

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION

WASHINGTON, D.C. 20202

AUG 22 1996

6RD-0332

TO: All OCR Staff

FROM: Sue Bowers, Enforcement Director (East)
Cathy Lewis, Acting Enforcement Director (West)
Eileen Hanrahan, Acting Director, Program/Legal Group

SUBJECT: Issue Facilitators and Building Our Internal Networks

Almost all of our pro-active efforts in FY'97 are grouped around the following issue areas: the provision of services to limited English proficient students (LAW), Gifted and Talented, Minorities and Special Education and Racial Harassment/Student Discipline. As we have seen in the past two years, continued conversations around these issues, by legal and program staff from across the country, have helped us increase our collective ability to sustain a strong and effective enforcement program.

We would now like to build upon these efforts and establish identifiable internal networks, or communities of practice, around each issue area. "Communities of practice" is a phrase used by the Institute for Research on Learning at Stanford University to recognize informal groupings of people, within an organizations, who are "bound to one another by exposure to a common set of problems." Such groups collaborate directly, teach one another and use each other as sounding boards. They can serve as an organizational bridge between people doing the same job in different parts of the country. Members of such groups "join and stay because they have something to learn and to contribute."

We believe that such groups, in addition to providing a forum for building knowledge and expertise around each issue area, can also help us increase our ability to target strong cases; identify and share best practices; enhance our ability to identify and obtain strong remedies; help us to refine our case resolution tools and approaches; develop ways to monitor more effectively; and facilitate our ability to take enforcement action, when appropriate.

To ensure that each network or community is "up and running," an issue facilitator, or facilitators, has been identified for each group. Facilitators do not have the same responsibilities as the former issue coordinators. Rather, the role of the facilitator is to ensure that within OCR we maintain an active, multi-site group around each specific issue area. Each issue related community or network will include individuals who are directly involved in these issues in their offices. As not every office is heavily invested in each issue area, not every office may be represented on every group.

Internal Networks - page 2

Based upon multiple recommendations from a wide variety of OCR staff who have worked in these issue areas, the Assistant Secretary's Council has asked the following individuals to serve as issue facilitators:

Lau - Angela Martinez (Division D)
Gifted and Talented - Sarah Hawthorne and Barbra Shannon (Divisions D and B)
Minorities and Special Education - Chip Smailer and Brenda Wolff (Division A)
Racial Harassment/Student Discipline - John Benjes and Barbara Wolkowitz (Divisions D and C)

Because OCR also has a strong interest in building capacity around the issues of testing, the First Amendment, and affirmative action, the following facilitators have also been identified for each of those issues:

First Amendment - Doreen Dennis (Program/Legal)
Testing - Howie Kallem (Program/Legal)
Affirmative Action - John Fry (Division C)

(In addition, Fran O'Shea (Division C) will continue her current responsibilities with respect to Title IX Athletics.) There may or may not be formal network activities built around these issues; however, each contact person will be responsible for sharing issue related information throughout the agency (e.g., information bulletins) and serving as a national resource on these issues for OCR staff all over the country.

To function effectively, it is critical that this effort has the full support of OCR management and that each network has the ability to stay closely connected with the rest of the organization, particularly the Enforcement Coordinators, the Enforcement Directors and the Program/Legal teams. To this end, a member of the Assistant Secretary's Council will serve as a resource liaison for each group. In addition, staff members from the Program/Legal teams will participate in each group and Program/Legal unit will take general responsibility for providing support and helping to ensure the health of each issue network.

The first task of each network group will be to assess where we are in the issue area, where we need to be and what we need to help us get there? Each group will also be asked to begin the task of identifying agency standards for quality case resolution in each of these issue areas.

Some of the issue facilitators have already begun the process of contacting individuals who have worked on these issues in the past. Any OCR staff person who has cases in one of these areas and would like to be an active part of a network, should also feel free to contact the individual facilitators directly.

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C.

To: Senior Staff
Component Planning Teams

From: Norma V. Cantú *Norma V. Cantú*
Raymond Pierce *Raymond C. Pierce*

Date: March 1, 1995

RE: Development of the FY 1996 Enforcement Docket

This memorandum sets out guidance for FY 1996 enforcement planning. We will be using an approach that should both facilitate our discussions about where OCR should put its proactive resources, and simplify communication about OCR's docket as we carry out our enforcement activities over the coming months.

In the interest of paperwork reduction, only two documents will be produced.

The first is the summary analysis of the region's projected FY 1996 FTE usage. The format is somewhat changed from last year, but is now available in QuattroPro or Lotus so that you can more painlessly manipulate the numbers at home.

The second is a proposed docket of proactive enforcement activities. The docket will indicate for each case the identification of the targeted student population facing discrimination, the approach taken to developing a strong remedy, and, over time, how the achievement of the desired results is being ensured. The docket will include current as well as proposed proactive enforcement activities. It will be maintained by each individual component, updated and shared as needed to maintain clear and open communication between the component and the OAS.

The time line for development of FY 1996 component dockets is as follows:

February 22	Draft procedures circulated to components.
February 24	Conference call to discuss proposed procedures.
March 1	Revised procedures distributed to components.

March 3	Conference call to discuss communication and consultation on components' current dockets and OAS coordination.
March 10-17	Components submit current comprehensive dockets. Please circulate these to all components.
March 10-28	Preliminary OAS feedback.
March 29-31	Roundtable in Washington.
April 7-14	Components submit FY 1996 FTE Usage Charts and Comprehensive Component Dockets (including proposed FY 1996 proactive enforcement activities). Please circulate these to all components.
April 7-28	Consultation with OAS on finalization and approval of plans. Please circulate your approved plans to all components.
As Appropriate	Ongoing discussions.

As you prepare your enforcement dockets for FY 1996, you may assume the following:

- Proactive enforcement activities should be directed towards developing and ensuring the implementation of strong remedies for students denied access to high quality, high standards curriculum. This priority, the umbrella for the "above the line" high priority areas, is not anticipated to change over the next few years. You have wide latitude to target your proactive enforcement program within the umbrella priority. If you believe that program reasons argue for other priorities, it is vital that you contact us as soon as possible to set up time to discuss these.
- The component and the relevant issue area coordinator will need to work together in cases in which you anticipate that at least some of your proactive enforcement activities will be "below the line" (higher education desegregation, for example). Again, a major goal is to allow full and open discussion of students in need, remedial approaches and methods of ensuring compliance. You may always call to set up a discussion.
- It is not anticipated or expected that every component will carry out enforcement activities in every issue area. Region XX may pursue Lau while Region XXX concentrates on overrepresentation. Our goal is a nationally-balanced enforcement program. Necessary balancing is one purpose of the enforcement roundtable.
- We are expanding our notion of a "case" beyond a traditional compliance review to allow a broader range of strategies for making positive impact in the lives of children

facing discrimination. The component's docket may include any proactive enforcement activity that (1) brings resources to bear on behalf of a well-defined student population facing discrimination; (2) develops a strong, educationally sound civil rights remedy that increases educational opportunity for those students, and (3) ensures that OCR will be prepared to move towards enforcement if results are not achieved as anticipated. This is not to suggest that OCR will not provide information or technical assistance requested by the public; only that such activities are not part of the components' proactive enforcement docket.

- We are targeting 40 percent of OCR resources to be dedicated to proactive enforcement activities. If you intend to target less or more in your individual component, please be sure to explain. Your completed docket should include specific site selections for your cases. We are encouraging data requests for first quarter activities to go out this spring to prepare for meaningful case activity in the fall. We are strongly discouraging late-year case starts, unless there are compelling program reasons.

Preparing and Using the Summary FTE Usage Chart for FY 1996

You will see that the chart is similar to the one we used last year. We have consolidated categories where the differences did not appear meaningful or helpful (between planning and management activities, for example, or between priority and other-training). Please also note the following:

- Attached is a copy of the chart, and a copy of the chart with the fields highlighted into which you should enter FTE data. DO NOT enter information into other fields; other fields are all computed automatically.
- You will receive by e-mail a spreadsheet version of the chart compatible with Lotus 1-2-3.
- The first major section, FTE BY ISSUE AREA, should give us a sense of the balance of all component program activities by subject area. Include in your calculations all activities, whether Proactive Compliance Activities (PCA), Complaints, or Other Program Activities.
- Under PROACTIVE FTE BY ACTIVITY, we have asked you to break out estimated FTE usage for Proactive Compliance Activities (PCA) by New PCA (activities to be started in FY 1996) and Carry Over PCA (activities to be carried over from FY 1995 or before). We have done the same for Complaints under OTHER PROGRAM FTE.

Please feel free to ask questions if you're not sure of how to use the Chart to create a snapshot of your projected FTE usage.

Preparing The Comprehensive Component Docket

In order to communicate and coordinate more effectively on OCR's ongoing enforcement activities, and in order to provide context for our discussion of FY 1996 activities, we are asking each component to prepare a comprehensive component docket.

Please include the following cases on your component docket. This will give us an overview of your entire enforcement program, and should greatly reduce the need for ad hoc queries over the course of the year. Because these cases are already open, targeting information is not necessary; but please include a brief (4-8 line) summary giving the case opening date; an explanation of the targeted student population and the discrimination they are (or are alleged to be) facing; your approach to the development of a strong, educationally sound remedy (and, to the extent possible, a description of the likely or proposed remedy); and how OCR is ensuring that results are in fact being achieved in a timely manner. Please order by docket number within section; a case need only appear under one heading.

Please provide this docket to us (and to each other) no later than March 17; if you can manage, please provide it by March 10.

Enforcement Cases

- All cases in enforcement or that you anticipate will go to enforcement.

Open Proactive Enforcement Activities

- All open reviews or other proactive enforcement activities. Include cases in monitoring, as well as those that are still pending resolution.

Proposed Proactive Enforcement Activities

- All proposed proactive enforcement activities (in the extended format set out below at page 8). This section may remain blank until your April 7-14 submission of proposed FY 1996 proactive enforcement activities.

Other Cases

- All unresolved complaints over 365 days old;
- All cases requested by an issue area coordinator to be included on the docket;
- All cases that you believe, because of their scope, sensitivity or other factors, should be included on the docket.

The monthly alert, compiled from CIS, will provide information on critical caseload data, including number of cases in monitoring, number of pending complaints over 365 days old.

number of complaints in monitoring, etc. You will continue to be able to verify the monthly alert data before it is made widely available.

Once this docket is prepared for each component, our intent in Washington is to maintain it on our shared network directory. When asked for information, you will at all times be empowered to say, "it's on the docket; please read it first and get back to me with any additional questions." For example, you will be able to flag the start of a compliance review in your May 10 weekly activities report by noting, "Data request in Ontario County (No. 96051234) anticipated June 1, 1995. No changes in circumstances since case proposed in Spring 1995. Information on Region XX docket is current," or note, "Region XXX has reached agreement in its Montreal review (no. 96052345). A summary is in the updated docket."

Communication and Changes/Updates to the Component Docket

The OCR team in Washington is dedicated to better communication and coordination on case-related issues. We are proposing that the following process, modeled on the new EAR process, be used immediately for case and other docket-related discussions.

The component docket should at all times reflect an accurate picture of the progress of the component's proactive and other docketed cases, and of any changes to the docket that the component has made.

There can not be too much communication on these issues. To the extent that a component's action represents a change in the component's proactive docket, or a substantial change in the approach to a particular case on that docket, or you'd just like to add an extra set of eyes and ears to a problem, additional conversation with us is in order.

Major case developments should be communicated both by updating the component docket (and sharing this with others), and by flagging that such a change has been made on the component's weekly activities report.

We need notification about the initiation of compliance activities at least two weeks in advance of your notification to appropriate congressional offices. Most of you have been providing the kind of advance notice that allows us, if necessary, to discuss your initiative before the compliance activity begins.

A note on logistics and Washington team work. We would like there to be a simple, easily understood process for checking in, when checking in is in order. While we encourage you to pick up the telephone early and often, in particular with us and with the issue area coordinators, please also help us coordinate our team. We are designating Lilian Dorka (Roseita Hillary during Lilian's maternity leave) as the entry point into our office for docket updates and proposed docket changes, as well as for EAR packages.

Please send your original docket and any future updates in WordPerfect 5.1 or 5.2 format to Lilian and to each of the Regional Directors. Updates should not be piecemeal, but should

reflect the component's entire revised docket. Lilian will ensure that a master set of component dockets is maintained on the network for Washington staff. If there are updates to be made, we would expect to see the updated docket submitted on the same day as your first weekly activities report of the month; this will keep the dockets in sync with the monthly alerts (alternatively, you should note "no docket update" in your first weekly of the month). You can, of course, update your docket as often as you think advisable.

When you want to propose a change to your FY 1995 docket, or discuss an EAR, please send to Lilian a brief note explaining the proposed action or changes. You may wish to use the format set out above, describing the student population targeted and the discrimination they are facing; the information on which you are basing your recommendation; your proposed approach to developing a strong, educationally sound remedy; and how OCR will ensure that results are in fact being achieved in a timely manner. She will ensure that all of our team--ourselves, the issue area coordinators, etc.--are made aware of the proposed changes; she will ensure that you and all of us know who the single Washington contact person for any case will be. As a result of your note, you may get a call back from an issue coordinator saying, "don't wait. I'll check in with folks here for any additional thoughts or ideas, but you should go ahead." Alternatively, you may get a call from Lilian saying, "I've pulled together a conference call day after tomorrow so you can discuss the proposal more fully with Ray and Norma. Here are the people I think should be at the table (from PEPS, PASS, OSERS, OS, etc.)." By coordinating through Lilian, you will know that the entire management team here is in the loop. We hope to provide "one stop shopping" for Washington consultation, and to increase our team's conversations with you, rather than about you. By bringing everyone to the table together, we hope to make sounder decisions based on better advice and information, and to do so in a quick and efficient manner.

Preparing the Proposed Component Docket for FY 1996

In any discussion about our proactive docket, we should remain focused on the reason we are committing a significant percentage of OCR resources to these activities. We want to have a positive influence on the lives of children, and can best maximize our impact with well-targeted, well-planned compliance activities in our high-priority areas. We are in the best position to fulfill the promise of equal opportunity for all children through a progressive, proactive commitment of resources that is based on sound decision-making. This is the message that I communicate to all audiences, and a standard by which I expect all of OCR to be measured.

To facilitate our discussion of proposed enforcement activities, and our tracking of our progress along the way, please provide the following information for each proposed proactive compliance activity. Proactive compliance activities will remain on your component docket until closed, not only until they are resolved. You may, if you wish, preface your docket with a brief explanation of your overall enforcement approach.

Please provide your comprehensive component docket to us (and to each other), including both current and proposed activities, no later than April 14; if you can manage, please provide it by April 7.

PROPOSED Date of proposed case opening

DATE OPENED Date of actual case opening (as this becomes applicable)

STAFF CONTACT Name and telephone number for the person or persons who will act as contact person for questions on this case

TARGETED STUDENT POPULATION AND NATURE OF THE CIVIL RIGHTS PROBLEMS THEY FACE There are numerous factors that should be carefully considered when making judgements about the initiation of proactive compliance activities. Please include your information about and assessment of :

- Information derived from contact with the targeted recipient;
- Accurate statistical (and similar) data;
- Complaints (agency or court);
- Legislative findings, testimony, etc.;
- Number of students that may be (directly or indirectly) affected;
- Information from other OCR, ED or US Government components;
- Information from educators, parent groups, advocacy groups, etc.;
- Press information;
- Contacts with state and local government agencies;
- Other information on which you have relied.

Please discuss the degree to which the information at hand suggests that the targeted recipient is among the "biggest speeders" in your jurisdiction.

