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To: Elena Kagan/OPD/EOP
cc: Dawn M. Chirwa/WHO/EOP, Laura Emmett/WHO/EOP
Subject: Draft memo on rollout of guidance



ASSESRL3.MEM

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 Dawn.

Dawn --

If this goes forward on Monday, please note at the end of the memo that I will be out next week so questions should go to you.

Thanks.

-- Bill

DRAFT

December 19, 1997

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 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.

- 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 (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].
- Week of Jan. 19 -- hold briefing at ED to walk through document with larger number of

leaders in civil rights and education community.

- Late Jan. -- appropriately address 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 successful approaches to fostering diversity. These reports, if well-done, could be released in build-up to 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 -- Provide 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 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 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.

Introduction

This self-assessment guidance 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.

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.

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 award of privately donated funds. Several months after the publication of that 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 challenged scholarship program was not 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 use of racial classifications in higher education in that circuit.

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. 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 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.¹

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.² Any public or private institution that receives financial assistance from the federal government is subject to the requirements of Title VI.³ 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 award of privately donated funds.⁴ Title VI does not bar affirmative action measures that would satisfy the requirements of the Fourteenth Amendment.⁵

The Office of 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 of 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 for disadvantaged students, 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

It is a requirement of both the Constitution and of Title VI that any program that uses race

or national origin as a factor in decisionmaking must satisfy “strict scrutiny”.⁷ 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 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.⁹ 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.¹⁰ 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 by a majority of the Court, however. In contrast, no majority of the Court has squarely addressed whether any non-remedial interest is sufficiently compelling to justify the consideration of race or national origin. But the Department of Education and the Department of Justice believe that, as Justice Powell indicated in his landmark separate opinion in *Regents of the University of California v. Bakke*, a university may have a compelling interest in considering race in its admissions process in order to foster diversity among its student body to further the university's educational objectives.

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.¹¹ Thus, ~~where authorized by law~~ 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.¹²

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.¹³ Similarly, amorphous claims of discrimination in education that are not related to an institution's programs are inadequate.¹⁴ 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.¹⁵

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.¹⁶ 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.¹⁷ 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.¹⁸ 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.¹⁹

The Title VI regulations require that, in administering a program in which it has previously discriminated, an institution receiving federal financial assistance take action to overcome the effects of that prior discrimination.²⁰ 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.²¹ 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.²² “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.”²³ 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.²⁴ 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.²⁵

2. Non-Remedial Interests

a. Diversity

~~No majority opinion for the Supreme Court has addressed when a non-remedial objective may constitute a compelling interest that can justify the use of narrowly tailored race-conscious measures. However,~~ 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 the central mission of higher education and in keeping with the time-honored value in academic freedom.²⁶ 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.²⁷ ~~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.²⁸~~

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.”²⁹ 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,³⁰ 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.³¹ 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 serves 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.³² 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.³³ It is not clear whether a racial classification that was narrowly tailored to this interest could survive strict scrutiny.³⁴ 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.³⁵ 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.³⁶ 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”.³⁷ 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, 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 of the affirmative action program, 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, 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.³⁸ 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.³⁹ 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,⁴⁰ 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”.⁴¹ 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.⁴² 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.⁴³

Courts have looked favorably upon plans in which numerical targets are waived if there are not enough qualified minority applicants.⁴⁴ 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 availability 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.⁴⁵ 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 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 light of these considerations~~ 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.⁴⁶ 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.⁴⁷

Two types of racial classifications are most 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 slots in the medical school for members of racial and ethnic minority groups.⁴⁸

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.⁴⁹

~~In light of these considerations, 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. 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 include diversity characteristics in addition to race or national origin, such as other life experiences, achievements, talents, interests, extracurricular activities, economic disadvantages, and geographic background.~~

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 Department of Education's published guidance, 59 Fed. Reg. 8756 (1994).

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.⁵⁰

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.⁵¹ 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.⁵² 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 of 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.⁵³ 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.

~~In this regard, race-targeted financial aid may be less burdensome than race-based admissions policies. Race-targeted aid does not necessarily foreclose a non-minority student from attending a school solely on the basis of his or her race. Moreover, in contrast to the number of admissions slots, the amount of financial aid at an institution may not be fixed. For a more detailed discussion of narrow tailoring in the context of race-targeted financial aid, see the Financial Aid Guidance Department of Education's published 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. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 213-18 (1995).
2. 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).
3. For a list of federal education financial assistance programs, see 34 C.F.R. Pt. 100, App. A (1997).
4. *See* 42 U.S.C. 2000d-4a(2)(A) (1994).
5. *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.).
6. Those regulations are located in 34 C.F.R. Pt. 100 (1997).
7. *Adarand*, 515 U.S. at 235 (Constitution); *see Fordice*, 505 U.S. at 732 n.7; *Bakke*, 432 U.S. at 284-287 (Powell, J.), 325, 328 (Brennan, J., joined by White, Marshall, and Blackmun, JJ.) (Title VI does not prohibit affirmative action measures that would be permissible under the Constitution).
8. *Adarand*, 515 U.S. at 200.
9. *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).
10. 438 U.S. 265, 311-15 (1978) (opinion of Powell, J.).
11. *See Croson*, 488 U.S. at 491-93 (plurality opinion); *id.* at 518-19 (Kennedy, J. concurring in part and concurring in the judgment).
12. *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).
13. *See Croson*, 488 U.S. at 499, 505.
14. *Id.* at 499 ("amorphous" claim of past discrimination in an industry can not justify the use of an unyielding quota).
15. *See, e.g., Podberesky v. Kirwan*, 38 F.3d 147, 153 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995); *Fordice*, 505 U.S. at 730 n.4.
16. *See Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion).
17. *See Croson*, 488 U.S. at 500.
18. *See id.* at 501, 509.
19. *Id.* at 501-02.
20. 34 C.F.R. 100.3(b)(6)(I).
21. 78 F.3d 932, 951 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996)

22. *Id.* at 951.

23. *Id.* at 954.

24. *See id.* at 951.

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

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

27. *Id.* at 314.

28. 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.

29. *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).

30. *Id.* at 313.

31. *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).

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

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

34. 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.

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

36. *Id.* at 944, 948.

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

38. *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).

39. *Croson*, 488 U.S. at 507.
40. *See Fullilove v. Klutznick*, 448 U.S. 448, 508 (Powell, J., concurring)
41. *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).
42. *See Adarand*, 515 U.S. at 237 (government may respond to the lingering effects of racial discrimination by using narrowly tailored race-based action).
43. *Croson*, 488 U.S. at 506.
44. *See, e.g., Paradise*, 480 U.S. at 177-78.
45. *See Croson*, 488 U.S. at 508 (discussing *Fullilove*, 448 U.S. at 488 (1980) (plurality opinion)).
46. *See, e.g., Paradise*, 480 U.S. at 149.
47. *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.)
48. *Bakke*, 438 U.S. at 275.
49. *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).
50. *See Croson*, 488 U.S. at 507.
51. *See Fullilove*, 448 U.S. at 513 (Powell, J., concurring).
52. *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).
53. *See Johnson*, 480 U.S. at 638; *Sheet Metal Workers*, 478 U.S. at 488 (Powell, J., concurring).

Meeting on Self-Assessment Guidance

December 15, 1997

I. Guidance Format and Content

- Separation of overview discussion and questions
 - Explain format in introduction?
- Responses to questions
- Treatment of Powell's Bakke opinion (pp. 3, 5)
- "Handout" vs. "Guidance" v. Guide
- Other issues?

Intro | Work Done → Acc. all/consist
 Interest in getting the out/used; ~~partly~~
 Issue in low-hr
 low-probability
 ensuring will be well-received
 at least by FLOW.

II. Rollout

- Vetting
 - What has been done so far?
 - Timing?
 - How and with whom?
 - Who responsible?
 - Responding to feedback.
- Transmission
 - Timing
 - Issue as draft?
 - By whom/to whom?
 - Press?

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Consortium On Financing Higher Education

November 18, 1997

Member Institutions

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Bryn Mawr College
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of Technology
Mount Holyoke College
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Rice University
Smith College
Stanford University
Swarthmore College
Trinity College
The University of Chicago
University of Pennsylvania
The University of Rochester
Washington University
Wellesley College
Western University
Williams College
Yale University

Professor Christopher Edley
Harvard University Law School
Griswold 405
Cambridge, MA 02138

Dear Professor Edley:

I write on behalf of a number of COFHE presidents to express a felt need and to make a request for your help.

As you know from our participation in the several Harvard - ACE seminars that you have co-chaired on the current and pressing issues about affirmative action and diversity on our campuses, the members of COFHE are very interested in being involved in the current debate and very concerned about the direction in which the national public opinion and legal climate is moving. At our recent Annual Meeting, we had a two hour discussion about how our institutions could best participate in the national on-going debate and what ways we could exert some more active leadership. There is no question of our willingness to speak out and add to the effort that you have been leading to "make the case" with good data and good argument, but we are missing an important ingredient. As one president put it, we hear more and more about what we can not do, but we need to know what we CAN do! Are you aware of any good materials that have been written that a college president might turn to that summarize the current situation with respect to affirmative action practices on campuses in terms of what is still permissible and what practices are now under serious question given the changing legal environment? I think that it would be a major service to colleges and universities to have the Harvard project or, maybe, the American Council on Education make such information available as soon as possible. I am passing on the COFHE request for some concrete help by copy of this letter to Deborah Carter at the ACE.

