



U.S. Department of Justice

Civil Rights Division

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Justice revisions today

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CIVIL RIGHTS DIVISION

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language - p. 5-10 w/ 6 minutes

NUMBER OF PAGES TRANSMITTED (INCLUDING THIS SHEET)

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[1855-54]

financial aid. In addition, one "functionally separate unit" of an institution, such as a medical school, cannot rely on past discrimination by other units in that institution.²² A particular school in those states must have a strong basis in evidence for concluding that there exist present effects from discrimination for which that school itself is responsible. However, if a state or institution of higher education has an obligation to remedy state or institution-wide discrimination, *Hopwood* does not prohibit the appropriate legislative or administrative body, or the governing body of the institution, from using affirmative action to remedy that discrimination in its component schools.²³

2. Non-Remedial Interests

a. Diversity

In his landmark opinion in *Bakke*, Justice Powell stated that a university may have a compelling interest in considering the race of applicants in its admissions process in order to foster greater diversity among its student body. Such diversity brings a wider range of perspectives to campus, which in turn contributes to a more robust exchange of ideas. This exchange is a central mission of higher education and in keeping with the time-honored value of academic freedom. Moreover, in the view of Justice Powell, the First Amendment protection of academic freedom supports allowing a university to "make its own judgments" regarding education, including the selection of its student body.²⁴ During the nearly two decades since *Bakke* was decided, Justice Powell's opinion, though only joined in part by other members of the Court, has been relied upon by public and private institutions of higher education throughout the United States in crafting their admissions policies. It has also been relied on by lower federal and state courts.²⁵ The United States supports Justice Powell's opinion as a correct statement of the law under the Constitution and Title VI.²⁶ The United States also has relied on Justice Powell's opinion as a basis for concluding that affirmative action in higher education for purposes of achieving the educational benefits of diversity does not violate Title VI, so long as the affirmative action plan meets the narrow tailoring standards set out in that opinion.

In order for diversity to qualify as a compelling interest, an institution must seek a further objective beyond the mere achievement of diversity itself. The Court has consistently rejected "racial balancing" as a goal of affirmative action, because "[p]refering members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."²⁷ For example, in *Bakke*, Justice Powell stated that diversity in an institution's student body can serve the further goal of enriching the academic experience, but found no compelling interest in assuring that the student body had a specified percentage of particular minority groups or reducing the deficit of minorities in the medical profession.²⁸ Accordingly, an institution that uses affirmative action to achieve diversity must have a sound educational objective for its diversity program. A school must be able to support its claim that diversity provides educational benefits and serves the school's educational objectives.

b. Other Non-Remedial Interests

The Supreme Court has had little occasion to address other non-remedial objectives. In his *Bakke* opinion, Justice Powell assumed that a state could have a compelling interest in "improving the delivery of health-care services to communities currently underserved," but concluded that the university had failed to prove that reserving sixteen percent of the seats in its medical school class for minority students was either needed or geared to promote that goal.²⁹ It is not clear whether a racial classification that was narrowly tailored to this interest could survive strict scrutiny.³⁰ Whether other non remedial interests can be sufficiently compelling to justify the use of classifications based on race or national origin should be considered on a case-by-case basis.

c. Fifth Circuit Standards: Non-Remedial Interests

The United States believes that, as Justice Powell stated in *Bakke*, diversity may constitute a compelling interest justifying the consideration of race in higher education. However, in *Hopwood*, the U.S. Court of Appeals for the Fifth Circuit held that an institution's interest in diversity to enrich the academic experience cannot satisfy strict scrutiny.³¹ That ruling is binding in the states of Texas, Louisiana and Mississippi. Accordingly, institutions in those three states cannot use affirmative action to foster diversity among their student body in order to enrich the academic experience.

Institutions in the Fifth Circuit should be aware that there is language in *Hopwood* that suggests that remedying past wrongs is the only compelling state interest that can justify classifications based on race.³² However, the only non-remedial interest at issue in the case was diversity, and it may be argued that the holding of *Hopwood* does not extend to other non-remedial interests that were not before the panel. *Hopwood* itself noted that Justice Scalia has suggested one possible non-remedial compelling interest -- "a social emergency rising to the level of imminent danger to life and limb."³³ Because the case before it did not present such an interest, the panel did not take a position on Justice Scalia's suggestion. Institutions in Texas, Louisiana, and Mississippi should consult with their counsel before using classifications based on race or on national origin to further any non-remedial interest other than diversity, and cannot use affirmative action to foster diversity in order to enrich the academic experience.

B. Narrow Tailoring

In addition to advancing a compelling goal, any use of race must also be "narrowly tailored." This ensures that race-based affirmative action is the product of careful deliberation, not hasty decisionmaking. It also ensures that such action is truly necessary and that less intrusive, efficacious means to the end are unavailable.

The determination of whether a particular affirmative action program is narrowly tailored

. See *Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion).

. See *Cheney*, 438 U.S. at 500.

. *Id.* at 501-02, 509.

. 34 C.F.R. 100.3(b)(6)(i).

. 78 F.3d 932, 951 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996).

. *Id.* at 934.

. See *id.* at 951.

. See *id.* at 954-55 (citing *Fordice*, 505 U.S. at 731-32).

. *Bakke*, 438 U.S. at 311-14.

(15) See *DeRonde v. Regents of the Univ. Of Calif.*, 28 Cal.3d 875, 625 (1981); *McDonald v. Hogness*, 92 Wash.2d 31 (1979); *Davis v. Halpern*, 763 F.Supp. 968, 975-76 (E.D.N.Y. 1991).

(16) In *Adarand*, the Court expressly recognized that Justice Powell applied "the most exacting judicial examination" in reaching his conclusion in *Bakke* that diversity constitutes a compelling interest in the higher education context. 515 U.S. at 216, quoting *Bakke*, 438 U.S. at 291 (opinion of Powell, J.). Thus, the Supreme Court has never disavowed *Bakke*, and has assumed its continuing validity. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring). See also *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 568 (1990) (citing *Bakke*); *id.* at 601-2 (Sevens, J., concurring). In *Metro Broadcasting*, the Court applied intermediate scrutiny to a preference for minority-owned broadcasters and held that exposing the nation to diverse perspectives in broadcasting was an important governmental interest. The Court thus did not consider whether the government's interest in seeking diversity in broadcasting was compelling. *Adarand* overruled *Metro Broadcasting* insofar as it held that benign race-based action by the federal government is subject to intermediate scrutiny, but did not address whether diversity in broadcasting can be a compelling, as opposed to important, interest.

. *Bakke*, 438 U.S. at 307 (Powell, J.) (reducing deficit of minorities in medical school and the medical profession); see *Crosen*, 486 U.S. at 507; *Johnson v. Transportation Agency*, 480 U.S. 616, 639 (1987).

. See *id.* at 305, 307, 313. Similarly, in the law enforcement context, diversifying the ranks of officers may at times serve vital public safety and operational needs, thereby enhancing the agency's ability to carry out its functions effectively. See *Barthold v. Rodriguez*, 863 F.2d 233, 238 (2d Cir. 1982); *Talbert v. City of Richmond*, 648 F.2d 925, 931-32 (4th Cir. 1981), cert. denied, 451 U.S. 1145 (1982); *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 693-95 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981); *Baker v. City of St. Petersburg*, 400 F.2d 294, 301 n.10 (5th Cir. 1968); cf. *Wittmer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996), cert. denied, 117 S. Ct. 949 (1997) (upholding preference for a black lieutenant at a boot camp for young offenders based on the finding that the camp would not achieve its rehabilitative mission absent the preference because 70% black inmate population unlikely to accept military regimen with less than a 6% black security staff and no black lieutenants).

. *Bakke*, 438 U.S. at 310 (Powell, J.)

. Justice Powell approvingly quoted the same court below, which had noted that there were more precise and reliable ways to identify applicants who were genuinely interested in the medical problems of underserved communities than race, namely, a demonstrated concern for the problem in the past and a declaration that

practicing in such a community was an applicant's primary professional goal. *Id.* at 310-11.

. See *Hopwood*, 78 F.3d at 944, 948.

. *Id.* at 944, 948.

. *Id.* at 944 (quoting *Croson*, 488 U.S. at 501 (Stevens, J., concurring in judgment)).

. *Croson*, 488 U.S. at 507.

. See *Fullilove v. Klutznick*, 448 U.S. 448, 503 (Powell, J., concurring).

Wygant, 476 U.S. at 280 n.6 (plurality opinion of Powell, J.); cf. *Billish v. City of Chicago*, 989 F.2d 890, 894 (7th Cir.) (en banc) (Posner, J.) (in reviewing affirmative action measures, courts must be "sensitiv[e] to the importance of avoiding racial criteria . . . whenever it is possible to do so, [as] *Croson* requires"), *cert. denied*, 510 U.S. 908 (1993).

. *Croson*, 488 U.S. at 506.

. See, e.g., *United States v. Paradise*, 480 U.S. 149, 171-78 (1986).

. See *Croson*, 488 U.S. at 503 (discussing *Fullilove*, 448 U.S. at 488 (1980) (plurality opinion)).

. See *Bakke*, 438 U.S. at 315 (Because "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element," a program "focused solely on ethnic diversity would hinder rather than further attainment of genuine diversity.") (Powell, J.)

. *Bakke*, 438 U.S. at 275.

. See *Bakke*, 438 U.S. at 315-17; see also *Johnson*, 480 U.S. at 616 (upholding program that did not set aside any positions for women).

. See *Croson*, 488 U.S. at 507.

. See *Paradise*, 480 U.S. at 178 (plurality opinion); *Sheet Metal Workers*, 478 U.S. at 487 (Powell, J., concurring); *Fullilove*, 448 U.S. at 513 (Powell, J., concurring).

. See *Johnson*, 480 U.S. at 638; *Sheet Metal Workers*, 478 U.S. at 488 (Powell, J., concurring).

Record Type: Record

To:

cc:

Subject: Reorganization

Also as you are reviewing the guide, think about this idea for reorganizing it to make it more useful:

- A. Cover Page - *Work w/ Affirmative Action At Your School :
A Guide to Self Assessment*
- B. Table of Contents

1. "Introduction"

This would be the existing introduction page, with some appropriate edits, and especially with a clearer statement that carefully crafted programs are ok, along the lines of what I have suggested.

Overview
2. "Executive Summary" [or some similar term]

This could basically be comprised of the bullets and an abbreviated version of other narrative text (like the intro on coverage) from what is currently the "checkpoints" section, since these track the DOJ outline pretty well. This section would NOT contain the questions from the "checkpoints" section. Each segment of the executive summary could reference pages in the main "Guide" where there is a full discussion.

3. "Guide"

This would basically be the DOJ Outline, perhaps with some more point headings, bolding, or other changes/graphics to make existing text a little more accessible. We could even pull out some quotes and put them in boxes just to make the thing more readable.

4. "Worksheet"

This would basically be the questions from the existing ED "Checkpoints" section. This section could also be cross-referenced to the main "Guide". Would state that the worksheet provides a starting point for institutions to review their programs, in consultation with counsel and OGC. For the affirmative statements that are currently mixed in with the lists of questions, and possibly the shaded notes, if they are important enough to flag on the worksheet they could be pulled out and listed below the questions, pointed to with arrows.

I think this might be more logical and useful than the current structure; it would achieve what ED wants in getting a quick precis up front where folks will see it, but it would avoid this awkward mix of summary and questions that currently exists in the checkpoints section.

Thanks.

-- Bill



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Part I. Part 2 to follow.

Happy New Year.

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**AFFIRMATIVE ACTION
ASSESSMENT GUIDE:**
*Postsecondary Admissions and Financial Aid
Programs*

February 1998

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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CHECKPOINT(S)
) Baseline
Information

1. If the institution has decided to consider race and ethnic origin as factors in its admissions process, is the admissions process guided by a written affirmative action plan? How are admissions structured? For public institutions, is the consideration of race mandated or authorized by legislation?
2. What standards guide admissions decisions and how does the admissions process work? How and at what point in the admissions process is each admissions criterion weighted and considered? Is each admissions criterion educationally justifiable and closely related to the institution's mission? How and at what points are race or national origin considered and weighted in admissions? How and at what point(s) are minority students being admitted?

B. IS AFFIRMATIVE ACTION SUPPORTED BY COMPELLING INTERESTS ?

1. Introduction to Compelling Interest

Overview

- The Supreme Court has held, in the *Regents of the University of California v. Bakke* decision, that a college or university may consider race in its admissions process.
- Remedying the effects of past discrimination constitutes a compelling interest that may justify the use of race in admissions.
- In his landmark opinion in *Bakke*, Justice Powell concluded that a university may consider race in admissions to attain the educational benefits of diversity where race or national origin is considered as one factor among many.
- If the institution is in the Fifth Circuit, remember to consult the Fifth Circuit Standards sections of the *Legal Outline* and the *Hopwood* decision for the appropriate standards.

These principles are explained in the following sections of this Guide. For a complete presentation of federal standards, see Legal Outline, pp.

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CHECKPOINT(S)
**Compelling
Interest**

3. Why does the program consider race or national origin in admissions? Is it intended to remedy discrimination, to foster diversity to achieve an educational objective, or for some other purpose?

2. Remedial Purpose

Overview

- The Title VI regulations require a recipient of federal funds that has discriminated in violation of Title VI or its regulations to take remedial action to overcome the effects of past discrimination.
- A college that has been found to have discriminated by a court or an administrative agency like the U.S. Department of Education, Office for Civil Rights, must take steps to remedy that discrimination. A finding could also be made by a State or local legislative body, as long as the body finding discrimination had a strong basis in evidence identifying discrimination within its jurisdiction for which remedial action is required.
- Absent such formal findings by a court, agency or legislature, a college may take race-conscious remedial action if it has a strong basis in evidence for concluding that the affirmative action is necessary to remedy the effects of its past discrimination and is narrowly tailored to remedy that discrimination.
- In justifying remedial affirmative action based on the current effects of past discrimination, schools should be prepared to articulate how current conditions that limit educational opportunities by race or national origin are related to past discrimination for which the school shares responsibility.

For a complete presentation of federal standards, see Legal Outline, pp.

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CHECKPOINT(S)
Remedial Purposes

4. Are there facts that show discrimination? Is the program justified solely by reference to general societal discrimination, general assertions of discrimination in education, or a statistical underrepresentation of minorities as compared to their percentage of the general population rather than the relevant pool of qualified applicants? Without more, these are impermissible bases for affirmative action.
5. Has a court, legislative body, or agency made a finding that the institution has discriminated against minorities? Is the institution the subject of a court desegregation order or a legislative or administrative finding of unlawful discrimination? Did the body making the finding have a strong basis in evidence for its conclusion? Does the institution itself have a strong basis in evidence for concluding that it has discriminated?

6. If the institution is public, has a state or local government made findings of discrimination within its jurisdiction, including discrimination by private actors? Are there present effects of any such past discrimination? Was the government, or is the government now, a passive participant in that discrimination so as to perpetuate the exclusion? Did the institution help to perpetuate that discrimination?
7. Identify the racial and ethnic composition (%African American, Hispanic, Asian-American, American Indian, white) of the following groups: i) the institution's student body; ii) the institution's qualified applicants; and iii) the pool of qualified potential applicants from which the institution draws its students, for example, students meeting the school's admission requirements living in the areas served by the institution.
8. Based on the information above, is there underrepresentation at the school of qualified students from particular races or national origins? If so, is the statistical disparity significant?
9. What is the nature of the evidence? Is it statistical or based on written documents? Are statistics based on comparisons to the general minority population, or are they more sophisticated and focused? For example, do they attempt to identify the number of qualified minorities in the applicant pool, or seek to explain what the number would look like "but for" the exclusionary effects of discrimination? Is there evidence on how discrimination has hampered minority opportunity in education, or is the evidence simply based on generalized claims of societal discrimination? In addition to any statistical or documentary evidence, are there persons who have knowledge or other anecdotal evidence of discrimination?
10. Since the adoption of the program, have additional findings of discrimination been made that could serve to justify the need for the program when it was adopted? If not, can such evidence be assembled now? Is there new evidence that the remedial program is no longer necessary?

11. Apart from any past findings or court orders, is there past discrimination affecting admissions at that institution? Has the institution determined whether the effects of past discrimination continue? If there have not been findings of past discrimination, is there a strong basis in evidence to believe that there may be a current violation or the continuing effects of past discrimination?

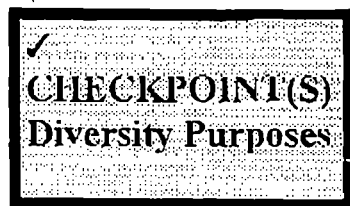
Note: Although it rejected diversity as a basis for affirmative action, the Hopwood decision (covering Texas, Louisiana, and Mississippi) permits the use of race or national origin to remedy the effects of discrimination by that school. See Legal Outline, pp.

3. Diversity Purposes

Overview

- In *Regents of the University of California v. Bakke*, Justice Powell concluded that achieving the educational benefits of campus diversity is a compelling reason for considering race or national origin in admissions in a narrowly tailored way. According to Justice Powell's opinion, colleges may seek diversity in admissions to fulfill their academic mission through the "robust exchange of ideas" that flows from a diverse student body. The United States supports Justice Powell's opinion as a correct statement of the law under the Constitution and Title VI.
- Colleges and universities may justify the use of race or national origin to achieve fundamental educational goals through campus diversity. An institution must be able to support its claim that diversity serves its educational objectives.
- For the consideration of race and national origin in admissions to be lawful under a diversity rationale, an institution's definition of diversity must include characteristics in addition to race or national origin. Such diversity characteristics may include other life experiences, achievements, talents, interests, extracurricular activities, economic disadvantages, geographic background, as well as various others.

For a complete presentation of federal standards, see Legal Outline, pp.



12. Is affirmative action in admissions used to achieve the educational benefits of diversity? What is the institution's definition of diversity? What are the institution's mission statements and how do they relate to its diversity objectives?
13. The institution must articulate how achieving greater diversity would foster an educational goal beyond diversity for diversity's sake. What are the educational benefits of diversity at the institution? What are the bases for the educational benefits the institution identifies?
14. Does diversity include factors other than race and national origin? If so, what factors? Which admissions criterion or groups of criteria are related to the diversity goal? How is each weighted and considered in the admissions process?

Note: In Hopwood, the U.S. Court of Appeals for the Fifth Circuit held that an institution's interest in diversity to enrich the academic experience cannot satisfy strict scrutiny. That ruling is binding in the states of Texas, Louisiana and Mississippi. Accordingly, institutions in those three states cannot use affirmative action to foster diversity among their student body in order to enrich the academic experience. See Legal Outline, p.

**C. IS THE USE OF RACE IN REMEDIAL OR DIVERSITY PROGRAMS
NARROWLY TAILORED?**

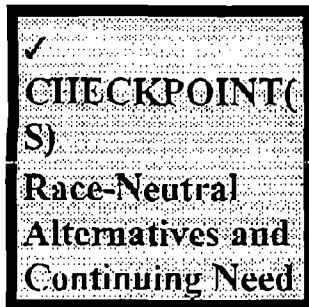
If the institution supports its affirmative action program on remedial purposes or the attainment of diversity, is the use of race or national origin in admissions narrowly tailored to achieve its purposes?

1. Race Neutral Alternatives and Need for the Use of Race

Overview

- Whether a college's consideration of race or national origin meets the narrow tailoring requirements of Title VI and the Constitution depends upon factors established by federal case law.
- An overriding question is whether the school's use of race is truly necessary and focused as narrowly as possible on the achievement of the school's compelling interest, e.g., remedial or diversity objectives.
- Before resorting to race-conscious action, it is important that an institution consider seriously the use of race-neutral alternative approaches (e.g., the use of admissions criteria that do not include race or recruitment programs).

For a complete presentation of federal standards, see Legal Outline, pp.



15. If race or national origin is considered as a positive factor, has the institution made efforts to achieve its goals in race-neutral ways? If so, what efforts were made and what were the results?
16. If race-neutral measures were not undertaken, why does the institution believe that such efforts would be insufficient to serve its compelling interest without relying on race? What was the nature and extent of the deliberation over any race-neutral alternatives? Was there a judgment regarding the relative effectiveness of race-neutral alternatives and race-conscious measures?
17. Does the college have data to show whether affirmative action is necessary? When did the institution begin implementing its affirmative action program? Does the institution have statistics or other evidence to show the effect of the program on achievement of diversity objectives or remedying the effects of discrimination, e.g., data regarding minority participation levels before and after affirmative action programs began?

2. Manner Race is Used, Flexibility, and Pool of Beneficiaries

Overview

- Set-asides or quotas should not be used in an admissions program unless such measures are absolutely essential to remedying discrimination and its effects. In addition, admissions programs that rely on separate tracks or separate decision-making procedures that prevent a comparison among applicants of different races and ethnic origins are also particularly vulnerable to challenge.
- The use of classifications based on race or national origin should be flexible. For example, the Supreme Court in United States v. Paradise found that a race-conscious promotion requirement was flexible in operation because it could be waived if no qualified candidates were available. Consideration of race or national origin as one factor among several other admissions criteria in some circumstances may also be evidence of flexibility.

For a complete presentation of federal standards, see Legal Outline, pp.

