



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS – REGION VII

November 26, 2012

Brady J. Deaton, Chancellor
Office of the Chancellor
105 Jesse Hall
Columbia, Missouri 65221

Re: OCR Docket # 07052028

Dear Chancellor Deaton:

On March 17, 2005, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received a complaint against the University of Missouri – Columbia (University or MU) alleging discrimination on the basis of race. Specifically, the complainant alleged the University administers a range of racially exclusive programs.¹ For the reasons set out below, we have determined there is insufficient evidence to conclude that the University discriminated on the basis of race as alleged in the complaint.

OCR is responsible for enforcing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and its implementing regulation, 34 C.F.R. Part 100. Title VI prohibits discrimination on the basis of race, color or national origin by recipients of Federal financial assistance. As a recipient of such assistance from the Department, the University is subject to Title VI.

OCR analyzed information from the complainant and the University. On December 18, 2006, and July 3, 2007, the University submitted data and other information to OCR regarding the financial aid programs identified in this complaint. On January 31 and March 25, 2011, the University submitted to OCR comprehensive update reports. OCR held discussions with and interviewed University officials on July 7, 2005, July 18, 2010, and February 28, 2011 and interviewed the Vice Provost with responsibility for the financial aid program in October 2011. OCR also conducted interviews with the complainant and a former faculty member at the University.

¹ Minority Biomedical Researchers Training Initiative; Missouri's Alliance for Graduate Education and the Professoriate; Gus T. Ridgel Fellowship for Underrepresented Minority Americans; Thurgood Marshall Academic Scholarships; MAP Program; Shell Oil Company Foundation Scholarship; Financial Aid for 4+1 Master's Students; George C. Brooks Scholar Award; Diversity Award; and, the Transition Scholarship.

8930 WARD PARKWAY, SUITE 2037, KANSAS CITY, MO 64114-3302
www.ed.gov

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

Findings

The University's financial aid program awards undergraduate and graduate students grants, scholarships, fellowships, loans and work study from Federal, State, University and private sources. Scholarship aid from all sources totaled \$141,722,933 for undergraduate and graduate students in 2009-10, from 1,881 scholarships.² During our investigation, the University acknowledged that some of its scholarships provide aid based on a combination of merit and other criteria, including race-as-a-factor.³ The University also acknowledged that some scholarships, for example the University-funded Diversity, Transition, Brooks and Suggs programs, restrict participation to members of certain races and national origins who meet other race-neutral merit criteria. In total, OCR's investigation found 52 scholarships that either involved race or national origin as one factor among other factors or as a condition of eligibility.

OCR analyzed the University's policies and practices for administering scholarship programs under Title VI and the Department's "Notice of final policy guidance on the use of race and national origin in student financial aid programs, Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964," 59 Fed. Reg. 8756 (February 23, 1994) (1994 Guidance). Specifically, OCR analyzed the evidence to determine whether the University met its burden of showing that its use of race and national origin in grant and scholarship programs was narrowly tailored to achieve the University's compelling interest in diversity, in accordance with Principle 4 of the 1994 Guidance.

Compelling Interest in Diversity

The University of Missouri asserts that diversity is a central component of the University's educational mission. "The University has a compelling interest in creating and maintaining a diverse campus environment to achieve educational benefits, especially for the benefit of our students and their development as productive citizens in a global society." The University has determined that the use of race in awarding scholarships is necessary to further this compelling interest.

The University also showed that it considers diversity broadly and not simply in terms of race or national origin. "In its broadest sense, the diverse community that we seek is one made up of individuals from different races, ethnic backgrounds, economic strata, religious beliefs, sexual orientations, talents, life experiences, interests and abilities, geographical and national origins,

² In this letter, the term "scholarship" refers to MU's financial aid programs that award scholarships, grants and fellowships from public or private external sources or from University funds. The terms scholarship aid, grant aid, and gift aid refer to scholarships.

³ This letter refers to three categories of scholarships that use race or national origin: "race-as-a-factor" aid uses race as one factor among other diversity factors and race is not a condition of eligibility; "race-targeted" aid uses race as a condition of eligibility, almost always in addition to other race-neutral factors like financial need or academic credentials; and "race-involved" aid includes all aid that is either race-targeted or that uses race-as-a-factor.

and political beliefs and values – all of whom share a united belief in the importance of education that is provided at MU.”

