**Chapter III—Education Affirmative Action**

**K-12 Education**

**Race to the Top; Charter Schools; Vouchers**

**President Obama championed universalistic K-12 education policies meant to assist all racial/ethnic groups. However, they were also meant to disproportionately assist minorities.[[1]](#footnote-1) Among Obama’s universalistic policies was the competitive grant (“Race to the Top”) allocation to states for K-12 education public units which was given when the U.S. Department of Education (DED) was convinced that the applicants for such “Race to the Top” monies were working on achieving appropriate academic standards for students and teachers. Additionally, state waivers from the proficiency requirements of the George W. Bush Administration’s “No Child Left Behind” (NCLB) statute were granted by the Obama DED on the condition that states commit themselves to both teacher-evaluations (which relied substantially on student-exam scores), and to academic standards designed to make students “career and college ready.”[[2]](#footnote-2) The goal was to transform K-12 education.**

**Prompted by DED’s Race to the Top criteria (and its waiver policy), the large majority of states committed themselves to teacher evaluations tied to student exam performance, and “Common Core” academic standards. The latter were accepted by the Obama Administration as appropriate for beneficial K-12 education. Common Core recommendations adopted by state education officials required grade-level reading and math skills. Tests measuring those skills were created by the states. Whether the Obama waiver “conditions” were constitutional exercises of executive authority was very much challenged, as were the Common Core emphases and teacher/student exam evaluation mechanisms.[[3]](#footnote-3) The nation’s largest teacher union (The National Education Association) urged the resignation of the Secretary of Education who was called by President Obama as one of the best education secretaries ever.[[4]](#footnote-4) The 2015 Congressional statute replacing “No Child Left Behind,” (called Every Student Succeeds Act[[5]](#footnote-5)) allowed the states to jettison Common Core standards and teacher evaluations tied to student test performance. This repudiation of the Obama Administration was augmented by a specific statutory prohibition preventing the Secretary of Education from influencing the kinds of student exams created by the states.[[6]](#footnote-6) Nevertheless, President Obama found it fit to describe the 2015 statute as a “Christmas miracle.” [[7]](#footnote-7)**

**The localism emphasized in the Every Student Succeeds Act corresponded well to the Trump theme of local K-12 decision-making to which he added the super- localist view that parents should be able to choose which school—public, private, or parochial—best suited their children.[[8]](#footnote-8) And this “super decentralist” theme called for a major change in K- 12 education.**

**Charter schools were also deemed beneficial by President Trump even though Race to the Top was much criticized for its stress on charters which were determined by some civil-rights groups as not helpful for school integration and minority scholastic achievement.[[9]](#footnote-9) President Trump—to the contrary—found charter schools helpful to minorities. He said in an executive proclamation:[[10]](#footnote-10)**

**During National Charter Schools Week, we recognize the important contributions public charter schools make by providing American families with the freedom to choose high-quality education options that meet their children’s needs.  For more than a quarter century, charter schools — tuition-free public schools of choice — have been incubators of educational innovations, while being accountable for student achievement and outcomes.  Today, what began as a grassroots movement now flourishes in 44 States, the District of Columbia, Guam, and Puerto Rico, with more than 7,000 schools serving approximately 3.2 million students.**

**Charter schools empower families to pursue the right educational fit for their children, helping ensure that there are paths to the American Dream that match the needs of students striving to achieve it.  The unique needs of students, rather than address or family income, should determine where they learn.  My Administration is committed to reducing the outsized Federal footprint in education and to empowering families, as well as State and local policymakers and educators, with the flexibility to adapt to student needs.**

**Public charter schools work for students, teachers, and communities.  The Center for Research on Education Outcomes found that charter schools better serve low-income students, minority students, and students learning English than neighboring public schools.  The success of our Nation’s public charter schools in helping students of all backgrounds thrive and in addressing the needs of local education confirms what Americans have always known:  those who are closest to students know best how to prepare them to reach their full potential.**

**Nothing better proves the value of and need for charter schools than the ever-growing demand from students and families.**

**Though President Trump appreciated charter schools, he has also emphasized a voucher capacity which would enable parents to send their children to private schools, including religious schools.[[11]](#footnote-11) The U.S. Supreme Court permitted states to use public funds (tax-credits) for religious-school vouchers.[[12]](#footnote-12) President Trump has called for a tax-credit program authorized by Congress enabling private voucher investors to experience a tax deductions for their efforts. This policy was never achieved, but the Department of Education has set aside funds supportive of private-school vouchers.[[13]](#footnote-13)**

