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U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY IN POSTSECONDARY EDUCATION

Introduction

The United States Department of Education (ED) and the United States Department of Justice (DOJ) (collectively, the Departments) are issuing this guidance to explain how, consistent with existing law, postsecondary institutions can voluntarily consider race to further the compelling interest of achieving diversity. This guidance replaces the August 28, 2008 letter issued by ED's Office for Civil Rights (OCR) entitled "The Use of Race in Postsecondary Student Admissions." Ensuring that our nation's students are provided with learning environments comprised of students of diverse backgrounds is not just a lofty ideal. As the Supreme Court has recognized, the benefits of participating in diverse learning environments flow to an individual, his or her classmates, and the community as a whole. These benefits greatly contribute to the educational, economic, and civic life of this nation.

Learning environments comprised of students from diverse backgrounds provide an enhanced educational experience for individual students.[1] Interacting with students who have different perspectives and life experiences can raise the level of academic and social discourse both inside and outside the classroom; indeed, such interaction is an education in itself. By choosing to create this kind of rich academic environment, educational institutions help students sharpen their critical thinking and analytical skills.

These skills not only enhance academic progress, but also prepare students to succeed in the professional world. The skills students need for success in "today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[2] Moreover, postsecondary institutions play a unique role in opening doors for "all segments of American society, including people of all races and ethnicities."[3] As a result, "attaining a diverse student body is at the heart of [a university's] proper institutional mission."[4]

For all these reasons, the Departments recognize the compelling interest that postsecondary institutions have in obtaining the benefits that flow from achieving a diverse student body.[5] This

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[1] *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

[2] *Id*.

[3] *Id*. at 331-32.

[4] *Id.* at 329.

[5] The Departments also recognize the compelling interest in remedying the vestiges of past racial discrimination, which is not the focus of this guidance. Some postsecondary institutions are required to consider race pursuant to

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guidance addresses the degree of flexibility that postsecondary institutions have to take proactive steps, in a manner consistent with principles articulated in Supreme Court opinions, to meet this compelling interest. As the Supreme Court has made clear, such steps can include taking account of the race of individual students in a narrowly tailored manner, as described below.

Section I of this guidance describes the relevant legal framework for considering race to further the compelling interest in achieving diversity in postsecondary institutions. Section II sets forth considerations for postsecondary institutions in their voluntary use of race to achieve diversity. Section III summarizes key steps for institutions seeking to achieve diversity. Section IV provides examples of ways that, in light of this guidance, postsecondary institutions may choose to advance this compelling interest.

I. LEGAL FRAMEWORK

Under the Civil Rights Act of 1964, the Departments are responsible for enforcing federal laws that bar public colleges and universities, as well as private colleges and universities that receive federal financial assistance, from discriminating on the basis of race, color, or national origin. See 42 U.S.C. §§ 2000(c)-(d) (Title IV and Title VI).[6] Racial discrimination by institutions that violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution also violates Titles IV and VI.[7] Accordingly, the Departments here consider not only federal statutory law, but also case law interpreting the Equal Protection Clause, particularly the Supreme Court's decisions in *Grutter v. Bollinger*[8] and *Gratz v. Bollinger*.[9]

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desegregation orders, compliance plans, or other legal mandates to remedy discrimination. This guidance does not address the remedial use of racial classifications in these or other circumstances; nothing in it should be read to imply any limitations on remedial orders by courts or administrative agencies. In addition, nothing in this guidance addresses other claims of compelling interests justifying the consideration of race, which the Departments will consider on a case-by-case basis. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (stating that the Court's opinion was issued "[w]ithout attempting in these cases to set forth all the interests a school district might assert").

[6] Throughout this guidance, references to "race" includes race, color, and national origin. When evaluating efforts to promote diversity that fall within the scope of Title VI (and Title IV in the case of DOJ), the Departments will apply this guidance.

[7] *See Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001) (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (opinion of Powell, J.)).

[8] 539 U.S. 306 (2003).