The Department’s 1994 Guidance determined that postsecondary institutions may use race in a narrowly tailored way to award financial aid to achieve a compelling interest in diversity.⁴ In 2003, the Supreme Court upheld the view that diversity is a compelling interest. The rationales relied on in *Grutter v. Bollinger*⁵ to uphold a compelling diversity interest, as did the rationales relied on by Justice Powell in *Regents of the University of California v. Bakke*, apply to institutions that use race and national origin in awarding financial aid to seek the benefits of diversity.

In *Grutter*, the Court evaluated the University of Michigan Law School’s admissions program under the strict scrutiny standard of review, requiring the Law School to demonstrate that its program was narrowly tailored to serve a compelling interest. 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.

The Court unequivocally recognized that the benefits of student body diversity in institutions of higher education are “substantial,” “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 U.S. Department of Education and the U.S. Department of Justice issued in 2011 Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education (2011 Guidance), which confirmed “the compelling interest that postsecondary institutions have in obtaining the benefits that flow from achieving a diverse student body.”⁶

In accordance with these authorities, OCR has determined that the University has a compelling interest in diversity.

⁴ The 1994 Guidance relied on Justice Powell’s opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), to conclude that diversity is a compelling interest that supports the narrowly tailored use of race in higher education admissions.

⁵ 539 U.S. 306, 328-33 (2003).

⁶ Guidance at p.1 (December 2011), <http://www.ed.gov/ocr/docs/guidance-pse-201111.html>.

Narrow Tailoring

Having recognized the University’s compelling interest in diversity, OCR must determine whether the University’s use of race or national origin in awarding financial aid is narrowly tailored to achieve the University’s diversity interests. According to the 1994 Guidance, this requires a “case-by-case determination that is based on the particular circumstances involved.” 59 Fed. Reg. at 8761. Further, in applying the 1994 Guidance, OCR is guided by the Supreme Court’s admonitions that narrow tailoring analysis requires an exacting investigation of the use of race, in the context of the particular institutional and individual interests involved. According to *Grutter*, “[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause. . . In *Adarand* . . . we made clear that strict scrutiny must take ““relevant differences” into account.’ Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision maker for the use of race in that particular context.” 539 U.S. at 327. In framing the narrow tailoring analysis, *Grutter* emphasized that the narrow tailoring inquiry “must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity.” *Id.* at 333-34.

In determining whether an institution’s use of race in financial aid programs is narrowly tailored, OCR, in accordance with its 1994 Guidance and Supreme Court guidance on narrow tailoring, weighs each of these considerations:

- (1) Whether race or national origin are used flexibly by the financial aid program as a whole and whether race is predominant;
- (2) Whether the use of race or national origin is of limited extent and aligned with the University’s diversity interest;
- (3) Whether the use of race or national origin is of limited duration, including whether the institution regularly reexamines its use of race or national origin in awarding financial aid to determine whether it is still necessary to achieve its goal;
- (4) Whether the effect of the use of race or national origin on students who are not direct beneficiaries of that use is sufficiently diffuse so as not to create an undue burden on their opportunity to receive financial aid; and
- (5) Whether the University has reviewed in good faith whether race-neutral means or less extensive or intrusive uses of race or national origin in awarding financial aid have been or would be workable to achieve the benefits of diversity.

1) FLEXIBILITY OF THE USE OF RACE AND NATIONAL ORIGIN BY THE SCHOLARSHIP PROGRAM
AS A WHOLE AND WHETHER RACE IS THE DECISIVE FACTOR WITHIN THE PROGRAM

Under the 1994 Guidance, race, if used, must be used flexibly in awarding scholarships to achieve diversity. Under the 1994 Guidance, that race-targeted scholarships use race or national origin as a condition of eligibility does not preclude compliance with narrow tailoring flexibility requirements so long as the financial aid program as a whole provides individual competitive consideration for scholarships. An institution may also show flexibility by making exceptions to the use of race in appropriate circumstances or waiving racial considerations if no qualified applicants can be found. Consistent with *Grutter*, another way for a financial aid program to also use race flexibly is if it provides individual consideration to candidates for aid.

