practices that unintentionally have excluded minorities, or it could be based on the agency's operational needs. Once this predicate is identified, the agency should consider all reasonable means of increasing minority participation in its workforce without specific reliance on racial criteria. However, if such methods are inadequate to meet the agency's legitimate objectives, consideration can be given to racial and ethnic factors. Under *Adarand*, such measures must be flexible and fair—race can be used as one of a number of factors in evaluating an applicant's credentials, but it cannot be the sole factor, or so outweigh all other considerations that it effectively defines who will receive consideration. The use of race-conscious measures also must be limited in duration, lasting no longer than necessary to accomplish the agency's objectives. If the use of the classification is intended to be remedial, it can be targeted only at those groups against whom discrimination has been shown. Finally, consideration must be given to the kind of employment decision that is at issue and the impact the use of the criteria will have on nonminorities to assure that the burden will not fall too heavily on innocent parties.

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