[9] 539 U.S. 244 (2003). This guidance is also informed by *Parents Involved*, which discussed the use of race in student assignment in the K-12 context. Further information on the *Parents Involved* decision is contained in the Departments' "Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools."

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A. ***Grutter v. Bollinger***

In *Grutter*, the Court evaluated the University of Michigan Law School's admissions program under the strict scrutiny standard of review, requiring that the Law School demonstrate that its program was narrowly tailored to serve a compelling government interest. The Court has repeatedly emphasized that the application of strict scrutiny, in and of itself, is "'not fatal in fact.'" *Grutter*, 539 U.S. at 327 (quoting *Adarand v. Pena*, 515 U.S. 200, 237 (1995)). Applying that standard, the Court held that postsecondary institutions have a compelling interest in the benefits that flow from a diverse student body. In reaching this result, the Court followed its tradition, grounded in the First Amendment, of "giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits." *Grutter*, 539 U.S. at 328. As described further below, the Court also held that the Law School's program was narrowly tailored to meet its compelling interest.

1. The Law School Had a Compelling Interest in Achieving Diversity.

The Court recognized that the benefits of student body diversity in institutions of higher education are "substantial," as well as "important and laudable." *Id*. at 330. One aspect of such student body diversity, the Court recognized, can be racial diversity. The Court accepted the Law School's goal to achieve broad diversity where race was "'only one element in a range of factors a university properly . . . consider[ed] in attaining the goal of a heterogeneous student body.'" *Id*. at 324 (quoting *Bakke*, 438 U.S. at 314 (opinion of Powell, J.)).

The Court also held that the Law School could permissibly seek a "critical mass" of students of underrepresented groups — a concept "defined by reference to the educational benefits that diversity is designed to produce" — as part of its efforts to achieve student body diversity. *Id*. at 330. The Court recognized that a critical mass is necessary to dispel stereotypes about minorities, including assumptions that minorities share the same characteristic viewpoints, as well as to ensure that there are enough members of underrepresented minority groups for those students to participate in the classroom without feeling isolated or feeling like spokespersons for their race. *Id.* at 318-19.[10]

2. The Law School's Admissions Program Was Narrowly Tailored.

The Court looked to several criteria in concluding that the Law School's admissions program was narrowly tailored: whether the Law School had considered workable race-neutral

[10] The Court also recognized that the concept of critical mass could involve "some attention to numbers": "[t]here is of course 'some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted.'" *Id.* at 336 (quoting *Bakke*, 438 U.S. at 323 (opinion of Powell, J.)). Indeed, "'some attention to numbers,' without more, does not transform a flexible admissions system into a rigid quota." *Id.* Such consideration of numbers is distinct from setting impermissible quotas, which exist where an institution: (1) imposes a fixed number or percentage that must be attained or that cannot be exceeded; and (2) insulates particular categories of individuals, based on their race, from comparison with all other candidates for the available openings within its schools or programs. *Id*. at 335.

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alternatives; whether the admissions program provided for flexible and individualized review of applicants; whether it unduly burdened students of any racial group; and whether the consideration of race was limited in time and subject to periodic review. *See id*. at 334-43.

Consideration of Workable Race-Neutral Alternatives

The Court held that before using race as a factor in individualized admissions decisions, a postsecondary institution must conduct a serious, good faith review of workable race-neutral alternatives to achieve the diversity that it seeks. *Id.* at 339. An institution may deem unworkable a race-neutral alternative that would be ineffective or would require it to sacrifice another component of its educational mission. *Id.* at 339-40. Applying this standard, the Court found that the Law School "adequately considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission." *Id.* at 340.

Flexible and Individualized Review

The Court concluded that the Law School's admissions program provided for a "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." *Id*. at 337. Under the Law School's program, race was not an applicant's "defining feature" across the board, *id.* at 337; race played no role in some admissions decisions while in others it was the "determinative" factor. *Id*. at 319.