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CHECKPOINT(S)

Manner in which Race is Used, Flexibility, and Pool of Beneficiaries

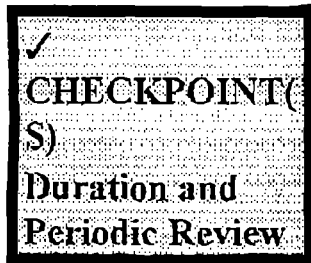
18. How does the college assess whether diversity has been achieved? Does the admissions process incorporate numerical goals? By what process were these goals derived? Do all or only some of the schools or programs have goals? If the program is remedial, are the goals related to the percentage of minorities in the pool of qualified applicants, and do the beneficiaries include people in racial or ethnic groups for whom there is insufficient evidence of prior discrimination?
19. Are admissions decisions made through separate tracks, admissions committees, or eligibility criteria defined on the basis of race or national origin? Does the program establish fixed numerical set-asides? Is race an explicit requirement of eligibility for the program? If there is no such factual requirement, does the program operate that way in practice? Or is race just one of several factors -- a "plus" -- used in decision making? Could the objectives of any program that uses race as a requirement for eligibility be achieved through a more flexible use of race?

3. Duration and Periodic Review

Overview

- The duration of the use of a racial classification should be no longer than is necessary to its purpose, and the classification should be periodically reexamined to determine whether there is a continued need for its use or whether it should be modified based on changing circumstances.
- OCR considers annual reviews the best practice to satisfy this aspect of Title VI's narrow tailoring requirements.

For a complete presentation of federal standards, see Legal Outline, pp.



20.

Is the program subject to periodic oversight, and if so, what is the nature of that oversight? Does the periodic review assess whether the form or extent to which race or national origin is considered should be modified in light of the outcomes of the affirmative action program? Has the program ever been adjusted or modified in light of periodic review? What were the results of the most recent review? Even if there was a compelling justification at the time of adoption, that may not be the case today. In that regard, does the program have an end date? Is there evidence of what might result if the racial classification were discontinued?

4. Burden on Non-Beneficiaries

Overview

- Affirmative action necessarily imposes some burden or disadvantage on persons who do not belong to the racial or ethnic groups favored by the program's classifications. While some burdens are acceptable, others may be too high. In general, a race-based classification that "unsettle[s] . . . legitimate, firmly rooted expectation[s]" or imposes the "entire burden . . . on particular individuals" crosses that line. For example, if an institution terminated scholarships that had been awarded to particular non-minority students in order to fund a scholarship program for minority students, that might place too much of a burden on the affected non-minority students to be considered narrowly tailored.
- Generally, the less severe and more diffuse the impact on nonminority students, the more likely a classification based on race or national origin will address this factor satisfactorily. It is not necessary to show that no student's opportunity to be admitted has been in any way diminished. Rather, the use of race or national origin must not, overall, place an undue burden on students who are not eligible for that consideration.

For a complete presentation of federal standards, see Legal Outline, pp.

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CHECKPOINT(S)
Burden on Non-Beneficiaries

21.

Does the institution periodically assess whether its consideration of race or national origin in admissions places an undue burden on students not eligible for that consideration? . What is the nature of the burden imposed on persons who are not included in the racial or ethnic classification established by the program? Does the program displace those persons from existing positions or financial aid awards? What is the nature and extent of the impact on non-beneficiaries in admissions? Does the impact of the program fall upon a particular group or class of students, or is it more diffuse? What is the extent of other opportunities outside of the program? Are persons who are not beneficiaries of the program put at a significant competitive disadvantage as a result of the program?

III. FINANCIAL AID

Federal Standards

The relevant standards are stated in the Department's published guidance on the use of race or national origin in the provision of financial aid, 59 Federal Register 8756 (1994) (copy included with this Guide). The Financial Aid Guidance is also available on the Department of Education's internet web site, www.ed.gov.

The legal standards governing the use of race or national origin in awarding financial aid are the same as those described for admissions decisions. The institution should answer the questions related to compelling interest and narrow tailoring as outlined in Section II to evaluate its financial aid programs. The checkpoints below identify additional information that may be specific to financial aid programs.

- If the institution is in the Fifth Circuit, remember to consult the Fifth Circuit Standards sections of the *Legal Outline* and the *Hopwood* decision for the appropriate standards.
- If the institution is in the Fourth Circuit, remember to consult the *Podheresky v. Kirwan* decision as described in the *Legal Outline*.



A. Initial Information Needs

1. Is the institution's financial aid program guided by a written affirmative action plan? How is the institution's financial aid process structured?
2. From what sources does the institution obtain its financial aid funds? Are the sources public or private? Inside sources or outside sources? Federal, state or local? What percentage of aid is received from each source?
3. Does the institution's financial aid programs include the consideration of race or national origin (as either an exclusive factor or as one among a number of factors)? If so, how? Does

the institution fund or administer "race-based scholarships"?¹ If so, what is the justification for each consideration of race or national origin? Are the institution's reasons consistent with the Department's race-targeted scholarship policy?

B. Financial Aid for Disadvantaged Students

3. Schools may target financial aid for disadvantaged students, e.g., students from low-income families, or aid based on students' being in the first generation to attend college or family income. Does the institution's definition of "disadvantaged" used for participation in the program include any consideration of race? If not, then the program is not a racial classification subject to strict scrutiny. If yes, the program is subject to strict scrutiny and does not fit within this principle. ?

C. Compelling Interests

4. Why does the program consider race or national origin in financial aid decisions? Is it intended to remedy discrimination, to foster diversity to achieve an educational objective, or for some other purpose? If the use of race is intended to remedy discrimination, see questions 4-11 in Part II. If it is intended to foster diversity to achieve an educational objective, see questions 12-14 in Part II.

D. Narrow Tailoring of Remedial or Diversity Programs

5. Are financial aid decisions that consider race or national origin narrowly tailored to achieve their purpose? See questions 15-21 in Part II.

"Race-based scholarships" or "race-targeted aid" mean, for the purposes of this Guide, any financial aid for which eligibility is limited to persons of a specific racial or ethnic background. Each of the questions in this section on financial aid also are applicable to financial aid programs where race or ethnicity are used only as a plus-factor in deciding awards. This section is based upon the Department's 1994 race-targeted scholarships policy.

6. If race-based scholarships are awarded, how many does the institution award annually? How many students at the institution, by race and national origin, receive non-race-based financial aid, annually? What proportion of total financial aid at the institution (institutional, state, local, Federal, private) is earmarked for race-based scholarships? Does a comparison of the amount of race-targeted financial aid provided to students to the total amount of aid provided to students without regard to race or national origin show that the program places an undue burden on other students who are not eligible for race-targeted aid?

E. Private Gifts Restricted by Race or National Origin

7. Are racial or other criteria attached by the donors to the award of any financial aid funds? If so, can the institution justify the use of race under any of the principles of the OCR policy guidance?
8. Is any race-targeted aid received by the college's students provided directly to students without involvement by the institution? If so, under the policy guidance Title VI does not apply. If the college makes privately provided race-targeted aid part of its operations by getting involved in the offering or administration of the aid (e.g., through selection of recipients, distribution of funds), can the college justify the use of the aid under a diversity or remedial rationale?



Office for Civil Rights

Fax Transmittal

To: *Paul Kinsaid*

Organization: *Domestic Policy Council*

Phone Number:

Fax Number: *456 - 2857*

Number of Pages (excluding cover page):

Date:

From: *Art Coleman*
Deputy Assistant Secretary

Phone Number: 202-205-5557

Fax Number: 202-205-5381

Message:

*Look forward to talking
at 5:00*

If there are transmission problems, please call Millie Palmer at 202-205-5557.

**NOTE TO BILL KINCAID, DAWN CHIRWA, RICHARD JEROME****Re: Assessment Outline**

We have revised the self assessment package in response to Bill's suggestions. The package is now an Outline, comprising an Overview, a Guide (the legal memo), and a Worksheet (the checkpoints).

Please flag the presentation of Bakke on pages 2 and 5. The Guide reflects the discussion of Bakke the Department of Education believes appropriate and necessary. Our version omits from p. 5 of the Guide a sentence that was provided by DoJ after we discussed our concerns:

While no majority opinion for the Supreme Court has squarely addressed when a non-remedial objective may constitute a compelling interest that can justify the use of narrowly tailored race-conscious measures, the United States supports Justice Powell's opinion as a correct statement of the law under the Constitution and Title VI.

To ensure that colleges understand that there is an issue about the legal weight of Powell's opinion, we added the Fifth Circuit's rejection of Powell -- as not writing for a majority-- to the Hopwood section, on pages 5-6.

Our position is that the scope of the holding in Bakke and the effect to be given Justice Powell's opinion on diversity are issues on which differing interpretations are reasonably possible. From discussions with attorneys representing two universities in federal litigation on diversity issues, we know that the authoritative nature of Powell's opinion and the extent of the holding in Bakke will be litigated. Counsel in these pending cases and higher education groups representing a substantial majority of colleges and universities in the country will have major legal concerns about the "no majority opinion" language. In addition to affecting the defense of pending law suits, including this language in materials designed to support lawful practices may tend to discourage colleges and universities from pursuing diversity in a lawful manner. We believe that the United States has no compelling need to weigh in on this unresolved issue at this time.

In response to Bill's suggestions, we added some text boxes with key excerpts from the Guide. We also added, on page 5 a reference to the educational benefits of diversity claimed by ACF et al. in their amici brief in Piscataway.

We look forward to completing the vetting process and issuing assessment materials that will meet a widespread need for information.



**AFFIRMATIVE ACTION
ASSESSMENT OUTLINE**
*Postsecondary Admissions and Financial Aid
Programs*

February 1998

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

ASSESSMENT OUTLINE

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INTRODUCTION

Properly designed and conducted affirmative action programs that consider race or national origin in postsecondary admissions and financial aid decisions are permissible under federal law. This guide is designed to help postsecondary institutions that have, or are considering establishing, affirmative action programs assess whether those programs are consistent with Title VI of the Civil Rights Act of 1964 and the Constitution. Institutions that operate affirmative action programs should rigorously review those programs on a regular basis to ensure that they continue to be necessary and that they are being conducted consistent with the applicable legal standards.

As used in this Outline, the term "affirmative action" means the use or consideration of race or national origin as a factor in admissions or in the award of financial aid. Because recruitment and outreach programs designed to increase the number of minorities in an institution's applicant pool raise distinct questions and typically should not be subject to heightened constitutional scrutiny, this guide should not be used to assess those types of programs. This Outline also does not address programs undertaken pursuant to a court order.

In 1994, the U.S. Department of Education published guidance regarding its evaluation under Title VI of an institution's consideration of race or national origin in the award of financial aid. *Nondiscrimination in Federally Assisted Programs: Title VI of the Civil Rights Act of 1964*, 59 Fed. Reg. 8756 (1994) [hereinafter *Financial Aid Guidance*]. Institutions should consult that guidance for a more specific discussion of affirmative action in financial aid decisions, including an institution's involvement with privately donated race restrictive funds. The *Financial Aid Guidance* is included with this Outline and can be found on the Education Department's web site at www.ed.gov.

This Self Assessment Outline consists of an **Overview**, a **Legal Guide**, and a **Worksheet**. The **Overview** highlights the Guide's comprehensive presentation of federal standards applicable to affirmative action in admissions and financial aid. The **Worksheet** is included to aid institutions in collecting the information necessary to conduct a thorough review of their programs. The **Worksheet** is designed to help institutions identify and organize information relevant to the legal standards discussed in the Guide, but not every question necessarily will be relevant to each institution. In addition, no single answer or combination of answers will be conclusive as to the validity of any particular program.

There is much uncertainty with respect to the law on affirmative action at this time. New decisions, by the Supreme Court or lower courts, may significantly affect the standards governing the appropriate consideration of race or national origin by educational institutions. An institution's programs may also be affected by state law requirements, such as Proposition 209 in California. We encourage institutions to consult with their counsel, and to contact the Office for Civil Rights ("OCR") at the Department of Education, for assistance. A list of OCR offices and staff available to assist you is included in this guidance.

ASSESSMENT OVERVIEW

Federal legal standards that apply to the consideration of race or national origin in higher education arise from the Constitution and Title VI of the Civil Rights Act of 1964. This summary is intended as a brief overview of the comprehensive legal discussion in the Guide, which must be thoroughly considered in using the Assessment Outline.

1. COVERAGE OF THE OUTLINE

SEE GUIDE.

- Public institutions that are part of a state's government are subject to the Fourteenth Amendment of the Constitution. Public and private institutions that receive federal financial assistance from the U.S. Department of Education are subject to Title VI.
- This Assessment Outline applies to admissions and financial aid programs where race, color, or national origin is a factor in decision making. It applies both to programs in which race or national origin is the sole factor in a decision and to those in which race or national origin is one of many factors considered. The Outline does not apply to admissions or financial aid decisions made without regard to race or national origin.
- The legal standards governing the use of race or national origin in awarding financial aid are generally the same as those applicable to admissions decisions. The Department has published guidance on the use of race or national origin in financial aid programs, 59 Federal Register 8756 (1994) (copy included with this Outline). The Financial Aid Guidance is also available on the Department of Education's internet web site, www.ed.gov.

2. CONSIDERATION OF RACE OR NATIONAL ORIGIN IS PERMISSIBLE WHEN THE STRICT SCRUTINY TEST IS SATISFIED

SEE GUIDE.

- Under the Constitution and Title VI of the Civil Rights Act of 1964 it is permissible for colleges and universities to consider race or national origin in making admissions decisions and in awarding financial aid provided that they satisfy the legal test of "strict scrutiny."
- To satisfy strict scrutiny, the institutional interest underlying an affirmative action measure must be "compelling" and the measure must be "narrowly tailored" to serve that interest.

3. REMEDYING DISCRIMINATION AND ACHIEVING CAMPUS DIVERSITY ARE COMPELLING INTERESTS SUPPORTING CONSIDERATION OF RACE OR NATIONAL ORIGIN

SEE GUIDE.

- The compelling interest inquiry centers on "ends" and asks why an institution is classifying individuals on the basis of race or national origin.
- Remedying the effects of past discrimination constitutes a compelling interest that justifies the narrowly tailored use of race or national origin in admissions or financial aid.
- In his landmark opinion in *Bakke*, Justice Powell concluded that a university may consider race in admissions to attain the educational benefits of diversity where race or national origin is considered as one factor among many.

REMEDIAL PURPOSES

SEE GUIDE.

- The Title VI regulations require a recipient of federal funds that has discriminated in violation of Title VI or its regulations to take remedial action to overcome the effects of past discrimination.
- A college that has been found to have discriminated by a court or an administrative agency like the U.S. Department of Education, Office for Civil Rights, must take steps to remedy that discrimination. A finding could also be made by a State or local legislative body, as long as the body finding discrimination had a strong basis in evidence identifying discrimination within its jurisdiction for which remedial action is required.
- Absent such formal findings by a court, agency or legislature, a college may take race-conscious remedial action if it has a strong basis in evidence for concluding that the affirmative action is necessary to remedy the effects of its past discrimination and is narrowly tailored to remedy that discrimination.

DIVERSITY PURPOSES

SEE GUIDE.

- In *Regents of the University of California v. Bakke*, Justice Powell concluded that achieving the educational benefits of campus diversity is a compelling reason for considering race or national origin in admissions in a narrowly tailored way. According to Justice Powell's opinion, colleges may seek diversity in admissions to fulfill their academic mission through the "robust exchange of ideas" that flows from a diverse student body. The United States supports Justice Powell's opinion as a correct statement of the law under the Constitution and Title VI.
- Colleges and universities may justify the use of race or national origin to achieve fundamental educational goals through campus diversity. An institution must be able to support its claim that diversity serves its educational objectives.
- For the consideration of race and national origin in admissions to be lawful under a diversity rationale, an institution's definition of diversity must include characteristics in addition to race or national origin. Such diversity characteristics may include other life experiences, achievements, talents, interests, extracurricular activities, economic disadvantages, geographic background, as well as various others.

4. USES OF RACE OR NATIONAL ORIGIN MUST BE NARROWLY TAILORED

The narrow tailoring inquiry focuses on "means" and asks how the government is seeking to meet the objective of the race or national origin-based classification. If an institution supports its affirmative action program on remedial purposes or the attainment of diversity, the use of race or national origin must be narrowly tailored to achieve its purposes.

SEE GUIDE.

- Whether a college's consideration of race or national origin meets the narrow tailoring requirements of Title VI and the Constitution depends upon factors established by federal case law.

**CONSIDERATION OF RACE/NATIONAL ORIGIN- NEUTRAL ALTERNATIVES
AND THE NEED FOR THE USE OF RACE OR NATIONAL ORIGIN**

SEE GUIDE.

- A school's use of race should be necessary and focused as narrowly as possible on the achievement of the school's compelling interest, for example, remedial or diversity objectives.
- Before resorting to race-conscious action, it is important that an institution consider seriously the use of race-neutral alternative approaches (e.g., the use of recruitment or admissions criteria that do not include race).

**MANNER RACE OR NATIONAL ORIGIN IS USED, FLEXIBILITY, AND
POOL OF BENEFICIARIES**

SEE GUIDE.

- Set-asides or quotas should not be used unless such measures are absolutely essential to remedying discrimination and its effects. In addition, admissions programs that rely on separate tracks or separate decision-making procedures that prevent a comparison among applicants of different races and ethnic origins are also particularly vulnerable to challenge.
- The use of classifications based on race or national origin should be flexible. For example, the Supreme Court in *United States v. Paradise* found that a race-conscious promotion requirement was flexible in operation because it could be waived if no qualified candidates were available.

Consideration of race or national origin as one factor among several other admissions criteria in some circumstances may be evidence of flexibility.

DURATION AND PERIODIC REVIEW

SEE GUIDE,

- The duration of the use of a racial classification should be no longer than is necessary to its purpose. The classification should be periodically reexamined to determine whether there is a continued need for its use or whether it should be modified based on changing circumstances.
- OCR considers annual reviews the best practice to satisfy this aspect of Title VI's narrow tailoring requirements.

BURDEN ON NON-BENEFICIARIES

SEE GUIDE,

- Affirmative action necessarily imposes some burden or disadvantage on persons who do not belong to the racial or ethnic groups favored by the program's classifications. While some burdens are acceptable, others may be too high. In general, a race-based classification that unsettles legitimate, firmly rooted expectations or imposes the entire burden on particular individuals crosses that line.

For example, if an institution terminated scholarships that had been awarded to particular non-minority students in order to fund a scholarship program for minority students, that might place too much of a burden on the affected non-minority students to be considered narrowly tailored.

- Generally, the less severe and more diffuse the impact on non-minority students, the more likely a classification based on race or national origin will address this factor satisfactorily. It is not necessary to show that no student's opportunity to be admitted has been in any way diminished. Rather, the use of race or national origin must not, overall, place an undue burden on students who are not eligible for that consideration.
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NOTES

If your institution is in the Fifth Circuit, remember to consult the Fifth Circuit Standards sections of the Guide and the *Hopwood* decision for the appropriate standards.

If your institution is in the Fourth Circuit, remember to consult the *Podberesky v. Kirwan* decision as described in the Guide.

ASSESSMENT GUIDE

I. WHEN IS AN INSTITUTION COVERED BY THE CONSTITUTION OR TITLE VI?

Both the Constitution and Title VI of the Civil Rights Act of 1964 may apply to an institution's affirmative action programs. The Fourteenth Amendment to the United States Constitution prohibits states from denying any person equal protection of the laws. Because they are a part of state government, public colleges and universities are covered by the Fourteenth Amendment.

Title VI provides that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.¹ Any public or private institution that receives financial assistance from the federal government is subject to the requirements of Title VI. A public institution that receives federal financial assistance is therefore covered by both the Constitution and Title VI. Title VI covers all of the operations of an institution that receives federal financial assistance, including the institution's involvement in the award of privately donated funds.² Title VI permits affirmative action measures that would satisfy the requirements of the Fourteenth Amendment.³

The Office for Civil Rights at the Department of Education is responsible for enforcing the requirements of Title VI at institutions receiving federal education funds. Institutions subject to Title VI must abide by the provisions of the statute and comply with regulations promulgated by the Office for Civil Rights.⁴

II. WHEN DOES AN ADMISSIONS OR FINANCIAL AID PROGRAM USE A CLASSIFICATION BASED ON RACE OR NATIONAL ORIGIN?

This Guide applies to admissions and financial aid programs that use criteria based on race, color, or national origin as a factor in decision making. It applies both to programs in which race or national origin is the sole factor underlying the institution's decision and to those in which race or national origin is one of many factors considered. This Guide does not apply to admissions decisions or financial aid awards that are based on race-neutral factors. For example, the Guide would not apply to an institution's support for disadvantaged students through admissions or financial aid, as long as the determination that a student is disadvantaged is not based on race or national origin. A public institution that receives federal financial assistance is

III. COMPLIANCE WITH THE CONSTITUTION AND TITLE VI: STRICT SCRUTINY

The Supreme Court has determined that the Constitution requires that any government program that uses race or national origin as a factor in decision making must satisfy "strict scrutiny".⁵ As explained above, this same standard applies under Title VI to all schools receiving federal funds. To satisfy strict scrutiny, the institutional interest underlying an affirmative action measure must be "compelling" and the measure must be "narrowly tailored" to serve that interest.⁶ The compelling interest inquiry centers on "ends" and asks why an institution is classifying individuals on the basis of race or national origin. The narrow tailoring inquiry focuses on "means" and asks how the government is seeking to meet the objective of the race-based classification.

The strict scrutiny
test is rigorous,
but it is important
to remember that
....

