



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

400 MARYLAND AVENUE, SW
WASHINGTON, DC 20202-1475

REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, D.C.

March 19, 2013

Dr. Teresa Sullivan
President, University of Virginia
P.O. Box 400224
Charlottesville, Virginia 22904-4224

Re: OCR Complaint No. 11-03-2072
Letter of Findings

Dear Dr. Sullivan:

This is in reference to the above-referenced complaint received by the District of Columbia office of the Office for Civil Rights (OCR), within the U.S. Department of Education (the Department), on May 23, 2003, against the University of Virginia (the University). The complainant alleged that the University discriminated against White and male applicants by considering race and gender as factors in admissions as a means to achieve diversity in its undergraduate classes.

OCR has responsibility for enforcing Title VI of the Civil Rights Act of 1964 (Title VI), 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. OCR is also responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 *et seq.*, which prohibits discrimination on the basis of gender by recipients of Federal financial assistance from the Department. The regulation implementing Title IX is found at 34 C.F.R. Part 106. The University is a recipient of Federal financial assistance from the Department and is therefore subject to the provisions of Title VI and Title IX and their implementing regulations.

OCR's investigation included extensive interviews of University administrators and faculty, as well as a review of relevant University policies, records, and applicant files.¹

¹ OCR conducted interviews of admissions staff and examined sample application files soon after the above-referenced complaint was filed. OCR also conducted follow-up interviews in the subsequent years and reviewed application files from applicants to the 2012-13 freshman class. In early 2009, the Dean of Admission passed away. OCR interviewed the former Dean of Admission in 2004 and 2006, and interviewed the current Dean of Admission in 2013. To the extent that changes were made to the admissions process between 2003 and 2013, they will be noted, but none were critical to the outcome of OCR's investigation.

The Admissions Process

The University comprises four undergraduate schools: Architecture, Arts and Sciences (the largest), Engineering, and Nursing. Candidates apply through the central admissions office, but indicate the school to which they are applying.²

Prior to the start of the admissions cycle, the Provost, the Director of the Office of Institutional Assessment & Studies, and the President's office set the class size for each school (including the percentages of in-state and out-of-state students). These targets do not include numerical goals for students by race, national origin, or gender.

Freshman Processing

The University has two application deadlines for first-year admission, the first in November for Early Action, and the second in January for Regular Decision. Early Action applicants are notified of the University's decision by the end of January and regular applicants are notified of the decision by April 1st. Early Action decisions are non-binding. Until 2007, the University used a binding Early Decision process, which ended due to concerns about the lack of diversity (particularly socioeconomic diversity) in the applicant pool. The University instituted its non-binding Early Action program in the fall of 2011. The standards for admission are the same for Early Action and Regular Decision candidates.

Each application is reviewed by at least two admission readers. Each application is randomly assigned to a first reader.³ The first reader reads the application and enters a recommended decision, which for Early Action could be to admit, defer or deny and for Regular Decision could be to admit, waitlist or deny. The reader also enters comments in support of his/her recommended decision. The application is then assigned to a second reader, who is always a senior admissions dean. If the second reader disagrees with the first reader, the second reader's decision generally prevails, although there can be discussion between the two readers.

In the second phase of the admissions process, applications at the top of the waitlist pool are considered by committees divided both by the college to which the applicant is applying and by in-state and out-of-state applicants. These committees decide whether to recommend any waitlisted students for admission. All applications are then randomly assigned to school group review teams, which compare each applicant against the other applicants from the same high school in order to ensure consistent decisions within high schools. If an anomalous decision is found that is not otherwise explainable, the school group review team makes a recommendation regarding that applicant. The Dean of Admission makes final decisions on school group review recommendations for in-state applications; two senior admissions deans make final decisions on school group review recommendations for out-of-state applications. School group review teams may know the number of applicants who have been accepted and/or how many students are still

² In 2008 the University began using the Common Application for all of its schools. Nursing applications are read by the College of Nursing; all other applications are read by the central Admissions office.

