

This document expresses policy that is inconsistent in many respects with Executive Order 13985 on Advancing Racial Equity and Support for Underserved Communities through the Federal Government and was issued without the review required under the Department's Rulemaking and Guidance Procedures, 85 Fed. Reg. 62597 (Oct. 5, 2020).

OCR Webinar: Use of Race in Postsecondary Admissions

January 19, 2021

<https://youtu.be/QTslsdz3cYE>

The mission of the U.S. Department of Education's Office for Civil Rights, or OCR, is to ensure equal access to education, and to promote educational excellence through vigorous enforcement of civil rights law.

This video will describe the court cases and OCR guidance that have previously explained how colleges and schools can comply with the Department's anti-discrimination laws and regulations with respect to the use of race in postsecondary school admissions and programs. In 2008, OCR issued its Guidance on the Use of Race in Postsecondary Student Admissions, which sets forth many of the principles discussed in this video.

Title VI of the Civil Rights Act of 1964 states that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Regulations promulgated under the statute prohibit schools from, among other things, "treating an individual differently from others in determining whether she or he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition."

In addition to being covered by Title VI, race discrimination is also prohibited by the U.S. Constitution. The 14th Amendment to the Constitution contains the Equal Protection Clause, which states that "no state shall deny any person within its jurisdiction the equal protection of the laws." Judicial opinions interpreting this provision of the 14th Amendment guide OCR's work in the context of race discrimination under Title VI, since courts have generally held that case law addressing racial classifications under the Equal Protection Clause is applicable to similar classifications under Title VI.

We should note that under cases decided by the U.S. Supreme Court, a classification based on race is presumptively invalid unless the classification meets a demanding test often referred to as strict scrutiny. The concept of a strict scrutiny test for the use of race in educational settings has been central in several major Supreme Court cases.

These cases set forth two parts to strict scrutiny review: 1) an assessment of whether the use of race serves a compelling interest and, 2) an assessment of whether the use of race is narrowly tailored to meet that compelling interest. The Supreme Court has clarified that the academic judgment as to the educational benefits that exist from a diverse student body is entitled to some, but not complete, judicial deference.

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In order for a use of race to be narrowly tailored, in the context of postsecondary admissions, the Court has said there must be a serious, good faith review of workable race-neutral alternatives to achieve the sought-after student body diversity; there must also be a flexible and individualized review of applicants; the use of race must not unduly burden applicants of any racial group; and the consideration of race must be subject to periodic review. In this regard, it is incumbent upon the institution to show that the approach utilized in promoting diversity is narrowly tailored to meet the compelling interest.

In other words, some conduct that treats individuals differently on the basis of race may still be legal under Title VI, but only in the narrowest of contexts, and after the conditions set out by the Supreme Court have been met.

Now let's discuss the two important assessments that have to be made as part of evaluating whether a classification based on the race is valid under the strict scrutiny test.

For the first assessment, the Supreme Court has held that a school may treat having a diverse student body as a compelling interest. While diversity can be defined in numerous ways, some schools have opted to include race as part of their diversity metrics, for instance, in selecting applicants or offering financial aid. Courts have given some, although not complete, deference when they assert that they have a compelling interest in this form of diversity. For instance, schools are permitted to consider race as one element of diversity, but are not permitted under Title VI to maintain diversity programs that are solely focused on racial diversity, but no other forms of diversity.

But that leaves the second assessment, which still has to be met as well. The U.S. Supreme Court has held that in order for a school's use of race to be narrowly tailored to its interest in a diverse student body, there must be a serious, good faith review of alternatives that are neutral with respect to race, and which may be workable. If a school can use race-neutral alternatives to achieve their sought-after student body diversity, then using race as an explicit factor in admissions or financial aid is impermissible.

Even if race-neutral alternatives don't work, courts have held that schools still lack the authority to establish quotas or set-asides for applicants who are members of a specific race or set of races. Instead, schools must give individualized review to all applicants for admission or financial aid. Moreover, the use of race must not unduly burden applicants of any other racial group; and the classification based on race must always be subject to periodic review to determine whether it is still necessary to achieve diversity. In this regard, court cases establish that it is incumbent upon the institution to show that the approach utilized in promoting diversity is narrowly tailored to meet the compelling interest.

