Irene Bueno
04/13/2000 05:39:45 PM

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The Dallas Morning News

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April 12, 2000, Wednesday Associated Press EDITION

SECTION: NEWS; Pg. 26A

LENGTH: 433 words

HEADLINE: Officials rebuff affirmative-action criticism

SOURCE: Austin Bureau of The Dallas Morning News

BYLINE: Terrence Stutz

DATELINE: AUSTIN

BODY:
AUSTIN - Legislative leaders said a federal commission was off base when it criticized Texas on Tuesday for not having an affirmative--action plan for college admissions.

State Rep. Irma Rangel, D--Kingsville, chairwoman of the House Higher Education Committee, said Texas had no choice in the matter because the federal courts ordered the state in 1996 to quit admitting students based on race.

"It was the federal courts that ordered us to eliminate affirmative-action programs in our colleges and universities," said Ms. Rangel, noting that the U.S. Supreme Court affirmed the decision.

Her comments were in response to a report by the U.S. Commission on Civil Rights, which sharply criticized Texas, California and Florida for eliminating affirmative action in college admissions.

Unlike Texas, which ended its program under a court order, California voters eliminated affirmative action in a statewide referendum, and Florida Gov. Jeb Bush used his authority to halt the program in his state.

In response to the court decision affecting Texas, Ms. Rangel wrote a college-admissions bill passed by the Legislature that automatically admits students who rank in the top 10 percent of their high school class.

Higher-education officials have reported that because of the top 10 percent rule, minority enrollment at the state's flagship institutions - the University of Texas at Austin and Texas A&M University - has been restored to the same levels as before the 1996 ruling in the Hopwood case.

"I don't understand how they can criticize us when our [minority] numbers are up," said Senate Education Committee Chairman Teel Bivins, R-Amarillo.

Mr. Bivins said the Texas situation is much different than California's or Florida's.

"I have always been in favor of increasing minority enrollment in higher education, but the problem was that the federal courts told us students had to be admitted in a race-neutral fashion," he said.

Sen. Bivins and Rep. Rangel noted that the top 10 percent rule - criticized by the civil-rights panel - passed the Texas House and Senate with strong bipartisan support.

"Without the top 10 percent rule, we have nothing," Ms. Rangel said. "We have to have something to keep the doors open to our minority students."

She noted that the Legislature also has passed scholarship and grant programs for low-income students, another way to help many minority students get to college.

"We have been able to reach a lot of minority students in South Texas, Houston and Dallas" who otherwise might not have gone to college, she said.

LANGUAGE: ENGLISH

LOAD-DATE: April 13, 2000

Sarah Rosen Wartell
04/03/2000 07:29:58 PM

Record Type: Record

To: See the distribution list at the bottom of this message

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Subject: Fwd: FCRA

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Rody Biggert <rbiggert@seyfarth.com>
04/03/2000 06:31:01 PM

Record Type: Record

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Date: Mon, 03 Apr 2000 16:43:20 -0500
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Content-type: multipart/mixed; boundary="Boundary_(ID_AK00qyfqDlc7hmcC3X0gVA)"

As a follow-up to our recent meeting in Washington, D.C. on the application of the FCRA to employment-related investigations, we have attached a white paper which responds to the points you asked us to address. As the paper demonstrates, we remain committed to an amendment to the FCRA which provides a Section 603 exemption under certain limited circumstances, and with certain safeguards. Please call or e-mail after you have an opportunity to review so that we can discuss next steps.

- 60k3903!.WPD

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FAIR CREDIT REPORTING ACT

I Purpose of Paper

To propose and support an amendment to the Fair Credit Reporting Act, 15 U.S.C. Section 1681, et. seq. ("FCRA") relieving employers who utilize outside investigation organizations of the administrative and other burdens of complying with the Act, as they relate to employment-related investigations.

II Summary of the Issue

Whether certain employment-related investigations should be exempt from the definition of a "consumer report" under Section 603 of the Act subject to specific reasonable safeguards, or whether such employment-related investigations should be subject to the full range of the FCRA's obligations and liabilities, with only certain limited exceptions.

III Recommended Amendment

It is recommended that Section 603 be amended by excluding from the definition of a " consumer report" certain employment-related misconduct investigations as follows:

Adding at the end of Section 603(d)(2):

(D) A communication described in <u>either</u> subsection (o) <u>or (q)</u>.

Adding at the end of Section 603 the following new subsection as 603(q):

(q) Partially Excluded Communications Used For Employment Purposes. A communication is described in this subsection if it is a communication:

(1) that, but for subsection (d)(2)(D) would be a consumer report;

(2) that is made to an employer for the purpose of conducting a good faith investigation of alleged misconduct relating to employment or compliance with federal, state or local laws and regulations;

(3) that is not made for the purpose of investigating a consumer's credit worthiness, credit standing, or credit capacity;

(4) that is not provided to any person except the employer or prospective employer of the consumer, or as required by law, or pursuant to Section 608;

(5) with respect to which, if adverse action is taken based in whole or in part on the communication, the employer will disclose to the consumer a summary containing the nature and substance of the communication upon which the adverse action is based.

By way of explanation, subparagraph 2 is to allay any fears that an investigation might be done in bad faith simply to cause difficulty for an alleged wrongdoer. Thus, the employer must conduct the investigation in good faith, the alleged misconduct must relate to employment (as opposed to some other subject), and/or the investigation must be conducted to insure compliance with federal, state or local laws and regulations.

Subparagraph 3 makes clear that if an employer obtains a report dealing with credit worthiness, credit standing or credit capacity in connection with an investigation, then the exclusion does not apply and the provisions of the Act must be followed. It is unlikely that employers will need to obtain credit-related reports in connection with an employment misconduct investigation (i.e., with the possible exception of a fraud investigation to ascertain the spending habits of the alleged wrongdoer). Again, if reports dealing with credit worthiness, credit standing or credit capacity are obtained, the obligations and liabilities of the Act apply.

Subparagraph 4 is to ensure that the information is used solely for the benefit of the employer or prospective employer of the consumer, and to ensure protection of the privacy interests of the accused as well as other consumers involved in the investigation.

Subparagraph 5 provides due process protections to employees and prospective employees. Under this obligation, when an employer takes adverse action, a summary of the report stating the nature and substance of the investigation will be communicated to the alleged wrongdoer. This subparagraph also addresses the important issue that investigations, and the privacy rights of employees who provide information, will be compromised if individuals who supply information are named in a report. Hence, the use of a summary report.

The proposed amendment to Section 603 is preferred and recommended because: 1) it creates certainty in the law by setting forth a specific exclusion while including necessary protections for all consumers (witnesses, complaining employees, and the accused); 2) avoids the unintended consequences of claims regarding whether or not certain FCRA provisions govern employment-related investigations; 3) is less costly and administratively burdensome to employers and outside investigation organizations; 4) avoids chilling efficient and effective workplace misconduct investigations; and 5) provides clarity and consistency without having to seek additional exclusions to future amendments to the Act. An amendment to Section 603 is the most efficient and straightforward approach to achieving these ends.

IV Summary of Reasons Why The FCRA Should Not Apply to Certain Employment-Related Misconduct Investigations

As is clear from the legislative history and the provisions of the Act itself, the FCRA was not designed to apply to employment-related misconduct investigations. Instead, the protections were drafted to protect consumers from credit-related information transmitted between banks, credit bureaus, other financial institutions, and background investigators. The Act as presently interpreted by the FTC deters employers from using skilled and experienced outside consultants to conduct employment-related misconduct investigations because any misstep in compliance with the many detailed/technical provisions of the Act can easily result in an increased threat of litigation.

Additionally, the Act as presently interpreted chills co-workers from coming forth with necessary information for fear of having their identity disclosed; tips off wrongdoers of the possibility of an investigation into their conduct; requires (without regard to need) invasive and repetitive investigative techniques; and restricts the use of potential relevant information. Moreover, application of the Act adds unnecessary cost and time to the investigation process because of potential reinvestigations.

The Act's application to employment-related misconduct investigations will also inevitably heighten the risk of litigation for failure to comply with the many provisions containing vague/subjective requirements. When employment-related misconduct proceeds to actual litigation, plaintiffs' attorneys will simply add boilerplate FCRA counts to a complaint in the hopes of finding an inadvertent misstep which will open the door to unlimited actual and punitive damages. The courts are already overburdened with employment-related litigation. According to published statistics of the United States District Courts, employment litigation cases grew from 8,413 in 1990 to 23,755 in 1998. The addition of FCRA compliance issues will only increase this burden.

A case in point. In November, 1999 Shane Salazar sued his former employer, the Golden State Warriors, in a United States District Court in San Francisco, under the FCRA seeking over $1,000,000 in damages. Salazar, a former equipment manager, was terminated from his employment as a result of an investigation initiated by his employer that observed him using cocaine. Salazar takes no issue that while under surveillance he used cocaine, but complains that before the investigator followed him to observe his cocaine use, he should have been "tipped off" to the surveillance, and it should not have been done absent his consent. The FCRA simply should not apply to such an investigation into uncontested illegal activity.