A. THE COMPELLING INTEREST

The Supreme Court has held, in the *Regents of the University of California v. Bakke* decision, that a college or university may consider race in its admissions process.⁷ The interests that may justify the consideration of race or national origin in higher education can be divided into two broad categories: remedial interests and non-remedial interests. The Supreme Court repeatedly has held that remedying the effects of past discrimination constitutes a compelling interest.⁸ In his landmark opinion in *Bakke*, Justice Powell concluded that a university may consider race in its admissions process in order to foster diversity among its student body to further the university's educational objectives.⁹ The United States supports Justice Powell's opinion as a correct statement of law under the Constitution and Title VI.

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Bakke

The Court's decisions have not foreclosed the possibility that non-remedial interests other than fostering diversity for educational purposes may also be compelling, but no such interest has been recognized as compelling by the Supreme Court to date. Thus, there are substantial questions as to whether and in what settings such other non-remedial objectives can constitute a compelling interest.

I. REMEDYING THE EFFECTS OF DISCRIMINATION

Remedying the identified effects of past discrimination constitutes a compelling interest that can support an institution's use of a classification based on race or national origin.

A. GENERAL STANDARDS

Remedying the identified effects of past discrimination constitutes a compelling interest that can support an institution's use of a classification based on race or national origin. This discrimination could fall into two categories. First, an institution can seek to remedy the effects of its own discrimination. Second, the federal government or a state or local government may seek to

remedy the effects of discrimination committed within its jurisdiction, including discrimination committed by private actors, where the government becomes a passive participant in that conduct and thus helps to perpetuate a system of exclusion.¹⁰

Thus, a public institution may, consistent with its authority, seek to remedy the effects of past discrimination in its educational system, including discrimination by local school systems or by private entities, that it has helped to perpetuate.

In either category, the remedy may be aimed at ongoing patterns and practices of exclusion or at the lingering effects of prior discriminatory conduct.¹¹ The fact and legacy of general, historical societal discrimination, however, is an insufficient basis for affirmative action. Similarly, amorphous claims of discrimination in education that are not related to an institution's programs are inadequate.¹²

An institution should be able to identify with some precision the discrimination to be remedied. In justifying remedial affirmative action based on the current effects of past discrimination, an institution should be prepared to articulate how any current conditions that limit educational opportunities by race or national origin are related to past discrimination.¹³

It is not necessary for a court to make a judicial finding of discrimination before an institution may undertake remedial measures. Rather, the institution must have a "strong basis in evidence" for its conclusion that remedial action is necessary.¹⁴ This evidence should approach what the Supreme Court has called "a prima facie case of a constitutional or statutory violation" of the rights of minorities.¹⁵ For example, significant statistical disparities between the number of minorities admitted to an institution and the percentage of minorities in the pool of qualified applicants might permit an inference of discrimination that would support the use of racial or ethnic criteria intended to correct those disparities. In making this comparison, a school may consider the pool of qualified students who actually apply for admission, and the larger pool of students in areas from which applications may be drawn who would meet the school's admissions standards. However, mere underrepresentation of minorities compared to the percentage of minorities in the general population is an insufficient predicate for affirmative action.¹⁶

When a finding of prior discrimination, whether by a court, an agency, a legislative body, or the institution itself, rests on a strong basis of evidence that the institution discriminated, the institution may use narrowly tailored affirmative action measures to remedy the discrimination.

The Title VI regulations require that an institution receiving federal financial assistance that has previously discriminated take action to overcome the effects of that prior discrimination.¹⁷ Thus if a court, a federal agency, or a legislative or administrative body has found that a covered institution has engaged in discrimination, that institution must take steps to remedy that discrimination. The same obligation arises if the institution itself determines that remedial action is necessary to correct the effects of past

discrimination. When a finding of prior discrimination, whether by a court, an agency, a legislative body, or the institution itself, rests on a strong basis of evidence that the institution discriminated, the institution may use narrowly tailored affirmative action measures to remedy the discrimination.

B. FIFTH CIRCUIT STANDARDS: REMEDIAL OBJECTIVES

In *Hopwood v. Texas*, the U.S. Court of Appeals for the Fifth Circuit held that the law school at the University of Texas could not rely on past discrimination by other schools in the Texas state system, including other schools at the University of Texas, as a predicate for considering race in its admissions process.¹⁴ Rather, in the view of the court, the law school's constitutionally valid remedial interests extended no farther than redressing the effects of any prior racial discrimination by the law school itself. "As a result, past discrimination in education, other than at the law school, [could not] justify the present consideration of race in law school admissions."¹⁵ This holding is binding precedent in the Fifth Circuit. Accordingly, postsecondary institutions in Texas, Louisiana, and Mississippi cannot use discrimination by other actors in the state's educational systems as a predicate for considering race or national origin in admissions and financial aid. In addition, one "functionally separate unit" of an institution, such as a medical school, cannot rely on past discrimination by other units in that institution.²⁰ A particular school in those states must have a strong basis in evidence for concluding that there exist present effects from discrimination for which that school itself is responsible. However, if a state or institution of higher education has an obligation to remedy state or institution-wide discrimination, *Hopwood* does not prohibit the appropriate legislative or administrative body, or the governing body of the institution, from using affirmative action to remedy that discrimination in its component schools.²¹

2. NON-REMEDIAL INTERESTS

A. DIVERSITY

In his landmark opinion in *Bakke*, Justice Powell stated that a university may have a compelling interest in considering the race of applicants in its admissions process in order to foster greater diversity among its student body. Such diversity brings a wider range of perspectives to campus, which in turn contributes to a more robust exchange of ideas. This exchange is a central mission of higher education and in keeping with the time-honored value of academic freedom. Moreover, in the view of Justice Powell, the First Amendment protection of academic freedom supports allowing a university to "make its own judgments" regarding education, including the selection of its student body.²² The United States supports Justice

The United States supports Justice Powell's opinion as a correct statement of the law under the Constitution and Title VI.

Powell's opinion as a correct statement of the law under the Constitution and Title VI.²¹

In order for diversity to qualify as a compelling interest, an institution must seek a further objective beyond the mere achievement of diversity itself. The Court has consistently rejected "racial balancing" as a goal of affirmative action, because "[p]refering members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."²⁴ For example, in *Bakke*, Justice Powell stated that diversity in an institution's student body can serve the further goal of enriching the academic experience, but found no compelling interest in assuring that the student body had a specified percentage of particular minority groups or reducing the deficit of minorities in the medical profession.²⁵ Accordingly, an institution that uses affirmative action to achieve diversity must have a sound educational objective for its diversity program. A school must be able to support its claim that diversity provides educational benefits and serves the school's educational objectives.

During the
2 decades

For example, in their *Amici Curiae* brief filed in the *Piscataway* case, a coalition of educational organizations, representing a substantial portion of the higher education community, presented to the Supreme Court social science research and evidence of a consensus view among educators that campus diversity has a measurable positive effect on educational outcomes and that diversity is essential to the missions of colleges and universities. They stated: "Both kinds of evidence support the conclusion that diversity improves education and advances the goals of imparting knowledge where there was preconception, and fostering mutual regard where there was hostile stereotype."²⁶

B. OTHER NON-REMEDIAL INTERESTS

The Supreme Court has had little occasion to address other non-remedial objectives. In his *Bakke* opinion, Justice Powell assumed that a state could have a compelling interest in "improving the delivery of health-care services to communities currently underserved," but concluded that the university had failed to prove that reserving sixteen percent of the seats in its medical school class for minority students was either needed or geared to promote that goal.²⁷ It is not clear whether a racial classification that was narrowly tailored to this interest could survive strict scrutiny.²⁸ Whether other non-remedial interests can be sufficiently compelling to justify the use of classifications based on race or national origin should be considered on a case-by-case basis.

C. FIFTH CIRCUIT STANDARDS: NON-REMEDIAL INTERESTS

and fostering mutual regard where there was hostile stereotype.

➡ Does the college or university have a duty to remedy discrimination on the basis of race or national origin?

✓ CHECKPOINT(S) REMEDIAL PURPOSES

GUIDE,
PP.

4. Are there facts that show discrimination? Is the program justified solely by reference to general societal discrimination, general assertions of discrimination in education, or a statistical underrepresentation of minorities as compared to their percentage of the general population rather than the relevant pool of qualified applicants? Without more, these are impermissible bases for affirmative action.
5. Has a court, legislative body, or agency made a finding that the institution has discriminated against minorities? Is the institution the subject of a court desegregation order or a legislative or administrative finding of unlawful discrimination? Did the body making the finding have a strong basis in evidence for its conclusion? Does the institution itself have a strong basis in evidence for concluding that it has discriminated? If the institution is public, has a state or local government made findings of discrimination within its jurisdiction, including discrimination by private actors? Are there present effects of any such past discrimination? Was the government, or is the government now, a passive participant in that discrimination so as to perpetuate the exclusion? Did the institution help to perpetuate that discrimination?
6. Identify the racial and ethnic composition (%African American, Hispanic, Asian-American, American Indian, white) of the following groups: i) the institution's student body; ii) the institution's qualified applicants; and iii) the pool of qualified potential applicants from which the institution draws its students, for example, students meeting the school's admission requirements living in the areas served by the institution.
7. Based on the information above, is there underrepresentation at the school of qualified students from particular races or national origins? If so, is the statistical disparity significant?
8. What is the nature of the evidence? Is it statistical or based on written documents? Are statistics based on comparisons to the general minority population, or are they more sophisticated and focused? For example, do they attempt to identify the number of qualified minorities in the applicant pool, or seek to explain what the number would look like "but for" the exclusionary effects of discrimination? Is there evidence on how discrimination has hampered minority opportunity in education, or

is the evidence simply based on generalized claims of societal discrimination? In addition to any statistical or documentary evidence, are there persons who have knowledge or other anecdotal evidence of discrimination?

9. Since the adoption of the program, have additional findings of discrimination been made that could serve to justify the need for the program when it was adopted? If not, can such evidence be assembled now? Is there new evidence that the remedial program is no longer necessary?

10. Apart from any past findings or court orders, is there past discrimination affecting admissions at that institution? Has the institution determined whether the effects of past discrimination continue? If there have not been findings of past discrimination, is there a strong basis in evidence to believe that there may be a current violation or the continuing effects of past discrimination?

➡ Is the institution seeking to achieve the educational benefits of diversity?

✓ CHECKPOINT(S) DIVERSITY PURPOSES

➡ GUIDE.
PP.

11. Is affirmative action in admissions used to achieve the educational benefits of diversity? What is the institution's definition of diversity? What are the institution's mission statements and how do they relate to its diversity objectives?

12. The institution must articulate how achieving greater diversity would foster an educational goal beyond diversity for diversity's sake. What are the educational benefits of diversity at the institution? What are the bases for the educational benefits the institution identifies?

13. Does diversity include factors other than race and national origin? If so, what factors? Which admissions criterion or groups of criteria are related to the diversity goal? How is each weighted and considered in the admissions process?

➡ Is the use of race or national origin in remedial or diversity programs narrowly tailored?

✓ CHECKPOINT(S) NEED FOR USE OF RACE OR NATIONAL ORIGIN AND RACE/NATIONAL ORIGIN NEUTRAL ALTERNATIVES

➡ GUIDE.
PP.

14. If race or national origin is considered as a positive factor, has the institution made efforts to achieve its goals in race-neutral ways? If so, what efforts were made and what were the results?

15. If race-neutral measures were not undertaken, why does the institution believe that such efforts would be insufficient to serve its compelling interest without relying on race? What was the nature and extent of the deliberation over any race-neutral alternatives? Was there a judgment regarding the relative effectiveness of race-neutral alternatives and race-conscious measures?

16. Does the college have data to show whether affirmative action is necessary? When did the institution begin implementing its affirmative action program? Does the institution have statistics or other evidence to show the effect of the program on achievement of diversity objectives or remedying the effects of discrimination, e.g., data regarding minority participation levels before and after affirmative action programs began?

✓ CHECKPOINT(S) MANNER RACE OR NATIONAL ORIGIN IS USED, FLEXIBILITY, AND POOL OF BENEFICIARIES

➡ GUIDE.
PP.

17. How does the college assess whether diversity has been achieved? Does the admissions process incorporate numerical goals? If by what process were these goals derived? Do all or only some of the schools or programs have goals? If the program is remedial, are the goals related to the percentage of minorities in the pool of qualified applicants, and do the beneficiaries include people in racial or ethnic groups for whom there is insufficient evidence of prior discrimination?

18. Are admissions decisions made through separate tracks, admissions committees, or eligibility criteria defined on the basis of race or national origin? Does the program establish fixed numerical set-asides? Is race an explicit requirement of eligibility for the program? If there is no such factual requirement, does the program operate that way in

practice? Or is race just one of several factors -- a "plus" -- used in decision making? Could the objectives of any program that uses race as a requirement for eligibility be achieved through a more flexible use of race?

✓ CHECKPOINT(S) DURATION AND PERIODIC REVIEW OF THE USES OF RACE OR NATIONAL ORIGIN

GUIDE.
PP.

19. Is the program subject to periodic oversight, and if so, what is the nature of that oversight? Does the periodic review assess whether the form or extent to which race or national origin is considered should be modified in light of the outcomes of the affirmative action program? Has the program ever been adjusted or modified in light of periodic review? What were the results of the most recent review? Even if there was a compelling justification at the time of adoption, that may not be the case today. In that regard, does the program have an end date? Is there evidence of what might result if the racial classification were discontinued?

✓ CHECKPOINT(S) BURDEN ON NON-BENEFICIARIES

GUIDE.
PP.

20. Does the institution periodically assess whether its consideration of race or national origin in admissions places an undue burden on students not eligible for that consideration? What is the nature of the burden imposed on persons who are not included in the racial or ethnic classification established by the program? Does the program displace those persons from existing positions or financial aid awards? What is the nature and extent of the impact on non-beneficiaries in admissions? Does the impact of the program fall upon a particular group or class of students, or is it more diffuse? What is the extent of other opportunities outside of the program? Are persons who are not beneficiaries of the program put at a significant competitive disadvantage as a result of the program?

STUDENT FINANCIAL AID WORKSHEET

✓ CHECKPOINT(S) INITIAL INFORMATION NEEDS

1. Is the institution's financial aid program guided by a written affirmative action plan? How is the institution's financial aid process structured?
2. Does the institution's financial aid programs include the consideration of race or national origin (as either an exclusive factor or as one among a number of factors)? If so, how? Does the institution fund or administer "race-based scholarships"? If so, what is the justification for each consideration of race or national origin? Are the institution's reasons consistent with the Department's race-targeted scholarship policy?

✓ CHECKPOINT(S) FINANCIAL AID FOR DISADVANTAGED STUDENTS

3. Schools may target financial aid for disadvantaged students, e.g., students from low-income families, or aid based on students' being in the first generation to attend college or family income. Does the institution's definition of "disadvantaged" used for participation in the program include any consideration of race? If not, then the program is not a racial classification subject to strict scrutiny. If yes, the program is subject to strict scrutiny and does not fit within this principle.

✓ CHECKPOINT(S) COMPELLING INTERESTS

4. Why does the program consider race or national origin in financial aid decisions? Is it intended to remedy discrimination, to foster diversity to achieve an educational objective, or for some other purpose? If the use of race is intended to remedy discrimination, see checkpoints 4-10, above. If it is intended to foster diversity to achieve an educational objective, see checkpoints 11-13, above.

"Race-based scholarships" or "race-targeted aid" mean, for the purposes of this Guide, any financial aid for which eligibility is limited to persons of a specific racial or ethnic background. Each of the questions in this section on financial aid also are applicable to financial aid programs where race or ethnicity are used only as a plus-factor in deciding awards. This section is based upon the Department's 1994 race-targeted scholarships policy.

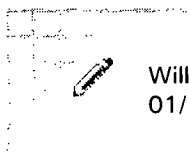
✓ CHECKPOINT(S) NARROW TAILORING OF REMEDIAL OR DIVERSITY PROGRAMS

Are financial aid decisions that consider race or national origin narrowly tailored to achieve their purpose? See checkpoints 14-20, above.

6. If race-based scholarships are awarded, how many does the institution award annually? How many students at the institution, by race and national origin, receive non-race-based financial aid, annually? What proportion of total financial aid at the institution (institutional, state, local, Federal, private) is earmarked for race-based scholarships? Does a comparison of the amount of race-targeted financial aid provided to students to the total amount of aid provided to students without regard to race or national origin show that the program places an undue burden on other students who are not eligible for race-targeted aid?

✓ CHECKPOINT(S) PRIVATE GIFTS RESTRICTED BY RACE OR NATIONAL ORIGIN

7. Are racial or other criteria attached by the donors to the award of any financial aid funds? If so, can the institution justify the use of race under any of the principles of the OCR policy financial aid guidance?
8. Is any race-targeted aid received by the college's students provided directly to students without involvement by the institution? If so, under the policy guidance, Title VI does not apply. If the college makes privately provided race-targeted aid part of its operations by getting involved in the offering or administration of the aid (e.g., through selection of recipients, distribution of funds), can the college justify the use of the aid under a diversity or remedial rationale?



William R. Kincaid
01/14/98 08:32:41 PM

Record Type: Record

To: Arthur_Coleman @ ed.gov @ INET @ LNGTWY

cc:

Subject: Guide Revisions

Art--

I'm glad we got to chat tonight. Here is the outline that folks agreed to today, together with some other changes that folks agreed to. The modified outline should help in getting a quick precis up front where folks will see it, but it avoid the awkward mix of summary and questions that currently exists in the checkpoints section.

OUTLINE

A. Cover Page

B. Table of Contents

I. "Introduction"

This will be the existing introduction page, with some appropriate edits, and especially with a clearer statement that carefully crafted programs are ok.

2. "Overview"

This will be comprised of the bullets and an abbreviated version of other narrative text (like the intro on coverage) from what is currently the "checkpoints" section, since these track the DOJ outline pretty well. This section will NOT contain the questions from the "checkpoints" section. Each segment of the overview will reference pages in the main "Guide" where there is a full discussion.

3. "Guide"

This will be the DOJ Outline, perhaps with some more point headings, bolding, or other changes/graphics to make existing text a little more accessible. We should explore pulling out a few quotes and putting them in boxes to make the thing more readable.

4. "Worksheet"

This will primarily consist of the existing ED "Checkpoints" section. This section will also be cross-referenced to pages in the the main "Guide". Will state up front what the purpose of the worksheet is -- to provide a starting point for institutions to review their programs, in consultation with counsel and OGC.

For the affirmative statements that are currently mixed in with the lists of questions, and

possibly the shaded notes, if they are important enough to flag on the worksheet they can be pulled out and listed below the questions, perhaps pointed to with arrows, or something like that, but distinguishing them clearly from the questions.

OTHER CHANGES

1. Substitute 1st paragraph in introduction:

Introduction

Properly designed and conducted affirmative action programs that consider race or national origin in postsecondary admissions and financial aid decisions are permissible under federal law. This guide is designed to help postsecondary institutions that have, or are considering establishing, affirmative action programs assess whether those programs are consistent with Title VI of the Civil Rights Act and the Constitution. Institutions that operate affirmative action programs should rigorously review those programs on a regular basis to ensure that they continue to be necessary and that they are being conducted consistent with the applicable legal standards.

There are a few additional edits on this page that I will just fax over.

2. Try to develop a few helpful examples/hypos -- probably should go in the main body of the "Guide". Dawn noted that this was done with the Title IX guidance. I know this is a big undertaking, but please give it a shot.
3. Throughout, use the term "guide" to refer to this, rather than "guidance."
4. In the worksheet section, try to find a way to begin each numbered paragraph with a broader question, followed by more specific questions, to give this more of a sense of organization.
5. Before it gets moved into the overview, the material under "coverage and general standards" from the the first page of the existing checkpoints section can probably be reduced to 4 bullets, as shown in a marked up page I will fax over; the last existing bullet on this page can be divided up and placed at the beginning of two other sections on compelling interest and narrow tailoring. You don't have to make all the cuts indicated -- they are suggestive.
6. There were a few other suggested edits that people had in the body of the guide, but Dawn is still going over the draft, and I think the best thing would be to consolidate all those suggestions and for ED to focus for now on the organizational, etc. stuff covered here.

Please give me a call if you have any questions.

Thanks.

-- Bill



Arthur_Coleman @ ed.gov
01/13/98 11:01:00 AM

Record Type: Record

To: William R. Kincaid

cc:

Subject: Aff. action self assessment guide/pre-ACE conf. release

Bill,

Here is a recommended gameplan for releasing the self assessment guide prior to the ACE conference, and following the kind of vetting that we've discussed. Consider this a baseline for further conversation--there's a lot of flexibility here.

1. ACE (with likely dissemination to some of its members that have expressed an interest in this, and with an eye towards setting up regional conferences on this subject).
2. Schools where OCR is already consulting on aff. action (not subject to complaint of discrimination): The Florida System of Higher Education; Salisbury State.
3. Schools that are scheduled for meetings with OCR, to begin consultations: Univ. Iowa Medical School [first meeting 1/27]; Univ. of Pennsylvania [first meeting end of March].
4. Schools that have expressed a specific interest in OCR technical assistance and that want to see the guide, before committing: Univ. Wisconsin; UNC system of higher education; Miami of Ohio.

We also have on our list the 50 or so attendees at the ACE Miami conference. Release to those parties could pre- or post-date the SF event.

