

Matthew G. Bevin
Governor



Hal Heiner
Secretary
Education and
Workforce Development Cabinet

Stephen L. Pruitt, Ph.D.
Commissioner of Education

KENTUCKY DEPARTMENT OF EDUCATION

300 Sower Boulevard • Frankfort, Kentucky 40601
Phone: (502) 564-4770 • www.education.ky.gov

May 23, 2017

VIA EMAIL AND U.S. MAIL

Wendella P. Fox
Director of the Philadelphia Office
U.S. Department of Education, Office for Civil Rights
Wanamaker Building, Suite 515
100 Penn Square East
Philadelphia, PA 19107
Wendella.fox@ed.gov

Re: Additional evidence and request for legal review of the evidence in OCR Case 03-04-1058

Dear Ms. Fox:

As discussed in this week's phone conference between representatives of the Kentucky Department of Education (KDE) and the U.S. Department of Education's Office for Civil Rights (USED OCR), the KDE is submitting this letter and evidence supporting the constitutionality of the Kentucky Minority Educator Recruitment and Retention (MERR) financial assistance for minority public postsecondary students pursuing studies in education and the Administrative Leadership Institute (ALI) financial assistance for minority public postsecondary students pursuing advanced studies in education. We ask that USED OCR consider this evidence when determining the constitutionality and compliance of these programs with federal civil rights law, as interpreted by the U.S. Supreme Court, for this fourteen (14) year old complaint.

Specifically, this letter is to 1) summarize and memorialize the history of this fourteen (14) year old complaint filed with OCR in 2003; 2) reduce to writing the statutory history (and literal language from the Kentucky statute) and legal arguments provided numerous times to OCR via phone conference but not acknowledged or recognized by OCR; and 3) provide additional evidence and rationale for appropriate legal review and investigation by OCR.

As stated repeatedly by KDE, starting in 2014 when some of this additional context and evidence regarding these public postsecondary financial assistance race-restricted programs was discovered by KDE and again in a phone conference two weeks ago with USED OCR as well as in last week's phone conference, the additional evidence gleaned and submitted to USED OCR regarding the history, context, and statutory purpose of these statewide postsecondary financial assistance programs meets the strict scrutiny test, as set forth most recently in *Fisher v. University of Texas at Austin*, 136 S.Ct. 2198 (2016). Please see the evidence and analysis of this set forth below for your review and resolution of this 2003 complaint. Unfortunately, it is our belief that based on the tone and tenor of the recent calls with USED OCR, OCR is unwilling to consider any conclusion other than the forced termination of these programs that were created and funded by the Kentucky General Assembly.

A full recitation of the lengthy history and exchanges between USED OCR and KDE regarding this 2003 complaint follows below:

Since 1992¹, the MERR program has been instrumental in providing tuition assistance to minority students seeking initial teacher certification in Kentucky. Since the late 1990s, the ALI has been instrumental in providing tuition assistance to minority students pursuing advanced studies in education for leadership certification. As you are aware, there is a significant need for efforts to increase the racial diversity of students in the public postsecondary educational institutions statewide and that need requires the use of these race-restricted programs to make postsecondary education accessible for minority students. The KDE believes continuation of these programs is necessary to support and increase the diversity of students pursuing education studies in the postsecondary institutions of Kentucky.

In 2003, a complaint was filed with USED OCR regarding the MERR and ALI programs. The basis of this complaint, as described by USED OCR, involved concerns regarding the legality of using race as one of the eligibility factors for the public postsecondary institutions to use in determining student eligibility for these financial assistance programs. Since USED OCR first notified KDE of this complaint in August 2004, KDE has had ongoing discussions with USED OCR regarding the value and development of these programs, as called for by Kentucky Revised Statute (KRS) 161.165. Through this Kentucky statute and the specific state budget appropriations every two (2) years, the Kentucky General Assembly has directed KDE and the Education Professional Standards Board (EPSB) to:

promote programs that increase the percentage of minorities who enter and successfully complete a four (4)-year teacher preparation program and provide support to minority students in meeting qualifying requirements for students entering a teacher preparation program at institutions of higher education.

Discussions began in 2004 between USED OCR and KDE and then within the next year USED OCR discontinued communication regarding this complaint. KDE's historical information and records reflect that USED OCR then contacted KDE again five years later in 2010 to resume discussion of this 2003 complaint regarding these programs. Those communications were abandoned by USED OCR in 2011.

Two years later in 2013, USED OCR contacted KDE once again to resume communication regarding this 2003 complaint. KDE continued dialogue with USED OCR through these sporadic conversations, arguing for the continuation of these necessary programs, through mid-2014. In mid-2014, KDE, which is the elementary and secondary (K-12) state education agency, not the state postsecondary education agency or the state postsecondary financial assistance agency, through conversations with the state postsecondary education agency, the Kentucky Council on Postsecondary Education (CPE), learned of the context of these financial assistance programs in the USED OCR statewide

¹ KRS 161.165 was promulgated by the Kentucky General Assembly in 1992 and it is KDE's historical information that the MERR scholarship program funding began that year as well. KRS 161.165 was later part of HB 1 (1997 Special Session), the Kentucky General Assembly's effort to address the systemic racial disproportionality.

desegregation order, beginning in 1981 and continuing until January 2009, for Kentucky's entire public postsecondary education system. KDE immediately by phone and email provided the information, gleaned and available at that time from CPE's website, on the USED OCR and CPE desegregation order, the CPE Diversity Policy under KRS 164.020(19) and CPE regulation 13 KAR 2:060 requiring efforts statewide and at each individual public postsecondary institution to make "substantial progress toward meeting ... equal educational opportunity goals", and the public postsecondary context of these race-restricted financial assistance programs aimed at increasing the racial diversity of public postsecondary institutions statewide. From 2014 until last week, USED OCR provided no response to this vital portion of evidence regarding this 2003 complaint and appeared to end its pursuit of resolution of this complaint.

Then, three years later, on April 25, 2017, USED OCR again contacted KDE regarding this 2003 complaint and requested a phone conference to discuss the state of these programs. On Monday, May 1, 2017, KDE and USED OCR discussed this complaint by phone, including KDE's frustration with the age of this complaint, the repeated lack of responsiveness of USED OCR and USED OCR's refusal to put any of its preliminary findings and directives to KDE in finalized written recitations, and the absence of any response by USED OCR to the additional pertinent evidence that KDE provided to USED OCR in mid-2014. Ironically, OCR's contact with KDE on April 25, 2017 was five (5) days before the general acceptance deadline for most colleges in Kentucky.

USED OCR stated in that phone conference that it had concluded these programs violated federal civil rights laws and was sending KDE a draft resolution agreement and placing KDE on a ninety-day deadline to resolve this complaint or risk the withholding of federal funds. USED OCR, on May 4, 2017, sent the enclosed email stating these programs violate federal civil rights laws and attached to that email a **draft** resolution agreement for KDE and USED OCR to negotiate during the ninety-day window. KDE has held firm that no ceasing of any kind of these programs will occur until and unless USED OCR directs the KDE, in writing, to cease its role in these financial assistance programs. USED OCR continues to issue cease and desist demands orally but then refuses to memorialize those directives in writing.

On May 9, 2017, KDE requested another phone conference with USED OCR to discuss the additional evidence regarding these programs and their lawfulness and that phone conference was held May 9, 2017. KDE provided more evidence on this phone call of the lawfulness of these programs and the newly learned evidence and the legal analysis which supports their continuation. KDE has also repeatedly asked USED OCR to provide suggestions as to how these important programs could continue the goal of increasing racial diversity of postsecondary students pursuing education studies in a manner that USED OCR found lawful and that is available and workable for achieving these goals in light of the statewide context of these programs and other circumstances which prevent race-neutral alternatives from being available and workable alternatives to these race-restricted programs. KDE stated to USED OCR that KDE is providing, in writing, all this newly uncovered evidence of the history and context of these financial assistance programs resulting from the USED OCR and CPE desegregation order of 1981 and providing USED OCR the legal analysis to support the lawful continuation of these programs.