APPROACH TO DEVELOPING A STRONG, EDUCATIONALLY SOUND REMEDY We should have as clear a picture as possible not only of where the problem may be, but also of where we think we're going to remedy it. To the extent that proving our case in administrative proceedings becomes necessary, what is our ability to do so? What factors or evidence will we rely on? Provide your assessment of possible remedies in the event of civil rights violations, and what your approach will be to achieving them. Discuss:

- State and local actors and how you plan to work with them;
- Parents groups, local advocates, and others, and how your activities may include or otherwise empower them;
- Educational experts inside or outside of the Department and how you plan to include them in your efforts;
- Other stakeholders, how they may be affected, and your plans for managing your relationship with them;
- Anticipated press interest, and how we might best manage public affairs.

**HOW OCR
WILL ENSURE
THAT RESULTS
ARE IN FACT
ACHIEVED**

This section should be used to provide updates on the status of compliance activities already initiated, or the status of discussions for proposed activities, including remedial agreements, monitoring, community involvement in ensuring implementation, etc. We want to know how OCR is ensuring that appropriate results are achieved in a timely manner.

The bottom line here is simple: if we're looking for the best opportunities to help students who are being discriminated against, and who are, therefore, being denied educational opportunities, we should devote significant effort in our pre-compliance review assessments and investigations. In most cases, several (if not many) of the factors listed should be indicators for our proactive enforcement.

Notably, the fact that a region receives a complaint does not--alone--justify the conversion of that complaint into a compliance review. If, in fact, you receive a complaint that is expected to drain significant resources, and as a result, you need to adjust your enforcement docket, then we should talk. In general, we have not favored the conversion of complaint investigations to compliance reviews unless there are reasons that independently justify such action.

How detailed should the information be? Art Coleman will send under separate cover some better examples that explain why we have targeted the site and issue in question. By contrast, it's not enough to state that the issue is a high priority one and that there are numerous victims, or that the site selected is a large school district. How compelling do these reasons sound to you? It is important for us to be able to communicate persuasively our interests in any proactive compliance activity that we launch, both as a matter of sound planning and as a matter of communication of our program objectives and results. You should carefully consider all information before concluding that all necessary informational bases have been covered.

Managing Development and Discussion of the FY 1996 Enforcement Docket

As we review your proposed FY 1996 proactive enforcement activities, we will want to discuss programmatic issues (where we target, how and why) as well as operational issues (how individual components and OCR as a whole allocate FTE and budget resources to get the job done).

This will require communication and coordination with a large number of people on both the programmatic and the operational fronts.

So much of our proactive enforcement docket is ultimately tied to budget and operations--how a component's comprehensive docket impacts the component's and OCR's overall FTE and other resource use, team structures and other organizational issues within the component and throughout OCR; training needs, and the like.

We are therefore designating Cathy Lewis in her capacity as OCR Executive Officer as coordinator for development of our FY 1996 enforcement docket. Cathy will work with Brian Ganson, our Executive Assistant for Policy and Operations, as well as the issue area coordinators and other staff, to ensure that program, budget and operational issues are coordinated, thoroughly discussed with us, and ultimately resolved in a manner that allows OCR to maximize its positive impact on children's lives in the coming year.

We look forward to working with you over the coming months.

Total FTE		50.0	Available FTE		43.9	Percent of OCR FTE		6.3	
FTE			% of T	% of A	FTE			% of T	% of A
FTE BY ISSUE AREA					FOIA, CORRESPONDENCE & OTHER ACTIVITIES				
Overrepresentation	4.3	25.7			FOIA & Appeals	0.2	66.7		
Underrepresentation	0.0	0.0			General Correspondence	0.1	33.3		
Testing/Assessment	1.8	10.8			Regulatory Reviews	0.0	0.0		
LEP Student Services	6.0	35.9					0.0		
E & S Desegregation	0.0	0.0					0.0		
Other ATL	0.0	0.0					0.0		
Subtotal ATL	12.1	72.5			TOTAL NDA	0.3	0.6	0.7	
S & R Harassment	2.3	13.8			ED/OCR OPERATIONS				
Title IX Athletics	2.3	13.8			ED/OCR Budget	0.0	0.0		
Higher Ed. Desegregation	0.0	0.0			ED/OCR Management	0.0	0.0		
Subtotal BTL	4.6	27.5			ED/OCR Personnel	0.0	0.0		
Total Priority Issues	16.7	33.4	38.0		ED/OCR Planning	0.0	0.0		
Other Issues	19.5	39.0	44.4		OCR Quality Improvement	0.1	100.0		
TOTAL	36.2	72.4	82.5		Technical Support	0.0	0.0		
PROACTIVE FTE BY ACTIVITY					TOTAL ED/OCR OP				
New PCA	10.0	68.0				0.1	0.2	0.2	
Carry Over PCA	2.5	17.0			COMPONENT OPERATIONS				
PCA Monitoring	1.9	12.9			Resource Management	2.0	35.7		
Proactive Policy Dev't	0.2	1.4			Administrative Support	3.5	64.3		
PCA Enforcement/Litigation	0.1	0.7					0.0		
Proactive Docket	14.7	29.4	33.5		TOTAL CO	5.6	11.2	12.8	
OTHER PROGRAM FTE BY ACTIVITY					NON-AVAILABLE FTE				
New Complaint Resolution	14.0	73.7			Vacation/Leave	5.6	91.8		
Carry Over Complaint Res.	2.0	10.5			Union Leave	0.5	8.2		
Complaint Monitoring	2.8	14.7			Other	0.0	0.0		
Case-Specific Policy	0.1	0.5			TOTAL NA FTE	6.1	12.2	N/A	
Complaint Enforcement/Lit.	0.1	0.5			SUMMARY				
Complaint Docket	19.0	38.0	43.3		PCA	14.7	29.4	33.5	
Magnet School Reviews	0.0	0.0			Complaints	19.0	38.0	43.3	
Survey Support	0.0	0.0			Other Program	2.5	5.0	5.7	
Vocational Ed. MOAs	0.0	0.0			Total Program	36.2	72.4	82.5	
Cust.Ser. Public Info & TA	2.5	100.0			Program Development	1.7	3.4	3.9	
Program Info. Technology	0.0	0.0			FOIA, Corr. & Other	0.3	0.6	0.7	
Other Program	2.5	5.0	5.7		ED/OCR Operations	0.1	0.2	0.2	
TOTAL PROGRAM	36.2	72.4	82.5		Component Operations	5.6	11.2	12.8	
PROGRAM DEVELOPMENT					Available FTE	43.9	87.8		
Training	0.9	52.9			Non-Available FTE	6.1	12.2		
Training Development	0.3	17.6			TOTAL FTE	50.0			
Focus Groups/Outreach	0.5	29.4			should equal	50.0			
TOTAL PD	1.7	3.4	3.9						

Anticipated Complaint Receipts	480	Reviews Pending From Prior Years	2
Complaints per FTE	34.3	Reviews in Monitoring	20
		Pending Complaints Over 365 Days Old	2
		Pending Complaints Over 180 Days Old	112
		Complaints in Monitoring	500

EXECUTIVE SUMMARY

OCR's Electronic Library Group was created to develop an electronic library system that will deliver OCR's policy issuances, case documentation, significant correspondence, technical assistance, and related materials to every OCR employee's workstation; and to make access to the electronic library data bases available to the public. The goal is to have a single source of OCR document information.

This project consists of three phases. Phase I is design and development, Phase II is implementation, and Phase III is maintenance. This document includes recommendations for the project developed during Phase I design activities.

Chapter 1 outlines the recommended documents to be included in the Electronic Library (EL), such as recipient letters from December 1993 with substantive closure codes, corrective actions plans, policies, statutes, and regulations.

Chapter 2 defines two approaches to electronic retrieval of documents and details recommendations regarding search techniques. One recommendation is that the EL allow users to combine concept and text searches. Appendix B outlines some detailed concept trees for inclusion in the library.

The recommended technical specifications are outlined in Chapter 3, including the OCR LAN hardware and software configurations, costs, and implementation.

Chapter 4/5 details the staffing and training needs for the proposed EL Information Center, which will manage the daily operations of the EL. The procedure for collection and redacting current documents is defined. This chapter also explains the recommended procedure for electronic transmission of future documents from the regions into the EL.

Four options for training regional staff in the operation and administration of the EL are discussed in Chapter 6. Each option details staffing, travel, costs, and benefits. Option I is recommended, which includes two to three trainers per region to spend four to six days on travel for a total cost of \$35,528, which includes estimated air, hotel, per diem, and related costs for the trainers.

Chapter 7 is dedicated to a discussion of Freedom of Information Act considerations in relation to the EL. It is recommended that HQ staff redact materials prior to entering them into the EL.

OCR/ ELECTRONIC LIBRARY

Short-term and long-term strategies for making the EL accessible to the public are discussed in Chapter 8. A definition of the Internet and other related programs is included in this section. It is recommended that an OCR section be added to the ED Gopher, which was established in 1993 to disseminate information about the Department. Creation of an OCR Internet node is also presented as a possible long-term solution. This chapter defines the hardware and software requirements to produce the EL on CD-ROM and various marketing strategies.

Appendix A includes a glossary of some of the terms and abbreviations used in this document.

1998 E&S Compliance Report

5,662 Districts
55,377 Schools

Actual Reporting Methods

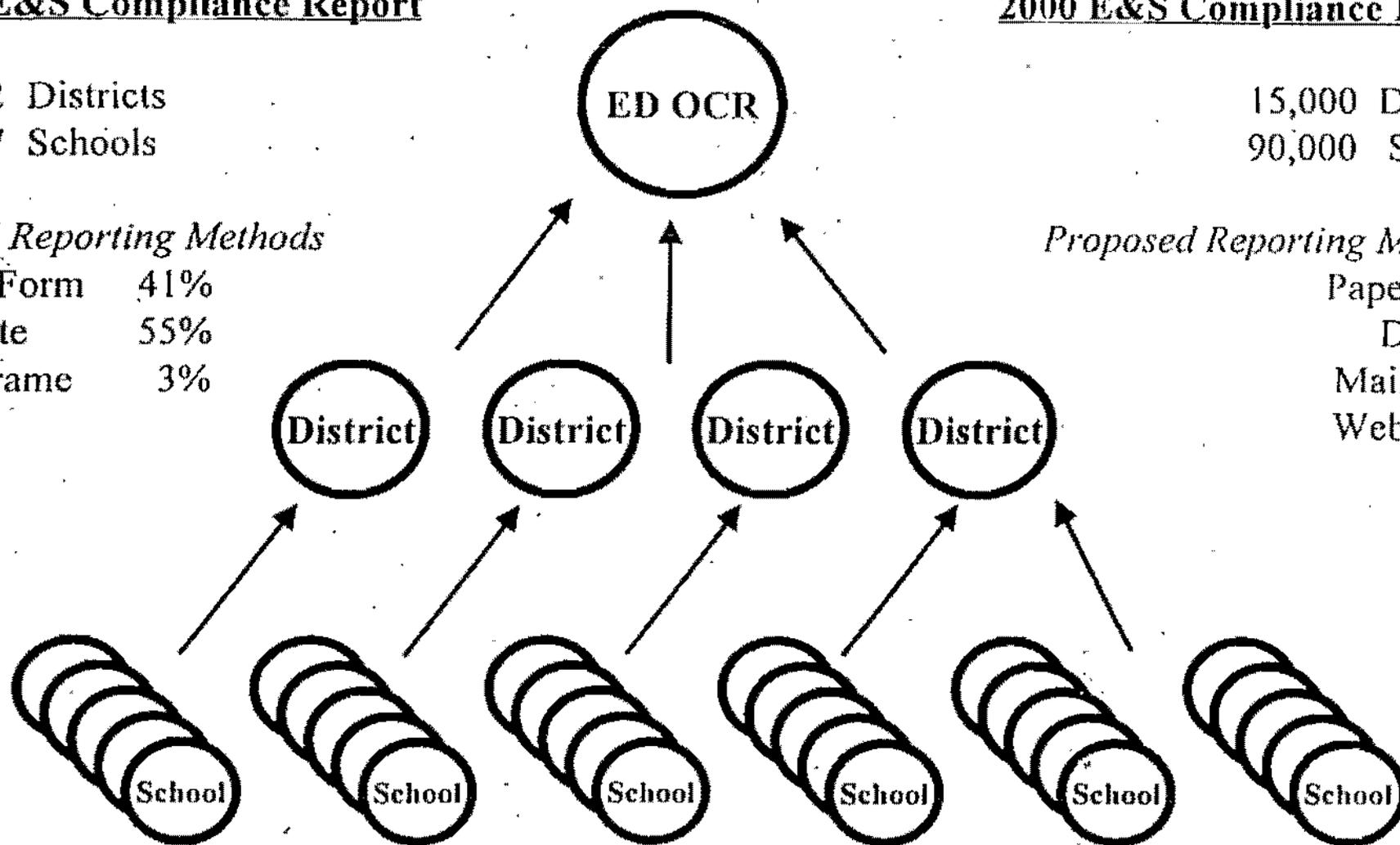
Paper Form 41%
Diskette 55%
Mainframe 3%

2000 E&S Compliance Report

15,000 Districts
90,000 Schools

Proposed Reporting Methods

Paper Form
Diskette
Mainframe
Web-based



Incremental Development - Cycle 1



OUTBOUND

OCR - to - District

Paper
Diskette (IBM Windows only)
Mainframe Tape
Web ID and Password

INBOUND

District - to - OCR

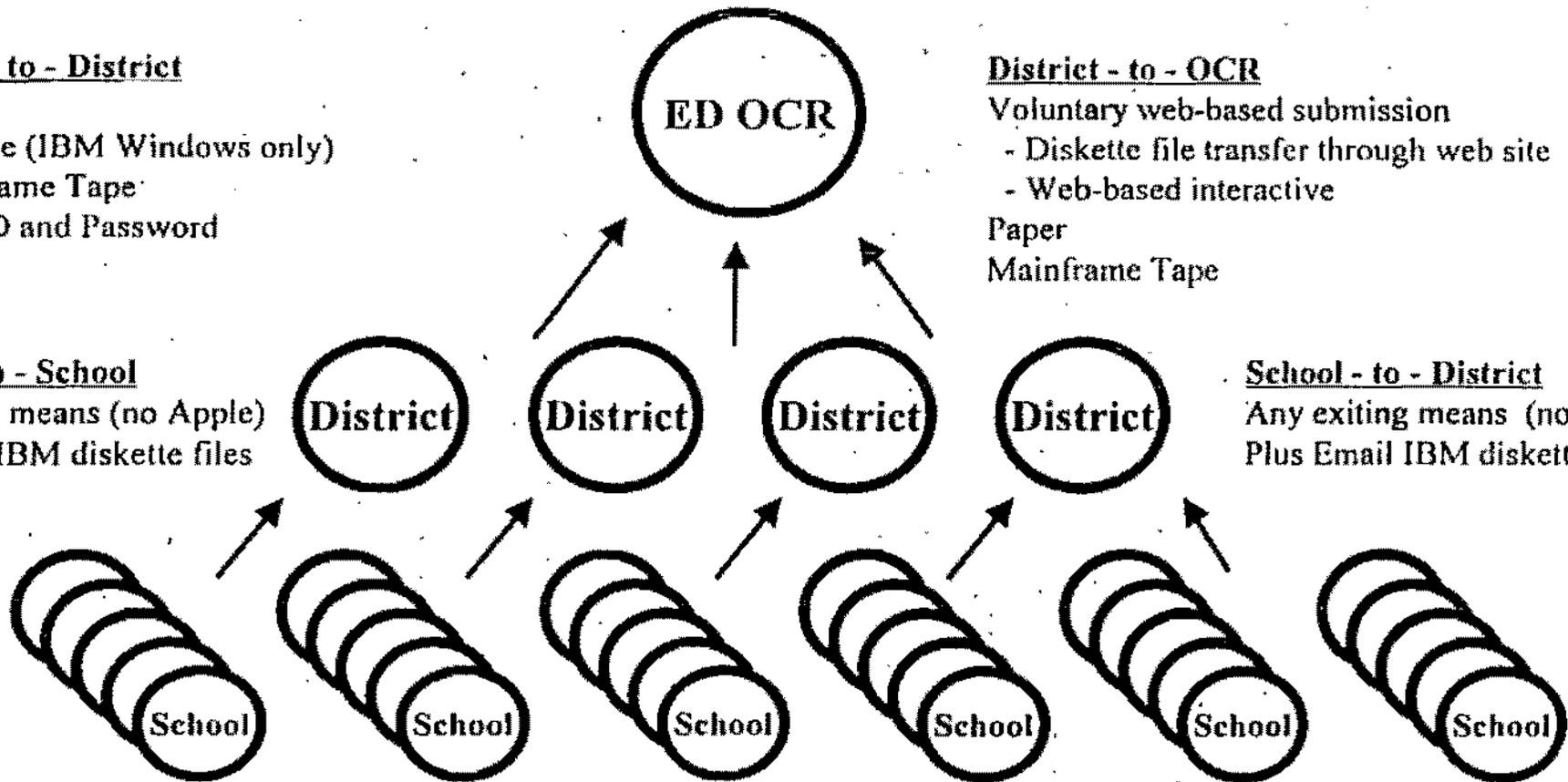
Voluntary web-based submission
- Diskette file transfer through web site
- Web-based interactive
Paper
Mainframe Tape

District - to - School

Any exiting means (no Apple)
Plus Email IBM diskette files

School - to - District

Any exiting means (no Apple)
Plus Email IBM diskette files



Cycle 1 Plan

Voluntary web-based reporting from Districts in addition to existing means. Encourage Districts to email files to Schools. Encourage District use of web-based submissions. Eliminate Apple diskette method to achieve immediate savings. Other savings to come from reduction in Paper and Diskette Districts who submit via Web and less damaged/remailed diskettes.