**School Discipline and Other Issues; Guidance Redux**

**Central to the Obama K-12 affirmative-action programs were the compliance-reviews conducted by the Office for Civil Rights (OCR) in the U.S. Department of Education (DED) . OCR is responsible for implementing Title VI of the 1964 Civil Rights Act (which prohibits racial and ethnic discrimination in enterprises funded by U.S. monies)[[14]](#footnote-14); and Title IX of the 1972 Education Act[[15]](#footnote-15) which prohibits sexual discrimination in federally subsidized educational undertakings.[[16]](#footnote-16) Implementing statutes requires interpretation, and the Obama OCR’s interpretation thoroughly embraced disparate-impact discrimination theory, insisting that K-12 school districts would deviate from Title VI if, for example, minorities are disproportionately subject to school discipline, or are given disproportionately lesser educational opportunities such as college-level courses, and access to charter schools. The Trump OCR tilted away from Title VI disparate-impact theory. (The Obama OCR also determined that females, in the higher education setting, were disproportionately sexually harassed, requiring Title IX corrective action. As will be described, the Obama Administration’s female-protective rules were later changed by the Trump Administration.) OCR’s civil-rights compliance reviews of school districts were prompted by complaints of discrimination, and often involved *guidance* (not *regulations*) documents--legal interpretations by Federal administrators which are not specifically required by statute, and do not technically have the force of law. Guidance documents are to be distinguished from Federal *Regulations* which have the force of law. Regulations require a period of public comment before they acquire statute-like law status. Administrative guidance interpretations are presented with the potentiality that non-adherence might involve Federal funding reductions, or other penalties. Guidance can be faulted as “end-runs” around our Constitution’s requirement that *all* legislative power is granted to Congress, not the bureaucracy. Such a claim was made by the Trump Department of Justice when, in 2018, it rescinded a number of Obama-era guidance documents.[[17]](#footnote-17) That guidance interpretations are often not incorporated in Federal Regulations can further be faulted because they are not preceded by public comment, but public comment does not seem to stimulate much public concern, and administrators are not required to follow whatever comments are made. Altogether, the public comment requirement was regarded by former Professor Elena Kagan (Harvard Law) as a mere charade.[[18]](#footnote-18) Nonetheless, Professor Shep Melnick views the public comment mechanism as a vehicle for prompting needed discussion about how OCR interprets the law. He also suggests a return to fund denials for deviations from OCR law interpretations as a discussion stimulant, since Congress must approve fund endings. OCR threatens education-fund denial, but rarely pursues it.[[19]](#footnote-19)**

**President Trump said the following about guidance documents:[[20]](#footnote-20)**

**Departments and agencies (agencies) in the executive branch adopt regulations that impose legally binding requirements on the public even though, in our constitutional democracy, only Congress is vested with the legislative power.  The Administrative Procedure Act (APA) generally requires agencies, in exercising that solemn responsibility, to engage in notice-and-comment rulemaking to provide public notice of proposed regulations under section 553 of title 5, United States Code, allow interested parties an opportunity to comment, consider and respond to significant comments, and publish final regulations in the Federal Register.**

**Agencies may clarify existing obligations through non binding guidance documents, which the APA exempts from notice-and-comment requirements.  Yet agencies have sometimes used this authority inappropriately in attempts to regulate the public without following the rulemaking procedures of the APA.  Even when accompanied by a disclaimer that it is non-binding, a guidance document issued by an agency may carry the implicit threat of enforcement action if the regulated public does not comply.  Moreover, the public frequently has insufficient notice of guidance documents, which are not always published in the Federal Register or distributed to all regulated parties. [I]t is the policy of the executive branch, to the extent consistent with applicable law, to require that agencies treat guidance documents as non-binding both in law and in practice, except as incorporated into a contract, take public input into account when appropriate in formulating guidance documents, and make guidance documents readily available to the public.  Agencies may impose legally binding requirements on the public only through regulations and on parties on a case-by-case basis through adjudications, and only after appropriate process, except as authorized by law or as incorporated into a contract. …**