KDE has informed USED OCR that these are not KDE-created programs and that KDE is not the state agency over public postsecondary institutions or financial assistance for that education level.

KDE has informed USED OCR that these programs are crafted, funded, and monitored by the Kentucky General Assembly. USED OCR's response to this information is that USED OCR has authority over KDE, not the state legislature, and that USED OCR is forcing KDE to cease its administrative role in these programs or face loss of federal funds. USED OCR has refused the suggestion that these programs could be continued in a new form, with the stated goals for these programs only being the increasing of racial diversity of students throughout the public postsecondary education system statewide, under the governance of the state postsecondary education agency, CPE, and as part of CPE's Diversity Policy which is crafted, continued, and monitored under the U.S. Supreme Court case law and which advances the argument for the need in Kentucky for the continuation of race-neutral and race-restricted efforts to increase the racial diversity of the postsecondary student body statewide. USED OCR stated on May 9, 2017, that neither these programs, nor any successive programs with the compelling interest and narrow tailoring stated above, could be found lawful by USED OCR and therefore could not be utilized in Kentucky.

USED OCR has now informed KDE that KDE cannot continue to administer these two programs as a result of the fourteen (14)-year-old complaint. In this last phone conference, USED OCR stated that its May 4, 2017 email combined with the attached **draft** resolution agreement, to be negotiated and not yet final during the ninety (90) day negotiation period, requires KDE to cease operating these programs with the exception of provision of financial assistance to postsecondary institutions for returning students in the upcoming school year, 2017-18, and requires KDE to communicate this to the public postsecondary institutions. A copy of the USED OCR May 4, 2017 email and its attached **draft** resolution agreement, are enclosed. The email, the only final document or written communication thus far from USED OCR, states as follows:

On May 1, 2017, OCR met by phone with you, along with KDE officials, to discuss resolution of the complaint filed against the Kentucky Department of Education (KDE), OCR Docket No. 03-04-1058. This complaint alleged two scholarship programs operated by KDE, the Administrative Leadership Institute (ALI)/Principalship Program and the Minority Educator Recruitment and Retention Scholarship (MERRS) Program, do not comply 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.

As designed and implemented, these programs are inconsistent with multiple fundamental tenets of jurisprudence from the United States Supreme Court, and they are therefore inconsistent with Title VI. If KDE's efforts are intended to increase teacher and administrator diversity, it must seek these goals in a lawful manner. To the extent that KDE contends these programs help facilitate student body diversity, it has not provided OCR with adequate support for its position and, again, KDE must seek this goal in a lawful manner.

Attached please find the proposed resolution agreement that OCR mentioned to KDE during the May 1, 2017 teleconference that we would be sending. Consistent with OCR's Case Processing Manual (CPM), from the date that the proposed terms are shared with the recipient, OCR and the recipient will have a period of up to 90 calendar days within which to reach final agreement. If during this time KDE would like to provide additional information that may be relevant to negotiations, it may do so.

OCR is also requesting again that KDE provide data on any students who were not participants in either ALI or MERRS during the 2016-2017 academic year who have been offered one of these scholarships for summer 2017, fall 2017 or spring 2018. KDE will provide OCR with documentation of when these offers were made and when they were accepted.

Although KDE counsel stated during the teleconference that it was already familiar with OCR's procedures, OCR is providing KDE the link (<https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>) to its Case Processing Manual. If you have any questions, please contact me at Wendella.fox@ed.gov or 215-656-8542. OCR will be in touch with KDE in the next few days to schedule a call to review the specific terms of the proposed resolution agreement.

Nowhere in the May 4, 2017 email from USED OCR, the only finalized written document or communication from USED OCR to KDE regarding these programs and a determination of their lawfulness, does USED OCR direct KDE to cease these programs. USED OCR stated repeatedly in the May 9, 2017 conference call that the email *in combination with the draft resolution agreement*, directs KDE to cease these programs. As KDE stated on this conference call in response to this USED OCR assertion, no lawyer in good faith would advise his client to take such significant and drastic action based on a **draft** document, and especially in light of the fact that additional evidence as to the lawfulness of these programs is being submitted currently to USED OCR for review and consideration in USED OCR's resolution of this 2003 complaint. To that end, USED OCR is on notice that KDE is requiring USED OCR to commit, in writing, in a finalized written document, not in a draft document, that USED OCR is directing KDE to cease these financial assistance programs. The failure or delay of USED OCR in doing so is within USED OCR's control and KDE cannot, in good conscience and in good faith, take any actions regarding these programs prior to this action.

KDE is providing notice of USED OCR's oral directive and a copy of the USED OCR May 4, 2017 email and its attached **draft** resolution agreement to the public postsecondary institution contacts for these programs. KDE is continuing to provide, in writing, evidence to USED OCR (in this and future communications) from the Kentucky General Assembly, from CPE, and from the Kentucky Higher Education Assistance Authority (KHEAA) as to the compliance of these programs with federal civil rights laws. KDE is herein notifying USED OCR that the content of its May 4, 2017 email did not include the requirements for ceasing these programs and that the requirement to cease these programs is only found in the **draft** resolution agreement attachment sent with that email and subject to negotiation for ninety (90) days between KDE and USED OCR.

Legal analysis of these programs under *Fisher*:

As stated in *Fisher*, 136 S.Ct. at 2207-15 (a large portion of the majority opinion is so necessary for the review of the legal arguments asserted by KDE below that the lengthy quotations of the majority opinion are set out below):

Fisher I set forth three controlling principles relevant to assessing the constitutionality of a public university's affirmative-action program. First, "because racial characteristics so

seldom provide a relevant basis for disparate treatment,” *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), “[r]ace may not be considered [by a university] unless the admissions process can withstand strict scrutiny,” *Fisher I*, 570 U.S., at —, 133 S.Ct., at 2418. Strict scrutiny requires the university to demonstrate with clarity that its “ ‘purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary ... to the accomplishment of its purpose.’ ” *Ibid.*

Second, *Fisher I* confirmed that “the decision to pursue ‘the educational benefits that flow from student body diversity’ ... is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper.” *Id.*, at —, 133 S.Ct., at 2419. A university cannot impose a fixed quota or otherwise “define diversity as ‘some specified percentage of a particular group merely because of its race or ethnic origin.’ ” *Ibid.* Once, however, a university gives “a reasoned, principled explanation” for its decision, deference must be given “to the University’s conclusion, based on its experience and expertise, that a diverse student body would serve its educational goals.” *Ibid.* (internal quotation marks and citation omitted).

Third, *Fisher I* clarified that no deference is owed when determining whether the use of race is narrowly tailored to achieve the university’s permissible goals. *Id.*, at —, 133 S.Ct., at 2419–2420. A university, *Fisher I* explained, bears the burden of proving a “nonracial approach” would not promote its interest in the educational benefits of diversity “about as well and at tolerable administrative expense.” *Id.*, at —, 133 S.Ct., at 2420 (internal quotation marks omitted). Though “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative” or “require a university to choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to members of all racial groups,” *Grutter*, 539 U.S., at 339, 123 S.Ct. 2325, it does impose “on the university the ultimate burden of demonstrating” that “race-neutral alternatives” that are both “available” and “workable” “do not suffice.” *Fisher I*, 570 U.S., at —, 133 S.Ct., at 2420.

....
The ... [educational institution has a] continuing obligation to satisfy the burden of strict scrutiny in light of changing circumstances. The University engages in periodic reassessment of the constitutionality, and efficacy, of its admissions program. See Supp. App. 32a; App. 448a. Going forward, that assessment must be undertaken in light of the experience the school has accumulated and the data it has gathered since the adoption of its admissions plan. As the University examines this data, it should remain mindful that diversity takes many forms. Formalistic racial classifications may sometimes fail to capture diversity in all of its dimensions and, when used in a divisive manner, could undermine the educational benefits the University values. Through regular evaluation of data and consideration of student experience, the University must tailor its approach in light of changing circumstances, ensuring that race plays no greater role than is necessary to meet its compelling interest.