Incremental Development - Cycle 2



OUTBOUND

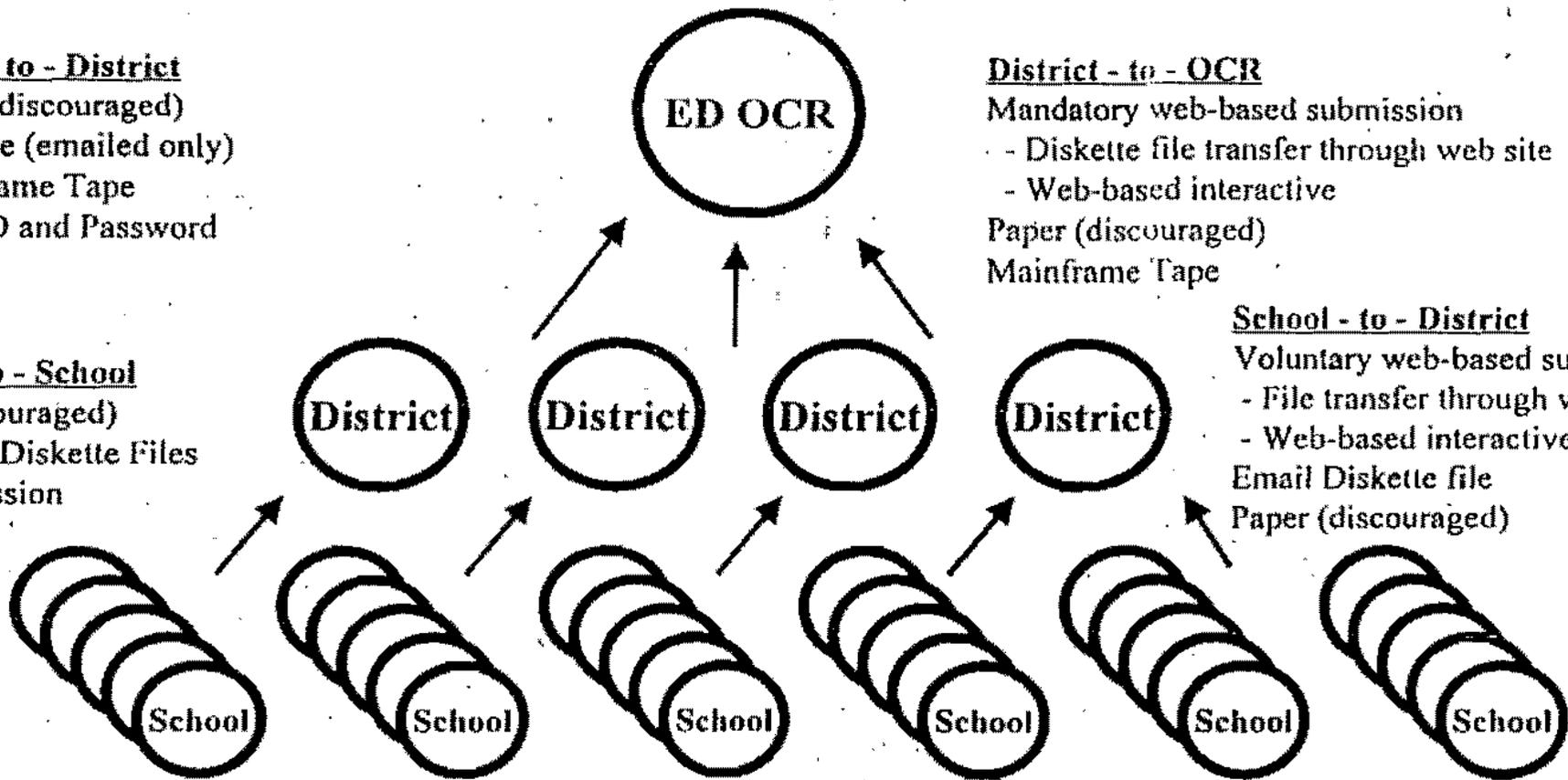
OCR - to - District
Paper (discouraged)
Diskette (emailed only)
Mainframe Tape
Web ID and Password

District - to - School
Paper (discouraged)
Email IBM Diskette Files
Web Permission

INBOUND

District - to - OCR
Mandatory web-based submission
- Diskette file transfer through web site
- Web-based interactive
Paper (discouraged)
Mainframe Tape

School - to - District
Voluntary web-based submission
- File transfer through web site
- Web-based interactive
Email Diskette file
Paper (discouraged)



Cycle 2 Plan

Mail no outbound diskettes. Mandatory web-based reporting from Districts (in addition to mainframe). Discourage paper at all levels. Encourage Districts to email files to Schools. Schools get voluntary interactive web ability. Districts grant web permission to their schools. Immediate savings from not mailing diskettes and eliminating mail damage and remails. Other savings to come from reduction in Paper method usage.



Incremental Development - Cycle 3



OUTBOUND

OCR - to - District

- Paper (minimal)
- Mainframe Tape
- Web ID and Password

INBOUND

District - to - OCR

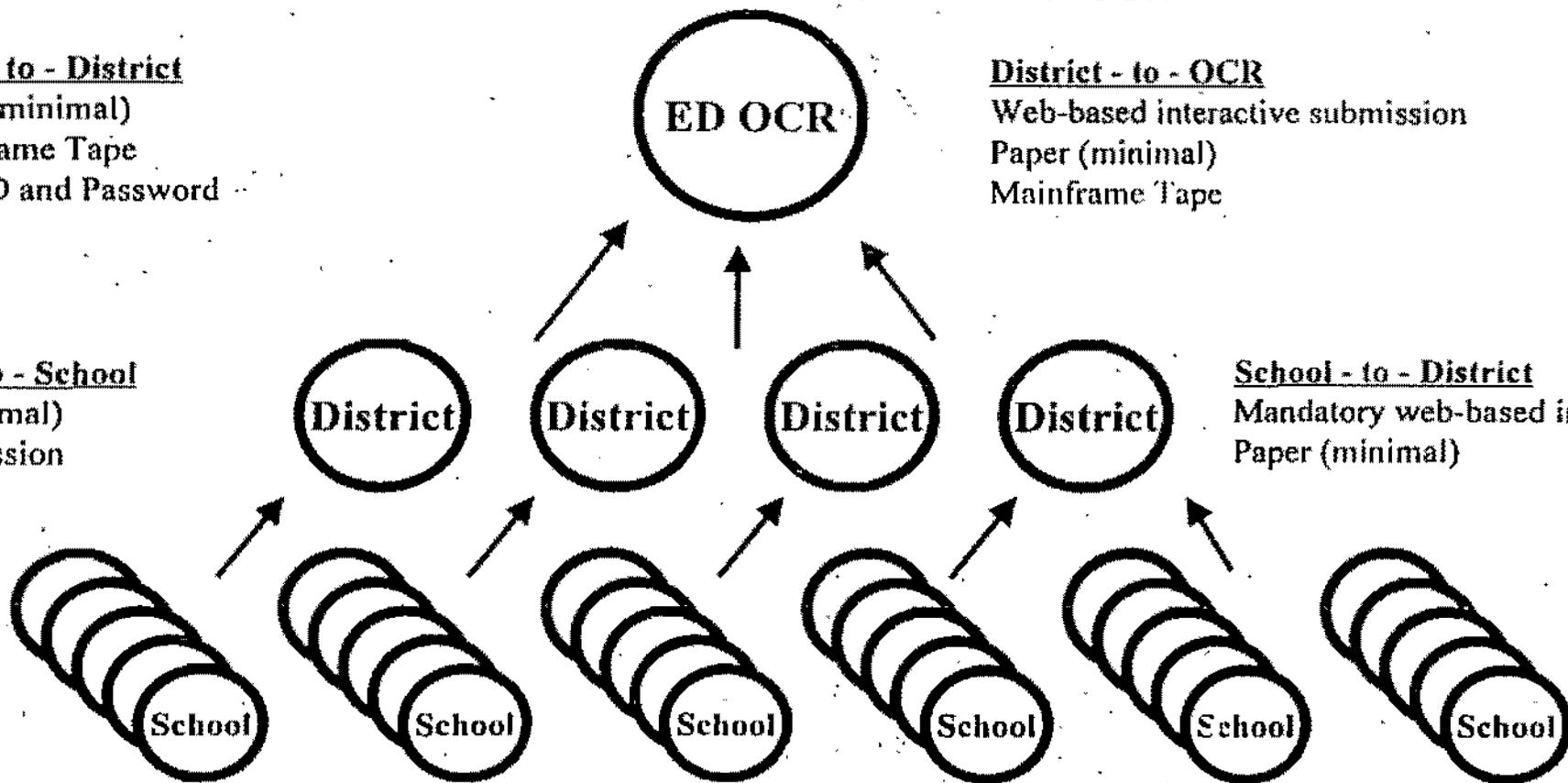
- Web-based interactive submission
- Paper (minimal)
- Mainframe Tape

District - to - School

- Paper (minimal)
- Web Permission

School - to - District

- Mandatory web-based interactive
- Paper (minimal)



Cycle 3 Plan

Create no diskettes. Mandatory web-based reporting from all (in addition to mainframe). Minimalize paper at all levels. Districts grant web permission to their schools. Immediate savings from not creating diskettes. Other savings to come from reduction in Paper method usage.



ASC CRITICAL AGENDA

May 13, 1996

I. LEADERSHIP

1. Alignment/Selling the Vision
2. Setting Clear Expectations and World Class Standards
3. Expanding the Leadership

II. CLEAR AGENDA FOR ACTION

4. Keeping the OCR Docket Most Relevant
5. Securing Necessary Resources
6. Managing the ASC Agenda

III. EFFECTIVE MANAGEMENT FOR POSITIVE CHANGE

7. Ensuring the Achievement of Strategic Objectives
8. Ensuring the Functioning of Our Networks
9. Ensuring the Health of OCR Systems

IV. ACCOUNTABILITY FOR RESULTS

Cuts across all critical agenda items.

Proposed or draft items are in italics.

Agreed items are in normal print.

Cycle

Success Looks Like...	Specific ASC Projects	To Be Done By	Point Person	IV. ACCOUNTABILITY
I. LEADERSHIP				
1. Alignment/Selling the Vision				
<p><i>Staff know and understand OCR's Mission, goals and objectives as set out in the Strategic Plan</i></p> <p><i>Staff feel no more than a step removed from the ASC, and feel heard</i></p> <p><i>Staff see and believe that we're here for them</i></p> <p><i>OCR's Senior Managers are enfranchised & empowered</i></p>	<p><i>We heard that Leadership is less a set of discreet tasks than something that needs to imbue everything else we do, collectively and individually.</i></p> <p><i>Some ASC members noted that, even as we work together, ASC members still will need, individually, to put good ideas to work without waiting for "the ASC" to act.</i></p> <p><i>Better use of Friday calls</i></p>			<p><i>We don't know how we're doing in this area.</i></p>
2. Setting Clear Expectations and World Class Standards				
<p><i>Best practices are shared--and implemented!--across the agency</i></p>	<p><i>Develop "Roles and Expectations" Pieces</i></p> <p><i>Set high standards for proactive cases</i></p> <p><i>Set high standards for complaint resolution</i></p> <p><i>Set other customer service standards</i></p>	<p><i>Finish work of "Case Strategies & Standards for OCR Work"</i></p> <p><i>"Best practices" Roundtable?</i></p>	<p>Tom, Sue, Cathy, Linda</p>	<p><i>Expectations are underway, but not there, yet.</i></p> <p><i>World class standards aren't there, yet.</i></p>

Success Looks Like...	Specific ASC Projects	To Be Done By	Point Person	IV. ACCOUNTABILITY
3. Expanding the Leadership				
	<i>Plan for critical hires in FY 1996</i> <i>Plan for critical hires in FY 1997</i> <i>Create leadership development opportunities</i>	<i>Critical, higher-level hires should be planned and to the greatest extent possible in place by Sept. 1996</i>		
II. CLEAR AGENDA FOR ACTION				
4. Keeping the OCR Docket Most Relevant				
<i>Increased number of good cases</i> <i>Increased number of enforcement cases</i> <i>Cases are prosecuted quickly and effectively; needed coordination is seamless</i> <i>Increased Intelligence and Coordinated Response on "Defensive" Issues</i>	Complete 1997 Docket Planning for EDs, P/L and Resource Groups <i>Monthly (bimonthly?) status calls w/ NVC, RCP</i> <i>A roundtable around enforcement issues may help</i>	ECs, Art C ECs	May 31; June 14 Ongoing	<i>Impact data is limited; general dissatisfaction expressed by ASC members on data.</i> <i>Impact benchmarks not in place.</i>

Success Looks Like...	Specific ASC Projects	To Be Done By	Point Person	IV. ACCOUNTABILITY
5. Securing Necessary Resources				
<p><i>Fiscal resources are well allocated</i></p> <p><i>Human resource capacity is increasing</i></p> <p><i>Outside resources are being cultivated</i></p> <p><i>Key Program/Policy resources are available</i></p> <p><i>Technology resources are widely available</i></p>	<p><i>Complete 1996 Resource Planning</i></p> <p><i>Conduct 1997 Resource Planning</i></p> <p><i>Quarterly (bimonthly?) Resource check-ins</i></p> <p><i>Plan for a Smaller OCR</i></p>	<p><i>Any anticipated hiring should to the greatest extent possible be planned and executed by Sept. 1996</i></p>		<p><i>Hard to tell whether choices we made actually paid off;</i></p> <p><i>No real benchmarks in place.</i></p>
6. Management of the ASC				
<p><i>We know what we're doing</i></p> <p><i>We see progress in getting it done</i></p> <p><i>Satisfaction with our work is high</i></p>	<p><i>Next Meeting Planning</i></p>			<p><i>We have done some check-ins with ASC members, have limited impressions from others.</i></p> <p><i>At least we're started!</i></p>