**Obama’s OCR advanced its guidance interpretations vigorously, insisting that Title VI requires appropriate responses even though whether Title VI (in cases brought by private parties) can remedy disparate-impact discrimination appears constitutionally very questionable[[21]](#footnote-21)—a position taken by the Federal School Safety Commission created by the Trump Administration to help correct violence in the school setting.[[22]](#footnote-22) The Safety Commission noted that President Trump was committed to prohibiting *disparate-treatment* discrimination and not statistical over or under representation of minority students prohibited by disparate-impact law .[[23]](#footnote-23) In any event, OCR, during the Trump years did not seek to prioritize systemic background of civil rights complaints as did the Obama Administration. Such consideration produces the statistical under or over representation associated with disparate-impact analysis. And such tilting away from systemic considerations supposedly enabled the Trump OCR to resolve some 3,250 civil-rights complaint cases in its first 15 months, as compared to 1500 resolutions during the last 15 months of the Obama years.[[24]](#footnote-24) Student K-12 discipline has been one such area of Obama OCR disparate-impact insistence.**

**Early in the Obama presidency, OCR committed itself to a “disparate-impact initiative” intended to correct the disproportionate allocation of school discipline affecting young minority students. Public schools were to be informed of their disproportionate disciplinary treatment affecting minority students through “compliance reviews,” and were to be advised that Title VI of the 1964 Civil Rights Act[[25]](#footnote-25) (which bars racial/ethnic discrimination in federally subsidized enterprises) prohibits such disproportionalities unless required by academic necessity. Even when such justification was provided, Title VI --OCR insisted--required the search for and adoption of those corrective devices which imposed lesser disproportionalities.[[26]](#footnote-26)**

**Using data provided by OCR, the Civil Rights Project at UCLA reported in August, 2012 that African-American and Hispanic school children were subject to outlandishly excessive discipline when compared to Whites and Asians:**

**• National suspension rates show that 17%, or 1 out of every 6 Black school children enrolled in K-12, were suspended at least once. That is much higher than the 1 in 13 (8%) risk for Native Americans; 1 in 14 (7%) for Latinos; 1 in 20 (5%) for Whites; or the 1 in 50 (2%) for Asian Americans.**

**• For all racial groups combined, more than 13% of students with disabilities were suspended. This is approximately twice the rate of their non-disabled peers.**

**• Most disturbing is the fact that one out of every four (25%) Black children with disabilities enrolled in grades K-12 was suspended at least once in 2009-2010.**

**• Students with disabilities and Black students were also more likely to be suspended repeatedly in a given year than to be suspended just once. The reverse was true for students without disabilities and for most other racial/ethnic groups.[[27]](#footnote-27)**

**Fueling OCR’s school-discipline, disparate-impact initiative is the view that much of the disproportionality stems from invidious racism, a charge which OCR- critics said was not supported by the evidence.[[28]](#footnote-28) However, four members of the U.S. Civil Rights Commission, in an October 2012 *Briefing Report* found that[[29]](#footnote-29)**

**A recent analysis of nationwide data showed that students from African American families were 2.19 (elementary) to 3.78 (middle school) times as likely to be referred to the office for disciplinary problems as their white peers.[[30]](#footnote-30) In addition, the results also indicated that students from African American and Latino families were more likely than their white peers to receive expulsion or out-of-school suspension as consequences for the same or similar problem behavior. In a recent longitudinal study of all Texas students conducted by the Council of State Governments Justice Center, African American students were found to be disproportionately removed from their classrooms for disciplinary reasons.[[31]](#footnote-31) *The study conducted a multivariate analysis which controlled for 83 different variables in isolating the effect of race alone on disciplinary actions. The study found that African American students had a 31 percent higher likelihood of receiving a disciplinary action when compared to similarly situated white and Hispanic students.[[32]](#footnote-32)***

**In response to the above-cited commentary, fellow Commissioner Abigail Thernstrom said:**

**In a joint news release of July 21, 2011 Attorney General Eric Holder and Secretary of Education Arne Duncan announced a new initiative to address what they called the “school- to-prison pipeline.” The initiative, they said, would support “good discipline policies and practices” that “foster safe and productive learning environments in every classroom.” To that end, they promised to bring together government, law enforcement, academic, and community leaders to make sure “school discipline policies are enforced fairly and do not become obstacles to future growth, progress, and achievement.”**