....
As this Court’s cases have made clear, however, the compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number

of minority students. Rather, a university may institute a race-conscious admissions program as a means of obtaining “the educational benefits that flow from student body diversity.” *Fisher I*, 570 U.S., at —, 133 S.Ct., at 2419 (internal quotation marks omitted); see also *Grutter*, 539 U.S., at 328, 123 S.Ct. 2325. As this Court has said, enrolling a diverse student body “promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races.” *Id.*, at 330, 123 S.Ct. 2325 (internal quotation marks and alteration omitted). Equally important, “student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society.” *Ibid.* (internal quotation marks omitted).

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.

On the other hand, asserting an interest in the educational benefits of diversity writ large is insufficient. A university’s goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them.

The ... University identifies the educational values it seeks to realize through its admissions process: the destruction of stereotypes, the “ ‘promot[ion of] cross-racial understanding,’ ” the preparation of a student body “ ‘for an increasingly diverse workforce and society,’ ” and the “ ‘cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry.’ ” Supp. App. 1a; see also *id.*, at 69a; App. 314a–315a (deposition of N. Bruce Walker (Walker Dep.)), 478a–479a (Walker Aff. ¶ 4) (setting forth the same goals). Later in the proposal, the University explains that it strives to provide an “academic environment” that offers a “robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders.” Supp. App. 23a. All of these objectives, as a general matter, mirror the “compelling interest” this Court has approved in its prior cases.

The University has provided in addition a “reasoned, principled explanation” for its decision to pursue these goals. *Fisher I*, *supra*, at —, 133 S.Ct., at 2419. The ... “use of race-neutral policies and programs ha[d] not been successful” in “provid[ing] an educational setting that fosters cross-racial understanding, provid[ing] enlightened discussion and learning, [or] prepar[ing] students to function in an increasingly diverse workforce and society.”

....

Third, petitioner argues that considering race was not necessary because such consideration has had only a “ ‘minimal impact’ in advancing the [University’s] compelling interest.” Brief for Petitioner 46; see also Tr. of Oral Arg. 23:10–12; 24:13–25:2, 25:24–26:3. Again, the record does not support this assertion. In 2003, 11 percent

of the Texas residents enrolled through holistic review were Hispanic and 3.5 percent were African-American. Supp. App. 157a. In 2007, by contrast, 16.9 percent of the Texas holistic-review freshmen were Hispanic and 6.8 percent were African-American. *Ibid.* Those increases—of 54 percent and 94 percent, respectively—show that consideration of race has had a meaningful, if still limited, effect on the diversity of the University's freshman class. In any event, it is not a failure of narrow tailoring for the impact of racial consideration to be minor. The fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality. Petitioner's final argument is that "there are numerous other available race-neutral means of achieving" the University's compelling interest. Brief for Petitioner 47. A review of the record reveals, however, that, at the time of petitioner's application, none of her proposed alternatives was a workable means for the University to attain the benefits of diversity it sought. None of these efforts succeeded, and petitioner fails to offer any meaningful way in which the University could have improved upon them at the time of her application.

.... See *Grutter, supra*, at 340, 123 S.Ct. 2325 (explaining that percentage plans "may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university"); 758 F.3d, at 653 (pointing out that the Top Ten Percent Law leaves out students "who fell outside their high school's top ten percent but excelled in unique ways that would enrich the diversity of [the University's] educational experience" and "leaves a gap in an admissions process seeking to create the multi-dimensional diversity that [*Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978),] envisions").

In short, none of the petitioner's suggested alternatives—nor other proposals considered or discussed in the course of this litigation—have been shown to be "available" and "workable" means through which the University could have met its educational goals, as it understood and defined them in 2008. *Fisher I, supra*, at —, 133 S.Ct., at 2420. The University has thus met its burden of showing that the admissions policy it used at the time it rejected the petitioner's application was narrowly tailored.

* * *

A university is in large part defined by those intangible "qualities which are incapable of objective measurement but which make for greatness." *Sweatt v. Painter*, 339 U.S. 629, 634, 70 S.Ct. 848, 94 L.Ed. 1114 (1950). Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission. But still, it remains an enduring challenge to our Nation's education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity.

In striking this sensitive balance, public universities, like the states themselves, can serve as "laboratories for experimentation." *United States v. Lopez*, 514 U.S. 549, 581, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (KENNEDY, J., concurring); see also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S.Ct. 371, 76 L.Ed. 747 (1932) (Brandeis, J., dissenting). The University of Texas at Austin has a special opportunity to learn and to teach. The University now has at its disposal valuable data about the manner in which

different approaches to admissions may foster diversity or instead dilute it. The University must continue to use this data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary.

The Court's affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy without refinement. It is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies.

Constitutional analysis of a racially restrictive financial aid program for public postsecondary students to withstand strict scrutiny, as described above in *Fisher*, 136 S.Ct. at 2207-15, can be met for the MERR and ALI public postsecondary financial assistance programs as described below. While the *Fisher* case is focused on the use of race in postsecondary admissions decisions, the same test is applicable to race-restricted postsecondary financial aid, as USED OCR itself has held in its 2012 decision regarding a complaint of racial discrimination against the University of Missouri-Columbia². USED OCR reviewed the total financial aid available to students at that postsecondary institution and the amount of financial aid that was race-restricted. USED OCR, in the Missouri case, "analyzed the evidence to determine whether the University met its burden of showing that its use of race and national origin in grant and scholarship programs was narrowly tailored to achieve the University's compelling interest in diversity...." USED OCR then reviewed the compelling interest asserted by the educational institution in promoting and increasing diversity. USED OCR specifically found, in the 2012 Missouri case on race-restricted financial assistance:

The Department's 1994 Guidance determined that postsecondary institutions may use race in a narrowly tailored way to award financial aid to achieve a compelling interest in diversity. In 2003, the Supreme Court upheld the view that diversity is a compelling interest. The rationales relied on in *Grutter v. Bollinger* to uphold a compelling diversity interest, as did the rationales relied on by Justice Powell in *Regents of the University of California v. Bakke*, apply to institutions that use race and national origin in awarding financial aid to seek the benefits of diversity. In *Grutter*, the Court evaluated the University of Michigan Law School's admissions program under the strict scrutiny standard of review, requiring the Law School to demonstrate that its program was narrowly tailored to serve a compelling interest. Applying that standard, the Court held that postsecondary institutions have a compelling interest in the benefits that flow from a diverse student body. In reaching this result, the Court followed its tradition, grounded in the First Amendment, of "giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits." *Grutter*, 539 U.S. at 328. The Court unequivocally recognized that the benefits of student body diversity in institutions of higher education are "substantial," "important and laudable." *Id.* at 330. One aspect of such student body diversity, the Court recognized, can be racial diversity. The Court accepted the Law School's goal to achieve broad diversity where race was " 'only one element in a range of factors a university . . . properly consider[ed] in attaining the goal

² Available on USED OCR's website at <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/07052028.html> and <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/07052028-a.pdf>.

of a heterogeneous student body.’ ” Id. at 324 (quoting *Bakke*, 438 U.S. at 314 (opinion of Powell, J.)). The U.S. Department of Education and the U.S. Department of Justice issued in 2011 Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education (2011 Guidance), which confirmed “the compelling interest that postsecondary institutions have in obtaining the benefits that flow from achieving a diverse student body.” In accordance with these authorities, OCR has determined that the University has a compelling interest in diversity.

USED OCR, then, in the Missouri case, looked at whether the postsecondary institution’s efforts to achieve the compelling interest were narrowly tailored:

Narrow Tailoring

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

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

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

(5) Whether the University has reviewed in good faith whether race-neutral means or less extensive or intrusive uses of race or national origin in awarding financial aid have been or would be workable to achieve the benefits of diversity.

USED OCR went on to review the postsecondary institution's overall financial aid program and the case law governing in reviewing whether the University of Missouri's race restricted and race-as-a-factor financial aid, in the context of all the financial aid available to its students, violate the federal civil rights laws:

The University's views that individual scholarships must be viewed in the context of the scholarship program as a whole is consistent with what OCR said on this point in its 1994 Guidance. In assessing whether a particular scholarship provides individualized consideration by examining the scholarship in the context of a university's entire scholarship program, as a whole, OCR is mindful of the 1994's Guidance's statement that Page 6 – Brady J. Deaton, Chancellor – 07052028.

