

Commissioner's Interoffice Mail Routing Form



Date: 9/26/17 Log Number: 09261754

To: Kevin Brown From: Teresa Perry

Governor's Correspondence _____

Commissioner's Correspondence ✓ Email
rec'd 9/22/17

From: DeLissa M. Corbin, Office of Civil Rights

Subject: Letter of findings for complaint 03041058

✓ For your information. re: KDE and discrimination

____ For your action. (Please send a hard copy of any action taken to Teresa Perry.)

____ Prepare response for Commissioner's signature within 5 working days. Deliver an addressed envelope, the response, the original letter and routing slip back to Teresa Perry. Please include an addressed envelope for mailing.

____ Respond over appropriate signature within 5 working days. Deliver a hard copy of the response, the original letter and routing slip to Teresa Perry.

____ Prepare e-mail response for Commissioner's approval within 5 working days. Send Teresa Perry a copy via e-mail and deliver a hard copy of the e-mail response, original letter and routing slip to Teresa Perry.

____ Prepare e-mail response over appropriate signature within 5 working days. Deliver a hard copy of the e-mail response, the original e-mail and routing slip to Teresa Perry.

____ GOVERNOR'S CORRESPONDENCE: Prepare response the Commissioner's signature on behalf of the Governor within 4 working days and deliver a hard copy of the response, original letter and routing slip to Teresa Perry. Please include an addressed envelope for mailing.

Other Instructions:

Kevin Brown copied on email.

cc: Comm mail

Direct any questions to Teresa Perry at 564-3141/ext. 4801.

SW

Pruitt, Stephen - Commissioner, KY Dept. of Education

From: Corbin, Melissa <Melissa.Corbin@ed.gov>
Sent: Friday, September 22, 2017 5:06 PM
To: Pruitt, Stephen - Commissioner, KY Dept. of Education
Cc: Mayo, Travis (KYOAG); Lant, Ashley - Office of Legal, Legislative and Communication Services; Buckner, La Tasha (KYOAG); Brown, Kevin - Associate Commissioner, Office of Legal, Legislative and Communication Services; Fox, Wendella
Subject: Letter of Findings - OCR complaint 03041058
Attachments: OCR-#1593574-v1-FINAL_SIGNED-R-LOF-KDE.PDF; OCR-#1587131-v1-FINAL_SIGNED-RES-AGR-Kentucky_Department_of_Education.PDF

Dear Commissioner Pruitt,

Attached is OCR's letter of findings for complaint 03041058. I have also attached a copy of the executed Resolution Agreement. We thank you and your staff for your cooperation in resolving this matter and look forward to continuing to work with you during the monitoring phase.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Melissa M. Corbin
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September 22, 2017

Stephen L. Pruitt
Commissioner of Education
Kentucky Department of Education
300 Sower Boulevard
Frankfort, Kentucky 40601

Via email only

In Response, Please Refer to: 03-04-1058

Dear Commissioner Pruitt:

The United States Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed on December 17, 2003 against the Kentucky Department of Education (KDE). The complaint alleged that KDE discriminates on the bases of race and ethnicity through the administration of two scholarship programs. These scholarships are provided pursuant to: a) the Minority Educator Recruitment and Retention Scholarship (MERRS) program, and b) the Administrative Leadership Institute (ALI).¹ The complaint alleged that the criteria for awarding these scholarships violate Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d.

OCR enforces Title VI and its implementing regulation, 34 C.F.R. Part 100, which prohibit discrimination based on race, color, or national origin by institutions or organizations that receive or benefit from Federal financial assistance from the United States Department of Education (Department). KDE is a recipient of Federal financial assistance from the Department and, therefore, its programs and activities are subject to Title VI.

To reach a determination in this complaint, OCR analyzed information provided by the complainants and by KDE. OCR also conducted a site visit, interviewed KDE officials, and reviewed publically available documents. The issue that OCR investigated was whether it was lawful for KDE, in its administration of the scholarships, to make the race of individual students

¹ During the course of OCR's investigation, the names of the programs changed. ALI was previously called the "Principalship Program" and the title of MERRS was changed to the Minority Educator Recruitment and Retention Loan Forgiveness program. The complaint also referenced a third program that aimed at increasing the number of minority school superintendents in Kentucky. OCR referred this aspect of the complaint to the U.S. Equal Employment Opportunity Commission (EEOC), as it was solely employment-related.

an eligibility criterion. This letter, when it refers to the MERRS and ALI programs, refers to the scholarships that are provided pursuant to the two programs.