Success Looks Like...	Specific ASC Projects	To Be Done By	Point Person	IV. ACCOUNTABILITY
III. EFFECTIVE MANAGEMENT FOR POSITIVE CHANGE				
7. Ensuring the Achievement of Strategic Objectives				
<p><i>Larger numbers of students are served by real and positive change</i></p> <p><i>Fewer "misses" or lost opportunities</i></p> <p><i>We are hitting and making progress on all nine strategic objectives</i></p> <p><i>Outside advocates, educators and civil rights attorneys would give us a B+ in 1997.</i></p>	<p><i>Review and revise specific strategic plan initiatives, or at least, success measures and critical initiatives</i></p> <p><i>Special attention needed for boxes 5 (models that work) and 6 (empowerment of others)</i></p>			<p><i>Quality assessment is not in place at the "macro" or OCR level.</i></p> <p><i>Quality assessment is not in place at the "micro" or case resolution team level.</i></p> <p><i>Customer satisfaction data is spotty.</i></p> <p><i>Sense that consequences for non-compliance by recipients are not swift or sure enough</i></p>
8. Ensuring the Functioning of Our Networks				
<p><i>Internal subject-area networks on track</i></p> <p><i>US/ED constituencies on track</i></p> <p><i>Hill constituencies on track</i></p> <p><i>Recipient constituencies on track</i></p> <p><i>Educator constituencies/resources on track</i></p> <p><i>Advocacy/Parent constituencies on track</i></p> <p><i>Public Affairs on track</i></p>				<p><i>Unclear sense of goals or criteria for effectiveness</i></p>

Success Looks Like...	Specific ASC Projects	To Be Done By	Point Person	IV. ACCOUNTABILITY
9. Ensuring the Health of OCR Systems				
<p><i>L/M relations on track</i></p> <p><i>Organizational issues on track</i></p> <p><i>Staff is more productive</i></p> <p><i>Managers are more effective</i></p> <p><i>Team accountability is increasing</i></p> <p><i>The difficult is becoming routine: what in 1995 is a big, tough case, in 1997 all CRTs can do</i></p> <p><i>Key barriers are identified and removed</i></p> <p><i>Solutions are tailored to individual problems/challenges</i></p> <p><i>EEO/Equity systems are on track</i></p> <p><i>Job satisfaction is growing</i></p>	<p><i>Most of the implementation for OCR systems happens at the Division or local level. The ASC may provide a good forum, however, for expectations and approaches around, for example:</i></p> <ul style="list-style-type: none"> - <i>Success in L/M relations</i> - <i>Performance appraisal/ feedback system alignment with OCR standards and expectations</i> - <i>Awards system alignment with OCR standards and expectations</i> - <i>Corrective actions systems alignment with OCR standards and expectations</i> - <i>OM issues</i> 	<p>Norma and Cathy to set up meeting w/ Marvin Farmer</p>	<p>Next face-to face meeting of ASC</p>	<p><i>Should have some better benchmarks for L/M relations after meeting w/ Marvin</i></p> <p><i>We don't measure against standards of performance well (standards aren't there);</i></p> <p><i>Consequences of not meeting standards are unclear.</i></p>

Hillary, Rosetta

From: Norma V. Cantu [Norma V. Cantu at WDCFO1] on behalf of Norma V. Cantu
Sent: Friday, November 13, 1998 10:39 AM
To: Susan Bowers; Arthur Coleman; Steve Cramolini; Lillian Dorka; Paul Fairley; Richard Foster; Eileen Hanrahan; Rosetta Hillary; Cathy H. Lewis; Jeanette Lim; Millie Palmer; Raymond Pierce; Taylor August; Angela Bennett; Lillian Gutierrez; Thomas Hibino; Gary Jackson; Linda McGovern; Archie Meyer; Harry Orris; Stefan Rosenzweig; Gary Walker; Helen Whitney; Brenda Wolff; Alice Wender; Wendella Fox; John Fry; Nick Dorka; Craig Seymour; Kelly Saunders; Sheila Harvey; Marvin Farmer
Subject: Note to All OCR Staff on Tech. Board



CHARTER DOC

Please circulate broadly--

Although we have made great progress in the last few years, OCR needs to continue to maximize its efforts to use technology effectively. We need to be sure that available funds are invested wisely, that our strategies are aligned with the Department's efforts, and that new initiatives support our program objectives and needs, including improved customer service. While the ASC has provided excellent input to me in making technology budget decisions, our ability to move forward as aggressively as we would like has been hampered by our inability to consistently bring together staff with a wide range of organizational, program, fiscal and technical expertise as one group to provide input to me on technology decisions.

Last year, Gary Jackson helped me pull together the Technology Advisory Group (TAG), which was a first attempt to address this need. Building on the experience of that group, I have now pulled together a Technology Advisory Board to provide me with direct advice. Like the TAG group it will include staff with technological expertise, but it will also include senior managers who can bring a broad range of additional skills to the discussion. The purpose of this new board is to bring together what I think is an appropriate cross section of OCR staff to help us find ways to capitalize on the opportunities created by technology. The group, chaired by Art Coleman, complements our excellent Information Technology Team and will, of course, coordinate closely with them and will rely heavily on their expertise, as well as that of the Office of the Chief Information Officer (OCIO).

In addition to providing specific input to me on planning and investment decisions, I anticipate that the board will serve as a forum within OCR for a continuing national conversation on technology. I encourage all staff to participate in these discussions as they occur.

A copy of the charter for this group is attached for your information.

11/13/98

ASSISTANT SECRETARY'S TECHNOLOGY ADVISORY BOARD CHARTER

OCR must continue to find ways to maximize the effectiveness of its human, technology and financial resources to ensure the vigorous enforcement of federal civil rights laws. The Technology Advisory Board is created to ensure that OCR is capitalizing on the opportunities created by technology and the internet to achieve these objectives. The Board serves in an advisory capacity to the Assistant Secretary. The Board will work with the Assistant Secretary to coordinate national strategic planning on technology issues and investments and to ensure that technology funding decisions are integrally related to program objectives and needs, that they support OCR's capacity to respond to the information resource needs of students, parents and other customers, and that they enhance staff development opportunities. The Board will also provide the Assistant Secretary with a technology investment review process that, while encouraging innovation and responding to agency specific needs, will ensure consistency with the Department's overall technology support plan.

Membership: The Assistant Secretary will select up to 7 Board members. The Deputy Assistant Secretary for Policy will serve as the Chairperson. The Board will include managers and staff with a wide-range of organizational program, fiscal and technical expertise and will include an Enforcement Director, an Enforcement Coordinator, an office Director, the Program Legal Group's Departmental liaison on research and information systems, and a representative from the Information Technology Team (ITT) in the Resource Management Group. OCR's Budget Officer will serve as an ex-officio member.

Membership Terms: To maintain continuity while broadening the participation opportunity, members of the Board will be appointed to serve staggered terms. The AS retains the option of appointing members to serve consecutive terms. New terms will begin January 2001 and every January thereafter. Appropriate orientation and training will be provided upon creation of the Board and again annually after the change in membership. Beginning in October 1999, and each October thereafter, the AS will identify members whose terms will end December 31, and new members who will take office the following January. To provide for a smooth transition, new members may participate as observers during the intervening months.

Meeting: The Board shall meet at least quarterly and at other appropriate intervals as determined by the Chairperson.

Responsibilities: The Board will gather information, develop and review IT proposals and initiatives, including risk and return analyses, determine cost-effectiveness, and evaluate the ability of the projects to meet OCR's mission and business needs, and make recommendations to the Assistant Secretary regarding IT needs. Working with the ASC, the Board will be responsible for formulating OCR's annual technology budget.

Operational parameters: The Board, where applicable, will follow the guidelines set forth by the Department in the "Enterprise Information Technology Architecture," document, issued in draft on July 21, 1998 and Office of Management and Budget (OMB) IT Investment Guidelines.

OFFICE OF THE INSPECTOR GENERAL

investigating significant instances of fraud, waste and abuse. The increase will support the following activities in FY 2001.

Contracts

Financial Management

The OIG is requesting \$1.575 million, an increase of \$510,000, to contract for the full costs of the audit of the Department-wide fiscal year 2000 financial statements. The majority of the increase is for the additional work required to report separately on Student Financial Assistance's (SFA) Performance Based Organization (PBO).

As required by the Government Management Reform Act (GMRA) of 1994, the OIG will oversee the conduct of an audit of the Department-wide fiscal year 2000 financial statements by an independent CPA firm. This audit will include the newly formed SFA. Congress created the PBO to operate as a discrete management unit responsible for managing the functions supporting the Title IV programs. The audit will result in two reports: (1) the Department-wide financial statements, including the PBO and (2) the PBO's financial statements, separately.

The scope of the audit will include the examination of account balances, review of applicable financial systems, evaluation on internal controls and compliance with significant laws and regulations. Audit results will include an assessment of the fair presentation of the financial statements, recommendations for improving financial accountability and stewardship, and identification of areas requiring further review.

Information Technology

The request includes \$200,000 to continue auditing the Department's security controls of its critical information systems. The reviews of the adequacy of security controls will provide management with an independent assessment of the impact of any weaknesses on the information technology (IT) environment. These reviews will provide risk exposure assessments both for the electronic data processing and manual portions of the IT control environment.

--Highly publicized incidents of successful hacking of government systems raise the awareness of the need for better security over Federal information systems and databases over the Internet. For example, most grant recipients now request funds, via the Internet, directly from the Department's financial system. Additionally, the Department is promoting the use of the Internet for students to apply for financial aid.

--Due to the complexity of the issues involved with system security, OIG requires the assistance of highly technical auditors to provide insight into current security risk aversion methodologies and assist the OIG in developing its own staff capabilities in these areas.

Overhead

OIG's overhead costs of \$6.035 million, which represent over 54 percent of the non-personnel request, will increase by \$423,000 over 2000 primarily to cover costs

ARE MOOT 8

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-v-

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 99-35209, 99-35347, 99-35348

KATURIA E. SMITH, et al., Plaintiffs-Appellants

v.

THE UNIVERSITY OF WASHINGTON LAW SCHOOL, et al., Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

Case No. 99-35209, 99-35347, 99-35348

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING
APPELLEES AND URGING AFFIRMANCE

INTEREST OF THE UNITED STATES

This case presents the important question whether institutions of higher education may consider the race or national origin of an applicant as one factor in an admissions decision in order to further the compelling educational goal of enrolling a diverse student body. The United States Department of Education has primary responsibility for the administrative enforcement of federal civil rights laws affecting educational institutions, including Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq., which prohibits discrimination on the basis of race, color, or national origin by recipients of federal financial assistance. The Department's regulations and policy guidance interpreting Title VI provide that educational institutions may take race into consideration for purposes of remedying past discrimination or enrolling a diverse student body. See 34 C.F.R. 100.3(b)(6)(i)-(ii); 59 Fed. Reg. 8756, 8759-8762 (1994). In addition, the Department of Justice is responsible for the judicial enforcement of Title VI and for enforcing the Equal Protection Clause under Title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c et seq. The United States thus has an interest in participating in

litigation not only to support the appropriate and lawful use of narrowly tailored affirmative action programs by educational institutions, but also to ensure that the important constitutional issues raised by such programs are reached only when necessary and only after the development of a full factual record.

STATEMENT OF THE ISSUES

The United States will address the following issues:

1. Whether the district court correctly held that plaintiffs' claims for prospective relief are moot.
2. Whether this Court should dismiss the discretionary 1292(b) appeal of the denial of plaintiffs' motion for partial summary judgment in light of the changed circumstances since leave to appeal was granted.
3. Whether the district court correctly held that the University of Washington Law School may constitutionally consider the race of applicants as one factor in its admissions process in order to obtain the educational benefits of a diverse student body.

STATEMENT OF THE CASE

1. This case involves a challenge to the admissions policies of the University of Washington Law School (the Law School). Until late 1998, the Law School considered race as one factor among many in its admissions process for the purpose of enrolling a diverse student body (ER106).⁽¹⁾ Plaintiffs Katuria Smith, Angela Rock, and Michael Pyle, are white applicants who were denied admission to the Law School for the academic years 1994, 1995, and 1996 respectively (ER2-3). Smith and Rock attended and graduated from other law schools (see ER2-3). Pyle initially did not attend law school, but he has been admitted to the Defendant University of Washington Law School (Br. 7). 2. In July 1997, plaintiffs filed suit against the Law School and four of its present and former administrators (ER1). Plaintiffs alleged that, by considering race in the admissions process, defendants discriminated against them in violation of the Equal Protection Clause of the Fourteenth Amendment (ER1).⁽²⁾ Plaintiffs brought suit under 42 U.S.C. 1981, 42 U.S.C. 1983, and 42 U.S.C. 2000d *et seq.* (Title VI) (ER2).

3. On April 22, 1998, the court certified a class under Fed. R. Civ. P. 23(b)(2) consisting of all white applicants who had been denied admission to the Law School since 1994 (ER210). The court held that the class would be "limited to claims for injunctive and declaratory relief" (ER242). The court denied plaintiffs' motion for class certification of the damages claims, reasoning that claims for damages "turn[ed] on the individual circumstances of each applicant" and therefore were not appropriate for class treatment (ER242). The court bifurcated the trial, holding that the claims of the "named plaintiffs" for damages would be addressed, if necessary, after liability was established (ER242-243).

The April 22, 1998 order did not specifically address plaintiffs' alternative request to certify the class pursuant to Rule 23(b)(3). In a subsequent order, dated February 22, 1999, the court stated that it was also denying class certification of the claims for damages under Rule 23(b)(3) (ER858). Plaintiffs have not appealed the orders denying class certification for damage claims.

The April 22, 1998, order also denied the individual defendants' motion for summary judgment on

their claim that they were entitled to qualified immunity on plaintiffs' Section 1981 and Section 1983 claims (ER217-224). The court held, and the plaintiffs conceded,⁽³⁾ that the individual defendants would be entitled to qualified immunity if they had implemented an affirmative action plan that was consistent with the "Harvard plan" endorsed by Justice Powell's opinion in Regents of the University of California v. Bakke, 438 U.S. 265, 378 (1978) (ER220-224). The court found summary judgment to be inappropriate, however, because plaintiffs were claiming that the Law School's plan in practice was not consistent with Justice Powell's opinion, and plaintiffs were entitled to take discovery on this claim (ER224). For similar reasons, the court also denied the Law School's motion for summary judgment on the Title VI claim (ER224-228).

4. On November 3, 1998, the voters of the State of Washington approved Initiative I-200, which states, in relevant

part (ER249, emphasis added):

The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

On November 3, 1998, hours after I-200 became law, the President of the University of Washington directed all of the University's schools and colleges, including the Law School, "to suspend the use of race and sex as factors in admissions decisions * * *" (ER253). On December 3, 1998, the Law School adopted a new admissions policy eliminating the use of race and ethnic origin in admissions decisions (ER256-257).

5. On February 10, 1999, the court dismissed plaintiffs' claims for injunctive and declaratory relief as moot in light of the passage of I-200 and the Law School's new admissions policy (ER791). The court then decertified the class that it had previously certified solely for injunctive and declaratory relief (ER801-803).

On February 12, 1999, the court denied plaintiffs' cross-motions for summary judgment on their Title VI claim against the Law School (ER804). Declining plaintiffs' invitation to follow Hopwood v. Texas, 78 F.3d 932 (5th Cir.), cert. denied, 518 U.S. 1033 (1996), the court held that Bakke remained good law and that universities therefore may, consistent with Justice Powell's opinion, consider race as one factor in a narrowly tailored admissions process (ER805-811). At the same time, the court again concluded that material issues of fact concerning whether defendants' former admissions program had been consistent with Justice Powell's opinion precluded entry of summary judgment for defendants (ER812).