[T]here are important differences between admissions and financial aid. The . . . admissions program struck down in *Bakke* had the effect of excluding applicants from the university on the basis of their race. The use of race-targeted financial aid, on the other hand, does not . . . dictate that a student would be foreclosed from attending a college solely on the basis of race. Moreover, in contrast to the number of admissions slots, the amount of financial aid available to students is not necessarily fixed. For example, a college's receipt of privately donated monies restricted to an underrepresented group might increase the total pool of funds for student aid . . . 59 Fed. Reg. at 8762.

USED OCR then reviewed the amount of financial aid that was race-restricted in the Missouri complaint. USED OCR reviewed the facts involved in this case and whether there was a compelling interest that was narrowly tailored:

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

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

USED OCR then, in the Missouri complaint, reviewed whether the duration of the race-restricted financial aid was limited to when it was found necessary to promote the compelling interest and whether there were reviews of the need for these programs:

Under the 1994 Guidance, “the duration of the use of the racial classification should be no longer than is necessary to its purpose, and the classification should be periodically reexamined to determine whether there is a continued need for its use.” 59 Fed. Reg. at 8762. Race-involved aid may not be continued when it is no longer necessary to further diversity.

Finally, in the Missouri complaint, USED OCR reviewed whether Missouri had in good faith considered and had available and workable race-neutral alternatives to the race-restricted financial aid programs to achieve its compelling interest; and, when the University of Missouri demonstrated that it did not have available, workable race-neutral alternatives to these programs, USED OCR concluded that Missouri had met its burden of proving it had a compelling interest, that was narrowly tailored, periodically reviewed, in the absence of available, workable race-neutral alternatives, to ensure that its race-restricted financial assistance did not violate the federal civil rights law.

Pursuant to the line of cases, most recently *Fisher* (above), and pursuant to the USED OCR 2012 decision on the University of Missouri complaint, there must be a compelling interest in restricting the program based on racial status of applicants. This compelling interest for these Kentucky programs is increasing the percentage of racial minority students in the entire Kentucky public postsecondary system, as stated by the Kentucky General Assembly in KRS 161.165(2) (copy enclosed), to obtain the educational benefits that flow from student body diversity, as described in *Fisher*; this can be applied to these programs in Kentucky: destruction of stereotypes, promotion of cross-racial understanding, preparation of a student body for an increasingly diverse workforce and society, and cultivation of a set of leaders with legitimacy in the eyes of the citizenry as educational values Kentucky seeks to promote and realize through these scholarship programs. The above referenced subsection of KRS 161.165 does not state or have a particular percentage or amount of increase as a goal, a requirement to pass strict scrutiny. The use of race for this goal is both constitutionally permissible and substantial. As a financial assistance program for minority students pursuing education studies at any public postsecondary institution in Kentucky, these programs should be viewed in light of the statewide diversity policy, created by CPE. Some of these goals for student body diversity, listed in *Fisher*, are stated on the CPE website at <http://cpe.ky.gov/ourwork/diversity.html> and in the Kentucky Community and Technical College System’s (KCTCS) resolution for cultivation of diversity, multiculturalism, and inclusion in the public career and technical colleges (CTCs) in Kentucky. The KCTCS Board Resolution to Cultivate Diversity, Multiculturalism and Inclusion is available on KCTCS’s website at <http://en.calameo.com/read/00128100115df16280f69>. CPE’s Diversity Policy mentions the Statewide Desegregation Plan and goals such as improving campus climate:

Policy for Diversity, Equity, and Inclusion: This statewide policy is grounded on the premise that to truly prepare students for life and work in an increasingly diverse society, the public postsecondary institutions within the Commonwealth shall develop a plan to embrace diversity and equity within constitutional and legal parameters, commit to

improving academic achievement for all students, create an inclusive campus environment, and produce culturally competent graduates for the workforce.

CPE's Diversity Policy also provides recitation of the Kentucky General Assembly's work in the 1997, Special Session, to create legislation to address and work on the racial disparity issues that led to the 1981 USED OCR and CPE Desegregation Order over the entire public postsecondary educational system of the state. KRS 161.165 was included in Kentucky House Bill 1 from the 1997 Special Session, found at <http://www.lrc.state.ky.us/recarch/97ss/HB1.htm>. CPE's Diversity Policy, crafted as a result of the Desegregation Order and HB 1 (1997 Special Session), includes the following which are integral to USED OCR's review of the lawfulness of these two particular programs:

Vision and Guiding Principles:

The vision of the CPE is for all public postsecondary institutions to implement strategies, programs, and services that fulfill the educational objectives set forth in The Postsecondary Education Improvement Act (HB 1, 1997 Special Session), and address the needs of and support the success of all students, particularly those most affected by institutional and systemic inequity and exclusion. The following principles shape the priorities that guide decisions about the Commonwealth's promotion of diversity, equity, and inclusion:

- The recognition of diversity as a vital component of the state's educational and economic development.
- An affirmation of the long-standing commitment to the enrollment and success of Kentucky's African-American students at public colleges and universities.
- The challenging of stereotypes and the promotion of awareness and inclusion.
- Support for community engagement, civic responsibility, and service that advance diverse and underserved populations/groups.
- Increased success for all students, particularly those from historically disadvantaged backgrounds who have exhibited a lower rate of retention, persistence, and graduation than the total student population.
- The nurturing, training, and production of students with the ability to interact effectively with people of different cultures (i.e., cultural competence.)
- The preparation of a workforce that is diverse, culturally competent, and highly educated to compete in a global economy.
- The creation of an inclusive environment on our campuses.

The CPE Diversity Policy cites historic U.S. Supreme Court case law (*Grutter v. Bollinger*, 539 U.S. 306 (2003)) on the use of race-restrictive programs to further student body diversity and is crafted under the framework and requirements of that law. The current CPE Diversity Policy, finalized in September 2016, states explicitly that both race-neutral and race conscious strategies may be required at this time to attain these goals of racial diversity of the student bodies of the entire Kentucky public postsecondary education system. CPE acknowledges in its Diversity Policy that achievement of student body diversity in Kentucky's public postsecondary educational institutions may require the use of race-restricted tools:

Strategies:

In order to meet the goals outlined above, institutions shall identify strategies for the recruitment and enrollment of diverse students and outline plans for implementation. These strategies may include:

- Race and ethnicity-neutral policies designed to increase diversity in the student body.

Examples are included in the following:

<http://diversitycollaborative.collegeboard.org/sites/default/files/document-library/adc-playbook-october-2014.pdf>

- Race-conscious enrollment and recruitment policies that adhere to any and all applicable constitutional limitations.

Postsecondary diversity information and each postsecondary institution's current diversity plan are available on CPE's website at <http://cpe.ky.gov/ourwork/diversity.html>. CPE's statute requiring equal educational opportunities in public postsecondary educational institutions is KRS 164.020(19) <http://www.lrc.ky.gov/Statutes/statute.aspx?id=45397> and its regulation is 13 KAR 2:060. The statute provides:

The Council on Postsecondary Education in Kentucky shall: ...

(19) Postpone the approval of any new program at a state postsecondary educational institution, unless the institution has met its equal educational opportunity goals, as established by the council. In accordance with administrative regulations promulgated by the council, those institutions not meeting the goals shall be able to obtain a temporary waiver, if the institution has made substantial progress toward meeting its equal educational opportunity goals;

Fisher as well requires that the compelling interest must not be available and workably achievable through a race-neutral plan. The following race-neutral alternatives to the race-restricted MERR and ALI financial assistance programs have been considered in good faith and for the reasons stated below are not available and workable to achieve improved statewide racial diversity of the student bodies of the public postsecondary institutions of Kentucky.