- *Program-wide Scope of OCR's Review*

Like many other postsecondary institutions, the University commonly divides its general funds into scholarships that serve a variety of interests, e.g., academic merit, socioeconomic disadvantage, athletic ability, and multi-factored diversity. Whether funded through public or private money, University scholarships support numerous objectives. Student aid packages may commonly include combinations of federal and state funds for which the student is categorically entitled, grants and scholarships from University resources, grants provided through third party donors, work study awards, and a variety of loans.

In constructing each candidate's award, the financial aid office must balance available resources with the University's objectives. Each candidate's opportunity to receive grant aid necessarily involves consideration of the entire scholarship program and cannot be evaluated based solely on particular scholarships, with no regard for context. The University asserted that the scholarships at issue should be seen as components of the financial aid system and not as separate programs:

The proper level for analysis is the University's financial aid system as a whole, not each individual scholarship viewed in isolation. . . . [T]he various scholarships available to students are connected both from the perspective of applicants and students and from the perspective of the University. From the perspective of the students, the primary point of financial aid is to obtain assistance in financing . . . an education. . . . [That] a student is not eligible for a particular scholarship does not foreclose access to other scholarships. And from the perspective of the University, individual scholarships are not isolated programs but instead represent tools for allocating aid within its overall financial aid system to target desirable characteristics in students.

The University's views that individual scholarships must be viewed in the context of the scholarship program as a whole is consistent with what OCR said on this point in its 1994 Guidance.

In assessing whether a particular scholarship provides individualized consideration by examining the scholarship in the context of a university's entire scholarship program, as a whole, OCR is mindful of the 1994's Guidance's statement that

[T]here are important differences between admissions and financial aid. The . . . admissions program struck down in *Bakke* had the effect of excluding applicants from the university on the basis of their race. The use of race-targeted financial aid, on the other hand, does not . . . dictate that a student would be foreclosed from attending a college solely on the basis of race. Moreover, in contrast to the number of admissions slots, the amount of financial aid available to students is not necessarily fixed. For example, a college's receipt of privately donated monies restricted to an underrepresented group might increase the total pool of funds for student aid

59 Fed. Reg. at 8762.

- *Individual competitive consideration for scholarships that further diversity*

In addition to viewing individualized consideration through the lens of an entire scholarship program, it may be possible for a university to also provide individualized review to each applicant for aid. Here, the University has asserted that the financial aid program reviews each candidate for aid as an individual, based on consideration of all Federal, State, University and private aid sources.

The University showed that it selects scholarship recipients based on an individualized assessment of the whole file of each applicant. For each scholarship candidate, the financial aid staff considers a range of information, including the federal FAFSA form and the application to the University for aid or scholarship (which includes detailed information about an applicant's accomplishments, activities, and experiences as well as a required essay), and all information used by the admissions staff, including the application for admission. Also, for competitive scholarship programs, additional information is required; for example, separate applications and, in some cases, written statements and/or interviews.

Financial aid offers are made to induce admitted students to enroll. Each aid package reflects the aid office's estimation of the effort needed to enroll particular candidates. Financial aid packaging requires staff to be experts in building a class of students that satisfies University expectations, and this necessarily includes an assessment of a range of factors, including historical yield patterns, the current competitive environment, the nature of the applicant pool, economic trends, and application rates.

- *Whether race is the predominant factor in awarding scholarships*

The use of race-involved scholarships is not the sole source of diversity-based aid. According to the University, in the 2009-10 academic year, scholarships were offered based on diversity characteristics other than race or national origin including socioeconomic status/need, service/extracurricular accomplishments, veteran/military status, disability, non-traditional/age, graduation from particular high schools, home schooled/non-accredited high school, community college/AA degree, geography (regions of Missouri), out of state, work status (e.g., work during school), family background/upbringing (e.g., first generation college, rural background, survivor/orphans, single parent home), LGBT/Ally, and gender (in underrepresented fields, e.g.,

women in STEM and business). There were at least 400 such scholarships given in 2009-10, and they resulted in more than 19,000 awards of aid, totaling \$46,775,149. Scholarships based on the diversity consideration of need or socioeconomic status exceeded \$39 million. The financial aid program at the University thus provides an opportunity for each candidate to receive scholarship aid that recognizes his or her demonstrated academic capabilities and potential contributions to diversity.