**The federal government is much practiced in the art of making empty educational promises. …[I]t is a very safe bet that the latest fantasy of ensuring that the educational system becomes “a doorway to opportunity– and not a point of entry to our criminal justice system” – is little more than appealing rhetoric. Attorney General Holder and Secretary Duncan describe that aim as “a critical and achievable goal.” “Critical,” okay, but “achievable” . . . surely they do not believe that in schools across the nation in every demographic setting (in the entire “educational system”) they can magically transform the current school discipline picture. We can all agree that, proportionate to their school population, black children are much more likely than their white or Asian peers to be disciplined for behavior the schools find intolerable. I hope we can also acknowledge that Whites are twice as likely to be disciplined as Asians. We *should* also be able to agree that disciplinary actions are taken in response to real discipline problems. But can we come to a consensus on a solution? The clear answer is no.**

**Indeed, the likelihood of a constructive response to the problem of school discipline policies that have a disparate impact on non-Asian minority group members is probably diminished by framing the issue in civil rights terms. Labeling an issue one that involves civil rights usually implies a problem of bigotry – racial animus. But racial animus cannot account for the magnitude in disparity that we see in looking at group differences in school discipline. That same disparity shows up in school systems run by black superintendents, schools in which the principal is black, and classrooms in which the teacher is black…. What public policy can solve the problem of the collapse of the black family in the last four-to-five decades?[[33]](#footnote-33)**

**Critics of the Obama OCR argued that OCR efforts in overcoming discipline disproportionality affecting minorities (by reducing discipline) would increase danger for obedient children.[[34]](#footnote-34) This was nonsense to some who supported reduced minority punishment because –as they alleged--studies have shown that increased discipline does not correlate with improved student performance.[[35]](#footnote-35) Researchers at the American Bar Association (ABA) argued that it would be difficult to say that OCR-reduced discipline increased student danger because ABA studies show that the Obama OCR disparate-impact discipline initiative has not done much of anything other than improve the collection of civil rights statistics.[[36]](#footnote-36)**

**Compliance resolutions, however, were reached between OCR and schools regarding discipline during the Obama years. . One such resolution involving the Rochester, Minnesota schools stipulated the following: (1) the designation of a discipline supervisor with the title of Principal on Culturally Responsive Teaching and Learning; (2) partnership with an Equity Center to strengthen existing discipline practices; (3) consultation with an expert on non-discriminatory discipline; (4) the use of PBIS – Positive Behavior Interventions and Support—meaning, discussions with troublesome students meant to minimize classroom removal.[[37]](#footnote-37)**

**The Obama Administration generally handled its implementation of Title VI at the K-12 level through compliance negotiations which offered considerable room for give and take negotiation.[[38]](#footnote-38) When negotiations failed, OCR could request the Department of Justice to seek judicial action. One such Justice suit involving school discipline resulted in a settlement criticized by American Bar Association researchers as being too broad and vague.[[39]](#footnote-39)**

**The Trump Administration has rescinded the disparate-impact guidance document calling for a reduction of punishment for minority children in K-12.[[40]](#footnote-40) Rather, the President sought to rely on traditional state/ local, and parental controls to handle disobedient children.[[41]](#footnote-41)**

**In the wake of Obama Education Secretary Arne Duncan’s insistence that the needs of school children could no longer wait for Congressional action, the Obama OCR issued a capstone 37 page Dear Colleague guidance letter to K-12 officials throughout the country insisting that Title VI of the 1964 Civil Rights Act required the remediation of the extensive disparate-impact discrimination affecting students of color in the realms of teacher capacity, school equipment, advanced course availability, school leadership, and extracurricular activities. Resource equalization for students of color was achievable through state and local funding increases, but it was left to Federal officials to determine when “equalization” was achieved.[[42]](#footnote-42) Though the Dear Colleague guidance Letter was dense with legalistic citations, it failed to note that the U.S. Supreme Court’s prohibition of school discrimination under the 14th Amendment’s Equal Protection Clause was restricted to discrimination imposed by law (de jure), [[43]](#footnote-43) and legal mandates no longer specifically—on their face-- deprive racial or ethnic minorities of educational resources. Nor did the letter disclose that statutorily, the Supreme Court has made very questionable the extension of Title VI’s unintentional disparate-impact restrictions to non-federal government.[[44]](#footnote-44) Additionally, there was not one reference in the guidance letter to *San Antonio v. Rodriguez* (1973)[[45]](#footnote-45) where the Court made clear that states were not required to equalize school funding. Reasonable allocations were sufficient, even where extra monies were not provided to assist the poor. The aforementioned 37-page Dear Colleague guidance Letter on resource equality did conform with Justice Marshall’s dissent in *San Antonio v. Rodriguez* where he said:**  **“[T]he****majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens.”[[46]](#footnote-46)**