Based on the evidence, OCR has determined that there is a sufficient basis to conclude that KDE violated Title VI and its implementing regulation with regard to the issue investigated. OCR found that both programs were created and have been administered by KDE—which is the K-12 education division of Kentucky government—to try to increase the number of minority teachers and school principals in Kentucky’s public K-12 schools. This is a goal that has not been recognized by the United States Supreme Court as compelling and capable of possibly justifying the consideration of an individual’s race; it is distinctly different from the interests that the Supreme Court has recognized as compelling. In addition, there are other legal problems with the scholarships.

A summary of the facts ascertained during OCR’s investigation, the relevant legal standards, and OCR’s investigative approach is set forth below.

Findings of Fact

The official eligibility rules for both scholarships require that student recipients be a “minority.” The definition of minority that is used for the ALI and MERRS programs comes from Kentucky Revised Statute (KRS) 160.345(1)(a): “Minority means American Indian; Alaskan native; African-American; Hispanic, including persons of Mexican, Puerto Rican, Cuban, and Central or South American origin; Pacific islander; or other ethnic group underrepresented in the school.” KDE itself calls the scholarships “race-restricted,” but OCR has identified some recipients of the scholarships who have been Asian or white.

The largest of the two scholarship programs is the Minority Educator Recruitment and Retention Scholarship (hereinafter referred to as MERRS or the undergraduate program). KDE has noted on its website, as recently as May 25, 2017, that the MERRS program “was authorized in 1992 by the Kentucky General Assembly to address the shortage of minority teachers in the Commonwealth of Kentucky, especially in the areas of mathematics and science.”² In addition to being a minority, recipients of the scholarship must be a U.S. citizen and Kentucky resident; declare Teacher Education as a major field of study; be an undergraduate student or graduate student pursuing initial teacher certification; and maintain a grade point average of at least 2.75.³ The program provides financial assistance up to a maximum award of \$5000 per academic year for students enrolled at any of Kentucky’s eight public universities. Students attending a community or technical college may receive up to \$2000 per academic year.

Students who receive the MERRS scholarship must obtain a Kentucky teaching certificate and, upon graduation, teach in a Kentucky public school for the same number of semesters for which they received a scholarship. If they do not, their scholarships are converted to loans that must be repaid with interest.

² <https://education.ky.gov/teachers/div/pages/minority-educator-recruitment-and-retention-scholarship.aspx>.

³ Ibid.. In the past, student recipients of MERRS were required to have a minimum grade point average of at least 2.5.

The second scholarship program is now called the Administrative Leadership Institute (hereinafter referred to as ALI or the graduate program). In addition to being a minority, recipients of the scholarship must have at least three years of teaching experience and already have a master's degree with at least a 3.0 grade point average. ALI provides financial assistance, including tuition, fees and books, to students enrolled in a particular graduate program at Western Kentucky University (WKU). Recipients who successfully complete the program receive certificates to become school principals.

Kentucky statute, as codified at KRS 161.165- Recruitment of Minority Teachers, states in part that KDE must “review and revise as needed a strategic plan for increasing the number of minority teachers and administrators in the Commonwealth.” According to the statute, the plan must include, but not be limited to, recommendations on ways to:

- (a) Identify methods for increasing the percentage of minority educators in proportion to the number of minority students;
- (b) Establish programs to identify, recruit, and prepare as teachers minority persons who have already earned college degrees in other job fields; and
- (c) Create awareness among secondary school guidance counselors of the need for minority teachers.

Although KDE has asserted that both programs are required by the state statute noted above, the statute does not specifically mention either the MERRS or ALI programs.

Legal Standard

The regulation implementing Title VI, at 34 C.F.R. § 100.3(a), states that no person shall, on the grounds of race, color or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving federal financial assistance. The regulation, at 34 C.F.R. § 100.3(b)(1), further states that a recipient may not, on the grounds of race, color or national origin, treat an individual differently from others in determining whether they satisfy any admission, enrollment, quota, eligibility, membership or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program.

