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001. letter	Archie B. Meyer, Sr. to Dr. Frederick M. Humphries (9 pages)	11/13/1992	P6/b(6)
002. letter	John E. Palomino to Dr. H. Deon Holt (10 pages)	6/4/1993	P6/b(6)
003. letter	Gary D. Jackson to Thomas O'Rourke (8 pages)	10/16/1992	P6/b(6)
004. letter	Gary D. Jackson to Dr. Joan K. Wadlow (2 pages)	8/7/1992	P6/b(6)

COLLECTION:

Clinton Presidential Records
 Domestic Policy Council
 Stephen Warnath (Civil Rights)
 OA/Box Number: 9593

FOLDER TITLE:

Racial Harassment

ds71

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

AMERICAN COUNCIL ON EDUCATION

Division of Governmental Relations

· mtg at Dept

· mtg w/ACE, Joe

April 18, 1994

Mr. William Galston
Domestic Policy Council
West Wing 2nd Floor
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

Dear Bill:

On March 10, 1994, the Department of Education's Office for Civil Rights (OCR) issued a "Notice of Investigative Guidance" concerning the application of Title VI of the Civil Rights Act of 1964 to racial incidents and harassment against students at educational institutions receiving federal financial assistance (59 Fed. Reg. 11448). I am writing to express our deep concern that the Guidance, although aimed at a serious problem, is in conflict with fundamental principles of free expression on campus.

I want to emphasize that ACE is not opposed to governmental efforts to protect students from racial harassment. Indeed, ACE and its 1,800 members have a long record of supporting affirmative action and racial diversity on college and university campuses and of promoting a climate within which all students can learn and thrive.

Our concern is that complaints of racial harassment are often sparked by speech, writings or other expressive conduct. As recent court decisions show, such complaints raise difficult and complex constitutional issues. The Guidance, however, is entirely insensitive to this issue and to the risk it poses to free expression on campus. If left unchanged, it could lead to OCR investigations of higher education to adopt the very kinds of speech codes courts have recently invalidated under the First Amendment. One need only review the newspaper coverage of recent efforts by universities to protect students from racial harassment to realize that unfocused efforts by OCR to do the same could be both controversial and counter-productive.

Although a footnote to the Guidance states that it is directed at "conduct that constitutes race discrimination...not at the content of speech," the Guidance does not explain these distinctions, merely promising to give consideration to any implications of the First Amendment." The Guidance fails to distinguish between conduct that is primarily expressive, and thus is entitled to First Amendment protection, and conduct whose expressive content is incidental. Nor does it make it

Mr. William Galston
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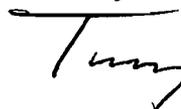
clear to OCR investigators that they must not, under any circumstances, investigate pure expressive activities, such as speech or writings that convey opinions, however offensive they may be. To the contrary, the Guidance specifically defines "harassing conduct" as including "verbal, graphic or written" communications, thus raising the prospect that such expressive activities will be investigated under Title VI.

The OCR Guidance is well-intended but ill-conceived. Not only does it conflict with important academic values, but it is not likely to survive direct legal challenge since it suffers from the defects that have caused courts to invalidate campus speech codes as vague, overbroad and chilling of free speech.

The Guidance suffers from a number of other serious defects. To give just one example, it directs investigators to consider how the alleged harassment would be perceived by a "reasonable person of the same...race of the victim under similar circumstances." In a recent Supreme Court decision, Justice O'Connor implicitly rejected this approach in a Title VII case, ruling that conduct must be measured by a reasonable "person" standard.

We would very much appreciate the opportunity to pursue this issue with you further. While we are fully supportive of efforts to protect students from racial harassment, it is extremely important that this worthwhile goal be pursued without interfering with fundamental rights of free expression so critical to the proper functioning of our universities. These rights are no less important to minority students, and we urge the Administration to work with us to preserve those rights while at the same time protecting students from racial harassment.

Sincerely,



Terry W. Hartle
Vice President

TWH:wls

DEPARTMENT OF EDUCATION

Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance**ACTION:** Notice of investigative guidance.

SUMMARY: The Assistant Secretary for Civil Rights announces investigative guidance, under title VI of the Civil Rights Act of 1964, that has been provided to the Office for Civil Rights (OCR) Regional Directors on the procedures and analysis that OCR staff will follow when investigating issues of racial incidents and harassment against students at educational institutions. The investigative guidance incorporates and applies existing legal standards and clarifies OCR's investigative approach in cases involving racial incidents and harassment.

EFFECTIVE DATE: March 10, 1994.**FOR FURTHER INFORMATION CONTACT:**

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

SUPPLEMENTARY INFORMATION: Title VI of the Civil Rights Act of 1964 (title VI), 42 U.S.C. 2000d *et seq.*, prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving Federal financial assistance. The Department of Education (Department) has promulgated regulations in 34 CFR part 100 to effectuate the provisions of title VI with regard to programs and activities receiving funding from the Department. The regulations in 34 CFR 100.7(c) provide that OCR will investigate whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with title VI and the Department's implementing regulations. The Department has interpreted title VI as prohibiting racial harassment.

The existence of racial incidents and harassment on the basis of race, color, or national origin against students is disturbing and of major concern to the Department. Racial harassment denies students the right to an education free of discrimination. To enable OCR to investigate those incidents more effectively and efficiently, a memorandum of investigative guidance has been distributed to OCR staff. The substance of this memorandum and the accompanying legal compendium are being published today with this notice

to apprise recipients and students of the legal standards, rights, and responsibilities under title VI with regard to this issue.

The guidance outlines the procedures and analysis that OCR will follow when investigating possible violations of title VI based upon racial incidents and harassment. The guidance relies upon current legal standards.

Dated: March 7, 1994.

Norma V. Cantu,

*Assistant Secretary for Civil Rights.***Investigative Guidance on Racial Incidents and Harassment Against Students**

This notice discusses the investigative approach and analysis that the Office for Civil Rights (OCR) staff will follow when investigating issues of discrimination against students based on alleged racial incidents—including incidents involving allegations of harassment on the basis of race—that occur at educational institutions.¹ This guidance is supplemented by a corresponding compendium of legal resources for detailed legal citations and examples.

Under title VI of the Civil Rights Act of 1964 (title VI) and its implementing regulations, no individual may be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination on the ground of race, color or national origin under any program or activity that receives Federal funds. Racially based conduct that has such an effect and that consists of different treatment of students on the basis of race by recipients' agents or employees, acting within the scope of their official duties, violates title VI. In addition, the existence of a racially hostile environment that is created, encouraged, accepted, tolerated or left uncorrected by a recipient also constitutes different treatment on the basis of race in violation of title VI. These forms of race discrimination are discussed further below.²

¹ This investigative guidance is directed at conduct that constitutes race discrimination under title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* (title VI), and its implementing regulations at 34 CFR Part 100, and not at the content of speech. In cases in which verbal statements or other forms of expression are involved, consideration will be given to any implications of the First Amendment to the United States Constitution. In such cases, regional staff will consult with headquarters.

² For the sake of simplicity and clarity, the term "race" shall be used throughout this guidance to refer to all forms of discrimination prohibited by title VI—i.e., race, color, and national origin.

Jurisdiction

In all cases, OCR must first decide whether it has jurisdiction over claims involving racial incidents or harassment. Under the Civil Rights Restoration Act of 1987,³ OCR generally has institution-wide jurisdiction over a recipient of Federal funds.

If an institution receives Federal funds, title VI requirements apply to all of the academic, athletic, and extracurricular programs of the institution, whether conducted in facilities of the recipient or elsewhere. Title VI covers all of the uses of property that the recipient owns and all of the activities that the recipient sponsors. Title VI covers all of these operations, whether the individuals involved in a given activity are students, faculty, employees, or other participants or outsiders.

Standard Different Treatment by Agents or Employees

As with other types of discrimination claims, OCR will first apply a standard different treatment analysis to allegations involving racial incidents perpetrated by representatives of recipients. Under this analysis, a recipient violates title VI if one of its agents or employees, acting within the scope of his or her official duties, has treated a student differently on the basis of race, color, or national origin in the context of an educational program or activity without a legitimate, nondiscriminatory reason so as to interfere with or limit the ability of the student to participate in or benefit from the services, activities or privileges provided by the recipient.⁴ In applying this standard different treatment analysis, OCR staff will address the following questions—

(1) Did an official or representative (agent or employee) of a recipient treat someone differently in a way that interfered with or limited the ability of a student to participate in or benefit from a program or activity of the recipient?

(2) Did the different treatment occur in the course of authorized or assigned duties or responsibilities of the agent or employee?⁵

³ See 42 U.S.C. 2000d-4 (1988) (amending title VI).

⁴ Note that such incidents can constitute violations of title VI even if they do not constitute "harassment," so long as they do constitute direct different treatment by agents or employees, as defined in this section, that interferes with or limits the ability of a student to participate in or benefit from the recipient's programs or activities.

⁵ As used throughout this investigative guidance, the determination as to whether an agent or employee of a recipient is acting within the scope

(3) Was the different treatment based on race, color, or national origin?