Set forth below is a point-by-point summary of specific FCRA provisions and the unreasonable burdens imposed by the application of such provisions in connection with employment-related misconduct investigations.

V Unreasonable Burdens of Existing FCRA Provisions

FCRA Provisions	Unreasonable Burdens Imposed by Application of FCRA to Workplace Investigations

Section 604 - Permissible Purposes Conditions for furnishing and using consumer reports for employment purposes including those containing medical information.	The notice and authorization requirements of this section require an employer ("user") to tip-off employees ("consumers") that an investigation will be undertaken. In many situations, employees will immediately cease any inappropriate and/or illegal behavior, eliminating any chance of catching them " red-handed." Where violence is a concern, the notice could trigger a reaction in an employee already prone to violence. It is not sound public policy to give advance notice to employees alleged to be engaged in misconduct or unlawful activity that their employer is investigating. State and federal law already protects employees from improper disclosure of medical records (*e.g.*, doctor/patient privilege, state privacy laws, etc.).
Section 605 - Obsolescence Individuals are entitled to a "fresh start" if their problems occurred more than seven years before a consumer report is prepared. Key exceptions: no time limit on reporting criminal convictions; does not apply if the report is to be used "in connection with" the employment of an individual at a salary of $75,000 or more.	The seven-year time limit unreasonably limits an employer's right to take employment action on the basis of valid and relevant information. For example, progressive discipline stemming from acts which occurred over seven years previous to the date of the report should be available to employers making employment decisions, especially if the progressive discipline culminated in a "last chance agreement." Where permissible, employment decisions may be appropriately based, in part, on information obtained or leads derived from arrest records, civil judgments and civil suits relating to the employment position sought or held, regardless of the amount of time that has passed since the problem occurred.

Section 606 - Best Evidence Information in investigative consumer reports based on personal interviews must either be confirmed from sources with independent and direct knowledge or the person interviewed must have been the best possible source.	The terms "reasonable procedures" and "best possible source" are vaguely defined and will promote an onslaught of litigation. Already overburdened courts will face FCRA-based complaints and/or an FCRA count in every employment-related complaint. In the context of employment-related investigations, the requirement of confirmation and/or best possible source will translate to more invasive investigations prying unnecessarily into the background of witnesses. The subsequent invasive investigations will chill victims' willingness to come forward and witnesses' interest in participating in the investigation. Further, the alleged wrongdoer ("consumer") may control the best possible source of information and/or those with direct knowledge of events, further chilling victims' and witnesses' willingness to come forward. In addition, the best possible source of information may not be willing to cooperate in the investigation. This section is a particularly vivid example of how the FCRA encourages employers to utilize inexperienced and/or internal investigators who are not subject to vaguely defined "best evidence" requirements. Section 606 also requires advance consent prior to investigation. For the reasons stated in response to Section 604, it is not sound public policy to require employers to give advance notice of investigations into allegations of misconduct or unlawful activity. Such notice will "tip off" alleged wrongdoers, eliminating any chance of catching them " red-handed" (e.g., an employee accused of embezzlement will immediately cease all unlawful activity upon notice of an ongoing investigation).

Section 607 – Reasonable Procedures Reports must be prepared using reasonable procedures to assure maximum possible accuracy.	As noted above, the term "reasonable procedures" is vaguely defined and will promote an onslaught of litigation (*i.e.,* every employment-related lawsuit will allege procedures were not "reasonable" and that " maximum possible accuracy" was not achieved). In response, investigations will become unnecessarily burdensome and invasive, chilling participation by victims and witnesses. This section is another vivid example of how the FCRA encourages employers to utilize inexperienced and/or internal investigators who are not subject to vaguely defined "reasonable procedures" requirements. In addition, it will place the FTC in the position of monitoring employer-initiated investigations over areas that are already subject to the jurisdiction of other agencies (such as the EEOC, U.S. Department of Labor, and OSHA). For example, under the EEOC Guidelines, 29 C.F.R. Part 1604.11(d), employers have a duty to take "immediate and appropriate corrective action" in response to sexual harassment allegations", and yet the EEOC cautions that the techniques used to evaluate testimony, the scope of the investigation itself, and the weight given to evidence must be determined on a case-by-case basis. EEOC Policy Guidance on Sexual Harassment Issues (March 19, 1990).

<u>Section 609 - Accountability</u> Consumer reporting agencies (CRAs) must disclose to individuals the identity of anyone obtaining an employment report on them in the prior two years.	Results of employment-related misconduct investigations are subject to privilege and privacy concerns, and are not generally shared between employers. Since the information is not generally in the public domain, the need for disclosure to the consumer is obviated. Furthermore, information often comes to light during an investigation that is not relevant and not considered by the employer in making a final determination. It serves no purpose to provide that information to the consumer. In addition, CRAs engaged in such investigations do not maintain files on individuals. Rather, the files address the particular incident that prompted the investigation. Thus, disclosures relating to individuals impose an undue burden on CRAs functioning in the employment context. CRAs conducting employment-related investigations do not have access to information about what reports have been generated about an individual over the prior two years. Further, a report previously obtained by an employer who complied with FCRA notice and authorization requirements should not be subject to additional disclosures (risks tipping off wrongdoers of reports legally obtained where no adverse action was taken). Many of the concerns set forth under Section 615, below, are also applicable to Section 609.
<u>Section 610 - Disclosure to Consumers</u> CRAs are required to obtain proper identification from consumers before disclosure of a report and must have trained personnel to explain any information furnished about the consumer.	CRAs conducting employment-related investigations rarely have direct contact with consumers regarding the results of the investigation. The type of information reported pursuant to a workplace investigation is not the type that requires special explanation, and should not be distributed to others. Many of the concerns set forth under Section 615, below, are also applicable to this Section.

Section 611 - Accuracy Disputes Individuals have the right to dispute, at no charge, information in their consumer report. Disputes must generally be resolved within thirty days.	First, this requirement is clearly meant to apply to situations in which there is a dispute over a consumer's credit history, not to an investigation of an allegation of employee misconduct. In the employment context, resolution of disputes would almost always require reinvestigation of the incident giving rise to the original investigation (including reinterviewing complaining witnesses and co-workers). These interviews will often require reinterviewing witnesses about sensitive subjects. Commonly this requirement would put the CRA in the position of requesting from employers the right to engage in a reinvestigation of employees (usually during work time and on work premises). Ultimately, the risk of reinvestigation will chill victim/witness incentive to participate in such investigations and provides disincentive for employers to utilize experienced outside organizations where inexperienced and/or internal investigators are not subject to reinvestigation requirements. This provision will also add significantly to the cost of an investigation. If a CRA is used, this section will promote an onslaught of litigation (*i.e.*, every employment-related lawsuit will allege insufficient reinvestigations).

Section 612 - Free Disclosure Individuals are entitled to a free copy of their report if requested within 60 days of the adverse employment action.	Results of employment-related misconduct investigations are subject to privilege and privacy concerns. Sharing such reports in their entirety with consumers violates such concerns, and will ultimately chill victims' willingness to come forward and witnesses' interest in participating in the investigation. Since the information is not generally in the public domain, the need for complete disclosure to the consumer is obviated. Further, CRAs engaged in such investigations do not maintain files on individuals. Rather, the files address the particular incident that prompted the investigation. Thus, disclosures relating to individuals impose an undue burden on CRAs functioning in the employment context. Disclosure of complainants names may be in conflict with other federal laws as well as the EEOC Guidelines on Harassment in the workplace. Such disclosures increase the likelihood of workplace violence, retaliation, and/or disruption of working relationships.
Section 613 - Public Record Accuracy Special procedures must be employed to insure the accuracy of public record information reported for employment purposes or the public record information must be provided to the individual so that they can dispute its accuracy.	Provision of public record information to consumer will tip-off consumer to ongoing investigation. CRAs conducting employment-related misconduct investigations have no power to verify accuracy of public information. Vaguely defined "special procedures" and "public record" leave provisions open to interpretation leading to increased litigation.
Section 614 - Current Information Information in investigative consumer reports must be reverified if more than three months old.	Employment-related misconduct investigations are too broad in scope to be reverified if over three months old. Victims/witnesses would have to be reinterviewed on sensitive subjects, thus infringing upon their privacy interests on oftentimes sensitive subjects. Reliable or "best" sources of information may not be available for reverification. *See* Section 611.