A use of race or national origin that violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution also violates Title VI.⁴ Thus, in analyzing the lawfulness of the use of race or national origin, OCR considers not only Title VI⁵ and its implementing regulation, but also case law from the United States Supreme Court interpreting the Equal Protection Clause. This includes the Court's decisions in Parents Involved in Community Schools v. Seattle School District No. 1 (Parents Involved),⁶ Grutter v. Bollinger

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 In interpreting Title VI, OCR also considers the U.S. Department of Education's policy guidance on the use of race and national origin in student financial aid programs, as published at <http://www2.ed.gov/about/offices/list/ocr/docs/racefa.html>.

⁶ 551 U.S. 701 (2007).

(Grutter),⁷ Gratz v. Bollinger (Gratz),⁸ and Fisher v. University of Texas at Austin (Fisher I)⁹ and Fisher v. University of Texas at Austin (Fisher II).¹⁰

Under the terms of these and other Supreme Court cases, strict scrutiny review is required to determine whether programs that consider the race of individual persons to award benefits violate the Equal Protection Clause. The Supreme Court has said there are 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. 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 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 limited in time and subject to periodic review.

Legal Analysis and Conclusions

The race of individual students is a criterion in the awarding of scholarships by both programs, and therefore the scholarships are subject to strict scrutiny review to determine if they are lawful. This letter first examines whether the scholarships meet the first prong of strict scrutiny review (that is, compelling interest) and then it examines whether the scholarships meet the second prong of strict scrutiny review (that is, narrow tailoring).

I. Compelling Interest

A. The programs aim to increase the number of minority teachers and administrators within Kentucky, and thus they are inconsistent with the compelling interests recognized by the U.S. Supreme Court. Therefore, they fail the first prong of strict scrutiny review.

The first part of strict scrutiny review, as stated above, is determining whether the use of race is in pursuit of a compelling interest. The record, including written submissions from KDE to OCR, establishes that the purpose for which the scholarship programs were created, and how they have operated, is to try to increase the number of minorities among the state's public school teachers and administrators. In addition, that the goal of the programs is to increase the number of minority teachers and school administrators is also what KDE has stated on its public website pages, some of which were updated as recently as March 2017, and in the agency's official publications.¹¹ In a 2007 letter to OCR, in answering the question of what compelling interest

⁷ 539 U.S. 306 (2003).

⁸ 539 U.S. 244 (2003).

⁹ 133 S.Ct. 2411 (2013).

¹⁰ 136 S.Ct. 2198 (2016).

¹¹ For example, on a webpage, published on February 10, 2017 and pertaining to the graduate scholarship, KDE stated that, "As a result of Kentucky's desire to increase the recruitment and retention of a diverse educator workforce, the Kentucky Department of Education (KDE), the Kentucky Alliance of Black School Educators (KABSE), and Western Kentucky University (WKU) formed a collaborative union to identify and prepare minority teachers to become certified administrators in the Commonwealth of Kentucky (KRS: 161.165)." [http://education.ky.gov/teachers/div/pages/administrative-leadership-institute-\(ali\).aspx](http://education.ky.gov/teachers/div/pages/administrative-leadership-institute-(ali).aspx).

the programs served, KDE stated that “KDE implements KRS 161.165 to promote the possibility of diversity in Kentucky’s public school faculties.”

More recently, KDE has told OCR that the two programs are needed in order for K-12 minority students in Kentucky to have as teachers (and administrators) role models who look like them. KDE has also stated that the programs are necessary because there is an expectation that minority students living in Kentucky’s rural areas may receive one of the scholarships, go on to become teachers or administrators, and return to their hometown rural areas to work and serve as role models to minority students there. A webpage of KDE also states that:

“As the population of Kentucky and the nation becomes increasingly more diverse, it is important that we have a teacher work force that mirrors the population. All students benefit from a culturally and ethnically diverse teacher workforce. While we recognize the national shortage of minority educators, our primary goal is to supply minority teachers for the Commonwealth of Kentucky.”¹²

These views are all consistent with the programs having a purpose of increasing the number of minority teachers and administrators in Kentucky’s K-12 schools. The Supreme Court in its 1986 Wygant decision rejected the role model theory as a compelling interest.¹³ The Supreme Court, in the educational context, has recognized only two interests as compelling: a) the remedying of an entity’s own, established discrimination and b) the benefits of student body diversity. In recent years, the Court has emphasized that the benefits of student body diversity is the only non-remedial compelling interest that it has recognized in the educational context.¹⁴ Thus, the interest that has been pursued through the two scholarship programs is not a compelling interest that the Supreme Court has recognized.