I hope this helps. In all day and happy to talk. Art



Arthur_Coleman @ ed.gov
01/12/98 04:47:00 PM

Record Type: Record

To: William R. Kincaid

cc:

Subject: Schedule re assessment guide

Bill, here's something to work from re "drop dead" deadlines.
Certainly something to talk from as we move forward...

1/16 Have vetting scheduled and participants advised

Week of 1/19 Vetting

1/28 Deadline for any vetting, to allow time for final edits

2/5 Deadline for final edits, to allow for copying etc. pre 2/6
departure for S.F.

Art

~~Change use "guide" to refer to this program~~
Doc

Introduction

Replace
This Self-Assessment Guide is designed to help postsecondary institutions that have affirmative action programs that consider race or national origin in admissions and financial aid decisions assess whether their programs are consistent with Title VI of the Civil Rights Act of 1964 and the U.S. Constitution. Institutions considering establishing affirmative action programs are also encouraged to refer to this guidance.

As used in this guidance, the term "affirmative action" means the use or consideration of race or national origin as a factor in admissions or in the award of financial aid. Because mere recruitment and outreach programs designed to increase the number of minorities in an institution's applicant pool raise distinct questions and typically should not be subject to heightened constitutional scrutiny, this guidance should not be used to assess those types of programs. This guidance also does not address programs undertaken pursuant to a court order.¹

In 1994, the U.S. Department of Education published guidance regarding its evaluation under Title VI of an institution's consideration of race or national origin in the award of financial aid. Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, 59 Fed. Reg. 8756 (1994) [hereinafter Financial Aid Guidance]. Institutions should consult that guidance for a more specific discussion of affirmative action in financial aid decisions, including an institution's involvement with privately donated race-restrictive award of privately donated funds.² The Financial Aid Guidance can be found on the Education Department's web site at www.ed.gov.

affirmative action in
This Self-Assessment Guide consists of a legal outline, which describes the federal standards applicable to higher education admissions and financial aid issues, and a set of *worksheet* questions or checkpoints that will aid institutions in collecting the information necessary to conduct a thorough review of their programs. The *worksheet* checkpoints are designed to help institutions identify and organize information relevant to the applicable legal standards, but not every question necessarily will be relevant to each institution. In addition, because the questions are just a guide, no single answer or combination of answers necessarily is dispositive as to the validity of any particular program. *worksheet is*

appropriate
There is much uncertainty with respect to the law on affirmative action at this time. New decisions, by the Supreme Court or lower courts, may significantly affect the standards governing the use of affirmative action in educational institutions. An institution's programs may also be affected by state law requirements, such as Proposition 209 in California. We encourage institutions to consult with their counsel, and to contact the Office for Civil Rights ("OCR") at the Department of Education, for assistance. A list of OCR offices and staff available to assist you is included in this guidance.

I. COVERAGE AND GENERAL STANDARDS

A { The legal standards in this Guide come from the Constitution and Title VI of the Civil Rights Act of 1964. • Public institutions that are part of a state's government are subject to the Fourteenth Amendment of the Constitution. Public and private institutions that receive federal financial assistance from the U.S. Department of Education are subject to Title VI.

~~(Classifications based on race or national origin for the purpose of affirmative action are permitted under Title VI to the same extent as under the Constitution.)~~ This guidance applies to admissions and financial aid programs where race, color, or national origin is a factor in decisionmaking. It applies both to programs in which race or national origin is the sole factor in a decision and to those in which race or national origin is one of many factors considered. This guidance does not apply to admissions or financial aid decisions made without regard to race. ~~(For example, financial aid may be reserved for disadvantaged students, as long as the determination that a student is disadvantaged is not based on race or national origin. In this Guide, references to "race" alone are occasionally used as a short-hand reference to race and national origin.)~~ B

Overview

- C
- Under the Constitution and Title VI of the Civil Rights Act of 1964 it is permissible for colleges and universities to consider race in making admissions decisions provided that they satisfy "strict scrutiny." *as in award financial aid* *or national origin* *the legal test of*
 - D
 - To satisfy strict scrutiny, the institutional interest underlying an affirmative action measure must be "compelling" and the measure must be "narrowly tailored" to serve that interest.
 - The compelling interest inquiry centers on "ends" and asks why an institution is classifying individuals on the basis of race or national origin. The narrow tailoring inquiry focuses on "means" and asks how the government is seeking to meet the objective of the race-based classification. *move to narrow fairly* *to Compelling interest*

II. STUDENT ADMISSIONS

~~(Legal issues arise when a college or university considers race, color or national origin in decisions involving educational programs, such as financial aid or admissions. A thorough understanding of the admissions criteria and process is essential. The questions below cover baseline information for assessing admissions.)~~

The Court has not specified the extent to which an institution must consider race-neutral measures before resorting to race-conscious action. Justice Powell has suggested that in a remedial setting, it is not necessary to use the "least restrictive means" where they would not accomplish the desired ends as well,⁴¹ and has described the narrow tailoring requirement as ensuring that "[less] restrictive means" are used when they would promote the objectives of a racial classification "about as well."⁴² Accordingly, an institution probably need not exhaust race-neutral alternatives, but it must give them serious attention and must use them where efficacious.

2. Scope of Program Flexibility and Waivers

If an affirmative action program's scope exceeds that necessary to achieve the compelling interest underlying the program, the program is not narrowly tailored. A program need not be limited to the specific individuals who suffered the past discrimination.⁴³ But a program undertaken to remedy past discrimination against certain races should not include preferences for other racial groups who did not experience that discrimination. For example, the Supreme Court found that a set-aside program for minority contractors was not narrowly tailored in part because the city's evidence of discrimination, all of which pertained to the treatment of African Americans, did not provide a predicate for the program's preferences for Aleuts, Asian Americans, and Hispanics.⁴⁴

Courts have looked favorably upon plans in which numerical targets are waived if there are not enough qualified minority applicants.⁴⁵ In the context of government contracting, for example, Congress permitted officials to waive a national goal of ten percent participation by minority contractors if it was necessary given the unavailability of qualified minority contractors in a particular area, or if a grantee demonstrated that his or her best efforts would not succeed in achieving the target.⁴⁶ Waivers such as these ensure that a program is flexible, and are especially important if the program uses a relatively rigid measure such as a quota or set-aside.

3. Manner in Which Race is Used

An integral part of the narrow tailoring requirement is the manner in which race is used. Flexible programs are more likely to be narrowly tailored than programs with rigid requirements. Thus programs in which certain admissions positions spots or financial aid awards are open only to members of designated racial or ethnic groups are significantly less likely to satisfy the narrow tailoring requirement than programs that merely consider race or national origin as one of many factors and are open to all races and ethnic groups.

In this regard, two general principles are apparent with respect to admissions. First, set-asides or quotas should not be used in an admissions program unless such measures are absolutely essential to remedying discrimination and its effects.⁴⁷ In addition, admissions programs that rely on separate tracks or separate decision-making procedures that prevent a comparison among applicants of different races and ethnic origins are also particularly vulnerable to challenge.

certain admissions positions or financial aid awards are open only to members of designated racial or ethnic groups.

Second, where an institution considers race or national origin to foster diversity for educational objectives, Justice Powell's opinion in *Bakke* indicates that the program should give consideration to diversity characteristics in addition to race or national origin, such as other life experiences, achievements, talents, interests, extracurricular activities, economic disadvantages, and geographic background.⁴⁸

Two types of racial classifications are especially vulnerable to a challenge on the ground that they are too rigid. First and foremost are affirmative action programs in which a specific percentage of positions or financial aid is set aside for minorities. A good example is the medical admissions program that the court invalidated in *Bakke*, which reserved sixteen percent of the positions slots in the medical school for members of racial and ethnic minority groups.⁴⁹

The second type of classification vulnerable to attack on flexibility grounds is a program in which race or national origin is the sole or primary factor in determining eligibility -- for example, a scholarship program reserved for minorities. A scholarship program reserved for minorities may be distinguished from an admissions quota reserving a portion of seats in a class for minorities, in that the burden imposed on non-minority students in the financial aid context -- possibly receiving less aid -- is less severe than the burden imposed by an admissions program -- not being admitted to the institution at all. But a scholarship program open only to minorities is less flexible than a scholarship program in which race is one of many factors that determine eligibility for the award.

Under both the admissions set-aside and the minority scholarship program, persons not within the designated categories are ineligible for certain benefits or positions. This is not the case in programs where race or national origin is deemed a plus in evaluating an applicant's file but does not insulate the applicant from comparison with all other candidates for the available benefit.⁵⁰

Admissions programs that rely on separate tracks or separate decision-making procedures that prevent a comparison among applicants of different races and ethnic origins are also particularly vulnerable to challenge.

For a detailed discussion of the standards that should be applied to minority scholarship programs, institutions and their counsel should consult the Financial Aid Guidance, 59 Fed. Reg. 8756 (1994).

4. Comparison of Numerical Targets to the Qualified Applicant Pool

When evaluating the use of numerical goal in a remedial affirmative action plan, the SCT has compared the numerical goal to the percentage of minorities in the relevant labor market or industry. The Court has rejected a city's target of providing thirty percent of its contracts to minority businesses where the target had been selected as roughly halfway between one percent, the percentage of contracts previously awarded to African American businesses, and fifty percent, the percentage of African Americans in Richmond's population. What was required, the Court stated, was a target that was related to the percentage of African Americans in the pool of qualified contractors, not the percentage in the general population.⁵¹

Therefore,

Institutions that use numerical goals and targets should select a goal that is related to the percentage of minorities in the pool of qualified applicants. A school may consider

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4. Comparison of Numerical Targets to the Qualified Applicant Pool

Where an affirmative action program is justified on remedial grounds, the Court has compared any numerical goal to the percentage of minorities in the relevant labor market or industry. The Court rejected a city's target of providing thirty percent of its contracts to minority businesses where the target had been selected as roughly halfway between one percent, the percentage of contracts previously awarded to African American businesses, and fifty percent, the percentage of African Americans in Richmond's population. What was required, the Court stated, was a target that was related to the percentage of African Americans in the pool of qualified contractors, not the percentage in the general population.⁵¹

Institutions that use numerical goals and targets therefore should select a goal that is related to the percentage of minorities in the pool of qualified applicants. A school may consider

the pool of qualified students who actually apply for admission, and the larger pool of students in areas from which applications are drawn who would meet the school's admissions standards.

5. Duration and Periodic Review

A particular affirmative action measure should remain in place only as long as it is needed to achieve the compelling interest that it serves.⁵² A race-based classification is therefore more likely to satisfy the narrow tailoring test if it has a definite end date or is subject to meaningful periodic review in order to ascertain the continued need for the measure.⁵³ Reexamination of affirmative action programs also allows an institution to fine tune its classification or discontinue it if warranted, which may allow the program to satisfy other factors in the narrow tailoring test. The Office for Civil Rights recommends annual reviews to ensure compliance with this aspect of the narrow tailoring requirements of Title VI.

6. Burden on Non-Beneficiaries

Affirmative action necessarily imposes some burden or disadvantage on persons who do not belong to the racial or ethnic groups favored by the program's classifications. While some burdens are acceptable, others may be too high. In general, a race-based classification that "unsettle[s] . . . legitimate, firmly rooted expectation[s]" or imposes the "entire burden . . . on particular individuals" crosses that line.⁵⁴ For example, if an institution terminated scholarships that had been awarded to particular non-minority students in order to fund a scholarship program for minority students, that might place too much of a burden on the affected non-minority students to be considered narrowly tailored. Generally, the less severe and more diffuse the impact on non-minority students, the more likely that a racial or ethnic classification will address this factor satisfactorily.

For a more detailed discussion of narrow tailoring in the context of race-targeted financial aid, see the Financial Aid Guidance, 59 Fed. Reg. 8756 (1994).

IV. Conclusion

Any covered institution that uses race or national origin as a basis for decisionmaking should review its program to determine if it comports with the strict scrutiny standard. Appended to this guidance is a nonexhaustive checklist of questions that will aid institutions in collecting the information necessary to conduct a thorough review. Because the questions are just a guide, no single answer or combination of answers is necessarily dispositive as to the validity of any particular program.

1. The U.S. Court of Appeals for the Fifth Circuit's decision in *Hopwood v. Texas* governs the application of federal law to affirmative action programs in postsecondary institutions in Texas, Mississippi and Louisiana. Institutions in those three states are subject to more severe restrictions than institutions in other parts of the country in their use of affirmative action. Accordingly, institutions located in Texas, Louisiana, and Mississippi should consult the *Hopwood* opinion and the "Fifth Circuit Standards" sections of this guidance to determine the appropriate standards for their programs.
2. Several months after the publication of the Financial Aid Guidance, the U.S. Court of Appeals for the Fourth Circuit sustained a constitutional challenge to a state university scholarship program open only to African American students in *Podberesky v. Kirwan*. *Podberesky* held that the university failed to provide sufficient factual support that its challenged scholarship program was narrowly tailored to the asserted interest in remedying the present effects of past discrimination. Institutions located in the Fourth Circuit, which includes the states of Virginia, Maryland, North Carolina, and South Carolina, should review *Podberesky*, as that decision will guide the evaluation of the remedial use of racial classifications in higher education in that circuit.
3. 42 U.S.C. 2000d (1994). Title VI does not apply to programs directly administered by the United States or its agencies. See *Suberalt-Perez v. Heckler*, 717 F.2d 36, 38 (2d Cir. 1983), cert. denied, 466 U.S. 929 (1984).
4. See 42 U.S.C. 2000d-4a(2)(A) (1994).
5. With respect to the kinds of race-conscious measures at issue in this Guidance, the restrictions of Title VI and of the Equal Protection Clause are coextensive. See *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992); *Regents of the University of California v. Bakke*, 438 U.S. 265, 284-87 (Powell, J.), *id.* at 325, 328 (Brennan, J., joined by White, Marshall, and Blackmun, JJ.). For other purposes, however, the requirements of Title VI and its implementing regulations are not completely coextensive with the Constitution. See *Guardians Ass'n. v. Civil Service Comm'n. of City of New York*, 403 U.S. 582, 584, 589-93 (White, J.) (1982) (in disparate impact case not involving affirmative action, Title VI can be violated without proof of the discriminatory intent necessary to prove a constitutional violation); *id.* at 623-24 (Marshall, J. Concurring); *id.* at 642-45 (Stevens, J. joined by Brennan and Blackmun, JJ.).
6. Those regulations are located in 34 C.F.R. Pt. 100 (1997).
7. *Adarand*, 515 U.S. at 235. (Constitution); see *Bakke*, 432 U.S. at 284-287 (Powell, J.); 325, 328 (Title VI does not prohibit affirmative action measures that would be permissible under the Constitution).
8. *Adarand*, 515 U.S. at 200.
9. 438 U.S. 265 (1978).
10. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-506 (1989); *Shaw v. Hunt*, 116 S. Ct. 1894, 1902-03 (1996).
11. 438 U.S. 265, 311-15 (1978) (opinion of Powell, J.).
12. See *Croson*, 488 U.S. at 491-93 (plurality opinion); *id.* at 518-19 (Kennedy, J. concurring in part and concurring in the judgment).
13. See *Adarand*, 515 U.S. at 269-70 (Souter, J. dissenting); Cf. *Fordice*, 505 U.S. at 727-29 (state must eradicate policies and practices traceable to prior de jure system that continue to foster segregation).

14. *See Croson*, 488 U.S. at 499, 505.
15. *Id.* at 499 ("amorphous" claim of past discrimination in an industry can not justify the use of an unyielding quota).
16. *See, e.g., Fordice*, 505 U.S. at 730 n.4.
17. *See Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion).
18. *See Croson*, 488 U.S. at 500.
19. *See id.* at 501, 509.
20. *Id.* at 501-02.
21. 34 C.F.R. 100.3(b)(6)(I).
22. 78 F.3d 932, 951 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996)
23. *Id.* at 951.
24. *Id.* at 954.
25. *See id.* at 951.
26. *See id.* at 954-55 (citing *Fordice*, 505 U.S. at 731-32).
27. *Bakke*, 438 U.S. at 311-14.
28. *Id.* at 314.
29. In *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), the Court applied intermediate scrutiny to a preference for minority-owned broadcasters and held that exposing the nation to diverse perspectives in broadcasting was an important governmental interest. The Court thus did not consider whether the government's interest in seeking diversity in broadcasting was compelling. *Adarand* overruled *Metro Broadcasting* insofar as it held that benign race-based action by the federal government is subject to intermediate scrutiny, but did not address whether diversity in broadcasting can be a compelling, as opposed to important, interest.
30. *Bakke*, 438 U.S. at 307 (Powell, J.) (reducing deficit of minorities in medical school and the medical profession); *see Croson*, 488 U.S. at 507; *Johnson v. Transportation Agency*, 480 U.S. 616, 639 (1987).
31. *Id.* at 313.
32. *See id.* at 305, 307. Similarly, in the law enforcement context, diversifying the ranks of officers may at times serve vital public safety and operational needs, thereby enhancing the agency's ability to carry out its functions effectively. *See Barhold v. Rodriguez*, 863 F.2d 233, 238 (2d Cir. 1988); *Talbert v. City of Richmond*, 648 F.2d 925, 931-32 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 695-96 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981); *Baker v. City of St. Petersburg*, 400 F.2d 294, 301 n.10 (5th Cir. 1968); *cf. Wittmer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 949 (1997) (upholding preference for a black lieutenant at a boot camp for young offenders based on the finding that the camp would not achieve its rehabilitative mission absent the preference because 70% black inmate population unlikely to

accept military regimen with less than a 6% black security staff and no black lieutenants).

33. See *Adarand*, 515 U.S. at 242-64 (Stevens, J. dissenting).

34. *Bakke*, 438 U.S. at 310 (Powell, J.)

35. Justice Powell approvingly quoted the state court below, which had noted that there were more precise and reliable ways to identify applicants who were genuinely interested in the medical problems of underserved communities than race, namely, a demonstrated concern for the problem in the past and a declaration that practicing in such a community was an applicant's primary professional goal. *Id.* at 310-11.

36. See *Hopwood*, 78 F.3d at 944, 948.

37. *Id.* at 944, 948.

38. *Id.* at 944 (quoting *Croson*, 488 U.S. at 521 (Scalia, J., concurring in judgment)).

39. *Croson*, 488 U.S. at 496; see also *Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986); *United States v. Paradise*, 480 U.S. 149 (1987).

40. *Croson*, 488 U.S. at 507.

41. See *Fullilove v. Klutznick*, 448 U.S. 448, 508 (Powell, J., concurring).

42. *Wygant*, 476 U.S. at 280 n.6 (plurality opinion of Powell, J.); cf. *Billish v. City of Chicago*, 989 F.2d 890, 894 (7th Cir.) (en banc) (Posner, J.) (in reviewing affirmative action measures, courts must be "sensitiv[e] to the importance of avoiding racial criteria . . . whenever it is possible to do so, [as] *Croson* requires"), *cert. denied*, 510 U.S. 908 (1993).

43. See *Adarand*, 515 U.S. at 237 (government may respond to the lingering effects of racial discrimination by using narrowly tailored race-based action).

44. *Croson*, 488 U.S. at 506.

45. See, e.g., *Paradise*, 480 U.S. at 177-78.

46. See *Croson*, 488 U.S. at 508 (discussing *Fullilove*, 448 U.S. at 488 (1980) (plurality opinion)).

47. See, e.g., *Paradise*, 480 U.S. at 149.

48. See *Bakke*, 438 U.S. at 315 (Because "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element," a program "focused solely on ethnic diversity would hinder rather than further attainment of genuine diversity.") (Powell, J.)

49. *Bakke*, 438 U.S. at 275.

50. See *Bakke*, 438 U.S. at 315-17; see also *Johnson*, 480 U.S. at 616 (upholding program that did not set aside any positions for women).

51. See *Croson*, 488 U.S. at 507.

52. See *Fullilove*, 448 U.S. at 513 (Powell, J., concurring).

53. See *Paradise*, 480 U.S. at 178 (plurality opinion); *Sheet Metal Workers*, 478 U.S. at 487 (Powell, J., concurring); *Fullilove*, 448 U.S. at 513 (Powell, J., concurring).

54. See *Johnson*, 480 U.S. at 638; *Sheet Metal Workers*, 478 U.S. at 488 (Powell, J., concurring).

(replacement 1st
paragraph)

Introduction

Properly designed and conducted affirmative action programs that consider race or national origin in postsecondary admissions and financial aid decisions are permissible under federal law. This guide is designed to help postsecondary institutions that have, or are considering establishing, affirmative action programs assess whether those programs are consistent with Title VI of the Civil Rights Act and the Constitution. Institutions that operate affirmative action programs should rigorously review those programs on a regular basis to ensure that they continue to be necessary and that they are being conducted consistent with the applicable legal standards.



U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

P.O. Box 65808
Washington, D.C. 20035-5808

Telephone (202) 514-2151

TELEFACSIMILE COVER SHEET

DATE: _____

TO: _____

Dawn Chirwa
with Council

PHONE: _____

FAX: _____

456-1647

FROM: _____

Theresa Kayem

OFFICE OF THE ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

FAX NUMBER: 202-307-2839

PHONE: _____

COMMENTS: _____

Part I, Part 2 to follow.

Happy New Year.

NUMBER OF PAGES TRANSMITTED (INCLUDING THIS SHEET) 15

THE INFORMATION CONTAINED IN THIS TRANSMISSION IS PROPERTY OF THE UNITED STATES AND IS ATTORNEY-CLIENT PRIVILEGED AND CONFIDENTIAL. IT IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION, OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY CALLING 202-514-3853.

