



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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WASHINGTON, D.C.

November 27, 2012

Dr. Holden Thorp  
Chancellor, University of North Carolina  
103 South Building  
Campus Box 9100  
Chapel Hill, NC 27599-9100

Re: OCR Complaint No. 11-07-2016  
Letter of Findings

Dear Dr. Thorp:

This is in reference to the above-referenced complaint received by the District of Columbia Office for Civil Rights (OCR), within the U.S. Department of Education (the Department), on December 5, 2006 against the University of North Carolina at Chapel Hill (the University). The complaint alleged that the University's consideration of race and national origin as factors to achieve diversity in its undergraduate classes violates Title VI.

OCR has responsibility for enforcing Title VI, at 42 U.S.C. §§ 2000d *et seq.*, which prohibits discrimination on the basis of race, color, or national origin by recipients of Federal financial assistance from the Department. The regulation implementing Title VI is found at 34 C.F.R. Part 100. The University is a recipient of Federal financial assistance from the Department and is, therefore, subject to the provisions of Title VI and its implementing regulation.

The Complainant alleged that the University's undergraduate admissions process discriminates against White and Asian-American students. In support, he: (1) provided statistical data for the Fall 2005 entering freshman class that showed a difference of 176 points between the average SAT score of accepted White students and the average SAT score of accepted African American students and 235 points between the average SAT score of accepted Asian American students and the average SAT score of accepted African American students; (2) stated that a University admissions person said during a forum that race is used as a tie-breaker; and (3) provided anecdotal information about students who applied to enter in the fall of 2003.

OCR's investigation included extensive interviews of University administrators and faculty, as well as a review of relevant University policies, records, and applicant files. As discussed more fully below, the information gathered in the investigation demonstrated the University's compliance with Title VI, thus OCR is closing this complaint as of the date of this letter.

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

### The Admissions Process

The University has two application deadlines for first-year admission, the first for non-binding early action in October and the second for regular admission in January. Early action applicants are notified of the University's decision by the end of January and regular applicants are notified of the decision by the end of March. Admissions staff consistently reported that the evaluation process for both sets of candidates is the same.

Each application is randomly assigned to an admissions officer who serves as the "first reader." That officer reads the application and enters a recommended decision, which could be to admit, deny, defer, or waitlist. The reader also enters comments in support of his recommended decision. The application is then assigned to a "second reader," who repeats the process. If the two readers agree and either the applicant is a North Carolina resident or the applicant is from out of state and the recommendation is to deny admission, then the decision is entered as a tentative decision. If the two readers do not agree or if the applicant is from out of state and the recommendation is to admit, then the application is reviewed by the Admissions Director, the Admissions Deputy Director, or a subcommittee of admissions officers, and a tentative decision is entered.

Admissions officers consistently reported to OCR that they base their recommendations on a holistic review of each application. All denied that any formulas are used and stated that the weight assigned to any one criterion, if any, varies from student to student. The Admissions Director identified more than forty criteria that might be used, grouped broadly in eight categories: academic performance (such as grade point average, rank in class, and trends in grades), academic program (such as the rigor of courses taken), standardized testing (including SAT scores), extracurricular activity (such as work history and demonstrated leadership), special talent (including talent in athletics and music), essay (including persuasiveness, evidence of self-knowledge, and unique perspective), background (including socio-economic status, legacy status, race, and national origin), and personal (including curiosity, integrity, and history of overcoming obstacles).

After preliminary or tentative decisions have been entered for all candidates, the admissions office uses a statistical model to predict the number of entering students based on the applications that have been provisionally marked for admission. The office then conducts an end-of-season review, referred to as the school group review or SGR. The review serves two purposes: quality control and alignment of the predicted enrollment to the number of available spaces for the entering class.<sup>1</sup> During SGR, a report is run showing every applicant from the same high school, with applicants ordered from highest to lowest grade point average. The Admissions Director explained that, as a matter of fairness, he needs to ensure that the decisions are "defensible within the context of the student's high school." Although applicants are not batched by high school during the review process and applicants from the same high school are

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<sup>1</sup> In past years, the office conducted at least two separate end-of-season reviews. The purpose of the first review was to align the projected enrollment with the number of available spaces. Because the projected enrollment almost always exceeds the number of available spaces, that review was referred to as the "purge." After that review was complete, the office would conduct the SGR for the purpose of quality control. In more recent years, those reviews are conducted simultaneously in SGR.