OCR notes as well that there have been additional legal problems with these programs and how they have operated. In Wygant, for example, the Court rejected a teacher diversity plan that was based on a discerned “need for more minority faculty role models by finding that the percentage of minority teachers was less than the percentage of minority students,” and the Court spoke against policies “tying the required percentage of minority teachers to the percentage of minority students.”¹⁵ Here, the two Kentucky programs similarly aim to “increas[e] the percentage of minority educators in proportion to the number of minority students.”

The Supreme Court’s 2007 decision in Parents Involved is also illustrative here. The case involved two K-12 school districts – one of them Jefferson County, Kentucky and the other Seattle, Washington – that claimed they were trying to achieve student body diversity through student assignment policies that required the demographics of local schools to mirror district

¹² <http://education.ky.gov/teachers/div/Documents/MERR%20FAQ.pdf> (italics in original).

¹³ “The role model theory allows the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose.” Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275 (1986).

¹⁴ For example, in Fisher I, citing to the opinion of Justice Powell in 1978’s Bakke decision, the Supreme Court said: “In order for judicial review to be meaningful, a university must make a showing that its plan is narrowly tailored to achieve the only interest that this Court has approved in this context: the benefits of a student body diversity that ‘encompasses a ... broad array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.’” Fisher I at 241-22, citing to Bakke, *supra*, at 315 (opinion of Powell, J.).

¹⁵ Wygant, *supra*, at 274-275.

demographics. The districts' plans were similar to the one that Kentucky has used for the two programs at issue here, in that they all measure the desired "diversity" level simply by making it proportionate to local demographics. The Court said this "work[ing] backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits," was a "fatal flaw under [its] existing precedent."¹⁶

The Court added:

The plans are tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits...This comparison makes clear that the racial demographics in each district—whatever they happen to be—drive the required "diversity" numbers.... The districts offer no evidence that the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective school districts—or rather the white/nonwhite or black/'other' balance of the districts, since that is the only diversity addressed by the plans. Indeed, in its brief Seattle simply assumes that the educational benefits track the racial breakdown of the district.¹⁷

The Supreme Court again spoke of these principles in both its Fisher I and Fisher II decisions. In 2013, in Fisher I, quoting from some of its earlier cases, including Parents Involved, the Court said, "A university is not permitted to define diversity as 'some specified percentage of a particular group merely because of its race or ethnic origin.' ... 'That would amount to outright racial balancing, which is patently unconstitutional.' ... Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'"¹⁸ Most recently, in 2016's Fisher II, the Court said the university at issue there was prohibited from setting specific numerical goals for minority student enrollment.¹⁹

Here, KDE has not established how its programs are in furtherance of an interest that the Supreme Court has recognized as compelling. The programs aim for increased numbers of minority teachers and administrators, which the Court has not recognized as compelling, and both programs have goals that bear the hallmarks of impermissible racial balancing.

¹⁶ Parents Involved, at 729, later quoting from Bakke, *supra*, at 307 (1978) (opinion of Powell, J.), to say that, "If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected ... as facially invalid."

¹⁷ Parents Involved, *supra*, at 727.

¹⁸ Fisher I, *supra*, at 2419.

¹⁹ Fisher II, *supra*, at 2210: "Increasing minority enrollment may be instrumental to these educational benefits, but it is not, as petitioner seems to suggest, a goal that can or should be reduced to pure numbers. Indeed, since the University is prohibited from seeking a particular number or quota of minority students, it cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained."

B. Despite KDE's recent contentions, the programs are not pursuits of student body diversity and are not intended to remedy the state's own established history of segregation; thus, the programs are inconsistent with the compelling interests recognized by the U.S. Supreme Court. Therefore, they fail the first prong of strict scrutiny review.

In recent years, KDE has asked OCR to view the programs as pursuits of the student body diversity interest that the Supreme Court has recognized as compelling. KDE in recent years has also asked OCR to view the programs in light of Kentucky's former agreement with OCR to desegregate its public institutions of higher education; that agreement was dissolved in 2009. The U.S. Supreme Court has held that both student body diversity and the remedying of an entity's own history of discrimination can be compelling interests. Each of these issues is addressed below, in turn.