1. Locating race-neutral versions of these financial assistance programs only at the historically black college or university (HBCU) in Kentucky does not work for two reasons.
 - a. The HBCU is of course a "historically black college or university" and does not typically have the same draw for other minority races. That would lead to allegations that the scholarship is being implemented to only benefit one particular racial minority student group, which was conveyed to KDE originally to be part of the 2003 complaint to USED OCR regarding these programs.
 - b. Locating the scholarships at the HBCU will not increase the statewide low racial minority student percentages since it is a single public postsecondary in Kentucky (and several more exist).
2. Locating a race-neutral version of these programs at only a particular few other public postsecondary institutions in Kentucky will not address the statewide need for increasing racial diversity of public postsecondary student bodies. The regional four-year institutions usually attract students from that region only. The CTCs even experience this more so. Therefore, locating a race-neutral version of these financial assistance programs in only targeted postsecondary institutions will not work to

increase the percentage of racial minority students in the entire Kentucky public postsecondary system.

3. Locating a race-neutral version of these programs at only a particular few other public high schools in Kentucky will not address the statewide need for increasing racial diversity of public postsecondary student bodies. See regional preference and statewide need factors described above. Therefore, locating a scholarship program in only targeted high schools will not work to increase the percentage of racial minority students in the entire Kentucky public postsecondary system.
4. As well, a race-neutral version of these programs housed anywhere will not advance the goal of increasing the statewide number of racial minority students in the public postsecondary system because Kentucky has a high poverty rate among all races, including Caucasian. As a result, amending the minority status eligibility requirement to low income applicants will not work to address the low racial student minority percentages at Kentucky's public postsecondary institutions statewide.

Fisher requires the program to be narrowly tailored to achieve this compelling interest and to ensure that race plays no greater role than necessary to achieve this compelling interest and there must be continuing review of whether the compelling interest still exists. (See, KRS 161.165(3) requirement for periodic reporting to Kentucky legislative subcommittee which informs the legislative decision every two years to continue funding for these scholarships; and see, CPE race neutral and race conscious efforts described in their Diversity Policy and the CPE regulation requiring public postsecondary institutions to have diversity plans and for these to be reviewed and updated.)

Fisher requires KDE to bear the burden of showing that Kentucky's entire public postsecondary education system had not obtained the educational benefits of diversity before creating the race restricted scholarship programs. There can be no question of the fact that USED OCR required CPE to enter a desegregation plan in 1981 and continue it until 2009, as well as the CPE 2011-15 enrollment report detailing the progress, but still gains to be had, in enrollment of racial minority students in public postsecondary educational institutions statewide, and the current CPE Diversity Policy meet the demands of this burden. As stated in last week's phone conference, KDE has communicated with CPE to request and secure the current racial demographic enrollment data statewide to provide to CPE for review in their consideration of the lawfulness of these programs currently. That data has been provided by CPE to KDE and is enclosed. This most recent racial demographic data for each individual public postsecondary institution in Kentucky, and Kentucky's total public postsecondary system, demonstrates that gains have been made but that racial diversification of the student bodies is still a compelling interest to be achieved.

Fisher requires KDE to establish that the race-restricted scholarship programs are having a meaningful impact on diversity of the Kentucky public postsecondary system's student bodies. The 2009 letter from USED OCR to Kentucky's Governor releasing Kentucky from the desegregation plan is evidence of this as is the overall increase in the number of racial minority students enrolled in Kentucky's public postsecondary educational institutions from 2011-2015 (see CPE 2011-2015 report at pages 4, 6-7, enclosed). As well, there are still gains to be had and so the compelling interest in using these race-restricted programs to encourage minority students to attend public postsecondary institutions in Kentucky is the reason that these programs are still necessary today to work toward this goal.

Pursuant to the 2012 USED OCR ruling on this issue in the University of Missouri complaint, USED OCR has previously found that evidence of all the financial aid available to students at that postsecondary educational institution was relevant to the determination of narrow tailoring. Because the 2003 USED OCR complaint regarding the MERR and ALI programs involves financial aid programs available at all the public postsecondary educational institutions statewide and not just one postsecondary educational institution as in the Missouri case above, USED OCR may want to secure and review from KHEAA and KCTCS information on the financial aid that is available at any and all of Kentucky's public postsecondary institutions and how much of that aid is race-restricted in order for USED OCR to determine that only a small portion of the financial aid is race-restricted. The information KDE can provide on this today is that KHEAA has issued a publication listing all the financial aid available at the Kentucky public four-year institutions (which includes MERR) for the 2016-17 school year and this publication is available on KHEAA's website at <https://www.kheaa.com/pdf/pubs/ky/ahe/ahepublic.pdf>. (KHEAA's information on their administration of the MERR financial aid is available on their website at https://www.kheaa.com/website/kheaa/convloan_merr?main=1.) KCTCS may have additional information on the financial assistance available to students at any or all of the CTCs in Kentucky and would be the authoritative source of that evidence. KCTCS's contact information is available on their website at https://systemoffice.kctcs.edu/Student_Services/Cultural_Diversity for their work on increasing cultural diversity and at https://systemoffice.kctcs.edu/en/Student_Services/Financial_Aid.aspx for information on financial aid.

In closing, it is clear that over the past fourteen (14) years, OCR has not sufficiently performed its investigation and evidence gathering duties for this single complaint. As KDE has stated repeatedly, OCR was on notice in mid-2014 of the additional evidence regarding this case and its context and appropriate analysis as public postsecondary race-restricted financial assistance to diversify the student bodies of the entire public postsecondary system in our state, pursuant to KRS 161.165(2). As a result, OCR had a duty from then to investigate and gather additional evidence regarding the entire financial aid available to all students in the public postsecondary system in Kentucky (available from KHEAA), regarding the racial composition of the entire public postsecondary student body and individual racial diversity of each public postsecondary institution (available from CPE and KCTCS), and to gather any additional evidence which was considered and utilized in the Missouri complaint to reach a conclusion regarding the allegations of discrimination in that public postsecondary institution's use of race-restricted financial assistance. OCR has failed, since 2014, to begin to perform any of these due diligence responsibilities required of it for the investigation and professional and just resolution of this complaint. For that reason, as stated by KDE to OCR, starting in mid-2014 and then again on May 1, 2017 and twice since that date via phone conference, it is premature for OCR to have sent KDE the draft resolution agreement under Section 303 of the OCR Case Processing Manual and OCR should withdraw the draft resolution agreement and renew its investigatory duties for this complaint with collection and consideration of the above-described evidence and legal analysis.

It is my hope that this additional information and legal argument will spur USED OCR to leave the door open to consider and review anew, with these in mind, whether these programs can meet the lawfulness requirements for race-restricted financial assistance programs for postsecondary educational students. I believe the tests of *Fisher* are met, as stated above, and that a conversation including all the historic and current shareholders of this goal and these programs should proceed immediately so an unjust outcome for minority students pursuing educational studies in Kentucky does not result.

Sincerely,

A handwritten signature in blue ink, appearing to read "Stephen L. Pruitt", with a stylized flourish at the end.

Stephen L. Pruitt, Ph.D.
Commissioner of Education

Enclosures

cc with enclosures:
(via Email)

- Members of the Kentucky Congressional Delegation
- Hon. Andy Beshear, Attorney General
- President Robert Stivers, Kentucky State Senate
- Speaker Jeff Hoover, Kentucky House of Representatives
- Members of the Interim Joint Committee on Education, Ky. General Assembly
- Robert King, Kentucky Council on Postsecondary Education (CPE)
- Travis Powell, CPE
- Carl Rollins, Kentucky Higher Education Assistance Authority (KHEAA)
- Kevin C. Brown, KDE
- Amy Peabody, KDE
- KDE Planning Committee
- Randolph Wills, USED OCR
- Carol Ashley, USED OCR
- Sherrell Evans, USED OCR
- Michael Wesley, USED OCR
- Melissa Corbin, USED OCR
- Jacques Toliver, USED OCR
- Joseph Mahoney, USED OCR
- Judith O'Boyle, USED OCR