Sincerely,

Katharine H. Hanson
President

cc: Deborah Carter, ACE ✓
cc: President Judith Shapiro, COFHE Chair

vc/KHH/eaj



William R. Kincaid
12/15/97 12:19:31 PM

Record Type: Record

To: Dawn M. Chirwa/WHO/EOP

cc:

Subject: Affirmative Action Self Assessment Guide Meeting

Invitees are on the addressee list, including DoJ folks.

----- Forwarded by William R. Kincaid/OPD/EOP on 12/15/97 12:19 PM



● Allison Balderston 12/11/97 06:31:48 PM

Record Type: Record

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

cc: iva_smith @ ed.gov @ inet

Subject: Affirmative Action Self Assessment Guide Meeting

There will be a meeting to discuss the Affirmative Action Guide on Monday, December 15 from 1:30 to 3:00 in room 211. Please let me know if you cannot attend.

For those of you outside of the building please send me your date of birth and social security number.

If you have any questions please call me at 456-5543.

Message Sent To:

Dawn M. Chirwa/WHO/EOP
William R. Kincaid/OPD/EOP
Peter Rundlet/WHO/EOP
Julie A. Fernandes/OPD/EOP
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Cohen

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Scott Palmer

Jamie Steddy

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Introduction

This self-assessment guidance 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.

At this point should explain the guidance is organization

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.

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.

^(U.S.)
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. 59 Federal Register 8756 (1994). Institutions should consult that guidance for a more specific discussion of affirmative action in financial aid decisions, including an institution's award of privately donated funds. Several months after the publication of that 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 challenged scholarship program was not 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 use of racial classifications in higher education in that circuit.

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. 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 in this guidance.

DRAFT**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.¹

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.² 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 award of privately donated funds.⁴ Title VI does not bar affirmative action measures that would satisfy the requirements of the Fourteenth Amendment.³

The Office of 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 of 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 for disadvantaged students, 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 both the Constitution and of Title VI that any program that uses race

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or national origin as a factor in decisionmaking must satisfy "strict scrutiny".⁷ 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 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.⁹ In contrast, no majority of the Court has squarely addressed whether any non-remedial interest is sufficiently compelling to justify the consideration of race or national origin. But the Department of Education and the Department of Justice believe that, as Justice Powell indicated in his landmark separate opinion in *Regents of the University of California v. Bakke*, a university may have a compelling interest in considering race in its admissions process in order to foster diversity among its student body to further the university's educational objectives.¹⁰ *

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 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.¹¹ Thus, where authorized by law, a public institution may 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.¹²

An institution should be able to identify with some precision the discrimination to be

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remedied. The fact and legacy of general, historical societal discrimination is an insufficient basis for affirmative action.¹³ Similarly, amorphous claims of discrimination in education that are not related to an institution's programs are inadequate.¹⁴ 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.¹⁵

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.¹⁶ 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.¹⁷ 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.¹⁸ 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.¹⁹

The Title VI regulations require that, in administering a program in which it has previously discriminated, an institution receiving federal financial assistance take action to overcome the effects of that prior discrimination.²⁰ 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.²¹ 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.²² "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."²³ 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

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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.²⁴ 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 from using affirmative action to remedy that discrimination in its component schools.²⁵

2. Non-Remedial Interests

a. Diversity

No majority opinion for the Supreme Court has addressed when a non-remedial objective may constitute a compelling interest that can justify the use of narrowly tailored race-conscious measures.²⁶ However, 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 the central mission of higher education and in keeping with the time-honored value in 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

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."²⁹ 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,³⁰ 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.³¹ 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 serves 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.³² 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

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reserving sixteen percent of the seats in its medical school class for minority students was either needed or geared to promote that goal.³³ It is not clear whether a racial classification that was narrowly tailored to this interest could survive strict scrutiny.³⁴ 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.³⁵ 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.³⁶ 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".³⁷ 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, 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 of the affirmative action program, 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

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meaning?

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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, 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.³⁸ 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.³⁹ 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,⁴⁰ 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".⁴¹ Accordingly, an institution probably need not exhaust race-neutral alternatives, but it must give them serious attention and must use them where efficacious.

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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.⁴² 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.⁴³

Courts have looked favorably upon plans in which numerical targets are waived if there are not enough qualified minority applicants.⁴⁴ 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 availability 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.⁴⁵ 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 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.

Two types of racial classifications are most 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 slots in the medical school for members of racial and ethnic minority groups.⁴⁶

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.

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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.⁴⁷

In light of these considerations, 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.⁴⁸ 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 include diversity characteristics in addition to race or national origin, such as other life experiences, achievements, talents, interests, extracurricular activities, economic disadvantages, and geographic background.⁴⁹

For a detailed discussion of the standards that should be applied to minority scholarship programs, institutions and their counsel should consult the Department of Education's published guidance, 59 Federal Register 8756 (1994).

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.⁵⁰

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.⁵¹ 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.⁵² 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 of Civil Rights recommends annual reviews to ensure compliance with this aspect of the narrow tailoring requirements of Title VI.

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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 expectations" or imposes the "entire burden . . . on particular individuals" crosses that line.³³ 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.

In this regard, race-targeted financial aid may be less burdensome than race-based admissions policies. Race-targeted aid does not necessarily foreclose a non-minority student from attending a school solely on the basis of his or her race. [Moreover, in contrast to the number of admissions slots, the amount of financial aid at an institution may not be fixed.] For a more detailed discussion of narrow tailoring in the context of race-targeted financial aid, see the Department of Education's published guidance, 59 Federal Register 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. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 213-18 (1995).
2. 42 U.S.C. 2000d. 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. 104 (1984).
3. For a list of federal education financial assistance programs, see 34 C.F.R. Part 100, Appendix A.
4. See 42 U.S.C. 2000d-4a(2)(A).
5. See *Regents of the University of California v. Bakke*, 438 U.S. 265, 284-87 (Powell, J.), 325, 328 (plurality opinion).
6. Those regulations are located in 34 C.F.R. Part 100 (1997).
7. *Adarand*, 515 U.S. at 235 (Constitution); see *Bakke*, 432 U.S. at 284-287 (Powell, J.), 325, 328 (plurality opinion). (Title VI does not prohibit affirmative action measures that would be permissible under the Constitution).
8. *Adarand*, 515 U.S. 200.
9. 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).
10. 438 U.S. 265, 311-15 (1978) (Powell, J., concurring in the judgment).
11. See *Croson*, 488 U.S. at 491-93 (plurality opinion); *id.* at 518-19 (J. Kennedy concurring in part and concurring in the judgment).
12. See *Adarand*, 515 U.S. at 269-70 (Souter, J. dissenting); *Cf. United States v. Fordice*, 505 U.S. 717, 727-29 (1992) (state must eradicate policies and practices traceable to prior de jure system that continue to foster segregation).
13. See *Croson*, 488 U.S. at 499, 505.
14. See *Croson*, 488 U.S. at 499 ("amorphous" claim of past discrimination in an industry can not justify the use of an unyielding quota).
15. See, e.g., *Podberesky v. Kirwan*, 38 F.3d 147, 153 (4th Cir. 1994) (*cert. denied*...); *Fordice*, 505 U.S. at 730 n.4.
16. See *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986) (plurality opinion).
17. See *Croson*, 488 U.S. at 500.
18. See *Croson*, 488 U.S. at 501, 509.
19. *Croson*, 488 U.S. at 501-02.
20. 34 C.F.R. 100.3(b)(6)(I).
21. 78 F.3d 932, 951 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).
22. 78 F.3d at 951.

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23. 78 F.3d at 954.

24. See 78 F.3d at 951.

25. See 78 F.3d at 954 (citing *Fordice*, 505 U.S. at 731-32).

26. 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.

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

28. *Bakke*, 438 U.S. at 314.

29. *Bakke*, 438 U.S. at 307 (J. Powell, concurring) (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).

30. *Bakke*, 438 U.S. at 313.

31. See *Bakke*, 438 U.S. 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).

32. See *Adarand*, (Stevens, J. dissenting).

33. *Bakke*, 438 U.S. at 310 (Powell, J. concurring in the judgment)

34. 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.

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

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

37. See *Hopwood*, 78 F.3d at 944 (discussing *Croson*, 488 U.S. at 521 (Scalia, J., concurring in judgment)).

38. *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).

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

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40. See *Fullilove*, 448 U.S. at 508 (Powell, J., concurring).
41. *Wygant*, 476 U.S. at 280 n.6 (plurality opinion of Justice Powell); 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, 114 S.Ct. 290 (1993).
42. See *Adarand*, 515 U.S. at 237 (government may respond to the lingering effects of racial discrimination by using narrowly tailored race-based action).
43. *Croson*, 488 U.S. at 506.
44. See, e.g., *Paradise*, 480 U.S. 177-78.
45. See *Croson*, 488 U.S. at 508 (discussing *Fullilove v. Klutznick*, 448 U.S. 448, 488 (1980) (plurality opinion)).
46. *Bakke*, 438 U.S. at 275.
47. 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).
48. See, e.g., *Paradise*, 480 U.S. 149.
49. See *Bakke*, 438 U.S. at 315 (Because "[t]he diversity that furthers a compelling state interests 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., concurring in the judgment).
50. See *Croson*, 488 U.S. at 507.
51. See *Fullilove*, 488 U.S. at 513 (Powell, J., concurring).
52. 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).
53. See *Johnson*, 480 U.S. at 638; *Sheet Metal Workers*, 478 U.S. at 488 (Powell, J., concurring).