1. Student Body Diversity

The Supreme Court has said that "Strict scrutiny is a searching examination, and it is the [postsecondary institution] that bears the burden to prove 'that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate.'"²⁰ As to the first part of strict scrutiny review, an assessment of whether it is a compelling interest for which race is used, the Supreme Court has said that reviewing courts "should ensure that there is a reasoned, principled explanation for the academic decision" and that only "some, but not complete, judicial deference is proper under Grutter."²¹ Nonetheless, despite the evidence that the true and established purpose of the programs is to increase the number of minority teachers and school administrators within Kentucky, OCR evaluated whether the programs may be consistent with the student body diversity interest that the Supreme Court has recognized as compelling. OCR found that they were not, for these reasons:

1. Notably, the undergraduate scholarship is generally awarded only after students have been admitted by a particular college or university and have accepted the offer of admission; candidates for the graduate scholarship have until the end of July to apply for it. Many commit to a college with no guarantee that they will receive one of the scholarships. Thus, the scholarships bear an important distinction from other scholarships that are awarded before a student has accepted an offer of admission; colleges say such scholarships can serve to attract diverse students by encouraging them to accept offers of admission. KDE has also not established how either scholarship, which does not include family income as an eligibility requirement, can be used to retain diverse students.
2. In addition, the undergraduate scholarship program is actually a forgivable loan, in that recipients of the scholarship are required to sign promissory notes, and if they do not teach in a Kentucky public school for a specified period of time (generally, corresponding with the number of semesters for which they received the scholarship), they are required to pay back the "scholarships", with interest. That recipients of the undergraduate scholarship have such

²⁰ Fisher I, *supra*, at 2419, referring to Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989) (quoting Fullilove v. Klutznick, 448 U.S. 448, 533–535, (Stevens, J., dissenting)).

²¹ Fisher I, *supra*, at 2419.

conditions placed upon them also establishes that the goal of the MERRS program is to get more minority teachers for Kentucky's K-12 schools, and not to achieve student body diversity in the Commonwealth's postsecondary institutions. For example, a student who receives the undergraduate scholarship may complete four years of education at a Kentucky university, and while there, may contribute to student body diversity. But if he or she fails upon graduation to teach in a Kentucky public school for the required minimum length of time, he or she will have to begin repaying the scholarship.

Further, the graduate scholarship can be used only for one program at WKU, a program where participants earn certificates to qualify as school principals, and it cannot be used for other studies, even within the graduate education department, at WKU. The website of WKU shows that WKU has multiple other graduate education programs, including doctorate programs in educational leadership, elementary education, and secondary education and more than a dozen of master's degree programs and additional certificate programs.²²

3. In practice, neither scholarship program has operated as a pursuit of the benefits of student body diversity. For example, data provided by KDE to OCR shows that for at least some public colleges and universities in Kentucky, there have been only a minimal number of recipients of the undergraduate scholarship in any given year. Morehead State University's enrollment of recipients of the undergraduate scholarship is illustrative here. In Fall 2015 Morehead State had an undergraduate enrollment of nearly 10,000 students, more than 90% of whom were white. The university enrolled no new recipients of the undergraduate scholarship in Fall 2014 and it had a total of only five minority students, at the freshmen through senior class levels, who got the scholarship. This dearth of scholarship recipients differs from the "critical mass" of minority students garnered through the admissions policy of the Law School at issue in *Grutter*. There, the Supreme Court noted testimony made in district court that the Law School's admissions policy had made a notable difference in the number of minority students who were admitted;²³ the Court said the benefits of such diversity include the promotion of cross-racial understanding, the breaking down of racial stereotypes, and the enabling of students to better understand persons of different races.²⁴ At Morehead State and at some of Kentucky's other public colleges and universities, there have been too few scholarship recipients to realize these and other benefits of student body diversity that the Supreme Court has noted are "substantial" and "important and laudable."²⁵ In addition, the state's historically black college and university, Kentucky State University (KSU), has in some years awarded dozens of the undergraduate scholarships to black students, but few if any, to students of other racial groups; this too did not help to promote cross-racial understanding, the breaking down of stereotypes, or the enabling of students to better understand persons of different races.