³ The only applications not randomly assigned to first and second readers are international applications, which are read by international deans.

needed for each school from in-state or out-of-state, but no one on the admissions teams has any other applicant data at this point (e.g., number of admitted students by race or gender).

After school group review decisions are made, the Dean of Admission reviews any files that require a third reader (generally these are recruited athlete applications) and makes final decisions on those applications. Admission decisions will then be released. Admitted students have one month to accept the offer of admission; after this point, admissions officers will return to the top waitlist candidates to determine which ones should be admitted if spaces still remain in the incoming class.

Admissions office staff (admissions officers) consistently reported to OCR that they base their recommendations on a holistic review of each application. Each candidate is evaluated as an individual at least twice, based on a careful review of the entire application file. Admissions officers denied that any formulas are used or that numerical targets are considered for anything other than class size and domicile (including targets for international students). All admissions officers emphasized the importance of high school program rigor and academic achievement in the review of an applicant's file, but they were consistent in saying that there are no minimum cutoff scores or thresholds for standardized test scores or grade point average (GPA). Race and national origin (but not gender, as discussed below) are considered during the admissions process as diversity factors, but are only part of the holistic review. Race and national origin are not given special weight relative to any other factor at any stage of the holistic review process.

Application reviews begin with a reader sheet that is filled out by the first reader. Although the reader sheet form has changed since OCR's investigation began, most core categories remain the same, including: domicile, standardized test scores, GPA, class rank, legacy, University employee connection, sibling who attends/attended the University, first generation college attendee, single parent, learning disability, some reporting of course program (program rigor), love of learning, academic improvement, academic industry, honors/awards, leadership, bridge builder, character, special talent, diversity, economic hardship, and other adversity. The University indicated to OCR that these are only examples of factors that are typically considered, and that other factors such as geographic diversity can be and are considered as applications are reviewed, case-by-case. According to the current Dean of Admission, the goal of the University is to admit an academically talented and diverse group of good citizens with an appropriate balance of in-state and out-of-state residents.

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., "Student is really motivated to learn on his own"); the quality or lack thereof of applicants' essays (e.g., "She writes beautifully about her quest to serve"); extracurricular involvement (e.g., "Placed 14th in World Odyssey of the Mind Tournament," "Enterprising kid who started his own summer landscaping business"); and grade patterns, such as downward trends or increasing rigor. As discussed in more detail below, the files also reflected consideration of racial and non-race diversity, both considered essential to fulfillment of the University's mission.

Legal Standards and Analysis: Race and National Origin

Title VI prohibits discrimination on the basis of race, color or national origin in any program or activity that receives Federal financial assistance. The Title VI implementing regulation, at 34 C.F.R. § 100.3(b)(2), provides that a recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration that have the effect of subjecting individuals to discrimination because of their race, color or national origin when the recipient determines the type of services, benefits or facilities it will provide or the class of individuals to whom such services, benefits or facilities will be provided.

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.⁴ 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 and its use of race must be narrowly tailored to that interest. 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.

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*.⁵ The Guidance confirms "the compelling interest that postsecondary institutions have in obtaining the benefits that flow from achieving a diverse student body."⁶ The Dean of Admission explained that the use of various diversity factors is aligned with the University's core objectives. The Dean of Admission cited the educational benefits of diversity, including access to a range of opinions, beliefs, thoughts, and ideas; preparation for success in a diverse society; and exposure to peers from many different backgrounds. The Dean also laid out a broad vision of diversity, including socioeconomic status, geography, culture, artistic ability, athletic ability, age, educational background (including community college transfers), political beliefs, public/private K-12 education, academic interests and extracurricular involvement, as well as race and national origin. Thus, the University may consider individual applicants' race and national origin in admissions decisions to achieve diversity so long as that use of race is narrowly tailored.

⁴ 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.)).

⁵ <http://www.ed.gov/ocr/docs/guidance-pse-201111.html>.

⁶ *Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education* at p.1 (December 2011).