(4) Did the context or circumstances of the incident provide a legitimate, nondiscriminatory, nonpretextual basis for the different treatment?

Where, based on the evidence obtained in the investigation, questions 1-3 are answered "yes" and question 4 is answered "no," OCR will conclude that there was discrimination in violation of title VI under this standard different treatment analysis. If questions 1, 2 or 3 are answered "no," or if questions 1 through 4 are answered "yes," OCR will find no violation under this theory. If warranted by the nature and scope of the allegations or evidence, OCR will proceed to determine whether the agent's or employee's actions established or contributed to a racially hostile environment as described below. OCR also will conduct a "hostile environment" analysis where actions by individuals other than agents or employees are involved.

Hostile Environment Analysis

A violation of title VI may also be found if a recipient has created or is responsible for a racially hostile environment—i.e., harassing conduct (e.g., physical, verbal, graphic, or written) that is sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient. A recipient has subjected an individual to different treatment on the basis of race if it has effectively caused, encouraged, accepted, tolerated or failed to correct a racially hostile environment of which it has actual or constructive notice (as discussed below).

Under this analysis, an alleged harasser need not be an agent or employee of the recipient, because this theory of liability under title VI is premised on a recipient's general duty to provide a nondiscriminatory educational environment.

To establish a violation of title VI under the hostile environment theory, OCR must find that: (1) A racially hostile environment existed; (2) the recipient had actual or constructive notice of the racially hostile environment; and (3) the recipient failed to respond adequately to redress the racially hostile environment. Whether conduct constitutes a hostile environment must be determined from

of his or her official duties or employment must be made on a case-by-case basis, taking into account such factors as the relationship between the parties and the time, location and context of the alleged harassment.

the totality of the circumstances, with particular attention paid to the factors discussed below.

Severe, Pervasive or Persistent Standard

To determine whether a racially hostile environment exists, it must be determined if the racial harassment is severe, pervasive or persistent. OCR will examine the context, nature, scope, frequency, duration, and location of racial incidents, as well as the identity, number, and relationships of the persons involved. The harassment must in most cases consist of more than casual or isolated racial incidents to establish a title VI violation. Generally, the severity of the incidents needed to establish a racially hostile environment under title VI varies inversely with their pervasiveness or persistence.

First of all, when OCR evaluates the severity of racial harassment, the unique setting and mission of an educational institution must be taken into account. An educational institution has a duty to provide a nondiscriminatory environment that is conducive to learning. In addition to the curriculum, students learn about many different aspects of human life and interaction from school. The type of environment that is tolerated or encouraged by or at a school can therefore send a particularly strong signal to, and serve as an influential lesson for, its students.

This is especially true for younger, less mature children, who are generally more impressionable than older students or adults. Thus, an incident that might not be considered extremely harmful to an older student might nevertheless be found severe and harmful to a younger student. For example, verbal harassment of a young child by fellow students that is tolerated or condoned in any way by adult authority figures is likely to have a far greater impact than similar behavior would have on an adult. Particularly for young children in their formative years of development, therefore, the severe, pervasive or persistent standard must be understood in light of the age and impressionability of the students involved and with the special nature and purposes of the educational setting in mind.

As with other forms of harassment, OCR must take into account the relevant particularized characteristics and circumstances of the victim—especially the victim's race and age—when evaluating the severity of racial incidents at an educational institution. If OCR determines that the harassment was sufficiently severe that it would have adversely affected the enjoyment of some aspect of the recipient's

educational program by a reasonable person, of the same age and race as the victim, under similar circumstances, OCR will find that a hostile environment existed. The perspective of a person of the same race as the victim is necessary because race is the immutable characteristic upon which the harassment is based. The reasonable person standard as applied to a child must incorporate the age, intelligence and experience of a person under like circumstances to take into account the developmental differences in maturity and perception due to age.

To determine severity, the nature of the incidents must also be considered. Evidence may reflect whether the conduct was verbal or physical and the extent of hostility characteristic of the incident. In some cases, a racially hostile environment requiring appropriate responsive action may result from a single incident that is sufficiently severe. Such incidents may include, for example, injury to persons or property or conduct threatening injury to persons or property.

The size of the recipient and the location of the incidents also will be important. Less severe or fewer incidents may more readily create racial hostility in a smaller environment, such as an elementary school, than in a larger environment, such as a college campus. The effect of a racial incident in the private and personal environment of an individual's dormitory room may differ from the effect of the same incident in a student center or dormitory lounge.

The identity, number, and relationships of the individuals involved will also be considered on a case-by-case basis. For example, racially based conduct by a teacher, even an "off-duty" teacher, may have a greater impact on a student than the same conduct by a school maintenance worker or another student. The effect of conduct may be greater if perpetrated by a group of students rather than by an individual student.

In determining whether a hostile environment exists, OCR investigators will also be alert to the possible existence at the recipient institution of racial incidents other than those alleged in the complaint and will obtain evidence about them to determine whether they contributed to a racially hostile environment or corroborate the allegations.

Finally, racial acts need not be targeted at the complainant in order to create a racially hostile environment. The acts may be directed at anyone. The harassment need not be based on the ground of the victim's or complainant's race, so long as it is racially motivated

(e.g., it might be based on the race of a friend or associate of the victim). Additionally, the harassment need not result in tangible injury or detriment to the victims of the harassment.

If OCR finds that a hostile environment existed under these standards, then it will proceed to determine whether the recipient received notice of the harassment, and whether the recipient took reasonable steps to respond to the harassment.

Notice

Though the recipient may not be responsible directly for all harassing conduct, the recipient does have a responsibility to provide a nondiscriminatory educational environment. If discriminatory conduct causes a racially hostile environment to develop that affects the enjoyment of the educational program for the student(s) being harassed, and if the recipient has actual or constructive notice of the hostile environment, the recipient is required to take appropriate responsive action. This is the case regardless of the identity of the person(s) committing the harassment—a teacher, a student, the grounds crew, a cafeteria worker, neighborhood teenagers, a visiting baseball team, a guest speaker, parents, or others. This is also true regardless of how the recipient received notice. So long as an agent or responsible employee of the recipient received notice, that notice will be imputed to the recipient.

A recipient can receive notice in many different ways. For example, a student may have filed a grievance or complained to a teacher about fellow students racially harassing him or her. A student, parent, or other individual may have contacted other appropriate personnel, such as a principal, campus security, an affirmative action officer, or staff in the office of student affairs. An agent or responsible employee of the institution may have witnessed the harassment. The recipient may have received notice in an indirect manner, from sources such as a member of the school staff, a member of the educational or local community, or the media. The recipient also may have received notice from flyers about the incident(s) posted around the school.

In cases where the recipient did not have actual notice, the recipient may have had constructive notice. A recipient is charged with constructive notice of a hostile environment if, upon reasonably diligent inquiry in the exercise of reasonable care, it should have known of the discrimination. In other words, if the recipient could have found out about the harassment had it

made a proper inquiry, and if the recipient should have made such an inquiry, knowledge of the harassment will be imputed to the recipient. A recipient also may be charged with constructive notice if it has notice of some, but not all, of the incidents involved in a particular complaint.

In some cases, the pervasiveness, persistence, or severity of the racial harassment may be enough to infer that the recipient had notice of the hostile environment (e.g., a racially motivated assault on a group of students). A finding that a recipient had constructive notice of a hostile environment meets the notice requirement of the analysis.

If the alleged harasser is an agent or employee of a recipient, acting within the scope of his or her official duties (i.e., such that the individual has actual or apparent authority over the students involved), then the individual will be considered to be acting in an agency capacity and the recipient will be deemed to have constructive notice of the harassment. If the recipient does not have a policy that prohibits the conduct of racial harassment, or does not have an accessible procedure by which victims of harassment can make their complaints known to appropriate officials, agency capacity—and thus constructive notice—is established.

The existence of both a policy and grievance procedure applicable to racial harassment (depending upon their scope, accessibility and clarity, and upon the acts of harassment) is relevant in the determination of agency capacity. A policy or grievance procedure applicable to harassment must be clear in the types of conduct prohibited in order for students to know and understand their rights and responsibilities. As discussed above, in the education context, the person from whose perspective the apparent authority of an agent or employee of a recipient must be evaluated is a reasonable student of the same age, intelligence and experience as the alleged victim of the harassment.

Finally, in order to find that the recipient had a duty to respond to notice of a racially hostile environment, OCR must examine the facts and circumstances to establish that the recipient knew or should have known that the conduct was of a racial nature or had sufficient information to conclude that it may have been racially based. OCR will consider whether the incident involved explicitly racial conduct or whether the circumstances indicate that, through symbols or other persuasive factors, the recipient should have recognized that the conduct was in fact, or was reasonably likely to have

been, racial (e.g., the hanging of nooses, random violence against minorities, etc.).