Thus, the evidence establishes that the programs have not functioned consistent with the student body diversity interest that the Supreme Court has held is compelling.

²² <http://catalog.wku.edu/graduate/education-behavioral-sciences/teacher-education/#programtext>.

²³ *Grutter*, *supra*, at 320.

²⁴ *Ibid.*, at 330.

²⁵ *Ibid.*, at 330-322.

2. Remedying Kentucky's History of Segregation in its Public Institutions of Higher Education

The evidence establishes that the programs are not, nor have ever been, efforts to remedy Kentucky's established history of segregation in its public institutions of higher education. In 1969, OCR had determined that Kentucky was operating a racially segregated system of higher education and in 2000, OCR and Kentucky entered into an agreement to remedy that segregation. However, the agreement between OCR and Kentucky was dissolved in 2009 when OCR found that Kentucky had met the terms of the agreement.²⁶ By law, as OCR explained in dissolving the agreement, any Kentucky programs that continued past dissolution of the agreement would have to stand on their own in meeting applicable legal requirements.²⁷ Thus, the scholarship programs must stand on their own in meeting applicable legal requirements.

The Jefferson County, Kentucky school district whose diversity plan was at issue in Parents Involved faced a similar issue. There, the Supreme Court said the school district could not rely upon a previous desegregation order to justify its continuing use of race. The Court explained that "Once Jefferson County achieved unitary status, it had remedied the constitutional wrong that allowed race-based assignments. Any continued use of race must be justified on some other basis."²⁸

OCR notes, as well, that even before the desegregation agreement with Kentucky was dissolved in 2009, neither program operated in a manner consistent with the desegregation agreement. The desegregation agreement required Kentucky to attract white students to KSU, and black students to the state's predominantly white institutions of higher education. However, as noted above, there have been years in which the state's historically black university, KSU, was awarding the undergraduate scholarship to dozens of black students but few if any to students of other races and there were years in which some of the state's predominantly white institutions of higher education got few, if any, black scholarship recipients.

Thus, the programs, both in their creation and operation, have not been consistent with the remedying of past discrimination that the Supreme Court has recognized as compelling. For this reason, in addition to the other reasons related to compelling interest as stated above, the programs fail the first prong of strict scrutiny review.

²⁶ *Final Report on the Commonwealth of Kentucky's Implementation of the Partnership Agreement between the Commonwealth of Kentucky and the U.S. Department of Education, Office for Civil Rights.*

²⁷ For example, in the *Final Report, supra*, that officially dissolved the desegregation agreement, OCR stated: "OCR cautions the Commonwealth that programs and activities, formerly provided in furtherance of this Agreement, that continue to use or consider race, color or national origin, must be narrowly tailored to achieve a compelling interest in accordance with Title VI strict scrutiny standards."

²⁸ Parents Involved, supra, at 720-21, citing to a line of previous U.S. Supreme Court cases, including Milliken v. Bradley, 433 U.S. 267, 280, n. 14, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977) and Freeman v. Pitts, 503 U.S. 467 at 495-96 (1992).

II. Narrow Tailoring

In addition to failing the compelling interest assessment that is the first prong of strict scrutiny review, the programs also fail the narrow tailoring requirements that form the second prong of strict scrutiny review.

The lack of a recognizable compelling interest here is enough for OCR to find that the programs are “facially invalid,”²⁹ as the Supreme Court did in Parents Involved. The purpose of narrow tailoring is to assess whether a use of race is narrowly tailored to meet a compelling interest.³⁰ If there is no compelling interest to which a use of race can be narrowly tailored, an assessment of whether the use of race is narrowly tailored to meet a compelling interest is a circular exercise.

For example, KDE has asserted that it has conducted periodic reviews to assess whether the scholarship programs at issue here continue to be necessary. KDE has also told OCR that, in KDE’s view, the benefits of teacher diversity are similar to the benefits of student-body diversity, in that there is value in having an integrated and diverse faculty, “with varying backgrounds and experiences who will respect and learn from each other.” Yet, for its “periodic reviews,” KDE has not shown evidence that it has developed and applied any standards other than reviewing whether it is, as the Kentucky statute states, “increasing the percentage of minority educators in proportion to the number of minority students.”