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, 330.⁷

The University’s pursuit of diversity is informed by critical mass principles that are consistent with *Grutter*. University administrators, including both the former and current Deans of Admission, stated that there is no set number of students of a particular race that the University seeks to enroll; neither is there a goal for a particular percentage, or range of numbers or percentages of students by race.⁸ Although the University does not use the term “critical mass,” the former Dean indicated that the University attempts to enroll “more than a tiny number” of underrepresented students, and the current Dean indicated that the University hopes to enroll “a meaningful number” of students from traditionally underrepresented groups, in order for the University to achieve the educational benefits of diversity. The current Dean of Admission noted that a sufficient mass of students is needed to ensure that underrepresented minority students do not feel isolated on campus and that students have real opportunities to engage with others from different backgrounds, including race. The Dean indicated that the University seeks a meaningful mass of students across all characteristics, not just in terms of racial diversity.

The Dean of Admission communicates with a variety of sources regarding whether the educational benefits of diversity are realized on campus. These sources include the Board of Visitors; the President of the University; the Provost (to whom the Dean of Admission reports); an admissions advisory committee composed of faculty, students, and members of the administration; and members of special interest groups on campus.

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.⁹ 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.¹⁰ 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.

⁷ See Guidance at p.3.

⁸ *Grutter*, 539 U.S. at 318.

⁹ *Id.* at 339.

¹⁰ *Id.* at 340.

In some cases, race-neutral approaches will be unworkable because they will be ineffective to achieve the diversity the institution seeks.”¹¹

The University has considered several race-neutral admissions practices. The former Dean of Admission visited the University of California at Berkeley to study that school’s race neutral admissions process adopted after California enacted a ballot initiative curtailing the use of race-based admissions by public schools. The former Dean also discussed a study conducted at the University that indicated that race-based admissions were necessary to maintaining diversity on campus. The current Dean of Admission reported that, in the summer of 2011, the admissions staff discussed the possibility of relying solely on race-neutral alternatives, but concluded that such alternatives, including reliance on factors such as socioeconomic status and first generation in college status, would not suffice to produce diverse classes of incoming students. Several admissions staff interviewed confirmed discussion of the potential viability of a top ten percent plan. However, the current Dean stated that the University has not adopted a top ten percent plan because the relatively high levels of racial integration in many Virginia schools would mean that such a plan would not result in sufficient levels of racial diversity on campus. The University is currently using some race-neutral diversity factors, including socio-economic status and first generation college status but, according to the Dean, has not realized sufficient racial diversity from these factors.

OCR concludes that the University has seriously and in good faith considered race-neutral alternatives and that it will continue to address this issue through periodic reviews of its admissions process.

Narrow Tailoring: Individualized Review of Applicants

The Supreme Court has made clear in the context of admissions that, in order to survive strict 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 stated that no particular weight or points are assigned to any of the factors considered by admissions officers. As also noted below, the University does not use race inflexibly through racial quotas nor are separate or different admissions criteria or standards applied based on race. Thus, applicants are not denied independent competitive consideration because of race.

The current Dean of Admission indicated that, under this system, lower scoring White applicants could be admitted because of a contribution to diversity, such as having come from an underrepresented cultural or ethnic background. In addition, relatively high scoring African

¹¹ 2011 Guidance at p. 6.

American applicants could be denied if they were not otherwise highly competitive for admission and did not contribute to diversity in other ways.

OCR reviewed application files and interviewed admissions officers who read and make decisions about applications. The applicant files reviewed by OCR and the explanations provided by admissions officers and University representatives were consistent with these assertions of individualized consideration. For example, the successful application of one White out of state applicant with strong academic credentials also noted that he was from a “low enrollment state.” A White applicant with only modest academic credentials was also admitted and the readers noted her coal mining town background, that she would be a first generation college student, and that she worked over thirty hours per week on her family’s farm. Another first generation college student, half Filipino and half White, whose mother had passed away and who was raised by a single father struggling with alcoholism, was admitted in the second phase of the admissions process after the reader noted that the University needed more in-state Arts and Sciences students, and “I think this first gen with diversity can make it.” In addition, OCR reviewed the application files of African American applicants with a range of academic and extracurricular achievements who were nonetheless denied admission mainly because of non-competitive grades or test scores or general academic rigor. For example, one applicant who had strong test scores and extracurricular activities and was noted for his leadership was nonetheless denied admission after being deferred because the final reader did not see improvement in his grades (an A and B mix) from junior to senior year. An African American applicant to the School of Engineering and Applied Science who was the brother of a University engineering student and who had strong math scores was originally waitlisted but then denied after his midyear grades showed two Cs. Overall, the University’s consideration of applicants is highly individualized and does not make an applicant’s race or ethnicity the defining feature of his or her application.