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Appendix: Questions to Guide Assessment of Affirmative Action in Higher Education

Why are there if so,
"then" type response
for only a few of
them?

I. Coverage of Constitution and Title VI

- Is the institution public and part of a state government? If so, it is subject to the Fourteenth Amendment. Is the institution a part of the federal government? [If so, it is subject to the Fifth Amendment.] Does the institution receive federal financial assistance through any of the programs listed in Appendix A of Part 100 of the Office of Civil Rights' regulations? [If so, it is subject to Title VI.]
- Is the institution located in the Fifth Circuit? If so, the standards governing its affirmative action program are those in *Hopwood v. Texas*, which is discussed in the "Fifth Circuit Standards" sections of this guidance.

II. Race-based Classifications

- Does the institution use race, color, or national origin as a factor in any aspect of admissions or the award of financial aid? If an institution considers disadvantaged status, does the definition of disadvantage include consideration of race or national origin?
- If the institution has decided to consider race and national 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?
- 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?

III. Strict Scrutiny

A. Compelling Interest

- What is the objective of the program's consideration of race or national origin? Is it intended to remedy discrimination, to foster diversity to

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achieve an educational objective, or for some other purpose?

1. Remedial Interests

- **Factual Predicate.** What is the underlying factual predicate of 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.]
 - 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?
 - 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.
- 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?
- What is the nature of the evidence? Is it statistical or documentary? Are statistics based on comparisons to the general minority population, or are they more sophisticated and focused? For

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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, is there testimonial or anecdotal evidence of discrimination?

term not defined in guidance

- 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?
- 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?

2. Diversity Interests

- What are the institution's mission statements and how do they relate to its diversity objectives?
- What are the educational benefits of diversity at ^{the} your institution? What is the empirical basis for the conclusion that diversity will enhance the educational benefits the institution identifies?
- Is affirmative action in admissions used to achieve the educational benefits of diversity? What is the institution's definition of diversity? [The institution must assemble a factual predicate demonstrating that greater diversity would foster some larger societal goal beyond diversity for diversity's sake.] 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?

B. Narrow Tailoring

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- Race-neutral alternatives. 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? If race-neutral measures were not undertaken, why does the institution believe that such efforts would be insufficient to serve the compelling goals without the plus-factor credit? 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?
- Duration/Continued Need. Does the institution have data to show whether affirmative action is necessary? When did the institution begin implementing its affirmative action program? 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 the program subject to periodic oversight, and if so, what is the nature of that oversight? Has the program ever been adjusted or modified in light of periodic review? What were the results of the most recent review? Is there evidence of what might result if the racial classification were discontinued? 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?
- Pool of Beneficiaries. How does the college assess whether diversity has been achieved? Does the admissions process incorporate numerical goals? By what process were these goals derived? 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 categories of minorities who may not have been discriminated against?
- Manner in Which Race is Used. 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?
- Burden on Non-Beneficiaries. What is the nature of the burden imposed on persons who are not included in the racial or ethnic classification?

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established by the program? Does the program displace those persons from existing positions or financial aid awards? What is the size and dimension of the exclusionary impact in admissions? What is the dollar value of the financial aid awards in question? 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 not eligible for the preference put at a significant competitive disadvantage as a result of the program?

check of Chirwa on
specific issues
broad and general

NOTE TO BILL KINCAID

Re: Department of Education/Department of Justice Self Assessment Guide

Edits not
forwarded to
OCR -
wait to see
DOT
changes.

Art Coleman asked me to fax you the last version of the draft Self Assessment Guide. This draft includes all of the Justice Department edits. FYI, before using the document, we would mark each page as "Draft, For Discussion Purposes" and do some cosmetic word processing like displaying the "Additional Legal Consideration" sections in text boxes.

Call me at 312 886- 8360 if you need more information.

Thanks.

John Fry

John Fry
DOE/Office for Civil Rights
October 30, 1997

cc: Art Coleman

Post-It™ brand fax transmittal memo 7871		# of pages > 16
To Bill Kincaid	From John Fry	
Co. White House	Dept Ed. OCR	
Dept. Domestic Policy	Phone 312 886 8360	
Fax # Council	Fax #	

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1

INTRODUCTION

or are involved in establishing,

why copy this? **#1**

This Handout is designed to help postsecondary institutions that have affirmative action programs which 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 interested in establishing affirmative action programs are also encouraged to consider this Handout.~~ As used in this Handout, the term "affirmative action" means the use or consideration of race or national origin as a factor in admission or financial aid programs. Recruitment and outreach programs designed to increase the number of minorities in the applicant pool raise distinct questions and are not included in this Assessment Handout. Note also that the Hopwood v. State of Texas decision, which applies in the states of Texas, Mississippi and Louisiana, while permitting an institution to consider race or national origin to remedy the effects of its past discrimination, prohibits the use of race or national origin in admissions to achieve the goal of a diverse student body or to remedy discrimination by other components of the State's educational institutions. Thus, the discussion of diversity issues in this Handout would not apply in those states. *the use of race*

Positive/plus?

Do we have to share the power some on this program? CA?

ED/DOJ?

The Self Assessment Handout includes Standards, Checkpoints, and Additional Legal Considerations. The Standards are based on federal statutes, case law, and policy. (See the list of legal and policy resources included with this Handout.) The Checkpoints are meant to help institutions identify information relevant to the applicable legal standards. The Additional Legal Consideration sections offer additional principles and background 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.

summarize?

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Please note that each Checkpoint in a category will not necessarily be relevant to every institution. In many 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 or lower courts, may significantly impact the standards governing the use of affirmative action in educational institutions.

Institutions working with this Handout are encouraged to contact The Office of Civil Rights ("OCR") at the Department of Education for help. The last page of the Handout lists OCR offices and staff available to assist you.

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I. General Standards

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. Under Title VI and the Constitution, decisions with race or national origin as a factor are "suspect" and are subject to strict scrutiny. To satisfy strict scrutiny a school's use of race or national origin must be based on a compelling governmental interest and must be narrowly tailored to meet that interest. (Narrow tailoring is discussed later in the Handout.)

The Supreme Court has held that remedying the effects of discrimination can be a compelling governmental interest that might justify the consideration of race or national origin. In the Bakke decision, Justice Powell's controlling opinion found achieving the educational benefits of campus diversity to be a compelling interest. *(as well)*

*Further*II. Student AdmissionsA. Baseline Considerations

Legal issues may 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 college and university admissions.

*To assess these issues*Checkpoints

Overview: 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?

1. 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?

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B. Is Affirmative Action Supported by Compelling Interests?**Standards**

As discussed above, under the Constitution and Title VI of the Civil Rights Act of 1964, it is permissible in appropriate circumstances for colleges and universities to consider race in making admissions decisions. They may do so to promote diversity of their student body, consistent with Justice Powell's landmark opinion in Bakke. They may also do so to remedy the continued effects of discrimination by the institution itself or within the state or local educational system as a whole. As noted, however, in Texas, Mississippi and Louisiana, the Hopwood decision limits the justification for affirmative action to remedying the school's own discrimination.

Checkpoint

- ②. If the institution's student admissions process includes consideration of applicants' race or national origin, what is the educational and legal justification (e.g., to remedy the effects of discrimination or to obtain the educational benefits of a diverse student body)?

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.

1. Remedial Purposes**Standards**

The Title VI regulations require a recipient of federal funds

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that has discriminated in violation of Title VI or its regulations to take remedial action to overcome the effects of the 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. ^{such} 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.

In addition, colleges are permitted to take remedial action without having to wait for a formal finding by a court, administrative agency, or legislative body. Even absent such formal findings, 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.

Checkpoints

- ③. Is the institution the subject of a court desegregation order or a legislative or administrative finding of unlawful discrimination?
- ④. Separate 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?
- ⑤. Is there under-representation at the school of qualified students from particular races or national origins? Identify the racial and ethnic composition (%African-American, Hispanic, Asian-American, American Indian, white) of the following groups: a) the institution's student body; b) the institution's qualified applicants; and, c) 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

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by the institution.

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.

The Supreme Court has described the "strong basis in evidence" standard as approaching the evidence needed to show a prima facie case of discrimination under the constitution or civil rights statutes. In order to satisfy the "strong basis in evidence" standard, a college may, if applicable, rely on evidence of past discrimination such as documentation of specific instances of intentional discrimination for which the institution is responsible. Evidence of a significant disparity between the percentage of minority students in a college's student body and the percentage of qualified minorities in the relevant pool of applicants also supports an inference of discrimination. In addition to the qualified applicant pool, the racial/ethnic composition of the pool of college-bound high school graduates who would be qualified for admission to the institution may also be used to determine whether admission practices have resulted in a significant under-representation of qualified students from particular races or national origins. Colleges should assess the composition of the pool of qualified potential applicants based on the number of students by race and national origin in the areas from which applications may be drawn who may meet the school's admissions standards. Such an approach is analogous to employment discrimination cases where courts have accepted statistical evidence to infer patterns or practices of intentional discrimination against minority job applicants. Colleges can strengthen the predicate for remedial affirmative action by supplementing statistical evidence that qualified students are substantially under-represented in the student body with instances of discrimination on the basis of race or national origin against individuals.

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

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basis for remedial affirmative action.

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.

2. Diversity Purposes

Standards

Achievement of core educational objectives stated in an institution's mission may constitute a compelling educational interest that justifies the consideration of race or national origin in a narrowly tailored manner.

