

Bill -

Ok. Did this go out?

Elena

 William R. Kincaid
01/28/98 06:30:10 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Michael Cohen/OPD/EOP
cc: Julie A. Fernandes/OPD/EOP, Tanya E. Martin/OPD/EOP, Laura Emmett/WHO/EOP
bcc:
Subject: Re: Admissions standards/Magnet schools grant applications 

Mike and Elena--

I spoke with Dawn about this again today. She is satisfied that the analysis of ED and DOJ that the reducing/preventing/eliminating racial isolation aspect of the program meets the compelling interests test under Adarand is consistent with the way the Administration has approached similar issues, in light of the Magnet Schools program's statutory grounding and history. Therefore, she will be clearing this notice to go forward.

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01/24/98 01:18:19 PM

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To: Elena Kagan/OPD/EOP, Michael Cohen/OPD/EOP
cc: Julie A. Fernandes/OPD/EOP, Tanya E. Martin/OPD/EOP, Laura Emmett/WHO/EOP
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----- Forwarded by William R. Kincaid/OPD/EOP on 01/24/98 01:11 PM -----

 William R. Kincaid
01/22/98 10:12:02 PM

Record Type: Record

To: William R. Kincaid/OPD/EOP

cc:

Subject: Magnet schools grant applications

----- Forwarded by William R. Kincaid/OPD/EOP on 01/22/98 10:12 PM -----



Arthur_Coleman @ ed.gov
01/22/98 09:07:00 AM

Record Type: Record

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In addition to the remedial and diversity interests that are identified as compelling, we are setting forth the interest of "reducing, preventing, or eliminating" minority group isolation as a compelling interest. Based on desegregation law as well as specific language from the authorizing legislation, this represents a new position by the federal government.

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REACTION

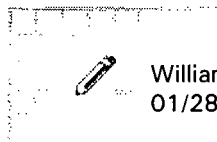
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205-9703

Magnet Schools



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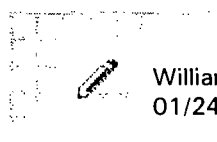
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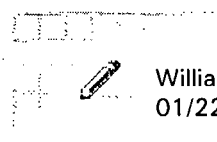
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UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

EQUAL JUSTICE
UNDER LAW

FAX: 202-205-2689

TELECOPIER COVER SHEET

Number of Pages Including This Cover Sheet: 51Telephone Number of Receiving Telecopier: 456-1647**ADDRESSEE:**Name: Dawn Chirwa

Organization: _____

Telephone Number: 456-7903**FROM:**Name: Steve Winnick

Organization: _____

Telephone Number: 401-6000

DATE: _____ TIME: _____

Dawn,

This is the Magnet Schools notice I mentioned and the internal Justice Department memorandum. The Civil Rights Division and the Office of Legal Counsel have advised us we can proceed with the notice. They are still waiting to talk to the Solicitor General on the issue of the implications of the Hopwood decision in the Fifth Circuit for finding the reduction of racial group isolation a compelling interest, but have advised that this issue does not implicate what we say in the notice. As I mentioned, the notice is already late, so we would appreciate anything you can do to get back to us quickly. Thank you.

Steve Winnick

CONFIDENTIALITY NOTICE

THIS TRANSMISSION IS INTENDED FOR AND RESTRICTED TO THE NAMED ADDRESSEE ONLY. IT MAY CONTAIN CONFIDENTIAL AND/OR PRIVILEGED INFORMATION. IF YOU RECEIVE THIS TRANSMISSION IN ERROR, YOU ARE NOTIFIED THAT YOU ARE PROHIBITED FROM READING, COPYING, OR DISSEMINATING THE TRANSMISSION. PLEASE CALL (202) 401-8340 TO ARRANGE FOR RETURN OF ANY TRANSMISSION SENT IN ERROR. THANK YOU

4001-01-P

DEPARTMENT OF EDUCATION

(CFDA No.: 84.165A)

Magnet Schools Assistance Program

Notice inviting applications for new awards for fiscal year (FY) 1998

PURPOSE OF PROGRAM: Provides grants to eligible local educational agencies and consortia of such agencies to support magnet schools that are part of approved desegregation plans.

ELIGIBLE APPLICANTS: Local educational agencies (LEAs) and consortia of such agencies.

DEADLINE FOR TRANSMITTAL OF APPLICATIONS:

DEADLINE FOR INTERGOVERNMENTAL REVIEW:

APPLICATIONS AVAILABLE:

AVAILABLE FUNDS: \$96,500,000

ESTIMATED RANGE OF AWARDS: \$200,000 - \$3,000,000.

ESTIMATED AVERAGE SIZE OF AWARDS: \$1,608,000.

ESTIMATED NUMBER OF AWARDS: 60.

NOTE: The Department is not bound by any estimates in this notice.

PROJECT PERIOD: Up to 36 months.

APPLICABLE REGULATIONS: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR Parts 75, 77, 79, 80, 81, 82, 85 and 86; and (b) the regulations in 34 CFR Part 280.

PRIORITIES

Background

The Magnet Schools Assistance Program (MSAP) makes grants to eligible LEAs and consortia of LEAs for programs that are designed to support—

- o the elimination, reduction, or prevention of minority group isolation in public elementary and secondary schools with substantial proportions of minority group children;

- o the development and implementation of magnet school projects that will assist in achieving systemic reform and

providing all children the opportunity to meet challenging State content standards and challenging student performance standards;

- o the development and design of innovative educational methods and practices; and

- o courses of instruction within magnet schools that will substantially strengthen the knowledge of academic subjects and the grasp of tangible and marketable vocational skills of students attending those magnet schools.

Competitive Priorities

Under 34 CFR 75.105(c)(2)(I) and 34 CFR 280.32(b)-(f), the Secretary gives preference to applications that meet competitive priorities. Depending upon how well an application meets each priority, the Secretary awards additional points to the application for each priority up to the maximum number of points available for that priority. These points are in addition to any points the applicant earns under the selection criteria in 34 CFR 280.31.

The Secretary will award up to a total of 45 points for the following competitive priorities:

- o Need for assistance. (5 points) The Secretary evaluates the applicant's need for assistance under this part, by considering --

- (a) The costs of fully implementing the magnet schools project as proposed;

- (b) The resources available to the applicant to carry out the project if funds under the program were not provided;

- (c) The extent to which the costs of the project exceed the applicant's resources; and

- (d) The difficulty of effectively carrying out the approved plan and the project for which assistance is sought, including consideration of how the design of the magnet school project -- e.g., the type of program proposed, the location of the magnet school within the LEA -- impacts on the applicant's ability to successfully carry out the approved plan.

- o New or revised magnet schools projects. (10 points)

The Secretary determines the extent to which the applicant proposes to carry out new magnet schools projects or significantly revise existing magnet schools projects.

- o Selection of students. (15 points) The Secretary determines the extent to which the applicant proposes to select students to attend magnet schools by methods such as lottery, rather than through academic examination.

- o Innovative approaches and systemic reform. (10 points) The Secretary determines the extent to which the project for which assistance is sought proposes to implement innovative educational approaches that are consistent with the State's and LEA's systemic reform plans, if any, under Title III of Goals 2000: Educate America Act.

- o Collaborative efforts. (5 points) The Secretary determines the extent to which the project for which assistance is sought proposes to draw on comprehensive community involvement plans.

SUPPLEMENTARY INFORMATION: Applicants must submit with their applications one of the following types of plans to establish eligibility to receive MSAP assistance: (1) a desegregation plan required by a court order; (2) a plan required by a State agency or official of competent jurisdiction; (3) a plan required by the Office for Civil Rights (OCR), United States Department of Education (ED), under Title VI of the Civil Rights Act of 1964 (Title VI plan); or (4) a voluntary plan adopted by the applicant.

Under the regulations, applicants are required to provide all of the information required at §280.20(a)-(g) in order to satisfy the civil rights eligibility requirements found in §280.2(a)(2) and (b) of the regulations. Prior to 1995, if necessary, ED requested enrollment data or other information from applicants after their applications were submitted utilizing the procedures set forth in §280.20(h). However, that follow-up process delayed awards under the program. In order to respond to requests from applicants and grantees that the Department

announce MSAP awards earlier in the year, ED will follow the application review process modified for the FY 1995 competition.

Specifically, when conducting eligibility reviews of plans, under §280.2 the Department may not follow up with applicants to obtain additional information or clarification. Accordingly, in order to satisfy the civil rights eligibility requirements found in §280.2(a)(2) and (b) of the regulations, it is very important that an applicant provide all of the information required under the regulations at §280.20(a)-(g). This notice describes that information.

In addition to the particular data and other items for required and voluntary plans, described separately in the information that follows, an application must include:

- o Signed civil rights assurances (included in the application package);
- o A copy of the applicant's plan; and
- o An assurance that the plan is being implemented or will be implemented if the application is funded.

Required Plans

1. Plans Required By A Court Order

An applicant that submits a plan required by a court must submit complete and signed copies of all court or State documents demonstrating that the magnet schools are a part of the approved plan. Examples of the types of documents that would meet this requirement include--

- o A Federal or State court order that establishes or amends a previous order or orders by establishing additional or different specific magnet schools;
- o A Federal or State court order that requires or approves the establishment of one or more unspecified magnet schools or that authorizes the inclusion of magnet schools at the discretion of the applicant.

2. Plans Required By A State Agency Or Official Of Competent Jurisdiction

An applicant submitting a plan ordered by a State agency or

official of competent jurisdiction must provide documentation that shows that the plan was ordered based upon a determination that State law was violated. In the absence of this documentation, the applicant should consider its plan to be a voluntary plan and submit the data and information necessary for voluntary plans.

3. Title VI Required Plans

An applicant that submits a plan required by OCR under Title VI must submit a complete copy of the plan demonstrating that magnet schools are part of the approved plan.

4. Modifications to Required Plans

A previously approved desegregation plan that does not include the magnet school or program for which the applicant is now seeking assistance must be modified to include the magnet school component. The modification to the plan must be approved by the court, agency or official, that originally approved the plan. An applicant that wishes to modify a previously approved OCR Title VI plan to include different or additional magnet schools must submit the proposed modification for review and approval to the OCR Regional Office that approved its original plan.

An applicant should indicate in its application if it is seeking to modify its previously approved plan. However, all applicants must submit proof to ED of approval of all modifications to their plans by [insert date 28 days after the Deadline Date for Transmittal of Applications].

Voluntary Plans

A voluntary plan must be approved each time an application is submitted for funding. Even if ED has approved a voluntary plan in an LEA in the past, the plan must be resubmitted to ED for approval as part of the application.

An applicant submitting a voluntary plan must include in its application:

- o A copy of a school board resolution or other evidence of final official action adopting and implementing the plan, or

agreeing to adopt and implement the plan upon the award of assistance.

o Enrollment and other information as required by the regulations at §280.20(f) and (g) for applicants with voluntary plans. Enrollment data and information are critical to ED's determination of an applicant's eligibility under a voluntary plan.