Narrow Tailoring: Effect on Students of Other Racial Groups

Next, OCR must also consider the negative impact that the admissions process may have on students who are not African American, Hispanic, or Native American, who are among the racial groups the University deems underrepresented.¹² In the context of race-conscious admissions, the Court has indicated that narrow tailoring requires that the program “not unduly burden individuals who are not members of the favored racial and ethnic group.” *Grutter*, 539 U.S. at 341. 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.

The evidence shows that the University engages in a holistic review process. No factors are weighted or assigned point values. There are no quotas or numeric goals for any category of applicant other than in-state and out-of-state/international applicants. Applications are not sorted,

¹² The current Dean of Admission also noted that certain subgroups within the population of Asian applicants, for example applicants of Hmong or Cambodian origin, are underrepresented on campus and thus might also receive positive consideration for their contribution to racial diversity.

read, or processed according to the race of the applicant. Applicants of different races are not judged by different criteria in the application review process.

Diversity is defined broadly by admissions officers and a wide range of applicants can benefit in the admissions process through their potential contribution to diversity on campus. Academic achievement (defined by program rigor, scores, and grades) is the most important criterion in the admissions process. Beyond that, members of all races can and do receive positive consideration for what they might bring to campus, for example by coming from an underrepresented part of the United States or the world, having suffered economic or other hardships, or possessing a unique talent or worldview. Any of an applicant's characteristics – including non-race diversity characteristics – can serve as deciding factors, and no factor is categorically any more persuasive than any other factor.

Narrow Tailoring: Periodic Review

Another important element, 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.¹³

The current Dean of Admission noted that the last time the University undertook a review of its need for race-based admissions was in the summer of 2011. The University has also committed to conducting a review of its use of race and national origin in admissions after the Supreme Court issues its ruling in *Fisher v. University of Texas at Austin*, No. 11-345 (U.S. argued Oct. 10, 2012). The review will comply with the requirements established by the Supreme Court.

Legal Standards and Analysis: Gender

Title IX prohibits a recipient from treating individuals differently or denying or limiting benefits to individuals on the basis of their sex. The Title IX implementing regulation, at 34 C.F.R. § 106.21(b), addresses the admissions process, and prohibits recipients from giving preferences, ranking applicants separately, establishing quotas, or treating individuals differently from one another on the basis of sex. In the absence of a finding of discrimination, the Title IX regulations permit recipients to take affirmative action consistent with law to overcome the effects of conditions that resulted in limited participation in a program by persons of a particular sex. Under Title IX, a recipient may use individual classifications based on sex if such classifications are supported by an exceedingly persuasive justification based on a substantial relationship between the classification and an important state objective.

Admissions officers at the University consistently affirmed that the admissions process is gender neutral. While the former Dean of Admission stated in 2004 that sex might be a minor consideration, for example with respect to female applicants to the School of Engineering and Applied Science, the current Dean of Admission stated that this is no longer the case. In

¹³ “[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.”

reviewing applicant files, OCR found no evidence of consideration of sex by any readers and no evidence that female engineering applicants were receiving special consideration based on sex.

Based on the evidence gathered in the course of OCR's investigation and the University's pending periodic review of admissions, 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. OCR found no evidence that the University's gender-neutral admissions process is in violation of Title IX. 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.

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: Richard Kast, Associate General Counsel (via e-mail)