6. Plaintiffs appealed the dismissal of their claims for injunctive relief pursuant to 28 U.S.C. 1292(a)(1) (ER862). Plaintiffs also petitioned to appeal the class de-certification order under Rule 23(f) and the denial of partial summary judgment pursuant to 28 U.S.C. 1292(b). Defendants did not oppose either petition and this Court granted both. At the parties' request, the district court stayed the trial pending disposition of these interlocutory appeals (ER861).

SUMMARY OF ARGUMENT

The district court properly held that plaintiffs' claims for prospective injunctive and declaratory relief are moot in light of the passage of I-200. In response to I-200, which prohibits racial preferences in

public education, the University prohibited its components from taking race into consideration in the admissions process, and the Law School changed its admissions policy accordingly. In light of the fundamental change in state law and the resulting change in the Law School's admissions policy, in order to obtain prospective relief, plaintiffs must show that it is likely, as opposed to merely speculative, that the Law School will disregard state law and University policy and re-institute the consideration of race in admissions. Defendants make no attempt to make such a showing.

The absence of a viable claim for prospective relief and the recent decision of this Court in Hunter v. Regents of the University of California, --- F.3d ---, No. 97-55920, 1999 WL 694865 (9th Cir. Sept. 9, 1999) makes the 1292(b) appeal on the validity of Bakke inappropriate. The validity of Bakke is potentially relevant to only part of plaintiffs' multi-count complaint and, depending on the outcome of the trial, the district court could enter a judgment for plaintiffs on all of their claims without ever reaching the Bakke issue. This Court has made clear that the court of appeals should grant review pursuant to 28 U.S.C. 1292(b) only in extraordinary circumstances. Where, as here, the sole issue raised by the 1292(b) appeal will not obviate the need for a trial and might not even be necessary to the disposition of the case, such extraordinary circumstances are not present.

Assuming this Court reaches the merits of the 1292(b) appeal, it should hold that Bakke remains binding precedent and that a University may constitutionally consider race as one factor in its admissions process in order to obtain a diverse student body. Bakke clearly held that university may constitutionally consider race in their admissions process even when it was not necessary to remedy past discrimination at the University itself. This Court in Hunter also has rejected plaintiffs' argument that the use of race in public education is never permissible except for remedial purposes. Those holdings foreclose the result plaintiffs seek here. This Court has no authority to ignore Bakke based on speculation about what the Court would do if it were to revisit the issues raised in that case. Only the Supreme Court may overrule its own decisions.

ARGUMENT

THE COURT CORRECTLY HELD THAT PLAINTIFFS' CLAIMS FOR PROSPECTIVE INJUNCTIVE AND DECLARATORY RELIEF ARE MOOT

The district court properly held that plaintiffs' claims for prospective relief are moot. Mootness is "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness)." Arizonans for Official English v. Arizona, 520 U.S. 43, 68 n.22 (1997); Cook Inlet Treaty Tribes v. Shalala, 166 F.3d 986, 988 (9th Cir. 1999). In order to obtain prospective injunctive and declaratory relief, the plaintiff must show, at each stage of the litigation, that it is likely, rather than merely speculative, that he or she will be injured in the immediate future if relief is not granted. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992); City of Los Angeles v. Lyons, 461 U.S. 95, 102, 111 (1983); Nava v. City of Dublin, 121 F.3d 453, 455-460 (9th Cir. 1997). A claim for prospective relief becomes moot after the defendant's challenged activity ceases if it is "clear that the alleged violations could not reasonably be expected to recur." See Ruiz v. City of Santa Maria, 160 F.3d 543, 549 (9th Cir. 1998), cert. denied, 119 S. Ct. 2367 (1999).

Applying these principles, the court's decision that plaintiffs' claim for prospective relief is moot is clearly correct. I-200 has changed state law in Washington: racial preferences in public education in

Washington are now impermissible and the University has directed the Law School to stop considering race in its admissions process. The Law School has adopted a new admissions policy under which race will no longer be considered. There is no need for relief requiring the University to do what it has already done.

In order to obtain prospective relief notwithstanding the change in Washington law and the Law School's change in its admissions policy, plaintiffs would have to show that one of the following scenarios is "imminent," see Defenders of Wildlife, 504 U.S. at 560: (1) the Law School will disobey the University's directive; (2) the University will rescind its directive and tell its components that they may consider race in the admissions notwithstanding the passage of I-200; or (3) I-200 will be repealed. Plaintiffs do not allege, much less attempt to show, that any of these events is likely to happen in the near future.⁽⁴⁾

Plaintiffs' reliance (Br. 32) on the doctrine concerning the voluntary cessation of illegal activity is misplaced. The "voluntary cessation" doctrine does not relieve plaintiffs of their burden under Article III to show that there is a "reasonable possibility that the unlawful conduct will recur." See Armster v. United States Dist. Court, 806 F.2d 1347, 1358 & n.16 (9th Cir. 1986); accord Defenders of Wildlife, 504 U.S. at 561. There is no suggestion that defendants changed their policy only temporarily in an effort to avoid an injunction, or that they are free to or will reinstate their old policy at any time. Compare City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 288 (1982). Defendants did not change their policy voluntarily, but were ordered to do so in response to a fundamental change in Washington law that continues to constrain their conduct. This case is therefore similar to Banas v. Dempsey, 742 F.2d 277, 278-279 (6th Cir. 1984), aff'd sub nom. Green v. Mansour, 474 U.S. 64 (1985), where the court held that plaintiffs' claims for prospective relief were moot because the State had changed the challenged policy in response to a new federal law. Because plaintiffs have not established that there is any reasonable possibility that defendants can or will re-institute the use of race in their admissions process, plaintiffs' claims for prospective relief are moot. See Native Village of Noatak v. Blatchford, 38 F.3d 1505, 1510 (9th Cir. 1994) ("A statutory change . . . is usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed."); Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992) (university's adoption of new policy regarding showing of films mooted claims for injunctive relief).

Nor does this case fall within the mootness exception for conduct that is "capable of repetition, yet evading review." That exception is applicable only if "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration[;] and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action." Lewis v. Continental Bank Corp., 494 U.S. 472, 481 (1990) (emphasis added). Plaintiffs have not shown that the Law School is likely continually to reinstate its previous admissions policy and then withdraw it, thereby avoiding review. See Adarand Constructors, Inc. v. Slater, 169 F.3d 1292, 1296 (10th Cir. 1999). Nor have they shown that there is any reasonable expectation that defendants will reinstate a race conscious admissions policy.

II

THIS COURT SHOULD DISMISS PLAINTIFFS' 1292(b) APPEAL OF THE DENIAL OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

This Court should dismiss the appeal that it initially approved pursuant to 28 U.S.C. 1292(b). Section

1292(b) permits an appeal of an interlocutory order that otherwise would not be appealable when: (1) the order involves a controlling question of law as to which there is substantial ground for difference of opinion; and (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C. 1292(b). The court of appeals may decline to hear the appeal for any reason even if the jurisdictional requirements are met. See Coopers & Lybrand v. Livesay, 437 U.S. 463, 473 (1978). This Court has made clear that an appeal under this Section should be allowed "only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation." In re Cement Antitrust Litig., 673 F.2d 1020, 1026 (9th Cir. 1982); accord Coopers & Lybrand, 437 U.S. at 473. As this Court noted soon after Section 1292(b) was enacted, the provision "was intended primarily as a means of expediting litigation by permitting appellate consideration during the early stages of litigation of legal questions which, if decided in favor of the appellant, would end the lawsuit." United States v. Woodbury, 263 F.2d 784, 785 (9th Cir. 1959) (emphasis added).

Although this Court initially approved the 1292(b) appeal, the petition was not opposed and the merits of granting the petition were never briefed. A court of appeals may dismiss a 1292(b) appeal that it has previously approved whenever changed circumstances or other facts suggest that permitting the appeal is no longer appropriate. See, e.g., Nickert v. Puget Sound Tug & Barge Co., 480 F.2d 1039, 1040 (9th Cir. 1973); United States v. Bear Marine Servs., Inc., 696 F.2d 1117, 1119 (5th Cir. 1983). For several reasons, the strong policy against "piecemeal" appeals, see Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974), now requires dismissal of plaintiffs' 1292(b) appeal. First, there is no longer a controlling legal question for which there is a substantial ground for disagreement in the Ninth Circuit. Plaintiffs' principal claim is that race conscious measures are appropriate only when necessary to remedy discrimination at the institution (see ER860-861). This Court has recently held to the contrary. See Hunter v. Regents of the Univ. of Cal., --- F.3d ---, No. 97-55920, 1999 WL 694865 (9th Cir. Sept. 9, 1999).

Second, the 1292(b) appeal will at most only resolve one count of a multi-count complaint and it will not make a trial unnecessary. Plaintiffs' appeal raises only the narrow question of whether Bakke remains valid, i.e., whether the interest in enrolling a diverse student body may ever be a compelling interest. That question has no relevance to plaintiffs' Section 1981 and Section 1983 claims against the individual defendants.⁽⁵⁾ Plaintiffs have stipulated that these defendants will be entitled to qualified immunity as long as their actions were consistent with the requirements set forth in Justice Powell's opinion in Bakke. Therefore, plaintiffs' appeal can only affect the resolution of the Title VI claim against the Law School.⁽⁶⁾ Regardless of how plaintiffs' appeal is resolved, it will not obviate the need for a trial on both liability and damages of plaintiffs' claims against the individual defendants. In similar circumstances, i.e., when the appeal will only resolve one claim and/or a trial would still be necessary, courts have held that a 1292(b) appeal is not appropriate.⁽⁷⁾ See New York Health & Hosp. Corp. v. Blum, 678 F.2d 392, 397 (2d Cir. 1982); Cummins v. EG & G Sealol, Inc., 697 F. Supp. 64, 65 (D.R.I. 1988).

Third, a trial may render moot the question sought to be reviewed, a fact that further counsels against permitting the appeal. See Lerner v. Atlantic Richfield Co., 690 F.2d 203, 210 (Temp. Em. Ct. App. 1982). Plaintiffs may prevail in the district court even if the court's ruling on the validity of Bakke is left undisturbed. The court could find that defendants' admissions policies were not narrowly tailored to serve the compelling interest in diversity and, therefore, discriminated against plaintiffs on the basis of race. See, e.g., Wessmann v. Gittens, 160 F.3d 790, 795-800 (1st Cir. 1998). Plaintiffs could seek relief based on the assumption that they would have been admitted, unless the Law School is able to show that these plaintiffs would have been denied admission under a race-neutral admissions

plan. See Regents of the Univ. Of Cal. v. Bakke, 438 U.S. 265, 320 & n.54; Hopwood v. Texas, 78 F.3d 932, 956-957 (5th Cir.), cert. denied, 518 U.S. 1033 (1996). Thus, whether plaintiffs prevail on the narrow grounds that the admissions policy was not consistent with Justice Powell's opinion in Bakke or on the broader grounds that any consideration of race violates the Equal Protection Clause of the Fourteenth Amendment, their right to relief will be the same.

Finally, the Law School has raised a good faith defense to its liability under Title VI for damages. Defendant argues that as long as its policies were consistent with Justice Powell's opinion in Bakke, it should not be required to pay damages, even if Bakke is eventually overturned (Appellees' Br. 30-31; ER226-227). If this defense ultimately is sustained by the trial court, the question of whether Bakke has been overruled would be irrelevant to the Title VI claim for damages. Thus, this Court would likely have to resolve the merits of this defense in order to know whether reaching the merits of the 1292(b) appeal can have any effect on this litigation. The fact that this Court would have to consider this additional issue -- an issue that would be moot if plaintiffs prevail in the district court by arguing that the Law School's implementation of its admissions program violated Bakke standards -- is yet another reason why the court should dismiss the 1292(b) appeal.

In sum, 28 U.S.C. 1292(b) should be reserved for situations where it will eliminate, not generate, unnecessary litigation. See Note, Interlocutory Appeals In the Federal Courts Under 28 U.S.C. 1292 (b), 88 Harv. L. Rev. 607 (1975). Furthermore, this Court should not reach important constitutional issues, such as the continued validity of Bakke, unless it is necessary to do so. Oregon Shortline R.R. Co. v. Department of Revenue Oregon, 139 F.3d 1259, 1264 (9th Cir. 1998). Because plaintiffs' appeal will not eliminate unnecessary litigation, it should be dismissed.^(S)

III

A UNIVERSITY MAY CONSIDER RACE AS ONE FACTOR IN ITS ADMISSIONS PROCESS IN ORDER TO ENROLL A DIVERSE STUDENT BODY

If this Court chooses to address the merits of the 1292(b) appeal, this Court should follow Bakke and hold that a university may consider the race of applicants as one factor in its admissions decisions in order to further the compelling educational goal of enrolling a diverse student body. In Bakke, the Supreme Court affirmed a California Supreme Court judgment holding that a state medical school's use of a rigid racial admissions quota was unconstitutional, but reversed that portion of the judgment that completely barred the school from considering race in its admissions process. Five Justices joined in the Court's holding that the medical school constitutionally could consider race under a "properly devised admissions program." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (Opinion of Powell, J.); id. at 328 (Brennan, J., concurring in the judgment in part and dissenting in part). Thus, despite the fact that the medical school had neither asserted nor demonstrated a need to remedy any present effects of discrimination at the school itself, see id. at 296 n.36 (Opinion of Powell, J.), the Court expressly refused to prohibit consideration of race altogether.

Justice Powell's separate opinion has been regarded by lower federal and state courts and by commentators for the past two decades as stating the applicable law.⁽²⁾ That opinion identified the medical school's interest in providing the educational benefits of a diverse student body as a constitutionally permissible basis for consideration of race in admissions. See Bakke, 438 U.S. at 311-315. Applying strict scrutiny, id. at 291, Justice Powell found that "[a]n otherwise qualified * * * student with a particular background * * * may bring to a professional school * * * experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates." Id. at

314. Justice Powell emphasized, however, that race is merely one of many aspects of diversity, and that a narrowly tailored admissions program must treat all applicants as individuals. See *id.* at 318.

The Supreme Court has never disavowed either *Bakke's* holding that a university cannot be enjoined from the narrowly tailored use of race in its admissions programs or Justice Powell's opinion stating that the educational benefits of diversity constitute a compelling state interest. Indeed, in 1990, the Court reaffirmed that "a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 568 (1990), overruled in part, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).⁽¹⁰⁾ Justice O'Connor has also noted that, "although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) (citing Justice Powell's opinion in *Bakke*).

The Department of Education also has relied on Justice Powell's opinion in *Bakke* in advising educational institutions. The Department of Education has stated that the use of properly narrowly tailored affirmative action to achieve a diverse student body does not violate the Constitution or Title VI. See 59 Fed. Reg. 8756, 8759-8762 (1994); 44 Fed. Reg. 58,509, 58,510-58,511 (1979).

Plaintiffs argue that the district court erred in concluding that Justice Powell's opinion represents the holding of the *Bakke* Court. In *Marks v. United States*, 430 U.S. 188, 193 (1977), the Supreme Court explained that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds[.]" Some courts have held that "an opinion represents the "narrowest grounds" only when it represents a "common denominator of the Court's reasoning" and "embod[ies] a position implicitly approved by at least five Justices who support the judgment." See, e.g., *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254 (D.C. Cir. 1998); *Rappa v. New Castle County*, 18 F.3d 1043, 1057 (3d Cir. 1994). Even when no opinion represents a common denominator of the reasoning of the majority of the Court, however, lower courts are still bound by the result of the case and by those propositions to which a majority of the Court did agree. See *id.* at 1043, 1060 & n.26.