Section 615 - Adverse Action Notices Individuals must be told that an adverse action has been taken against them based in whole or in part on a consumer report along with a statement of their rights and contact information for the CRA.	Results of employment-related misconduct investigations are subject to privilege and privacy concerns. Sharing such reports in their entirety with consumers violates such concerns, and will ultimately chill victims' willingness to come forward and witnesses' interest in participating in the investigation. Since the information is not generally in the public domain, the need for complete disclosure to the consumer is obviated. Further, CRAs engaged in such investigations do not maintain files on individuals. Rather, the files address the particular incident that prompted the investigation. Thus, disclosures relating to individuals impose an undue burden on CRAs functioning in the employment context. Disclosure of complainants names may be in conflict with other federal laws as well as the EEOC Guidelines on Harassment in the workplace. Such disclosures increase the likelihood of workplace violence, retaliation, and/or disruption of working relationships.
Sections 616 & 617 - Civil Liability Aggrieved individuals have a civil cause of action against those who have violated the FCRA with no limit on actual damages.	This section is a particularly vivid example of how the FCRA encourages employers to utilize inexperienced and/or internal investigators because, although they may not provide the best investigative techniques and greatest privacy protections for all involved, at least they will not expose the employer to liability for punitive damages under the FCRA. This approach is directly contrary to that taken by virtually every other federal employment law (such as Title VII of the Civil Rights Act which cap damages at $300,000).
Sections 619, 620 & 621 - Gov. Enforcement Civil and criminal governmental remedies for FCRA violations.	All of the same comments noted under Sections 616 & 617 are applicable here. Criminal penalties generally are not available in comparable state and federal employment laws.
Section 623 - Furnisher Liability Information should not be provided to a CRA that is known to be inaccurate.	Protections are currently in place to insure against inaccurate information (*e.g.*, defamation tort). In employment context, furnishers of information rarely " regularly and in the ordinary course of business" furnish information about individuals. As to reinvestigation requirement, *see* Sections 611 & 614.

VIWorkplace Investigations Are Necessary, And Existing Protections

Obviate The Need For Additional Burdensome Regulation

The primary purpose of the Fair Credit Reporting Act is to provide reasonable procedures for the assembly and evaluation of information about consumers with regard to confidentiality, accuracy, relevancy, and proper utilization of information. Toward this goal, the Act imposes significant notice and authorization requirements on employers who are required by numerous sources to investigate allegations of misconduct and compliance with employment laws. As it relates to such workplace investigations, an amendment to the Act simplifying those notice and authorization requirements is appropriate because safeguards already exist to insure fairness with regard to confidentiality, accuracy, relevancy, and proper utilization of information.

A. Sources of Employers' Legal Duty to Investigate Alleged Misconduct and Compliance with Employment Laws

The duty to investigate workplace misconduct and compliance with employment laws is directly or indirectly imposed on employers by a variety of federal, state and local statutes, constitutions, regulations and/or common law (court-made law).

The Federal Civil Rights Acts of 1964 and 1991 and similar state laws impose an affirmative obligation on employers to investigate complaints of harassment. Under those laws, employers risk liability for the acts of employees, and even customers, who harass employees on the basis of race, religion, color, national origin, ancestry, physical disability, medical condition, marital status, sex or age. The Supreme Court has recently affirmed the duty to investigate complaints of harassment, establishing an affirmative defense to liability only where the employer has exercised reasonable care to "correct promptly any ... harassing behavior." Further, the Equal Employment Opportunity Commission had developed guidelines such as the 1990 Policy Guidance on Current Sexual Harassment Issues, that detail procedures to be followed in an investigation of alleged sexual harassment, including the content of the investigation, and the evaluation of evidence. Even those Guidelines caution that every investigation is by its nature different, and the scope and nature of the investigation must be determined on a "case-by-case basis."

State and federal laws regulating health and safety in the workplace impose an affirmative duty on employers to provide a safe workplace and to investigate potential hazards including exposure to workplace violence. Thorough investigations in the area of safety and health not only reduce the risk of exposure under these statutes, but they may also reduce the risk of workers' compensation claims and personal injury lawsuits from employees and members of the public.

The Federal Drug-Free Workplace Act and individual department regulations, such as Department of Defense regulations, require employers with government contracts to provide drug-free work environments. A duty is imposed on employers to investigate and eliminate drug use in the workplace as well as to establish drug-free awareness programs, employee assistance programs, drug counseling, and procedures for notifying the employer of convictions under criminal drug statutes.

Investigations of applicants and employees are increasingly important in avoiding liability for the torts of negligent hiring, supervision and retention. For example, a Colorado jury awarded damages of $210,000 in a sexual assault case where, the jury found, the employer would have learned of the employee's prior child molestation conviction if it had conducted a thorough reference check.

Several state and federal courts have ruled that an employer cannot be liable for wrongful termination if the firing followed a good-faith investigation that found reasonable grounds for believing the misconduct occurred. The same holds true in cases alleging breach of the implied covenant of good faith and fair dealing. As a result, employers are compelled to conduct good-faith investigations to determine whether reasonable grounds for termination exist.

Numerous other state and federal statutes explicitly or implicitly require employers to conduct workplace investigations. For example, federal securities laws impose affirmative obligations upon broker-dealers to establish, maintain and enforce procedures designed to prevent and detect violations by employees. Similarly, in many instances employers investigate Medicare fraud and abuse on their own initiative or in response to reports from individual employees. The FCRA unreasonably interferes with employers' numerous investigation requirements.

B. Existing Safeguards Insure Fairness

1. Confidentiality, Accuracy, Relevancy, and Proper Utilization of Information

In addition to requiring investigations, federal, state and local statutes, constitutions, regulations and/or common law require investigators to be fair with regard to confidentiality, accuracy, relevancy, and proper utilization of information. To illustrate, there are four theories of recovery for the tort of invasion of privacy under common law. Of the four, three are directly relevant to investigations: (1) public disclosure of private facts; (2) placing in a false light; and (3) intrusion into another's seclusion. In addition, the constitutions of Alaska, Arizona, California, Florida, Massachusetts, Montana and Rhode Island have specific provisions protecting the right of privacy.

Additional safeguards exist in common law. For example, an employer who divulges information gained in an investigation to anyone without a "need to know" (*e.g.*, third parties, including co-workers, office staff and personal friends) risks liability for defamation. Furthermore, as mentioned above, courts have ruled that an employer cannot be liable for wrongful termination if the firing followed a good-faith investigation. Thus, many plaintiffs' attorneys are attacking the quality of an employer's investigation (negligent investigation) rather than disproving the misconduct occurred. The risk of such attacks insure that investigatory procedures are fair and comprehensive. Another example involves false imprisonment. Investigations, and particularly witness interviews, create a risk of liability for false imprisonment involving allegations that the employer intentionally confined or restrained an individual's physical liberty. Likewise, investigations conducted in extreme and outrageous ways raise a risk of liability for intentional infliction of emotional distress.

Even criminal law provides protections for abuse of proper investigatory procedure. To illustrate, an employer who institutes unsuccessful criminal or civil proceedings against an employee without probable cause and for an improper purpose may be charged with malicious prosecution. Employers also face liability for the wrongful actions of its agents (*e.g.*, police or private security guards).

State and federal laws also govern the proper collection of information that may be included in a workplace investigation. Such laws prohibit the interception of electronic and oral communications of others on cellular phones, in electronic mail and in computer transmissions. Similar laws limit the use of polygraph examinations by employers, prohibiting the use of such examinations for either pre-employment screening or to test current employees. In addition to the Federal Employee Polygraph Protection Act, approximately 20 states have prohibited or severely restricted the use of polygraphs.

In a union environment, employees are afforded additional protections. For example, the National Labor Relations Act ("NLRA") requires employers to bargain over the implementation of investigative procedures. In addition, an employee can insist upon union representation at an employer's investigatory interview that might reasonably result in disciplinary action. Further, disciplinary actions against employees are governed by a just cause standard, and an alternative dispute resolution procedure is utilized to resolve differences of opinion. Similarly, government employees who are disciplined can assert violations of "procedural due process," *i.e.*, that they did not get notice of the charge(s) or a fair chance to tell their side of the story. Federal employees subject to civil service protection can challenge discipline through the Merit Systems Protection Board.

Finally, many state and federal laws prohibit retaliation against employees who participate in a legitimate complaint involving the workplace. To avoid liability, therefore, employers may not use workplace investigation reports to retaliate against such employees.

2. <u>Access to Reports</u>

Several authorities also grant employees access to workplace investigation reports. Many state and federal laws require employers to retain personnel records (including workplace investigation reports) for extended periods of time to insure their availability in connection with audits and litigation. For example, case law interpreting the Employee Retirement Income Security Act ("ERISA") grants benefit plan participants the right to access and review all information that formed the basis for a denial of benefits, including the results of any investigation into the participant's eligibility for benefits. Similarly, most states require employers to allow employees access to their complete personnel records. In the litigation context, non-privileged workplace investigation reports are almost certainly relevant to employment related litigation, and would therefore be subject to production pursuant to a discovery request.