There is also evidence that the programs do not meet other narrow tailoring requirements. Parents Involved is again illustrative here, because there the Supreme Court, in addition to focusing on the lack of a compelling interest, also discussed whether there were workable race-neutral alternatives and the need for the use of race to have more than a minimal impact or effect on student body diversity. The Court said the two diversity plans at issue there could not survive narrow tailoring because they had only a “minimal impact” on student body diversity;³¹ the Court said this indicated that a race-neutral alternative could work about as well.

The two programs at issue here have similar problems. It is the responsibility of KDE, under the law, to show that it has given good faith consideration to available, workable alternative means of accomplishing its goal. Consideration of possible alternatives must include both race-neutral options and lesser uses of race.³² KDE has not met this standard. For example, if the goal of the

²⁹ Parents Involved, *supra*, at 729.

³⁰ See, for example, Grutter, *supra*, at 333 (2003): “Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still ‘constrained in how it may pursue that end: [T]he means chosen to accomplish the [government’s] asserted purpose must be specifically and narrowly framed to accomplish that purpose.’ *Shaw v. Hunt*, 517 U.S. 899, 908, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (internal quotation marks and citation omitted). The purpose of the narrow tailoring requirement is to ensure that ‘the means chosen ‘fit’ th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.’ *Richmond v. J.A. Croson Co.*, 488 U.S., at 493, 109 S.Ct. 706 (plurality opinion).”

³¹ Parents Involved, *supra*, at 733.

³² See, for example, Grutter, *supra*, at 339-40, referring to Wygant, *supra*, at 280, n. 6: “narrow tailoring
[{ “pageset”: “S1d require[s] consideration’ of ‘lawful alternative and less restrictive means’).”

programs is student body diversity, KDE has failed to show how a lesser use of race (such as the consideration of race as one factor in the admissions process at Kentucky's public colleges and universities, consistent with the Supreme Court's decisions) would not further this goal about as well as these "race-restricted" programs. Further, OCR has advised KDE of alternative programs that could help KDE accomplish its established goal of teacher and administrator diversity. KDE has not addressed whether the alternative programs suggested by OCR could be an effective means of furthering teacher and administrator diversity.

In addition, the evidence shows that there have been years in which some Kentucky public colleges and universities had three or fewer recipients of the undergraduate scholarship in their entire undergraduate student bodies. While it is true that other colleges and universities in Kentucky have had larger numbers of undergraduate scholarship recipients, it is necessary that each participating institution show that it meets the requirements of narrow tailoring. In Parents Involved, for example, the Supreme Court looked at the effect of the use of race on individual schools within the districts.³³ As for the graduate program, ALI, the evidence shows that the scholarship recipients are restricted to one particular program within the graduate school of education at one university (WKU). There are more than a dozen other programs within the graduate school of education at WKU, but the graduate scholarship at issue here cannot be used for any of these programs. KDE has not established how the graduate scholarship is necessary for, or even makes more than a minimal contribution to, student body diversity at WKU or to student body diversity within the graduate school of education at that university.

Thus, the evidence shows that neither program is narrowly tailored. They therefore fail the second prong of strict scrutiny review.

Conclusion

The scholarship programs aim to increase minority teachers and administrators in the Commonwealth of Kentucky. Although some studies have concluded that there are benefits to having a diverse teaching staff, it is an interest that the U.S. Supreme Court has not recognized as compelling and capable of possibly justifying the consideration of an individual's race. The evidence also shows that the programs were not established, and have not operated as, pursuits of student body diversity. Nor were the programs established or have operated as attempts to remedy Kentucky's history of segregation in its institutions of higher education (which had been remedied by 2009, as noted above). Further, the evidence shows that the programs fail to meet requirements of narrow tailoring. Therefore, the programs fail strict scrutiny review and, accordingly, they therefore violate Title VI.

To resolve the areas of non-compliance identified above, KDE entered into the attached Resolution Agreement, signed on September 14, 2017.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address KDE's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual

³³ Ibid., at 727-8.

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 KDE must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, or participates in an OCR proceeding. If this happens, the individual may file a retaliation complaint with OCR.

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 personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

Thank you for your cooperation. If you have any questions, please do not hesitate to contact me at melissa.corbin@ed.gov or 215-656-8526.

Sincerely,

A handwritten signature in cursive script that reads "Melissa M. Corbin".