To qualify as a legal justification for the use of race or national origin, diversity programs must have sound educational objectives. An institution must be able to support its claim that diversity serves educational objectives by demonstrating the educational benefits that diversity produces on campus and/or within the institution's programs.

Checkpoints

- ⑥. What are the institution's mission statements and how do they relate to its diversity objectives?
- ⑦. What are the educational benefits of diversity at ^{the} your institution? What is the empirical basis for the educational benefits the institution identifies?

Additional Legal Considerations

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.

To articulate the educational benefits of diversity, studies or other expert-based information can be helpful. 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

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use of race or national origin (see following section on Narrow Tailoring).

Standards

A college may pursue its diversity interest consistent with the strict scrutiny test by using race or national origin as one of several factors considered in the admissions process.

For the consideration of race and national origin in admissions to be lawful under a diversity rationale, an institution's diversity program must include diversity characteristics in addition to race or national origin. Such characteristics may include other life experiences, achievements, talents, interests, extracurricular activities, economic disadvantages, geographic background, as well as various others. The relative weight granted to each factor in making admissions decisions is properly determined by the college or university: race or national origin may be accorded greater weight than other factors, for example, in a multi-factored diversity program, when diversity objectives related to race or national origin remain unfulfilled while race neutral components of diversity have been achieved. }

Checkpoints

9. Is affirmative action in admissions used to achieve the educational benefits of diversity? What is the institution's definition of diversity? Does diversity include factors other than race and ethnicity? 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

Colleges may seek diversity in admissions to fulfill their academic mission through the "robust exchange of ideas" that flows from a diverse student body. Bakke, 438 U.S. at 312-313. Under the Bakke decision, which governs our interpretation of Title VI, achieving the educational benefits of campus diversity is a compelling interest for purposes of the strict scrutiny test. Since Bakke, the Supreme Court has decided a number of affirmative action cases, none of which has invalidated Justice Powell's opinion in Bakke that the promotion of diversity in the higher education setting can be a compelling interest.

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 Note that according to the Hopwood decision, diversity is not lawful ^{a lawful} under the Constitution to justify the consideration of race or national origin. Hopwood applies in Mississippi, Louisiana, and Texas and is not legally binding in any other state. Note also that Hopwood upheld the consideration of race or national origin by an institution where necessary to remedy discrimination by that school.

C. Is the use of race in remedial or diversity programs narrowly tailored?

Overview: 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?

Standards

The Department of Education will consider factors established by case law in assessing whether a college's consideration of race or national origin meets the narrow tailoring requirements of Title VI and the Constitution. An overriding question is whether the school's use of race is focused as narrowly as possible on the achievement of the school's compelling interest, e.g., remedial or diversity objectives.

First, it is necessary to determine the efficacy of alternative approaches. It is important that consideration has been given to the use of race-neutral alternative approaches (e.g., the use of admissions criteria that do not include race or national origin, or recruitment programs). Race or national origin may be considered in admissions decisions only if a college determines that alternative approaches to the use of race have not been or will not be effective.

Checkpoints

- ①. 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?
- ②. If race-neutral measures were not undertaken, why does the institution believe that such efforts would be insufficient to enhance diversity without the plus-factor credit?

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11. 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?

Standards

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. A program that includes a broad, multi-factored definition of diversity, designed to produce articulated educational benefits may measure whether multi-factored diversity has been achieved in determining whether programs are narrowly tailored. Lawful diversity admissions programs, however, should not set aside positions based on race or national origin. Unless essential to remedying discrimination and its effects, such set-asides or quotas are inconsistent with the legal requirement of Bakke that all applicants be able to compete for all vacancies and have their individual merits considered. Rather, race may be used as one factor among many.

Checkpoint

12. 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?

Standards

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. Thus, for example, the use of race or national origin as among multiple factors considered in admissions should continue only while necessary to overcome the effects of past discrimination and achieve a diverse student body. Institutions should periodically assess whether the use of race or national origin to achieve diversity continues to be necessary or whether the admissions system should be modified

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based on changing circumstances. OCR considers annual reviews the best practice to support this aspect of Title VI's narrow tailoring requirements.

Checkpoint

13. Is the affirmative action program (~~based on diversity or remedying the effects of discrimination~~) periodically reviewed and modified? If so, 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?

Standards

The use of the classification 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.

The burden on those who are not conferred the benefit of the affirmative action program (generally, non-minority students) must be considered. Lawful diversity programs do not include separate tracks, separate decision-making procedures, or different admissions formulas based on the race or national origin of applicants. It is important that institutions exercise care to avoid separate procedures that are based on race or national origin as such procedures may prevent competition among applicants of all races and national origins. A use of race or national origin may impose such a severe burden on particular individuals that it is too intrusive to be considered narrowly tailored. See Wygant v. Jackson Board of Education, (use of race in imposing layoffs involves severe disruption to lives of identifiable individuals).

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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Narrow Tailoring (Continued)

Checkpoint

1. 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?

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13**III. Financial Aid****Standards**

of Education

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 Handout). Note that the standards for admissions and financial aid are generally the same.

In the Podberesky v. Kirwin^a decision¹, the Fourth Circuit, which covers Maryland, Virginia, West Virginia, North Carolina and South Carolina, ruled that the challenged race-targeted scholarships at the University of Maryland did not meet the Supreme Court's strict scrutiny standard. The court did not rule that all race-targeted scholarships are impermissible. Rather, it held that colleges may establish race targeted scholarships to remedy the present effects of prior discrimination, so long as such measures are narrowly tailored to achieve that objective. The court found, however, that the University had not demonstrated the need for remedial action, and that even if such need existed, the University's scholarship program was not narrowly tailored to cure the present effects of the University's previous discrimination. The Podberesky decision, which rests on the nature and weight of the University's factual evidence and the extent to which it met the "narrow tailoring" standard, does not require the Department to modify its policy guidance on remedial race-targeted scholarships. The evidentiary standards set out in the Podberesky decision should be used in applying the Department's guidance in the states of the Fourth Circuit -- Maryland, Virginia, West Virginia, North Carolina and South Carolina.

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The following questions are keyed to the financial aid guidance, which should be considered carefully in assessing financial aid programs:

Checkpoints**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"? 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?

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

B. Principle 1: Financial Aid for Disadvantaged Students

- ①. 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.

"Race-based scholarships" or "race-targeted aid" mean, for the purposes of this memorandum, 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 scholarship policy.

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where Principle 2?

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

1. What are the racial or national origin groups eligible for race-based aid? What is the nature of the past discrimination against that group? Are there court, legislative, or administrative findings of past discrimination at that institution? If so, are there continuing effects of past discrimination at the institution? If there have not been formal findings of past discrimination, is there a strong basis in evidence to believe that there are current effects of discrimination?

D. Principle 4: Financial Aid to Create Diversity

1. Is affirmative action in financial aid used for purposes of diversity? What is the institution's definition of diversity? Has the institution identified the benefits of diversity?
2. Is special consideration for minority status used as one factor among many factors for scholarship awards in some cases? If many factors are considered, what are the other factors? How are the factors weighted and considered, and why?

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.

1. 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 means have not been tried, does the institution reasonably believe that race-neutral efforts would be insufficient to meet its diversity goals without race-based scholarships?

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9. Is the use of race-based scholarships in the financial aid process periodically reviewed and modified? What standards are used in the review? When was the last such review?
10. 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?
11. 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?
- F. Principle 5: Private Gifts Restricted by Race or National Origin**
12. 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?
13. 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?



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

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Subject: Affirmative action self-assessment guide: status

----- Message Contents -----

(Also faxed to Richard Jerome 307-3904)

Friends,

I'd like to set up a call this week to talk about the self assessment guide, with a focus on:

1. Process--where we are at this point, and future steps before final issuance.
2. Substantive changes made since the last draft was circulated.
3. Recommendations regarding the strategic rollout of this resource.

There may be other matters that you'll want to add to this list. Millie Palmer from my office will call so that we can arrange a time that suits our busy schedules.

Thanks.

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Julie + Bill -

Could you work with Dawn Chinn
to make sure this is working?
Thanks.

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INTRODUCTION

This Handout is designed to help postsecondary institutions that have affirmative action programs which 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 interested in establishing affirmative action programs are also encouraged to consider this Handout. As used in this Handout, the term "affirmative action" means the use or consideration of race or national origin as a factor in admission or financial aid programs. Recruitment and outreach programs designed to increase the number of minorities in the applicant pool raise distinct questions and are not included in this Assessment Handout. Note also that the Hopwood v. State of Texas decision, which applies in the states of Texas, Mississippi and Louisiana, while permitting an institution to consider race or national origin to remedy the effects of its past discrimination, prohibits the use of race or national origin in admissions to achieve the goal of a diverse student body or to remedy discrimination by other components of the State's educational institutions. Thus, the discussion of diversity issues in this Handout would not apply in those states.

The Self Assessment Handout includes Standards, Checkpoints, and Additional Legal Considerations. The Standards are based on federal statutes, case law, and policy. (See the list of legal and policy resources included with this Handout.) The Checkpoints are meant to help institutions identify information relevant to the applicable legal standards. The Additional Legal Consideration sections offer additional principles and background 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 many 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 or lower courts, may significantly impact the standards governing the use of affirmative action in educational institutions. Institutions working with this Handout are encouraged to contact The Office of Civil Rights ("OCR") at the Department of Education for help. The last page of the Handout lists OCR offices and staff available to assist you.

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I. General Standards

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. Under Title VI and the Constitution, decisions with race or national origin as a factor are "suspect" and are subject to strict scrutiny. To satisfy strict scrutiny a school's use of race or national origin must be based on a compelling governmental interest and must be narrowly tailored to meet that interest. (Narrow tailoring is discussed later in the Handout.)