not competing against each other *per se*, applicants are evaluated in part based on the extent to which they have taken advantage of the most rigorous courses available at their school; accordingly, it is important that readers consistently assessed the curriculum available within a school. One purpose of SGR is to identify anomalies in assessments of candidates' programs of study. Admissions officers also look for "outlying" decisions such as a denied student with a higher GPA than an admitted student. Upon seeing those outliers, the admissions officers review the applicants' files. If a decision is reasonable based on the applicant's whole file, then the decision is upheld; however, the decision might be changed if, for example, the decision was based on a misunderstanding of the high school's program or simply was entered incorrectly.

The files reviewed by OCR corroborated the admissions officers' description of a holistic review process. Evaluator comments consistently reflected consideration of all aspects of applicants' files, such as by noting significant information from counselor or teacher recommendations (e.g., "Counselor states that she has a hard time taking upper level classes because of her commitment to band"), the quality or lack thereof of applicants' essays (e.g., "Her very confident essays ease my fears of senior year slump"; "Essays predictable and flat"), significant leadership experience, extracurricular involvement (e.g., "he's an accomplished martial artist"; "wilderness leader"), and grade patterns, such as downward trends or increasing rigor. As discussed in more detail below, the files also reflected consideration of non-race diversity criteria.

### Legal Standards and Analysis

Title VI prohibits discrimination on the basis of race, color or national origin in any program or activity that receives Federal financial assistance. A use of race or national origin in admissions that violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution also violates Title VI.<sup>2</sup> In investigating the use of race by programs that seek diversity, OCR considers not only Title VI and its regulations, but also case law interpreting the Equal Protection Clause, particularly the Supreme Court's decisions in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003).

Under Title VI, strict scrutiny review is applied to the use of an individual's race in admissions in federally assisted programs. Under the strict scrutiny standard of review, the recipient must have a compelling interest for using race or national origin and its use of race must be narrowly tailored to that interest.

### Compelling Interest

The University has a compelling interest in achieving the educational benefits of diversity, as recognized by the U.S. Department of Education and the U.S. Department of Justice in the Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education.<sup>3</sup> The Guidance confirms "the compelling interest that postsecondary institutions have in obtaining the benefits that flow from achieving a diverse student body."<sup>4</sup> The University's 2011 academic

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<sup>2</sup> See *Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001) (citing *Regents of the University of California v. Bakke*, 438 U.S. 265, 287 (1978) (opinion of Powell, J.)).

<sup>3</sup> <http://www.ed.gov/ocr/docs/guidance-pse-201111.html>

<sup>4</sup> Guidance at p.1 (December 2011).

plan (*Reach Carolina*) as well as its earlier 2003 academic plan expressly recognize diversity, including racial diversity, as an educational priority: “Our approach to equity and inclusion on campus must proceed from a moral conviction, a social commitment, and an institutional educational priority that recognize how much Carolina’s learning environment is enhanced by students, faculty, and staff from multiple backgrounds and ethnicities interacting together.” In addition, the full Faculty Council adopted a Faculty Statement on Principles of Service, Diversity, and Freedom of Inquiry in 1998 that confirmed that diversity “in its many manifestations” (including racial and ethnic diversity) is essential to “educational excellence and [is] necessary for the University to achieve its mission.” Thus, the University may consider individual students’ race and national origin in admissions decisions to achieve diversity so long as that use of race is narrowly tailored.

In *Grutter*, the Court held that the Law School could permissibly seek a “critical mass” of students from underrepresented groups as part of its pursuit of student body diversity. The concept of critical mass accepted by the Supreme Court was “defined by reference to the educational benefits that diversity is designed to produce.” *Grutter*, 539 U.S. at 330. The Court acknowledged 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, 330.<sup>5</sup>

The University’s pursuit of diversity is informed by critical mass principles that are consistent with *Grutter*. The Admissions Director indicated that the enrollment of a “critical mass” of members of underrepresented groups is necessary in order for the University to achieve the educational benefits of diversity. He noted that a critical mass is needed to avoid isolation and so that students do not feel they have to represent a particular group. The Chair of the Faculty Advisory Committee on Undergraduate Admissions (Advisory Committee Chair) similarly emphasized the importance of achieving a sufficient number of underrepresented students to avoid isolation and create a “rich mix” of perspectives. The Admissions Director and the Advisory Committee Chair indicated that the “critical mass” concept and the goal of achieving a critical mass apply to non-racial diversity factors as well.