VII Current Landscape For Employment Misconduct Investigations

The FCRA currently does not apply to investigators who are not consumer reporting agencies. Thus, investigations by the following are not governed by the Act:

- any company employee, regardless of their lack of information & training (e.g., president, business manager, director of human resources, internal legal counsel, internal private security guards, a part-time employee).

- any employee regardless of their bias and/or relationship to individuals involved in the investigation.

- any outside consultant who does not regularly engage in workplace investigations or who does not accept a fee for engaging in workplace investigations.

Instead, many employers have chosen to conduct investigations through professional consultants who regularly provide employers with investigative services designed to meet their legal obligations to employees. The following are examples of instances where an employer may opt for an outside investigation entity:

- small businesses without any internal human resource/legal resource.

- employers of any size, large or small, that want to comply with recent Supreme Court rulings and the EEOC guidelines and provide employees with prompt, impartial and thorough EEO investigations by a well trained professional.

- executives accused of wrongdoing creating fear of bias in outcome.

- individuals with responsibility to investigate may themselves be accused of wrongdoing.

- accusations that may be too time consuming or time sensitive to use existing internal resources.

- accusations that may require investigative techniques/knowledge of laws not available internally.

- accusations that invoke complex laws with potentially competing interests.

However, as noted above, employers who chose to investigate through outside consultants who regularly engage in this type of work face undue scrutiny and burdensome administrative and other requirements under the FCRA. The ultimate question is what heightened risk is it to consumers when employers choose outside objective, trained, and experienced consultants to conduct employment-related misconduct investigations. The clear answer is none.

Indeed, an outside consultant will provide an employer the skill and knowledge to conduct a comprehensive investigation as required by many laws and consistent with good employer-employee relations. Additionally, outside consultants can supply employers with investigations free of bias and with less chance of a privacy risk.

Finally, the use of outside consultants will ultimately inure to the benefit of the consumer. As an alleged wrongdoer, the consumer is entitled to a fair and complete investigation conducted by persons skilled and knowledgeable regarding the issue at hand to minimize the chance of an improper decision being made with respect to the accusations leveled at the consumer.

For all of the above reasons, the Act should be amended in the manner proposed herein.

The Chamber of Commerce of the United States of America
Chicagoland Chamber of Commerce
The East-West Corporate Corridor Association
The Management Association of Illinois

Metropolitan Chicago Health Care Council
National Council of Investigations and Security Services
Newspaper Association of America
Society for Human Resource Management

April 3, 2000

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04/18/2000 05:32:23 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: "Pierce, Raymond" <Raymond_Pierce@ed.gov>, "August, Taylor" <Taylor_August@ed.gov>
Subject: FW: Revised Texas Draft

Hi Peter,

Attached is the most recent draft of the Texas Agreement, based upon negotiations we had with the State on April 6. The major changes between this draft and the earlier draft we shared with you are the bolded section, particularly p. 6-7. We look forward to meeting with you tomorrow at 2:30. Please share with others who will be in attendance.

Thanks you,

Sue Bowers/OCR
> <<Revised Texas Draft 4-18-00.doc>>

- Revised Texas Draft 4-18-00.doc

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Bethany Little/OPD/EOP

Draft Texas Commitment

The State of Texas is committed to ensuring equal access to high quality education for all of the State's citizens regardless of race, color, or national origin, and is aware of its affirmative duties under Title VI of the Civil Rights Act of 1964. Texas has been and will continue to be engaged in on-going efforts to provide all of its citizens with full opportunities to participate in the benefits of the State's public higher education system.

I. LEGAL CONTEXT

A. Fordice

In United States v. Fordice, the Supreme Court found that, under Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment, race neutral policies alone are not sufficient to determine that a state has effectively discharged its affirmative obligation to dismantle a formerly *de jure* segregated system of higher education. According to the standards announced by the Court, "[i]f policies traceable to the *de jure* system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound education practices." Fordice, 112 S.Ct. at 2737.

The Court urged an examination of "a wide range of factors to determine whether [a] state has perpetuated its formerly *de jure* segregation in any facet of its institutional system." Fordice, 112 S.Ct. at 2735. As identified by the Court, a few examples of this wide range of possible factors include, but are not limited to, the following: admissions standards; program duplication; institutional mission assignments; and continued racial identifiability of previously segregated institutions. The Court went on to note:

> If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects—whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system—and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system. Fordice, 112 S.Ct. at 2736.

B. The United States Department of Education, Office for Civil Rights (OCR) Federal Register Notice

Responding to inquiries concerning the effect of Fordice, on January 31, 1994, OCR published a Notice in the Federal Register, 59 Fed. Reg. 4271 (1994), outlining the procedures and analysis that the agency planned to follow in future reviews of states with a history of de jure segregated systems of higher education.

The Notice stated that OCR planned to apply the Fordice standard to all pending Title VI evaluations of statewide higher education systems with OCR-accepted desegregation plans that had expired, including Florida, Kentucky, Maryland, Pennsylvania, Texas, and Virginia. Specifically, the Notice explained that OCR planned to examine a wide range of factors to ensure that the vestiges of these States' systems have been eliminated. The comprehensive array of factors that OCR planned to consider included those addressed in Fordice and those reflected in the criteria for acceptable desegregation plans specified in the Department's "Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education," published in the Federal Register on February 12, 1978, (43 Fed. Reg. 6658). 59 Fed. Reg. 4272.

Additionally, OCR reaffirmed in the Notice its position that States may not place an unfair burden upon African American students and faculty in the desegregation process and that State systems of higher education may be required to strengthen and enhance historically black institutions. Further, OCR announced that it planned to "strictly scrutinize state proposals to close or merge traditionally or historically black institutions, and any other actions that might impose undue burdens on black students, faculty, or administrators or diminish the unique roles of those institutions." 59 Fed. Reg. 4272.

C. Summary

From the conclusion of Texas' five-year Plan in 1988 until the current review, which officially began in 1997, OCR did not comment upon the status of the State's compliance with Title VI. However, in January 1994, Raymond Pierce, Deputy Assistant Secretary for Civil Rights for the Department, informed the State of OCR's intent to reexamine the status of Texas' desegregation efforts in its state-supported system of higher education. In a February 1997 letter to Governor Bush, Assistant Secretary Norma V. Cantú indicated the benefits of collaboration between the State and OCR. During the initial meeting between OCR and the Governor's representative at the outset of the review, OCR explained its desire to work collaboratively with the State to address OCR's concerns. Following OCR's data collection and on-site visits to selected institutions, and beginning in March 1999, the State and OCR held a series of meetings which have culminated in the resolution as described herein and formation of the collaborative process.

What happened 1994-1997?

What were OCR's concerns?

II. TEXAS COMMITMENTS

As part of its continuing efforts to create the best possible higher education opportunities for all Texans seeking postsecondary education, the State of Texas, without admitting that any of its present day policies or practices are traceable to its prior *de jure* dual system, voluntarily commits to engage in a collaborative process with OCR. The purpose of this process is to identify and implement specific measures that are realistically designed to produce results in addressing issues of concern presented to Texas regarding its higher education system, as reflected in the initiatives described below. In addition, the State has taken the initiative to address other related issues affecting access to higher education in Texas in order to ensure a comprehensive and integrated plan for Texas higher education.

It is understood that when the public agencies or institutions of higher education in Texas implement any of the measures or operate any other programs relating to admissions or financial aid in a race-conscious manner, they must operate in conformity with Title VI of the Civil Rights Act of 1964, and its implementing regulations, applicable federal court case law, including Fordice, Regents of the University of California v. Bakke, 438 U.S. 265 (1978), Hopwood v. Texas 78 F.3d 932(5th Cir.1996), and the U.S. Department of Education's published policy regarding race-targeted financial aid, 59 Federal Register 4271 (Feb. 23, 1994), so long as they are controlling law.

Texas is developing a comprehensive plan for its higher education system that, among other things, will address OCR's concerns through a collaborative process involving the State and OCR. To that end, Texas commits to develop specific recommended **measures** that reflect the following initiatives, including approximate spending levels required to implement those **recommendations**. These recommendations will be incorporated into the Board's comprehensive education plan. The Board will recommend the plan to the Texas legislature. The Governor, as chief executive officer of Texas, will approve the **measures** contained in the plan and recommended by the Board, formally notify OCR of his approval of the **measures**, and advocate their adoption by the legislature. Those initiatives are as follows:

TX develop spec. measures
Incorp part of Board's ~~[illegible]~~ comprehensive ed. plan + recommend to State leg.
Gov. approve plan, notify OCR + advocate leg. adopt.