I. When is an Institution Covered by the Constitution or Title VI?

Both the Constitution and Title VI of the Civil Rights Act of 1964 may apply to an institution's affirmative action programs. The Fourteenth Amendment to the United States Constitution prohibits states from denying any person equal protection of the laws. Because they are a part of state government, public colleges and universities are covered by the Fourteenth Amendment. ~~The Fifth Amendment to the United States Constitution prohibits the federal government from denying any person life, liberty, or property without due process of law. Postsecondary institutions operated by the federal government are covered by the Fifth Amendment. The Supreme Court has held that equal protection claims under the Fifth Amendment's Due Process Clause are governed by the same standards that apply to equal protection claims under the Fourteenth Amendment.~~

Title VI provides that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.³ Any public or private institution that receives financial assistance from the federal government is subject to the requirements of Title VI. A public institution that receives federal financial assistance is therefore covered by both the Constitution and Title VI. Title VI covers all of the operations of an institution that receives federal financial assistance, including the institution's ~~involvement in the~~ award of privately donated funds.⁴ ~~Title VI permits~~ ~~does not bar~~ affirmative action measures that would satisfy the requirements of the Fourteenth Amendment.⁵

The Office for Civil Rights at the Department of Education is responsible for enforcing the requirements of Title VI at institutions receiving federal education funds. Institutions subject to Title VI must abide by the provisions of the statute and comply with regulations promulgated by the Office for Civil Rights.⁶

II. When Does an Admissions or Financial Aid Program Use a Classification Based on Race or National Origin?

This guidance applies to admissions and financial aid programs that use criteria based on race, color, or national origin as a factor in decisionmaking. It applies both to programs in which race or national origin is the sole factor underlying the institution's decision and to those in which race or national origin is one of many factors considered. This guidance does not apply to admissions decisions or financial aid awards ~~that are based on race-neutral factors. For example, the guidance would not apply to an institution's support for disadvantaged students through~~ admissions or financial aid, as long as the determination that a student is disadvantaged is not based on race or national origin.

III. Compliance with the Constitution and Title VI: Strict Scrutiny

The Supreme Court has determined that it is a requirement of the Constitution and of Title VI requires that any government program that uses race or national origin as a factor in decisionmaking must satisfy "strict scrutiny".⁷ As explained above, this same standard applies under Title VI to all schools receiving federal funds. To satisfy strict scrutiny, the institutional interest underlying an affirmative action measure must be "compelling" and the measure must be "narrowly tailored" to serve that interest.⁸ The compelling interest inquiry centers on "ends" and asks why an institution is classifying individuals on the basis of race or national origin. The narrow tailoring inquiry focuses on "means" and asks how the government is seeking to meet the objective of the race-based classification.

A. The Compelling Interest

The Supreme Court has held, in the *Regents of the University of California v. Bakke* decision, that a college or university may consider race in its admissions process.⁹ The interests that may justify the consideration of race or national origin in higher education can be divided into two broad categories: remedial interests and non-remedial interests. The Supreme Court repeatedly has held that remedying the effects of past discrimination may constitute a compelling interest.¹⁰ In his landmark opinion in *Bakke*, Justice Powell concluded that The United States has taken the position that, as Justice Powell indicated in his landmark opinion in *Regents of the University of California v. Bakke*, a university may consider race in its admissions process in order to foster diversity among its student body to further the university's educational objectives.¹¹ The United States supports Justice Powell's opinion as a correct statement of law under the Constitution and Title VI. The question of whether any non-remedial interest is sufficiently compelling to justify the consideration of race or national origin has never been squarely addressed in a majority opinion by a majority of the Court, however.

The Court's decisions have not foreclosed the possibility that non-remedial interests other than fostering diversity for educational purposes may also be compelling, but no such interest has been recognized as compelling by the Supreme Court to date. Thus, there are substantial questions as to whether and in what settings such other non-remedial objectives can constitute a compelling interest.

1. Remedying the Effects of Discrimination

a. General Standards

Remedying the identified effects of past discrimination may constitute a compelling interest that can support an institution's use of a classification based on race or national origin. This discrimination could fall into two categories. First, an institution can seek to remedy the effects of its own discrimination. Second, the federal government or a state or local government may seek to remedy the effects of discrimination committed within its jurisdiction, including

discrimination committed by private actors, where the government becomes a passive participant in that conduct and thus helps to perpetuate a system of exclusion.¹² Thus, a public institution may, consistent with its authority, seek to remedy the effects of past discrimination in its educational system, including discrimination by local school systems or by private entities, that it has helped to perpetuate. In either category, the remedy may be aimed at ongoing patterns and practices of exclusion or at the lingering effects of prior discriminatory conduct.¹³

An institution should be able to identify with some precision the discrimination to be remedied. The fact and legacy of general, historical societal discrimination is an insufficient basis for affirmative action.¹⁴ Similarly, amorphous claims of discrimination in education that are not related to an institution's programs are inadequate.¹⁵ In justifying remedial affirmative action based on the current effects of past discrimination, an institution should be prepared to articulate how any current conditions that limit educational opportunities by race or national origin are related to past discrimination for which the institution shares responsibility.¹⁶

It is not necessary for a court to make a judicial finding of discrimination before an institution may undertake remedial measures. Rather, the institution must have a "strong basis in evidence" for its conclusion that remedial action is necessary.¹⁷ This evidence should approach what the Supreme Court has called "a prima facie case of a constitutional or statutory violation" of the rights of minorities.¹⁸ For example, significant statistical disparities between the number of minorities admitted to an institution and the percentage of minorities in the pool of qualified applicants might permit an inference of discrimination that would support the use of racial or ethnic criteria intended to correct those disparities.¹⁹ In making this comparison, a school may consider the pool of qualified students who actually apply for admission, and the larger pool of students in areas from which applications may be drawn who would meet the school's admissions standards. However, mere underrepresentation of minorities as compared to the percentage of minorities in the general population is an insufficient predicate for affirmative action.²⁰

The Title VI regulations require that, ~~in administering a program in which it has previously discriminated~~, an institution receiving federal financial assistance ~~that has previously discriminated~~ take action to overcome the effects of that prior discrimination.²¹ Thus if a court, a federal agency, or a legislative or administrative body has found that a covered institution has engaged in discrimination, that institution must take steps to remedy that discrimination. The same obligation arises if the institution itself determines that remedial action is necessary to correct the effects of past discrimination. When a finding of prior discrimination, whether by a court, an agency, a legislative body, or the institution itself, rests on a strong basis of evidence that the institution discriminated ~~in the relevant jurisdiction~~, the institution may use narrowly tailored affirmative action measures to remedy the discrimination.

b. Fifth Circuit Standards: Remedial Objectives

In *Hopwood v. Texas*, the U.S. Court of Appeals for the Fifth Circuit held that the law school at the University of Texas could not rely on past discrimination by other schools in the

Somewhere in this section - perhaps at end - clarify that numerous other courts, P appeals body have developed a more developed Powell decision.

Texas state system, including other schools at the University of Texas, as a predicate for considering race in its admissions process.²² Rather, in the view of the court, the law school's constitutionally valid remedial interests extended no farther than redressing the effects of any prior racial discrimination by the law school itself.²³ "As a result, past discrimination in education, other than at the law school, [could not] justify the present consideration of race in law school admissions."²⁴ This holding is binding precedent in the Fifth Circuit. Accordingly, postsecondary institutions in Texas, Louisiana, and Mississippi cannot use discrimination by other actors in the state's educational systems as a predicate for considering race or national origin in admissions and financial aid. In addition, one "functionally separate unit" of an institution, such as a medical school, cannot rely on past discrimination by other units in that institution.²⁵ A particular school in those states must have a strong basis in evidence for concluding that there exist present effects from discrimination for which that school itself is responsible. However, if a state or institution of higher education has an obligation to remedy state or institution-wide discrimination, *Hopwood* does not prohibit the appropriate legislative or administrative body, or the governing body of the institution, from using affirmative action to remedy that discrimination in its component schools.²⁶

2. Non-Remedial Interests

a. Diversity

In his landmark ~~separate~~ opinion in *Bakke*, Justice Powell stated that a university may have a compelling interest in considering the race of applicants in its admissions process in order to foster greater diversity among its student body. Such diversity brings a wider range of perspectives to campus, which in turn contributes to a more robust exchange of ideas. This exchange is a central mission of higher education and in keeping with the time-honored value of academic freedom.²⁷ Moreover, in the view of Justice Powell, the First Amendment protection of academic freedom supports allowing a university to "make its own judgments" regarding education, including the selection of its student body.²⁸ No majority opinion for the Supreme Court, however, has addressed when a non-remedial objective may constitute a compelling interest that can justify the use of narrowly tailored race-conscious measures.²⁹

In order for diversity to qualify as a compelling interest, an institution must seek a further objective beyond the mere achievement of diversity itself. The Court has consistently rejected "racial balancing" as a goal of affirmative action, because "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."³⁰ For example, in *Bakke*, Justice Powell stated that diversity in an institution's student body can serve the further goal of enriching the academic experience,³¹ but found no compelling interest in assuring that the student body had a specified percentage of particular minority groups or reducing the deficit of minorities in the medical profession.³² Accordingly, an institution that uses affirmative action to achieve diversity must have a sound educational objective for its diversity program. A school must be able to support its claim that diversity provides educational benefits and serves the school's educational objectives, by being prepared to demonstrate the educational benefits that diversity produces on campus or within the university's programs.

b. Other Non-Remedial Interests

~~The Supreme Court has had little occasion to address other non-remedial objectives. The Supreme Court has neither approved nor foreclosed the use of affirmative action to serve non-remedial ends, but, as we have already noted, no majority opinion of the Court has found a non-remedial objective compelling.~~³³ In his *Bakke* opinion, Justice Powell assumed that a state could have a compelling interest in "improving the delivery of health-care services to communities currently underserved," but concluded that the university had failed to prove that reserving sixteen percent of the seats in its medical school class for minority students was either needed or geared to promote that goal.³⁴ It is not clear whether a racial classification that was narrowly tailored to this interest could survive strict scrutiny.³⁵ Whether other non-remedial interests can be sufficiently compelling to justify the use of classifications based on race or national origin should be considered on a case-by-case basis.

c. Fifth Circuit Standards: Non-Remedial Interests

The Department of Education and the Department of Justice believe that, as Justice Powell stated in *Bakke*, diversity may constitute a compelling interest justifying the consideration of race in higher education. However, in *Hopwood*, the U.S. Court of Appeals for the Fifth Circuit held that an institution's interest in diversity to enrich the academic experience cannot satisfy strict scrutiny.³⁶ That ruling is binding in the states of Texas, Louisiana and Mississippi. Accordingly, institutions in those three states cannot use affirmative action to foster diversity among their student body in order to enrich the academic experience.

Institutions in the Fifth Circuit should be aware that there is language in *Hopwood* that suggests that remedying past wrongs is the only compelling state interest that can justify classifications based on race.³⁷ However, the only non-remedial interest at issue in the case was diversity, and it may be argued that the holding of *Hopwood* does not extend to other non-remedial interests that were not before the panel. *Hopwood* itself noted that Justice Scalia has suggested one possible non-remedial compelling interest -- "a social emergency rising to the level of imminent danger to life and limb."³⁸ Because the case before it did not present such an interest, the panel did not take a position on Justice Scalia's suggestion. Institutions in Texas, Louisiana, and Mississippi should consult with their counsel before using classifications based on race or on national origin to further any non-remedial interest ~~other than diversity~~, and cannot use affirmative action to foster diversity in order to enrich the academic experience.

B. Narrow Tailoring

In addition to advancing a compelling goal, any use of race must also be "narrowly tailored." This ensures that race-based affirmative action is the product of careful deliberation, not hasty decisionmaking. It also ensures that such action is truly necessary and that less

intrusive, efficacious means to the end are unavailable.

The determination of whether a particular affirmative action program is narrowly tailored is highly fact-specific. As applied by the courts, the factors that typically determine whether a measure is narrowly tailored are the following: (i) whether the institution considered race-neutral alternatives before resorting to race-conscious action; (ii) the scope and flexibility of the affirmative action program, including whether the racial classification is subject to a waiver and whether the use of a waiver or other mechanism facilitates the narrowing of the program's scope; (iii) the manner in which race is used, that is, whether race determines eligibility for a program or whether race is just one factor in the decisionmaking process; (iv) the comparison of any numerical targets to the percentage of qualified minorities in the applicant pool; (v) the duration of the program and whether it is subject to periodic review; and (vi) the degree and type of burden imposed on non-minorities by the program.

Before describing each of the components, ~~two~~ **three** general points about the narrow tailoring test deserve mention. First, it is unlikely that an affirmative action program must satisfy every factor. A strong showing with respect to most of the factors may compensate for a weaker showing with respect to others.

Second, all of the factors will not be relevant in every case. The objective of the program may determine the applicability or weight to be given a factor, and factors may play out differently in remedial programs than they will in non-remedial programs.

~~Third, the narrow tailoring test should not be viewed in isolation from the compelling interest inquiry. While the two inquiries are distinct, as a practical matter there may be an interplay among the two. For example, in a case involving a set-aside program for minority contractors, the Court stated that the weak evidence of discrimination on which the city of Richmond predicated its remedial program could not justify the adoption of a rigid racial quota.³⁹ This suggests that if Richmond had opted for a more flexible measure, the Court might have been less demanding in reviewing the evidence of prior discrimination. However, the Court has never explicitly recognized any trade-off between the compelling interest and narrow tailoring tests.~~

1. Race-Neutral Alternatives

Before resorting to race-conscious action, an institution should give serious consideration to race-neutral alternatives, that is, measures that do not rely on race or national origin as a factor in decisionmaking. For example, the Court found that a preference for minority-owned businesses was not narrowly tailored in part because the local government did not consider other, race-neutral means to increase minority participation in contracting before adopting race-conscious measures, such as targeted financial assistance for small or new businesses.⁴⁰ In the context of higher education, an institution might consider the use of socioeconomic criteria that do not include race or national origin, or increasing efforts to solicit applications from students who have not traditionally applied for admission, including minority students.

01/06/86 15:25 FAX
MAIL ROOM

THE WHITE HOUSE
WASHINGTON

From the Office of:

The Domestic Policy Council

Elena Kagan
Deputy Assistant to the President
for Domestic Policy

TO: Bill/Mike

FAX: 65581

PHONE: _____

PAGES: _____

MESSAGE: _____

Please call (202) 456-5584 if there are any problems with the transmission.

01/00/80 13.25 FAX
DRAFT

December 19, 1997

Bill/Mike -
Call me when you
review those notes.
Elena

MEMORANDUM FOR SYLVIA MATHEWS AND ELENA KAGAN

FROM: DAWN CHIRWA AND BILL KINCAID

RE: Rollout of Self-assessment Guidance on Affirmative Action for Institutions of Higher Education.

This week we met with ED and DOJ to review the status of the self-assessment guidance on affirmative action for institutions of higher education. We reached rough agreement on most substantive issues and ED and DOJ are making additions/modifications to make the document more user-friendly and to better convey Administration support for properly conducted affirmative action programs. We expect to have a document ready to go into final by the second week in January. At this point we are working to develop an appropriate roll-out strategy and would appreciate your input. *We want to share with you our plan for a*

We believe that the goals of the roll-out strategy should be: 1) make sure that appropriate postsecondary institutions get this information quickly and are able to put it to work, thus speeding and strengthening campus efforts to ensure that affirmative action programs comply with the law; 2) ensure that the civil rights community is aware of the Administration's continued support for properly conducted affirmative action programs in education; 3) demonstrate a substantive step forward that supports the President's Race Initiative; 4) time the release in relation to announcement of the new mentoring initiative and other action steps so it is perceived as part of broader administration efforts to ensure diversity in higher education, and 5) avoid unnecessarily fanning dispute over affirmative action.

We think the following approach should meet these goals. [Bracketed elements could be added in depending on how aggressive we want to be in promoting the guidance and building these actions up for the press as a part of the race initiative, although none of the steps outlined are especially high profile.] From the perspective of getting the document into the hands of higher education institutions and assisting them to proceed with needed internal reviews quickly and with the least possible controversy, the low-key course is probably best; we know that ACE, the umbrella group for higher ed institutions which is very supportive of this effort, would prefer such a strategy. [However, demonstrating action with respect to the Race Initiative might dictate a more visible approach.] *Agree*

- Week of Jan. 12 -- hold briefing at ED to walk through document with small number of key leaders in the civil rights and education community (such as Wade Henderson with the Leadership Conference on Civil Rights, Tom Henderson with the Lawyers' Committee on Civil Rights, and Stan Ikenberry with ACE). [Share document with leaders who are asked to close hold and provide comments within a week] *21 wouldn't.*
- [Week of Jan. 19 -- hold briefing at ED to walk through document with larger number of

*NO - should
be Ed. too*

01/07/99 10:20 AM
leaders in civil rights and education community. *I don't see any need for two brochures, but don't feel strongly.*

mid
[Late Jan. -- appropriately address comments from civil rights and education community.]

share publicly - low-key, should meet or possibly to a meeting
[Late Jan. -- Department of Education is working on reports on the value of diversity in higher education and successful approaches to fostering diversity. These reports, if well-done, could be released in build-up to announcement of mentoring initiative and to lay *help build a broader context* the groundwork for release of self-assessment guidance].

Jan. 27 to Feb. 3 -- President announces new mentoring initiative in or around the time of the State of the Union Address, and proposed funding for the program will be included in the FY 99 budget submission. In rolling out the mentoring initiative, officials should stress that one important benefit is that it would help open up the pipeline to higher education for more disadvantaged minority students and help foster campus diversity.

[Feb. 7 -- Provide self-assessment guidance to friendly paper emphasizing how it is part of broader Administration efforts to foster diversity in higher education]. *Rather not.*

revising already released
Feb. 8 -- ED *shares* guidance publicly at already-scheduled ACE Conference. *in SF OK*

Feb
[Feb. 9 -- Secretary *Ed gives organ* Riley sends guidance to higher education institutions and announces the Department will be holding a series of regional forums to assist institutions to review their affirmative action programs. Cover letter could *work w/ ACE to organize* also discuss importance of diversity in higher education and encourage institutions to get involved in mentoring initiative.]

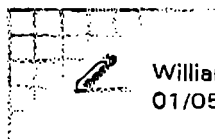
~~Early~~ March -- ED holds first regional meeting on affirmative action self-assessment at Penn (already scheduled).

Please let us know what you think of this approach. We would be happy to meet with you to discuss.

do so much for what I favor. What does ED propose to do there?

I'd rather do the guidance as quietly as possible and (depending on what they say) highlight those reports.

We should find some effective means of distribution, but I'm not in favor of regional forums.



William R. Kincaid
01/05/98 04:56:04 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Michael Cohen/OPD/EOP, Dawn M. Chirwa/WHO/EOP, Laura Emmett/WHO/EOP

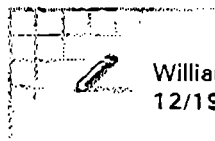
Subject: Rollout memo/conference in CA

Elena--

As you look over these materials, one additional piece of information to factor in: it turns out that the ACE conference scheduled for February 8 will be held in San Francisco. If the document is first released publicly there, some in CA might interpret that as some kind of challenge to prop 209. If the goal is to keep this low-key, or at least relatively non-political, then it might be better to go public with it prior to the conference; however, I would imagine any discussion of the guidance is going to get attention in California, even if the document isn't completely "new."

Thanks.

----- Forwarded by William R. Kincaid/OPD/EOP on 01/05/98 04:46 PM -----



William R. Kincaid
12/19/97 07:03:37 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Dawn M. Chirwa/WHO/EOP, Laura Emmett/WHO/EOP

Subject: Draft memo on rollout of guidance



ASSESRL3.M

Elena--

Attached is a draft memo to you and Sylvia from Dawn and me on a possible rollout strategy for the self-assessment guidance on affirmative action for colleges and universities. Mike and Julie F. have reviewed/commented and are fine with this. Before we sent this forward we wanted to make sure you were comfortable with it. Also, I wanted to get your take on whether we should run this by Judy Winston/others in the race initiative or Bob Shireman/NEC (because of the link with the mentoring initiative).

I am leaving tomorrow afternoon on vacation, and will be out until a week from Tuesday, but I can come in tomorrow morning if necessary to make changes to this. Otherwise, please follow up with

Agree -- not in CA.



John_Fry @ ed.gov
12/22/97 02:33:00 PM

Record Type: Record

To: Julie A. Fernandez, scott r. palmer, William R. Kincaid

cc:

Subject: Vet List

Friends

At our meeting on 12/15, OCR agreed to circulate a list of people and organizations from whom we could seek feedback in January on our package of affirmative action legal resource materials. Art and I have prepared a list of organizations and institutions.

We would appreciate your input on the following vet list. It may be longer than we need so suggestions on shortening the list would be appreciated.

Organizations:

Deborah Carter/Hector Garza
American Council on Education

Wade Henderson
The Leadership Conference on Civil Rights

Marcia Greenberger
The National Women's Law Center

Nancy Zirkin
American Association of University Women

Jon Alger
The American Association of University Professors

Sheila Trice Bell
The National Association of College and University Attorneys

Carol Schneider
American Assn of Colleges and Universities

American Assn of Universities

Katherine Hanson
Consortium on Financing Higher Education

Lawyers Committee on Civil Rights

HACU

NAACP/LDF

NAFEO

Selected schools:

Florida Regents Diversity Task Force
University of Wisconsin-Madison
University of North Carolina System
University of Iowa School of Medicine
Salisbury State University

Please address comments to me at 312 886 8360, fax 312 353 2479, email
John_Fry@ed.gov.