Regardless of whether or not Justice Powell's entire opinion represents the holding of *Bakke*, the *Bakke* Court clearly held that "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin," even in circumstances where the university has not asserted or demonstrated a need to remedy any present effects of discrimination at the school itself. *Bakke*, 438 U.S. at 296 n.36, 320 (Opinion of Powell, J.); *id.* at 328 (Opinion of Brennan, J.) (joining this part of Justice Powell's opinion). Moreover, the Court reversed the judgment of the lower court insofar as it had granted the same relief -- an injunction prohibiting the university from "any consideration of the race of any applicant"; see *id.* at 320 -- that plaintiffs seek here. Thus, *Bakke* clearly forecloses the result sought by plaintiffs.

Relying on *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), cert. denied, 518 U.S. 1033 (1996), plaintiffs ask this Court to declare that *Bakke* has been overruled by implication and, contrary to *Bakke's* explicit holding, hold that race can never be considered in admissions decisions for other than strictly remedial purposes. In our view, *Hopwood* was wrongly decided. In attempting to discern what the Supreme Court would do in the future, rather than following what it had held in the past, the

Hopwood majority ignored the Supreme Court's repeated admonition that lower courts may not conclude that a Supreme Court decision has been overruled by implication. See Agostini v. Felton, 521 U.S. 203, 237 (1997) (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)) ("[I]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). The court of appeals may not question the "soundness of * * * Supreme Court determinations and their continuing vitality in the light of later Supreme Court pronouncements. * * * [I]t is for the Supreme Court, not [the court of appeals], to proclaim error in its past rulings, or their erosion by its adjudications since."⁽¹¹⁾ Holmes v. Burr, 486 F.2d 55, 60 (9th Cir), cert. denied, 414 U.S. 1116 (1973).

The Hopwood court wrongly concluded that the use of race to promote diversity rests on impermissible stereotyping. See 78 F.3d at 946. The Court rejected that same argument in Metro Broadcasting. See 497 U.S. at 579. Narrowly tailored race conscious admissions programs do not assume that all minorities think alike. They simply recognize that, in the aggregate, race and ethnic diversity, when considered in conjunction with other factors, will produce more diversity of viewpoints and perspectives in the student body than if the students were drawn from a racially and ethnically homogenous group. See Bakke, 438 U.S. at 313 (Opinion of Powell, J.); William G. Bowen & Derek Bok, The Shape of the River: Long-Term Consequences of Considering Race in College & University Admissions 8 (1998).

The Hopwood majority also ignored several compelling considerations that counsel against its erroneous conclusion that Bakke had been overruled and make clear that Justice Powell's conclusion that achieving diversity can be a compelling governmental interest is a correct statement of the law. Two decades of experience in implementing affirmative action plans modeled on Justice Powell's opinion in Bakke have confirmed his conclusion that diversity, including racial and ethnic diversity, significantly enhances the educational experiences of all students. See, e.g., Bowen & Bok, supra, at 279-280; Note, An Evidentiary Framework for Diversity as a Compelling Interest in Higher Education, 109 Harv. L. Rev. 1357, 1369-1373 (1996) (citing studies); Daryl G. Smith & Assocs., Diversity Works: The Emerging Picture of How Students Benefit (1997); Gary Orfield & Dean Whitla, Diversity & Legal Education: Student Experiences in Leading Law Schools, (The Civil Rights Project, Harvard Univ. ed., Aug. 1999). Furthermore, research confirms that without some consideration of race and ethnicity in the admission process, the numbers of racial and ethnic minorities in competitive colleges and law schools would likely drop precipitously. See Bowen & Bok, supra, at 31-50; Linda Wightman, The Threat To Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions, 72 N.Y.U. L. Rev. 1 (1997).

In other contexts, the Supreme Court has recognized that the principle of stare decisis is critical to maintaining respect for the rule of law and that the Court should be particularly reluctant to overrule precedent where it has "engendered substantial reliance." See Adarand Constructors, Inc., 515 U.S. at 233 (Opinion of O'Connor, J.) (citing Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992)). Such reliance is present here. In the two decades since Bakke was decided, virtually every selective college and professional school in the United States has relied on Bakke in developing and implementing their admissions programs. See Bowen & Bok, supra, at 8. Declaring Bakke dead would upset carefully crafted policies that have been developed in reliance on Bakke over the past twenty years. Thus, even if there were doubts about Bakke's continued validity, this Court would be required to follow Bakke and leave to the Supreme Court the task of weighing the serious consequences of

overruling its decision.

Contrary to plaintiffs' contentions (Br. 66), the Court has never overruled Bakke and Metro Broadcasting's holdings that non-remedial interests may, in appropriate circumstances, provide sufficient constitutional support for the limited and narrowly tailored consideration of race and ethnicity. Both Adarand Constructors, Inc. v. Pena, *supra*, and City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), on which plaintiffs rely, involved the use of affirmative action in public contracting, not higher education. It is hardly surprising that the Supreme Court in those cases did not address or consider the State's interest in the educational benefits of a diverse student body, as that interest has no relevance to public contracting, which involves very different governmental interests, and clearly implicates only remedial aims. Justice O'Connor's suggestion in Croson that racial classifications should be "reserved for remedial settings" in order to avoid promoting notions of racial inferiority, *id.* at 493 (citing Bakke, 438 U.S. at 298 (Opinion of Powell, J.)), must be read in that context. Moreover, if Justice O'Connor had intended to overrule Bakke in that sentence, she certainly would not have cited to Justice Powell's opinion in Bakke as support. And as Justice Stevens noted in his dissent in Adarand, nothing in the majority opinion suggested that the interest of fostering diversity could not, in appropriate circumstances, be sufficient to support race conscious measures in government programs.⁽¹²⁾ See Adarand, 515 U.S. at 257 (Stevens, J. dissenting).

In any event, this Court has recently held that a non-remedial purpose in the context of public education may satisfy strict scrutiny. In Hunter v. Regents of the University of California, --- F.3d ---, No. 97-55920, 1999 WL 694865, at *2 & n.3 (9th Cir. Sept. 9, 1999), this Court held that California had a compelling state interest in operating a research-oriented elementary school dedicated to improving the quality of education in urban public schools, even though the parties agreed that the school's admissions process was not part of a remedial program. Other courts of appeal have also held that non-remedial interests may satisfy strict scrutiny. See Buchwald v. University of New Mexico Sch. of Med., 159 F.3d 487, 498 (10th Cir. 1998) (identifying compelling interest in public health); Wittmer v. Peters, 87 F.3d 916, 918-919 (7th Cir. 1996), cert. denied, 519 U.S. 1111 (1997) (identifying compelling interest in integrity of correctional facility's boot camp program).

Plaintiffs' attempt (Br. 64-65) to equate efforts to achieve educational diversity with the practice of wholesale exclusion of racial minorities simply ignores the nature of constitutional interests involved. Justice Powell never suggested that an educational institution could invoke "academic freedom" to support racially discriminatory measures to reduce the level of diverse viewpoints and vigorous intellectual debate at a university. The constitutional difference between efforts to enhance the robust exchange of ideas and efforts to eliminate undesirable viewpoints is neither subtle nor irrelevant.

In the absence of any Supreme Court authority overruling Bakke, this Court should not frustrate the efforts of university administrators to continue to provide the crucial educational benefits of diversity. We do not argue that the mere assertion of an interest in diversity always establishes a compelling interest supporting consideration of race or national origin in admissions. Plaintiffs are wrong, however, in contending that the state interest in the educational benefits of diversity can never, as a matter of law, constitute such a compelling interest. Educational institutions should have the opportunity to demonstrate as a factual matter that the benefits of a diverse student body are sufficiently compelling to justify an appropriate and narrowly tailored admissions program that considers race as one factor among many.

CONCLUSION

The judgment dismissing plaintiff's claims for prospective relief should be affirmed. Plaintiffs' interlocutory appeal of the order denying their motion for partial summary judgment should be dismissed. In the alternative, the order should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES URGING AFFIRMANCE complies with Federal Rule of Appellate Procedure 32(a)(7)(B). It contains 6,684 words.

TIMOTHY J. MORAN
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 1999, I served the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES AND URGING AFFIRMANCE, by mailing two copies, by first class mail, postage pre-paid, to counsel at the following addresses:

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1. "ER ___" refers to the Excerpts of Record. "SER ___" refers to the Supplemental Excerpts of Record. "Br. ___" refers to the brief filed by appellants. "Appellees' Br. ___" refers to the brief filed by appellees.

2. Plaintiffs did not challenge the Law School's consideration of ethnic origin.

3. Plaintiffs' brief opposing defendants' motion stated:

"For purposes of this motion -- and only such purpose -- plaintiffs will assume that Justice Powell's lone opinion can be construed as the 'rationale' for the 'holding' of the entire Court in Bakke, and that state actors may consider race for the non-remedial reason set forth in that opinion." (SER204)

4. Plaintiffs rely (Br. 34) on a deliberative memorandum written before I-200 was passed, in which the Assistant Attorney Generals (AAGs) of Washington outlined for the Attorney General the "major legal issues" raised by I-200 (ER263). This memorandum has no relevance to the issues in this litigation. The University has interpreted I-200 to ban all consideration of race in public education. Plaintiffs have not demonstrated that there is any likelihood that the University will reverse course and interpret I-200 in a different manner.

5. Under the Eleventh Amendment, plaintiffs may not maintain an action under Section 1983 or Section 1981 for damages against the Law School. See Quern v. Jordan, 440 U.S. 332, 344 (1979).

6. Although the Eleventh Amendment ordinarily bars suit for damages against the State, Congress has abrogated the State's immunity for Title VI claims. See 42 U.S.C. 2000d-7; Clark v. California, 123 F.3d 1267, 1271 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998).

7. Indeed, this appeal is not even likely to speed the ultimate termination of the Title VI claim. Even if plaintiffs are successful, the court will still have to hold a trial on damages and make findings on how defendants' admissions process worked and if, and how, it damaged the plaintiffs.

8. Dismissal of the 1292(b) appeal is appropriate regardless of whether or not the class was properly decertified.

9. See, e.g., Eisenberg v. Montgomery County Pub. Schs., 19 F. Supp. 2d 449, 453-454 (D. Md.

1998), appeal pending, No. 98-2503 (4th Cir.); Wessmann v. Boston Sch. Comm., 996 F. Supp. 120 (D. Mass. 1998), rev'd on other grounds, sub nom. Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998); Davis v. Halpern, 768 F. Supp. 968, 975-976 (E.D.N.Y. 1991); DeRonde v. Regents of the Univ. of Cal., 28 Cal. 3d 875, 625 P.2d 220 (Cal.), cert. denied, 454 U.S. 832 (1981); McDonald v. Hogness, 598 F.2d 707, 712-713 & n.7 (Wash. 1979), cert. denied, 445 U.S. 962 (1980); Akhil Amar & Neal Katyal, Bakke's Fate, 43 U.C.L.A. L. Rev. 1745, 1753 (1996); Charles Fried, Foreword: Revolutions?, 109 Harv. L. Rev. 13, 47 (1995) (Justice Powell's opinion "was an exact area of intersection between four Justices who would have been far more permissive of race conscious programs * * * and four others who, on statutory grounds, would have been more restrictive"); Vincent Blasi, Bakke as Precedent: Does Mr. Justice Powell Have a Theory, 67 Cal. L. Rev. 21, 23 (1979).

10. In Adarand, the Supreme Court overruled Metro Broadcasting to the extent that that decision applied a lower level of constitutional scrutiny to a congressionally enacted program. See 515 U.S. at 227. The Court expressly recognized in Adarand that Justice Powell applied "the most exacting judicial examination" in his opinion in Bakke. Id. at 218.

11. Other courts of appeals have reached the same conclusion. See, e.g., Columbia Natural Resources, Inc. v. Tatum, 58 F.3d 1101, 1107 n.3 (6th Cir. 1995), cert. denied, 516 U.S. 1158 (1996) ("While we understand that changes in Court personnel may alter the outcomes of Supreme Court cases, we do not sit as fortune tellers, attempting to discern the future by reading the tea leaves of Supreme Court alignments. Each case must be reviewed on its merits in light of precedent, not on speculation about what the Supreme Court might or might not do in the future, as a result of personnel shifts."); Adams v. Department of Juvenile Justice, 143 F.3d 61, 65 (2d Cir., 1998) (court of appeals bound by Supreme Court precedent notwithstanding contention that rule set forth in the precedent would no longer command a majority of the Supreme Court).

12. Plaintiffs' reliance (Br. 66) on Wygant v. Jackson Board of Education, 476 U.S. 267, 276 (1986), is also misplaced. Although the Court rejected the Board's purported interest in providing role models for minority students, Justice O'Connor emphasized that interest "should not be confused with the very different goal of promoting racial diversity among the faculty." Id. at 288.

No. 95-1773

In the Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF TEXAS, ET AL., PETITIONERS

v.

CHERYL J. HOPWOOD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the University of Texas School of Law may not constitutionally consider race or national origin as a factor in its admissions process.

(I)

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INTEREST OF THE UNITED STATES

The United States Department of Education has primary responsibility for the administrative enforcement of federal civil rights laws affecting educational institutions, including Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq., which prohibits discrimination on the basis of race, color, or national origin by recipients of federal financial assistance. The Department's regula-

tions and policy guidance interpreting Title VI provide that educational institutions may take race into consideration for the purposes of remedying past discrimination or enrolling a diverse student body. See 34 C.F.R. 100.3(b)(6)(i); 59 Fed. Reg. 8756, 8759-8762 (1994). The Department of Education's Office for Civil Rights has engaged in efforts to eliminate the vestiges of the dual systems of higher education that previously were operated by a number of States, including Texas. The

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United States Department of Justice is participating in Title VI litigation to desegregate the systems of higher education in Mississippi, Louisiana, Alabama, and Tennessee. The United States has a strong interest in desegregating institutions of higher education and in ensuring that the States are not hampered in their efforts to remedy the effects of unconstitutional discrimination on those systems.

STATEMENT

1. In 1946, acting pursuant to the requirements of the Texas Constitution, 1. the University of Texas School of Law (the Law School) denied admission to Heman Sweatt, a black man, solely on account of his race. This Court reversed that decision, unanimously rejecting the assertion that an unaccredited, makeshift law school that Texas had established for blacks could provide Sweatt with an equal educational opportunity. *Sweatt v. Painter*, 339 U.S. 629, (1950). Sweatt thereafter became the only non-white student in the Law School. He left the school in 1951, without graduating, because of severe racial harassment from his classmates and professors. Pet. App. B6.

After Sweatt was decided, the University of Texas continued officially to discriminate against black and Mexican-American students with regard to housing and facilities. Enforced segregation pervaded the State's entire educational system well into the 1960s. Texas responded to *Brown v. Board of Education*, 347 U.S. 483 (1954), with a policy of official resistance to the integration of its public schools, Pet. App. B4, and as recently as the 1980s some Texas school districts continued to

(footnotes)

1 Tex. Const. art. VII, 7 (repealed 1969) (requiring the maintenance of "separate schools * * * for the white and colored children").

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practice overt race-based segregation, see, e.g., *United States v. Crucial*, 722 F.2d 1182, 1184-1185 (5th Cir. 1983). In many Texas school districts, the effects of prior de jure segregation continue to manifest themselves in segregated schools. Pet. App. B4.

2. In the late 1970s, the Department of Health, Education and Welfare's Office for Civil Rights (OCR) began an investigation of the Texas public higher educational system, pursuant to the court order in *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C.), aff'd as modified, 480 F.2d 1159 (D.C. Cir. 1973). OCR found that Texas had failed to eliminate the vestiges of its dual higher education system. It began negotiations with the State to bring it into compliance with Title VI by removing those vestiges. Pet. App. B7-B8. In 1983, Texas submitted a desegregation plan acceptable to OCR. That plan included both a general commitment "to seek to achieve proportions of black and Hispanic graduates from undergraduate institutions in the State who enter graduate study or professional schools in the State at least equal to the proportion of white Texas graduates from undergraduate institutions in the State who enter such programs," and a specific commitment by the University of Texas to increase the number of black and Hispanic college graduates entering its graduate and professional schools. Id. at B9 n.6. OCR (now within the Department of Education) has committed to evaluating whether, in light of *United States v. Fordice*, 505 U.S. 717 (1992), the State has eliminated all vestiges of its former de jure segregated higher education system. See 59 Fed. Reg. 4271, 4272 (1994); Pet. App. B9-B10.