Narrow Tailoring

The purposes of the MSAP include the reduction, elimination or prevention of minority group isolation. In many instances, in order to carry out these purposes, districts take race into account in assigning students to magnet schools. In order to meet the requirements of Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment to the United States Constitution, applicants submitting voluntary plans that take involve racial classification must ensure that the use of race is designed to reduce, eliminate or prevent minority group isolation and is narrowly tailored to achieve this compelling purpose.

In order for OCR to make a determination that a voluntary plan is "adequate under Title VI" the plan must be narrowly tailored. Among the considerations that affect a determination of whether the use of race in a voluntary plan is narrowly tailored are (1) whether race-neutral means of achieving that goal(s) have been or would be less effective; (2) whether a less extensive or intrusive use of race in selecting magnet school participants as a means of achieving the MSAP goal(s) has been or would be ineffective; (3) whether the use of race is of limited extent and duration and is applied in a flexible manner; (4) whether the institution regularly reexamines its use of race in selecting magnet school participants to determine whether the use of race is still necessary to achieve its MSAP goal(s); and (5) whether the effect of the use of race on other race students is sufficiently small and diffuse so as not to create an undue burden on their opportunity to participate in magnet schools. If

a district determines that using race as a factor in selecting students for magnet schools is necessary to meet its MSAP goal(s), such use of race must be "narrowly tailored."

Each of the considerations set out above should be specifically considered in framing a district's strategy. For example:

Determining whether race-neutral means have been or would be less effective

One example of a race neutral approach for applicants proposing to conduct a lottery for student admission to a magnet school would be to strengthen efforts to recruit a large pool of eligible students for the lottery that reflects the diverse racial and ethnic composition of the students in the applicant's district. If recruitment efforts are successful, the lottery should result in a racially and ethnically diverse student body.

It may be possible to broaden the appeal of a given magnet school by aggressively publicizing it, making application to it as easy as possible, and broadening the geographic area from which the school is intended to draw.

Less extensive use of racial criteria

It may be possible to establish a procedure whereby race is taken into account in admissions only if race-neutral steps have proven ineffective, i.e., when the applicant pool for a given school, notwithstanding efforts such as those described, still remains largely or very disproportionately one-race.

The decision to consider race in admission decisions should be made on a school-by-school basis.

Limited time and flexibility

Over time, the enrollment at a magnet school may become

stable and the school may attract a diverse group of students. At this point, use of race as a factor in admissions may no longer be necessary.

In some instances, exceptions to the use of race in admissions -- where a relatively small number of students are adversely affected and their admission will not substantially effect the racial composition of the program -- should be available.

Reexamining the use of criteria

The school or school district should formally review the steps it has taken which involve the use of race, on a regular basis, such as on an annual basis, to determine whether the use of race is still needed, or should be modified.

Effect on students

Where there are a number of magnet schools, it may also be possible to assign students to a comparable magnet school, if they are unable to gain admission to their first preference.

Enrollment and Other Information

A voluntary plan is a plan to reduce, eliminate, or prevent minority group isolation (MGI), either at a magnet school or at a feeder school -- a school from which students are drawn to attend the magnet school. Under §280.2, the establishment of the magnet school cannot result in an increase in MGI at a magnet school or any feeder school above the districtwide percentage of minority group students at the grade levels served by the magnet school.

The following example and those in subsequent sections of this notice are designed to assist applicants in the preparation of their application. The examples illustrate the types of data

and information that have proven successful in the past for satisfying the voluntary plan regulation requirements.

District A has a districtwide percentage of 65.5 percent for its minority student population in elementary schools. District A has six elementary schools with the following minority student populations:

1. School A -- 67 percent.
2. School B -- 58 percent.
3. School C -- 64 percent.
4. School D -- 76 percent.
5. School E -- 47 percent.
6. School F -- 81 percent.

District A has five minority group isolated schools, i.e., five schools with minority student enrollment of over 50 percent. District A seeks funding to establish a magnet program at School F to reduce MGI at that school. For District A to be eligible for a grant, the establishment of the magnet program at School F should not increase the minority student enrollment at feeder school C to more than 65.5 percent (the districtwide percentage). Also, the establishment of the magnet program should not increase the minority student enrollment at feeder schools A or D at all because those schools are already above the districtwide percentage for minority students. If projected enrollments at a magnet or feeder school indicate that there will be an increase in MGI, District A should provide an explanation in its application for the increase that shows it is not caused by the establishment of the magnet program. See the discussion below.

An applicant that proposes to establish new magnet schools must submit projected data for each magnet and feeder school that show that the magnet schools and all feeders will maintain eligibility for the entire three-year period of the grant. Projected data are included in the examples below.

OBJECTIVE: REDUCTION OF MINORITY GROUP ISOLATION IN EXISTING

MAGNET SCHOOLS

In situations where the applicant intends to reduce minority isolation in an existing magnet program, whether in the magnet school or in one or more of the feeder schools, and minority isolation has increased, the applicant must provide data and information to demonstrate that the increase was not due to the applicant's magnet program, in accordance with §280.20(g). See the following examples.

OPTIONS FOR DEMONSTRATING REDUCTION**1. Magnet School Analysis**

District 2 has two existing magnet elementary schools. All of the other schools in the district are feeders schools to one or both of the magnet schools. District 2 has six feeder schools and a districtwide minority enrollment of 60.0 percent at the elementary school level.

District 2 Base Year Data for Magnet Schools					
Magnet School (Base Year)	Total Enrollmen t	Minority Number	Minority Percentage	Non- Minority Number	Non- Minority Percentage
Adams (1996)	449	382	85.1%	67	14.9%
Edison (1996)	387	306	79.1%	81	20.9%

Note: "Base Year" is the year prior to the year each school became a magnet.

District 2 Current Year Data for Magnet Schools					
Magnet School	Total Enrollmen t	Minority Number	Minority Percentage	Non- Minority Number	Non- Minority Percentage
Adams	459	365	79.5%	94	20.5%
Edison	400	326	81.5%	74	18.5%

Since becoming a magnet school last year, Adams has decreased in MGI from 85.1 percent to 79.5 percent. The district projects that through operation as a magnet school MGI will continue to be reduced over the next three years, however, Edison Magnet has increased its MGI by 2.4 percent, from 79.1 percent to 81.5 percent since the creation of the magnet school but projects that MGI will

be reduced over the next three years through operation as a magnet. Because of the increase, this school would be found ineligible unless the increase in MGI in the current year was not caused by the magnet school. This may be shown through data indicating an increase either in minority enrollment districtwide or in the area served by the magnet school.

If District Z's districtwide elementary school enrollment has become more minority isolated due to districtwide demographic changes in the student population and if a magnet or a feeder school's increase in MGI is less than the districtwide increase in MGI, ED will conclude that the school's increase in MGI was not the result of the magnet programs, but due to the overall effect of demographic changes in the district as a whole at the elementary level.

District Z Base Year Data for Feeder Schools					
Feeder School	Total Enrollment	Minority Number	Minority Percentage	Non-Minority Number	Non-Minority Percentage
Rose	398	301	75.6%	97	24.4%
Rocky Mount	289	199	68.9%	90	31.1%
Wheeler	239	144	60.3%	95	39.7%
King	289	144	49.8%	145	50.2%
Tinker	429	173	40.3%	256	59.7%
Holly	481	122	25.4%	359	74.6%
Districtwide	2,961	1,771	59.8%	1,190	40.2%

District 2 Current Year Data for Feeder Schools					
Feeder School	Total Enrollment	Minority Number	Minority Percentage	Non-Minority Number	Non-Minority Percentage
Rose	401	278	69.3%	123	30.7%
Rocky Mount	291	211	72.5%	80	27.5%
Wheeler	251	153	61.0%	98	39.0%
King	277	149	53.8%	128	46.2%
Tinker	424	198	46.7%	226	53.3%
Holly	475	130	27.4%	345	72.6%
Districtwide	2,978	1,810	60.8%	1,168	39.2%

District 2 Projected 1998-1999 Data for Magnet Schools					
Magnet School	Total Enrollment	Minority Number	Minority Percentage	Non-Minority Number	Non-Minority Percentage
Adams	469	349	74.4%	120	25.6%
Edison	410	312	76.1%	98	23.9%

District 2 Projected 1999-2000 Data for Magnet Schools					
Magnet School	Total Enrollment	Minority Number	Minority Percentage	Non-Minority Number	Non-Minority Percentage
Adams	483	331	68.5%	152	31.5%
Edison	407	289	71.0%	118	29.0%

District 2 Projected 2000-2001 Data for Magnet Schools					
Magnet School	Total Enrollment	Minority Number	Minority Percentage	Non-Minority Number	Non-Minority Percentage
Adams	489	307	62.8%	182	37.2%
Edison	409	266	65.0%	143	35.0%

District 2 Projected 1998-1999 Data for Feeder Schools					
Feeder School	Total Enrollment	Minority Number	Minority Percentage	Non-Minority Number	Non-Minority Percentage
Rose	400	272	68.0%	128	32.0%
Rocky Mount	306	216	70.6%	90	29.4%
Wheeler	250	148	59.2%	102	40.8%
King	280	151	53.9%	129	46.1%
Tinker	417	232	55.6%	185	44.4%
Holly	447	170	38.0%	277	62.0%
Districtwide	2,979	1,850	62.1%	1,129	37.9%

District 2 Projected 1999-2000 Data for Feeder Schools					
Feeder School	Total Enrollment	Minority Number	Minority Percentage	Non-Minority Number	Non-Minority Percentage
Rose	396	265	66.9%	131	33.1%
Rocky Mount	293	202	68.9%	91	31.1%
Wheeler	259	153	59.1%	106	40.9%
King	291	169	58.1%	122	41.9%
Tinker	418	242	57.9%	176	42.1%
Holly	451	216	47.9%	235	52.1%
Districtwide	2,998	1,867	62.3%	1,131	37.7%

District 2 Projected 2000-2001 Data for Feeder Schools					
Feeder School	Total Enrollment	Minority Number	Minority Percentage	Non-Minority Number	Non-Minority Percentage
Rose	400	267	66.8%	133	33.2%
Rocky Mount	299	204	68.2%	95	31.8%
Wheeler	262	154	58.8%	108	41.2%
King	302	181	59.9%	121	40.1%
Tinker	419	244	58.2%	175	41.8%
Holly	441	227	51.5%	214	48.5%
Districtwide	3,021	1,850	61.2%	1,171	38.8%

However, as with the Edison magnet, if the MGI in a magnet

increases above the districtwide increase between the base year and the current year, an applicant must demonstrate that the magnet is not causing the problem. In order to show that the increase in MGI at a particular school is not the result of the operation of a magnet, a district should provide student transfer data on the number of minority and non-minority students that attend the magnet program from the other feeder schools in the district for the current year. If, by subtracting from the magnet enrollment those students that came from other schools, the MGI is higher than the actual MGI for the current year, it can be concluded that the increase in MGI was not caused by the magnet school.