**The previously mentioned, comprehensive Dear Colleague Letter underscored that K-12 schooling was obligated to avoid disparate-impact discrimination:[[47]](#footnote-47)**

**School districts also violate Title VI if they adopt facially neutral policies that are not intended to discriminate based on race, color, or national origin, but do have an unjustified, adverse disparate impact on students based on race, color, or national origin. In determining whether a facially neutral policy or practice has an unjustified, adverse disparate impact in allocating educational resources that violates Title VI, OCR applies the following analysis:**

**1) Does the school district have a facially neutral policy or practice that produces an adverse impact on students of a particular race, color, or national origin when compared to other students?**

**2) Can the school district demonstrate that the policy or practice is necessary to meet an important educational goal? In conducting the second step of this inquiry OCR will consider both the importance of the educational goal and the tightness of the fit between the goal and the policy or practice employed to achieve it. If the policy or practice is not necessary to serve an important educational goal, OCR would find that the school district has engaged in discrimination. If the policy or practice is necessary to serve an important educational goal, then OCR would ask**

**3) Are there comparably effective alternative policies or practices that would meet the school district’s stated educational goal with less of a discriminatory effect on the disproportionately affected racial group; or, is the identified justification a pretext for discrimination? If the answer to either question is yes, then OCR would find that the school district had engaged in discrimination. If no, then OCR would likely not find sufficient evidence to determine that the school district had engaged in discrimination.**

**Other Dear Colleague guidance letters offered guidance as to how schools could racially and ethnically integrate where minorities were statistically under or overrepresented.[[48]](#footnote-48) This guidance was also rescinded by the Trump Administration[[49]](#footnote-49) as was the guidance concerning limited English learners discussed below.[[50]](#footnote-50) In discussing these rescissions, the use of guidance as opposed to regulations (requiring public comment) was underscored by the Justice Department:[[51]](#footnote-51)**

**Attorney General Jeff Sessions today announced that, consistent with his November 2017 memorandum prohibiting the Department from making rules without following the procedures required by Congress, he is rescinding 24 guidance documents that were unnecessary, outdated, inconsistent with existing law, or otherwise improper.**

**“The American people deserve to have their voices heard and a government that is accountable to them. When issuing regulations, federal agencies must abide by constitutional principles and follow the rules set forth by Congress and the President. In previous administrations, however, agencies often tried to impose new rules on the American people without any public notice or comment period, simply by sending a letter or posting a guidance document on a website. That’s wrong, and it’s not good government.**

**“In the Trump administration, we are restoring the rule of law. That’s why in November I banned this practice at the Department and we began rescinding guidance documents that were issued improperly or that were simply inconsistent with current law. …”**

**The forces angered by Obama’s OCR’s supposed invasion of decentralized-K-12 control through Dear Colleague Letters, compliance reviews, and the like may have been victorious in the passage of major *Every* *Student Succeeds Act* of December, 2015 (ESSA).[[52]](#footnote-52) Senator Lamar Alexander, long at the forefront of educational policy-making and a key architect of that statute meant to replace *No Child Left Behind*, said that the Act removed Federal “handcuffs,” enabling a renaissance of state/local innovation and ingenuity, “classroom by classroom, state by state, that will benefit children.”[[53]](#footnote-53) President Trump also insisted that the Federal Government had overreached insofar as K-12 was concerned. And he called for a return to state /local control.[[54]](#footnote-54)**