Recipient's Response

Once a recipient has notice of a racially hostile environment, the recipient has a legal duty to take reasonable steps to eliminate it.⁶ Thus, if OCR finds that the recipient took responsive action, OCR will evaluate the appropriateness of the responsive action by examining reasonableness, timeliness, and effectiveness. The appropriate response to a racially hostile environment must be tailored to redress fully the specific problems experienced at the institution as a result of the harassment. In addition, the responsive action must be reasonably calculated to prevent recurrence and ensure that participants are not restricted in their participation or benefits as a result of a racially hostile environment created by students or nonemployees.

In evaluating a recipient's response to a racially hostile environment, OCR will examine disciplinary policies, grievance policies, and any applicable anti-harassment policies.⁷ OCR also will determine whether the responsive action was consistent with any established institutional policies or with responsive action taken with respect to similar incidents.

Examples of possible elements of appropriate responsive action include imposition of disciplinary measures, development and dissemination of a policy prohibiting racial harassment, provision of grievance or complaint procedures, implementation of racial awareness training, and provision of counseling for the victims of racial harassment.

Conclusion

OCR will investigate allegations of racial incidents where the incidents fall within its jurisdiction. Based on the facts and circumstances of each case, OCR will use either or both the standard different treatment analysis and the hostile environment analysis to determine whether title VI has been violated.

⁶Of course, a recipient can and should investigate and respond to individual racial incidents if and as they arise—regardless of whether any particular incident is severe enough by itself to establish a racially hostile environment under Title VI. By doing so in a timely and thorough manner, the recipient might prevent the development of a racially hostile environment.

⁷Of course, OCR cannot endorse or prescribe speech or conduct codes or other campus policies to the extent that they violate the First Amendment to the United States Constitution.

If OCR determines that an agent or employee, acting within the scope of his or her employment, treated someone differently on the basis of race, color, or national origin without a legitimate, nondiscriminatory reason for the treatment (i.e., direct different treatment), then OCR will conclude that Title VI was violated. If OCR determines that a racially hostile environment exists at a recipient, the recipient had notice of it, and the recipient failed to take adequate action in response to the hostile environment, OCR will also find a violation. If OCR determines that a hostile environment was not established, or that a hostile environment was established but that the recipient either (1) did not have notice of it; or (2) had notice of it and took adequate action in response, OCR will find no violation.

Appendix—Racial Incidents and Harassment Against Students—Compendium of Legal Resources

This compendium provides an outline summarizing key legal resources (including statutes, regulations, cases, and letters of findings) to serve as a reference for the Office for Civil Rights (OCR) staff in investigating possible discrimination against students based on racial incidents—including incidents involving allegations of harassment on the basis of race—that occur at educational institutions. It is intended to be used in conjunction with the investigative guidance on racial incidents and harassment, and follows the same general outline as that guidance.¹

The investigation and analysis of cases under title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, (title VI) relies, to a large extent, on case law developed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, which prohibits discrimination on the basis of race, color, national origin, sex, and religion in employment.² See *Dillon*

¹ The investigation guidance is directed at conduct that constitutes race discrimination under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., (Title VI), and not at the content of speech. In cases in which verbal statements or other forms of expression are involved, consideration will be given to any implication of the First Amendment to the United States Constitution. In such cases, regional staff will consult with headquarters.

The term "race" shall be used throughout this compendium to refer to all forms of discrimination prohibited by Title VI—i.e., race, color, and national origin.

² Note that in addition to racial incidents/harassment cases, many sexual harassment cases are cited throughout this compendium—because the legal standards and theories applicable to these two different types of discrimination are similar. See *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 859–60 (3d Cir. 1990) (both racial and sexual

County District No. 1 and South Carolina State Department of Education, No. 84–VI–16 (Civil Rights Reviewing Auth. 1987); *United States v. LULAC*, 793 F.2d 636, 648–49 (5th Cir. 1986); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985); and *NAACP v. Medical Center, Inc.*, 657 F.2d 1322 (3d Cir. 1981). See also, generally, EEOC Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory, No. N–915.002 (July 14, 1992).³

I. Jurisdiction

OCR must first decide whether it has jurisdiction over a claim involving racial incidents or harassment. OCR has jurisdiction if the complaint alleges that the racially based conduct occurred in the context of an operation of an elementary, secondary, or postsecondary school or institution, or other entity that is a recipient of Federal funds.

A. Title VI Prohibits Race Discrimination in Federally Funded Programs and Activities

Title VI prohibits race discrimination in programs and activities that receive Federal financial assistance. See also 34 CFR part 100 (regulations effectuating provisions of title VI).

B. OCR Has Institution-Wide Jurisdiction

Under the Civil Rights Restoration Act of 1987,⁴ OCR generally has institution-wide jurisdiction over a recipient of Federal funds.⁵

C. Allegation Must Relate to an "Operation" of Recipient

Discrimination must be alleged in an "operation" of a recipient. See 42 U.S.C. 2000d–4a.

D. Specific Discriminatory Actions Prohibited

The regulations implementing Title VI include provisions prohibiting discrimination based on race in terms of:

(1) Services: Provision of services or other benefits. 34 CFR 100.3(b)(1)(iii).

harassment are actionable based on right to nondiscriminatory environment).

³ Of course, OCR will consider the differences between the contexts of employment and education.

⁴ See 42 U.S.C. 2000d–4 (1988) (the section which amends Title VI).

⁵ Note, however, that the Waggoner Amendment, 20 U.S.C. 1144(b), prohibits Federal agencies from directing or controlling the membership activities or internal operations of privately funded fraternities and sororities whose facilities are not owned by the recipient. This provision does not bar OCR from regulating recipients with respect to other activities of these groups.

(2) Privileges: Restriction of an individual's enjoyment of an advantage or privilege enjoyed by others. 34 CFR 100.3(b)(1)(iv).

(3) Participation: Opportunities to participate. 34 CFR 100.3(b)(1)(vi).

The regulations also include a general, catchall provision prohibiting race discrimination. See 34 CFR 100.3(b)(5).

II. Standard Different Treatment by Agents or Employees

As with other claims of race discrimination under Title VI, OCR should first apply a standard different (disparate) treatment analysis to allegations involving racial incidents perpetrated by representatives of recipients. In doing so, OCR must determine whether a student was treated differently than other students on the basis of race without a legitimate, nondiscriminatory, nonpretextual reason.

The basic elements of a different treatment case were set out by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (focusing on indirect evidence of such treatment), a Title VII employment case. See also *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

A. Prima Facie Case

(1) Identify the racial group to which the complainant belongs for purposes of differential treatment analysis.

(2) Determine whether the complainant was treated differently than similarly situated members of other racial groups with regard to a service, benefit, privilege, etc., from the recipient. See, e.g., *University of Pittsburgh*, OCR Case No. 03–89–2035 (campus police treated black students more severely than white students); *Roosevelt Warm Springs Institute for Rehabilitation*, OCR Case No. 04–89–3003 (similar).

B. Rebuttal of Prima Facie Case by Showing Legitimate, Nondiscriminatory Reason for Treatment

After a prima facie case of race discrimination has been established against the recipient, OCR must then determine whether the recipient had a legitimate, nondiscriminatory reason for its action(s) which would rebut the prima facie case against it.

C. Recipient's Rebuttal Overcome With Showing of Pretext

If the prima facie case of discrimination is rebutted, OCR must

next determine whether the recipient's asserted reason for its action(s) is a mere pretext for discrimination. Ultimately, however, the weight of the evidence must convince OCR that actual discrimination occurred. See *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993) (under title VII disparate treatment analysis, ultimate burden of persuasion regarding intentional discrimination remains at all times with plaintiff).

III. Hostile Environment Analysis

A violation of Title VI may be found if racial harassment is severe, pervasive, or persistent so as to constitute a hostile or abusive educational environment. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (sets similar standard for sexual harassment under title VII) (relying on *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (race discrimination can consist of an "environment heavily charged with ethnic or racial discrimination"), cert. denied, 406 U.S. 957 (1972)); *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993) (reiterating *Meritor* standard). Accord, *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1412 (10th Cir. 1987); *Snell v. Suffolk County*, 782 F.2d 1094, 1102 (2d Cir. 1986); *Gray v. Greyhound Lines, East*, 545 F.2d 169, 176 (D.C. Cir. 1976) (noting with approval that EEOC has consistently held that title VII gives employee right to "a working environment free of racial intimidation"). See also, e.g., *Defiance College*, OCR Case No. 05-90-2024 (violation where college was aware of "repeated" and "patently offensive" verbal and physical racial harassment committed by students).

Whether conduct constitutes a hostile environment must be determined from the totality of the circumstances. See *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993) (under title VII, factors to consider may include frequency and severity of discriminatory conduct, whether it is physically threatening or humiliating or merely offensive, and whether it interferes with work performance; psychological harm is not required but may be taken into account like any other relevant factor); *Johnson v. Bunny Bread*, 646 F.2d 1250, 1257 (8th Cir. 1981) (court examined nature, frequency, and content of racial harassment, as well as identities of perpetrators and victims). See also *Snell*, 782 F.2d at 1103 (citing *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)) (same standard for sexual harassment).