During the investigation, OCR identified 52 undergraduate and/or graduate scholarships that use race or national origin as among the conditions of eligibility (34 race-targeted scholarships) or as a plus factor that is considered among other factors (18 scholarships). No scholarship is awarded solely based on race or national origin because other factors are also considered such as academic performance, demonstrated personal integrity, socioeconomic disadvantage and involvement in the candidate's school or community.

As provided in the 1994 Guidance, OCR will presume that the use of race or national origin as one factor among other diversity factors is narrowly tailored so long as the institution “periodically reexamines whether its use of race or national origin as a plus factor continues to be necessary to achieve a diverse student body.” 59 Fed. Reg. at 8761 n.10. The 18 race-as-a-factor scholarships at issue qualify for this presumption, given OCR's finding, *infra*, that MU has conducted, and will continue to conduct, periodic reviews in compliance with the 1994 Guidance. Even without the application of this presumption, however, OCR finds that the scholarship program as a whole, including race-as-a-factor aid, is narrowly tailored. The use of these scholarships is also relevant to whether the scholarship program as a whole, in the context of race-neutral and race-targeted aid, uses race flexibly.

Providing all students individual competitive consideration for scholarships that further multi-factored diversity through the exercise of discretion and expertise by University staff can help to show the flexibility of the financial aid program's use of race or national origin. The scholarship program pursues all facets of diversity and, even with the use of race-targeted scholarships, the program as a whole uses race, in legal effect, as a plus factor among the other diversity factors supported by grants.⁷

OCR also examined whether the use of race-involved scholarships made race a predominant or decisive factor in the scholarship program as a whole. As an example, in the University of Michigan undergraduate admissions case,⁸ the Supreme Court found the use of race predominant or decisive when, in an admissions system based on points awarded for numerous factors, the number of points given based on race had the effect of virtually guaranteeing admission to nearly

⁷ Cf. *Grutter*, 539 U.S. at 337; *Gratz v. Bollinger*, 539 U.S. 244, 277 (2003) (citing *Bakke*, 438 U.S. at 324 (requiring, in the factual context of the admissions decision, “**consideration** of each applicant's individualized qualifications, including the contribution each individual's race or ethnic identity will make to the diversity of the student body”).

⁸ *Gratz*, 539 U.S. at 271-72.

all minimally qualified minority applicants. Unlike the weight given race in that case, here status as an underrepresented minority student is not a guarantor of aid, nor is it the paramount factor affecting aid opportunities at the University.

Not all underrepresented minorities at the University receive race-involved aid. For example, in the 2009-10 academic year, at most 1,265 underrepresented-minority students⁹--constituting about 42% of the total enrolled underrepresented-minority students (2,997)--received one or more of the race-involved scholarships at issue. Among undergraduates, at most 1,187 students--constituting 46.5% of total underrepresented-minority undergraduate students (2,552)--received one or more of the scholarships at issue.

Further, in 2009-10, underrepresented-minority students were nearly 9% of total enrollment while the 1,265 student awards of race-involved aid represent less than 4% of the total enrollment. Race-involved scholarships (\$9,480,059) were a small percentage (6.7%) of the University's total grant aid in this same year, 2009-10 (\$141,722,933). In addition, according to the Vice Provost for Enrollment Management, there are students of color who receive no race-involved aid but who do receive University scholarships to support non-racial diversity, including, for example, scholarships given to veterans of the armed forces.