Effect on Other Students

The Law School did not unduly burden members of any racial group because it allowed each applicant to compete with every other applicant for every available opening, and made decisions based on individualized consideration of "'all pertinent elements of diversity.'" *Id.* at 341 (citing *Bakke*, 438 U.S. at 319 (opinion of Powell, J.)). The Court noted that the Law School's program also resulted in the admission of certain "nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants." *Id*. (quoting *Bakke*, 438 U.S. at 317 (opinion of Powell, J.)).

Limited in Time and Subject to Periodic Review

The Court held that admissions programs must be limited in time and subject to periodic review "to determine whether racial preferences are still necessary to achieve student body diversity." *Id*. at 342. The Court accepted the Law School's assurances that it would "terminate its race-conscious admissions program as soon as practicable." *Id*. at 343.

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B. Gratz v. Bollinger

In *Gratz*, the Court — for the reasons set forth in *Grutter* — accepted that the University of Michigan had a compelling interest in achieving diversity, including racial diversity, in its undergraduate student body. *Gratz*, 539 U.S. at 268. The Court struck down the University's undergraduate admissions program, however, because the University used a point system that automatically awarded 20 points, one-fifth of the points required to guarantee admission, to every "underrepresented minority" applicant solely because of race. *Id.* at 270. The Court explained that this policy was not sufficiently flexible and had "the effect of making 'the factor of race … decisive' for virtually every minimally qualified underrepresented minority applicant." *Id*. at 272 (quoting *Bakke*, 438 U.S. at 317 (opinion of Powell, J.)). The Court also faulted the University for failing to provide an individualized review of applicants, and dismissed the argument that the sheer volume of applications for admission made individualized review impossible.

II. APPLICATION TO POSTSECONDARY EDUCATION

This Section sets out considerations for postsecondary institutions in their voluntary use of race to achieve diversity. The discussion in this and the following sections assumes that postsecondary institutions are acting to achieve diversity; institutions should be prepared to explain how this objective fits within their overall mission. Nothing in this guidance should be understood to suggest that race, or racial impact, may be considered in furtherance of an invidious purpose.[11]

The institution should, based on its particular educational objectives and unique needs, determine how it will achieve the desired benefits it is pursuing. An institution may permissibly aim to achieve a critical mass of underrepresented students, as described in Section I(A)(1) above.

In implementing its program, an institution should consider whether it can meet its compelling interest in diversity by using race-neutral approaches. An institution using a race-neutral approach for the purpose of achieving diversity may consider the impact a given approach might have on students of different races,[12] and thus may take into account how employing the approach would help achieve diversity. Race-neutral mechanisms can be used for decisions made about individual students, such as admissions decisions, as well as for decisions made on an aggregate basis, such as selecting partner schools that would serve as pipelines to the institution.[13]

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[11] *See, e.g.*, *Parents Involved*, 551 U.S. at 788-89 (Kennedy, J., concurring in part and concurring in the judgment) (clarifying that the leeway to "devise race-conscious measures" to achieve diversity or avoid racial isolation extends only to circumstances where entities "pursue the goal of bringing together students of diverse backgrounds and races"); *cf., e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-68 (1977); *Washington v. Davis*, 426 U.S. 229, 239-42 (1976).

[12] *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment).

[13] *See* Section IV(B) below (describing pipeline programs).

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Institutions are not required to implement race-neutral approaches if, in their judgment, the approaches would be unworkable. In some cases, race-neutral approaches will be unworkable because they will be ineffective to achieve the diversity the institution seeks. Institutions may also reject approaches that would require them to sacrifice a component of their educational mission or priorities (*e.g.*, academic selectivity).[14]

When an institution is taking an individual student's race into account in an admissions or selection process, it should conduct an individualized, holistic review of all applicants. That is, the institution should evaluate each applicant's qualifications in a way that does not insulate any student, based on his or her race, from comparison to all other applicants. An institution may assign different weights to different diversity factors based on their importance to the program. Race can be outcome determinative for some participants in some circumstances. But race cannot be given so much weight that applicants are defined primarily by their race and are largely accepted or rejected on that basis.