The Supreme Court has held that remedying the effects of discrimination can be a compelling governmental interest that might justify the consideration of race or national origin. In the Bakke decision, Justice Powell's controlling opinion found achieving the educational benefits of campus diversity to be a compelling interest.

II. Student Admissions

A. Baseline Considerations

Legal issues may 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 college and university admissions.

Checkpoints

Overview: 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?

1. 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?

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B. Is Affirmative Action Supported by Compelling Interests?

Standards

As discussed above, under the Constitution and Title VI of the Civil Rights Act of 1964 it is permissible in appropriate circumstances for colleges and universities to consider race in making admissions decisions. They may do so to promote diversity of their student body, consistent with Justice Powell's landmark opinion in Bakke. They may also do so to remedy the continued effects of discrimination by the institution itself or within the state or local educational system as a whole. As noted, however, in Texas, Mississippi and Louisiana, the Hopwood decision limits the justification for affirmative action to remedying the school's own discrimination.

Checkpoint

2. If the institution's student admissions process includes consideration of applicants' race or national origin, what is the educational and legal justification (e.g., to remedy the effects of discrimination or to obtain the educational benefits of a diverse student body)?

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.

1. Remedial Purposes

Standards

The Title VI regulations require a recipient of federal funds

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that has discriminated in violation of Title VI or its regulations to take remedial action to overcome the effects of the 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.

In addition, colleges are permitted to take remedial action without having to wait for a formal finding by a court, administrative agency, or legislative body. Even absent such formal findings, 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.

Checkpoints

3. Is the institution the subject of a court desegregation order or a legislative or administrative finding of unlawful discrimination?
4. Separate 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?
5. Is there under-representation at the school of qualified students from particular races or national origins? Identify the racial and ethnic composition (%African-American, Hispanic, Asian-American, American Indian, white) of the following groups: a) the institution's student body; b) the institution's qualified applicants; and, c) 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

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by the institution.

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.

The Supreme Court has described the "strong basis in evidence" standard as approaching the evidence needed to show a prima facie case of discrimination under the constitution or civil rights statutes. In order to satisfy the "strong basis in evidence" standard, a college may, if applicable, rely on evidence of past discrimination such as documentation of specific instances of intentional discrimination for which the institution is responsible. Evidence of a significant disparity between the percentage of minority students in a college's student body and the percentage of qualified minorities in the relevant pool of applicants also supports an inference of discrimination. In addition to the qualified applicant pool, the racial/ethnic composition of the pool of college-bound high school graduates who would be qualified for admission to the institution may also be used to determine whether admission practices have resulted in a significant under-representation of qualified students from particular races or national origins. Colleges should assess the composition of the pool of qualified potential applicants based on the number of students by race and national origin in the areas from which applications may be drawn who may meet the school's admissions standards. Such an approach is analogous to employment discrimination cases where courts have accepted statistical evidence to infer patterns or practices of intentional discrimination against minority job applicants. Colleges can strengthen the predicate for remedial affirmative action by supplementing statistical evidence that qualified students are substantially under-represented in the student body with instances of discrimination on the basis of race or national origin against individuals.

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

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basis for remedial affirmative action.

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.

2. Diversity Purposes

Standards

Achievement of core educational objectives stated in an institution's mission may constitute a compelling educational interest that justifies the consideration of race or national origin in a narrowly tailored manner.

To qualify as a legal justification for the use of race or national origin, diversity programs must have sound educational objectives. An institution must be able to support its claim that diversity serves educational objectives by demonstrating the educational benefits that diversity produces on campus and/or within the institution's programs.

Checkpoint

6. What are the institution's mission statements and how do they relate to its diversity objectives?
7. What are the educational benefits of diversity at your institution? What is the empirical basis for the educational benefits the institution identifies?

Additional Legal Considerations

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.

To articulate the educational benefits of diversity, studies or other expert-based information can be helpful. 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

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use of race or national origin (see following section on Narrow Tailoring).

Standards

A college may pursue its diversity interest consistent with the strict scrutiny test by using race or national origin as one of several factors considered in the admissions process.

For the consideration of race and national origin in admissions to be lawful under a diversity rationale, an institution's diversity program must include diversity characteristics in addition to race or national origin. Such characteristics may include other life experiences, achievements, talents, interests, extracurricular activities, economic disadvantages, geographic background, as well as various others. The relative weight granted to each factor in making admissions decisions is properly determined by the college or university: race or national origin may be accorded greater weight than other factors, for example, in a multi-factored diversity program, when diversity objectives related to race or national origin remain unfulfilled while race neutral components of diversity have been achieved.

Checkpoints

8. Is affirmative action in admissions used to achieve the educational benefits of diversity? What is the institution's definition of diversity? Does diversity include factors other than race and ethnicity? 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

Colleges may seek diversity in admissions to fulfill their academic mission through the "robust exchange of ideas" that flows from a diverse student body. Bakke, 438 U.S. at 312-313. Under the Bakke decision, which governs our interpretation of Title VI, achieving the educational benefits of campus diversity is a compelling interest for purposes of the strict scrutiny test. Since Bakke, the Supreme Court has decided a number of affirmative action cases, none of which has invalidated Justice Powell's opinion in Bakke that the promotion of diversity in the higher education setting can be a compelling interest.

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Note that according to the Hopwood decision, diversity is not lawful under the Constitution to justify the consideration of race or national origin. Hopwood applies in Mississippi, Louisiana, and Texas and is not legally binding in any other state. Note also that Hopwood upheld the consideration of race or national origin by an institution where necessary to remedy discrimination by that school.

C. Is the use of race in remedial or diversity programs narrowly tailored?

Overview: 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?

Standards

The Department of Education will consider factors established by case law in assessing whether a college's consideration of race or national origin meets the narrow tailoring requirements of Title VI and the Constitution. An overriding question is whether the school's use of race is focused as narrowly as possible on the achievement of the school's compelling interest, e.g., remedial or diversity objectives.

First, it is necessary to determine the efficacy of alternative approaches. It is important that consideration has been given to the use of race-neutral alternative approaches (e.g., the use of admissions criteria that do not include race or national origin, or recruitment programs). Race or national origin may be considered in admissions decisions only if a college determines that alternative approaches to the use of race have not been or will not be effective.

Checkpoints

9. 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?
10. If race-neutral measures were not undertaken, why does the institution believe that such efforts would be insufficient to enhance diversity without the plus-factor credit?

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11. 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?

Standards

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. A program that includes a broad, multi-factored definition of diversity, designed to produce articulated educational benefits may measure whether multi-factored diversity has been achieved in determining whether programs are narrowly tailored. Lawful diversity admissions programs, however, should not set aside positions based on race or national origin. Unless essential to remedying discrimination and its effects, such set-asides or quotas are inconsistent with the legal requirement of Bakke that all applicants be able to compete for all vacancies and have their individual merits considered. Rather, race may be used as one factor among many.

Checkpoint

12. 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?

Standards

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. Thus, for example, the use of race or national origin as among multiple factors considered in admissions should continue only while necessary to overcome the effects of past discrimination and achieve a diverse student body. Institutions should periodically assess whether the use of race or national origin to achieve diversity continues to be necessary or whether the admissions system should be modified

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based on changing circumstances, OCR considers annual reviews the best practice to support this aspect of Title VI's narrow tailoring requirements.

Checkpoint

13. Is the affirmative action program (based on diversity or remedying the effects of discrimination) periodically reviewed and modified? If so, 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?

Standards

The use of the classification 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.

The burden on those who are not conferred the benefit of the affirmative action program (generally, non-minority students) must be considered. Lawful diversity programs do not include separate tracks, separate decision-making procedures, or different admissions formulas based on the race or national origin of applicants. It is important that institutions exercise care to avoid separate procedures that are based on race or national origin as such procedures may prevent competition among applicants of all races and national origins. A use of race or national origin may impose such a severe burden on particular individuals that it is too intrusive to be considered narrowly tailored. See Wygant v. Jackson Board of Education, (use of race in imposing layoffs involves severe disruption to lives of identifiable individuals).

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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Narrow Tailoring (Continued)

Checkpoint

14. 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?

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III. Financial Aid

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 Handout). Note that the standards for admissions and financial aid are generally the same.

In the Podberesky v. Kirwin decision¹, the Fourth Circuit, which covers Maryland, Virginia, West Virginia, North Carolina and South Carolina, ruled that the challenged race-targeted scholarships at the University of Maryland did not meet the Supreme Court's strict scrutiny standard. The court did not rule that all race-targeted scholarships are impermissible. Rather, it held that colleges may establish race targeted scholarships to remedy the present effects of prior discrimination, so long as such measures are narrowly tailored to achieve that objective. The court found, however, that the University had not demonstrated the need for remedial action, and that even if such need existed, the University's scholarship program was not narrowly tailored to cure the present effects of the University's previous discrimination. The Podberesky decision, which rests on the nature and weight of the University's factual evidence and the extent to which it met the "narrow tailoring" standard, does not require the Department to modify its policy guidance on remedial race-targeted scholarships. The evidentiary standards set out in the Podberesky decision should be used in applying the Department's guidance in the states of the Fourth Circuit -- Maryland, Virginia, West Virginia, North Carolina and South Carolina.

38 F.3d 147 (4th Cir. 1994), cert. den., 115 S. Ct. 2001 (1995).

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13

The following questions are keyed to the financial aid guidance, which should be considered carefully in assessing financial aid programs:

Checkpoints

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"?² 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?