A. Harassment Must Be Severe, Pervasive or Persistent

1. Pervasive or Persistent

Where the harassment is not sufficiently severe, it must consist of more than casual or isolated racial incidents to create a racially hostile environment. Compare *Trenton Junior College*, OCR Case No. 07-87-6006 (title VI violated where college failed to provide adequate security for black basketball players who were subjected to a break-in, cross-burning, and placement of raccoon skins at their campus residences) with *University of California, Santa Cruz*, OCR Case No. 09-91-6002 (no finding of racial harassment where OCR found only isolated individual incidents over three-year period). See also, e.g., *Snell*, 782 F.2d at 1103 ("To establish a hostile atmosphere, * * * plaintiffs must prove more than a few isolated incidents of racial enmity * * *. Casual comments, or accidental or sporadic conversation, will not trigger equitable relief"); *Gates Rubber Co.*, 833 F.2d 1406; *Powell v. Missouri State Highway and Transportation Department*, 822 F.2d 798 (8th Cir. 1986); *Moylan v. Maries County*, 792 F.2d 746 (8th Cir. 1986); *Henson*, 682 F.2d at 904 (quoting *Rogers*, 454 F.2d at 238).

OCR and Federal courts have found a hostile environment where there was a pattern or practice of harassment, or where the harassment was sustained and nontrivial. See, e.g., *Wapato School District No. 207*, OCR Case No. 10-82-1039 (Title VI violated where teacher repeatedly treated minority students in racially derogatory manner). Compare *Walker v. Ford Motor Co.*, 684 F.2d 1355 (11th Cir. 1982) (hostile environment where use of derogatory terms was "repeated, continuous, and prolonged") with *Gilbert v. City of Little Rock*, 722 F.2d 1390 (8th Cir. 1983) (hostile environment not created by isolated and allegedly unrelated racial slurs), cert. denied, 466 U.S. 972 (1984).

2. Severe

The severity of individual incidents must also be considered. See, e.g., *Vance v. Southern Bell Telephone and Telegraph Co.*, 863 F.2d 1503, 1510-11 (11th Cir. 1989) (determination whether conduct is "severe and pervasive" does not turn solely on number of incidents; fact-finder must examine gravity as well as frequency) (decided under 42 U.S.C. 1981); *Carrero v. New York City Housing Authority*, 890 F.2d 569, 578 (2d Cir. 1989) ("It is not how long the * * * obnoxious course of conduct lasts. The offensiveness of the individual actions

* * * is also a factor to be considered.").

Generally, the severity of the incidents needed to establish a racially hostile environment varies inversely with their pervasiveness or persistence. See EEOC Policy Guidance on Current Issues of Sexual Harassment, No. N-915.050 (Mar. 19, 1990) ("the more severe the harassment, the less need to show a repetitive series of incidents").

a. *Special mission and duties of educational institutions.* The unique setting and mission of an educational institution must be taken into account when OCR evaluates the severity of racial harassment under title VI. School officials have a duty to provide a nondiscriminatory environment conducive to learning. See generally 34 CFR part 100 (regulations prohibiting any form of race discrimination which interferes with educational programs or activities under title VI).

b. *Characteristics and circumstances of victim—especially race and age.* OCR must take into account the characteristics and circumstances of the victim on a case-by-case basis—particularly the victim's race and age—when evaluating the severity of racial incidents at an educational institution. See *Harris v. International Paper Co.*, 765 F. Supp. 1509, 1515-16 (D. Me. 1991) (the appropriate standard to apply in a "hostile environment racial harassment case is that of a 'reasonable black person'"). See also, e.g., *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) (discussing differences in perspectives of men and women toward sexual harassment, and need to examine harassment from perspective of reasonable victim with characteristic upon which harassment was based).

The reasonable person standard as applied to children is "that of a reasonable person of like age, intelligence, and experience under like circumstances." Restatement (2d), Torts, Section 283A (1965) (Comment b: "The special standard to be applied in the case of children arises out of the public interest in their welfare and protection * * *"). See also, e.g., *Honeycutt v. City of Wichita*, 247 Kan. 250, 796 P.2d 549 (Kan. 1990) (adopting Restatement standard); *Standard v. Shine*, 278 S.C. 337, 295 S.E.2d 786 (S.C. 1982) (same); *Camerlinck v. Thomas*, 209 Neb. 843, 312 N.W.2d 260 (Neb. 1981) (same).

c. *Nature of incident.* The nature of the incident(s) should also be considered. See, e.g., *Vance v. Southern Bell Telephone and Telegraph Co.*, 863 F.2d at 1506-10 (hostile environment created where noose was hung twice at employee's workstation); *Watts v. New York City Police Department*, 724 F.

Supp. 99, 105 (S.D.N.Y. 1989) (same, based on two sexual assaults).

A single incident that is sufficiently severe may establish a racially hostile environment. See EEOC Policy Guidance on Current Issues of Sexual Harassment, No. N-915.050 (Mar. 19, 1990) and cases cited therein; *Barrett v. Omaha National Bank*, 584 F. Supp. 22 (D. Neb. 1983), aff'd, 726 F.2d 424 (8th Cir. 1984) (sexually hostile environment established by sexual assault).

d. Size of recipient and location of incidents. The size of the recipient and the location of the incidents also may be important.

e. Identity of individuals involved. The identity, number, and relationships of the individuals involved will also be considered on a case-by-case basis. See, e.g., *Wapato School District No. 207*, OCR Case No. 10-82-1039 (racial harassment of students by teacher was particularly opprobrious).

f. Other incidents at the recipient. OCR will also consider other racial incidents at the institution. See, e.g., *Midwest City-Del City Public Schools*, OCR Case No. 06-92-1012 (finding of racially hostile environment based in part on several racial incidents at school which occurred shortly before incidents in complaint).

g. Harassment need not be directed specifically at complainant or tangibly harm complainant or victim. The regulations implementing Title VI provide that a complaint may be filed by "[a]ny person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part." 34 CFR 100.7(b). Thus, in hostile environment cases, the harassment need not be targeted specifically at the individual complainant. See *Waltman v. International Paper Co.*, 875 F.2d 468, 477 (5th Cir. 1989) (all sexual graffiti in office, not just that directed at plaintiff, was relevant to plaintiff's claim); *Hall v. Gus Construction Co.*, 842 F.2d 1010, 1015 (8th Cir. 1988) (evidence of sexual harassment directed at others is relevant to show hostile environment); *Gates Rubber Co.*, 833 F.2d at 1415 ("one of the critical inquiries in a hostile environment claim must be the environment" as a whole) (emphasis in original); *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1358-59 (11th Cir. 1982) (hostile environment established where racial harassment made plaintiff "feel unwanted and uncomfortable in his surroundings," even though it was not directed at him).

The harassment need not be based on the ground of the complainant's or victim's race, so long as it is racially motivated. See, e.g., *Center Grove*

Community School, OCR Case No. 15-91-1168 (title VI violated where white girl was forced to withdraw from all-white school, as result of harassment by classmates which included note criticizing her association with black student at another school).

To establish a hostile environment, harassment need not result in a tangible injury or detriment to the complainant or the victim of the harassment. *Vinson*, 477 U.S. at 64. See also, e.g., *Harris v. Forklift Systems, Inc.*, 114 S.Ct. at 371 (under title VII several factors are considered including whether behaviors interfere with work performance; psychological harm is not required but may be taken into account like any other relevant factor); *Gilbert*, 722 F.2d at 1394 (environment "which significantly and adversely affects the psychological well-being of an employee because of his or her race" is enough to constitute title VII violation); *Bundy v. Jackson*, 641 F.2d 934, 943-45 (D.C. Cir. 1981) (protection against race and sex discrimination extends to "psychological and emotional work environment").

B. Notice

A recipient has a duty to provide a nondiscriminatory educational environment, but it must somehow receive notice of racial harassment in order to be found responsible for it. See *Vinson*, 477 U.S. at 72; see also *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir. 1989); *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988).

1. Actual Notice

A recipient may be found liable for racial harassment if it has actual knowledge of the racially offensive behavior or actions. See, e.g., *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986) (liability exists if management-level employees were aware of barrage of offensive conduct); *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983) (actual knowledge where victim complains of harassment to appropriate authorities); *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982).

2. Constructive Notice

A recipient may be found liable where it reasonably should have known of the harassment—e.g., because the harassment was so pervasive that its awareness may be inferred. See *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989) (liability may be imputed where employer knew or should have known about prior conduct of harasser toward other women), vacated in part on other grounds, 900 F.2d 27 (4th Cir. 1990);

Yates v. Avco Corp., 819 F.2d 630 (6th Cir. 1987) (constructive notice where employee harassed women on a daily basis); *Waltman*, 875 F.2d 468 (possibility of constructive notice where sexual graffiti existed in numerous locations); *Vance v. Southern Bell Telephone and Telegraph Co.*, 863 F.2d at 1510-11; *Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987).