Conducting an individualized review will help to ensure that the institution considers the impact of its decision-making on all its applicants. Finally, the institution should periodically review its programs to determine whether the use of racial classifications remains necessary and should modify its practices as needed.

III. KEY STEPS FOR IMPLEMENTING PROGRAMS TO ACHIEVE DIVERSITY

Based on the foregoing, here is a checklist of key steps for colleges and universities seeking to achieve diversity:

Identifying the Reason for Your Plan

- Determine how this compelling interest relates to your institution's mission and unique circumstances.

- Evaluate how you will know when your compelling interest has been achieved.

Implementing Your Plan

- Consider whether there are race-neutral approaches that you can use, such as looking at socioeconomic status or the educational level attained by parents. In selecting among race-neutral approaches, you may take into account the racial impact of various choices.

- If race-neutral approaches would be unworkable to achieve your compelling interest, you may then consider approaches that take into account the race of individual students. When taking into account an individual student's race among other factors to achieve diversity, evaluate each student as an individual and do not make the student's race his or

[14] *See Grutter*, 539 U.S. at 340.

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her defining characteristic. Periodically review your program to determine if you continue to need to consider the race of individual students to achieve your compelling interest. It is important to ensure that race is used to the least extent needed to workably serve your compelling interest.

- It would be helpful to maintain documents that describe your compelling interest, and the process your institution has followed in arriving at your decisions, including alternatives you considered and rejected and the ways in which your chosen approach helps to achieve diversity. These documents will help you answer questions that may arise about the basis for your decisions.

IV. APPROACHES TO ACHIEVING DIVERSITY

This Section provides practical examples of actions that postsecondary institutions may consider, consistent with prior Supreme Court opinions and the principles set forth in the previous Sections, as necessary to achieve diversity. In choosing among options, postsecondary institutions should keep in mind the framework discussed above. We encourage institutions to contact us for technical assistance in applying this guidance to their particular situations. These examples are intended to be illustrative, not exhaustive. Institutions may choose to pursue more than one of these options (*e.g.*, a combination of recruiting and pipeline programs as well as admissions procedures) or may design other options that are consistent with this guidance.

A. Admissions

Postsecondary institutions may develop admissions procedures designed to achieve diversity.

Examples

Example 1: An institution could consider an applicant's socioeconomic status, first-generation college status, geographic residency, or other race-neutral criteria if doing so would assist in drawing students from different racial backgrounds to the institution.

Example 2: An institution could include in its admissions procedures special consideration for students who have endured or overcome hardships such as marked residential instability (*e.g.*, the student moved from residence to residence or school to school while growing up) or enrollment in a low-performing school or district.

Example 3: An institution could implement a plan that guarantees admission to a top percentile of students graduating from all in-state high schools.

Example 4: An institution could select schools (including community colleges) based on their demographics (*e.g.*, their racial or socioeconomic composition), and grant an admission preference to all students who have graduated from those schools, regardless of the race of the individual student.

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Example 5: An institution could consider an individual student's race among other factors in its admissions procedures; in so doing, an institution should follow the legal guidelines concerning the individualized use of race that are set forth above.

B. Pipeline Programs

Institutions of higher education may develop pipeline programs to promote diversity at the undergraduate or graduate levels. Pipeline programs include partnerships between postsecondary institutions and school districts (or specific schools), as well as other programs to introduce potential applicants to the institution. For example, a postsecondary institution might invite students from the partner school or program to the institution's campus for informational visits, mentoring or tutoring, summer classes, and workshops on academic, career, and other interests. The postsecondary institution might also send its own volunteers or staff to the partner school or program. The institution typically selects its partner (*e.g.*, a school, district, or community college) and in some programs, the institution may select individual students to participate in its program.

Pipeline programs can foster student body diversity at a postsecondary institution by increasing potential applicants' awareness of the institution and by assisting a diverse group of potential applicants to be better prepared to qualify for admission. In addition, pipeline programs are often used as a means to connect an institution to the local community.