1. Further define and enhance the missions of Texas' historically black institutions to ensure that they do not promote racial identifiability and that they do foster desegregation in other areas to the extent practicable. *To this end, these missions will be given expression through program enhancement at the historically black institutions and program differentiation as between historically black and historically white institutions* (HWI) *serving the same or similar service areas, or having overlapping missions from the de jure era. Actions related to the missions of these institutions will ensure that their missions are not based on race, either overtly or by inference. These actions will include* ***authorizing*** *new, high value high demand academic programs that are not unnecessarily duplicative of programs offered by proximate historically white institutions (HWIs), and strengthening existing programs, at historically black institutions in a manner that is congruent with their statutory missions and mission statements, as enhanced or otherwise modified.*

2. Strengthen existing academic programs and **authorize** new, high value, high demand programs or program components, that are not unnecessarily duplicative of programs offered by proximate HWIs at each of the historically black institutions. **The State will use its best efforts to ensure that the necessary actions are taken to ensure the successful implementation of those authorized programs.** *The steps necessary to implement the programs or components, the personnel and other resources necessary to successfully implement and begin operating such programs, and the funding requirements will be clearly identified along with implementation dates.*

3. Provide Texas' historically black institutions the facilities and other resources needed to ensure the successful implementation of measures identified pursuant to items 1 and 2. *The resources provided will include, but will not be limited to, new facilities or modifications to existing facilities, additional equipment and laboratories, additional faculty and staff, technological improvements, expanded library resources and other fiscal and human resources.*

4. Enhance facilities at Texas' historically black institutions and ensure equity with **comparable** HWIs with respect to physical character **(e.g., campus image, ambience, campus landscape and visual attractiveness)**, quality, adequacy and availability of facilities to support programs. *This includes the provision of sufficient resources and strategies to ensure current equity, and the provision of all appropriate assistance to the institutions to ensure the development, funding and implementation of projects to address capital improvements and operations and maintenance needs.*

5. Improve the recruitment, retention, and participation rates of African-American and Hispanic students at the State's historically white institutions. *The State and its institutions have long been engaged in efforts to improve the recruitment, retention, and graduation of African American and Hispanic students in the historically white institutions. The State and its institutions are committed to the continuing support, implementation, and where possible, the augmentation of these efforts to improve*

recruitment, retention and success of other race students, faculty, and staff. ***The Task Force on Participation and Success will make recommendations for inclusion in the comprehensive plan. These recommendations will not be part of the initiatives produced by the Committee on OCR Issues.***

board

The State has placed the responsibility for developing measures reflecting the above commitments and addressing other related issues with the Texas Higher Education Coordinating Board. The Board is engaged in a comprehensive planning process for Texas higher education and has recently designated a Higher Education Planning Committee to identify the five most important goals for a new higher education plan, and the best strategies for reaching the goals by specific dates. This statewide planning process includes two major committees which will address not only issues identified by OCR, but also the broader issues of African American and Hispanic student access, retention, and graduation with respect to higher education in the State.

Board
– OCR
~~– Board~~
Task Force
– relat

The first of these is the Committee on OCR Issues. The charge of the Committee on OCR Issues states in part:

OCR cmte

> Texas is committed to providing quality education for all of its people. In addition, the state is committed to strengthening Texas' historically black universities, Prairie View A&M University and Texas Southern University, along with the state's other public universities. To carry out those commitments, the Texas Higher Education Coordinating Board will create a new higher education plan for the entire state. The concerns of the OCR will be addressed through the process used to develop the new plan.
>
> The Higher Education Planning Committee appointed by the Coordinating Board chair will recommend the new plan to the Board. The Planning Committees will receive recommendations from the Task Force on Participation and Success, the Task Force on Medical, Nursing and Allied Health Education, the Task Force on Development of the Technological Workforce and from the Committee on OCR Issues.

The Committee on OCR Issues will collaborate with OCR throughout the development of the State's measures with respect to substantive input and outcomes as well as process.

The Committee on OCR Issues is comprised of stakeholders drawn from university-related groups and employer-related groups, including alumni, governing board members, administrators and faculty from the historically black institutions and from the higher education community at large. Employer-related members include private and public sector employers, relevant licensing agency representatives, and representatives from the Greater Houston Partnership.

The second committee central to this effort to improve African American and Hispanic student access, retention, and graduation is the Task Force on Participation and Success, also a critical part of the State's comprehensive planning process for higher education. The Board's charge to the Task Force on Participation and Success is to review the gaps in participation and graduation between Texas and other states, and within the State of Texas; identify the best strategies to increase participation in higher education; identify the best strategies to increase the number of students graduating from Texas public colleges and universities; and identify target years for closing gaps in participation and success in higher education.

The Task Force on Health Professions Education and the Task Force on Development of the Technological Workforce are the two other committees that will provide recommendations to the Higher Education Planning Committee. The State will facilitate communication among each of the four committees to assist in the development of comprehensive strategies that will effectively address the issues identified by OCR. To assist in that effort, OCR will be notified and invited to attend all meetings of these committees and will be provided status reports on committee discussions.

Dates

The work of these committees will culminate in April 2000, with recommendations to the Higher Education Planning Committee on May 1, 2000. The Higher Education Planning Committee will submit the recommended measures of the Committee on OCR Issues and the recommended measures of the Task Force on Participation and Success to OCR for official comment in May 2000. OCR will provide the Office of the Governor and the Higher Education Planning Committee with official written comments on the acceptability of the Committee's recommendations by June 16, 2000. The official comments will address whether the recommendations are realistically designed to accomplish the objectives embodied in the initiatives set forth above and may identify potential remedial measures. The Higher Education Planning Committee will submit its initial recommendations to the Board on June 22, 2000. This submission will reflect its work and also be responsive to the OCR comments and concerns. Immediately thereafter, a copy of this submission will be sent to OCR. In July, 2000, if necessary, OCR, the Governor's office, the Higher Education Coordinating Board and other officials that the State deems appropriate will engage in discussions regarding the responsiveness of the Higher Education Committee's recommendations to the OCR comments and concerns. By August 2000, the State will either accept and

6/16

7/2000

8/000

incorporate the comments and suggested modifications presented by OCR or provide pedagogically sound reasons, supported by documentation, as to why the OCR comments and suggested modifications are not being responsively addressed. To facilitate the resolution process, by September 18, 2000, OCR may file official written comments with the Office of the Governor and the Board on the acceptability to OCR of the measures that will present OCR's preliminary conclusions, acknowledge progress, and indicate deficiencies which may require further State efforts. Prior to Board action, the State will provide its response to the OCR official written comments by October 18, 2000, which will detail actions it will take to eliminate any deficiencies indicated by OCR. 9/18/00 10/18/00

The Board will vote on the OCR related specific measures contained in the comprehensive education plan on October 27, 2000. The measures in the adopted comprehensive education plan will be submitted to OCR on November 10, 2000 after Board approval. OCR will assess the acceptability of the OCR related measures in the comprehensive education plan. It is anticipated that the measures will address all concerns that OCR had communicated. If not, OCR will notify the Office of the Governor of any remaining issues that it may have regarding those measures within 20 days of their receipt. OCR and the State will engage in good faith discussions to address OCR's concerns, resolve any differences, and if necessary, develop alternative methodologies and approaches realistically designed to address the initiatives described herein. The Office of the Governor and OCR will collaborate to ensure that the measures satisfy the criteria of Title VI. OCR will determine the acceptability of any modifications to the measures. These measures will constitute the "final State implementation plan" (hereinafter the implementation plan). The Governor, as chief executive officer of Texas will approve the implementation plan and advocate its adoption by the legislature. The State will begin implementation of measures not requiring funding or other legislative action as soon as practicable after OCR's acceptance of the final implementation plan. The State will begin implementation of measures requiring legislative action or funding as soon as practicable after legislative action. The Governor will take necessary action to ensure that implementation of the State's implementation plan begins no later than the beginning of the 2001-2002 academic year. 10/27/00

Because the State and OCR recognize that the affected universities' governing boards will play an important role in implementation, the State will continue to ensure that these governing boards are of the highest caliber and will continue to assist the governing boards in effectively carrying out the agreement. The State and OCR will continue to collaborate during the monitoring and implementation period of the final State plan until implementation is completed.

III. MONITORING

The term of this commitment will be from the date it is signed through the completion of the measures in the implementation plan provided it is accepted by OCR. During the **implementation period** of the measures, OCR will not initiate enforcement action against Texas based on its compliance efforts regarding the initiatives stated herein, unless good faith, voluntary efforts to resolve OCR's continuing concerns about the plan have been attempted and exhausted, pursuant to 42 U.S.C. § 2000d.