Melissa M. Corbin
Team Leader
Philadelphia Office

Enclosure

cc: Travis Mayo

**Kentucky Department of Education
OCR Docket No. 03-04-1058**

The U.S. Department of Education, Office for Civil Rights (OCR) and the Kentucky Department of Education (KDE) enter into this agreement to resolve the allegation in the above-referenced complaint. This agreement does not constitute an admission of liability by KDE. KDE assures OCR that it will take the following actions to comply with the requirements of with Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, and its implementing regulation at 34 C.F.R. Part 100 which prohibit discrimination on the bases of race, color and national origin by recipients of Federal financial assistance.

ACTION STEPS

1. Effective September 15, 2017, KDE will discontinue all activities related to the enrollment of students in the Administrative Leadership Institute (ALI)/Principalship Program and the Minority Educator Recruitment and Retention Scholarship (MERRS) programs, including recruitment and tendering scholarship offers for the 2017-2018 academic year to any student who has not been selected as a participant of the programs as of September 15, 2017. The terms "selected as a participant" or "participant" shall mean any individual who, prior to and including September 15, 2017, was previously enrolled in either the ALI or MERRS program or who has been selected to participate in the ALI or MERRS programs, and to whom his or her respective university or college has sent written confirmation of the student's selection for and acceptance of participation in either program, regardless of whether all documentation, including but not limited to promissory notes, have been fully executed or finalized.
 - a. By September 15, 2017, KDE will issue a memorandum to all administrators and staff involved in the implementation of the ALI and MERRS programs that the programs are being discontinued.
 - b. By September 15, 2017, KDE will provide notification to the scholastic coordinator of each participating university or college or other person designated by a participating university or college who coordinates participation in the ALI or MERRS programs of the elimination of the programs, so that each respective university or college may notify all existing ALI or MERRS program participants regarding the elimination of the programs.
2. Nothing herein precludes the KDE from continuing to fund ALI or MERRS for students who were already participating in or who were selected as participants prior to September 15, 2017, so long as sufficient funds are available as appropriated by the Kentucky General Assembly to KDE.
3. OCR agrees that KDE may continue funding the ALI or MERRS programs for any student who was already participating in or who was selected as a participant in the ALI or MERRS

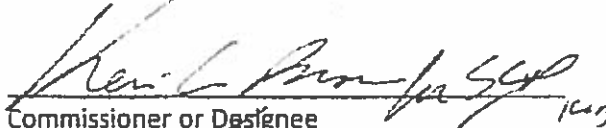
programs as of September 15, 2017, through the date of the student's graduation from a postsecondary education institution, or through the date of the student's eligibility to continue to participate in the ALI or MERRS programs based upon the written terms of eligibility, as those terms existed on May 4, 2017.

Reporting Requirements:

- By September 30, 2017, KDE will provide OCR with documentation demonstrating that it has discontinued the ALI and MERRS programs, and this documentation will include, but not be limited to, a copy of the memorandum as it was sent, the names/titles of the recipients, and an explanation as to how the memorandum was disseminated.
 - By September 30, 2017, KDE will report to OCR, by institution, the following information regarding each student who is participating in either the ALI or MERRS program during the 2017-2018 academic year, which the KDE is authorized to release to OCR pursuant to 34 C.F.R. § 100.6(b) and (c), and 34 C.F.R. § 99.31(a)(3)(iii): name or unique identifier, race/ national origin, whether a new or returning student, date selected for the program, amount of the financial aid provided, and the anticipated date of graduation.
 - By September 30, 2017, KDE will report to OCR the date and means by which the scholastic coordinator of each university or college notified each participant in the ALI or MERRS programs of the elimination of the programs.
4. At the KDE's request, OCR may provide technical assistance regarding the development of programs that comply with Title VI.

KDE understands and acknowledges that OCR may initiate administrative enforcement or judicial proceedings, including to enforce the specific terms and obligations of the Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10), or judicial proceedings, including to enforce the Agreement, OCR shall give KDE written notice of the alleged breach and sixty (60) calendar days to cure the alleged breach.

This Agreement will become effective immediately upon the signature of KDE's representative below.


Commissioner or Designee

9-14-17
Date


U.S. Department of Education, OCR Philadelphia Office Director

9/14/17
Date