2) EXTENT OF USE OF RACE: ALIGNMENT WITH COMPELLING DIVERSITY INTEREST

A narrow tailoring consideration under the 1994 Guidance is whether the “amount of financial aid that is awarded based on race or national origin [is] no greater than is necessary to achieve a diverse student body.” 59 Fed. Reg. at 8762. As recognized by the 1994 Guidance, race-targeted scholarships may be necessary to achieve diversity at institutions facing particular challenges. The Department affirmed that a university may need to use race-targeted financial aid when, because of its location or reputation it has difficulty attracting sufficient applications from students of color, convincing admitted underrepresented minority students to enroll, or retaining them once they enroll. *Id.* at 8761.

OCR reviewed the University's use of race-involved scholarships in the context of the particular challenges facing the institution and its many-faceted efforts to achieve diversity, including through the scholarship program as a whole, recruitment, admissions, retention efforts and other programs designed to achieve the educational benefits of diversity.

The University is the flagship of Missouri's public higher education system. In Fall 2010, the total student enrollment was 32,415,¹⁰ comprising 2.4 % Hispanic students; 6.4 % African-American students; 2.3% Asian American students; .4% American Indian/Alaskan Native

⁹ This is an unduplicated count of awards. The actual head count of students would be lower if multiple awards to a single candidate were considered.

¹⁰ These data are reported on the University's website and is collected from [Enrollment Management](#) and [Institutional Research](#). See, <http://diversity.missouri.edu/about/stats/>

students; 79.6% Caucasian, and .8% of the students reporting multiple races/ethnicities. The University's annual growth rate for all students since 2006 has averaged 3.5%, outpacing the 2.1% growth for enrollments of students of color. The University asserted that its location in counties with large white populations combined with its 120 mile distance from the nearest urban centers were impediments to attracting and enrolling students of color. The University claimed that its history of *de jure*¹¹ and *de facto* racial segregation has lasting effects, including a small number of minority alumni; and that recent media reports of racial incidents on campus, including the use of racial slurs and harassment of students of color, also highlighted the University's own past discriminatory history.¹² Further, campus climate surveys have illustrated the continuing concern of students of color about a campus climate perceived as unwelcoming and the need for additional efforts to achieve the benefits of diversity. The University also cited the need to compete vigorously with other postsecondary institutions for the relatively small number of in-state students of color with high ACT scores. In light of these perceived barriers, and the University's diversity-based mission, the University cited the need to continue race-targeted scholarship programs to make recruitment more effective, to convince underrepresented students to enroll, and to enhance retention for students of color.

The University reported to OCR that it has found that receiving a University scholarship is a more important factor leading to enrollment for first time African-American students than for White students, to a statistically significant degree. The University asserted that this difference in importance given to University scholarships "is consistent with the professional judgment of the University's educators and the observations of our recruiters that African-American applicants see a University scholarship as an important sign of the University's welcome and commitment to them."

According to University data, the use of race-targeted scholarships has coincided with higher enrollment yields of underrepresented minority applicants. In addition the use of race-targeted aid is associated with improved retention rates. For example, the year three retention rates for underrepresented minority students who received university-funded race-targeted scholarships were higher than for those who did not receive such race-targeted scholarships and equaled the year three retention rates for non-underrepresented minority students.

For the foregoing reasons, OCR concludes that the use of race in the scholarship program as a whole is necessary to and aligned with achieving the University's diversity interests.

¹¹ The University's history of *de jure* segregation led OCR to require, in 1981, the University to submit a plan to increase African-American enrollments as part of the University's duty under Title VI to eliminate the vestiges of racial segregation. In 1989, OCR notified the Governor that the University and the State system of public higher education had substantially complied with the terms of the Title VI desegregation plan.

¹² E.g., high profile racial incidents occurred in 2010 (two white students littered the lawn of a Black Culture Center with cotton balls) and 2011 (racist slur on public outdoor sculpture).

3) DURATION OF THE USE OF RACE AND PERIODIC REVIEW

Under the 1994 Guidance, “the duration of the use of the 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.” 59 Fed. Reg. at 8762. Race-involved aid may not be continued when it is no longer necessary to further diversity.