If the alleged harasser is an agent or employee of a recipient, acting within the scope of his or her official duties (i.e., such that the individual has actual or apparent authority over the students involved), then the individual will be considered to be acting in an agency capacity and the recipient will be deemed to have constructive notice of the harassment. See, e.g., *Kauffman v. Allied Signal, Inc., Autohite Division*, 970 F.2d 178 (6th Cir.) ("scope of employment" standard for holding employers liable for supervisory harassment is based on traditional agency principles, such as when and where harassment took place, and whether it was foreseeable), cert. denied, 113 S.Ct. 831 (1992). See also EEOC Policy Guidance on Current Issues of Sexual Harassment, N-915.050 (Mar. 19, 1990) (apparent authority exists where third parties reasonably believe that actions of supervisor represent exercise of authority possessed by virtue of employer's conduct).⁶

In evaluating whether constructive notice should be imputed to a recipient, the availability, coverage and public dissemination of antidiscrimination policies and grievance procedures for students will be considered in determining whether the recipient has made a sufficient effort to become aware of racial incidents if and when they occur. See *Meritor Savings Bank*, 477 U.S. at 72-73 (existence of uninvoked grievance procedures and policies against discrimination is relevant to issue of employer liability for sexual harassment, but not dispositive).

C. Recipient's Response

1. Duty to Take Reasonable Steps to End Harassment

Once a recipient has notice of a racially hostile environment, it has a duty to take reasonable steps to eliminate it. If it fails to respond adequately to the hostile environment, then the recipient may be found to have

⁶ As discussed supra, in the education context, the person from whose perspective the apparent authority of an agent or employee of a recipient must be evaluated is a reasonable student of the same age, intelligence and experience as the alleged victim of the harassment.

violated title VI. See, e.g., *California State University, Chico*, OCR Case No. 09-89-2106 (inadequate response to racial harassment where university had no written grievance procedure and failed to interview most of the individuals involved); *Township High School District No. 214*, OCR Case No. 05-82-1097 (OCR found violation where school district failed to take adequate steps to correct repeated racial harassment by students, of which employees were aware). See also, e.g., *Snell v. Suffolk County*, 782 F.2d 1094 (2d Cir. 1986) (responsibility depends on gravity of harm, nature of work environment, and resources available); *Hall v. Gus Construction Co., Inc.*, 842 F.2d 1010 (8th Cir. 1988) (employer will be liable for failing to discover what is going on and to take remedial steps when actions are so numerous, egregious, and concentrated as to add up to campaign of harassment); *Paroline*, 879 F.2d 100 (4th Cir. 1989);

Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982).

2. Response or Remedy Should Redress Actual Problems

The appropriate response or remedy for a hostile environment should be tailored to redress the specific problems experienced at the institution. See, e.g., *Trenton Junior College*, OCR Case No. 07-87-6006 (region developed remedial plan with college that included staff training on racial harassment, payment of compensation to harassed students and individuals who assisted the students in arranging for their safety, implementation of special efforts—including financial aid—to recruit black students, and development of plan for handling future harassment complaints).

3. Response Must Reasonably Attempt to Prevent Recurrence

The responsive action taken by a recipient must be reasonably calculated to prevent recurrence and ensure that individuals are not restricted in their

participation or benefits as a result of a racially hostile environment created by students or non-employees. See, e.g., *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989) (response must be reasonably calculated to prevent further harassment under particular facts and circumstances of case at time allegations are made; courts should not focus solely on whether remedial activity ultimately succeeded, but should determine whether total response was reasonable); *Waltman v. International Paper Co.*, 875 F.2d 468, 476 (5th Cir. 1989) (response must be reasonably calculated to halt harassment); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981) (employer liable where supervisor had full notice of harassment and did nothing to stop or investigate practice; employer must take all necessary steps to investigate and correct harassment—including warnings, appropriate discipline, and other means of preventing harassment).

[FR Doc. 94-5531 Filed 3-9-94; 8:45 am]

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Where We Stand

By Albert Shanker, President
American Federation of Teachers

Standards in Ohio

We say, in this country, that we are all in favor of tough education standards, but are we really serious? Not if the recent challenge of the Ohio high school exit exams by the U.S. Department of Education's Office of Civil Rights (OCR) is any indication.

The Ohio exams, which are designed to make sure that all graduating seniors have at least minimum competency in reading, writing, math and citizenship, were part of an education reform package that passed in 1987. But to make sure that students and schools knew about the tests and had time to prepare for them, linking the diploma to passing the tests was deferred until this year.

Now, however, OCR is raising the issue of fairness. Their challenge is based on the fact that approximately 90 percent of white students had passed all four tests as of March 1, but only about 80 percent of African-American students had done so. (The numbers of students passing has increased to 95 percent of white seniors and 88 to 90 percent of African-American seniors since OCR issued the challenge, but the agency is continuing its investigation.)

The tests are not tough. They were designed to measure proficiencies that students are supposed to attain by the end of eighth grade. And most students did not find them hard. When OCR issued its challenge, 99 percent of all seniors, both black and white, had already passed the writing test, and 99 percent of white seniors and 98 percent of black seniors had passed the reading test. However, there was a gap of 5 percentage points between passing rates of black and white students in the citizenship test and a 15-point gap in math. OCR does not allege that the tests themselves are biased; rather that a presumption of bias exists because minority youngsters had a higher failure rate. And their apparent explanation is that these kids were not given a fair and adequate opportunity to learn the material.



The Ohio tests were designed to measure proficiencies that students are supposed to attain by the end of eighth grade. And most students did not find them hard.

But does the fact that a student didn't learn something prove it wasn't taught—or taught adequately? When do kids themselves become responsible for what they learn or fail to learn? The youngsters who are now looking at the possibility of not graduating have had *eight* chances to take and pass the tests, beginning at the end of eighth grade—and they'll get a ninth this month. In Cleveland, where there was a big concentration of African-American students who failed early attempts to pass the exams, the school district ran remedial summer sessions. Only about 10 percent of the kids who had failed showed up at the first session. Last summer, kids who had failed were paid to come to summer school—and the ones who did made progress, but many did not bother.

Apparently many of these kids were not very serious about attending school during the year, either. The Ohio Department of Education, in defending its exit exams, says that the kids who are in danger of not graduating missed, on average, 32 days during their junior year of high school—that's over six weeks. A quarter of them missed 45 days, or nine weeks. How many of them would have passed if they had made it to school more regularly?

It's not clear exactly what remedy OCR will seek if it decides the allegations of bias are correct. The tests could be thrown out altogether or made optional, or linking them to graduation could be put off for several more years. The message any of these "remedies" will send to kids who didn't bother to learn the material, or even come to school, is clear: Despite all the talk of standards and getting tough, there are no consequences for failing to pass the exit exams. The kids who couldn't be bothered will get their diploma along with the rest. And the ones who failed the first or second or third time but worked hard and finally made it will get the message that they're chumps.

With the Goals 2000 legislation, the federal government made a promising start towards setting high standards for all our students and helping them meet these standards. The point of the OCR challenge seems to be that if some kids can't pass a test after seven or eight tries—a test that an overwhelming majority of students have passed—the schools are not yet perfect enough for us to risk standards for youngsters. This is a giant step backwards. What can we expect now? Will the federal government work to create and uphold standards or to destroy them?

Mr. Shanker's comments appear in this section every Sunday, under the auspices of the New York State United Teachers and the American Federation of Teachers. Reader correspondence is invited. Address your letters to Mr. Shanker at the AFT, 555 New Jersey Avenue, N.W., Washington, D.C. © 1994 by Albert Shanker.

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Racial Harassment

ds71

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- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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003. letter	Gary D. Jackson to Thomas O'Rourke (8 pages)	10/16/1992	P6/b(6)

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004. letter	Gary D. Jackson to Dr. Joan K. Wadlow (2 pages)	8/7/1992	P6/b(6)

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China's renewed MFN thrills U.S. business

Clinton's severing of trade rights exceeds hopes

By David R. Sands
THE WASHINGTON TIMES

President Clinton may be banning Chinese assault rifles, but U.S. businesses feel they dodged a bullet.

Mr. Clinton's decision yesterday to extend China's favorable trade status and break the link between U.S.-China trade policy and human rights evoked a giant sigh of relief from American businesses terrified of being cut off from the world's fastest-growing market.

"I think it's a ten-strike," said Rhett

Dawson, president of the Computer and Business Equipment Manufacturers Association. "It's going to give our members a lot more certainty about the China market."

"It's about as good a deal for U.S. business interests as could possibly have been worked out," said William Chastka, executive vice president at MK Technology, a D.C.-based marketing and government relations firm that has worked with companies investing in China.

"It was sound business, economic, and political judgment, because you're talking about what could be the world's biggest economy 15 years down the road," he added.

"Business leaders, who lobbied furiously in support of open trade with China," said Mr. Clinton's announcement yesterday afternoon exceeded

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CHINA

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their hopes. Mr. Clinton explicitly ended the connection between China's trade status and its human rights record, and he rejected more severe sanctions that had been under consideration in the weeks leading up to the decision.

"In many respects, his statement was a lot clearer than a lot of us were expecting," said Judge Morris, director of international trade at the National Association of Manufacturers. While saying China's human rights record over the past year was far from perfect, Mr. Clinton refused to apply more severe penalties against Chinese imports, such as targeting Chinese state- and military-owned companies for special sanctions.