Consistent with judicial opinions in this area, OCR guidance has stated that it will use certain factors to determine whether both assessments referred to above have been met, such that racial classifications satisfy the strict scrutiny test. For instance, when it receives a complaint alleging a Title VI violation that involves a school using race as a factor in its decision-making, OCR has stated in its guidance that it will apply the following principles drawn from judicial opinions when determining whether a school's conduct violates Title VI:

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- The use of race must be essential to an institution's mission and stated goals;
- The diversity sought by the postsecondary institution must be broader than mere racial diversity;
- Quotas and set asides based on race are always impermissible;
- Schools must provide individualized consideration to applicants, and there must be no undue burden on applicants of other races;
- Before using race, there must be serious good faith consideration of workable race-neutral alternatives; and
- Periodic reviews are necessary, and the use of race must have a logical end point.

Now let's turn to some of the complaints that OCR has received. We will discuss three complaints that challenged race-conscious programs, which OCR resolved in a way that illustrates the conditions on the use of race under Title VI.

The first complaint involved two Kentucky Department of Education scholarship programs. These programs were administered in a way that restricted the awards to members of certain racial groups. OCR found that the rationale offered – which was increasing the number of minority teachers, the need for minority role models, and remedying past segregation – were insufficient to satisfy the compelling interest prong under Title VI, because the diversity sought was not broader than mere racial diversity. The school's rationale, therefore, was not a compelling interest that justified the use of race by an educational institution. The Kentucky Department of Education voluntarily agreed to discontinue the program in order to comply with Title VI.

The second complaint also involved the use of race in awarding scholarships. Washington University in St. Louis operated a racially exclusive scholarship program, which was open only to African American students. After the complaint was filed with OCR, the University voluntarily agreed to end the program. In the resolution with OCR, the University agreed to develop a plan and a proposed timeline for ensuring that the program and all race-restricted financial aid programs administered by the University, or administered on behalf of the University, would be revised to ensure that students were eligible to compete for such programs without regard to race, color, or national origin.

In the third complaint, OCR found that even though Texas Tech University Health Sciences Center had a compelling interest in a diverse student body, it had failed the "narrowly tailored" requirement of the strict scrutiny test. Although the school had considered race as only one factor in its individual consideration of applicants, it had not documented when and how it used race as a factor, or the necessity for the continued use of such preferences, or whether workable race-neutral alternatives would be as effective in achieving similar levels of diversity.

OCR's investigation into the use of race at Texas Tech University Health Sciences Center illustrates the need for a school to narrowly tailor the use of race as a factor, including determining whether the school can reach its interest in diversity through non-racial classifications and documenting its efforts.

In its resolution agreement with OCR, Texas Tech University Health Sciences Center stated that

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it would discontinue all consideration of an applicant's race, and agreed that if it determined in the future that the use of race was necessary, it would provide a reasoned, principled explanation for any decision to consider race as a factor. The explanation would identify concrete and precise goals of such use, as well as show consideration of the degree to which race-neutral measures could achieve its educational goals. Furthermore, any use of race would afford flexible and individualized review of applicants; ensure no undue burden would be imposed on applicants of any racial group; and state by what process, and on what regular schedule, the need for and scope of race-conscious measures, if any, would be periodically reviewed and assessed.

These cases illustrate that a school's use of race in educational settings must meet the high standard of strict scrutiny under Title VI. If a school's race-based classification can't meet this standard, OCR will require that the school end that classification, since it violates Title VI's prohibition against discrimination on the basis of race.

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OCR is also available to provide more detailed technical assistance to individual postsecondary institutions on a case-by-case basis. Please contact OCR's Outreach, Prevention, Education and Non-discrimination (OPEN) Center by emailing OPEN@ed.gov if you have questions about OCR's enforcement policy or case processing. Anyone who believes that a school that receives federal funds has violated a federal civil rights law enforced by OCR can file a complaint online at o-c-r-c-a-s-dot-e-d-dot-g-o-v. You can also learn more about OCR by visiting www.ed.gov/OCR.