Current year student transfer data for magnet schools that increase in minority group isolation above the districtwide average					
	Total Enrollment	Minority Number	Minority Percentage	Non-Minority Number	Non-Minority Percentage
Edison (1997)	400	326	81.5%	74	18.5%
Students who transferred from feeder schools to Edison in order to attend magnet	50	31		19	
Edison enrollment with transfer students "returned" to feeder schools	350	295	84.3%	55	15.7%

Current year student transfer data for feeder schools that increase in minority group isolation above the districtwide average					
	Total Enrollment	Minority Number	Minority Percentage	Non-Minority Number	Non-Minority Percentage
Rocky Mount (1997)	291	211	72.5%	80	27.5%
Students who transferred to Edison to attend magnet	10	8		2	
Students who transferred to Adams to attend magnet	6	6		0	
Rocky Mount enrollment if transfer students were "returned"	307	225	73.3%	82	26.7%

2. Feeder School Analysis

In District Z, two feeder schools whose MGI was greater than the districtwide average, Rocky Mount and Wheeler, increased in MGI by 3.7 percent and 0.7 percent respectively between the base year and the current year. Since Wheeler's MGI increase of 0.7 percent is less than the districtwide MGI increase of 1.0 percent for the same time period, Wheeler's MGI increase would be considered to be due to the demographic changes in the district and further scrutiny of Wheeler is not required.

Because Rocky Mount, a feeder school to magnet programs at Adams and Edison, increased in MGI over the districtwide average from 68.9 percent to 72.5 percent, this would make both Adams and Edison ineligible unless the district demonstrates that the increase was not because of the magnet programs. The clearest way for an applicant to show this is to provide student transfer data on the number of minority and non-minority students that left Rocky Mount to attend magnet programs at Adams and Edison. (See student transfer data above.) By adding the number of students that transferred to the magnet programs to Rocky Mount's total enrollment, ED can determine whether the increase was due

to the magnet program. If it can be demonstrated that without the magnet program, the MGI at the feeder school would be even higher, these magnet schools would be found eligible.

Some applicants may find that they are unable to provide the type of student transfer data referred to above. In some cases, these applicants may be able to present demographic or other statistical data and information that would satisfy the requirements of the statute and regulations. This demographic data must persuasively demonstrate that the operation of a proposed magnet school would reduce, eliminate, or prevent minority group isolation in the applicant's magnet schools and would not result in an increase of MGI at one of the applicant's feeder schools above the districtwide percentage for minority students at the same grade levels as those served in the magnet school. (34 CFR §280.20(g)). For example, an applicant might include data provided to it by a local social service agency about the numbers and concentration of families in a recent influx of immigrants into the neighborhood or attendance zone of the feeder school.

3. Additional Base-Year Data

If an applicant believes that comparing a magnet program's current-year enrollment data with its base year enrollment data—i.e., data from the year prior to the year each school became a magnet or a feeder—is misleading due to significant changes that have occurred in attendance zones or other factors affecting the magnet school or in the closing and combining of other schools with the magnet school, additional and more recent enrollment data for an alternative to the base year may be submitted along with a justification for its submission.

OBJECTIVE: CONVERSION OF AN EXISTING SCHOOL TO A NEW MAGNET PROGRAM

District X will convert Williams, an existing elementary school, to a new elementary magnet program. Currently, Williams has a minority enrollment of 94.67 percent. The district projects that the magnet program will reduce minority group

isolation at Williams to 89 percent in the first year of the project. The projection of enrollment should be based upon reasonable assumptions and should clearly state the basis for these assumptions, e.g., parent or student interest surveys, or other objective indicators, such as waiting lists for other magnet schools in the district.

District X Current Year Data for Magnet & Feeder Schools					
School	Total Enrollment	Minority Number	Minority Percentage	Non-Minority Number	Non-Minority Percentage
Hill (Magnet)	450	426	94.7%	24	5.3%
Shaw (Feeder)	398	179	44.9%	219	55.1%
Smith (Feeder)	477	186	39.0%	291	61.0%
Districtwide	4,704	2,598	55.2%	2,106	44.8%

District X Projected 1998-1999 Data for Magnet & Feeder Schools					
School	Total Enrollment	Minority Number	Minority Percentage	Non-Minority Number	Non-Minority Percentage
Hill (Magnet)	450	400	89.0%	50	11.0%
Shaw (Feeder)	404	195	48.3%	209	51.7%
Smith (Feeder)	471	191	40.5%	280	59.5%
Districtwide	4,712	2,622	55.6%	2,090	44.4%

District X Projected 1999-2000 Data for Magnet & Feeder Schools					
School	Total Enrollment	Minority Number	Minority Percentage	Non-Minority Number	Non-Minority Percentage
Hill (Magnet)	500	415	83.0%	85	17.0%
Shaw (Feeder)	406	203	50.0%	203	50.0%
Smith (Feeder)	482	205	42.5%	277	57.5%
Districtwide	4,794	2,683	55.9%	2,111	44.1%

District X Projected 2000-2001 Data for Magnet & Feeder Schools					
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School	Total Enrollment	Minority Number	Minority Percentage	Non-Minority Number	Non-Minority Percentage
Hill (Magnet)	600	450	75.0%	150	25.0%
Shaw (Feeder)	410	215	52.4%	195	47.6%
Smith (Feeder)	477	229	48.0%	248	52.0%
Districtwide	4,815	2,690	55.9%	2,125	44.1%

OBJECTIVE: CONSTRUCTION OF NEW MAGNET SCHOOL/REOPENING A CLOSED SCHOOL

District Y will construct a new school, Ashe, and open its magnet program in 1999. There is no pre-existing school, and consequently, it appears that no enrollment data are readily available to use as a comparison. However, the district estimates that if the proposed magnet school had opened as a "neighborhood school," without a magnet program designed to attract students from outside the "neighborhood" or attendance zone, it would have a minority enrollment of 67 percent. This estimate was based on national census tract data, supplemented by more current data on the neighborhood provided by the local county government. The district further reasonably anticipates, based on surveys and other indicators, that when the new school opens as a magnet school in 1999, it will have a minority enrollment of 58 percent.

Note that in this example, since the school will not open until the second year of the project (the 1999-2000 school year), data is need only for the current year and each of the two years of the project during which the magnet at Ashe will be implemented.

District Y Current Year Data for Magnet & Feeder Schools					
School	Total Enrollment	Minority Number	Minority Percentage	Non-Minority Number	Non-Minority Percentage
Ashe (Magnet)	600	400	66.7%	200	33.3%

Mason (Feeder)	298	101	33.9%	197	66.1%
Vine (Feeder)	324	111	34.2%	213	65.8%
Districtwide	2,511	1,339	53.3%	1,172	46.7%

District Y Projected 1999-2000 Data for Magnet & Feeder Schools					
School	Total Enrollment	Minority Number	Minority Percentage	Non-Minority Number	Non-Minority Percentage
Ashe (Magnet)	600	348	58.0%	252	42.0%
Mason (Feeder)	290	133	45.8%	157	54.2%
Vine (Feeder)	332	144	43.4%	188	56.6%
Districtwide	2,559	1,352	52.8%	1,207	47.2%

District Y Projected 2000-2001 Data for Magnet & Feeder Schools					
School	Total Enrollment	Minority Number	Minority Percentage	Non-Minority Number	Non-Minority Percentage
Ashe (Magnet)	600	300	50.0%	300	50.0%
Mason (Feeder)	300	145	48.3%	155	52.7%
Vine (Feeder)	336	170	50.6%	166	49.4%
Districtwide	2,604	1,383	56.2%	1,221	43.8%

OBJECTIVE: REDUCTION, ELIMINATION, OR PREVENTION OF MGI AT TARGETED FEEDER SCHOOLS

Many applicants apply for MSAP funding to reduce, eliminate, or prevent minority group isolation at a magnet school. However, some applicants have established magnet programs at schools that are not minority-isolated for the purpose of reducing, eliminating, or preventing minority isolation at one or more targeted feeder schools. The data requirements and analysis for this type of magnet program are the same as described for "Existing Magnet Schools." In this example, MGI is being reduced

in each of the targeted feeder schools.

Base Year Data for Magnet & Feeder Schools					
School	Total Enrollment	Minority Number	Minority Percentage	Non-Minority Number	Non-Minority Percentage
Grant (Magnet)	505	62	12.3%	443	87.7%
North (Feeder)	449	347	77.3%	102	22.7%
Lewis (Feeder)	404	355	87.9%	49	12.1%
Clark (Feeder)	471	459	97.5%	12	2.5%
Districtwide	1,829	1,223	66.9%	606	33.1%

Current Year Data for Magnet & Feeder Schools					
School	Total Enrollment	Minority Number	Minority Percentage	Non-Minority Number	Non-Minority Percentage
Grant (Magnet)	520	105	20.2%	415	79.8%
North (Feeder)	453	338	74.6%	115	25.4%
Lewis (Feeder)	398	335	84.1%	63	15.9%
Clark (Feeder)	477	443	92.9%	34	7.1%
Districtwide	1,848	1,221	66.1%	627	33.9%

Projected 1998-1999 Data for Magnet & Feeder Schools					
School	Total Enrollment	Minority Number	Minority Percentage	Non-Minority Number	Non-Minority Percentage
Grant (Magnet)	526	139	26.5%	387	73.5%
North (Feeder)	461	331	71.9%	130	28.1%
Lewis (Feeder)	424	347	81.8%	77	18.2%
Clark (Feeder)	499	427	85.5%	72	14.5%
Districtwide	1,910	1,244	65.1%	664	34.9%

Projected 1999-2000 Data for Magnet & Feeder Schools					
School	Total Enrollment	Minority Number	Minority Percentage	Non-Minority Number	Non-Minority Percentage
Grant (Magnet)	532	200	37.5%	332	62.5%
North (Feeder)	470	329	70.0%	141	30.0%
Lewis (Feeder)	445	344	77.2%	101	22.8%
Clark (Feeder)	528	425	80.4%	103	19.6%
Districtwide	1,975	1,298	65.7%	677	34.3%

<i>Projected 2000-2001 Data for Magnet & Feeder Schools</i>					
School	Total Enrollment	Minority Number	Minority Percentage	Non-Minority Number	Non-Minority Percentage
Grant (Magnet)	548	263	48.0%	285	52.0%
North (Feeder)	475	316	66.5%	159	33.5%
Lewis (Feeder)	460	342	74.4%	118	25.6%
Clark (Feeder)	536	402	75.0%	134	25.0%
Districtwide	2,019	1,323	65.5%	696	44.1%

OBJECTIVE: PREVENTION OF MINORITY GROUP ISOLATION

An applicant that applies for MSAP funding for the purposes of preventing minority isolation must demonstrate that without the intervention of the magnet program, the magnet school or targeted feeder school will become minority-isolated within the project period. Generally this may be documented by showing a trend in the enrollment data for the proposed school. For example, if a neighborhood school currently has a 45 percent minority enrollment and, for the last three years, minority enrollment has increased an average of three percent each year (36 percent, 39 percent, and 42 percent), it is reasonable to expect that, in three years, the school would exceed 50 percent thereby becoming minority-isolated during the project period without the intervention of a magnet. The applicant in this example should submit this enrollment data in its application.

The preceding examples are not intended to be an exhaustive set of examples. Applicants with questions about their

desegregation plans and the information required in support of those desegregation plans (including applicants that find that these examples do not fit their circumstances and applicants who find that the enrollment data requested is unavailable or do not reflect accurately the effectiveness of their proposed magnet program) are encouraged to contact ED for technical assistance, prior to submitting their application by calling the contact person listed under the "FOR APPLICATIONS OR INFORMATION" heading.