Instead, Mr. Clinton announced a ban of Chinese gun and ammunition exports to the United States, and called on U.S. companies to develop a set of voluntary principles to guide their actions in China.

The possibility of harsher congressional action continues to cloud U.S.-China trade relations. Two leading China critics on the Hill, Senate Majority Leader George Mitchell, Maine Demo-

crat, and Rep. Nancy Pelosi, California Democrat, have begun drafting legislation that would impose sanctions against exports made by state-controlled Chinese companies.

At risk in the bitter MFN debate was a two-way trade relationship that topped \$40 billion in 1993 and the hopes of top U.S. companies such as Boeing, Caterpillar, AT&T and IBM of selling tens of billions of dollars in goods and services to China over the next two decades.

The handful of countries that do not enjoy MFN status with the United States pay import duties up to ten times higher. Stuffed toys, a major export from China, are assessed a 6.8 percent tax under MFN, for example, the non-MFN tax is 70 percent.

For that reason, among the most relieved in the business community yesterday were retailers, who have seen imports from China soar for such popular consumer items as clothing, toys and electronic goods.

Mr. Clinton's decision "ensures that American consumers can continue to purchase the high-quality affordable products China provides," said Tracy Mullin, president of the National Retail Federation.

The China MFN decision did not

prove popular with the nation's largest labor group. AFL-CIO President Lane Kirkland bitterly criticized Mr. Clinton's action.

"A country that seeks comparative advantage in the brutal deprivation of human rights does not deserve to engage in a normal trading relationship with the United States," Mr. Kirkland said in a statement. "We are gravely disappointed that the president has chosen to reverse his policy at the behest of the Beijing government's fifth column, American corporations, which don't give a tinker's damn about human rights in China or jobs in the United States, and whose only concern is to retain their license to profit from the abuse and exploitation of Chinese workers."

Sensitive to the debate over profits and human rights, business groups were quick yesterday to argue that increased trade and investment between China and the United States was the most effective way to promote human rights in China.

Said Willard Workman, vice president for international affairs at the U.S. Chamber of Commerce, "Tying MFN status to human rights is like using a blunt instrument for brain surgery."

U.S. investigates Ohio exit exams for discrimination

Black students fail at higher rate

By Carol Innerst
THE WASHINGTON TIMES

The U.S. Department of Education's Office for Civil Rights is investigating Ohio for evidence of discrimination because blacks have a higher failure rate than whites on tests required for graduation.

The OCR, in the midst of a "compliance review" there, wants to make sure black children have a fair "opportunity to learn" the material.

The review, being conducted under Title VI of the 1964 Civil Rights Act, is ongoing, a department spokesman said.

Critics of the OCR's action say it thrusts the federal government into state and local education systems in unprecedented ways. They also say the move has a chilling effect on state efforts — encouraged by Washington and the Goals 2000 legislation — to establish high academic standards and develop tests that will measure progress toward those standards.

"In our view, this situation raises serious questions about the feasibility of standards and assessment efforts in all states and raises the question of whether or not the department will allow any high-stakes standards and assessment provisions to ever be implemented," 14 Republican congressmen said in a May 24 letter to Education Secretary Richard Riley.

The Ohio Department of Education reported that students who failed the test missed, on average, 32 days of school during their junior year and that one-quarter of them missed 45 days, the lawmakers said. "One must wonder where the responsibility of the school system ends and the per-

sonal responsibility of the students and their families begins.

"At least 19 other states have exit tests for graduation. Does OCR anticipate similar investigations in each of those states?"

The 14 members of the House Education and Labor Committee who signed the letter included the committee's ranking Republican, Rep. Bill Goodling of Pennsylvania.

As of Wednesday, they had received no reply from the secretary. A spokeswoman for Mr. Riley said his office had not seen the letter and that he would not comment on a compliance review in progress.

"It's likely OCR will do in other states like Ohio because the results and consequences of standards and assessments are unfair," said education analyst Chester E. Finn Jr., who served as an assistant secretary of education in the Reagan administration.

Albert Shanker, president of the American Federation of Teachers, also criticized the OCR.

"Without high stakes, you can throw out Goals 2000 standards," Mr. Shanker said at a recent meeting of prominent educators and policy-makers at the Brookings Institution.

In his weekly commentary, which runs as a paid advertisement in the New York Times and the New Republic, Mr. Shanker said that if the OCR decides the allegations of bias are correct, "the tests could be thrown out altogether or made optional, or linking them to graduation could be put off for several more years."

"The message any of these remedies will send to kids who didn't bother to learn the material, or even come to school, is clear. Despite all the talk of standards



Education Secretary Richard Riley has not responded to a letter complaining about the probe.

and getting tough, there are no consequences for failing to pass the exit exams. The kids who couldn't be bothered will get their diploma along with the rest," he said.

The Ohio exams — designed to make sure all graduating seniors have at least minimum competency in reading, writing, mathematics and citizenship — became law in 1987. To give schools and students plenty of time to gear up, the class of 1994 was the first required to pass the tests to get diplomas.

By the beginning of May, after eight chances to pass the test, the gap between blacks and whites' passing rates was 5 percentage points in citizenship and 15 in math.

The OCR investigation was initiated in March. OCR regional director Kenneth Mines told Education Daily at the time that the office was not questioning the content of the tests, but looking at whether it's an educational necessity to use such a gauge.

Opportunity to learn standards were the focal point of contentious debate in the House and Senate during consideration of legislation to reauthorize the Elementary and Secondary Education Act. The term is generally taken to mean that children can't be held equally accountable without equal distribution of resources.

Family-values advocates blast Gay Games organizers

Giuliani also rapped for not stopping NYC event

By Iez Trotta
THE WASHINGTON TIMES

NEW YORK — Advocates for traditional family values lambasted the organizers of Gay Games IV from the steps of City Hall yesterday, charging them with trying to "promote sin" and to convince young people that homosexuality is an acceptable way of life.

They also blamed Mayor Rudolph W. Giuliani for not stopping the games, which run from June 18 to 25 and are expected to draw an estimated half-million homosexual visitors to the city. Two years ago, Mayor David N. Dinkins advocated that New York host the event.

"In all this time, there has not been one Republican Democrat or Conservative legislator in the city or state that has said one word of criticism against these games," said Dr. Howard L. Hurwitz, chairman of the Family Defense Council, an organization claiming about 10,000 members.

Dr. Hurwitz, who called the city "Sodom on the Hudson," was joined by Mary Cummins, former president of Community School Board 24, and the Rev. Ruben Diaz, president of the Bronx Hispanic Clergy Organization.

All were key forces in the ouster of Schools Chancellor Joseph A. Fernandez, who resigned a year ago in the wake of a bruising battle over his advocacy of sex and AIDS education for children.

Surrounded by his fellow clergymen, Mr. Diaz, a member of the mayor's Civilian Complaint Review Board, said: "Their objective is not competition, but to desensitize our society into accepting and believing that homosexuality is a normal way of life."

Even though Mr. Giuliani has given his blessing to the games and participated in the planning sessions, Mr. Diaz said he would still back him for re-election.

Earlier this year, Mr. Diaz, a Pentecostal minister, was at the center of a controversy when writing in a Spanish-language magazine, he said, athletes invited to the games and its attendant cultural events "are likely to be already infected with AIDS or can return home with the virus."

He decried a decision by Attorney General Janet Reno to waive an immigration law that prohibits people with the HIV virus to enter the United States. The waiver will allow game participants stays of up to 10 days.

About 11,000 athletes from 43 countries are expected to compete in the games, which were first held in San Francisco in 1982. The athletic events will include major traditional sports as well as powerlifting, martial arts, aerobics, single-sex pairs skating and women's wrestling. Sponsors for the games include Miller Brewing, Naya Spring Water and two condom manufacturers.

Mr. Giuliani welcomes the Gay Games, said Cristyne Lategano, a spokesman for the mayor, adding that they would be "a lesson in tolerance." She said she did not know how much the eight-day spectacle would cost the city in police protection and use of parks, or what the Gay Games organizers would pay to rent Yankee Stadium, site of the closing ceremonies. She hailed "the tremendous economic boost" the games would give to New York's economy, predicting \$80 million to \$150 million in revenue.

Gay Games Executive Director Jay Hill estimated his budget at \$6 million. He said a contribution yet to be agreed on would be made to a city parks foundation. Mr. Hill also said the games were open to heterosexuals, too, but he did not have any figures on how many would attend.

Mr. Hill said he has offers from New Yorkers to house more than 1,500 athletes coming from afar. About 45 hotels in the city will

also accommodate visitors.

Mrs. Cummins said she could not understand why the homosexual community was welcoming HIV-positive visitors when it spends so much time collecting money to combat the spread of AIDS. "Let's face it," she said. "The mayor could have rescinded the invitation and he didn't." Referring to his young son Andrew, she added: "I wonder if he's going to take Andrew up to Yankee Stadium to see this."

Meanwhile, a few feet away, homosexual advocates sought out reporters. "These people are hate-mongers," said City Council member Thomas Duane, who represents Greenwich Village. "Beyond that, they're whackos." Mr. Duane, a homosexual, is planning to challenge Rep. Jerrold Nadler in the September Democratic primary.