While Art Coleman and I are on leave, through 1/2, please contact Susan
Bowers, Senior Enforcement Director about the self assessment guide, etc.

Thanks. I hope your holidays are wonderful.

John

Juliette: Please give a copy to Richard Jerome.

Karen Stevens: Would you give a copy to Randy and Marty?

DRAFT

MEMORANDUM FOR SYLVIA MATHEWS AND ELENA KAGAN

FROM: DAWN CHIRWA AND BILL KINCAID

RE: Rollout of Self-assessment Guidance on Affirmative Action for Institutions of Higher Education.

This week we met with ED and DOJ to review the status of the self-assessment guidance on affirmative action for institutions of higher education. We reached rough agreement on most substantive issues and ED and DOJ are making additions/modifications to make the document more user-friendly and to better convey Administration support for properly conducted affirmative action programs. We expect to have a completed document by the second week in January. At this point we are working to develop an appropriate roll-out strategy and would appreciate your input.

It seems to us that the goals of the roll-out strategy are: 1) make sure that appropriate postsecondary institutions get this information quickly and put it to work, thus speeding and strengthening campus efforts to ensure that affirmative action programs comply with the law; 2) ensure that the civil rights community is aware of the Administration's continued support for properly conducted affirmative action programs and involvement with this guidance; 3) demonstrate a substantive step forward that supports the President's Race Initiative; 4) time the release in relation to announcement of the new mentoring initiative and other action steps so it is perceived as part of broader administration efforts to ensure diversity in higher education, and 5) avoid unnecessarily fanning controversy over affirmative action.

We think the following approach should meet these goals. Bracketed elements could be added in depending on how aggressive we want to be in promoting the guidance and building these actions up for the press as a part of the race initiative:

- Week of Jan. 12 -- hold briefing at WH to walk through document with small number of key leaders in the civil rights and education community. [Give leaders drafts and ask them to provide comments within a week].
- Week of Jan. 19 -- hold briefing at ED to walk through document with larger number of leaders in civil rights and education community.
- Mid - to - Late Jan. -- incorporate comments from civil rights and education community.
- [Late Jan. -- Department of Education is working on reports on the value of diversity in higher education and and successful approaches to fostering diversity. These reports, if well-done, could be released in conjunction with announcement of mentoring initiative and to lay the groundwork for release of self-assessment guidance].

- Jan. 27 to Feb. 3 -- President announces new mentoring initiative in or around the time of the State of the Union Address, and proposed funding for the program will be included in the FY 99 budget submission. In rolling out the mentoring initiative, officials should stress that one important benefit is that it would help open up the pipeline to higher education for more disadvantaged minority students and help foster campus diversity.
- [Feb. 7 -- Leak self-assessment guidance to friendly paper emphasizing how it is part of broader Administration efforts to foster diversity in higher education].
- Feb. 8 -- ED shares guidance publicly at already-scheduled ACE Conference.
- [Feb. 9 -- Secretary Riley sends guidance to higher ed institutions and announces the Department will be holding a series of regional forums to assist institutions to review their affirmative action programs. Cover letter could also discuss importance of diversity in higher ed and encourage institutions to get involved in mentoring initiative.]
- Early March -- ED uses guide at holds first regional meeting on affirmative action self-assessment at Penn (already scheduled).

Please let us know what you think of this approach. We would be happy to meet with you to discuss.

Girdone ml

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Allison Balderston

12/11/97 11:14:27 AM

Record Type: Record

To: William R. Kincaid/OPD/EOP

cc:

Subject: FYI phone numbers

I thought you may want the phone numbers for the people at Justice that are being invited to this meeting.

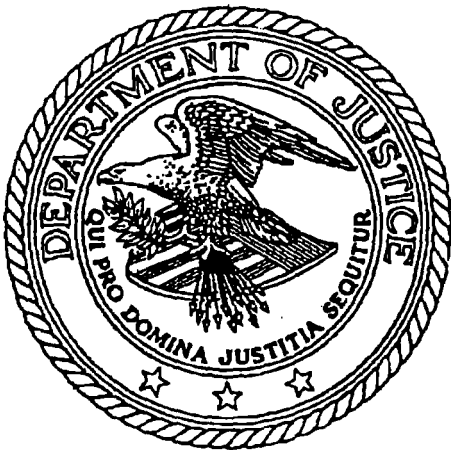
Veronica Washington 514-4127

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OF PAGES: _____ **(INCLUDING COVER)**

COMMENTS: 1. DOJ's rewrite of the legal guide
2. Ed's rewrite of the questions

Introduction

This Self-Assessment Guide is designed to help postsecondary institutions that have affirmative action programs that consider race or national origin in admissions and financial aid decisions assess whether their programs are consistent with Title VI of the Civil Rights Act of 1964 and the U.S. Constitution. Institutions considering establishing affirmative action programs are also encouraged to refer to this guidance.

As used in this guidance, the term "affirmative action" means the use or consideration of race or national origin as a factor in admissions or in the award of financial aid. Because mere recruitment and outreach programs designed to increase the number of minorities in an institution's applicant pool raise distinct questions and typically should not be subject to heightened constitutional scrutiny, this guidance should not be used to assess those types of programs. This guidance also does not address programs undertaken pursuant to a court order.¹

In 1994, the U.S. Department of Education published guidance regarding its evaluation under Title VI of an institution's consideration of race or national origin in the award of financial aid. Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, 59 Fed. Reg. 8756 (1994) [hereinafter Financial Aid Guidance]. Institutions should consult that guidance for a more specific discussion of affirmative action in financial aid decisions, including an institution's involvement with privately donated race-restrictive award of privately donated funds.² The Financial Aid Guidance can be found on the Education Department's web site at www.ed.gov.

of This Self Assessment Guide consists of a legal outline, which describes the federal standards applicable to higher education admissions and financial aid issues, and a set of questions, or checkpoints, that will aid institutions in collecting the information necessary to conduct a thorough review of their programs. The checkpoints are designed to help institutions identify and organize information relevant to the applicable legal standards, but not every question necessarily will be relevant to each institution. In addition, because the questions are just a guide, no single answer or combination of answers necessarily is dispositive as to the validity of any particular program.

There is much uncertainty with respect to the law on affirmative action at this time. New decisions, by the Supreme Court or lower courts, may significantly affect the standards governing the use of affirmative action in educational institutions. An institution's programs may also be affected by state law requirements, such as Proposition 209 in California. We encourage institutions to consult with their counsel, and to contact the Office for Civil Rights ("OCR") at the Department of Education, for assistance. A list of OCR offices and staff available to assist you is included in this guidance.

I. When is an Institution Covered by the Constitution or Title VI?

Both the Constitution and Title VI of the Civil Rights Act of 1964 may apply to an institution's affirmative action programs. The Fourteenth Amendment to the United States Constitution prohibits states from denying any person equal protection of the laws. Because they are a part of state government, public colleges and universities are covered by the Fourteenth Amendment. ~~The Fifth Amendment to the United States Constitution prohibits the federal government from denying any person life, liberty, or property without due process of law. Postsecondary institutions operated by the federal government are covered by the Fifth Amendment. The Supreme Court has held that equal protection claims under the Fifth Amendment's Due Process Clause are governed by the same standards that apply to equal protection claims under the Fourteenth Amendment.~~

Title VI provides that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.³ Any public or private institution that receives financial assistance from the federal government is subject to the requirements of Title VI. A public institution that receives federal financial assistance is therefore covered by both the Constitution and Title VI. Title VI covers all of the operations of an institution that receives federal financial assistance, including the institution's involvement in the award of privately donated funds.⁴ Title VI ~~permits~~ does not bar affirmative action measures that would satisfy the requirements of the Fourteenth Amendment.⁵

The Office for Civil Rights at the Department of Education is responsible for enforcing the requirements of Title VI at institutions receiving federal education funds. Institutions subject to Title VI must abide by the provisions of the statute and comply with regulations promulgated by the Office for Civil Rights.⁶

II. When does an admissions or financial aid program use a classification based on race or national origin?

This guidance applies to admissions and financial aid programs that use criteria based on race, color, or national origin as a factor in decisionmaking. It applies both to programs in which race or national origin is the sole factor underlying the institution's decision and to those in which race or national origin is one of many factors considered. This guidance does not apply to admissions decisions or financial aid awards that are based on race-neutral factors. For example, the guidance would not apply to an institution's support for disadvantaged students through admissions or financial aid, as long as the determination that a student is disadvantaged is not based on race or national origin.

III. Compliance with the Constitution and Title VI: Strict Scrutiny

Reorg: A. The Compelling Interest
Two broad categories:
1. Remedial
2. Non-remedial

The Supreme Court has determined that it is a requirement of the Constitution and of Title VI requires that any government program that uses race or national origin as a factor in decisionmaking must satisfy "strict scrutiny".⁷ As explained above, this same standard applies under Title VI to all schools receiving federal funds. To satisfy strict scrutiny, the institutional interest underlying an affirmative action measure must be "compelling" and the measure must be "narrowly tailored" to serve that interest.⁸ The compelling interest inquiry centers on "ends" and asks why an institution is classifying individuals on the basis of race or national origin. The narrow tailoring inquiry focuses on "means" and asks how the government is seeking to meet the objective of the race-based classification.

A. The Compelling Interest

The Supreme Court has held, in the *Regents of the University of California v. Bakke* decision, that a college or university may consider race in its admissions process.⁹ The interests that may justify the consideration of race or national origin in higher education can be divided into two broad categories: remedial interests and non-remedial interests. The Supreme Court repeatedly has held that remedying the effects of past discrimination may constitute a compelling interest.¹⁰ In his landmark opinion in *Bakke*, Justice Powell concluded that The United States has taken the position that, as Justice Powell indicated in his landmark opinion in *Regents of the University of California v. Bakke*, a university may consider race in its admissions process in order to foster diversity among its student body to further the university's educational objectives.¹¹ The United States supports Justice Powell's opinion as a correct statement of law under the Constitution and Title VI. The question of whether any non-remedial interest is sufficiently compelling to justify the consideration of race or national origin has never been squarely addressed in a majority opinion by a majority of the Court, however.

The Court's decisions have not foreclosed the possibility that non-remedial interests other than fostering diversity for educational purposes may also be compelling, but no such interest has been recognized as compelling by the Supreme Court to date. Thus, there are substantial questions as to whether and in what settings such other non-remedial objectives can constitute a compelling interest.

Remedying the Effects of Discrimination

a. General Standards

Remedying the identified effects of past discrimination may constitute a compelling interest that can support an institution's use of a classification based on race or national origin. This discrimination could fall into two categories. First, an institution can seek to remedy the effects of its own discrimination. Second, the federal government or a state or local government may seek to remedy the effects of discrimination committed within its jurisdiction, including discrimination committed by private actors, where the government becomes a passive participant in that conduct and thus helps to perpetuate a system of exclusion.¹² Thus, a public institution

Needs to be more clearly presented that the only non-remedial interest that has held to satisfy the compelling interest standard is the university's interest in fostering diversity... etc. The non-remedial interest in fostering diversity... etc. has been recognized as a compelling interest.

December 23, 1997
In addition, numerous lower courts have never been addressed in a majority opinion of the Court.
However, this has never been addressed in a majority opinion of the Court.

Following Powell's standard, have developed a body of law that recognizes diversity as a compelling interest.

note about add that the body of law that has been developed by lower Ct. is following Powell's standard

may, consistent with its authority, seek to remedy the effects of past discrimination in its educational system, including discrimination by local school systems or by private entities, that it has helped to perpetuate. In either category, the remedy may be aimed at ongoing patterns and practices of exclusion or at the lingering effects of prior discriminatory conduct.¹³

~~However,~~
~~An institution should be able to identify with some precision the discrimination to be remedied.~~ The fact and legacy of general, historical societal discrimination is an insufficient basis for affirmative action.¹⁴ Similarly, amorphous claims of discrimination in education that are not related to an institution's programs are inadequate.¹⁵ In justifying remedial affirmative action based on the current effects of past discrimination, an institution should be prepared to articulate how any current conditions that limit educational opportunities by race or national origin are related to past discrimination for which the institution shares responsibility.¹⁶

~~However,~~
It is not necessary for a court to make a judicial finding of discrimination before an institution may undertake remedial measures. ~~Rather,~~ the institution must have a "strong basis in evidence" for its conclusion that remedial action is necessary.¹⁷ This evidence should approach what the Supreme Court has called "a prima facie case of a constitutional or statutory violation" of the rights of minorities.¹⁸ For example, significant statistical disparities between the number of minorities admitted to an institution and the percentage of minorities in the pool of qualified applicants might permit an inference of discrimination that would support the use of racial or ethnic criteria intended to correct those disparities.¹⁹ In making this comparison, a school may consider the pool of qualified students who actually apply for admission, and the larger pool of students in areas from which applications may be drawn who would meet the school's admissions standards. However, mere underrepresentation of minorities as compared to the percentage of minorities in the general population is an insufficient predicate for affirmative action.²⁰

The Title VI regulations require that, in administering a program in which it has previously discriminated, an institution receiving federal financial assistance ~~that has previously discriminated~~ take action to overcome the effects of that prior discrimination.²¹ Thus if a court, a federal agency, or a legislative or administrative body has found that a covered institution has engaged in discrimination, that institution must take steps to remedy that discrimination. The same obligation arises if the institution itself determines that remedial action is necessary to correct the effects of past discrimination. When a finding of prior discrimination, whether by a court, an agency, a legislative body, or the institution itself, rests on a strong basis of evidence that the institution discriminated in the relevant jurisdiction, the institution may use narrowly tailored affirmative action measures to remedy the discrimination.

b. Fifth Circuit Standards: Remedial Objectives

In *Hopwood v. Texas*, the U.S. Court of Appeals for the Fifth Circuit held that the law school at the University of Texas could not rely on past discrimination by other schools in the Texas state system, including other schools at the University of Texas, as a predicate for considering race in its admissions process.²² Rather, in the view of the court, the law school's

constitutionally valid remedial interests extended no farther than redressing the effects of any prior racial discrimination by the law school itself.²³ "As a result, past discrimination in education, other than at the law school, [could not] justify the present consideration of race in law school admissions."²⁴ This holding is binding precedent in the Fifth Circuit. Accordingly, postsecondary institutions in Texas, Louisiana, and Mississippi cannot use discrimination by other actors in the state's educational systems as a predicate for considering race or national origin in admissions and financial aid. In addition, one "functionally separate unit" of an institution, such as a medical school, cannot rely on past discrimination by other units in that institution.²⁵ A particular school in those states must have a strong basis in evidence for concluding that there exist present effects from discrimination for which that school itself is responsible. However, if a state or institution of higher education has an obligation to remedy state or institution-wide discrimination, *Hopwood* does not prohibit the appropriate legislative or administrative body, or the governing body of the institution, from using affirmative action to remedy that discrimination in its component schools.²⁶

2. Non-Remedial Interests

a. Diversity

In his landmark separate opinion in *Bakke*, Justice Powell stated that a university may have a compelling interest in considering the race of applicants in its admissions process in order to foster greater diversity among its student body. (Such diversity brings a wider range of perspectives to campus, which in turn contributes to a more robust exchange of ideas. This exchange is a central mission of higher education and in keeping with the time-honored value of academic freedom.²⁷) Moreover, in the view of Justice Powell, the First Amendment protection of academic freedom supports allowing a university to "make its own judgments" regarding education, including the selection of its student body.²⁸ No majority opinion for the Supreme Court, however, has addressed when a non-remedial objective may constitute a compelling interest that can justify the use of narrowly tailored race-conscious measures.²⁹

In order for diversity to qualify as a compelling interest, an institution must seek a further objective beyond the mere achievement of diversity itself. The Court has consistently rejected "racial balancing" as a goal of affirmative action, because "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."³⁰ For example, in *Bakke*, Justice Powell stated that diversity in an institution's student body can serve the further goal of enriching the academic experience,³¹ but found no compelling interest in assuring that the student body had a specified percentage of particular minority groups or reducing the deficit of minorities in the medical profession.³² Accordingly, an institution that uses affirmative action to achieve diversity must have a sound educational objective for its diversity program. A school must be able to support its claim that diversity provides educational benefits and serves the school's educational objectives. by being prepared to demonstrate the educational benefits that diversity produces on campus or within the university's programs.

b. Other Non-Remedial Interests

The Supreme Court has neither approved nor foreclosed the use of affirmative action to serve non-remedial ends, but, as we have already noted, no majority opinion of the Court has found a non-remedial objective compelling.³³ In his *Bakke* opinion, Justice Powell assumed that a state could have a compelling interest in "improving the delivery of health-care services to communities currently underserved," but concluded that the university had failed to prove that reserving sixteen percent of the seats in its medical school class for minority students was either needed or geared to promote that goal.³⁴ It is not clear whether a racial classification that was narrowly tailored to this interest could survive strict scrutiny.³⁵ (Whether other non-remedial interests can be sufficiently compelling to justify the use of classifications based on race or national origin should be considered on a case-by-case basis.)

c. Fifth Circuit Standards: Non-Remedial Interests

The Department of Education and the Department of Justice believe that, as Justice Powell stated in *Bakke*, diversity may constitute a compelling interest justifying the consideration of race in higher education. However, in *Hopwood*, the U.S. Court of Appeals for the Fifth Circuit held that an institution's interest in diversity to enrich the academic experience cannot satisfy strict scrutiny.³⁶ That ruling is binding in the states of Texas, Louisiana and Mississippi. Accordingly, institutions in those three states cannot use affirmative action to foster diversity among their student body in order to enrich the academic experience.

Institutions in the Fifth Circuit should be aware that there is language in *Hopwood* that suggests that remedying past wrongs is the only compelling state interest that can justify classifications based on race.³⁷ However, the only non-remedial interest at issue in the case was diversity, and it may be argued that the holding of *Hopwood* does not extend to other non-remedial interests that were not before the panel. *Hopwood* itself noted that Justice Scalia has suggested one possible non-remedial compelling interest -- "a social emergency rising to the level of imminent danger to life and limb."³⁸ Because the case before it did not present such an interest, the panel did not take a position on Justice Scalia's suggestion. Institutions in Texas, Louisiana, and Mississippi should consult with their counsel before using classifications based on race or on national origin to further any non-remedial interest other than diversity, and cannot use affirmative action to foster diversity in order to enrich the academic experience.

B. Narrow Tailoring

In addition to advancing a compelling goal, any use of race must also be "narrowly tailored." This ensures that race-based affirmative action is the product of careful deliberation, not hasty decisionmaking. It also ensures that such action is truly necessary and that less intrusive, efficacious means to the end are unavailable.

The determination of whether a particular affirmative action program is narrowly tailored is highly fact-specific. As applied by the courts, the factors that typically determine whether a

measure is narrowly tailored are the following: (i) whether the institution considered race-neutral alternatives before resorting to race-conscious action; (ii) the scope and flexibility of the affirmative action program, including whether the racial classification is subject to a waiver and whether the use of a waiver or other mechanism facilitates the narrowing of the program's scope; (iii) the manner in which race is used; that is, whether race determines eligibility for a program or whether race is just one factor in the decisionmaking process; (iv) the comparison of any numerical targets to the percentage of qualified minorities in the applicant pool; (v) the duration of the program and whether it is subject to periodic review; and (vi) the degree and type of burden imposed on non-minorities by the program.

Before describing each of the components, two three general points about the narrow tailoring test deserve mention. First, it is unlikely that an affirmative action program must satisfy every factor. A strong showing with respect to most of the factors may compensate for a weaker showing with respect to others.

Second, all of the factors will not be relevant in every case. The objective of the program may determine the applicability or weight to be given a factor, and factors may play out differently in remedial programs than they will in non-remedial programs.

Third, the narrow tailoring test should not be viewed in isolation from the compelling interest inquiry. While the two inquiries are distinct, as a practical matter there may be an interplay among the two. For example, in a case involving a set-aside program for minority contractors, the Court stated that the weak evidence of discrimination on which the city of Richmond predicated its remedial program could not justify the adoption of a rigid racial quota.³⁹ This suggests that if Richmond had opted for a more flexible measure, the Court might have been less demanding in reviewing the evidence of prior discrimination. However, the Court has never explicitly recognized any trade-off between the compelling interest and narrow tailoring tests.

1. Race-Neutral Alternatives

Before resorting to race-conscious action, an institution should give serious consideration to race-neutral alternatives; that is, measures that do not rely on race or national origin as a factor in decisionmaking. For example, the Court found that a preference for minority-owned businesses was not narrowly tailored in part because the local government did not consider other, race-neutral means to increase minority participation in contracting before adopting race-conscious measures, such as targeted financial assistance for small or new businesses.⁴⁰ In the context of higher education, an institution might consider the use of socioeconomic criteria that do not include race or national origin, or increasing efforts to solicit applications from students who have not traditionally applied for admission, including minority students.