FOR APPLICATIONS OR INFORMATION CONTACT: Steven L. Brockhouse, U.S. Department of Education, 600 Independence Avenue, S.W., Portals Room 4509, Washington, D.C. 20202-6140. Telephone (202) 260-2476. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

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

PROGRAM AUTHORITY: 20 U.S.C. 3021-3032

Dated:

Gerald N. Tirozzi
Assistant Secretary
Elementary and Secondary Education

Memorandum

Subject: Magnet School Assistance Program

Date:

To: Mark Gross
Deputy Chief
Appellate Section
Civil Rights Division

From: Michelle Aronowitz
Attorney
Appellate Section
Civil Rights Division

The Magnet Schools Assistance Program (MSAP), 20 U.S.C. 7201-7213, is a discretionary grant program administered by the Department of Education (DOE). MSAP provides funds to local educational agencies (LEAs) to "assist in the desegregation of schools * * * by providing financial assistance to eligible [LEAs] for * * * the elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority students." 20 U.S.C. 7202. MSAP provides funds for magnet schools that are part of either voluntary or court-ordered desegregation plans.

Because some of the magnet schools funded by MSAP take race into account in making student assignments, and in light of recent court challenges¹ to the use of race in public education, the Department of Education has asked the Department of Justice (DOJ) for assistance in determining the appropriate use of race in the MSAP. This memo addresses two questions:

1. What was Congress' goal in authorizing school districts to use race in order to achieve the statutory purpose of MSAP of reducing, eliminating, or preventing minority group isolation?
2. Does this goal satisfy constitutional standards for the

¹ We are aware of court challenges to the use of race in admissions in elementary and secondary schools in DeKalb County, Georgia, Los Angeles, California, Charleston, South Carolina, Charlotte-Mecklenburg, North Carolina, Arlington, Virginia, Montgomery County, Maryland, Houston, Texas, Boston Massachusetts, and Buffalo, New York. In addition, Department of Education Office of Civil Rights has received complaints about the use of race in magnet schools admissions in Roanoke, Virginia, Darlington, South Carolina, and West Palm Beach, Florida.

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use of race by government actors?

I. CONGRESS' PURPOSE IN ENACTING MSAP

MSAP was enacted by Congress in 1984² to provide financial assistance to LEAs that lost federal funds because of the repeal of the Emergency School Aid Act (ESAA)³ of 1972 by section 5 of the Omnibus Budget Reconciliation Act of 1981. See MSAP, 20 U.S.C. 4052(1) (1984). ESAA "provided federal assistance to local school districts undergoing desegregation either voluntarily or in compliance with court decisions. ESAA provided the only substantial federal support to meet desegregation-related needs. It further encouraged voluntary desegregation in school districts across the country." S. Rep. No. 100-222, at 45 (1987) (accompanying 1988 reauthorization of MSAP). As stated in the text of the statute, ESAA applied uniformly across the United States to reduce segregation by race in elementary and secondary schools "without regard to the origin or cause of such segregation." P.L. 92-318, Sec. 703(a) (1972) (emphasis added).

ESAA was eliminated as a separate program in 1981 and consolidated along with more than 30 other programs as part of the Chapter 2 block grant under the Omnibus Budget Reconciliation Act of 1981. S. Rep. No. 100-222, at 45. As a result of this consolidation, federal financial assistance for desegregation efforts was sharply reduced. *Id.* Because of its concern that, in the face of considerable need for desegregation assistance, funding for desegregation had been sharply reduced, Congress passed MSAP in 1984 "to provide once again federal assistance to school districts involved in desegregation efforts." S. Rep. No. 100-222, at 45. Congress amended MSAP in 1985,⁴ and reauthorized MSAP in 1988⁵ and 1994⁶.

The purpose of the MSAP, as set out in the statute, is

to assist in the desegregation of schools served by local educational agencies by providing financial assistance to

²MSAP, 20 U.S.C. 4051, 98 Stat. 1299, P.L. 98-377, Aug. 11, 1984.

³ESAA, P.L. 92-318, Title VII, Sec. 701-720, June 23, 1972.

⁴MSAP, P.L. 99-159, Nov. 22, 1985.

⁵MSAP, 20 U.S.C. 3021, 102 Stat. 231, P.L. 100-297, Apr. 28, 1988.

⁶MSAP, 20 U.S.C. 7201, 108 Stat. 3695, P.L. 103-382, Oct. 20, 1994.

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eligible local educational agencies for --

- (1) the elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority students;
- (2) the development and implementation of magnet school projects that will assist local educational agencies in achieving systemic reforms and providing all students the opportunity to meet challenging State content standards and challenging State student performance standards;
- (3) the development and design of innovative educational methods and practices; and
- (4) courses of instruction within magnet schools that will substantially strengthen the knowledge of academic subjects and the grasp of tangible and marketable vocational skills of students attending such schools.

20 U.S.C. 7202. In reauthorizing MSAP in 1994, Congress found that it is in the best interest of the Federal Government to --

- (A) continue the Federal Government's support of school districts implementing court-ordered desegregation plans and school districts seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stage of such students' education;
- (B) ensure that all students have equitable access to quality education that will prepare such students to function well in a culturally diverse, technologically oriented, and highly competitive, global community; and
- (C) maximize the ability of local educational agencies to plan, develop, implement and continue effective and innovative magnet schools that contribute to State and local system reform.

20 U.S.C. 7201(5). Congress also found that "magnet schools are a significant part of our Nation's effort to achieve voluntary desegregation in our Nation's schools," 20 U.S.C. 7201(1), and that "where magnet programs are implemented for only a portion of a school's student body, special efforts must be made to discourage the isolation of * * * students by racial characteristics." 20 U.S.C. 7201(4)(A)(ii) (emphasis added).

A magnet school is defined under MSAP as a "public elementary or secondary school * * * that offers a special curriculum capable

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of attracting substantial numbers of students of different racial backgrounds." 20 U.S.C. 7204. To be eligible for MSAP funds, a magnet school program must be "part of an approved desegregation plan," 20 U.S.C. 7203(1), either court-ordered or voluntary, 20 U.S.C. 7205, and must be "designed to bring students from different social, economic, ethnic, and racial backgrounds together." 20 U.S.C. 7203(2). Specifically, an LEA is eligible for MSAP funds if it:

(1) is implementing a plan undertaken pursuant to a final order issued by a court * * * that requires the desegregation of minority-group-segregated children or faculty in the elementary and secondary schools of such agency; or

(2) without having been required to do so, has adopted and is implementing, or will, if assistance is made available to such [LEA] under this part, adopt and implement a plan that has been approved by the Secretary as adequate under title VI of the Civil Rights Act of 1964 * * * for the desegregation of minority-group-segregated children or faculty in such schools.

20 U.S.C. 7205 (1994) (emphasis added).

MSAP does not define "desegregation plan," but DOE regulations interpreting MSAP define a desegregation plan as "a plan for the reassignment of children or faculty to remedy the illegal separation of minority group children or faculty in the schools of an LEA or a plan for the reduction, elimination, or prevention of minority group isolation in one or more of the schools of an LEA." 34 C.F.R. 280.4(b) (emphasis added). The regulations define "minority group isolation" as "a condition in which minority group children constitute more than 50 percent of the enrollment of the school." 34 C.F.R. 280.4(b).

DOE requires applicants to submit one of the following types of desegregation plans with their applications: (1) a plan required by court order; (2) a plan required by a State agency or official; (3) a plan required by the DOE's Office for Civil Rights (OCR) under Title VI of the Civil Rights Act of 1964; or (4) a purely voluntary plan adopted by an applicant to reduce, eliminate, or prevent minority group isolation. See 60 Fed. Reg. 14868 (Mar. 20, 1995); 57 Fed. Reg. 61514 (Dec. 24, 1992). An application must include a description of how MSAP assistance "will be used to promote desegregation, including how the proposed magnet school project will increase interaction among students of different social, ethnic, and racial backgrounds." 20 U.S.C. 7206(1)(A). It must also include an assurance that the applicant will not engage in discrimination based on race, color, or national origin in "the assignment of students to schools, or to courses of instruction within the school, or such agency, except to carry out the approved plan." 20 U.S.C. 7206(b)(2)(C)(ii) (emphasis added).

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MSAP recipients are competitively selected in accordance with the criteria set out at 34 C.F.R. 280.30-280.32. Desegregation plans submitted with the selected applications are then reviewed by OCR to ensure that the plan is either (1) court-ordered; or (2) if voluntary, that it does not violate Title VI, will reduce, eliminate, or prevent minority group isolation within the grant period, and will not result in an increase in minority enrollment at the magnet school or any feeder school above the districtwide percentage of minority students at the grade levels served by that magnet school. 34 C.F.R. 280.2, 280.10(b). OCR also reviews desegregation plans submitted with applications to ensure that they comply with the nondiscrimination assurances required by the statute. See 20 U.S.C. 7206(b)(2)(C).

DOE may reserve not more than 2% of funds appropriated under MSAP to evaluate, inter alia, "the extent to which magnet school programs lead to the elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority students." 20 U.S.C. 7212(b).

A. CONGRESS INTENDED MSAP TO REMEDY DE FACTO SEGREGATION

DOE has consistently interpreted MSAP to authorize funding of magnet schools that are part of desegregation plans intended to remedy either de facto or de jure segregation. See Memorandum from Maureen Corcoran, General Counsel, Eligibility Requirements for Magnet Schools Assistance Program (April 30, 1995); 50 Fed. Reg. 21,190 (May 22, 1985); Memorandum from Harry M. Singleton, Assistant Secretary for Civil Rights, Determining the Eligibility of Local Education Agencies for Magnet Schools Assistance (June 6, 1985); 34 C.F.R. 280.2, 280.4(b) (1985-1997); 57 Fed. Reg. 61,508 (Dec. 24, 1992); 60 Fed. Reg. 14869 (Mar. 20, 1995). This interpretation is supported by the plain language of the Act and its legislative history.

1. ESAA. ESAA, the precursor to MSAP, explicitly covered plans to remedy de facto segregation. P.L. 92-318, Sec. 703(a) (1972) (ESAA applied uniformly across the United States to reduce segregation by race "without regard to the origin or cause of such segregation." (emphasis added). As the Supreme Court held in interpreting ESAA:

A reading of the Act in its entirety indisputably demonstrates that Congress was disturbed about minority segregation and isolation as such, de facto as well as de jure, and that, with respect to the former, it intended the limited funds it made available to serve as an enticement device to encourage voluntary elimination of that kind of segregation.

Board of Educ. v. Harris, 444 U.S. 130, 141 (1979) (emphasis added). The Court in Harris explained that in enacting ESAA,

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Congress' concern was stated expressly to be about "minority group isolation and improving the quality of education for all children." The stated purpose of the legislation was the elimination of this isolation. The focus is clearly on actual effect, not on discriminatory intent.