"I'm the only out-lesbian in the state Assembly," said Deborah Glick. She noted the large media turnout and charged them with giving "credibility to a handful of relics who are obviously twisted."

On the fringe of the crowd, a quiet Hispanic woman held her Bible open as she listened to the two sides. Emily Martinez pressed her fingers to a passage from Revelations, which she showed to an onlooker. "but the fearful, and the unbelieving... shall have their part in the lake which burneth with fire and brimstone."

CORRECTION

The Washington Times yesterday misstated the time of a memorial service for conservative author Russell Kirk. The service will be held today at 10:30 a.m. at St. Joseph's Church, Second and C streets NE.

The Washington Times FRIDAY, MAY 27, 1994

Whites sue law school on quotas

By Nancy E. Roman
THE WASHINGTON TIMES

Four white students — three men, one woman — are suing the University of Texas Law School in U.S. District Court in Austin, claiming that its quota system for admitting blacks and Hispanics shut them out.

Plaintiffs are white, and for this reason, the law school evaluated their admissions applications under a different, higher standard than that applied to black and Mexican-American applicants, said Michael P. McDonald, counsel to the Washington-based Center for Individual Rights, who is representing the students. As a result, the law school rejected plaintiffs, while admitting less qualified, and in numerous instances, far less qualified, black and Mexican-American applicants.

The university wrapped up its defense yesterday, saying the lawsuit rests on a misperception that the university admits by numbers when in fact it gives preferential treatment to minorities as a remedy to deep-seated racism going back to pre-Civil War Texas.

They said without giving some preference to minority applicants the University of Texas would be a lily white law school.

The law school does grant preferential treatment to minority applicants, said Javier Aguilar, special assistant attorney general in Texas. "The aim is clearly to increase the percentage of these groups in the entering class. But this is accomplished without any

(See RACE, page A1)

ADMISSIONS POLICY UNDER FIRE

Four potential law school students are suing the University of Texas Law School for discriminatory admissions practices. The following lists the number of students admitted for the 1992-93 academic year and their Texas Index — a composite score of their Law School Admissions Test score and grade point average.

Texas Index	White	Black	Hispanic
214	13	0	0
209	11	0	0
207	22	0	1
203	31	0	1
199	55	1	3
194	13	5	2
190	5	2	9
187	2	0	9
185	1	4	2
183	0	3	2
181	0	0	1
174	0	1	0
Total admitted	153	16	30

Source: University of Texas Law School

The Washington Times

RACE

From page A1

fixed numerical quotas, or set-asides.

U.S. District Judge Sam Sparks will decide who's right.

The case is the first of its kind in federal court since Allan P. Bakke sued regents of the University of California in 1978, the first major constitutional test of affirmative action.

Mr. Bakke, who was denied admission to medical school on the Davis campus, charged that the program violated Title VI of the Civil Rights Act of 1964, which bars racial or ethnic quotas in programs supported by federal funds. He also argued that the university's admission program — which set aside 16 of 100 slots for Asians, blacks and Hispanics — denied him equal protection under the law.

He won. In a landmark ruling, justices held that a university may consider racial criteria as part of a competitive admissions process as long as it does not employ "fixed quotas."

Law schools have struggled to abide by the Bakke decision, which produced six separate opinions by the justices. However, it has been difficult, especially in light of guidelines for racially diverse student bodies established by the American Association of Law Schools, the American Bar Association and the Law School Admission Council.

The three groups have defended preferential treatment for minority applicants, saying law schools must demonstrate that "by concrete action, a commitment to providing full opportunities for the study of law and entry into the profession by qualified members of groups [notably racial and ethnic minorities] which have been victims of discrimination in various forms," according to a joint press release.

Michael Greve, executive director of the Center for Individual Rights, said many smaller law schools and medical schools employ unofficial quota systems that are hard to expose.

"One reason there are so few of these suits is you have enormous proof problems," he said. "It's very hard to prove what a bunch of professors do in the basement of some law school. It isn't enough to show

that some less-qualified minorities were admitted because that is legitimate under the law.

But he said the University of Texas had in place a well-documented official policy for culling a class of about 600 from roughly 4,000 applications every year.

Under the system, the first 500 students are admitted automatically on the basis of a Texas Index, a composite of their college grade point average (GPA) and Law School Admission Test (LSAT) scores. The remaining applicants are divided according to race. Then, based on their composite score, they compete among members of their own race group for admission.

Cheryl Hopwood, one of the plaintiffs in the case, had LSAT scores in the top 20 percent of applicants and a grade point average of 3.8.

However, in documents filed with the court, university officials said she would not have been admitted under any circumstances because she attended a community college followed by Cal State Sacramento, a weak academic institution.

They also tried to discredit the three other plaintiffs, noting that Douglas Carvell failed to finish in the top two-fifths of his class; that Kenneth Robert Elliott was in the bottom half of his class; and that David Andrews Rogers flunked out of the University of Texas before graduating near the top of his class at University of Houston-Downtown.

"For Mr. Rogers to attempt to attribute his personal failures to charges of race discrimination is simply shameful," the defense said in papers submitted to the court.

Mr. McDonald said the university's attempt to disparage his clients were "outrageous" when viewed in context of the law school's admissions practices. The law school routinely admits candidates — more to the point, minority candidates — with records far inferior to the plaintiffs, he said, giving details about minority applicants admitted in 1993 who had inferior GPAs, scores and from lesser institutions.

But Mr. Greve said even if they win, he won't expect a change overnight.

"This is such a deeply ingrained attitude," he said. "One or two or three or 15 opinions — even if the liabilities are monstrous — may curb it but won't end it. You don't bring about a revolution of social ideas legally."

Clinton nudges Hill on health care

President told 'to be flexible'

By J. Jennings Moss
THE WASHINGTON TIMES

President Clinton went to Capitol Hill yesterday to urge Democrats to fight for his health care reform plan, but some lawmakers in his party had hoped to hear that the White House would adopt a new legislative strategy to find a compromise.

"He made it clear that his view is that members should stand up and fight. The alternative is to get beat up continually by these far-right groups," said Rep. Ron Wyden, Oregon Democrat and a backer of Mr. Clinton's health care reform plan.

But some Republicans mocked the message.

"If the president's coming down here to try to convince members of Congress that they need to hold tough on his plan or that he's only willing to accept minor changes, it's a waste of time. There clearly is a lack of consensus and support for the president's approach," said Sen. Daniel R. Coats, Indiana Republican.

Mr. Clinton's visit was intended to spur activity in a process that has yet to produce significant action by the committees handling health care. It came as one House subcommittee passed a health bill more expansive than Mr. Clinton's and as staff on the Senate Finance Committee began to draft specific health care options for a bill.

The president had three meetings with lawmakers yesterday. First, he talked with Democratic



Photo by Kenneth Lambert/The Washington Times
Rep. Charles B. Rangel, New York Democrat, takes a phone call during a House Ways and Means Committee meeting on health care reform.

leaders from both houses and the chairmen of the five committees handling health care. Then he met with a bipartisan group of 10 senators before addressing the House Democratic Caucus. He did not stop to talk to reporters.

Mr. Clinton heard words of caution during the session with Democratic and Republican senators as GOP members tried to remind him about the problems they had with his health care approach and the current lack of a bipartisan consensus on the issue.

Sen. Bob Packwood, of Oregon, ranking Republican on the Senate Finance Committee, said he told Mr. Clinton that, while he supports the Clinton idea of requiring businesses to pay for health insurance

for their workers, a bill that includes the mandate would not pass.

"I said, 'So you've got to make a decision whether you want a bill or an issue. If you want the issue, you can go ahead with a straight Democratic bill.' It's going to be an unpopular vote. It's not good politically," Mr. Packwood said.

Acknowledging current problems with finding middle ground, Senate Majority Leader George J. Mitchell of Maine said it's obvious there remain substantial disagreements, while adding he sees a growing desire to get something done.

"The number of different views far exceeds the number of senators," Mr. Mitchell said.

Mr. Clinton's health care approach is to provide health coverage to all Americans through employer mandates and government aid to the working poor and to control costs through premium caps.

The White House's strategy of pushing the bill it introduced in November has been to let the key congressional committees do their work with little administration interference.

White House officials intend to wait until the three House and two Senate committees with health care jurisdiction acted before stepping up their activity.

The crucial time for presidential involvement would come when both the House and Senate had acted and the time came to reconcile differences between the bills.

But the White House also hopes that the committees would have finished their work by the Memorial Day recess. As the recess starts today, none of the five panels has reported a bill.

Some Democratic lawmakers pointed to the ticking clock and said Mr. Clinton should embrace new strategy.

"I think he's been operating out of a deference to the Congress. He's been trying to counterattack the public relations attacks [by his critics]."

"There's a vacuum of leadership, and I think the president might well fill it," said Rep. Al Swift, Washington Democrat.

Rep. William J. Jefferson, Louisiana Democrat, said that he thinks it is good that Mr. Clinton has let the committees do the work, but that he also thinks the president should articulate what compromises he is willing to accept.