**Fall 2016 Enrollment by Race/Ethnicity
Kentucky Public Institutions**

	Fall 2016	% of total
Eastern Kentucky University	American Indian or Alaskan Native, Non-Hispanic Only	35 0.24%
	Asian, Non-Hispanic Only	98 0.69%
	Black, Non-Hispanic Only	792 5.54%
	Hispanic or Latino, regardless of race	382 2.67%
	Native Hawaiian or Other Pacific Islander, Non-Hispanic Only	13 0.09%
	Nonresident Alien	203 1.42%
	Race and Ethnicity Unknown	217 1.52%
	Two or More Races	362 2.53%
	White, Non-Hispanic Only	12191 85.29%
	Total	14293 100.00%
Kentucky State University	American Indian or Alaskan Native, Non-Hispanic Only	7 0.45%
	Asian, Non-Hispanic Only	13 0.83%
	Black, Non-Hispanic Only	734 46.81%
	Hispanic or Latino, regardless of race	35 2.23%
	Native Hawaiian or Other Pacific Islander, Non-Hispanic Only	0 0.00%
	Nonresident Alien	6 0.38%
	Race and Ethnicity Unknown	344 21.94%
	Two or More Races	38 2.42%
	White, Non-Hispanic Only	391 24.94%
	Total	1568 100.00%
Morehead State University	American Indian or Alaskan Native, Non-Hispanic Only	16 0.16%
	Asian, Non-Hispanic Only	69 0.71%
	Black, Non-Hispanic Only	336 3.44%
	Hispanic or Latino, regardless of race	184 1.89%
	Native Hawaiian or Other Pacific Islander, Non-Hispanic Only	12 0.12%
	Nonresident Alien	186 1.91%
	Race and Ethnicity Unknown	89 0.91%
	Two or More Races	201 2.06%
	White, Non-Hispanic Only	8661 88.79%
	Total	9754 100.00%
	American Indian or Alaskan Native, Non-Hispanic Only	21 0.24%

Murray State University	Asian, Non-Hispanic Only	88	0.99%
	Black, Non-Hispanic Only	565	6.36%
	Hispanic or Latino, regardless of race	168	1.89%
	Native Hawaiian or Other Pacific Islander, Non-Hispanic Only	6	0.07%
	Nonresident Alien	373	4.20%
	Race and Ethnicity Unknown	236	2.66%
	Two or More Races	211	2.37%
	White, Non-Hispanic Only	7218	81.23%
	Total	8886	100.00%
	American Indian or Alaskan Native, Non-Hispanic Only	37	0.29%
	Asian, Non-Hispanic Only	149	1.18%
Northern Kentucky University	Black, Non-Hispanic Only	850	6.72%
	Hispanic or Latino, regardless of race	393	3.11%
	Native Hawaiian or Other Pacific Islander, Non-Hispanic Only	6	0.05%
	Nonresident Alien	345	2.73%
	Race and Ethnicity Unknown	81	0.64%
	Two or More Races	307	2.43%
	White, Non-Hispanic Only	10475	82.85%
	Total	12643	100.00%
	American Indian or Alaskan Native, Non-Hispanic Only	38	0.17%
	Asian, Non-Hispanic Only	579	2.55%
	Black, Non-Hispanic Only	1765	7.78%
University of Kentucky	Hispanic or Latino, regardless of race	998	4.40%
	Native Hawaiian or Other Pacific Islander, Non-Hispanic Only	21	0.09%
	Nonresident Alien	675	2.98%
	Race and Ethnicity Unknown	670	2.95%
	Two or More Races	826	3.64%
	White, Non-Hispanic Only	17102	75.43%
	Total	22674	100.00%
	American Indian or Alaskan Native, Non-Hispanic Only	16	0.10%
	Asian, Non-Hispanic Only	574	3.58%
	Black, Non-Hispanic Only	1776	11.08%
	Hispanic or Latino, regardless of race	713	4.45%
University of Louisville	Native Hawaiian or Other Pacific Islander, Non-Hispanic Only	9	0.06%
	Nonresident Alien	452	2.82%
	Race and Ethnicity Unknown	22	0.14%

Western Kentucky University	Two or More Races	745	4.65%
	White, Non-Hispanic Only	11722	73.13%
	Total	16029	100.00%
	American Indian or Alaskan Native, Non-Hispanic Only	37	0.21%
	Asian, Non-Hispanic Only	269	1.53%
	Black, Non-Hispanic Only	1544	8.77%
	Hispanic or Latino, regardless of race	543	3.09%
	Native Hawaiian or Other Pacific Islander, Non-Hispanic Only	18	0.10%
	Nonresident Alien	850	4.83%
	Race and Ethnicity Unknown	220	1.25%
	Two or More Races	530	3.01%
	White, Non-Hispanic Only	13590	77.21%
	Total	17601	100.00%
	American Indian or Alaskan Native, Non-Hispanic Only	207	0.20%
	Asian, Non-Hispanic Only	1839	1.78%
	Black, Non-Hispanic Only	8362	8.08%
Four Year Public Institutions Total	Hispanic or Latino, regardless of race	3416	3.30%
	Native Hawaiian or Other Pacific Islander, Non-Hispanic Only	85	0.08%
	Nonresident Alien	3090	2.99%
	Race and Ethnicity Unknown	1879	1.82%
	Two or More Races	3220	3.11%
	White, Non-Hispanic Only	81350	78.64%
	Total	103448	100.00%
	American Indian or Alaskan Native, Non-Hispanic Only	5	0.18%
	Asian, Non-Hispanic Only	11	0.40%
	Black, Non-Hispanic Only	41	1.48%
	Hispanic or Latino, regardless of race	33	1.19%
	Native Hawaiian or Other Pacific Islander, Non-Hispanic Only	1	0.04%
	Nonresident Alien		0.00%
	Race and Ethnicity Unknown	21	0.76%
	Two or More Races	50	1.80%
	White, Non-Hispanic Only	2613	94.16%
Ashland Community & Technical College	Total	2775	100.00%
	American Indian or Alaskan Native, Non-Hispanic Only	17	0.34%
	Asian, Non-Hispanic Only	20	0.40%
	Black, Non-Hispanic Only	42	0.83%

Big Sandy Community & Technical College	Hispanic or Latino, regardless of race	38	0.75%
	Native Hawaiian or Other Pacific Islander, Non-Hispanic Only	2	0.04%
	Nonresident Alien	1	0.02%
	Race and Ethnicity Unknown	575	11.37%
	Two or More Races	42	0.83%
	White, Non-Hispanic Only	4320	85.43%
	Total	5057	100.00%
Bluegrass Community & Technical College	American Indian or Alaskan Native, Non-Hispanic Only	13	0.13%
	Asian, Non-Hispanic Only	239	2.40%
	Black, Non-Hispanic Only	1163	11.70%
	Hispanic or Latino, regardless of race	481	4.84%
	Native Hawaiian or Other Pacific Islander, Non-Hispanic Only	13	0.13%
	Nonresident Alien	40	0.40%
	Race and Ethnicity Unknown	98	0.99%
	Two or More Races	390	3.92%
Elizabethtown Community & Technical College	White, Non-Hispanic Only	7506	75.49%
	Total	9943	100.00%
	American Indian or Alaskan Native, Non-Hispanic Only	17	0.25%
	Asian, Non-Hispanic Only	74	1.07%
	Black, Non-Hispanic Only	461	6.68%
	Hispanic or Latino, regardless of race	257	3.73%
	Native Hawaiian or Other Pacific Islander, Non-Hispanic Only	16	0.23%
Gateway Community & Technical College	Nonresident Alien	2	0.03%
	Race and Ethnicity Unknown	238	3.45%
	Two or More Races	247	3.58%
	White, Non-Hispanic Only	5585	80.98%
	Total	6897	100.00%
	American Indian or Alaskan Native, Non-Hispanic Only	9	0.20%
	Asian, Non-Hispanic Only	31	0.70%
Gateway Community & Technical College	Black, Non-Hispanic Only	330	7.42%
	Hispanic or Latino, regardless of race	156	3.51%
	Native Hawaiian or Other Pacific Islander, Non-Hispanic Only	6	0.13%
	Nonresident Alien	2	0.04%
	Race and Ethnicity Unknown	82	1.84%
	Two or More Races	104	2.34%
	White, Non-Hispanic Only	3729	83.82%