To assess critical mass, the Admissions Director relies on information about whether the educational benefits of diversity are realized on campus. The Admissions Director gets feedback on whether critical mass has been achieved from a variety of sources. Every unit across campus (including academic schools, the department of athletics, and administrative units such as Finance and Administration) provide annual reports to the University’s Office of Diversity & Multicultural Affairs (Diversity Office); each unit comments on the University climate and provides input on the University’s progress on certain diversity-related goals, including the achievement of critical masses of members of underrepresented populations. The Admissions Director reviews those reports and receives additional faculty input, regarding the campus climate and whether the educational benefits of diversity are being achieved, through the Faculty Council, individual interactions with faculty members, and through the Advisory Committee on Undergraduate Admissions. The Admissions Director indicated that he also has conversations

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<sup>5</sup> See Guidance at p.3.

with the Provost about whether critical mass is being achieved and maintained and makes his own observations from talking with students. The Admissions Director and the Advisory Committee Chair denied that any specific number is required to achieve a critical mass. According to the Admissions Director, while critical mass is not a factor in individual decisions, the benefits of diversity, including achieving and maintaining critical mass, justify the continued consideration of race as part of the holistic review.

Under *Grutter*, several criteria apply to whether a use of race in admissions is narrowly tailored: whether the university in good faith considered workable race-neutral 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.

#### Narrow Tailoring: Consideration of Race-Neutral Alternatives

*Grutter* establishes that in order to use race as a factor in individual admissions decisions, a postsecondary institution must conduct a “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity” that it seeks.<sup>6</sup> 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 sacrifice another component of its educational mission.<sup>7</sup> The 2011 OCR/DOJ joint guidance states: “Institutions are not required to implement race-neutral approaches if, in their judgment, the approaches would not be workable. In some cases, race-neutral approaches will be unworkable because they will be ineffective to achieve the diversity the institution seeks.”<sup>8</sup>

Over the years, the University has repeatedly considered the workability of race-neutral alternatives. For example, in 2007, the Office of Undergraduate Admissions developed several formulas that scored all candidates according to a combination of grades, test scores, and various criteria associated with socioeconomic disadvantage. The Admissions Director told OCR that the freshmen classes that would have resulted from these race-neutral formulas (including the formula that weighted socioeconomic criteria the most heavily) were not as racially and ethnically diverse as the University’s entering class, and were weaker academically. Additionally, in 2009, the Admissions Director had a member of his staff conduct a literature review regarding race-neutral alternatives. That review concluded that “most research suggests that race-neutral alternatives, and class-rank plans in particular, have been ineffective in reproducing the same level of diversity as the practice of affirmative action. Race-neutral admissions models that do establish significant levels of diversity often compromise academic quality.” Further, the Admissions Director analyzed the application of a top ten percent plan to undergraduate admissions in June 2012. That analysis indicated that under such a policy, “every academic indicator other than the share of the class ranking in the top 10 percent of the high-school class would have declined.” Specifically, at UNC the predicted average SAT score would have declined over 50 points, and the predicted average GPA would have declined to 3.16 from

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<sup>6</sup> *Grutter*, 539 U.S. at 339.

<sup>7</sup> *Id.* at 340.

<sup>8</sup> 2011 Guidance at p. 6.

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OCR concludes that the University has seriously and in good faith considered race-neutral alternatives and notes that the University is currently using some race-neutral diversity factors, including socio-economic status and first generation college status.

Narrow Tailoring: Individualized Review of Applicants

The Supreme Court has made clear in the context of admissions that in order to survive scrutiny a program that includes consideration of race must “focus on each applicant as an individual, and not simply as a member of a particular racial group.” *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 722 (2007). The Court wrote that the “program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application. The importance of this individualized consideration...is paramount.” *Grutter*, 539 U.S. at 337.