The Court has not specified the extent to which an institution must consider race-neutral measures before resorting to race-conscious action. Justice Powell has suggested that in a remedial setting, it is not necessary to use the "least restrictive means" where they would not

accomplish the desired ends as well,⁴¹ and has described the narrow tailoring requirement as ensuring that "[less] restrictive means" are used when they would promote the objectives of a racial classification "about as well."⁴² Accordingly, an institution ~~probably~~ need not exhaust race-neutral alternatives, but it must give them serious attention and ~~must~~ use them where ~~efficacious~~. *step*

2. Scope of Program, Flexibility and Waivers

(but could use a better diff. word)

If an affirmative action program's scope exceeds that necessary to achieve the compelling interest underlying the program, the program is not narrowly tailored. A program need not be limited to the specific individuals who suffered the past discrimination.⁴³ But a program undertaken to remedy past discrimination against certain races should not include preferences for other racial groups who did not experience that discrimination. For example, the Supreme Court found that a set-aside program for minority contractors was not narrowly tailored in part because the city's evidence of discrimination, all of which pertained to the treatment of African Americans, did not provide a predicate for the program's preferences for Aleuts, Asian Americans, and Hispanics.⁴⁴

Courts have looked favorably upon plans in which numerical targets are waived if there are not enough qualified minority applicants.⁴⁵ In the context of government contracting, for example, Congress permitted officials to waive a national goal of ten percent participation by minority contractors if it was necessary given the unavailability of qualified minority contractors in a particular area, or if a grantee demonstrated that his or her best efforts would not succeed in achieving the target.⁴⁶ Waivers such as these ensure that a program is flexible, and are especially important if the program uses a relatively rigid measure such as a quota or set-aside.

3. Manner in Which Race is Used

An integral part of the narrow tailoring requirement is the manner in which race is used. Flexible programs are more likely to be narrowly tailored than programs with rigid requirements. Thus programs in which certain admissions positions spots or financial aid awards are open only to members of designated racial or ethnic groups are significantly less likely to satisfy the narrow tailoring requirement than programs that merely consider race or national origin as one of many factors and are open to all races and ethnic groups. *(A)*

In this regard, two general principles are apparent with respect to admissions. First, set-asides or quotas should not be used in an admissions program unless such measures are absolutely essential to remedying discrimination and its effects.⁴⁷ In addition, admissions programs that rely on separate tracks or separate decision-making procedures that prevent a comparison among applicants of different races and ethnic origins are also particularly vulnerable to challenge. Second, where an institution considers race or national origin to foster diversity for educational objectives, Justice Powell's opinion in Bakke indicates that the program should give consideration to diversity characteristics in addition to race or national origin, such as other life experiences, *(S)*

achievements, talents, interests, extracurricular activities, economic disadvantages, and geographic background.⁴⁸

in which certain admissions positions or financial aid awards are open only to members of designated racial or ethnic groups.

Two types of racial classifications are especially vulnerable to a challenge on the ground that they are too rigid. First and foremost are affirmative action programs in which a specific percentage of positions or financial aid is set aside for minorities. (A good example is the medical admissions program that the court invalidated in *Bakke*, which reserved sixteen percent of the positions slots in the medical school for members of racial and ethnic minority groups.)

The second type of classification vulnerable to attack on flexibility grounds is a program in which race or national origin is the sole or primary factor in determining eligibility -- for example, a scholarship program reserved for minorities. A scholarship program reserved for minorities may be distinguished from an admissions quota reserving a portion of seats in a class for minorities, in that the burden imposed on non-minority students in the financial aid context -- possibly receiving less aid -- is less severe than the burden imposed by an admissions program -- not being admitted to the institution at all. But a scholarship program open only to minorities is less flexible than a scholarship program in which race is one of many factors that determine eligibility for the award.

Under both the admissions set-aside and the minority scholarship program, persons not within the designated categories are ineligible for certain benefits or positions. This is not the case in programs where race or national origin is deemed a plus in evaluating an applicant's file but does not insulate the applicant from comparison with all other candidates for the available benefit.⁵⁰

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For a detailed discussion of the standards that should be applied to minority scholarship programs, institutions and their counsel should consult the Financial Aid Guidance, 59 Fed. Reg. 8756 (1994).

4. Comparison of Numerical Targets to the Qualified Applicant Pool

When evaluating the use of a numerical goal in a remedial affirmative action plan, the S.Ct. has compared any numerical goal to the percentage of minorities in the relevant labor market or industry. The Court rejected a city's target of providing thirty percent of its contracts to minority businesses where the target had been selected as roughly halfway between one percent, the percentage of contracts previously awarded to African American businesses, and fifty percent, the percentage of African Americans in Richmond's population. What was required, the Court stated, was a target that was related to the percentage of African Americans in the pool of qualified contractors, not the percentage in the general population.⁵¹

Therefore, Institutions that use numerical goals and targets therefore should select a goal that is related to the percentage of minorities in the pool of qualified applicants.] A school may consider the pool of qualified students who actually apply for admission, and the larger pool of students in areas from which applications are drawn who would meet the school's admissions standards.

5. Duration and Periodic Review

A particular affirmative action measure should remain in place only as long as it is needed to achieve the compelling interest that it serves.⁵² A race-based classification is therefore more likely to satisfy the narrow tailoring test if it has a definite end date or is subject to meaningful periodic review in order to ascertain the continued need for the measure.⁵³ Reexamination of affirmative action programs also allows an institution to fine tune its classification or discontinue it if warranted, which may allow the program to satisfy other factors in the narrow tailoring test. The Office for Civil Rights recommends annual reviews to ensure compliance with this aspect of the narrow tailoring requirements of Title VI.

6. Burden on Non-Beneficiaries

Affirmative action necessarily imposes some burden or disadvantage on persons who do not belong to the racial or ethnic groups favored by the program's classifications. While some burdens are acceptable, others may be too high. In general, a race-based classification that "unsettle[s] . . . legitimate, firmly rooted expectation[s]" or imposes the "entire burden . . . on particular individuals" crosses that line.⁵⁴ For example, if an institution terminated scholarships that had been awarded to particular non-minority students in order to fund a scholarship program for minority students, that might place too much of a burden on the affected non-minority students to be considered narrowly tailored. Generally, the less severe and more diffuse the impact on non-minority students, the more likely that a racial or ethnic classification will address this factor satisfactorily.

For a more detailed discussion of narrow tailoring in the context of race-targeted financial aid, see the Financial Aid Guidance, 59 Fed. Reg. 8756 (1994).

IV. Conclusion

Any covered institution that uses race or national origin as a basis for decisionmaking should review its program to determine if it comports with the strict scrutiny standard. Appended to this guidance is a nonexhaustive checklist of questions that will aid institutions in collecting the information necessary to conduct a thorough review. Because the questions are just a guide, no single answer or combination of answers is necessarily dispositive as to the validity of any particular program.

1. The U.S. Court of Appeals for the Fifth Circuit's decision in *Hopwood v. Texas* governs the application of federal law to affirmative action programs in postsecondary institutions in Texas, Mississippi and Louisiana. Institutions in those three states are subject to more severe restrictions than institutions in other parts of the country in their use of affirmative action. Accordingly, institutions located in Texas, Louisiana, and Mississippi should consult the *Hopwood* opinion and the "Fifth Circuit Standards" sections of this guidance to determine the appropriate standards for their programs.

2. Several months after the publication of the Financial Aid Guidance, the U.S. Court of Appeals for the Fourth Circuit sustained a constitutional challenge to a state university scholarship program open only to African American students in *Podberesky v. Kirwan*. *Podberesky* held that the university failed to provide sufficient factual support that its challenged scholarship program was narrowly tailored to the asserted interest in remedying the present effects of past discrimination. Institutions located in the Fourth Circuit, which includes the states of Virginia, Maryland, North Carolina, and South Carolina, should review *Podberesky*, as that decision will guide the evaluation of the remedial use of racial classifications in higher education in that circuit.

3. 42 U.S.C. 2000d (1994). Title VI does not apply to programs directly administered by the United States or its agencies. See *Soberal-Perez v. Heckler*, 717 F.2d 36, 38 (2d Cir. 1983), cert. denied, 466 U.S. 929 (1984).

4. See 42 U.S.C. 2000d-4a(2)(A) (1994).

5. With respect to the kinds of race-conscious measures at issue in this Guidance, the restrictions of Title VI and of the Equal Protection Clause are coextensive. See *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992); *Regents of the University of California v. Bakke*, 438 U.S. 265, 284-87 (Powell, J.), *id.* at 325, 328 (Brennan, J., joined by White, Marshall, and Blackmun, JJ.). For other purposes, however, the requirements of Title VI and its implementing regulations are not completely coextensive with the Constitution. See *Guardians Ass'n v. Civil Service Comm'n of City of New York*, 463 U.S. 582, 584, 589-93 (White, J.) (1983) (in disparate impact case not involving affirmative action, Title VI can be violated without proof of the discriminatory intent necessary to prove a constitutional violation); *id.* at 623-24 (Marshall, J. Concurring); *id.* at 642-45 (Stevens, J., joined by Brennan and Blackmun, JJ.).

6. Those regulations are located in 34 C.F.R. Pt. 100 (1997).

7. *Adarand*, 515 U.S. at 235. (Constitution); see *Bakke*, 432 U.S. at 284-287 (Powell, J.), 325, 328 (Title VI does not prohibit affirmative action measures that would be permissible under the Constitution).

8. *Adarand*, 515 U.S. at 200.

9. 438 U.S. 265 (1978).

10. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-506 (1989); *Shaw v. Hunt*, 116 S. Ct. 1894, 1902-03 (1996).

11. 438 U.S. 265, 311-15 (1978) (opinion of Powell, J.).

12. See *Croson*, 488 U.S. at 491-93 (plurality opinion); *id.* at 518-19 (Kennedy, J. concurring in part and concurring in the judgment).

13. See *Adarand*, 515 U.S. at 269-70 (Souter, J. dissenting); Cf. *Fordice*, 505 U.S. at 727-29 (state must eradicate policies and practices traceable to prior de jure system that continue to foster segregation).
14. See *Croson*, 488 U.S. at 499, 505.
15. *Id.* at 499 ("amorphous" claim of past discrimination in an industry can not justify the use of an unyielding quota).
16. See, e.g., *Fordice*, 505 U.S. at 730 n.4.
17. See *Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion).
18. See *Croson*, 488 U.S. at 500.
19. See *id.* at 501, 509.
20. *Id.* at 501-02.
21. 34 C.F.R. 100.3(b)(6)(I).
22. 78 F.3d 932, 951 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996)
23. *Id.* at 951.
24. *Id.* at 954.
25. See *id.* at 951.
26. See *id.* at 954-55 (citing *Fordice*, 505 U.S. at 731-32).
27. *Bakke*, 438 U.S. at 311-14.
28. *Id.* at 314.
29. In *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), the Court applied intermediate scrutiny to a preference for minority-owned broadcasters and held that exposing the nation to diverse perspectives in broadcasting was an important governmental interest. The Court thus did not consider whether the government's interest in seeking diversity in broadcasting was compelling. *Adarand* overruled *Metro Broadcasting* insofar as it held that benign race-based action by the federal government is subject to intermediate scrutiny, but did not address whether diversity in broadcasting can be a compelling, as opposed to important, interest.
30. *Bakke*, 438 U.S. at 307 (Powell, J.) (reducing deficit of minorities in medical school and the medical profession); see *Croson*, 488 U.S. at 507; *Johnson v. Transportation Agency*, 480 U.S. 616, 639 (1987).
31. *Id.* at 313.
32. See *id.* at 305, 307. Similarly, in the law enforcement context, diversifying the ranks of officers may at times serve vital public safety and operational needs, thereby enhancing the agency's ability to carry out its functions effectively. See *Barhold v. Rodriguez*, 863 F.2d 233, 238 (2d Cir. 1988); *Talbert v. City of Richmond*, 648 F.2d 925, 931-32 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 695-96 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981); *Baker v. City of St. Petersburg*, 400 F.2d 294, 301 n.10 (5th Cir. 1968); cf. *Wittmer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 949 (1997) (upholding preference for a

black lieutenant at a boot camp for young offenders based on the finding that the camp would not achieve its rehabilitative mission absent the preference because 70% black inmate population unlikely to accept military regimen with less than a 6% black security staff and no black lieutenants).

33. See *Adarand*, 515 U.S. at 242-64 (Stevens, J. dissenting).

34. *Bakke*, 438 U.S. at 310 (Powell, J.)

35. Justice Powell approvingly quoted the state court below, which had noted that there were more precise and reliable ways to identify applicants who were genuinely interested in the medical problems of underserved communities than race, namely, a demonstrated concern for the problem in the past and a declaration that practicing in such a community was an applicant's primary professional goal. *Id.* at 310-11.

36. See *Hopwood*, 78 F.3d at 944, 948.

37. *Id.* at 944, 948.

38. *Id.* at 944 (quoting *Croson*, 488 U.S. at 521 (Scalia, J., concurring in judgment)).

39. *Croson*, 488 U.S. at 496; see also *Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986); *United States v. Paradise*, 480 U.S. 149 (1987).

40. *Croson*, 488 U.S. at 507.

41. See *Fullilove v. Klutznick*, 448 U.S. 448, 508 (Powell, J., concurring).

42. *Wygant*, 476 U.S. at 280 n.6 (plurality opinion of Powell, J.); cf. *Billish v. City of Chicago*, 989 F.2d 890, 894 (7th Cir.) (en banc) (Posner, J.) (in reviewing affirmative action measures, courts must be "sensitiv[e] to the importance of avoiding racial criteria . . . whenever it is possible to do so, [as] *Croson* requires"), cert. denied, 510 U.S. 908 (1993).

43. See *Adarand*, 515 U.S. at 237 (government may respond to the lingering effects of racial discrimination by using narrowly tailored race-based action).

44. *Croson*, 488 U.S. at 506.

45. See, e.g., *Paradise*, 480 U.S. at 177-78.

46. See *Croson*, 488 U.S. at 508 (discussing *Fullilove*, 448 U.S. at 488 (1980) (plurality opinion)).

47. See, e.g., *Paradise*, 480 U.S. at 149.

48. See *Bakke*, 438 U.S. at 315 (Because "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element," a program "focused solely on ethnic diversity would hinder rather than further attainment of genuine diversity.") (Powell, J.)

49. *Bakke*, 438 U.S. at 275.

50. See *Bakke*, 438 U.S. at 315-17; see also *Johnson*, 480 U.S. at 616 (upholding program that did not set aside any positions for women).

51. See *Croson*, 488 U.S. at 507.

52. See *Fullilove*, 448 U.S. at 513 (Powell, J., concurring).

53. See *Paradise*, 480 U.S. at 178 (plurality opinion); *Sheet Metal Workers*, 478 U.S. at 487 (Powell, J., concurring); *Fullilove*, 448 U.S. at 513 (Powell, J., concurring).

54. See *Johnson*, 480 U.S. at 638; *Sheet Metal Workers*, 478 U.S. at 488 (Powell, J., concurring).

AFFIRMATIVE ACTION ASSESSMENT GUIDE:

Postsecondary Admissions and Financial Aid Programs

Richard

Our general counsel's office is
looking at this. We should hear
from them early next week.

February 1998

Have a
Good
weekend.

Joh

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of pages ► 19

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GENERAL SERVICES ADMINISTRATION



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

INTRODUCTION

This Self-Assessment Guide and attached Legal Outline are designed to help postsecondary institutions that use affirmative action programs that consider race or national origin in admissions and financial aid decisions assess whether their programs are consistent with Title VI of the Civil Rights Act of 1964 and the U.S. Constitution. Institutions considering establishing affirmative action programs are also encouraged to refer to this guidance.

As used in this Guide and Legal Outline, the term "affirmative action" means the use or consideration of race or national origin as a factor in admissions or in the award of financial aid. Because recruitment and outreach programs designed to increase the number of minorities in an institution's applicant pool raise distinct questions and typically should not be subject to heightened constitutional scrutiny, this guidance should not be used to assess those types of programs. This guidance also does not address programs undertaken pursuant to a court order.

In 1994, the Department of Education published guidance regarding its evaluation under Title VI of an institution's consideration of race or national origin in the award of financial aid. *Nondiscrimination in Federally Assisted Programs*, Title VI of the Civil Rights Act of 1964, 59 Fed. Reg. 8756 (1994) (hereinafter *Financial Aid Guidance*). Institutions should consult that guidance for a more specific discussion of affirmative action in financial aid decisions, including an institution's involvement with privately donated race-restrictive gifts. The *Financial Aid Guidance* can be found on the Department's web site at, www.ed.gov.

This Self Assessment Guide is designed to be used in conjunction with the attached Legal Outline, which sets forth federal standards applicable to higher education admissions and financial aid issues. The Guide includes Overviews, Checkpoints, and Additional Legal Considerations. Each Overview briefly frames the applicable federal standards and cross-references sections of the Legal Outline, which presents the standards in depth. The Checkpoints are meant to help institutions identify and organize information relevant to the applicable legal standards. The Additional Legal Consideration sections offer additional information for practitioners and campus policy makers. This catalogue of questions is a basic approach to fundamental issues regarding the use of affirmative action in admissions and financial aid. Please note that each Checkpoint in a category will not necessarily be relevant to every institution. In some cases, additional questions may need to be answered that will be specific to an institution's affirmative action plan.

There is much uncertainty with respect to the law on affirmative action at this time. New decisions, by the Supreme Court, lower federal courts, or state laws like Proposition 209 in California may significantly affect federal and state standards governing the use of affirmative action in educational institutions. For example, as explained in the Legal Outline, the decision of U.S. Court of Appeals in *Hopwood v. State of Texas* limits the consideration of race or national origin for some purposes in the affected states. We encourage institutions to consult with their counsel, and to contact the Office for Civil Rights ("OCR") at the Department of Education, for assistance. A list of OCR offices and staff available to assist you is included with this Guide.

I. GENERAL STANDARDS

The legal standards in this Guide come from the Constitution and Title VI of the Civil Rights Act of 1964. Public institutions that are part of a state's government are subject to the Fourteenth Amendment of the Constitution. Public and private institutions that receive federal financial assistance from the U.S. Department of Education are subject to Title VI.

Classifications based on race or national origin for the purpose of affirmative action are permitted under Title VI to the same extent as under the Constitution. This guidance applies to admissions and financial aid programs where race, color, or national origin is a factor in decisionmaking. It applies both to programs in which race or national origin is the sole factor in a decision and to those in which race or national origin is one of many factors considered. This guidance does not apply to admissions or financial aid decisions made without regard to race. For example, financial aid may be reserved for disadvantaged students, as long as the determination that a student is disadvantaged is not based on race or national origin. In this Guide, references to "race" alone are occasionally used as a short-hand reference to race and national origin.

II. STUDENT ADMISSIONS

INITIAL INFORMATION NEEDS

Legal issues arise when a college or university considers race, color or national origin in decisions involving educational programs, such as financial aid or admissions. A thorough understanding of the admissions criteria and process is essential. The questions below cover baseline information for assessing admissions.

CHECKPOINT(S)
Baseline Information

1. If the institution has decided to consider race and ethnic origin as factors in its admissions process, is the admissions process guided by a written affirmative action plan? How are admissions structured? For public institutions, is the consideration of race mandated or authorized by legislation?
2. What standards guide admissions decisions and how does the admissions process work? How and at what point in the admissions process is each admissions criterion weighted and considered? Is each admissions criterion educationally justifiable and closely related to the institution's mission? How and at what points are race or national origin considered and weighted in admissions? How and at what point(s) are minority students being admitted?

Qs should be pulled w/ follow-up (ex. If yes, find out what is and compare to...

Sentence or two about what this document is. (Set of questions that can be used as a guide to thinking about the school's affirmative action program.)

B. IS AFFIRMATIVE ACTION SUPPORTED BY COMPELLING INTERESTS ?

1. Introduction to Strict Scrutiny and Compelling Interests

Overview

- Under the Constitution and Title VI of the Civil Rights Act of 1964 it is permissible for colleges and universities to consider race in making admissions decisions provided that they satisfy "strict scrutiny."
- To satisfy strict scrutiny, the institutional interest underlying an affirmative action measure must be "compelling" and the measure must be "narrowly tailored" to serve that interest.
- The compelling interest inquiry centers on "ends" and asks why an institution is classifying individuals on the basis of race or national origin. The narrow tailoring inquiry focuses on "means" and asks how the institution is seeking to meet the objective of the race-based classification.
- Schools may justify the consideration of race or national origin in higher education for two types of reasons: to remedy discrimination and its effects and voluntary purposes not involving remedies for discrimination, such as achieving the educational benefits of diversity where race or national origin is considered as one factor among many.

These principles are explained in the following sections of this Guide. For a complete presentation of federal standards, see Legal Outline, pp.

CHECKPOINT(S)
Compelling Interest

3. Why does the program consider race or national origin in admissions? Is it intended to remedy discrimination, to foster diversity to achieve an educational objective, or for some other purpose?

Additional Legal Considerations

Caveat: In Bakke, Justice Powell rejected the following interests as insufficient on their face to justify the consideration of race by the UC-Davis medical school: reducing the deficit of disfavored minorities in medical schools and the medical profession, and countering the effects of societal discrimination. Justice Powell also rejected UC-Davis' argument that its affirmative action policy was necessary to increase the number of doctors who practice in medically underserved communities. See Legal Outline, pp.