Hazard Community & Technical College	Total	4449	100.00%
	American Indian or Alaskan Native, Non-Hispanic Only	3	0.09%
	Asian, Non-Hispanic Only	5	0.15%
	Black, Non-Hispanic Only	46	1.40%
	Hispanic or Latino, regardless of race	16	0.49%
	Native Hawaiian or Other Pacific Islander, Non-Hispanic Only		0.00%
	Nonresident Alien	1	0.03%
	Race and Ethnicity Unknown	32	0.98%
	Two or More Races	23	0.70%
	White, Non-Hispanic Only	3154	96.16%
	Total	3280	100.00%
Henderson Community College	American Indian or Alaskan Native, Non-Hispanic Only	2	0.15%
	Asian, Non-Hispanic Only	5	0.38%
	Black, Non-Hispanic Only	115	8.63%
	Hispanic or Latino, regardless of race	44	3.30%
	Native Hawaiian or Other Pacific Islander, Non-Hispanic Only	2	0.15%
	Nonresident Alien	1	0.08%
	Race and Ethnicity Unknown	16	1.20%
	Two or More Races	38	2.85%
	White, Non-Hispanic Only	1109	83.26%
	Total	1332	100.00%
	American Indian or Alaskan Native, Non-Hispanic Only	9	0.31%
Hopkinsville Community College	Asian, Non-Hispanic Only	42	1.46%
	Black, Non-Hispanic Only	649	22.52%
	Hispanic or Latino, regardless of race	265	9.20%
	Native Hawaiian or Other Pacific Islander, Non-Hispanic Only	18	0.62%
	Nonresident Alien	3	0.10%
	Race and Ethnicity Unknown	57	1.98%
	Two or More Races	109	3.78%
	White, Non-Hispanic Only	1730	60.03%
	Total	2882	100.00%
	American Indian or Alaskan Native, Non-Hispanic Only	25	0.21%
	Asian, Non-Hispanic Only	392	3.29%
Jefferson Community	Black, Non-Hispanic Only	2284	19.18%
	Hispanic or Latino, regardless of race	842	7.07%
	Native Hawaiian or Other Pacific Islander, Non-Hispanic Only	16	0.13%

& Technical College	Nonresident Alien	40	0.34%
	Race and Ethnicity Unknown	475	3.99%
	Two or More Races	413	3.47%
	White, Non-Hispanic Only	7421	62.32%
	Total	11908	100.00%
	American Indian or Alaskan Native, Non-Hispanic Only	14	0.42%
Madisonville Community College	Asian, Non-Hispanic Only	12	0.36%
	Black, Non-Hispanic Only	177	5.29%
	Hispanic or Latino, regardless of race	85	2.54%
	Native Hawaiian or Other Pacific Islander, Non-Hispanic Only	6	0.18%
	Nonresident Alien	2	0.06%
	Race and Ethnicity Unknown	97	2.90%
Maysville Community & Technical College	Two or More Races	68	2.03%
	White, Non-Hispanic Only	2884	86.22%
	Total	3345	100.00%
	American Indian or Alaskan Native, Non-Hispanic Only	5	0.14%
	Asian, Non-Hispanic Only	12	0.34%
	Black, Non-Hispanic Only	89	2.52%
Owensboro Community & Technical College	Hispanic or Latino, regardless of race	64	1.82%
	Native Hawaiian or Other Pacific Islander, Non-Hispanic Only	3	0.09%
	Nonresident Alien	2	0.06%
	Race and Ethnicity Unknown	31	0.88%
	Two or More Races	71	2.01%
	White, Non-Hispanic Only	3248	92.14%
Owensboro Community & Technical College	Total	3525	100.00%
	American Indian or Alaskan Native, Non-Hispanic Only	8	0.20%
	Asian, Non-Hispanic Only	31	0.77%
	Black, Non-Hispanic Only	127	3.17%
	Hispanic or Latino, regardless of race	76	1.90%
	Native Hawaiian or Other Pacific Islander, Non-Hispanic Only	2	0.05%
Owensboro Community & Technical College	Nonresident Alien	1	0.02%
	Race and Ethnicity Unknown	88	2.20%
	Two or More Races	100	2.50%
	White, Non-Hispanic Only	3568	89.18%
	Total	4001	100.00%
	American Indian or Alaskan Native, Non-Hispanic Only	23	0.35%

Somerset Community College	Asian, Non-Hispanic Only	32	0.48%
	Black, Non-Hispanic Only	81	1.22%
	Hispanic or Latino, regardless of race	143	2.15%
	Native Hawaiian or Other Pacific Islander, Non-Hispanic Only	4	0.06%
	Nonresident Alien	5	0.08%
	Race and Ethnicity Unknown	52	0.78%
	Two or More Races	142	2.14%
	White, Non-Hispanic Only	6159	92.74%
	Total	6641	100.00%
	American Indian or Alaskan Native, Non-Hispanic Only	7	0.16%
	Asian, Non-Hispanic Only	59	1.39%
Southcentral Kentucky Community & Technical College	Black, Non-Hispanic Only	301	7.08%
	Hispanic or Latino, regardless of race	180	4.23%
	Native Hawaiian or Other Pacific Islander, Non-Hispanic Only	2	0.05%
	Nonresident Alien	10	0.24%
	Race and Ethnicity Unknown	22	0.52%
	Two or More Races	150	3.53%
	White, Non-Hispanic Only	3520	82.80%
	Total	4251	100.00%
	American Indian or Alaskan Native, Non-Hispanic Only	16	0.51%
	Asian, Non-Hispanic Only	12	0.38%
	Black, Non-Hispanic Only	68	2.17%
Southeast Kentucky Community & Technical College	Hispanic or Latino, regardless of race	22	0.70%
	Native Hawaiian or Other Pacific Islander, Non-Hispanic Only	1	0.03%
	Nonresident Alien		0.00%
	Race and Ethnicity Unknown	150	4.78%
	Two or More Races	41	1.31%
	White, Non-Hispanic Only	2825	90.11%
	Total	3135	100.00%
	American Indian or Alaskan Native, Non-Hispanic Only	16	0.26%
	Asian, Non-Hispanic Only	46	0.75%
	Black, Non-Hispanic Only	380	6.18%
	Hispanic or Latino, regardless of race	215	3.50%
West Kentucky Community & Technical College	Native Hawaiian or Other Pacific Islander, Non-Hispanic Only	7	0.11%
	Nonresident Alien	6	0.10%
	Race and Ethnicity Unknown	413	6.72%

KCTCS Total	Two or More Races	199	3.24%
	White, Non-Hispanic Only	4864	79.14%
	Total	6146	100.00%
	American Indian or Alaskan Native, Non-Hispanic Only	173	0.24%
	Asian, Non-Hispanic Only	977	1.33%
	Black, Non-Hispanic Only	5974	8.14%
	Hispanic or Latino, regardless of race	2702	3.68%
	Native Hawaiian or Other Pacific Islander, Non-Hispanic Only	92	0.13%
	Nonresident Alien	110	0.15%
	Race and Ethnicity Unknown	2034	2.77%
	Two or More Races	1988	2.71%
	White, Non-Hispanic Only	59371	80.86%
	Total	73421	100.00%
Public Institution Total	American Indian or Alaskan Native, Non-Hispanic Only	380	0.21%
	Asian, Non-Hispanic Only	2816	1.59%
	Black, Non-Hispanic Only	14336	8.11%
	Hispanic or Latino, regardless of race	6118	3.46%
	Native Hawaiian or Other Pacific Islander, Non-Hispanic Only	177	0.10%
	Nonresident Alien	3200	1.81%
	Race and Ethnicity Unknown	3913	2.21%
	Two or More Races	5208	2.94%
	White, Non-Hispanic Only	140721	79.56%
	Total	176869	100.00%

Source: Kentucky Postsecondary Education Database System
Friday, May 12, 2017
Data Request #424

Payne, Jennifer - Office of Legal, Legislative and Communication Services

From: Fox, Wendella <Wendella.Fox@ed.gov>
Sent: Thursday, May 04, 2017 5:36 PM
To: Peabody, Amy - Office of Legal, Legislative and Communication Services; Brown, Kevin - Associate Commissioner, Office of Legal, Legislative and Communication Services
Cc: Evans, Sherrell
Subject: proposed Resolution Agreement
Attachments: R-AGR-KDE-MAY_2017.pdf

Dear Amy and Kevin

On May 1, 2017, OCR met by phone with you, along with KDE officials, to discuss resolution of the complaint filed against the Kentucky Department of Education (KDE), OCR Docket No. 03-04-1058. This complaint alleged two scholarship programs operated by KDE, the Administrative Leadership Institute (ALI)/Principalship Program and the Minority Educator Recruitment and Retention Scholarship (MERRS) program, do not comply 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.