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

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.

"Race-based scholarships" or "race-targeted aid" mean, for the purposes of this memorandum, 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 scholarship policy.

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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. What are the racial or national origin groups eligible for race-based aid? What is the nature of the past discrimination against that group? Are there court, legislative, or administrative findings of past discrimination at that institution? If so, are there continuing effects of past discrimination at the institution? If there have not been formal findings of past discrimination, is there a strong basis in evidence to believe that there are current effects of discrimination?

D. Principle 4: Financial Aid to Create Diversity

5. Is affirmative action in financial aid used for purposes of diversity? What is the institution's definition of diversity? Has the institution identified the benefits of diversity?
6. Is special consideration for minority status used as one factor among many factors for scholarship awards in some cases? If many factors are considered, what are the other factors? How are the factors weighted and considered, and why?

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.

7. 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 means have not been tried, does the institution reasonably believe that race-neutral efforts would be insufficient to meet its diversity goals without race-based scholarships?

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8. Is the use of race-based scholarships in the financial aid process periodically reviewed and modified? What standards are used in the review? When was the last such review?
9. 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?
10. 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?
- F. Principle 5: Private Gifts Restricted by Race or National Origin
11. 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?
12. 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?

POSTSECONDARY INSTITUTION ASSESSMENT GUIDE Admissions and Financial Aid Programs

INTRODUCTION

This Guide is designed to help postsecondary institutions that have affirmative action programs which 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 interested in establishing affirmative action programs are also encouraged to consider this Guide. As used in this Guide, the term "affirmative action" means the use or consideration of race or national origin as a factor in admission or financial aid programs. Recruitment and outreach programs designed to increase the number of minorities in the applicant pool are rarely subject to strict scrutiny review and are not included in this Assessment Guide. Note also that the Hopwood v. State of Texas decision, which applies in the states of Texas, Mississippi and Louisiana, while permitting an institution to consider race or national origin to remedy the effects of its past discrimination, prohibits the use of race or national origin in admissions to achieve the goal of a diverse student body. Thus, the discussion of diversity issues in this Guide would not apply in those states.

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The Self Assessment Guide includes Standards, Checkpoints, and Additional Legal Considerations. The Standards are based on federal statutes, case law, and policy. (See the list of legal and policy resources included with this Guide.) The Checkpoints are meant to help institutions identify information relevant to the applicable legal standards. The Additional Legal Consideration sections offer additional pointers 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 many 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 or lower courts, may significantly impact the standards governing the use of affirmative action in educational institutions. Institutions working with this Guide are encouraged to contact The Office of Civil Rights ("OCR") at the Department of Education for help. The last page of the Guide lists OCR offices and staff available to assist you.

I. General Standards

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. Under Title VI and the Constitution, decisions with race or national origin as a factor are "suspect" and are subject to strict scrutiny. To satisfy strict scrutiny a school's use of race or national origin must be based on a compelling governmental interest and must be narrowly tailored to meet that interest. (Narrow tailoring is discussed later in the Guide.)

The Supreme Court has upheld remedying the effects of discrimination as a compelling governmental interest for the consideration of race or national origin. In the Bakke decision, Justice Powell's controlling opinion found achieving the educational benefits of campus diversity to be a compelling interest.

II. Student Admissions

A. Baseline Information

Standards

Legal issues may 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 college and university admissions.

Checkpoints

Overview: 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?

1. 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?

Additional Legal Considerations

To ensure internal consistency, it is recommended that schools that have decided to consider race as a factor in admissions develop a written affirmative action plan.

B. Is Affirmative Action Supported by Compelling Interests?

Standards

As discussed above, under the Constitution and Title VI of the Civil Rights Act of 1964 it is permissible in appropriate circumstances for colleges and universities to consider race in making admissions decisions. They may do so to promote diversity of their student body, consistent with Justice Powell's landmark opinion in Bakke. They may also do so to remedy the continued effects of discrimination by the institution itself or within the state or local educational system as a whole. As noted, however, in Texas, Mississippi and Louisiana, the Hopwood decision limits the justification for affirmative action to remedying the school's own discrimination.

Checkpoint

2. If the institution's student admissions process includes consideration of applicants' race or national origin, what is the educational and legal justification(e.g., to remedy the effects of discrimination or to obtain the educational benefits of a diverse student body)?

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.

1. Remedial Purposes

Standards

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 the 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.

In addition, colleges are permitted to take remedial action without having to wait for a formal finding by a court, administrative agency, or legislative body. Even absent such formal findings, 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.

Checkpoints

3. Is the institution the subject of a court desegregation order or a legislative or administrative finding of unlawful discrimination?
4. Separate 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?
5. Is there under-representation at the school of qualified students from particular races or national origins? Identify the racial and ethnic composition (%African-American, Hispanic, Asian-American, American Indian, white) of the following groups: a) the institution's student body; b) the institution's qualified applicants; and, c) 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

Additional Legal Considerations

The Supreme Court has described the "strong basis in evidence" standard as approaching the evidence needed to show a prima facie case of discrimination under the constitution or civil rights statutes. In order to satisfy the "strong basis in evidence" standard, a college may, if applicable, rely on evidence of past discrimination such as documentation of specific instances of intentional discrimination for which the institution is responsible. Evidence of a significant disparity between the percentage of minority students in a college's student body and the percentage of qualified minorities in the relevant pool of applicants also supports an inference of discrimination. In addition to the qualified applicant pool, the racial/ethnic composition of the pool of college-bound high school graduates who would be qualified for admission to the institution may also be used to determine whether admission practices have resulted in a significant under-representation of qualified students from particular races or national origins. Colleges should assess the composition of the pool of qualified potential applicants based on the number of students by race and national origin in the areas from which applications may be drawn who may meet the school's admissions standards. Such an approach is analogous to employment discrimination cases where courts have accepted statistical evidence to infer patterns or practices of intentional discrimination against minority job applicants. Colleges can strengthen the predicate for remedial affirmative action by supplementing statistical evidence that qualified students are substantially under-represented in the student body with instances of discrimination on the basis of race or national origin against individuals.

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.

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.

2. Diversity Purposes

Standards

Achievement of core educational objectives stated in an institution's mission may constitute a compelling educational interest that justifies the consideration of race or national origin in a narrowly tailored manner.

To qualify as a legal justification for the use of race or national origin, diversity programs must have sound educational objectives. An institution must be able to support its claim that diversity serves educational objectives by demonstrating the educational benefits that diversity produces on campus and/or within the institution's programs.

Checkpoint

6. What are the institution's mission statements and how do they relate to its diversity objectives?
7. What are the educational benefits of diversity at your institution? What is the empirical basis for the educational benefits the institution identifies?

Additional Legal Considerations

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.

To articulate the educational benefits of diversity, studies or other expert-based information can be helpful. 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).

Diversity Purposes (continued)

Standards

A college may pursue its diversity interest consistent with the strict scrutiny test by using race or national origin as one of several factors considered in the admissions process.

For the consideration of race and national origin in admissions to be lawful under a diversity rationale, an institution's diversity program must include diversity characteristics in addition to race or national origin. Such characteristics may include other life experiences, achievements, talents, interests, extracurricular activities, economic disadvantages, geographic background, as well as various others. The relative weight granted to each factor in making admissions decisions is properly determined by the college or university: race or national origin may be accorded greater weight than other factors, for example, in a multi-factored diversity program, when diversity objectives related to race or national origin remain unfulfilled while race neutral components of diversity have been achieved.

Checkpoints

8. Is affirmative action in admissions used to achieve the educational benefits of diversity? What is the institution's definition of diversity? Does diversity include factors other than race and ethnicity? 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

Colleges may seek diversity in admissions to fulfill their academic mission through the "robust exchange of ideas" that flows from a diverse student body. Bakke, 438 U.S. at 312-313. Under the Bakke decision, which governs our interpretation of Title VI, achieving the educational benefits of campus diversity is a compelling interest for purposes of the strict scrutiny test. Since Bakke, the Supreme Court has decided a number of affirmative action cases, none of which has invalidated Justice Powell's opinion in Bakke that the promotion of diversity in the higher education setting can be a compelling interest.

Note that according to the Hopwood decision, diversity is not lawful under the Constitution to justify the consideration of race or national origin. Hopwood applies in Mississippi, Louisiana, and Texas and is not legally binding in any other state. Note also that Hopwood upheld the consideration of race or national origin by an institution where necessary to remedy discrimination by that school.

C. Is the use of race in remedial or diversity programs narrowly tailored?

Overview: 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?

Standards

The Department of Education will consider factors established by case law in assessing whether a college's consideration of race or national origin meets the narrow tailoring requirements of Title VI and the Constitution. An overriding question is whether the school's use of race is focused as narrowly as possible on the achievement of the school's compelling interest, e.g., remedial or diversity objectives.

First, it is necessary to determine the efficacy of alternative approaches. It is important that consideration has been given to the use of race-neutral alternative approaches (e.g., the use of admissions criteria that do not include race or national origin, or recruitment programs). Race or national origin may be considered in admissions decisions only if a college determines that alternative approaches to the use of race have not been or will not be effective.

Checkpoints

9. 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?
10. If race-neutral measures were not undertaken, why does the institution believe that such efforts would be insufficient to enhance diversity without the plus-factor credit?
11. 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?