Here, the University has demonstrated that its use of race-involved scholarships is not of unlimited duration. It has continually evaluated its practices to determine their effects on admissions and the retention of underrepresented minority students. For example, the University organized a Diversity Goals Committee in 2007 to assess its current practices for attaining campus diversity, including the use of race-targeted aid, and the potential effectiveness of alternative policies. Further, led by the Vice Provost for Enrollment Management, the University’s staff and administrators regularly review the effectiveness of the financial aid program and consider alterations. This review includes all scholarships, including those involving race. The review of the financial aid program in its entirety is conducted at least every six months and has continued for several years.

The University has informed OCR that it will continue to review the necessity for its use of race and national origin as factors in awarding scholarships. Consistent with *Grutter*, the University has assured OCR that its use of race and national origin in awarding the race-targeted and race-as-a-factor scholarships will continue only as long as necessary to achieve the educational benefits of student body diversity: “The University has no desire to offer race-based scholarship aid for its own sake, nor is it committed to providing such aid indefinitely. Instead, the University intends to reduce and eliminate race-based scholarships when its studies and judgment indicate that they are no longer needed to achieve its diversity interest. To that end, the University is committed to periodic reviews to determine whether its use of race in awarding scholarships is still needed to attain the educational benefits of a diverse student body.”

OCR finds that the University has regularly monitored its race-involved financial aid program and other measures of diversity on campus, and has adjusted the program to be responsive to changes in enrollments and other factors affecting the achievement of multi-factored diversity, including altering (and reducing) the dollar amount and number of race-involved awards over time and adjusting its financial aid packages, outreach and recruitment to better serve University objectives. This is a further indication that the University will, as it asserts, adjust or eliminate race-involved awards upon a determination that they are no longer necessary.

For the foregoing reasons, OCR concludes that the University has shown that its race-involved financial aid program is of “limited extent and duration,” and that its program is narrowly tailored in this regard.

4) CONSIDERATION OF WORKABLE ALTERNATIVES THAT USE RACE TO A LESSER EXTENT OR THAT ARE RACE NEUTRAL

The 1994 Guidance required a recipient to in good faith consider workable race-neutral alternatives to achieve the diversity that it seeks. Consistent with *Grutter*, an institution is not

required to exhaust every conceivable race-neutral alternative, and it may deem unworkable a race-neutral alternative that would be ineffective or would require it to lower its standards by sacrificing another component of its educational mission. OCR has determined that the University has satisfied this narrow tailoring factor.¹³

The University has considered and/or uses a variety of race-neutral alternatives in an attempt to improve campus diversity. For example, the University has recently conducted recruitment and outreach in urban school districts that do not send large numbers of applicants to the University. In addition, other race-neutral measures the University uses include:

- Outreach and recruitment efforts targeted at increasing applications from geographic areas that would further diversify the applicant pool,
- Offering admission to all applicants in the top 10% of their high school classes,
- Attempting to achieve the academic benefits of diversity by promoting better dialogue and interaction among diverse members of the University community, and
- Engaging in outreach efforts to improve the skills, resources, and abilities of students who might not otherwise apply to or succeed in a college environment.

In addition the University considered offering full-ride scholarships to low-income, high-performing students without considering race. The University concluded that the potential pool of students who would qualify for full ride scholarships based on very low income and high levels of performance would diminish, rather than add to racial diversity.

The University has also demonstrated its good faith review of alternatives that would use race to a lesser degree than its existing financial aid program, including modifying University scholarships to consider race only as a plus factor and using race-conscious recruitment without offering race-targeted scholarships.

MU concluded that conversion of the pool of money currently used for race-targeted scholarships to race-as-a-factor grants would not be effective because the reduced amounts granted to each underrepresented-minority student would reduce yield rates. This conclusion is supported by data showing the correlation between changes in race-targeted aid and yield rates. For example, in 1999 the University decreased the amounts and numbers of two race-targeted scholarships to meet budget pressures. Immediately after these decreases, the numbers of first time college African-American students who enrolled and their percentage of total enrollments dropped for three years. Total underrepresented-minority students also declined for the same

¹³ It is clear the University considered the adequacy of its then race-neutral financial aid program in the early 1990's when MU first added University funded race-targeted aid to the aid program. Additionally, the University reported that between 2003 and 2006-07, it considered financial aid options that did not include the use of race.

period. In addition, because of limited University resources, the University determined that diverting funds from other programs to create a larger pool of funds for race-as-a-factor scholarships would negatively impact non-minority applicants and other would-be scholarship recipients. For example, non-minority students who have received need or merit-based grants and who would not qualify for a diversity scholarship would likely receive reduced funding.