The **implementation** plan will include a monitoring component to ensure the timely implementation of the measures developed and adopted. The **implementation** plan, once approved by OCR, will be appended to this document. At the conclusion of the monitoring period, a determination will be made as to whether the measures in the **implementation** plan have been fully implemented and whether the Title VI and Fordice issues have thereby been resolved, thus concluding the review. If so, OCR will formally acknowledge, in writing, that Texas has eliminated all vestiges of segregation in the public system of higher education, in accordance with Fordice, Title VI, and applicable federal regulations. It is understood, however, that should the State and OCR not be able, in good faith, to resolve matters by means of this process, OCR reserves the right to determine, by other means, whether the requirements of the law have been satisfied regarding the outstanding issues set forth herein, taking into account Texas' accomplishments under this agreement.

For the State of Texas
George Bush
Governor

Date

For the Office of Civil Rights
Department of Education

Date

"Pierce, Raymond" <Raymond_Pierce@ed.gov>
03/22/2000 05:54:14 PM

Record Type: Record

To: Irene Bueno/OPD/EOP, Bethany Little/OPD/EOP, "'peter_rundlett@opd.eop.gov'" <peter_rundlett@opd.eop.gov>

cc:
Subject: FW: Texas Higher Education Desegregation Case

Note: Some recipients have been dropped due to syntax errors.
Please refer to the "$AdditionalHeaders" item for the complete headers.

> -----Original Message-----
> From: Pierce, Raymond
> Sent: Wednesday, March 22, 2000 5:50 PM
> To: 'peter_rundlett@odp.eop.gov'; 'bethany_little@0pd.eop.gov';
> 'irene_bueno@odp.eop.gov'
> Cc: Bowers, Susan
> Subject: Texas Higher Education Desegregation Case
>
>
> I mentioned to you all that we are nearing a key point in our Texas Higher
> Ed Deseg case and that it would be good for you to have an understanding
> of where we are and discuss next steps. It would be helpful if we could
> come over and brief you folks before the end of the week (Bethany, my
> daughter would appreciate not discussing this on weekends). We will send
> some materials in advance. Thanks.
>
> Raymond

"Pierce, Raymond" <Raymond_Pierce@ed.gov>
03/23/2000 09:56:18 AM

Record Type: Record

To: Bethany Little/OPD/EOP, "Pierce, Raymond" <Raymond_Pierce@ed.gov>
cc: Irene Bueno/OPD/EOP, "'peter_rundlett@opd.eop.gov'" <peter_rundlett@opd.eop.gov>, "Bowers, Susan" <Susan_Bowers@ed.gov>
Subject: RE: FW: Texas Higher Education Desegregation Case

Note: Some recipients have been dropped due to syntax errors.
Please refer to the "$AdditionalHeaders" item for the complete headers.

We also are sending you some briefing papers. Let me know if the system delivers them.

> -----Original Message-----
> From: Bethany_Little@opd.eop.gov [SMTP:Bethany_Little@opd.eop.gov]
> Sent: Wednesday, March 22, 2000 7:10 PM
> To: Pierce, Raymond
> Cc: Irene_Bueno@opd.eop.gov; 'peter_rundlett@opd.eop.gov'
> Subject: Re: FW: Texas Higher Education Desegregation Case
>
> I very much appreciate the offer, and think that your daughter is wise
> beyond her years! I am available between 12:00 noon and 3:00 pm tomorrow
> (Thursday) as well as between 1:00 pm and 4:00 pm Friday. Look forward to
> seeing you!
>
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>
> (Embedded
> image moved "Pierce, Raymond" <Raymond_Pierce@ed.gov>
> to file: 03/22/2000 05:54:14 PM
> PIC13213.PCX)
>
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>
> Record Type: Record
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>
> To: Irene Bueno/OPD/EOP, Bethany Little/OPD/EOP,
> "'peter_rundlett@opd.eop.gov'" <peter_rundlett@opd.eop.gov>
>
> cc:
> Subject: FW: Texas Higher Education Desegregation Case

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> Note: Some recipients have been dropped due to syntax errors.
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> > -----Original Message-----
> > From: Pierce, Raymond
> > Sent: Wednesday, March 22, 2000 5:50 PM
> > To: 'peter_rundlett@odp.eop.gov'; 'bethany_little@0pd.eop.gov';
> > 'irene_bueno@odp.eop.gov'
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> > Subject: Texas Higher Education Desegregation Case
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> > daughter would appreciate not discussing this on weekends). We will
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> >
> > Raymond
>
>
>
> << File: PIC13213.PCX >>

Talking Points
Texas Higher Education Desegregation
March 2000

what are the stnds?

- In 1994, OCR issued Federal Register guidance setting forth its higher education desegregation obligations under the U.S. Supreme Court opinion in U.S. v. Fordice. That guidance explained in detail the standards that would guide OCR's efforts to complete ~~long-standing~~ obligations among 7 "open" states, including Texas. The Texas investigation, initiated in February 1997, was conducted pursuant to the Fordice standards.

vestiges exist

- OCR's assessment of materials gathered during the two-year investigation in Texas led to preliminary conclusions that vestiges traceable to the prior de jure system of higher education remained in the following areas: institutional missions assignments; program duplication and offerings; allocation of land grant programs and resources; facilities; funding; and racial identifiability.

- Beginning in March 1999, OCR has held a series of meetings with Texas officials to share information regarding its preliminary conclusions and to explore avenues for achieving a resolution of outstanding issues. Texas agreed to work collaboratively with our Office to develop a plan to address the vestige areas preliminarily identified by OCR.

- During the fall of 1999, the State formed a "Committee on OCR Issues" to develop recommendations to address OCR's preliminary conclusions. The Texas Higher Education Coordinating Board is engaged in a comprehensive planning process for Texas higher education and the Committee on OCR Issues is one of four committees of the larger statewide higher education planning process. OCR and the State agreed to work to develop a Commitment at the same time as the Committee on OCR Issues is developing its specific recommendations.

- The current draft Texas Commitment provides the framework within which Texas will identify the specific actions that Texas will take to address areas where OCR reached preliminary conclusions that vestiges remain. The draft does not yet identify specific actions. However, ~~the action~~ steps will be identified in a final implementation plan, which will be submitted to OCR for approval, appended to the Texas Commitment, and monitored.

- Through working collaboratively with Texas officials and the Committee on OCR Issues, OCR has provided continuous feedback and input to the State on developing remedial strategies to address OCR's concerns. OCR also made its expert consultants available to the State and its Committee. OCR will continue the collaborative process throughout the spring and summer in an effort to ensure that the final implementation plan submitted by the State will remedy the preliminarily identified vestiges.

Fax Transmittal

Raymond C. Pierce
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400 Maryland Avenue
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E-Mail: raymond_pierce@ed.gov

Number of Pages (including cover sheet) 3

To: Irene Bueno

Fax Number: 456-5581

Comments: Re: Texas Higher Education Desegregation case. I mentioned this to you when we spoke last. This article from last week gives you an idea of some of the interest in this case. Jesse Jackson's comments were beneficial to our efforts. I spoke with Congresswoman Sheila Jackson-Lee this morning and she emphasizes urgency. Texas Southern University is in her district. She has also invited me to speak in her district next week to help inform the discussion and explain federal higher education desegregation policy. We would like to brief White House folks sometime in the coming weeks. Call if you want to talk about this.

Raymond

Feb. 27, 2000, 9:41PM

Jackson rips Texas 'apartheid'

University funding disparity at issue

By T.J. MILLING

The Rev. Jesse Jackson, speaking at a local church service Sunday, demanded equal funding for traditionally black universities in Texas, calling the current disparity "apartheid."

Jackson noted the differences between the University of Houston and Texas Southern University and Texas A&M and Prairie View A&M universities.

"We went to the back of the bus because we negotiated away our dignity," Jackson said. "We adjusted. University of Houston and TSU are in the same city on the same street. TSU is the back of the bus. TSU is apartheid, and we adjusted to TSU and Prairie View not being funded. We must not adjust. ... I've come to town to make you maladjusted."

Jackson pledged to organize a "march across the street" at the universities, and he called on Gov. George W. Bush to speed up negotiations with the federal Department of Education for funding parity. The department noted possible disparities in funding in a 1999 investigation under Title VI of the 1964 Civil Rights Act, which prohibits racial discrimination in educational funding.

This refers to OCR's Texas Higher Education Desegregation case

- get old TV shows
- Jackson rips Texas 'apartheid'
- Amtrak adding Houston, Dallas-Fort Worth connection
- Mardi Gras enables disabled to cut a rug
- FBI higher-up doubted team chief
- Houston's international scene
- Area briefs
- State briefs

Prairie View against the state last year, demanding funding from the tobacco settlement and the Texas Medical Center go to the universities. But Jackson said the matter should be handled outside the courts by executive agreement between Bush and the federal government.

"It should be resolved here," Jackson said. "It's a classic example of apartheid. It's two sets of rules."