Ibid. The Court further explained,

At the time of ESAA's passage, it was generally believed that the courts, when implementing the Constitution, could not reach de facto segregation. See, e.g., 117 Cong. Rec. 11519 (1971) (remarks of Sen. Mondale). Congress, apparently, was not then in much of a mood to mandate a change in the status quo. The midground solution found and adopted was the enticement approach "to encourage the voluntary elimination, reduction, or prevention of minority isolation," as § 702(a)(2) of [ESAA] recites. Thus, it would make no sense to allow a grant to a school district that, although not violating the Constitution, was maintaining a de facto segregated system.

Id. at 141-142.⁷

2. Statutory Language of MSAP. MSAP has the same statutory purpose as ESAA: to "ensure that all students have equitable access to quality education," 20 U.S.C. 7201(5)(B), and "the elimination, reduction, or prevention of minority group isolation." 20 U.S.C. 7202(1). As with ESAA, "[t]he focus is clearly on actual effect, not on discriminatory intent," and "it would make no sense to allow a grant to a school district that, although not violating the Constitution, was maintaining a de facto segregated system." Harris, 444 U.S. at 141-142.

As discussed above, to be eligible for MSAP funds, a magnet school must be "part of an approved desegregation plan," and "designed to bring students from different social, economic, ethnic, and racial backgrounds together." 20 U.S.C. 7203. Specifically, an LEA is eligible for MSAP funds if it

(1) is implementing a plan undertaken pursuant to a final order issued by a court * * * that requires the desegregation of minority-group-segregated children or faculty in the elementary and secondary schools of such agency; or

(2) without having been required to do so, has adopted and is implementing, or will, if assistance is made available to

⁷In 1973, the Supreme Court clarified that only de jure school segregation, that is, "a current condition of segregation resulting from intentional state action," violates the constitution. Keyes v. School Dist. No. 1, 413 U.S. 189, 206 (1973).

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such [LEA] under this part, adopt and implement a plan that has been approved by the Secretary as adequate under title VI of the Civil Rights Act of 1964 * * * for the desegregation of minority-group-segregated children or faculty in such schools.

20 U.S.C. 7205 (1994) (emphasis added). The 1984 and 1988 versions of MSAP contain identical language. See P.L. 98-377, Sec. 702(2) and (3) (1984); P.L. 100-297, Sec. 3002 (1988). As the phrase "without having been required to do so" indicates, Congress intended MSAP to fund voluntary desegregation plans entered into by the LEA in the absence of court or administrative findings of discrimination.

That MSAP, like ESAA, is intended to fund voluntary desegregation efforts to remedy de facto segregation is further supported by the fact that, in reauthorizing MSAP in 1994, Congress found that "it is in the best interest of the Federal Government to -- (A) continue the Federal Government's support of school districts implementing court-ordered desegregation plans and school districts seeking to foster meaningful interaction among students of different racial and ethnic backgrounds." 20 U.S.C. 7201(5) (emphasis added); see also 20 U.S.C. 7206(b)(1)(A) (promotion of "desegregation" includes "increase[d] interaction among students of different social, economic, ethnic, and racial backgrounds."). Congress also found that "magnet schools are a significant part of our Nation's effort to achieve voluntary desegregation in our Nation's schools." 20 U.S.C. 7201(1) (1994) (emphasis added).

3. Legislative History of MSAP. The legislative history also suggests that Congress intended MSAP to fund voluntary efforts to remedy de facto segregation.

For example, in the 1983 House debates on MSAP, Rep. Guarini argued that "[f]ocused national attention should be directed to eradicating the problem of school segregation, whether such segregation is deliberate or is a result of population trends." 130 Cong. Rec. 3590 (June 6, 1983) (emphasis added). Similarly, in the 1984 Senate debate Senator Hatch stated: "School districts who have no discernible intent to discriminate should not be barred from eligibility." 130 Cong. Rec. S6680 (June 6, 1984). And Senator Kennedy commented: "Schools under court order, or schools striving to enact voluntary desegregation plans, need Federal support in order to carry out an effective desegregation plan." 130 Cong. Rec. S6679 (June 6, 1984) (emphasis added); see also 130 Cong. Rec. S6680 (June 6, 1984) (Sen. Moynihan) (placing ESAA in a block grant "has limited schools in implementing voluntary plans") (emphasis added).

Moreover, the 1983 and 1984 House and Senate debates on MSAP cite a number of school districts that suffer only de facto segregation to justify the enactment of MSAP. In the 1984 House debate, for example, Rep. Kildee asked Rep. Perkins:

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Is it your understanding that the term 'voluntary plan' can mean plans that were not necessarily initiated by the courts and could include such voluntary plans as exist in the cities of Flint, MI; Rochester, NY; Seattle, WA; and Philadelphia, PA; but that are otherwise meeting guidelines established under Title VI of the Civil Rights Act of 1964?

130 Cong. Rec. H7742 (July 25, 1984). Rep. Perkins responded that Rep. Kildee was correct. *Id.*; see also 130 Cong. Rec. H3589 (June 6, 1983) (Rep. Conable); 130 Cong. Rec. S6675 (June 6, 1984) (Sen. Eagleton); 130 Cong. Rec. S11691 (Sept. 21, 1984) (Sen. Moynihan). None of these school districts were under court order to desegregate. See, e.g., Philadelphia (finding only de facto segregation in Philadelphia and thus no constitutional violation). See also 130 Cong. Rec. S8439 (June 27, 1984) (Sen. Riegle) (citing Grand Rapids school district in support of MSAP); Grand Rapids, (finding only de facto segregation in Grand Rapids).

Congress' reauthorization of MSAP in 1988 further supports the conclusion that Congress meant to remedy de facto segregation. The Senate Report accompanying the 1988 reauthorization states that Congress' intent in enacting MSAP was "to achieve voluntary desegregation and promote quality education." S. Rep. 100-222, at 47 (emphasis added). In reauthorizing MSAP in 1988, Congress required that special consideration be given to school districts that had not been funded in the past "[because [of] past experience which indicates that this federal program has encouraged many school districts to implement desegregation plans voluntarily." *Id.* (emphasis added). The report also notes that the two eligibility requirements -- "that schools are under court order to implement a magnet school, or that schools have filed a voluntary plan with the Office of Civil Rights which includes magnet schools -- still hold." S. Rep. at 47 (emphasis added). Moreover, the Magnet Program Coordinator from the Flint Michigan Community Schools -- a de facto district -- testified in support of MSAP at a congressional hearing on the reauthorization of MSAP. See Reauthorization of Expiring Federal Elementary and Secondary Education Programs. Vol. 8: Miscellaneous Programs, Hearings before the Subcomm. on Elementary, Secondary, and Vocational Educ. of the House Comm. on Educ. and Labor (Apr. 2, 1987) (testimony of Nona Gibbs).

It is thus clear that MSAP was intended to fund voluntary efforts to remedy de facto segregation. The only ambiguity on this point stems from the requirement that an eligible magnet school under MSAP must be part of a "desegregation" plan, 20 U.S.C. 7205, and under ESAA, DOE had defined a "desegregation plan" as a plan to remedy illegal segregation. See 42 Fed. Reg. 12085-12086 (March 2, 1977); see also 34 C.F.R. 280.4(e) (1981); 34 C.F.R. 280.42(b)(2)(iii) (1981).

But on May 22, 1985, DOE revised its former definition of

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"desegregation plan" to "cover[] the two principal types of plans that were eligible under the Emergency School Aid Act (ESAA) -- plans to remedy the illegal separation of children or faculty in an LEA's schools and plans for the reduction, elimination, or prevention of minority group isolation." 50 Fed. Reg. 21191; see also 34 C.F.R. 280.4(b) (defining "desegregation plan").⁸ The eligibility requirements under ESAA were unnecessarily complicated. ESAA funded two types of required plans: (1) court-ordered plans; and (2) and plans required by OCR. *Id.* at Sec. 706(a)(1)(A). ESAA also funded three types of voluntary plans: (1) plans to eliminate minority group isolation; (2) plans to reduce or prevent minority group isolation; and (3) plans to reduce minority group isolation by admitting nonresident students. *Id.* at Sec. 706(a)(1)(B), (C), and (D). MSAP simplified ESAA by combining these five categories of desegregation plans into two: court-ordered and voluntary. There is no indication that MSAP was meant to change the eligibility requirements under ESAA, and DOE has thus read them to be consistent. See, e.g., S. Rep. No. 100-222, at 45 (Congress passed MSAP in 1984 "to provide once again federal assistance to school districts involved in desegregation efforts.") (emphasis added); Compare ESAA, P.L. 92-318, Sec. 706(a)(1)(B) and (D) (1972), with MSAP, 20 U.S.C. 7205(2) (1994).

Congress acquiesced in DOE's reading of the eligibility requirements under MSAP as consistent with ESAA when it amended MSAP on November 22, 1985, and twice reauthorized MSAP -- in 1988 and 1994 -- without changing the eligibility requirements for the program in any relevant respect. Indeed, in 1988 the Senate Committee "undertook a serious internal review of the grant-awarding process in the Department of Education and the 'special consideration' criteria used in judging applications." S. Rep. 100-222, at 46. This process "identified no issues that require[d] legislative change." *Id.*

Further, Congress was actually aware when it reauthorized MSAP that it was DOE's practice to fund voluntary plans to reduce de facto segregation. The House Committee on Governmental Operations, on December 30, 1985, issued a report on the Investigation of Civil Rights Enforcement By The Office For Civil Rights At The Department Of Education, 99th Cong., 1st Sess., H. Rep. No. 99-458. The House Report (page 32, footnotes 90 and 91) references the June 6, 1985, Memorandum from Harry M. Singleton, Assistant Secretary for Civil Rights, Determining the Eligibility of Local Education Agencies for Magnet Schools Assistance. The June 6 Memorandum states clearly that plans to reduce, eliminate or prevent minority group isolation

⁸ DOE also adopted the definition of "minority group isolation" from ESAA -- "a condition in which minority group children constitute more than 50 percent of a school's enrollment." 50 Fed. Reg. 21191.

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are treated as voluntary plans under MSAP. Moreover, DOE has informed us that it is their practice under MSAP to notify members of Congress, prior to notification of award recipients, that LEAs in their districts will be recipients of MSAP awards. Thus, members in districts with no history of discrimination were fully aware of the voluntary efforts to remedy de facto segregation being undertaken by their constituents.

B. THE EDUCATIONAL BENEFIT OF REDUCING MINORITY GROUP ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS

In enacting MSAP, Congress sought to assist in the voluntary desegregation of our nation's elementary and secondary schools by funding magnet school programs that are part of an overall plan to reduce, eliminate, or prevent minority-group isolation. 20 U.S.C. 7202. In undertaking this task, Congress sought to ensure equal access to quality education for all students, and to prepare students to function in a culturally diverse global community. 20 U.S.C. 7201(5)(B). Congress intended MSAP to assist in remedying both de facto and de jure segregation, as discussed above, and anticipated that accomplishment of this goal may require student assignments on the basis of race. 20 U.S.C. 7206(b)(2)(C)(ii).