According to University recruiters, a conversion to race-as-a-factor scholarships would also hinder the University's marketing efforts to attract students who could contribute to racial and ethnic diversity. Recruiters report that the availability of race-targeted aid is effective in communicating that the University actively seeks qualified students of color and helps overcome a persisting image that the university is not welcoming. Given its persistent difficulty in attracting admissible students of color, the University has not abandoned the positive messaging and marketing benefits of the use of race-targeted scholarships.

In sum, the University's review of race-neutral alternatives has been substantive and has been conducted in good faith. As part of its periodic review process, OCR expects the University to continue to consider the workability of expanding the use of race-as-a-factor aid, including its impact on student persistence, as compared to other forms of race-involved grant aid.

5) BURDEN OF THE USE OF RACE ON STUDENTS NOT ELIGIBLE FOR RACE-INVOLVED SCHOLARSHIPS

Under the 1994 Guidance, the use of race or national origin may not create an undue burden on students who do not benefit directly from the scholarships at issue. The Guidance states: "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." *Id.* at 8762. However, as the 1994 Guidance stated, "[I]t is not necessary to show that no student's opportunity to receive financial aid has been in any way diminished by the use of the race-targeted aid." *Id.*

OCR findings regarding the flexibility of the use of race, *supra*, are relevant to whether the race-targeted aid is unduly burdensome. That the University offers race-targeted aid that is a relatively small portion of all scholarship aid tends to show that any potential burden of the use of race on individual students is diffuse. That the University provides individual competitive consideration to all aid candidates is a further indication of the diffuseness, as is the availability of non-race involved grant aid in substantial amounts that provides non-minority students opportunities to enhance their access to grants based on diversity characteristics other than race.

According to the University, it would not redistribute aid from race-involved scholarships if it could no longer award such scholarships: "[The University] would not abandon its diversity goals and simply spread those funds generally into other gift aid. Instead . . . it would shift those resources to other, albeit less efficient and effective, measures aimed at attracting and keeping URM students." The 1994 Guidance recognizes this issue: "Even in the case of a college's own funds, a decision to bar the award of race-targeted financial aid will not necessarily translate into increased resources for students from non-targeted groups. Funds for [race-targeted aid] . . .

viewed as a recruitment device might be rechanneled into other methods of recruitment if restricted financial aid is barred.” 59 Fed. Reg. at 8762.

Further, according to the 1994 Guidance, cancelling established scholarships received by non-minority students and using the funds for a race-targeted grant is an example of an undue burden. 59 Fed. Reg. at 8762. The race-involved scholarships at issue here are not funded through cancellations of existing aid programs.

The evidence demonstrates that MU’s use of race-involved aid does not create an unduly severe or intrusive burden for students not eligible for such scholarships.

Conclusion

In accordance with the 1994 Guidance, the 2011 Guidance, and *Grutter*, the University has a compelling interest in achieving the educational benefits of diversity that are necessary to fulfill its mission. Further, the University has presented sufficient evidence to show that its use of race is consistent with the 1994 Guidance and, where applicable, subsequent case law. OCR finds the evidence is not sufficient to support a finding of noncompliance with Title VI. Because there are no remaining allegations appropriate for further complaint resolution, OCR is closing this complaint as of the date of this letter.

The determinations discussed in this letter are not intended and should not be construed to pertain to any compliance issues under the regulations implementing Title VI or any other statute enforced by OCR that may exist but are not specifically addressed herein. This letter sets forth OCR’s determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR’s formal policy statements are approved by a duly authorized OCR official and made available to the public. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

OCR is committed to a high quality resolution of every case. If you have any questions, please contact me at (816) 268-0558 (voice) or (877) 521-2172 (telecommunications device for the deaf), or via email at bill.dittmeier@ed.gov.

Sincerely,

/s/

William J. Dittmeier
Chief Attorney

cc: Paul R. Maguffee
Office of the General Counsel