The Law School first initiated affirmative efforts to include minorities in its student body in the late 1960s, almost 20 years after *Sweatt* was decided. Pet. App. B 11. The Law School discontinued this program in 1971; it

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consequently admitted no black students that year. Id. at B12. Since then, its affirmative action efforts have taken various forms. In 1992, the year respondents were denied admission, a minority admissions subcommittee reviewed the files of all black and Mexican-American applicants and used lower presumptive admissions standards (based on standardized test scores and college grade-point averages) for them. The subcommittee presented recommendations to the full admissions committee, which accorded them dispositive weight. Id. at B17-B25.

3. Respondents, three white men and one white woman, were denied admission to the Law School in 1992. They filed suit in the United States District Court for the Western District of Texas, alleging that, "by favoring less qualified black and Mexican American applicants," defendants discriminated against them on the basis of race, in violation of the Fourteenth Amendment; Title VI; 42 U.S.C. 1981 and 42 U.S.C. 1983. Pet. App. B2. After an eight-day bench trial, the district court concluded that two of the purposes set forth in the Law School's "Statement of Policy on Affirmative Action" (see id. at B39) were sufficiently compelling, under strict scrutiny, to support race-conscious admissions practices: (1) achieving the educational benefits of a diverse student body; and (2) remedying the present effects of past discrimination in the Law School and in Texas's educational system as a whole. Ibid. 2. Although the court

(footnotes)

2 The court concluded, based on the evidence at trial, that a diverse student population provides substantial educational benefits "for all members of a law school class." Pet. App. B25. The court also found that the continuing effects of the Law School's own past discrimination presented "a strong evidentiary basis for concluding that remedial action is necessary." Id. at B43. Observing, moreover, that "[t]he State's institutions of higher education are inextricably linked to the primary

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observed that "[a]lternatives, such as minority scholarships and increased minority recruitment" are "effective tools in conjunction with the affirmative action program," it concluded that those measures "would not be effective means by themselves to meet the compelling governmental interests of true diversity and remedying the effect(s) of past de jure segregation." Id. at B47-B48. 3. The district court determined, however, that the Law School's use of a separate minority subcommittee effectively precluded individual comparisons between minority and nonminority applicants and thus did not satisfy the narrow tailoring requirement of strict scrutiny. For that reason, the court held that the Law School's 1992 admissions practices violated respondents' right to equal protection. Pet. App. B38-B59, B66-B67.

The district court denied respondents' prayer for relief in most other respects. It awarded only nominal damages, and declined to order respondents' admission to the Law School, having concluded from the evidence that, "in all likelihood, [respondents] would not have been offered admission even under a constitutionally permissible process." Pet. App. B65. The court also de-

(footnotes)

and secondary schools in the system," *ibid.*, the court found an additional compelling remedial interest in redressing the effects of the discrimination that pervaded the Texas educational system as a whole, *id.* at B46.

3 Under its general admissions criteria, and absent affirmative action, the Law School's 1992 entering class would have included, at most, a very small number of black and Mexican-American students. Pet. App. B41 & n.60, B47. The district court also found that the effect of eliminating affirmative action at the Law School would be to direct even more minority students to Texas Southern University Law School-the school Texas created, in response to Heman Sweatt's lawsuit, in order to avoid integration of the University of Texas. *Id.* at B47 & n.66.

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declined to issue an injunction against the Law School's future consideration of race in the admissions process. The court noted that Law School had, during the course of the litigation, adopted new admissions practices that eliminated the minority subcommittee and the use of differing presumptive admissions standards. The new

practices "appear[ed] to remedy the defects the Court ha[d] found in the 1992 procedure"; and, in any event, the application of the new practices was not before the court. *Id.* at B67. The court directed that respondents be permitted to reapply (without fee) for admission to the 1995 entering class under the new admissions practices. *Id.* at B67-B68.

4. Petitioners did not appeal the district court's ruling that the Law School's 1992 admissions process violated equal protection respondents appealed the district court's denial to them of damages and injunctive relief. The court of appeals reversed. 4. Expressly rejecting the continuing force of this Court's holding in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), the panel majority held that, no matter how narrowly tailored the process, "the law school may not use race as a factor in law school admissions." *Pet. App.* A3.

The court of appeals concluded that this Court's opinions since *Bakke* leave no room for the view that a law school may ever take race into account for the purpose of obtaining the educational benefits of a diverse student population. Although none of the cases cited by the panel majority involved school admissions standards, the panel

(footnotes)

4 The court of appeals affirmed the district court's order denying the request of two black student groups to intervene for the purpose of introducing evidence of discriminatory effects of the Law School's current admissions procedures. Those denied intervention have filed a petition (No. 95-1845) seeking review of that decision.

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majority read them to establish that, irrespective of the context, remedying past discrimination is the only governmental interest that may warrant consideration of race. *Pet. App.* A24-A26.

The court then rejected, as insufficiently compelling, the Law School's and State's interest in remedying the effects of de jure segregation in the Texas system of public education. It held that, just as "a state does not have a compelling state interest in remedying the effects of past societal discrimination," a particular state actor has no governmental interest in remedying official discrimination that has occurred at other levels of state government. *Pet. App.* A35, A36-A40. Past discrimination in Texas's primary and secondary schools, in its system of higher education, or at the University of Texas itself could not, in the court's view, "justify the present consideration of race in law school admissions." *Id.* at A45.

With regard to the Law School's interest in remedying its own history of official discrimination, the majority held that neither the Law School's reputation as a "white" institution, nor its hostile racial climate, justify consideration of race in its admissions process. Those conditions result, in its view, from (respectively) mere "knowledge of historical fact" and "present societal discrimination." *Pet. App.* A42.

With respect to certain forms of relief sought by respondents, the court of appeals concluded that the dis-

strict court erred in placing the burden of proof on respondents to demonstrate that they would have been admitted to the Law School under a constitutionally permissible admissions policy. Pet. App. A48-A51. It instructed that each respondent must, on remand, be awarded admission to the Law School and given the opportunity to establish monetary damages, unless the Law

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School proves that that respondent would not have been admitted in 1992 under a completely race-blind procedure. Id. at A51-A52. The court of appeals further directed that, should they choose to reapply, respondents "are entitled to apply under a system of admissions that will not discriminate against anyone on the basis of race." Id. at A54.

Finally, the court of appeals affirmed the district court's denial of prospective injunctive relief, "confident that the conscientious administration at the school, as well as its attorneys, w[ould] heed the directives contained in [its] opinion." Pet. App. A55. It cautioned, however, "that if the law school continues to operate a * * * racial classification system in the future, its actors could be subject to actual and punitive damages." Ibid. Judge Weiner concurred only in the judgment. Pet. App. A63-A75. He saw no need in this case to determine whether diversity is a compelling governmental interest in the graduate school context, id. at A63-A70, and (noting that respondents had challenged only the Law School's 1992 admissions policy), faulted the majority for issuing what amounted to a "de facto" prospective injunction, id. at A73.

Considering the matter sua sponte, the court of appeals denied rehearing en banc. Pet. App. C1-C3. Seven of the Circuit's sixteen active judges dissented from the denial. 5. Id. at E1-E11. Chief Judge Politz's dissenting opinion argued that the "radical implications" and "monumental import" of the case demanded en banc review, id. at E2, and criticized the panel for "stringing together pieces and shards of recent Supreme Court opinions * * * as a justification for overruling Bakke," id. at E3. Judge Stewart, writing separately, noted that

(footnotes)

5 Judge Garza did not participate in the decision. Pet. App. C3.

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official segregation had occurred at the Law School in the relatively recent past, and stressed the need to carefully consider that legacy when judging the lawfulness of the school's present remedial efforts. Id. at E9-E11.

ARGUMENT

The court of appeals has flatly held that the University of Texas School of Law may not consider the

race of applicants as a relevant factor in making its admissions decisions. If left unreviewed, this decision will effectively eliminate all affirmative action admissions programs in higher education within the Fifth Circuit. 6. The court of appeals recognized that its decision is inconsistent with the holding of this Court in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). By disregarding two decades of established law under *Bakke*, the decision has already created substantial confusion and upheaval among colleges and universities nationwide. 7. It also calls into question the lawfulness of existing Department of Education policies and regulations, and interferes with the federal government's efforts to obtain voluntary compliance by the States with

(footnotes)

6 Because the constraints imposed by Title VI on affirmative action programs are the same as those imposed by the Constitution, see *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992), the decision affects private colleges and universities that receive federal assistance as well as state institutions. We are informed by the National Center for Education Statistics, within the Department of Education, that there are more than 240 colleges and universities offering four-year degrees in Texas, Louisiana, and Mississippi.

7 The Attorney General of one State outside the Fifth Circuit (Georgia) has already recommended that affirmative action policies in the State's colleges and universities be revised or eliminated in light of the decision below. See William H. Honan, *New Attack on Race-Based Admissions*, N.Y. Times, Apr. 10, 1996, at B8.

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their desegregation obligations. The decision below thus raises issues of national importance that call for this Court's review.

1. The court of appeals' conclusion that the Law School has no compelling interest that warrants its consideration of race or national origin in its admissions process cannot be dismissed as mere "statements in [an] opinion]." *California v. Rooney*, 483 U.S. 307, 311 (1987). That conclusion was essential to the terms of the court's remand order. In remanding the case to the district court to consider remedy, the court of appeals ruled that, for relief to be denied to a respondent, the Law School must prove that that respondent would not have been admitted under what the court of appeals held, in the liability portion of its opinion, to be the only constitutionally permissible admissions policy, i.e., a completely "race-blind system." Pet. App. A51. The court of appeals' conclusion that the Law School may not constitutionally consider race in admissions was therefore an essential part of the court's holding, and not merely "unfortunate dicta" (*id.* at E8). 8.

(footnotes)

8 Petitioners suggest (Pet. 22-24) that the Eleventh Amendment bars federal courts jurisdiction in suits against the States under Title VI. Even if that were so, the district court would have jurisdiction to

afford prospective injunctive relief (in the form of admission to the Law School) against the individual petitioners in their official capacities under 42 U.S.C. 1983. See *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989). Such relief is not barred by sovereign immunity. See *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1131 nn. 14, 16 (1996).

In any event, Texas has no sovereign immunity from suits brought under Title VI. In 1986, Congress, "act[ing] pursuant to a valid exercise of power," *Seminole Tribe*, 116 S. Ct. at 1123, expressly abrogated the States' Eleventh Amendment immunity under Title VI. See Pub. L. No. 99-506, Tit. X, 1003, 100 Stat. 1845, codified at 42 U.S.C. 2000d-7; see also *Franklin v. Gwinnett Cty. Public Schools*, 503 US, 60, 72-73

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Moreover, although the court of appeals declined to authorize a formal injunction at this time barring the Law School from any consideration of race or national origin in its admissions program, the court's opinion effectively amounts to such an injunction. The court directed that, "[i]n accordance with [its] opinion," respondents must be permitted to reapply "under a system of admissions that will not discriminate against anyone on the basis of race." Pet. App. A54, and expressly warned that the Law School's failure to "heed" the "directives contained within [its] opinion" would provide cause for punitive damages. *Id.* at A55. 9. "[W]hen on fronted with

(footnotes)

(1992). Section 2000d-7 was enacted in response to this Court's decision in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242-243 (1985). It provides that a "state shall not be immune under the Eleventh Amendment * * * from suit in Federal Court for a violation of * * * Title VI." The legislative history of the provision shows that Congress acted pursuant to its authority under Section 5 of the Fourteenth Amendment. See S. Rep. No. 388, 99th Cong., 2d Sess. 27 (1986); 131 Cong. Rec. 22,346 (1985); 132 Cong. Rec. 28,624 (1986). The only court of appeals to consider the issue upheld Section 2000d-7 against an Eleventh Amendment challenge on that basis. See *United States v. Yonkers Bd. of Educ.*, 893 F.2d 498, 503 (2d Cir. 1990). In addition, and contrary to petitioners' suggestion (Pet. 24 n.17), Congress's explicit decision that the States be subject to suit in federal court under Section 2000d-7 "makes it clear to the [S]tates that their receipt of Federal funds constitutes a waiver of their [E]leventh [A]mendment immunity." 132 Cong. Rec. 28,624 (1986). See *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

9 The panel subsequently noted the "necessity" that petitioners "implement as soon as possible th[e] court's mandate to end racial discrimination in admissions at the law school." Pet. App. D5 (emphasis added). The court of appeals would also likely conclude that the panel's "directives" established the law of the circuit with sufficient clarity to foreclose a claim of qualified immunity for university or state officials sued for damages for considering race as a factor in admissions deci-

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such an opinion by a federal court, state officials would

no doubt hesitate long before disregarding it." *Gunn v. University Comm. to End the War in Viet Nam*, 399 U.S. 383, 390 (1970). Having "all of the substantive earmarks of an injunction," the court of appeals' opinion is correctly treated as such. Pet. App. A73, 10.

2. In *Bakke*, this Court affirmed the judgment of the California Supreme Court holding unconstitutional a state medical school's use of a rigid race-based admissions quota, but reversed that portion of the state-court judgment that completely prohibited the school from considering race in its admissions process. Five Justices agreed in *Bakke* that the medical school could constitutionally consider race under a "properly devised admissions program." 438 U.S. at 320 (opinion of Powell, J.); *id.* at 328 (Brennan, J., concurring in the judgment in part, and dissenting in part). 11. *Bakke's* landmark hold-

(footnotes)

sions. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Elder v. Holloway*, 114 S. Ct. 1019, 1021 (1994).

10 Petitioners correctly assert (Pet. 28-29) that respondents lacked standing to assert the rights of nonparties, and that the court of appeals therefore had no jurisdiction to issue injunctive relief barring consideration of race by the Law School with respect to other applicant. See *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 479 (1990) ("[T]he Article III question is not whether the requested relief would [affect] the world at large, but whether [respondents] ha[ve] a stake in the relief."). The court of appeals' directives were also related, however, to the court's instruction that respondents personally be accorded the right to reapply to the Law School under a race-blind system. Pet. App. A54. To the extent that any respondent demonstrated "a real and immediate" possibility that he or she would in fact reapply, that would provide standing and establish the court of appeals' jurisdiction to afford individual prospective injunctive relief. See, e.g., *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2104 (1995).

11 The remaining Justices would have affirmed the state court's holding that *Bakke's* exclusion from the medical school violated Title

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ing has guided the admissions policies of public and private institutions of higher education in the United States for almost two decades. The panel below nevertheless declared that *Bakke's* holding is no longer good law.

Justice Powell's opinion in *Bakke* applied strict scrutiny. *Bakke*, 438 U.S. at 291. It rested its approval of the use of race in the context of a properly devised admissions program on the educational benefits of a diverse student body. *Id.* at 311-315. This Court has cited *Bakke* for the proposition that "a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 568 (1990), overruled in part, *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995); see also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) ("[Although its precise contours are uncertain,

a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest.").

The court of appeals declined to follow Bakke because, in its view, a majority of this Court has since rejected the diversity rationale as a permissible predicate for affirmative action. See Pet. App. A17-A33. In so concluding, the court of appeals relied on cases involving affirmative action in public contracting, such as Adarand, supra, and City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), rather than decisions regarding higher education

(footnotes)

VI. They expressly declined to address the constitutionality of the admissions program. See 438 U.S. at 408-409 (Stevens, J., concurring in the judgment in part and dissenting in part).