Examples

Example 1: An institution could select high schools for partnership based on one or more of the following: school-wide performance on standardized tests, school-wide socioeconomic characteristics, geographic proximity to the institution, racial composition of the school's student body, or the similarity of academic or programmatic themes between the institution and the school with which it is partnering. In selecting schools using such criteria, a college or university may take into account the impact of those criteria on the diversity of its programs.

Example 2: An institution could form partnerships with other institutions of higher education, such as Historically Black Colleges and Universities (HBCUs), other minority-serving institutions, or community colleges to help the institution increase diversity.

Example 3: An institution that selects individual students for participation in programs could consider race among a range of factors, such as socioeconomic status, parental education level, work experience, or personal essays, to help the institution to achieve its interest in diversity. When taking account of an individual student's race as a factor, an institution should follow the legal guidelines concerning the individualized use of race that are set forth above.

C. Recruitment and Outreach

Postsecondary institutions may develop recruitment and outreach initiatives in an attempt to further diversity by broadening their applicant pools and thereby increasing the number of

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applicants from underrepresented groups. While recruitment and outreach efforts do not guarantee or increase the likelihood of admission for any applicant, efforts that are more inclusive can assist postsecondary institutions to increase the diversity of their applicant pools.

Examples

Example 1: An institution's recruitment and outreach procedures could target school districts or high schools that are underrepresented in the institution's applicant pool by focusing on geographic underrepresentation (*e.g.*, schools in the Midwest, or urban or rural communities) or other characteristics (*e.g.*, low-performing schools or schools with high dropout rates). Such targeting may also assist the institution in achieving racial diversity.

Example 2: An institution could target districts or schools that enroll students who are predominantly from low-income households to help the institution achieve its interest in racial diversity.

Example 3: As part of its overall recruitment efforts, a postsecondary institution could target geographic areas, specific districts or schools, or colleges (*e.g.*, community colleges, or, at the graduate level, HBCUs or other minority-serving institutions), that have a significant number of potential applicants who are of races underrepresented in the institution's applicant pool.

Example 4: An institution could consider other recruitment and outreach tools to increase diversity in its applicant pool, such as, as part of its overall recruitment efforts, direct mail and other outreach efforts to potential applicants — including the use of advertising in media aimed at specific racial groups, participation by admissions staff in community-sponsored events aimed at informing underrepresented groups about the institution, and encouraging individual students to apply.

D. Mentoring, Tutoring, Retention, and Support Programs

Many institutions operate mentoring, tutoring, retention, and support programs for enrolled students who may need additional assistance in academic or other areas to succeed at the institution. The Departments recognize that a postsecondary institution seeking the educational benefits of diversity not only must enroll a diverse group of students, but also must retain those students.

Examples

Example 1: An institution could provide mentoring, tutoring, or other academic support to all enrolled students who are at risk of not completing their programs.

Example 2: A college could sponsor a selective mentoring program in which there are a limited number of spaces for student participants. In selecting participants for the program, the college could consider race among a range of attributes, such as grade point averages, community service and faculty recommendations. When taking account of an individual student's race as a

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factor, an institution should follow the legal guidelines concerning the individualized use of race that are set forth above.

Example 3: An institution could sponsor retention or support programs open to all students that offer content that the institution believes might be of particular interest to a group targeted for retention. Such programs could, for example, hold motivational lectures (*e.g.*, highlighting the accomplishments of Latino business leaders or the artistic achievements of Pacific Islanders), and could include small group follow-up workshops with mentors.

Conclusion

This document provides guidance and examples of approaches that postsecondary institutions can voluntarily use to further their compelling interests in achieving diversity, consistent with case law under Title IV, Title VI, and the Equal Protection Clause of the Fourteenth Amendment to the Constitution**.**

The issues discussed herein relate to a complex area of the law, and the Departments encourage postsecondary institutions to contact us with questions or for further assistance in applying the guidance to a specific situation. To contact the OCR regional office for your state or territory, please visit *http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm*, or contact OCR's Customer Service Team at:

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