As described in detail above, the admissions program implemented at the University provides for flexible and individualized review of applicants. The University typically considers a host of factors, including quality of high school courses, grade point average, standardized test scores (SAT or ACT), rigor of high school attended, work experience, extracurricular activities, special talent and abilities, race or ethnicity, status as a first-generation college student, community service, demonstrated leadership, demonstrative academic initiative, exceptional experiences, University legacies, recommendations, geography, academic interest, first language, essays, overcoming obstacles, and socioeconomic status. The University denied that any particular weight or points are assigned to any of these factors.

Admissions officers indicated that under this system, lower scoring White and Asian applicants could be admitted because of a contribution to diversity, such as having come from a low socio-economic status or first generation college status. Further, race can be a plus factor in the admissions consideration for such applicants; for example, a White applicant who grew up in a neighborhood or school where he was one of few Whites and where most spoke English only as a second language. In addition, relatively high scoring African American applicants could be denied admission if they did not contribute to the undergraduate class in some other way, such as through diversity characteristics other than race or demonstrating exceptional leadership.

OCR reviewed application files and interviewed staff responsible for admissions about individual decisions. The applicant files reviewed by OCR and the explanations provided by admissions officers were consistent with these assertions of individualized consideration. For example, OCR reviewed the file of a White applicant with significantly below average SAT scores who was admitted based in part on non-racial diversity factors. The committee that voted to admit that student noted, “testing is a concern and so are the fairly simply written essays” but also noted that the student is a first-generation college student, qualified for a fee-waiver, and worked during the week. The committee concluded that the applicant was “highly likely to contribute to diversity and has earned her place.” An Asian student with low test scores also was admitted due in part to non-racial diversity factors; one admissions officer who read that student’s file noted, “Could see this admit for [first generation college].” Other lower scoring Asian applicants and White applicants were admitted with admissions officers noting such non-

racial diversity characteristics as having lived in Indonesia, having been placed in foster care, and having a self-disclosed disability. In addition, the files reviewed by OCR included relatively high scoring racial minority students who were not admitted. For example, one African American applicant was denied admission despite having above average SAT scores, a 4.310 GPA, and first generation college status, after the committee noted that the student's academic program was not competitive. Overall, the record indicates that the University's consideration of applicants does not make an applicant's race or ethnicity the defining feature of his or her application.<sup>9</sup>

In light of the Complainant's specific concern regarding the differences among average SAT scores of applicants based on race, OCR notes that SAT scores are not a decisive admissions factor in the University's holistic process, and the gaps in and of themselves do not establish that race is the predominant factor or even a predominant factor. Under Title VI, a recipient has academic discretion to decide on admissions criteria, including how test scores will be used. The University's Faculty Advisory Committee on Undergraduate Admissions, which is delegated authority by the Trustees to set procedures for assessing undergraduate admissions, issued a statement in 2007 expressly rejecting any system that placed predominant weight on standardized test scores:

In evaluating candidates for admission, we do not seek to maximize the average SAT score or the average eventual GPA of the entering class. Rather, we seek to shape the class so that its collective strengths will foster excellence within the University community; enhance the education of everyone within it; provide for the leadership of the educational, governmental, scientific, business, humanistic, artistic, and professional institutions of the state and nation; and enrich the lives of all the people of North Carolina.

Admissions officers consistently reported to OCR that they pay attention to a candidate's SAT scores, just as they pay attention to all the other information in the application. However, the weight given to the SAT scores varies depending on all the other attributes of the individual candidate. As discussed in more detail above, the applicant files reviewed by OCR showed that some White applicants and Asian applicants with lower SAT scores were admitted while some racial minority applicants with higher SAT scores were rejected; this supports the University's assertion that neither SAT scores nor race/ethnicity is a predominant factor that prevents individualized consideration of all applicants. OCR will not substitute its judgment for the University's by deciding that SAT scores have greater significance than the University confers, within its academic discretion.

#### Narrow Tailoring: Burden on Students of Other Racial Groups

Next, OCR must also consider the possible negative impact of the admissions process on students who are not African American, Hispanic, or Native American. In the context of race-

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<sup>9</sup> OCR noted as well that between 2007 and 2012 the admission rates of African American applicants has been comparable to or somewhat lower than the admission rates of White applicants. For example, in 2012, 27.4% of all White applicants were offered admission while only 24.6% of all African American applicants were offered admission. In that same year, the admission rate of Asian applicants was 23.4% and the admission rate of Hispanic applicants was 29.5%.

conscious admissions, the Court has stated that narrow tailoring requires the program “not unduly burden individuals who are not members of the favored racial and ethnic group.” *Grutter*, 539 U.S. at 341 (citing *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 630 (1990)). The Supreme Court held in *Grutter* that the Law School did not unduly burden members of any racial group because admission decisions were based on individualized consideration of “all pertinent elements of diversity.” *Id.* at 309 (quoting *Bakke*, 438 U.S. at 317). 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.* at 341.