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admissions programs. 12. The Court's suggestion in Croson that racial classifications should be "reserved for remedial settings," 488 U.S. at 493, was made in the context of public contracting, where redress of past discrimination may be the only compelling governmental purpose for the use of racial preferences. See id. at 512-513 (Stevens, J., concurring). Affirmative action may also serve vital remedial interests in the university admissions setting. See pp. 16-20, infra. It may, in addition, contribute to--indeed be necessary to--achieving the goal of educational diversity, a goal not relevant in the awarding of construction contracts.

(footnotes)

12 Adarand and Croson established that strict scrutiny applies to race-conscious affirmative action programs. The Court expressly noted in Adarand that Justice Powell also applied "the most exacting judicial examination" when he concluded in Bakke that diversity constitutes a sufficiently weighty state interest in the context of admissions in higher education. See Adarand, 115 S. Ct. at 2108 (quoting Bakke, 438 U.S. at 291 (opinion of Powell, J.)).

13 The Department of Education has relied upon Justice Powell's opinion in Bakke as a basis for concluding that diversity-based affirmative action in higher education does not violate Title VI, so long as it meets the constitutional standards described by Justice Powell. See 59 Fed. Reg. 8756, 8760-8762 (1994). Relying on Justice Powell's opinion in Bakke, the district court concluded in this case that the Law School's 1992 practice was constitutionally infirm, not because it considered race as a factor in admissions, but because it utilized a "separate process" that "fail[ed] to afford each individual applicant a comparison with the entire pool of applicants, not just, those of the applicant's own race." Pet. App. B59. We agree that the 1992 "separate process" policy was constitutionally flawed in this manner. Petitioners did not appeal the district court's ruling with respect to the 1992 policy, "having abandoned that policy in 1994 in favor of one that treated race as simply a factor in the individualized consideration and comparison of applicants to the Law School." Pet. 3-4. The constitutionality of the means by which the Law School has taken race into account is therefore not at issue. Rather, the question here is whether

Justice Powell's observation in Bakke (a case involving medical school admissions) that "an otherwise qualified * * * student. With a particular background * * * may bring to a professional school * * * experiences, outlooks and ideas that enrich the training of its student body and better equip its graduates," 438 U.S. at 314, 14. has even greater force with regard to schools that educate and train lawyers. Law students cannot effectively be trained "in isolation from the individuals and institutions with which the law interacts." Sweatt, 339 U.S. at 634. This Court correctly concluded in Sweatt that a black student could not receive an effective legal education in Texas while being kept separate from "members of racial groups which number[ed] 65% of the population of the State." Ibid. The predominantly white University of Texas School of Law may similarly conclude today that, absent racial diversity in its classrooms, its students will not effectively be prepared to be lawyers in Texas's (or the Nation's) racially diverse society. The court of appeals' suggestion that the Law School may constitutionally consider non-racial factors, including economic and social background, that might be

(footnotes)

the Law School may consider race at all in making its admissions decisions.

14 Justice Powell recognized in Bakke, 438 U.S. at 312 n.48 (quoting William Bowen, Admissions and the Relevance of Race, Princeton Alumni Weekly (Sept. 26, 1977) at 9), that

a great deal of learning occurs informally[,] * * * through interactions among students of both sexes; of different races, religions and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents and perspectives and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world.

closely correlated with race, Pet. App. A27, A29 n.31, ignores the Law School's compelling educational interest in maintaining a racially diverse student body. In the law school admissions context, race is not merely a "proxy for other, more germane bases of classification," Metro Broadcasting, 497 U.S. at 621 (O'Connor, J., dissenting), such as economic disadvantage. As the district court found from the evidence at trial, Pet. App. B41, at this time in the history of Texas and the United States, the inclusion in the law school educational process of those who have experienced, and will continue to experience, racial minority status, is essential to achieving meaningful educational diversity. That view does not rest on impermissible racial stereotypes; it does not equate race

with particular viewpoints; and it does not presume that all individuals of a particular race act or think alike. An admissions program that values racial diversity recognizes that a black (or Mexican-American) student reared in this country is likely to have had different life experiences, precisely because of his or her race, than an otherwise similarly situated white student. What each individual takes from those life experiences is unique; indeed, students may benefit from diversity by learning first-hand that "particular and distinct viewpoints" [do not] inhere in certain racial groups." Metro Broadcasting, 497 U.S. at 618 (O'Connor, J., dissenting). Cf. Wygant, 476 U.S. at 316 (Stevens, J., dissenting). 15.

(footnotes)

15 Assuming that a law school may constitutionally consider race as a factor for purposes of educational diversity, the means by which it does so must be narrowly tailored to advance that interest, in order to ensure that the school's race-sensitivity does not reflect or promote racial stereotypes, see Adarand, 488 U.S. at 493, or impose disproportionate harm on nonminority applicants, see Wygant, 476 U.S. at 297 (O'Connor, J., concurring). See also 59 Fed. Reg. at 8760-8762. A law school may not, for example, employ rigid numerical goals amounting

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3. The legitimacy of the Law School's concern for diversity in this case is underscored by the history of educational discrimination in Texas. The vestiges of that history have kept many black and Mexican-American students separated from white students, for most of their educational lives. In prohibiting the use of race in Law School admissions, the court of appeals acknowledged that official discrimination against minorities has existed in the State's public schools, see Pet. App. 139, and it did not dispute the district court's finding (id. at B45) that "[t]he effects of the State's past de jure segregation in the education system are reflected in the low enrollment of minorities in professional schools, including the law school." The court held, however, that the Law School's constitutionally valid remedial interests extend no further than redressing the effects of its own prior racial discrimination. Id. at A38 n.43. That conclusion finds no support in this Court's jurisprudence; it ignores the close nexus between a state university and the State's public schools; and it represents an unwarranted intrusion into state, governmental structures.

a. The practical effect of the court of appeals' holding will be to return the most prestigious institutions within state university systems to their former "white" status, and thereby to prolong, rather than eliminate, the vestiges of unconstitutional exclusion and segregation. That result ignores Texas's strong interest in eliminating the vestiges of state-sponsored discrimination-an interest

(footnotes)

to fixed quotas or set-asides, which deny each applicant's right to be treated as an individual in the admissions process in a pool of applicants of all races. See Bakke, 438 U.S. at 318-320 (opinion of Powell, J.).

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that is not satisfied by the mere adoption of race-neutral policies. See *Fordice*, 505 U.S. at 721, 729-732. 16. The court of appeals' position is not supported by this Court's holding in *Croson* that the City of Richmond had no compelling interest in remedying past discrimination in the national construction industry. 488 U.S. at 498. The Law School was not motivated here by generalized assertions of societal discrimination, which is an impermissible ground for affirmative action. Rather, it was attempting to address the effects on the Law School of the State's former de jure segregated system of public education. The court recognized that "[a]pplicants do not arrive at the admissions office of a professional school in a vacuum." *Pet. App. B43*. Texas has imposed a requirement that most (in 1992, 85%; now, 80%) of the Law School's entering class be Texas residents. *Id.* at B23-B24 & n.33. Most students considered for admission in 1992 would therefore have attended Texas public schools during a period (the 1970s and 1980s) when many of the State's primary and secondary schools remained segregated as a result of prior de jure segregation. The district court here found that the effects of that segregation "are reflected in the low enrollment of minorities in * * * the law school." *Pet. App. 1345*.

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16 This Court has "repeatedly recognized that the Government possesses a compelling interest in remedying the effects of identified race discrimination." *Metro Broadcasting*, 497 U.S. at 611 (O'Connor, J., dissenting). States and state subdivisions have both the "constitutional duty to take affirmative steps to eliminate the continuing effects of [their] past unconstitutional discrimination," *Wygant*, 476 U.S. at 291 (O'Connor, J., concurring); *id.* at 280 (plurality opinion), and the constitutional "authority to eradicate the effects of [even] private discrimination" within their respective jurisdictions; *Croson*, 488 U.S. 491-492 (opinion of O'Connor, J.).

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If the Law School is completely prohibited from taking those effects into account in its admissions process, the legacy of de jure discrimination will be left unremedied for another generation, and the Law School itself will be forced to become "a 'passive participant' in a system of racial exclusion," using "public dollars, drawn from the tax contributions of all citizens" to finance unlawful segregation. *Croson*, 488 U.S. at 492 (opinion of O'Connor, J.); cf. *Gaston Cty. v. United States*, 395 U.S. 285, 296-297 (1969) (Harlan, J.) (given the history of official segregation and systemic deprivation of educational opportunities to blacks, "[i]mpartial' administration of the literacy test today would serve only to perpetuate * * * inequalities"). The Constitution does not prohibit a State from attempting to compensate for injuries at one stage of the educational process through a remedial program at a later stage. 17.

(footnotes)

17 The Court stated in *Crosby* that "discrimination in primary and secondary schooling" cannot justify "a rigid racial preference in medical school admissions." 488 U.S. at 499. The Court there was apparently advertent to Justice Powell's conclusion in *Bakke* that the medical school could not rely on generalized societal discrimination (including generalized discrimination in education) to justify its use of a fixed numerical quota. In this case, the University of Texas School of Law is attempting to remedy recent, documented segregation in Texas's primary and secondary schools. The court of appeals has, moreover, prohibited all use of race in the admissions process—not only the use of fixed or rigid quotas.

As petitioners note (Pet. 18 & n.11), the court of appeals' view that a school of higher education may not take into account in its admissions process the effects of segregation at the primary and secondary school levels conflicts with the position taken by the Sixth Circuit in *Geier v. Alexander*, 801 F.2d 799 (1986). In *Geier*, the court of appeals upheld the University of Tennessee's consideration of race in admissions to a pre-professional program, on the ground that the university was not "seek[ing] to remedy some amorphous 'societal' wrong, but rather

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b. There is no warrant for the court of appeals' insistence that, "for the admissions scheme to pass constitutional muster, the State of Texas, through its legislature, would have to find that past segregation has present effects." Pet. App. A39. "[A] contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite" to the adoption of an affirmative action plan. *Wygant*, 476 U.S. at 289 (O'Connor J., concurring). The unlawful segregation of blacks and Mexican-Americans in Texas's public school systems is an undisputed matter of public record. In light of its extensive experience with students drawn from the State's public schools, the Law School is particularly well placed to assess the effects of that segregation on its minority applicants.

Moreover, "how power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself." *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937) (Cardozo, J.). Here, the Texas legislature, "which has ultimate control over the school, has delegated its 'management and control' to the regents of the University of Texas system," Pet. App. 340 n.44, and the Board of Regents has in turn largely delegated the responsibility to fashion lawful and educationally beneficial admissions policies to the individual schools within the system. The Constitution does not require (or, indeed, permit) federal courts to second-guess the wisdom of those delegations. 18.

(footnotes)

addressing "the continuing effects of past practices that adversely affected black[s] * * * as they moved through the public school systems and the higher education system of the state." 801 F.2d at 809-810.

18 See, e.g., *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902) (Harlan, J.); *Sweezy v. New Hampshire*, 354 U.S. 234, 256 (1957) (Frankfurter, J.).

concurring in the judgment).

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CONCLUSION

The petition for a writ of certiorari should be granted to review the court of appeals' holding that the University of Texas School of Law may not consider race or national origin in any manner in its admissions process.

Respectfully submitted.

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UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

July 30, 1996

THE GENERAL COUNSEL

Dear College and University Counsel:

I am writing to reaffirm the Department of Education's position that, under the Constitution and Title VI of the Civil Rights Act of 1964, it is permissible in appropriate circumstances for colleges and universities to consider race in making admissions decisions and granting financial aid. They may do so to promote diversity of their student body, consistent with Justice Powell's landmark opinion in Regents of the University of California v. Bakke, 438 U.S. 265, 311-315 (1978). See also Wygant v. Jackson Bd. of Education, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring). They also may do so to remedy the continuing effects of discrimination by the institution itself or within the state or local educational system as a whole.¹

The Department's position is reflected in its published regulations and its guidances on the application of Bakke, race-targeted financial assistance, and desegregation of institutions of higher education.² That position has not changed as a result of the Fifth Circuit's decision earlier this year in the Hopwood case or the Supreme Court's recent determination not to grant certiorari to review the Fifth Circuit's decision. Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), cert. denied, Texas v. Hopwood, No. 95-1773 (July 1, 1996).

In denying certiorari, the Supreme Court neither affirmed nor reversed the Fifth Circuit panel's decision in Hopwood, which took the position that the University of Texas Law School could not take race into account in admissions either to promote diversity or to remedy the effects of the State's formerly

¹ City of Richmond v. J.A. Croson Co., 488 U.S. 469, 491-92 (1989); United States v. Fordice, 505 U.S. 717, 732 n.7 (1992).

² 34 CFR Part 100; Race-targeted Financial Aid Notice, 59 Federal Register 8756 (Feb. 23, 1994); Fordice Notice, 59 Federal Register 4271 (Jan. 31, 1994); Bakke Notice, 44 Federal Register 58509 (Oct. 10, 1979); Sept. 7, 1995 letter from Judith Winston, General Counsel, United States Department of Education, to College and University Counsel regarding the Supreme Court's denial of certiorari in Podberesky v. Kirwin, 38 F.3d 147 (4th Cir. 1994) and its decision in Adarand Constructors v. Peña, 115 S. Ct 2097 (1995); Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education, 43 Federal Register 6658 (Feb. 12, 1978).

segregated system of public education, but could only seek to remedy the Law School's own discrimination. The denial of certiorari does not mean that the Supreme Court departed from Justice Powell's opinion in Bakke that a college or university has a compelling interest in taking race into account in a properly devised admissions program to achieve a diverse student body. Nor does it mean that the Supreme Court accepts the Fifth Circuit's narrow view of the permissible remedial predicate justifying the consideration of race by institutions of higher education.

Consequently, the Department continues to believe that, outside of the Fifth Circuit, it is permissible for an educational institution to consider race in a narrowly tailored manner in either its admissions program or its financial aid program in order to achieve a diverse student body or to remedy the effects of past discrimination in education systems. Within the Fifth Circuit, the law is unclear after the panel's decision in Hopwood.³ Given this uncertainty, the Department will await further proceedings in the case, which is now on remand from the panel decision, or subsequent rulings in other cases before determining whether further guidance is necessary.

The Department's Office of Civil Rights will continue to provide technical assistance to institutions in their efforts to develop programs that comply with Title VI of the Civil Rights Act of 1964.

Sincerely,



Judith A. Winston

³ See Texas v. Hopwood, No. 95-1773 (July 1, 1996) (opinion of Ginsburg, J. joined by Souter, J.); Whittmer v. Howard A. Peters III, 1996 WL 363399, 2-3 (7th Cir. 1996); Hopwood v. State of Texas, 84 F.3d 720, 722-24 (5th Cir. 1996) (Politz, King, Wiener, Benavides, Stewart, Parker and Dennis, JJ., dissenting), 724-25 (Stewart, J., dissenting).

Wednesday
February 23, 1994

FEDERAL REGISTER

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 5038-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 commentators 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 800 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

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

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

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.

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.*

⁵ Some commentators 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.* 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 (1975); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974); *Fourco Glass Co. v. Transmira 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-Mecklenburg Board*

of Education, 402 U.S. 1, 18-19 (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

*Of course, an individual may challenge the statute under which the aid is provided as violation 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 *Fallinow 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 306.

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 312-313.⁹ 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

⁹ 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.

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

¹⁰ The present policy guidance on student financial assistance supplements the 1979 policy interpretation.

¹¹ 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 countervailing 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.

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 these 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

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 commentators 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 commentators, 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.¹³

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 commentators 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

¹³ 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.¹¹ 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

¹¹ 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.

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 commentators 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

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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