To understand why Congress has acted to reduce segregation in elementary and secondary education, including de facto segregation, and to encourage equal access to quality education, it is necessary to look to the legislative history of ESAA, the precursor to MSAP. The 1985, 1988, and 1994 versions of MSAP all assert that Congress' goal in passing MSAP was to reduce segregation, or minority-group isolation, but the significance of this goal is assumed. See H. Rep. 103-425, at 32, 65-66 (1994); S. Rep. 103-292, at 68-70, 186(1994); S. Rep. 100-222, at 45-49 (1987).

The legislative history of ESAA, however, provides extensive justifications for Congress' decision to promote voluntary desegregation. The overall purpose of the Act was to promote voluntary school integration. The Report from the House Committee on Education and Labor found that racial isolation in our Nation's public schools was widespread. ESAA was enacted because Congress felt that "it is time for the rhetoric of the Federal Government calling for the integration of our schools to be backed up by sufficient funds to assist them in striving for this goal." H. Rep. No. at 4; accord S. Rep. No. 92-61, at 6 (citing statistics on racial isolation in public elementary and secondary schools); see also 130 Cong. Rec. S8439 (June 27, 1984) (Sen. Riegle) (in debating MSAP, noting a recent study concluding that 63% of black children and 68% of Hispanic children attend predominantly minority schools); 130 Cong. Rec. S6678 (June 6, 1984) (Sen. Durenberger) ("None of the 10 largest metropolitan areas in the country has substantially desegregated school systems. In the 26 largest cities, 3 of every 4 black children are assigned to intensively segregated schools.").

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The justifications for Congress' decision to promote voluntary integration include both remedial and non-remedial components, and can be grouped into four categories: (1) combating racism and teaching children of all races to function in a racially diverse community; (2) preventing the detriment to minority children that flows from segregated education; (3) promoting equal, quality education for all children; and (4) providing models of quality, integrated education to stem white flight from urban school districts.

1. One of the strongest justifications for ESAA was to reduce racism by educating as many young children as possible in integrated schools. In proposing the bill which eventually became ESAA, President Nixon stated:

This Act deals specifically with problems which arise from racial separation, whether deliberate or not, and whether past or present. It is clear that racial isolation ordinarily has an adverse effect on education. Conversely, we also know that desegregation is vital to quality education -- not only from the standpoint of raising the achievement levels of the disadvantaged, but also from the standpoint of helping all children achieve the broad-based human understanding that increasingly is essential in today's world.

This statement was quoted in House and Senate Reports on ESAA. H. Rep. 92-576, at 3 (1971) (Comm. on Educ. and Labor, accompanying H.R. 2266) (emphasis added); S. Rep. No. 92-61, at 7 (1971) (Comm. on Labor and Public Welfare, accompanying S. 1557). It was also quoted by Sen. Moynihan in the 1984 Senate debates on MSAP. 130 Cong. Rec. S6680 (June 6, 1984).

There were extensive hearings on ESAA. Consistent with President Nixon's statement, Dr. Ewald Nyquist, New York State Commissioner of Education, testified to the educational value to be derived from integrated education:

Integration is an educational matter. It involves the changing of attitudes, behavior, and understanding of people of all kinds of age levels. For school children, it means an environment conducive to the positive interaction of children from diverse backgrounds in which they learn that differences among peoples are not as great as similarities and that difference is a source of richness and value rather than a thing to be feared and denied. An integrated environment is one that teaches the child to judge individuals for what they are rather than by what group they belong to.

Needs of Elementary and Secondary Education for the Seventies: Hearings on H.R. 2266 and H.R. 4847 before the Subcomm. on Educ. of the House Comm. on Educ. and Labor, 92d Cong. 159, 200 (1971); see

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also S. Rep. No. 92-61, at 7 ("Education in an integrated environment, in which children are exposed to diverse backgrounds, is beneficial to both minority and nonminority children.").

Dr. Nyquist also testified to the danger of segregated education:

If children of different races and economic and social groups have no opportunity to know each other and to live together in school, they cannot be expected to gain the understanding and mutual respect necessary for the cohesion of our society. That stability of our social order depends, in large measure, on the understanding and respect which is derived from a common educational experience among diverse racial, social, and economic groups -- integrated education. The attainment of integrated education is dependent upon the elimination of racial segregation in the schools.

Id. at 179; see also S. Rep. No. 92-61, at 6 ("Whether or not it is deliberate, racial, ethnic, and socio-economic separation in our schools and school systems have serious and often irreparable adverse effects on the education of all children, be they from deprived or from advantaged backgrounds."); *id.* at 7 ("Testimony before the Committee indicated that the isolation of children from minority groups has adverse effects on non-minority children as well.").

Dr. Nyquist concluded that segregation "poses a threat to the economic, social, and cultural health of the community, State, and Nation," *id.* at 172. Indeed, President Nixon, in proposing the bill, stated that school integration is one of the most important issues facing the Country:

Few issues facing us as a nation are of such transcendent importance: important because of the vital role that our public schools play in the nation's life and in its future; because the welfare of our children is at stake; because our national conscience is at stake; and because it presents us a test of our capacity to live together in one nation, in brotherhood and understanding.

S. Rep. 92-61, at 9. Sen. Moynihan quoted this statement in the 1984 Senate debates on MSAP. 130 Cong. Rec. S6680 (June 6, 1984); see also 130 Cong. Rec. S6679 (June 6, 1984) (Sen. Kennedy) ("Support for desegregation assistance continues to be a national priority."); 130 Cong. Rec. S6679 (June 6, 1984) (Sen. Chafee) ("I believe the elimination of racial isolation in our Nation's public schools remains one of the primary responsibilities of the Federal Government in education.").

2. Congress' second reason for promoting school

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integration, closely related to the first, was to remedy the detriment specific to minority children caused by minority-group isolation in public schools. This is the rationale the Supreme Court adopted in Brown v. Board of Educ., applied by Congress to de facto segregation:

Negro children who attend predominantly Negro schools do not achieve as well as other children, Negro and white. Their aspirations are more restricted than those of other children and they do not have as much confidence that they can influence their own futures. When they become adults, they are less likely to participate in the mainstream of America society, and more likely to fear, dislike, and avoid white Americans. The conclusion drawn by the U.S. Supreme Court about the impact upon children of segregation compelled by law -- that it 'affects their hearts and minds in ways unlikely ever to be undone' -- applies to segregation not compelled by law.

The major source of the harm which racial isolation inflicts upon Negro children is not difficult to discover. It lies in the attitudes which such segregation generates in children and the effect these attitudes have upon motivation to learn and achievement. Negro children believe that their schools are stigmatized and regarded as inferior by the community as a whole. Their belief is shared by their parents and by their teachers. And their belief is founded in fact.

ESAA Hearings at 172-173 (emphasis added); see also Harris, 444 U.S. at 145 n.7 (quoting 117 Cong. Rec. 11511-11512 (1971) (remarks of Sen. Eastland):

I have never been able to understand how a 10-year-old colored student in a public school in Harlem, Watts, or South Chicago, is expected to look around and say to himself: "This kind of racial separation does not hurt me because the State of Illinois does not have a law requiring me to attend all-black schools. I should not feel hurt by this racial separation because it is the result of housing patterns that just accidentally developed."

The Senate Report on ESAA concluded that "[t]he Nation wastes much in the way of human resources when such a large number of its children are educationally deprived." S. Rep. No. 92-61, at 7.

At times, however, statements and testimony indicate that minority students are harmed by concentrated poverty as well as by racial isolation:

Many of these children [in minority-isolated schools] are from families living in poverty. Reports indicate that the vast majority of them are deprived of a decent educational

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opportunity throughout their lives. Their schools are often inferior, educationally, financially, and physically. Children in these schools lag years behind the norm in educational achievement; and few of them have the opportunity or do go on to higher education. Those from the poorest environments are consigned to generational poverty, unemployment, and welfare, and raise children who enter a perpetual cycle of poverty and despair.

S. Rep. No. 92-61, at 7.

Beginning with the "Coleman Report," research studies have concluded that educationally, the single most important factor in a school is the kind of home environment from which its pupils come, that students learn as much if not more from other students as from their teachers, and that when advantaged and disadvantaged children are placed together in schools in which the advantaged student is in the majority, the achievement levels of both groups will increase, while simultaneously the gap between each group is narrowed. Evidence presented at hearings on this legislation, and the hearings and studies conducted by the Select Committee on Equal Educational Opportunity, lead to two conclusions: children educated in isolation often suffer irreparable harm, and clear, positive and lasting benefits result from quality, integrated schools which have a majority of students from environments in which learning is encouraged.

Id.; see also Hearings at 216-217, 219-286.

Congress seems to have concluded that the harm suffered by minority students in minority-group isolated schools derives from a combination of racial and class isolation. See S. Rep. 92-61, at 8 ("Children benefit most from integrated environments where students are from a variety of socio-economic as well as racial and ethnic, backgrounds."); *id.* at 12 ("academic achievement improves most dramatically when racial and ethnic integration is accompanied by socio-economic integration.").

3. Congress' third justification for promoting school integration was to promote equal educational opportunity. "It is to the task of providing equality of educational opportunity that this bill is addressed." S. Rep. No. 92-61, at 6. As Senator Eagleton stated in the 1984 debates on MSAP, "[f]ederal desegregation assistance has long been a critical lever in promoting equal educational opportunity." 130 Cong. Rec. S11691 (Sept. 21, 1984). Senator Chafee agreed: "I believe the elimination of racial isolation in our Nation's public schools remains one of the primary responsibilities of the Federal Government in education. We must continue to assure that all students are given an equal opportunity to receive quality education, regardless of background." 130 Cong.

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Rec. S6679 (June 6, 1984).

By reducing de facto segregation, Congress can promote equal educational opportunity because more minority and nonminority students will attend the same schools, and thereby receive the same education. See S. Rep. No. 92-61, at 9 ("Public policy involves more than legalisms. * * * This Committee believes it is the responsibility of the Congress and the Nation to focus on the educational and human objectives that underlie the requirements of law, and on the programs and policies that are essential if equal educational opportunity is ever to become a reality for our Nation's children.").

Further, reducing segregation, regardless of its cause, can assist in remedying the effects of prior intentional discrimination in such areas as education, housing, and employment. This is so in part because some intentional school segregation may go undetected. See S. Rep. No. 92-61, at 6 ("The bill is not designed to change Constitutional or other legal standards or policies, or procedures with respect to the enforcement of those standards. The Committee believes that these standards should be enforced nationally and uniformly but it recognizes that this has not been the case either with respect to particular regions of the country or with respect to all minority groups.") (emphasis added). It is also true because neighborhood schools, operating in the context of employment and housing discrimination, create minority-group isolated schools and concentrated poverty:

Negroes in this country were first enslaved, later segregated by law, and now are segregated and discriminated against by a combination of governmental and private action. They do not reside today in ghettos as the result of an exercise of free choice and the attendance of their children in racially isolated schools is not an accident of fate wholly unconnected with deliberate segregation and other forms of discrimination.

ESAA Hearings at 169 (testimony of Dr. Nyquist). The reduction of minority group isolation is thus a means of remedying the vestiges of intentional discrimination in education as well as other areas. As the House Report on ESAA found, "[t]he schools are being made to bear a large part of the burden of integrating our society. The eventual attainment of that goal is seriously jeopardized so long as we deny them funds adequately to perform the task." H. Rep. No. at 4; see also 130 Cong. Rec. S6678 (June 6, 1984) (ESAA brought "an awareness that the federal government did see itself as part of the team in correcting the evils of segregated housing.") (excerpt of letter introduced by Sen. Durenberger).