Fax Transmittal

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Deputy Assistant Secretary

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Fax. No. (202) 205- 9889
E-Mail: raymond_pierce@ed.gov

Number of Pages (including cover sheet)

To: Irene Bueno

Fax Number: **456-5581**

Comments: **Sunday's New York Times article on Higher Education Desegregation. Slight mention of the Texas case.**

Raymond

The New York Times
April 9, 2000 Category: Commentary **Education Life Supplement**

The Price of Desegregation

By Randal C. Archibold
ITTA BENA, Miss. -- Look for the future of black colleges not on the spartan campus of Mississippi Valley State University, a survivor of near-death experiences that desperately wants the world to know it is alive and has enlisted B.B. King, a native son, to sing its praises in television spots.

Instead, go 10 miles west to Greenwood, cruise down Grand Boulevard past the stately homes recalling plantation days and behold a brick strip mall just shy of downtown. There, amid an insurance office, hair salon and satellite office of motor vehicles, is an extension of Valley, as locals call it.

In its handful of classrooms are students like Gregory Wenger, a 42-year-old National Guard soldier, studying organizational behavior in Greenwood en route to a degree in business administration. There is little remarkable about his presence, except perhaps his race, white.

For Mississippi Valley -- like the state's two other historically black public universities, Jackson State and Alcorn State -- finds itself in a seeming paradox. It is celebrating, in a reserved sort of way, the enrollment of 103 white students, who make up 4.5 percent of the student body. In 1991 there were just 5 white students.

Mr. Wenger's presence speaks to the unintended consequences here in Delta Mississippi of a class-action lawsuit filed against the state by Jake Ayers, a black sharecropper, on behalf of his son, Jake Jr., and other minority students.

This year marks the 25th anniversary of the suit, which seeks equal financing and facilities for the state's three black universities. It has come to be known as higher education 's Brown v. Board of Education . And like the Brown case, in which the United States Supreme Court ruled that "separate but equal" in public education was unconstitutional, Ayers eventually made its way to the High Court, in 1992.

That was nowhere near the end of it.

With the case dragging on, the governor of Mississippi last month pledged a new effort to resolve it. While in the eyes of the courts a settlement might finally put to rest the vestiges of segregation in Mississippi, the combatants think that, in a cruel twist, what was originally intended as an attempt at equity has in the end caused the black colleges to be shortchanged even more.

Top black students are being lured by predominantly white universities, and the three publicly financed black institutions, whose mission has long been to nurture African-American students, find themselves trying to figure out how to attract more white students.

A result of newly promised settlement talks is likely to influence similar cases that the Justice Department is overseeing in Alabama, Tennessee and Louisiana, which, like Mississippi, legally segregated higher educational institutions into the 1960's. There have been 19 desegregation cases since the flurry of litigation in the mid-1970's involving public education . Most have been in the South and most ended in agreements with the federal **Department of Education** . In mid-March, the department reached an agreement with the state of Kentucky that, among other things, will provide $13 million for academic and building improvements at historically black Kentucky State University. Negotiations continue with Maryland, Texas and Virginia.

The Ayers suit, filed in 1975, has roots in a 1969 federal directive to the state to draft a plan to eliminate segregation at Mississippi campuses. The state countered that its sole legal obligation was to ensure race-neutral admission standards in its plan. After winding its way through the courts, the case reached the Supreme Court, which ruled that race-neutral policies alone did not ensure the end of segregation. It sent the case back to federal district court, where a judge, Neal B. Biggers Jr., would oversee a more comprehensive plan.

The state, reasoning that a key vestige of segregation was the black colleges themselves, came up with a plan to consolidate the state's eight campuses into four. Mississippi Valley would close, merging with predominantly white Delta

State University about 70 miles away. But after vociferous protests by black leaders, Judge Biggers rejected that plan. Instead, he set up "remedies" that included the adoption of uniform admission standards at the eight campuses, instituting new programs at the black universities intended to make them more competitive for white students and issuing "other-way scholarships" that would entice white students to enroll.

Since the decree went into effect in 1996, the state has allocated about $44 million to make improvements to its black colleges and universities, including $5.7 million this year.

It is not enough, says Alvin O. Chambliss Jr., a charismatic lawyer with a preacher's cadence. Mr. Ayers died in 1986; Mr. Chambliss, who was among the original lawyers on the case, powers the suit today. To settle, he wants the state to spend about $300 million and set up professional programs like a law school or nursing program at one or more campuses.

Mr. Chambliss is not alone in his dissatisfaction. The circuitous course the suit has taken and its fallout have left many perplexed.

"They took Brown v. Board of Education and turned it upside down," said Raymond C. Pierce, deputy assistant secretary for civil rights at the Department of Education . "That is a poor product of a supposed desegregation remedy. I don't think anybody would say that it is equity."

The state, says Jimmie Barnes, a social science professor at Mississippi Valley for 29 years, "was able to lose the game but still win the trophy."

Part of the fallout from the plan is that the standardization of admission criteria -- raising the bar at the black universities and lowering it at the white ones -- has led to a decline in the number of black freshmen at the eight campuses. It fell 17.3 percent between 1995 and 1999, to 2,753 black freshmen from 3,332. In the same period, white enrollment increased 2.9 percent, the vast majority at the predominantly white campuses.

Black freshman enrollment also fell at the black campuses. In 1999, 1,588 were enrolled, compared with 2,314 in 1995.

Henry Ponder, president and chief executive of the National Association for Equal Opportunity, a Silver Spring, Md., umbrella group that advocates for historically black colleges, said the results in Mississippi defied the special mission of the institutions.

"We have proven that we can take a child with low test scores and G.P.A.'s and make competent citizens out of them," Dr. Ponder said. "I don't mean high standards are not worthwhile. I just don't think all schools should force students into the same peg hole. We should have respect for individual missions."

Against the backdrop of heightened standards and competition for resources and students, the courts have often questioned the purpose of these colleges.

"They continue to be, I would say, at risk," said Janell Byrd, a lawyer with the N.A.A.C.P. Legal Defense and Education Fund who tracks higher education cases. "When state legislators or federal judges look at what to cut, for some reason instead of looking at the institutions as assets, the courts have looked most immediately to black colleges with the attitude like, Do we need these colleges anymore?"

Mississippi Valley State rose from a cotton field off Route 82, inspiring the boosterish title of its official history, "Up From a Cotton Patch," by J.H. White, the university's first president.

As Mississippi Vocational College, it opened in the fall of 1950 in the plantation town Itta Bena, whose name is Choctaw for "little house in the woods." The state acquired the 450 acres for $56,000, but it wasn't long before people began questioning the wisdom of the deal. The Advocate in nearby Jackson wrote that students would have to attend class in boots because the buildings were surrounded by water.

Pretty close. As the current president, Lester Newman, walks the grounds, he points out the flat roofs of the buildings that spring leaks in the Delta's merciless rains and, yes, boots come in handy when downpours turn parts of the campus into a pond.

The campus is virtually bereft of trees. There are no signs of the towering magnolias and lush landscaping at predominantly white showpieces like the University of Mississippi, the flagship campus at Oxford known as Ole Miss. The orange-brick, boxy architecture may have been considered ultramodern in its time but today gives much of the campus the feel of a sterile office park. Its one standout, a new administration building with elegant neo-Classical touches, sits unoccupied because it leaks, Dr. Newman said.

The threadbare landscaping and blandness nag at him. First impressions, after all, count, and prospective students often look for comfortable surroundings and amenities, he said. Mississippi Valley is not exactly brimming with them.

Dr. Newman nevertheless projects an upbeat air. He has vowed to change things. Already, the campus center has opened a few fast-food restaurants. More computers are on the way, to the dorms and library.

He seems on a crusade to banish the word "struggling." Mississippi Valley, in his view, will elude the fiscal grim reaper. Rather than rely on the whims of state legislators for economic stability, the school has embarked on a $25 million fund-raising drive, with B.B. King and the actor Morgan Freeman serving as honorary chairmen. Jerry Rice, the San Francisco 49ers wide receiver who is the university's most often-mentioned alumnus, made an appearance in late March for a ceremony renaming the stadium in his honor.

But Dr. Newman realizes that years of threatened closure have done damage. Overall enrollment -- 2,500 in fall 1999 -- remains well below its peak of 3,300 in 1976. Academic offerings are short on technology and science -- a cherished nursing program was moved to Delta State years ago -- and faculty salaries that average $36,000 to $40,000 are much lower than at the predominantly white campuses, making it difficult to find top-flight faculty.

To attract "other race" students, the euphemism used here to mean white students, the school opened the Greenwood center in 1996. Many of them are nontraditional students taking advantage of the new satellite classrooms to complete their degrees.

Dr. Newman is also completing a plan to address how to further increase diversity, including a program in bioinformatics, which combines computer science and biology, and a master's program in business administration. Dr. Newman also plans aggressive marketing to overcome perceptions that Valley is an inferior university just for blacks.

"Once people see what we have to offer, that will break down barriers," he said.