In this regard, it is important to note first that the University does not use quotas, weights, points, or racial goals in its admissions process. Race is not used to sort applicants nor is it used to vary the impact of admissions criteria. The Admissions Director reported to OCR that he is aware of the projected racial composition of the provisionally admitted students when going into the SGR process, just as he is aware of other characterizations of the projected class, such as how many are foreign nationals, in the top 3% of their high school, demonstrate a special talent, participated in an Advanced Placement program at a certain level, qualified for a fee waiver, are first-generation college, are children of alumni, or are from out of state. OCR noted as well that the reports reviewed during SGR include information regarding each candidate’s race/ethnicity though not information regarding non-race diversity factors such as first generation college status or eligibility for a fee waiver. However, the Admissions Director credibly denied that this information affects the SGR process or that race or national origin plays any different role during SGR than during earlier review stages. The record was persuasive that racial minority candidates are not provided the benefit of a second or separate review that is not provided to White or Asian applicants.

The admissions office uses no numerical diversity goals or targets and focuses solely on whether candidates contribute to the University’s interest in the educational benefits of diversity. Race is only one among the many criteria considered in giving applicants an individualized, holistic review. Members of all racial and ethnic groups can and do benefit from this criterion, as well as other diversity characteristics, such as qualifying for a fee waiver, having a disability, having international experiences, or having first generation college status. All admissions officers interviewed by OCR denied that race or ethnicity is used as a “tie breaker,” contrary to the remark reported by the Complainant. As described by the University and reflected in the admissions files, the University’s holistic process never pits any two students against each other.

#### Narrow Tailoring: Periodic Review

Another narrow tailoring consideration, as indicated by the Supreme Court, is the duration of the racial classification. *Grutter*, 539 U.S. at 342. The Supreme Court held that the use of race and national origin in admissions must be limited in time and subject to periodic review “to determine whether racial preferences are still necessary to achieve student body diversity.” *Id.*

The Court accepted the Law School's assurances that it would "terminate its race-conscious admissions program as soon as practicable." *Id.* at 343. *See also* OCR/DOJ 2011 Guidance.<sup>10</sup>

As explained above, the University has considered race-neutral alternatives and determined that race-neutral processes would not achieve sufficient levels of diversity while maintaining the desired levels of academic achievement. The University has committed to conduct a review of its use of race and national origin in admissions by September 30, 2013. The review will comply with the strict scrutiny requirements established by the Supreme Court, including consideration of the continued necessity of the use of race and national origin in admissions in order to achieve the University's compelling interest in the educational benefits of diversity. The University has further committed to end or reduce the consideration of race or national origin if the review shows that the University can achieve diversity to a sufficient degree without, or with a lesser reliance on, race or national origin as among the factors used holistically in admissions.

Based on the evidence gathered in the course of OCR's investigation and the commitment made by the University, OCR has concluded that the University's consideration of race and national origin as factors to achieve diversity in its undergraduate classes is consistent with Title VI strict scrutiny requirements. Therefore, OCR is closing this complaint effective the date of this letter.

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.

Please be advised that the University may not harass, coerce, intimidate, or discriminate against an individual because that individual filed a complaint or participated in the complaint resolution process. If this happens, the individual may file another complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to protect, to the extent provided by law, personal information that, if released, could constitute an unwarranted invasion of privacy.

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<sup>10</sup> "[T]he institution should periodically review its programs to determine whether the use of racial classifications remains necessary and should modify its practices as needed."

We greatly appreciate the University's cooperation during the resolution of this complaint. If you have any questions, feel free to contact Howard Kallem, Chief Regional Attorney, at 202-453-5918.

Sincerely,

/s/

Alice Wender

Director

District of Columbia Office

Office for Civil Rights

Cc: Kara E. Simmons, Associate University Counsel (by e-mail)