2. Remedial Purposes

Overview

- The Title VI regulations require a recipient of federal funds that has discriminated in violation of Title VI or its regulations to take remedial action to overcome the effects of past discrimination.
- A college that has been found to have discriminated by a court or an administrative agency like the U.S. Department of Education, Office for Civil Rights, must take steps to remedy that discrimination. A finding could also be made by a State or local legislative body, as long as the body finding discrimination had a strong basis in evidence identifying discrimination within its jurisdiction for which remedial action is required.
- Absent such formal findings by a court, agency or legislature, a college may take race-conscious remedial action if it has a strong basis in evidence for concluding that the affirmative action is necessary to remedy the effects of its past discrimination and is narrowly tailored to remedy that discrimination.
- In justifying remedial affirmative action based on the current effects of past discrimination, schools should be prepared to articulate how current conditions that limit educational opportunities by race or national origin are related to past discrimination for which the school has legal responsibility.

For a complete presentation of federal standards, see Legal Outline, pp.



4. Are there facts that show discrimination? Is the program justified solely by reference to general societal discrimination, general assertions of discrimination in education, or a statistical underrepresentation of minorities as compared to their percentage of the general population rather than the relevant pool of qualified applicants? Without more, these are impermissible bases for affirmative action.
5. Has a court, legislative body, or agency made a finding that the institution has discriminated against minorities? Is the institution the subject of a court desegregation order or a legislative or administrative finding of unlawful discrimination? Did the body making the finding have a strong basis in evidence for its conclusion? Does the institution itself have a strong basis in evidence for concluding that it has discriminated?

6. If the institution is in the Fifth Circuit, remember to consult the Fifth Circuit Standards sections of the *Legal Outline* and the *Hopwood* decision for the appropriate standards.
7. If the institution is public, has a state or local government made findings of discrimination within its jurisdiction, including discrimination by private actors? Are there present effects of any such past discrimination? Was the government, or is the government now, a passive participant in that discrimination so as to perpetuate the exclusion? Did the institution help to perpetuate that discrimination?
8. Identify the racial and ethnic composition (%African American, Hispanic, Asian-American, American Indian, white) of the following groups: i) the institution's student body; ii) the institution's qualified applicants; and iii) the pool of qualified potential applicants from which the institution draws its students, for example, students meeting the school's admission requirements living in the areas served by the institution.
9. Based on the information above, is there underrepresentation at the school of qualified students from particular races or national origins? If so, is there a significant statistical disparity?
10. What is the nature of the evidence? Is it statistical or based on written documents? Are statistics based on comparisons to the general minority population, or are they more sophisticated and focused? For example, do they attempt to identify the number of qualified minorities in the applicant pool, or seek to explain what the number would look like "but for" the exclusionary effects of discrimination? Does the evidence seek to explain the secondary effects of discrimination? Is there evidence on how discrimination has hampered minority opportunity in education, or is the evidence simply based on generalized claims of societal discrimination? In addition to any statistical or documentary evidence, are there persons who have knowledge or other anecdotal evidence of discrimination?
11. Since the adoption of the program, have additional findings of discrimination been made that could serve to justify the need for the program when it was adopted? If not, can such evidence be assembled now? Is there new evidence that the remedial program is no longer necessary?

12. Apart from any past findings or court orders, is there past discrimination affecting admissions at that institution? Has the institution determined whether the effects of past discrimination continue? If there have not been findings of past discrimination, is there a strong basis in evidence to believe that there may be a current violation or the continuing effects of past discrimination?

Additional Legal Considerations: Remedial Purposes

Caveat: Evidence of societal discrimination or other factors that are beyond the school's control that may deter participation of minority students would not likely be accepted by courts as a basis for remedial affirmative action. See Legal Outline, pp.

Note: Although it rejected diversity as a basis for affirmative action, the Hopwood decision (covering Texas, Louisiana, and Mississippi) permits the use of race or national origin to remedy the effects of discrimination by that school. See Legal Outline, pp.

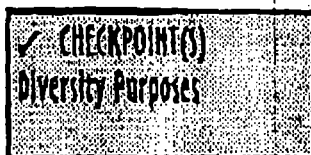
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3. Diversity Purposes

Overview

- In *Regents of the University of California v. Bakke*, Justice Powell concluded that achieving the educational benefits of campus diversity is a compelling reason for considering race or national origin in admissions in a narrowly tailored way. According to Justice Powell's opinion, colleges may seek diversity in admissions to fulfill their academic mission through the "robust exchange of ideas" that flows from a diverse student body. The United States supports Justice Powell's opinion as a correct statement of the law under the Constitution and Title VI.
- Colleges and universities may justify the use of race or national origin to achieve fundamental educational goals through campus diversity. An institution must be able to support its claim that diversity serves educational objectives.
- A college may pursue its diversity interest consistent with the strict scrutiny test by considering race or national origin as one of several factors in admissions.
- For the consideration of race and national origin in admissions to be lawful under a diversity rationale, an institution's definition of diversity must include characteristics in addition to race or national origin. Such diversity characteristics may include other life experiences, achievements, talents, interests, extracurricular activities, economic disadvantages, geographic background, as well as various others.

For a complete presentation of federal standards, see Legal Outline, pp.



13. Is affirmative action in admissions used to achieve the educational benefits of diversity? What is the institution's definition of diversity? What are the institution's mission statements and how do they relate to its diversity objectives?
14. The institution must articulate how achieving greater diversity would foster an educational goal beyond diversity for diversity's sake. What are the educational benefits of diversity at your institution? What are the bases for the educational benefits the institution identifies?
15. Does diversity include factors other than race and national origin? If so, what factors? Which admissions criterion or groups of criteria are related to the diversity goal? How is each weighted and considered in the admissions process?

Additional Legal Considerations: Diversity

A college's written mission is a statement of core educational values that are protected by academic freedom principles. Properly devised diversity principles that clearly serve an institution's mission can be the basis for affirmative action in admissions decisions as recognized in the Bakke decision.

In addition to identifying the educational benefits of diversity, a school should be prepared to explain why the educational advantages claimed for its diversity programs cannot be achieved without the use of race or national origin (see following section on Narrow Tailoring). See Legal Outline, pp.

Caveat: In Hopwood, the U.S. Court of Appeals for the Fifth Circuit held that an institution's interest in diversity to enrich the academic experience cannot satisfy strict scrutiny. That ruling is binding in the states of Texas, Louisiana and Mississippi. Accordingly, institutions in those three states cannot use affirmative action to foster diversity among their student body in order to enrich the academic experience. See Legal Outline, p.

C. IS THE USE OF RACE IN REMEDIAL OR DIVERSITY PROGRAMS NARROWLY TAILORED?

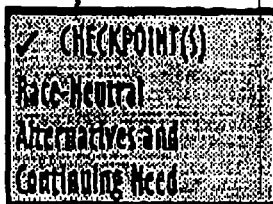
If the institution supports its affirmative action program on remedial purposes or the attainment of diversity, is the use of race or national origin in admissions narrowly tailored to achieve its purposes?

1. Race Neutral Alternatives and Continuing Need for the Use of Race

Overview

- Whether a college's consideration of race or national origin meets the narrow tailoring requirements of Title VI and the Constitution depends upon factors established by federal case law.
- An overriding question is whether the school's use of race is truly necessary and focused as narrowly as possible on the achievement of the school's compelling interest, e.g., remedial or diversity objectives.
- Before resorting to race-conscious action, it is important that an institution consider seriously the use of race-neutral alternative approaches (e.g., the use of admissions criteria that do not include race or recruitment programs).

For a complete presentation of federal standards, see Legal Outline, pp.



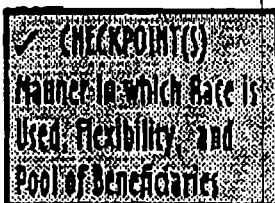
16. If race or national origin is considered as a positive factor, has the institution made efforts to achieve its goals in race-neutral ways? If so, what efforts were made and what were the results?
17. If race-neutral measures were not undertaken, why does the institution believe that such efforts would be insufficient to serve its compelling interest without relying on race? What was the nature and extent of the deliberation over any race-neutral alternatives? Was there a judgment regarding the relative effectiveness of race-neutral alternatives and race-conscious measures?
18. Does the college have data to show whether affirmative action is necessary? When did the institution begin implementing its affirmative action program? Does the institution have statistics or other evidence to show the effect of the program on achievement of diversity objectives or remedying the effects of discrimination, e.g., data regarding minority participation levels before and after affirmative action programs began?

2. Manner Race is Used, Flexibility, and Pool of Beneficiaries

Overview

- Each college or university has the academic discretion to define those characteristics and qualifications that will produce the educational benefits of diversity. Under Title VI, OCR will defer to a school's reasonable choices in defining diversity.
- Two types of racial classifications are especially vulnerable to challenge because they are too rigid: programs in which a specific percentage of positions is set aside on the basis of race and programs where race or national origin is the sole or primary factor in determining eligibility.
- The use of classifications based on race or national origin should be flexible. For example, the Supreme Court in United States v. Paradise found that a race-conscious promotion requirement was flexible in operation because it could be waived if no qualified candidates were available. Consideration of race or national origin as one factor among several other admissions criteria in some circumstances may also be evidence of flexibility.

For a complete presentation of federal standards, see Legal Outline, pp.



19. How does the college assess whether diversity has been achieved? Does the admissions process incorporate numerical goals? By what process were these goals derived? Do all or only some of the schools or programs have goals? If the program is remedial, are the goals related to the percentage of minorities in the pool of qualified applicants, and do the beneficiaries include people in racial or ethnic groups for whom there is insufficient evidence of prior discrimination?
20. Are admissions decisions made through separate tracks, admissions committees, or eligibility criteria defined on the basis of race or national origin? Does the program establish fixed numerical set-asides? Is race an explicit requirement of eligibility for the program? If there is no such factual requirement, does the program operate that way in practice? Or is race just one of several factors -- a "plus" -- used in decision making? Could the objectives of any program that uses race as a requirement for eligibility be achieved through a more flexible use of race?

3. Duration and Periodic Review

Overview

- The duration of the use of a racial classification should be no longer than is necessary to its purpose, and the classification should be periodically reexamined to determine whether there is a continued need for its use or whether it should be modified based on changing circumstances.
- OCR considers annual reviews the best practice to satisfy this aspect of Title VI's narrow tailoring requirements.

For a complete presentation of federal standards, see Legal Outline, pp.



21. Is the program subject to periodic oversight, and if so, what is the nature of that oversight? Does the periodic review assess whether the form or extent to which race or national origin is considered should be modified in light of the outcomes of the affirmative action program? Has the program ever been adjusted or modified in light of periodic review? What were the results of the most recent review? Even if there was a compelling justification at the time of adoption, that may not be the case today. In that regard, does the program have an end date? Has the end date been moved back? Is there evidence of what might result if the racial classification were discontinued?

4. Burden on Non-Beneficiaries

Overview

- Affirmative action necessarily imposes some burden or disadvantage on persons who do not belong to the racial or ethnic groups favored by the program's classifications. While some burdens are acceptable, others may be too high. In general, a race-based classification that "unsettle[s] . . . legitimate, firmly rooted expectation[s]" or imposes the "entire burden . . . on particular individuals" crosses that line. For example, if an institution terminated scholarships that had been awarded to particular non-minority students in order to fund a scholarship program for minority students, that might place too much of a burden on the affected non-minority students to be considered narrowly tailored.
- Generally, the less severe and more diffuse the impact on nonminority students, the more likely a classification based on race or national origin will address this factor satisfactorily. It is not necessary to show that no student's opportunity to be admitted has been in any way diminished. Rather, the use of race or national origin

must not, overall, place an undue burden on students who are not eligible for that consideration.

For a complete presentation of federal standards, see Legal Outline, pp.



22. Does the institution periodically assess whether its consideration of race or national origin in admissions places an undue burden on students not eligible for that consideration? . What is the nature of the burden imposed on persons who are not included in the racial or ethnic classification established by the program? Does the program displace those persons from existing positions or financial aid awards? What is the nature and extent of the impact on non-beneficiaries in admissions? Does the impact of the program fall upon a particular group or class of students, or is it more diffuse? What is the extent of other opportunities outside of the program? Are persons who are not beneficiaries of the program put at a significant competitive disadvantage as a result of the program?

III. FINANCIAL AID

Federal Standards

The relevant standards are stated in the Department's published guidance on the use of race or national origin in the provision of financial aid, 59 Federal Register 8756 (1994) (copy included with this Guide). The Financial Aid Guidance is also available on the Department of Education's internet web site, www.ed.gov.

The following questions are keyed to the Department of Education's Financial Aid Guidance, and the attached Legal Outline. Both documents should be considered carefully in assessing financial aid programs.

As noted in the Introduction to this Guide, there is much uncertainty with respect to the law on affirmative action at this time. New decisions, by the Supreme Court, lower federal courts, or state laws like Proposition 209 in California may significantly affect federal and state standards governing the use of affirmative action in educational institutions. For example, as explained in the Legal Outline, the decisions of U.S. Courts of Appeal in *Hopwood v. State of Texas* and *Poberesky v. Kirwan* limit the consideration of race or national origin for some purposes, including financial aid programs, in the affected states. We encourage institutions to consult with their counsel, and to contact the Office of Civil Rights ("OCR") at the Department of Education, for assistance. A list of OCR offices and staff available to assist you is included with this Guide.

Checkpoint(s)

A. General

Overview: Is the institution's financial aid program guided by a written affirmative action plan? How is the institution's financial aid process structured?

1. From what sources does the institution obtain its financial aid funds? Are the sources public or private? Inside sources or outside sources? Federal, state or local? What percentage of aid is received from each source?
2. Does the institution's financial aid programs include the consideration of race or national origin (as either an exclusive factor or as one among a number of factors)? If so, how? Does the institution fund or administer "race-based scholarships"?¹ If

¹ "Rased-based scholarships" or "race-targeted aid" mean, for the purposes of this Guide, any financial aid for which eligibility is limited to persons of a specific racial or ethnic background. Each of the questions in this section on financial aid also are applicable to financial aid programs where race or ethnicity are used only as a plus-factor in deciding awards. This section is based upon the Department's 1994 race-targeted scholarships policy.

so, what is the justification for each consideration of race or national origin? Are the institution's reasons consistent with the Department's race-targeted scholarship policy?

Note: The following sections refer to the principles from the Department's policy that are used most often by institution.

B. Principle 1: Financial Aid for Disadvantaged Students

3. Schools may target financial aid for disadvantaged students, e.g., students from low-income families, or aid based on students' being in the first generation to attend college or family income. Does the institution's definition of "disadvantaged" used for participation in the program include any consideration of race? If not, then the program is not a racial classification subject to strict scrutiny. If yes, the program is subject to strict scrutiny and does not fit within this principle.

C. Principle 3: Financial Aid to Remedy Past Discrimination

4. Are there facts that show discrimination? Is the program justified solely by reference to general societal discrimination, general assertions of discrimination in education, or a statistical underrepresentation of minorities as compared to their percentage of the general population rather than the relevant pool of qualified applicants? Without more, these are impermissible bases for affirmative action.
5. Has a court, legislative body, or agency made a finding that the institution has discriminated against minorities? Is the institution the subject of a court desegregation order or a legislative or administrative finding of unlawful discrimination? Did the body making the finding have a strong basis in evidence for its conclusion? Does the institution itself have a strong basis in evidence for concluding that it has discriminated?
6. If the institution is in the Fifth Circuit, remember to consult the Fifth Circuit Standards sections of the *Legal Outline* and the *Hopwood* decision for the appropriate standards.
7. If the institution is public, has a state or local government made findings of discrimination within its jurisdiction, including discrimination by private actors? Are there present effects of any such past discrimination? Was the government, or is the government now, a passive participant in that discrimination so as to perpetuate the exclusion? Did the institution help to

perpetuate that discrimination?

8. Identify the racial and ethnic composition (% African American, Hispanic, Asian-American, American Indian, white) of the following groups: i) the institution's student body; ii) the institution's qualified applicants; and iii) the pool of qualified potential applicants from which the institution draws its students, for example, students meeting the school's admission requirements living in the areas served by the institution.
9. Based on the information above, is there underrepresentation at the school of qualified students from particular races or national origins? If so, is there a significant statistical disparity?
10. What is the nature of the evidence? Is it statistical or based on written documents? Are statistics based on comparisons to the general minority population, or are they more sophisticated and focused? For example, do they attempt to identify the number of qualified minorities in the applicant pool, or seek to explain what the number would look like "but for" the exclusionary effects of discrimination? Does the evidence seek to explain the secondary effects of discrimination? Is there evidence on how discrimination has hampered minority opportunity in education, or is the evidence simply based on generalized claims of societal discrimination? In addition to any statistical or documentary evidence, are there persons who have knowledge or other anecdotal evidence of discrimination?
11. Since the adoption of the program, have additional findings of discrimination been made that could serve to justify the need for the program when it was adopted? If not, can such evidence be assembled now? Is there new evidence that the remedial program is no longer necessary?
12. Apart from any past findings or court orders, is there past discrimination affecting admissions at that institution? Has the institution determined whether the effects of past discrimination continue? If there have not been findings of past discrimination, is there a strong basis in evidence to believe that there may be a current violation or the continuing effects of past discrimination?

D. Principle 4: Financial Aid to Create Diversity

13. Is affirmative action in financial aid used to achieve the educational benefits of diversity? What is the institution's definition of diversity? What are the institution's mission statements and how do they relate to its diversity objectives?
14. The institution must articulate how achieving greater diversity would foster an educational goal beyond diversity for diversity's sake. What are the educational benefits of diversity at your institution? What are the bases for the educational benefits the institution identifies?
15. Is special consideration for minority status used as one factor among many factors for scholarship awards in some cases? Does diversity include factors other than race and national origin? If so, what factors? Which financial aid criterion or groups of criteria are related to the diversity goal? How is each weighted and considered in the process of awarding student financial assistance?

E. Narrow Tailoring of Remedial or Diversity Programs

These questions apply to all programs that fall under Principles 3 or 4, remedial or diversity programs.

16. Can the institution show that the use of race or national origin is necessary to achieve its stated purpose? If race is used as an eligibility criterion in awarding scholarships, has the institution made efforts to remedy discrimination or enhance diversity by using race as a plus factor? If race is considered as one factor in awarding scholarships, has the institution made efforts to remedy discrimination or enhance diversity by also using race-neutral means? If so, what race-neutral efforts were made and what were the results of those efforts? If race-neutral measures were not undertaken, why does the institution believe that such efforts would be insufficient to serve its compelling interest without race-based financial aid? What was the nature and extent of the deliberation over any race-neutral alternatives? Was there a judgment regarding the relative effectiveness of race-neutral alternatives and race-conscious measures?
17. Does the institution have statistics or other evidence to show the level of participation of minorities before and after programs to achieve diversity or to remedy discrimination were established? If race-based scholarships are awarded, how many does the

institution award annually? How many students at the institution, by race and national origin, receive non-race-based financial aid, annually?

18. Does the college have data to show whether affirmative action is necessary? When did the institution begin implementing its affirmative action program? Does the institution have statistics or other evidence to show the effect of the program on achievement of diversity objectives or remedying the effects of discrimination, e.g., data regarding minority participation levels before and after affirmative action programs began?
19. How does the college assess whether diversity has been achieved? Does the financial aid or admissions process incorporate numerical goals? By what process were these goals derived? Do all or only some of the schools or programs have goals? If the program is remedial, are the goals related to the percentage of minorities in the pool of qualified applicants, and do the beneficiaries include people in racial or ethnic groups for whom there is insufficient evidence of prior discrimination?
20. Are financial aid decisions made through separate tracks, admissions committees, or eligibility criteria defined on the basis of race or national origin? Does the program establish fixed numerical set-asides? Is race an explicit requirement of eligibility for the program? If there is no such factual requirement, does the program operate that way in practice? Or is race just one of several factors -- a "plus" -- used in decision making? Could the objectives of any program that uses race as a requirement for eligibility be achieved through a more flexible use of race?
21. Is the program subject to periodic oversight, and if so, what is the nature of that oversight? Does the periodic review assess whether the form or extent to which race or national origin is considered should be modified in light of the outcomes of the affirmative action program? Has the program ever been adjusted or modified in light of periodic review? What were the results of the most recent review? Even if there was a compelling justification at the time of adoption, that may not be the case today. In that regard, does the program have an end date? Has the end date been moved back? Is there evidence of what might result if the racial classification were discontinued?
22. Does the institution periodically assess whether its consideration of race or national origin in admissions places an undue burden

on students not eligible for that consideration? What is the nature of the burden imposed on persons who are not included in the racial or ethnic classification established by the program? Does the program displace those persons from existing positions or financial aid awards? Does the impact of the program fall upon a particular group or class of students, or is it more diffuse? What is the extent of other opportunities outside of the program? Are persons who are not beneficiaries of the program put at a significant competitive disadvantage as a result of the program?

23. What proportion of total financial aid at the institution (institutional, state, local, Federal, private) is earmarked for race-based scholarships? Does a comparison of the amount of race-targeted financial aid provided to students to the total amount of aid provided to students without regard to race or national origin show that the program places an undue burden on other students who are not eligible for race-targeted aid?

F. Principle 5: Private Gifts Restricted by Race or National Origin

23. Are racial or other criteria attached by the donors to the award of any financial aid funds? If so, can the institution justify the use of race under any of the principles of the OCR policy guidance?
24. Is any race-targeted aid received by the college's students provided directly to students without involvement by the institution? If so, under the policy guidance Title VI does not apply. If the college makes privately provided race-targeted aid part of its operations by getting involved in the offering or administration of the aid (e.g., through selection of recipients, distribution of funds), can the college justify the use of the aid under a diversity or remedial rationale?