But Valley faces considerable challenges in attracting white students. It and Alcorn, in Claiborne County, are in isolated, rural areas that draw from heavily black surrounding counties. And although there is a general perception that race relations are on the mend -- Mississippi now has more black elected officials than any other state -- there is no disputing a past rife with killings in the name of segregation. In 1962, the enrollment of James Meredith, the first black student at the University of Mississippi, caused riots on campus that left two dead.

Whether funds will come through for Dr. Newman's ambitions also remains uncertain. He acknowledges that Valley and other black institutions have been shortchanged. "Because of past discrimination, some things are not in place," he said. "If we are to be held accountable, we need resources, and that will take money."

In Dr. Newman's mind, Mississippi Valley will always honor its status as a historically black institution, and it will always have a predominantly black enrollment. It is, primarily, a regional institution, serving students whose relatives or friends have attended. Many, like Carmen A. Wyms, a single mother raising three children, simply wanted a college close to home with a comfortable atmosphere.

"I feel Valley is more family-oriented," said Miss Wyms, a senior. "There is a one-on-one, student-teacher atmosphere."

When she toured Delta State, she said, "I did not feel students were reaching out. Here, there are student mentors."

Miss Wyms, whose mother attended Valley for a year, said she did not know much about its history or that of other historically black colleges. And neither she nor other students seemed to mind the idea of recruiting more white students, though the underlying reason makes some uneasy.

"Will we at some point lose the historic blackness of the colleges?" asked Conswella C. Bennett, a senior and editor of the school paper, The Delta Devils Gazette. "I'm not really sure."

Miss Bennett thinks that as long as black students continue enrolling, the history will be respected, but some wonder why dramatic improvements were ordered to diversify the enrollment.

"Most black students agree there is an underlying feeling we need to attract us as well," she said.

White students like Mr. Wenger said the history of the campus neither deterred nor influenced them. Being in the minority "has not bothered me at all," he said, adding that he works with many black soldiers. Mr. Wenger, who plans to graduate in May, said he was drawn to the university because of pragmatic considerations like convenience and the university's emphasis on class participation.

"It's a more open forum and everyone participates," he said.

Mr. Chambliss, a graduate of Jackson State University who now teaches at the historically black Texas Southern Law School , is ambivalent about the integration issue, always a delicate subject among the black institutions.

None want to move away from their special status and sense of history, but few would argue that they could survive with a solely black enrollment, now that there are so many other opportunities available to black students.

According to the Department of Education , enrollment in the country's 105 historically black colleges and universities rose 20.5 percent between 1976 and 1997 but lagged behind the 40 percent increase at other colleges. At the same time, the proportion of blacks attending these institutions dipped, from 18.4 percent of all black college students in 1976 to 14.5 percent in 1997. Total enrollment was 269,167 in 1997, including 74,500 in private black colleges.

At a time when their leaders seem resigned to the new day that the data point to, Mr. Chambliss is a firm believer in black institutions.

When the conversation veers to political support, his voice rises as if in a sermon: "White liberals always want to integrate us out and close black schools."

But when asked to clarify his legal position on integration, it is as if a lawyer has stepped into the pulpit. "I have said on the record that I was not an integrationist. I was not a segregationist. I was not a desegregationist. I was an educationalist . What works best for people who enter the doors of black colleges, and in the main they are black students, is what we need to do."

Ronnie Musgrove, a Democrat who took office as Mississippi governor in January, has called for a conference to discuss settlement terms. He explained his move through a spokeswoman: "Leadership is bringing all sides together to once and for all settle the Ayers case. That is why I am building a consensus among all parties involved in order to create a resolution."

Ending the case had not been a priority for Mr. Musgrove's predecessor, Kirk Fordice, who once vowed, jokingly he later told reporters, to call in the National Guard if the courts ordered higher spending to resolve the case. And an aide to Mr. Musgrove said the Ayers case fell behind other concerns, like raising teacher pay and stoking economic development in a state that perennially ranks last in per capita income.

Mr. Chambliss, who has petitioned the Supreme Court to review all lower-court decisions in the case, said he would attend whatever conference the governor convenes but would not cave in on obtaining additional financing and facilities.

Among those waiting for resolution are Lilly Ayers, Mr. Ayers's 71-year-old widow, who is a social worker in Glen Allan, Miss., for Head Start, the federally financed prekindergarten program. She has kept up with the case even after Mr. Ayers's death and after Jake Jr., who attended Jackson State, went off to the Air Force and then factory work in Tulsa, Okla.

She sums up the case succinctly: "It was for equalizing the schools proportionately in financing and educationally ."

To get there, she said with a sigh: "I felt like it would be a long time but not 25 years. I don't think my husband would have felt it would take 25 years, either. It was so simple."

Photos: No towering magnolias here: the spartan campus of Mississippi Valley, once a cotton plantation.; Above, Mississippi Valley opened a branch in a nearby strip mall to attract white students. Carmen A. Wyms, left, who enrolled at Valley to be close to home, plays with her daughter on the main campus. (Nancy Siesel/The New York Times) Chronolgoy: "Black Colleges' Deep Roots" There are 105 institutions listed by the Department of Education as historically black colleges and universities, established before the Civil Rights Act of 1964 with the mission of educating America's black youth. In 1997, the latest figures available, 14.5 percent of all black college students were enrolled at the institutions, and 27 percent of the bachelor's degrees awarded to black students were given by them. Michael Porter 1837 The Institute for Colored Youth, a high school that will later offer college degrees, is established through a bequest from a Philadelphia Quaker, Richard

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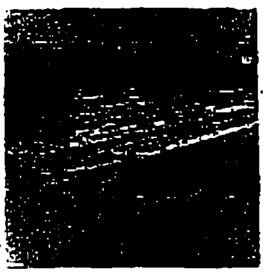

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One Florida plan taking flak

Education Department to monitor enrollment

By Laura Diamond
Times-Union staff writer

Raymond Pierce, deputy assistant secretary for the U.S. Education Department's Office of Civil Rights, speaks at Edward Waters College concerning affirmative action and the repercussions of One Florida.
– Stuart Tannehill/Staff

The U.S. Department of Education expressed "severe concern" regarding Florida's decision to end the use of racial and ethnic preferences in state university admissions and will closely monitor the new policy, a department official said yesterday.

Speaking before a Jacksonville town hall meeting on the One Florida Initiative, Raymond Pierce, deputy assistant secretary for the department's Office of Civil Rights, said there is concern the plan may reduce minority enrollment in state universities.

The initiative, which was approved Tuesday by the state Cabinet, replaces the use of racial and ethnic preferences in university admissions with a guarantee of admission for students at public high schools who finish in the top 20 percent of their class. Students will have to complete 19 core high school classes that prepare them for college to be eligible.

Gov. Jeb Bush has argued that diversity will increase because many public high schools have large Hispanic and African-American enrollments. His staff projects that the plan will increase enrollment in the university system by about 400 students.

Opponents argue that minority enrollment will drop because not all schools offer the required courses.

Should minority enrollment drop, the federal government will take immediate action, Pierce said.

"The minute the number starts to drop, we must increase our engagement with the state of Florida," Pierce said to more than 70 people at Edward Waters College. "We are preparing our analysis . . . and building our case."

The meeting was organized by U.S. Rep. Corrine Brown, D-Fla., an outspoken critic of One Florida. Brown and Pierce spoke earlier in the day at a breakfast with the First Coast African American Chamber of Commerce.

Pierce said his department is analyzing the initiative and has met regularly with Bush's staff. Another meeting is planned within the next several weeks.

Typically, the department tries to work with states to avoid litigation.

"Hopefully we will be able to do that with the state of Florida, but that remains to be seen," Pierce said.

A lawsuit is not imminent, but Pierce said the department could "firmly suggest" that the state abandon the initiative if minority enrollment drops.

When California and Texas dismantled their affirmative action policies regarding undergraduate admissions, no corrective action was taken by the federal government. No action has been necessary because there has not been a decrease in minority enrollment, said Roger Murphy, a spokesman with the education department.

Still, the federal government has been monitoring Florida and 18 other states since the 1970s because of low minority enrollment in public universities, Pierce said.

To correct this problem, the state has had a series of agreements with the federal government. The most recent was adopted in 1998. One aspect of that agreement calls for increasing minority enrollment in state universities, but it does not dictate methods for meeting this goal.

While One Florida may satisfy the agreement, there is concern regarding the guaranteed admission provision for top students, said Gary Walker, regional director of the southern division of the Office for Civil Rights for the U.S. Department of Education.

Of concern is whether the required 19 courses will be offered at all schools. If not, some students could be blocked from participating in the program, Walker said.

While there are concerns with One Florida, Pierce said the program is legal.

"The state has no lawful obligation to use affirmative action," Pierce said. "But we have severe concern about One Florida. This is an issue we will continue to monitor."