Standards

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. A program that includes a broad, multi-factored definition of diversity, designed to produce articulated educational benefits may measure whether multi-factored diversity has been achieved in determining whether programs are narrowly tailored. Lawful diversity admissions programs, however, should not set aside positions based on race or national origin. Unless essential to remedying discrimination and its effects, such set-asides or quotas are inconsistent with the legal requirement of Bakke that all applicants be able to compete for all vacancies and have their individual merits considered. Rather, race may be used as one factor among many.

Checkpoints

12. 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?

Standards

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. Thus, for example, the use of race or national origin as among multiple factors considered in admissions should continue only while necessary to overcome the effects of past discrimination and achieve a diverse student body. Institutions should periodically assess whether the use of race or national origin to achieve diversity continues to be necessary or whether the admissions system should be modified based on changing circumstances. OCR considers annual reviews the best practice to support this aspect of Title VI's narrow tailoring requirements.

Checkpoint

13. Is the affirmative action program (based on diversity or remedying the effects of discrimination) periodically reviewed and modified? If so, 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?

Standards

The use of the classification 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.

The burden on those who are not conferred the benefit of the affirmative action program (generally, non-minority students) must be considered. Lawful diversity programs do not include separate tracks, separate decision-making procedures, or different admissions formulas based on the race or national origin of applicants. It is important that institutions exercise care to avoid separate procedures that are based on race or national origin as such procedures may prevent competition among applicants of all races and national origins. A use of race or national origin may impose such a severe burden on particular individuals that it is too intrusive to be considered narrowly tailored. See Wygant v. Jackson Board of Education, (use of race in imposing layoffs involves severe disruption to lives of identifiable individuals).

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.

Checkpoint

14. 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?

Additional Legal Considerations

Justice Powell's opinion in Bakke indicated that race or national origin could be used in making admissions decisions to further the compelling interest of a diverse student body even though the effect might be to deny admission to some students who did not receive a competitive "plus" based on race or ethnicity. In cases since Bakke, the Supreme Court has provided additional guidance on the factors to be considered in determining whether affirmative action based on race or national origin is narrowly tailored to its purpose. See, for example, United States v. Paradise, 480 U.S. 149 (1987); Wygant v. Jackson Board of Education, 476 U.S. 267 (1986); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (and cases discussed in the decision).

An institution may rely on evidence of its own prior unsuccessful race-neutral efforts to achieve diversity, projections of the effects of race-neutral options, expert-based conclusions, the experience of other institutions in similar circumstances, or other professionally-supported information in determining whether the school's diversity objectives can be achieved without any consideration of race or national origin in admissions.

III. Financial Aid

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). Note that the standards for admissions and financial aid are generally the same.

Additional Legal Considerations

In the Podberesky v. Kirwin decision, the Fourth Circuit, which covers Maryland, Virginia, West Virginia, North Carolina and South Carolina, ruled that the challenged race-targeted scholarships at the University of Maryland did not meet the Supreme Court's strict scrutiny standard. The court did not rule that all race-targeted scholarships are impermissible. Rather, it held that colleges may establish race targeted scholarships to remedy the present effects of prior discrimination, so long as such measures are narrowly tailored to achieve that objective. The court found, however, that the University had not demonstrated the need for remedial action, and that even if such need existed, the University's scholarship program was not narrowly tailored to cure the present effects of the University's previous discrimination. The Podberesky decision, which rests on the nature and weight of the University's factual evidence and the extent to which it met the "narrow tailoring" standard, does not require the Department to modify its policy guidance on remedial race-targeted scholarships. The evidentiary standards set out in the Podberesky decision should be used in applying the Department's guidance in the states of the Fourth Circuit -- Maryland, Virginia, West Virginia, North Carolina and South Carolina.

The following questions are keyed to the financial aid guidance, which should be considered carefully in assessing financial aid programs:

checkpoints

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 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 institutions.

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. What are the racial or national origin groups eligible for race-based aid? What is the nature of the past discrimination against that group? Are there court, legislative, or administrative findings of past discrimination at that institution? If so, are there continuing effects of past discrimination at the institution? If there have not been formal findings of past discrimination, is there a strong basis in evidence to believe that there are current effects of discrimination?

"Race-based scholarships" or "race-targeted aid" mean, for the purposes of this memorandum, 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 scholarship policy.

D. Principle 4: Financial Aid to Create Diversity

5. Is affirmative action in financial aid used for purposes of diversity? What is the institution's definition of diversity? Has the institution identified the benefits of diversity?
6. Is special consideration for minority status used as one factor among many factors for scholarship awards in some cases? If many factors are considered, what are the other factors? How are the factors weighted and considered, and why?

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.

7. 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 means have not been tried, does the institution reasonably believe that race-neutral efforts would be insufficient to meet its diversity goals without race-based scholarships?
8. Is the use of race-based scholarships in the financial aid process periodically reviewed and modified? What standards are used in the review? When was the last such review?
9. 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?
10. 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?

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

11. 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?
12. 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?



Arthur_Coleman @ ed.gov

10/30/97 02:18:00 PM

Record Type: Record

To: William R. Kincaid

cc:

Subject: Follow up on affirmative action guide and ACE conf

Bill,

In follow up to our conversation, John Fry of our Chicago office will fax to your 2878 number the latest version of this document that incorporates all of DoJ comments, including OLC. Should be to you in under an hour.

Also, to recap, the day-long workshop ED and DoJ conducted at the ACE conference was very well received. The underlying effort--to educate regarding current legal standards and provide practical guidance in how to ensure that affirmative action programs meet the rigorous legal requirements--generated alot of positive response, with many requests from colleges and universities to conduct similar regional seminars and broadly disseminate the message. Many requested paper to accompany the discussion.

Thanks.

Art

November 3, 1997

NOTE TO ELENA KAGAN, MIKE COHEN, AND DAWN CHIRWA--

Attached is a revised draft of the Self-Assessment Guide (now called a "Handout") on Affirmative Action programs that the Department of Education and the Justice Department put together and that we reviewed leading up to the ACE conference recently. Education would still very much like to get this out to the field, in draft and for comment. Could everyone please try to review this with an eye towards whether, and under what conditions, the Department could release this at some point over the next few weeks?

Thanks.

-- Bill K.



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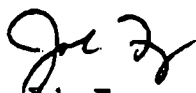
NOTE TO BILL KINCAID

Re: Department of Education/Department of Justice Self Assessment Guide

Art Coleman asked me to fax you the last version of the draft Self Assessment Guide. This draft includes all of the Justice Department edits. FYI, before using the document, we would mark each page as "Draft, For Discussion Purposes" and do some cosmetic word processing like displaying the "Additional Legal Consideration" sections in text boxes.

Call me at 312 886- 8360 if you need more information.

Thanks.



John Fry
DOE/Office for Civil Rights
October 30, 1997

cc: Art Coleman

Post-It™ brand fax transmittal memo 7871		# of pages > 16
To Bill Kincaid	From John Fry	
Co. White House	Co. Dept Ed. OCR	
Dept. Domestic Policy	Phone # 312 886 8360	
Fax # Council	Fax #	

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INTRODUCTION

This Handout is designed to help postsecondary institutions that have affirmative action programs which 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 interested in establishing affirmative action programs are also encouraged to consider this Handout. As used in this Handout, the term "affirmative action" means the use or consideration of race or national origin as a factor in admission or financial aid programs. Recruitment and outreach programs designed to increase the number of minorities in the applicant pool raise distinct questions and are not included in this Assessment Handout. Note also that the Hopwood v. State of Texas decision, which applies in the states of Texas, Mississippi and Louisiana, while permitting an institution to consider race or national origin to remedy the effects of its past discrimination, prohibits the use of race or national origin in admissions to achieve the goal of a diverse student body or to remedy discrimination by other components of the State's educational institutions. Thus, the discussion of diversity issues in this Handout would not apply in those states.

The Self Assessment Handout includes Standards, Checkpoints, and Additional Legal Considerations. The Standards are based on federal statutes, case law, and policy. (See the list of legal and policy resources included with this Handout.) The Checkpoints are meant to help institutions identify information relevant to the applicable legal standards. The Additional Legal Consideration sections offer additional principles and background 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 many 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 or lower courts, may significantly impact the standards governing the use of affirmative action in educational institutions. Institutions working with this Handout are encouraged to contact The Office of Civil Rights ("OCR") at the Department of Education for help. The last page of the Handout lists OCR offices and staff available to assist you.

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2

I. General Standards

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The Supreme Court has held that remedying the effects of discrimination can be a compelling governmental interest that might justify the consideration of race or national origin. In the Bakke decision, Justice Powell's controlling opinion found achieving the educational benefits of campus diversity to be a compelling interest.

II. Student Admissions**A. Baseline Considerations**

Legal issues may 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 college and university admissions.

Checkpoints

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DRAFT

3

B. Is Affirmative Action Supported by Compelling Interests?**Standards**

As discussed above, under the Constitution and Title VI of the Civil Rights Act of 1964 it is permissible in appropriate circumstances for colleges and universities to consider race in making admissions decisions. They may do so to promote diversity of their student body, consistent with Justice Powell's landmark opinion in Bakke. They may also do so to remedy the continued effects of discrimination by the institution itself or within the state or local educational system as a whole. As noted, however, in Texas, Mississippi and Louisiana, the Hopwood decision limits the justification for affirmative action to remedying the school's own discrimination.

Checkpoint

2. If the institution's student admissions process includes consideration of applicants' race or national origin, what is the educational and legal justification (e.g., to remedy the effects of discrimination or to obtain the educational benefits of a diverse student body)?

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.

