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Talking Points
Texas Higher Education Desegregation
March 6, 2000

- 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.
- 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.

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.

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:

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 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.

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.

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

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.

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 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.

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.

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