U.S. adds 2 ships to deployment off Haitian coastline

Aim is tighter rein on sanctions

By Martin Siefert
THE WASHINGTON TIMES

The U.S. government is sending two coastal patrol ships to shut down the inshore sanctions-busting trade between Haiti and the Dominican Republic.

State Department spokesman Mike McCurry yesterday announced the addition of close-to-shore craft to the deep-water flotilla of warships enforcing the U.N.-sanctioned embargo on Haiti that was imposed midnight Saturday. He did not specify the number of craft.

An administration source speaking on condition of anonymity said the two coastal patrol boats were being deployed and

seals) are ideally suited to get closer into shore, the administration source said.

The two ships will join the growing U.S. armada that is imposing a sweeping economic embargo against Haiti.

A total of eight U.S. warships are now off Haiti's coast, and an amphibious assault ship carrying 650 Marines is steaming toward the Caribbean for battle exercises, U.S. military officials said yesterday.

About 15 other American warships, led by the aircraft carrier USS Eisenhower, began exercises off Puerto Rico in the past week.

The ships, backed by frigates from Argentina and Canada, have been enforcing the U.N. fuel em-



A woman looks at the scene created by U.S. Ambassador William Swings' inspection visit to Malpasse, Haiti, a site of smuggling.

banic Republic that oil was being smuggled across.

A team of three U.N. officials returned Tuesday night from the Dominican Republic and are working on a report assessing the degree of sanctions busting there.

William Gray, the recently appointed U.S. special envoy on

defensive to tighten up the sanctions.

"I think our full range of policy regarding Haiti will be raised," Mr. McCurry said.

In another move to increase the pressure on Haiti's military rulers, the U.S. government is seeking to freeze the assets of Haitian businessmen who back them. U.S.

TAKING ISSUE

BY STUART TAYLOR JR.

A Clintonite Threat to Free Speech

Imagine a heated discussion of affirmative action in a constitutional law class at, say, the University of Texas. A white student complains that the Supreme Court has rigged the system so that her brother was denied admission to the law school while "less-qualified blacks" were admitted. A black student calls her "a racist liar."

As the debate heats up, the professor says: "Look, reasonable people disagree about this, but we all should recognize two facts: First, until a few decades ago, black people were excluded altogether from this law school and subjected to shameful discrimination in every area of life. Second, according to records on file in a pending lawsuit, the vast majority of our current minority students were admitted ahead of whites with higher grades and test scores, on the basis of racial preference."

This prompts a black student to shout angrily, "Are you saying we're not good enough to be here?" The professor says no; the white student growls, "You shouldn't have gotten in on a quota, over my brother."

Imagine further that afterward, a group of the black students files a complaint with the U.S. Department of Education. They charge the professor, the white student, and the university with racial harassment. The complaint states that the professor's mention of the preferential admissions system and his failure to rebuke the white student for her remarks, together with somewhat similar incidents elsewhere on campus, have contributed to a "hostile environment" for black students.

Is the professor in trouble? (If you think he should be, I despair of persuading you otherwise.)

Well, let's consult the Clinton Education Department's new guidance for its civil-rights investigators on "racial incidents and harassment against students at educational institutions," published in the *Federal Register* on March 10 by Norma Cantu, the Clinton-appointed assistant secretary of education for civil rights. It defines "racial harassment" to include creation of a "racially hostile environment" through any "verbal statements" that are "sufficiently severe that [they] would have adversely affected the enjoyment of some aspect of the [institution's] educational program by a reasonable person, of the same age and race as the victim."

Such statements, whether made by "a teacher, a student, the grounds crew, a cafeteria worker, neighborhood teenagers, a visiting baseball team, a guest speaker, parents or others," can put the institution in violation of Title VI of the Civil Rights Act of 1964 if "tolerated or left uncorrected," according to Cantu's guidance.

So in my hypothetical, if an Education Department bureaucrat were to decide that a reasonable black student might have been offended by the professor's statements—or by those of the white student—enough to affect the black student's "enjoyment" of the constitutional law class, the bureaucrat could find racial harassment and, perhaps, a hostile environment. Or, at least, the Cantu guidance lends itself to this interpretation.

In other words, *arguably offensive statements alone* (if "tolerated" by the institution) may be deemed unlawful harassment—and it would be no defense for the professor to demonstrate the truthfulness of his statements (as he could easily do).

Beyond that, the Cantu guidance specifies that the offending speech "need not be targeted at the complainant in order to create a racially hostile environment," "need not be based on the ground of the victim's or complainant's race," and "need not result in tangible injury or detriment to the victims of the harassment." And by stating that "in most cases [there must be] more than casual or isolated incidents to establish a Title VI violation," Cantu's guidance clearly implies that in *some* cases, a casual incident would suffice.

Once the university has actual or "constructive" notice of offensive speech or other racial harassment, it has "a legal duty to take reasonable steps to eliminate it." These steps include "racial awareness training" (read: indoctrination in the

politically correct school of racial sensitivity) and "imposition of disciplinary measures."

A more coercive governmental mandate for the deployment of speech-and-thought police could scarcely be devised.

To be sure, the Education Department's vague language could also be construed to absolve the professor in my hypothetical. A bureaucrat might find that the professor's remarks would not have offended a reasonable student—or, to be precise, a reasonable black student; the guidance explains that "[t]he perspective of a person of the same race as the victim is necessary because race is the immutable characteristic upon which the harassment is based." A bureaucrat might also find that any offense given in my hypothetical was not "sufficiently severe, pervasive or persistent" to create a hostile environment.

But nothing in the Cantu guidance says what should be utterly clear: that expressions of ideas and facts along the lines posed in this hypothetical are absolutely immune from governmental penalty of any kind: Instead, in two cursory footnotes, Cantu disclaims any purpose of regulating "the content of speech" and pays lip service to the need for regional staff to "consult with headquarters" on "any implications of the First Amendment"; in cases that involve (as most will) "verbal statements or other forms of expression."

Nowhere does the guidance state that reasoned debate on controversial public issues, in classrooms or otherwise, will be any more exempt from harassment liability than ugly racial epithets maliciously uttered for the purpose of physical intimidation or the infliction of emotional distress.

A similarly censorial proposed guideline—on race/color/religion/gender/national origin/age/disability harassment in the workplace—was put out for public comment last October by the Equal Employment Opportunity Commission. It defines harassing conduct to include "negative stereotyping" and "written or graphic material that denigrates or shows hostility or aversion toward an individual or group," along with epithets, slurs, and the like. (PC alert: Webster's defines *denigrate* to mean "to blacken; hence, to sully; to defame." Is the EEOC being insensitive?) A host of free-speech advocates and others have filed objections to the EEOC's proposal.

The Education Department's guidance, which unlike the EEOC document is already in force, has drawn expressions of concern from (among others) the rather liberal, pro-diversity American Council on Education, the largest organization representing colleges and universities, which would have to violate the First Amendment to comply with the guidance. Cantu has dismissed such concerns as unfounded, while suggesting that she will address

them one of these days by issuing a pronouncement on free speech.

The new liberal urge to censor that is reflected in these harassment guidelines is partly rooted in understandable concern about the power of racial epithets and other malicious expressions of hatred to wound. But an uglier impulse is also discernible: an intolerant craving to suppress ideas—and (perhaps especially) facts—that get in the way of the left-liberal agenda. Facts like the fabrication of rape and sexual-harassment charges by some women. Facts like those that Neil Hamilton, a professor at St.

Paul's William Mitchell College of Law, was persecuted for uttering.

"Two years ago."

Hamilton wrote in a publicly filed comment on the EEOC's proposed harassment guideline, "I served on the College's joint board and faculty committee to draft a diversity plan. I wrote a confidential memorandum to the faculty and board providing detailed data indicating that [as a result of the College's] aggressive affirmative action admissions policy . . . our minority students were grossly overrepresented in the bottom of the class; they also were passing the bar at a 40-percent pass rate, compared to a 90-percent pass rate for our other students. . . ."

"This confidential memorandum was given to the minority students at the College; five of them brought a complaint against me under the College's discrimination policy. The investigator found no violation of law but found me racially insensitive, and suggested that I resign from my elected positions and make a public apology."

"The EEOC proposed guidelines will provide a much stronger vehicle for this sort of assault on open discussion of the major issues of the day in the university. My memorandum would be written material that

denigrates a group because of race. The minority students felt it created a hostile environment for them. There is nothing in the guidelines that will prevent an accusation of moral turpitude, an investigation, and a tribunal for communications like my memorandum. This tactic is the essence of McCarthyism."

Is my University of Texas hypothetical far-fetched? Can one be confident that any complaint aimed at such speech would be instantly dismissed as frivolous?

Here's what Judith Winston, the Clinton-appointed general counsel of the Education Department, said when I posed my hypothetical to her: "I'm not coming to any conclusion whether that is or is not the type of incident that would be found to be racially discriminatory or racial harassment under Title VI. I'm stating no view on that."

Stuart Taylor Jr. is a senior writer with *American Lawyer Media, L.P.*, and *The American Lawyer* magazine. "Taking Issue" appears every other week in *Legal Times*.



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