1. Remedial Purposes**Standards**

The Title VI regulations require a recipient of federal funds

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that has discriminated in violation of Title VI or its regulations to take remedial action to overcome the effects of the 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.

In addition, colleges are permitted to take remedial action without having to wait for a formal finding by a court, administrative agency, or legislative body. Even absent such formal findings, 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.

Checkpoints

3. Is the institution the subject of a court desegregation order or a legislative or administrative finding of unlawful discrimination?
4. Separate 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?
5. Is there under-representation at the school of qualified students from particular races or national origins? Identify the racial and ethnic composition (%African-American, Hispanic, Asian-American, American Indian, white) of the following groups: a) the institution's student body; b) the institution's qualified applicants; and, c) 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

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by the institution.

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.

The Supreme Court has described the "strong basis in evidence" standard as approaching the evidence needed to show a prima facie case of discrimination under the constitution or civil rights statutes. In order to satisfy the "strong basis in evidence" standard, a college may, if applicable, rely on evidence of past discrimination such as documentation of specific instances of intentional discrimination for which the institution is responsible. Evidence of a significant disparity between the percentage of minority students in a college's student body and the percentage of qualified minorities in the relevant pool of applicants also supports an inference of discrimination. In addition to the qualified applicant pool, the racial/ethnic composition of the pool of college-bound high school graduates who would be qualified for admission to the institution may also be used to determine whether admission practices have resulted in a significant under-representation of qualified students from particular races or national origins. Colleges should assess the composition of the pool of qualified potential applicants based on the number of students by race and national origin in the areas from which applications may be drawn who may meet the school's admissions standards. Such an approach is analogous to employment discrimination cases where courts have accepted statistical evidence to infer patterns or practices of intentional discrimination against minority job applicants. Colleges can strengthen the predicate for remedial affirmative action by supplementing statistical evidence that qualified students are substantially under-represented in the student body with instances of discrimination on the basis of race or national origin against individuals.

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

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basis for remedial affirmative action.

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.

2. Diversity Purposes

Standards

Achievement of core educational objectives stated in an institution's mission may constitute a compelling educational interest that justifies the consideration of race or national origin in a narrowly tailored manner.

To qualify as a legal justification for the use of race or national origin, diversity programs must have sound educational objectives. An institution must be able to support its claim that diversity serves educational objectives by demonstrating the educational benefits that diversity produces on campus and/or within the institution's programs.

Checkpoint

6. What are the institution's mission statements and how do they relate to its diversity objectives?
7. What are the educational benefits of diversity at your institution? What is the empirical basis for the educational benefits the institution identifies?

Additional Legal Considerations

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.

To articulate the educational benefits of diversity, studies or other expert-based information can be helpful. 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

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use of race or national origin (see following section on Narrow Tailoring).

Standards

A college may pursue its diversity interest consistent with the strict scrutiny test by using race or national origin as one of several factors considered in the admissions process.

For the consideration of race and national origin in admissions to be lawful under a diversity rationale, an institution's diversity program must include diversity characteristics in addition to race or national origin. Such characteristics may include other life experiences, achievements, talents, interests, extracurricular activities, economic disadvantages, geographic background, as well as various others. The relative weight granted to each factor in making admissions decisions is properly determined by the college or university: race or national origin may be accorded greater weight than other factors, for example, in a multi-factored diversity program, when diversity objectives related to race or national origin remain unfulfilled while race neutral components of diversity have been achieved.

Checkpoints

8. Is affirmative action in admissions used to achieve the educational benefits of diversity? What is the institution's definition of diversity? Does diversity include factors other than race and ethnicity? 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

Colleges may seek diversity in admissions to fulfill their academic mission through the "robust exchange of ideas" that flows from a diverse student body. Bakke, 438 U.S. at 312-313. Under the Bakke decision, which governs our interpretation of Title VI, achieving the educational benefits of campus diversity is a compelling interest for purposes of the strict scrutiny test. Since Bakke, the Supreme Court has decided a number of affirmative action cases, none of which has invalidated Justice Powell's opinion in Bakke that the promotion of diversity in the higher education setting can be a compelling interest.

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Note that according to the Hopwood decision, diversity is not lawful under the Constitution to justify the consideration of race or national origin. Hopwood applies in Mississippi, Louisiana, and Texas and is not legally binding in any other state. Note also that Hopwood upheld the consideration of race or national origin by an institution where necessary to remedy discrimination by that school.

C. Is the use of race in remedial or diversity programs narrowly tailored?

Overview: 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?

Standards

The Department of Education will consider factors established by case law in assessing whether a college's consideration of race or national origin meets the narrow tailoring requirements of Title VI and the Constitution. An overriding question is whether the school's use of race is focused as narrowly as possible on the achievement of the school's compelling interest, e.g., remedial or diversity objectives.

First, it is necessary to determine the efficacy of alternative approaches. It is important that consideration has been given to the use of race-neutral alternative approaches (e.g., the use of admissions criteria that do not include race or national origin, or recruitment programs). Race or national origin may be considered in admissions decisions only if a college determines that alternative approaches to the use of race have not been or will not be effective.

Checkpoints

9. 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?
10. If race-neutral measures were not undertaken, why does the institution believe that such efforts would be insufficient to enhance diversity without the plus-factor credit?

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11. 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?

Standards

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. A program that includes a broad, multi-factored definition of diversity, designed to produce articulated educational benefits may measure whether multi-factored diversity has been achieved in determining whether programs are narrowly tailored. Lawful diversity admissions programs, however, should not set aside positions based on race or national origin. Unless essential to remedying discrimination and its effects, such set-asides or quotas are inconsistent with the legal requirement of Bakke that all applicants be able to compete for all vacancies and have their individual merits considered. Rather, race may be used as one factor among many.

Checkpoint

12. 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?

Standards

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. Thus, for example, the use of race or national origin as among multiple factors considered in admissions should continue only while necessary to overcome the effects of past discrimination and achieve a diverse student body. Institutions should periodically assess whether the use of race or national origin to achieve diversity continues to be necessary or whether the admissions system should be modified

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based on changing circumstances. OCR considers annual reviews the best practice to support this aspect of Title VI's narrow tailoring requirements.

Checkpoint

13. Is the affirmative action program (based on diversity or remedying the effects of discrimination) periodically reviewed and modified? If so, 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?

Standards

The use of the classification 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.

The burden on those who are not conferred the benefit of the affirmative action program (generally, non-minority students) must be considered. Lawful diversity programs do not include separate tracks, separate decision-making procedures, or different admissions formulas based on the race or national origin of applicants. It is important that institutions exercise care to avoid separate procedures that are based on race or national origin as such procedures may prevent competition among applicants of all races and national origins. A use of race or national origin may impose such a severe burden on particular individuals that it is too intrusive to be considered narrowly tailored. See Wygant v. Jackson Board of Education, (use of race in imposing layoffs involves severe disruption to lives of identifiable individuals).

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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Narrow Tailoring (Continued)**Checkpoint**

14. 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?

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13**III. Financial Aid****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 Handout). Note that the standards for admissions and financial aid are generally the same.

In the Podberesky v. Kirwin decision¹, the Fourth Circuit, which covers Maryland, Virginia, West Virginia, North Carolina and South Carolina, ruled that the challenged race-targeted scholarships at the University of Maryland did not meet the Supreme Court's strict scrutiny standard. The court did not rule that all race-targeted scholarships are impermissible. Rather, it held that colleges may establish race targeted scholarships to remedy the present effects of prior discrimination, so long as such measures are narrowly tailored to achieve that objective. The court found, however, that the University had not demonstrated the need for remedial action, and that even if such need existed, the University's scholarship program was not narrowly tailored to cure the present effects of the University's previous discrimination. The Podberesky decision, which rests on the nature and weight of the University's factual evidence and the extent to which it met the "narrow tailoring" standard, does not require the Department to modify its policy guidance on remedial race-targeted scholarships. The evidentiary standards set out in the Podberesky decision should be used in applying the Department's guidance in the states of the Fourth Circuit -- Maryland, Virginia, West Virginia, North Carolina and South Carolina.

38 F.3d 147 (4th Cir. 1994), cert. den., 115 S. Ct. 2001 (1995).

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The following questions are keyed to the financial aid guidance, which should be considered carefully in assessing financial aid programs:

Checkpoints**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"? 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?

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

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.

"Race-based scholarships" or "race-targeted aid" mean, for the purposes of this memorandum, 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 scholarship policy.

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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. What are the racial or national origin groups eligible for race-based aid? What is the nature of the past discrimination against that group? Are there court, legislative, or administrative findings of past discrimination at that institution? If so, are there continuing effects of past discrimination at the institution? If there have not been formal findings of past discrimination, is there a strong basis in evidence to believe that there are current effects of discrimination?

D. Principle 4: Financial Aid to Create Diversity

5. Is affirmative action in financial aid used for purposes of diversity? What is the institution's definition of diversity? Has the institution identified the benefits of diversity?
6. Is special consideration for minority status used as one factor among many factors for scholarship awards in some cases? If many factors are considered, what are the other factors? How are the factors weighted and considered, and why?

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.

7. 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 means have not been tried, does the institution reasonably believe that race-neutral efforts would be insufficient to meet its diversity goals without race-based scholarships?

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8. Is the use of race-based scholarships in the financial aid process periodically reviewed and modified? What standards are used in the review? When was the last such review?
 9. 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?
 10. 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?
- F. Principle 5: Private Gifts Restricted by Race or National Origin**
11. 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?
 12. 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?