4. Congress' fourth purpose in funding integrated schools was to stem the tide of white flight from urban school districts by providing models of quality, integrated education. The Act does

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this by providing money to maintain the quality of schools undergoing the process of desegregation. Noting the great expense that school districts bear in order to successfully integrate their schools, the House Committee articulated its "hopes that the funds provided by this bill will assist the successful achievement of both integration and quality education which in turn will attract white parents back to the public schools they have left." H. Rep. 92-576, at 5. As the House Committee stated:

The Committee believes that the goals of desegregation and integration will never be achieved unless the parents of non-minority students are convinced that their children will receive the same quality of education in integrated schools as they thought they received in segregated schools. And school districts can begin to prove this theory to those parents whose children are in those schools which now have or will shortly have at least ten per cent, but no more than fifty per cent, minority children.

Id. at 13. The Senate Committee was in accord with this rationale. See S. Rep. No. 92-61, at 12 ("Stable, quality integrated schools are intended to be models of educational excellence."); id. at 13 ("The Committee believes that stability will be the natural result if the school meets the definition in the bill, is designed to achieve the purposes set forth in section 2(b)(2), and thereby becomes a model of educational excellence, sensitive to the background cultures, abilities, and individual needs of every pupil.").

C. CONGRESS AUTHORIZED SCHOOL DISTRICTS TO USE RACE IN MAKING STUDENT ASSIGNMENTS TO ACCOMPLISH ITS INTENDED PURPOSE OF REDUCING MINORITY GROUP ISOLATION

To achieve the goal of reducing minority group isolation, a number of magnet schools funded under MSAP consider race in making student assignments, often in the form of caps on the admission of students from certain racial or ethnic groups. Depending on the demographics of the school district, the caps can limit the admission of minority or nonminority students who wish to attend the magnet school.

In enacting MSAP, Congress authorized the funding of magnet schools that use race in making student assignments as long as race is used to reduce, eliminate, or prevent minority-group isolation.

MSAP requires that each application for funding include an assurance that the applicant will "not engage in discrimination based on race, religion, color, national origin, sex, or disability" in employee hiring and assignments and in student extracurricular

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activities. 20 U.S.C. 7206(b)(2)(C)(i) and (iii).⁹ With respect to student assignments, however, the act makes an exception: The applicant must certify that it will not discriminate on the basis of race, etc., in "the assignment of students to schools, or to courses of instruction within the school, of such agency, except to carry out the approved plan." 20 U.S.C. 7206(b)(2)(C)(ii). The "approved plan" is a court-ordered or voluntary desegregation plan. See 20 U.S.C. 7205; 34 C.F.R. 280.2, 280.10(b). As discussed above, a desegregation plan is "a plan for the reassignment of children or faculty to remedy the illegal separation of minority group children or faculty in the schools of an LEA or a plan for the reduction, elimination, or prevention of minority group isolation in one or more of the schools of an LEA." 34 C.F.R. 280.4(b) (emphasis added). DOE will approve a voluntary desegregation plan if it concludes that, for each magnet school for which funding is sought: (1) the magnet school will reduce, eliminate, or prevent minority group isolation within the magnet school or a feeder school, within the grant period; and (2) the establishment of the magnet school will not increase minority enrollment at the magnet school or any feeder school above the districtwide percentage of minority group students at the grade levels served by that magnet school. 34 C.F.R. 280.2(b). The Act thus permits schools to use race in making student assignments in order to remedy illegal segregation or to reduce, eliminate, or prevent minority-group isolation.¹⁰

Thus, if a recipient of MSAP funds uses race in student admissions in order to remedy illegal segregation or to reduce, eliminate, or prevent minority-group isolation, such use of race is specifically authorized by MSAP. Of course, MSAP cannot be read to authorize an unconstitutional use of race. Therefore, as discussed below, the use of race in student admissions to reduce, eliminate, or prevent minority-group isolation may violate the constitution if it constitutes a racial classification that is not narrowly tailored to serve this purpose. See 50 Fed. Reg. 21,197 (May 22, 1985) (instructing MSAP applicants that they "must, of course, administer the provision [regarding the ban on using MSAP funds to teach secular humanism] in a manner consistent with the First Amendment of

⁹The Supreme Court interpreted an analogous provision in ESAA to prohibit discriminatory intent or impact. Harris, 444 U.S. at 149.

¹⁰In addition to this statutory exception to the nondiscrimination requirement, the legislative history of MSAP indicates that Congress intended to fund magnet schools that use race in making student assignments. In the 1994 reauthorization of MSAP, Congress rejected a proposed amendment that would have banned "race-norming" of educational tests, the practice of adjusting a racial group's test scores up or down. See H. Rep. No. 103-425, at 722 (1994).

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the United States Constitution.").¹¹

II. CONGRESS' PURPOSE OF REDUCING MINORITY GROUP ISOLATION JUSTIFIES THE USE OF RACE UNDER CONSTITUTIONAL STANDARDS

While not every use of race in making student assignments is a racial classification triggering strict scrutiny, race-based decisions that prevent certain students from attending a specialized program of instruction would probably trigger strict scrutiny where there is no comparable program in the district. See Bankeser v. DeKalb County Bd. of Educ., CAF No. 1:97-CV-2369-WBH, Order, slip op. at 6 (N.D. Ga., Aug. 22, 1997) (in equal protection challenge to use of race in assigning students to magnet school, plaintiffs suffered no irreparable injury because the magnet school was not sufficiently "unique"). Assuming that some admissions decisions by MSAP recipients involve racial classifications, this section addresses whether Congress' interest in reducing minority group isolation is "compelling" under equal protection analysis and, in particular, whether it is "compelling" in the Fifth Circuit following Hopwood v. State of Texas, 78 F.3d 932 (5th Cir. 1996).

A. It Is Within Congress' Discretion To Conclude That Reduction of Minority Group Isolation in Elementary and Secondary Schools Is A Compelling Interest That Justifies The Narrowly Tailored Use of Race In Student Admissions.

Some of the schools funded under MSAP are under court-order to desegregate. Others have entered into voluntary desegregation plans based on findings of intentional discrimination by OCR. In addition, a school district may have a firm basis in evidence for believing that assignment of students based on race is necessary to remedy intentional discrimination. These school districts clearly have a compelling interest in remedying the present effects of intentional segregation. See, e.g., McDaniel v. Barresi, 402 U.S. 39 (1971) (holding that a voluntary desegregation plan that assigns students on the basis of race in order to disestablish a dual system does not violate the equal protection clause or Title VI, even absent findings of discrimination). This section addresses whether MSAP can fund magnet school programs that use race to remedy purely de facto segregation.

All racial classifications imposed by government actors must be analyzed by a reviewing court under strict scrutiny. Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097, 2113 (1995). "[S]uch classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."

¹¹Title VI is generally understood to extend no further than the Fourteenth Amendment. See United States v. Fordice, 505 U.S. 717, 732 n.7 (1992).

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Id. But Congress is entitled to significant deference by federal courts when it acts on the basis of race or ethnicity to deal with problems of race discrimination. See Fullilove v. Klutznick, 448 U.S. 448, 472, 476-478, 480-481, 483-486 (1980) (Burger, C.J.) (plurality opinion) (reviewing affirmative action program with "appropriate deference to Congress, a co-equal branch charged by the Constitution with the power to 'provide for the * * * general Welfare of the United States' and 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment"); id. at 499-506, 515-516 (Powell, J., concurring) ("After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area"); id. at 548 (Stevens, dissenting); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 488-491, 504 (1989) (O'Connor, J.) (plurality opinion) ("Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define situations which congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." As a result, "Congress may identify and redress the effects of society-wide discrimination.") (citing Katzenbach v. Morgan, 384 U.S. 641, 651 (1966); South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966)); Croson, 488 U.S. at 521-523 (Scalia, J., concurring) ("A sound distinction between federal and state (or local) action based on race rests not only upon the substance of the Civil War Amendments, but upon social reality and governmental theory."); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 565-566, 569, 572 (1990), overruled on other grounds, Adarand, 115 S. Ct. 2097; Adarand, 115 S. Ct. at 2114 (No "Member of this Court has repudiated in this case his or her previously expressed views on the subject" of deference to Congress' authority to deal with the problem of racial discrimination).

Congress' purpose in enacting MSAP was to remedy racial segregation in elementary and secondary schools, whether de facto or de jure. Through this, Congress sought to prepare children to live in a pluralistic society, and to assist minority children in obtaining equal, quality educations. In enacting ESAA and then MSAP, Congress determined that remedying racial segregation in elementary and secondary schools is of the highest national priority. As President Nixon and the Senate Committee stated in enacting ESAA and Senator Moynihan reiterated in the debates on MSAP: "Few issues facing us as a nation are of such transcendent importance." S. Rep. 92-61, at 9; 130 Cong. Rec. S6680 (June 6, 1984) (Sen. Moynihan); see also 130 Cong. Rec. S6679 (June 6, 1984) (Sen. Kennedy) ("Support for desegregation assistance continues to be a national priority."); 130 Cong. Rec. S6679 (June 6, 1984) (Sen. Chafee) ("I believe the elimination of racial isolation in our Nation's public schools remains one of the primary responsibilities

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of the Federal Government in education."). This determination is entitled to considerable deference by a reviewing court. Further, Congress' conclusion that remedying segregated schools may require student assignments based on race is also entitled to deference.

Moreover, even absent congressional deference, the Supreme Court has suggested on several occasions that it is permissible for a school district to make race-based student assignments to remedy de facto segregation.

In Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971), for example, the Supreme Court stated that

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of [African-American] to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities.

The Supreme Court reaffirmed this observation in North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971), a case in which the Court struck down a North Carolina state statute that barred all student assignments based on race, whether to remedy de facto or de jure segregation:

We observed in Swann that school authorities have wide discretion in formulating school policy, and that as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements.

Id. at 45 (citations omitted).

In Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971), the Supreme Court summarily affirmed a three-judge decision that declared unconstitutional a New York state law that prevented certain state and local officials from assigning students "on account of race" or for the purpose of achieving equality in attendance or adjusting attendance by race. 319 F. Supp. at 712. The three-judge court explained the importance of remedying de facto school segregation:

Although there may be no constitutional duty to undo de facto segregation, it is by now well recognized by educational authorities that the elimination of racial isolation in the schools promotes the attainment of equal educational opportunity and is beneficial to all students, both black and white.

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Id. at 714. The court further elaborated:

The elimination of racial segregation in the schools can enhance the academic achievement of non-white children while maintaining achievement of white children and can effect positive changes in interracial understanding for all children. The latter consideration is paramount. If children of different races and economic and social groups have no opportunity to know each other and to live together in school, they cannot be expected to gain the understanding and mutual respect necessary for the cohesion of our society. The stability of our social order depends, in large measure, on the understanding and respect which is derived from a common educational experience among diverse racial, social, and economic groups -- integrated education. The attainment of integrated education is dependent upon the elimination of racial segregation in the schools.