As designed and implemented, these programs are inconsistent with multiple fundamental tenets of jurisprudence from the United States Supreme Court, and they are therefore inconsistent with Title VI. If KDE's efforts are intended to increase teacher and administrator diversity, it must seek these goals in a lawful manner. To the extent that KDE contends these programs help facilitate student body diversity, it has not provided OCR with adequate support for its position and, again, KDE must seek this goal in a lawful manner.

Attached please find the proposed resolution agreement that OCR mentioned to KDE during the May 1, 2017 teleconference that we would be sending. Consistent with OCR's Case Processing Manual (CPM), from the date that the proposed terms are shared with the recipient, OCR and the recipient will have a period of up to 90 calendar days within which to reach final agreement. If during this time KDE would like to provide additional information that may be relevant to negotiations, it may do so.

OCR is also requesting again that KDE provide data on any students who were not participants in either ALI or MERRS during the 2016-2017 academic year who have been offered one of these scholarships for summer 2017, fall 2017 or spring 2018. KDE will provide OCR with documentation of when these offers were made and when they were accepted.

Although KDE counsel stated during the teleconference that it was already familiar with OCR's procedures, OCR is providing KDE the link (<https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>) to its Case Processing Manual.

If you have any questions, please contact me at Wendella.fox@ed.gov or 215-656-8542. OCR will be in touch with KDE in the next few days to schedule a call to review the specific terms of the proposed resolution agreement.

Thanks so much
Wendella

Wendella P. Fox
Director of the Philadelphia office

US Department of Education, Office for Civil Rights
Wanamaker Building, Suite 515
100 Penn Square East
Philadelphia, PA 19107
(215) 656-8542
Wendella.fox@ed.gov

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

The Kentucky Department of Education (KDE) agrees to take the following actions described below in order to resolve OCR Docket No. 03-04-1058. KDE has entered into this agreement (the Agreement) to ensure compliance 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.

ACTION STEPS

1.

A. Effective immediately, KDE will discontinue all activities related to the enrollment of new students in the Administrative Leadership Institute (ALI)/Principalship Program and the Minority Educator Recruitment and Retention Scholarship (MERRS) programs, including recruitment, processing of applications, and tendering scholarship offers for the summer 2017 session or the 2017-2018 academic year to any student who was not a program participant during the 2016-2017 academic year.

- a. By [DATE], KDE will issue a memorandum to all administrators and staff involved in the implementation of the ALI and MERRS programs, announcing that the programs have been discontinued and will not be accepting new participants.
- b. By [DATE], KDE will notify all existing ALI or MERRS program students regarding the elimination of the program for any students not in receipt of scholarships as of the 2016-2017 academic year.

Reporting Requirement: By [DATE], KDE will provide OCR with materials 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 referenced in Action Item 1A of this Agreement as it was sent and the names/titles of the recipients.

B. If after eliminating the ALI and MERRS programs as required by Action Item 1A, KDE chooses to redesign either or both programs, KDE must:

- a. No longer use race, color, national origin or “minority status” in its marketing of ALI and MERRS, including, but not limited to, the name of the programs and KDE will widely announce that such programs do not consider race, color or national origin as eligibility criteria. KDE will include in such announcements that the changes apply specifically to ALI and MERRS and KDE will include all high schools in the state in its new announcements.
- b. Notify all existing ALI or MERRS program students that the redesigned program criteria will apply to students who had not received scholarships during the 2016-2017 academic year.
- c. Train its staff involved with implementing the redesigned ALI and MERRS programs regarding their Title VI compliant eligibility criteria and program implementation.

- d. Provide all institutions participating in the ALI or MERRS with clear instructions on the revised procedures for selecting applicants and/or awarding funding, as well as the revised applications and other related documents. Prior to authorizing the award of funds, KDE shall require all institutions participating in the ALI or MERRS to certify in writing that the race, color or national origin of participants was not used in funding awards.

Reporting Requirement:

KDE will provide for OCR's review and approval a draft of the revised rules for eligibility and procedures, along with its draft of revised training materials and promotional and informational documents. The draft documents and materials will be provided to OCR at least 90 days prior to the KDE's anticipated implementation date for the replacement programs.

Within 45 calendar days of written notification from OCR of its approval of the revised rules and procedures, and the training, promotional and informational documents, KDE will provide written confirmation to OCR that the revised rules and procedures were adopted, implemented and published, as well as a link to all web pages sponsored or participated in by KDE in which information about ALI or MERRS appears. Such web pages shall state the revised rules for eligibility and the revised procedures, and any other additional information as necessary.

Within 90 days of implementation of the redesigned programs, KDE will provide documentation to OCR demonstrating implementation of Action Step 1B.

2. Nothing herein precludes KDE from continuing to fund ALI or MERRS for students who were already participating in either ALI or MERRS in the 2016-2017 academic year, or who were selected prior to the change required by this Agreement, in Action Step 1B, above.

Reporting Requirement: Within 60 calendar days of signing the Agreement and by July 31, 2018, July 31, 2019, July 31, 2020, July 31, 2021, KDE will report to OCR the following information regarding each student who will be participating in either the ALI or MERRS programs during the upcoming academic year: race/ national origin, date selected for the program, amount of the financial aid provided, academic progress towards graduation requirements, and the anticipated date of graduation.

KDE understands that by signing the Agreement, it agrees to provide data as requested by OCR and other information in a timely manner. Further, KDE understands that, during the monitoring of the Agreement, OCR may visit KDE, interview staff and students, and request such additional reports or data as are necessary for OCR to determine whether KDE has fulfilled the terms of the Agreement and is in compliance with the regulations implementing Title VI, at 34 C.F.R. § 100.3(a), which was at issue in this case.

KDE understands that OCR will not close the monitoring of the Agreement until such time that OCR determines that KDE has fulfilled the terms of the Agreement and is in compliance with the regulations implementing Title VI, at 34 C.F.R. § 100.3(a), which was at issue in this case.

KDE understands and acknowledges that OCR may initiate administrative enforcement or judicial proceedings, including to enforce the specific terms and obligations of the Agreement and compliance with the regulations implementing Title VI, at 34 C.F.R. § 100.3(a), which was at issue in this case.

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.

Commissioner or Designee

Date

161.165 Recruitment of minority teachers.

- (1) The Kentucky Department of Education in cooperation with the Education Professional Standards Board, the Kentucky Board of Education, local school districts, universities, and colleges, and the Council on Postsecondary Education shall review and revise as needed the strategic plan for increasing the number of minority teachers and administrators in the Commonwealth. The plan shall 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;
 - (c) Create awareness among secondary school guidance counselors of the need for minority teachers.
- (2) The Kentucky Department of Education and the Education Professional Standards Board shall promote programs that increase the percentage of minorities who enter and successfully complete a four (4) year teacher preparation program and provide support to minority students in meeting qualifying requirements for students entering a teacher preparation program at institutions of higher education.
- (3) The Kentucky Department of Education with input from the Education Professional Standards Board shall periodically submit a report to the Interim Joint Committee on Education that evaluates the results of these efforts and includes accompanying recommendations to establish a continuing program for increasing the number of minorities in teacher education.

Effective: June 21, 2001

History: Amended 2001 Ky. Acts ch. 137, sec. 14, effective June 21, 2001. -- Amended 1997 (1st Extra. Sess.) Ky. Acts ch. 1, sec. 67, effective May 30, 1997. -- Amended 1996 Ky. Acts ch. 362, sec. 6, effective July 15, 1996. -- Created 1992 Ky. Acts ch. 432, sec. 1, effective July 14, 1992.