Id. at 714 (quoting The Regents of the University of the State of New York, 1969 Restatement of Policy on Integration and the Schools, p.3).

In Washington v. Seattle Sch. Dist. No. 1, the Supreme Court again reaffirmed Swann's observation that as a matter of education policy a school district might conclude that integrated schools are necessary to prepare students to live in a pluralistic society:

Education has come to be a 'principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. When that environment is largely shaped by members of different racial and cultural groups, minority children can achieve their full measure of success only if they learn to function in -- and are fully accepted by -- the larger community. Attending an ethnically diverse school may help accomplish this goal by preparing minority children 'for citizenship in our pluralistic society,' while, we may hope, teaching members of the racial majority 'to live in harmony and mutual respect' with children of minority heritage.

458 U.S. 457, 472-473 (1982) (reaffirming the holding of Lee v. Nyquist that a state law that prevents student assignment for purposes of achieving integration, but not other purposes, is unconstitutional). As the Seattle Court pointed out, "white as well as Negro children benefit from exposure to 'ethnic and racial diversity in the classroom.'" Id. at 472. Moreover, the Court in Seattle was aware that the plaintiff school districts made assignments based on race to remedy de facto segregation, as it pointed out in a footnote that one of the districts used "racially controlled enrollment at magnet schools * * * to enhance racial

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balance in its schools." Id. at 464 n.7.¹²

These four Supreme Court decisions suggest that whether a school district uses race-based students assignment to integrate their elementary and secondary schools is a question of educational policy left to the discretion of local authorities. But the Supreme Court has never squarely decided whether remedying de facto segregation is a compelling interest for using race to make student assignments. Indeed, the Court in Seattle clarified in a footnote that the propriety of race-conscious student assignments for the purpose of achieving integration was not raised, and thus the Court did "not specifically pass on that issue." Id. at 472 n.15. The dissent noted, moreover, that "in the absence of a finding of segregation by the School District, mandatory busing on the basis of race raises constitutional difficulties of its own. * * * "[W]hen a State or school board assigns students on the basis of their race, it acts on the basis of a racial classification." Id. at 492 n.6 (Powell, J., and Burger, C.J., Rehnquist, O'Connor, J.J., dissenting).

In the only published opinion addressing the issue post-Hopwood, a district court upheld diversity in secondary education as a compelling state interest. McLaughlin v. Boston School Comm., 938 F. Supp. 1001, 1008 (D. Mass. 1996); see also Hunter v. Regents of the University of California, CV No. 95-3301 KN, Trial Order Re: Findings of Fact and Conclusions of Law, slip op. at 21-22 (C.D. Cal., June 23, 1997) (state's interest in operating a laboratory elementary school to conduct research relevant to the improvement of the state's public education system is compelling). But see Tito v. Arlington County Sch. Bd., CA No. 97-540-A, 1997 U.S. Dist. Lexis 7932, *15 (E.D. Va., May 13, 1997) ("Although the advantages of composing a student body whose racial makeup mirrors that of the community at large may be real, more is needed than the facile talisman of 'diversity' to justify" the racial classification.).

B. Reduction of Minority Group Isolation in Elementary and

¹²The dissenters in Seattle pointed out that there could be legitimate reasons for a school district to adopt a race-neutral assignment system, but notably, described this as a question of educational policy within the school district's discretion. See id. at 495 n.9 ("The people of the State * * * might decide that the reassignment of students to distant schools, on the basis of race, was too great a departure from the ideal of racial neutrality in state action.") (emphasis added); id. at 498 n.12 ("the busing question is complex and is best resolved by the political process.") (citations omitted); id. at 501 n.17 ("As a policy matter, I would not favor reversal of the Seattle Board's decision to experiment with a reasonable mandatory busing program, despite my own doubts as to the educational or social merit of such a program.").

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Secondary Schools Is a Compelling Interest in the Fifth Circuit.

In Hopwood v. State of Texas, 78 F.3d 932 (5th Cir. 1996), the Fifth Circuit held that the affirmative action admissions program at the University of Texas Law School is unconstitutional. It rejected the Law School's asserted interest in achieving a diverse student body, holding that "any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment." 78 F.3d at 944. As the Hopwood court explained,

the use of race in admissions for diversity in higher education contradicts, rather than furthers, the aims of equal protection. Diversity fosters, rather than minimizes, the use of race. It treats minorities as a group, rather than as individuals. It may further remedial purposes but, just as likely, may promote improper racial stereotypes, thus fueling racial hostility.

The use of race, in and of itself, to choose students simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood of applicants. Thus, the Supreme Court has long held that governmental actors cannot justify their decisions solely because of race.

Id. at 945-946 (emphasis added).

The Fifth Circuit has never considered the government's interest in encouraging voluntary integration in elementary and secondary schools, however. Thus, although some of the language in Hopwood seems to suggest that diversity can never be a compelling interest for any government action, this language is dicta because these interests have never been put before the court in the context of primary or secondary education. Similarly, the February 5, 1997, opinion letter of the Attorney General of Texas interpreting Hopwood is addressed only to the effect of Hopwood on various university scholarship programs. Indeed, the letter was expedited "[b]ecause of the importance of these issues to the higher education community of this state" (emphasis added). As Judge Weiner noted in his concurrence in Hopwood, 78 F.3d at 965 n.21, "[w]e play with fire when we assume an easy crossover of Fourteenth Amendment maxims pronounced in cases decided in such other contexts."

As the Supreme Court has stated, "[a] state university system is quite different in very relevant respects from primary and secondary schools." United States v. Fordice, 505 U.S. 717, 728-729 (1992). In a case involving an equal protection challenge to the admissions practices of Boston Latin School, a magnet high school in Boston that admits students on the basis of achievement, the

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district court distinguished Hopwood because "it involved a law school, where the educational mission is so obviously different from that of a public secondary school in a racially diverse municipality." McLaughlin v. Boston Sch. Comm. at 1015. In elementary and secondary public schools, "[e]ducation has come to be 'a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.'" Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 472 (1982) (quoting Brown v. Board of Educ., 347 U.S. 483, 493 (1954)); see also Plyler v. Doe, 457 U.S. 202, 221 (1982) (recognizing "public schools as a most vital civic institution for the preservation of a democratic system of government"); Ambach v. Norwick, 441 U.S. 68, 76 (1979) ("Public education * * * fulfills a most fundamental obligation of government to its constituency."); Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (public education is "the very foundation of good citizenship."). A law school does not serve the same function.

Moreover, the difference in ages of children in elementary and secondary school, as compared to law students, is reason to weigh the interest in integrated education differently in the two contexts. As the Senate Committee considering ESAA found, "the most successful integration efforts are those which begin in earlier grades. That is when children learn most from each other, and when they will most readily develop attitudes which are tolerant and respectful of each other." See S. Rep. No. 92-61, at 8 (1971).

In Bakke, Justice Powell distinguished between the use of race in secondary school and medical school admissions because the medical school "did not arrange for Bakke to attend a different medical school," which made Bakke's position "wholly dissimilar" to that of an elementary school student who is admitted to one school rather than another in an effort to promote racial or ethnic integration." 438 U.S. at 300 n.39. Although the magnet school concept inserts a limited degree of choice into lower school education, a student denied admission to a particular magnet school must still be provided an education equal to that of other students in the district. See Fullilove, 448 U.S. at 527 n.6 (distinguishing the school district's race-conscious student assignment system approved by the court in McDaniel v. Barresi, 402 U.S. 39, from the MBE program, in part, because "no pupil was deprived of a public school education as a result") (Stewart, Rehnquist, J.J., dissenting).

1. Specifically, MSAP's goal of encouraging voluntary desegregation of elementary and secondary schools as a means of teaching mutual understanding and tolerance is different from the first amendment interest in fostering a robust exchange of ideas that flows from diversity in higher education. See Regents of the University of California v. Bakke, 438 U.S. 265, 311-315 (1978) (Powell, J.). As noted above, in the context of higher education,

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Hopwood held that using race to promote the first amendment interest in diversity of ideas is akin to using race as a proxy for other characteristics. Hopwood was concerned that the law school's affirmative action program relied on the assumption that students of different races have different ideas, an assumption that offends the radical color blindness on which Hopwood is based.

The promotion of integrated elementary and secondary education as a means of ending racial prejudice, however, makes no assumptions about students on the basis of their race. Instead, the goal is simply to provide a common educational experience to children of all races, through which they will learn that children of different races are more similar than they are different. To the extent that there happen to be differences among children of different races, they will learn to value, or at least become familiar with and not fear, these differences.¹³

2. Nor was the second goal -- reducing the harm that segregated education causes to the "hearts and minds" of minority children -- addressed in Hopwood. This interest, however, may not be as easily distinguishable from the first amendment higher education interest rejected in Hopwood. Because the legislative history of ESAA suggests that the harm to minority achievement is caused in part by concentrated poverty, in addition to racial segregation, the use of race to advance this second goal could be

¹³The legislative history of ESAA does include some discussion that sounds like the first amendment diversity interest rejected by Hopwood. See, e.g., S. Rep. 92-61, at 8 ("All children will benefit from the opportunity to learn about the diverse cultural heritages of their classmates."); see also id. at 6-7:

The Committee agrees with the response of Secretary of Health, Education, and Welfare Elliot Richardson to an inquiry regarding the policies and education objective of the Federal Government:

Every major report on research project dealing with educational problems, indeed, of the disadvantaged children, has concluded that educational development, that is, learning, is greatly hindered by homogenous learning environment. Children learn more from each other than from any other resources of the educational environment.

To create and perpetuate homogeneity is to break and reduce the pool of experience, ideas and values from which other children can draw and contribute to interaction with other children.

In a heterogeneous environment, cultural diversity can be presented in exciting, interaction, awareness and growth processes, which is education in its truest sense.

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susceptible to the reasoning of Hopwood. The use of race to remedy a harm caused by poverty, like the use of race to promote diversity of ideas, could be seen as the use race as a proxy for income level, and thus an impermissible stereotype of minorities as poor.

3. In addition to rejecting the Law School's interest in a diverse student body, Hopwood also rejected the Law School's remedial interest, holding that "a state does not have a compelling state interest in remedying the present effects of past societal discrimination." 78 F.3d at 949. But as Justice O'Connor pointed out in City of Richmond v. J.A. Croson Co., 488 U.S. 469, 488-491, 504 (1989) (plurality opinion), "Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define situations which congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." (Citing Katzenbach v. Morgan, 384 U.S. 641, 651 (1966); South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966)). As a result, "Congress may identify and redress the effects of society-wide discrimination." Ibid.

4. Finally, Hopwood did not address Congress' fourth goal under MSAP of providing models of quality, integrated elementary and secondary education to help stem the tide of white flight. See Hunter v. Regents of the University of California, CV No. 95-3301 KN, Trial Order Re: Findings of Fact and Conclusions of Law, slip op. at 21-22 (C.D. Cal., June 23, 1997) (although state's interest in racial diversity to promote academic freedom is not compelling, its interest in operating a laboratory elementary school to conduct research relevant to the improvement of the state's public education system is compelling).