**Doubtless entering the mix of discontent producing the ESSA was OCR’s longtime insistence that those K-12 children deficient in English be provided with extra help. English-only school training had traditionally been considered to be necessary, and such luminaries as Benjamin Franklin and Theodore Roosevelt had considered speaking in foreign tongues as disloyalty. Initial interpretations of the 1964 Civil Rights Act had it that training only in English for immigrants was not considered discriminatory.[[55]](#footnote-55) But OCR administrators soon came to view English-only training as having a disparate-impact, discriminatory effect on the ability of immigrants to acquire the benefits of American life. Through administrative *guidance*, OCR (pre- Obama and pre-Trump) prodded some 500 school districts (via compliance-resolution agreements) to commit themselves to assisting those with limited English capacity to overcome that burden. In this connection, OCR encouraged (and was able to extensively acquire) bilingual education as an appropriate mechanism-- that is, the education of limited-English students in their native tongues, while preparing them to learn English. These compliance agreements were abandoned by the Reagan Administration on the grounds that guidance was not binding as law.[[56]](#footnote-56) Thereafter, some states limited bilingualism (California and Arizona); others expanded its use (New York, New Jersey, and Connecticut).[[57]](#footnote-57)**

**OCR has continued to insist that federal antidiscrimination law required language assistance to English learners. Thus in 2015, a 40 page Dear Colleague (jointly written by OCR and the Department of Justice) guidance letter was issued to the nation’s school leaders. Bilingual training was one approach that could be undertaken. There are others like English-language immersion, or English as a Second Language where children are trained in English, but are given special classes to overcome English deficiencies.[[58]](#footnote-58) While there were a number of approaches to assist English-learners [ELs], K-12 schools were obliged by an Obama’s OCR Dear Colleague Letter to:[[59]](#footnote-59)**

**A. *Identify and assess EL* [English learner] *students in need of language assistance in a timely, valid, and reliable manner;***

**B. *Provide EL students with a language assistance program that is educationally sound and proven successful;***

**C. *Sufficiently staff and support the language assistance programs for EL students;***

**D. *Ensure EL students have equal opportunities to meaningfully participate in all curricular and extracurricular activities, including the core curriculum, graduation requirements, specialized and advanced courses and programs, sports, and clubs;***

**E. *Avoid unnecessary segregation of EL students;***

**F. *Ensure that EL students with disabilities under the Individuals with Disabilities Education Act (IDEA) or Section 504 are evaluated in a timely and appropriate manner for special education and disability-related services and that their language needs are considered in evaluations and delivery of services;***

**G. *Meet the needs of EL students who opt out of language assistance programs;***

**H. *Monitor and evaluate EL students in language assistance programs to ensure their progress with respect to acquiring English proficiency and grade level core content, exit EL students from language assistance programs when they are proficient in English, and monitor exited students to ensure they were not prematurely exited and that any academic deficits incurred in the language assistance program have been remedied;***

**Additionally, schools were mandated by the Dear Colleague Letter to conform with a series of “musts”:[[60]](#footnote-60)**

**• [Schools] Must enroll all students regardless of the students’ or their parents’ or guardians’ actual or perceived citizenship or immigration status;**

**• Must protect students from discriminatory harassment on the basis of race, color, national origin (including EL status), sex, disability, or religion;**

**• Must not prohibit national origin-minority group students from speaking in their primary language during the school day without an educational justification; and**

**• Must not retaliate, intimidate, threaten, coerce, or in any way discriminate against any individual for bringing civil rights concerns to a school’s attention or for testifying or participating in any manner in a school, OCR, or DOJ [Department of Justice] investigation or proceeding.**

**With ESSA—*Every Student Succeeds Act* [[61]](#footnote-61) (and in accordance with the Trump decentralist sentiments), states and localities were left to handle the English-learner issue on their own. The results in some states, according to one report, have been purely symbolic in terms of the conformity of state long-term objectives with the goal of the ESSA that EL’s become English-proficient. [[62]](#footnote-62)**

**Before ESSA, and in a move to mollify those who want more done to improve African-African education a, and to improve his electoral capacities, President Obama, in July, 2012 issued an Executive Order creating a commission to research how to thwart the**

**substantial obstacles to equal educational opportunity [that]still remain in America's educational system. African Americans lack equal access to highly effective teachers and principals, safe schools, and challenging college-preparatory classes, and they disproportionately experience school discipline and referrals to special education. African American student achievement not only lags behind that of their domestic peers by an average of two grade levels, but also behind students in almost every other developed nation.[[63]](#footnote-63)**

**Complementing the Executive Order, the President inaugurated the “My Brother’s Keeper” in February, 2014 to improve the educational and career opportunities for Black and Latino Boys. Only six months later, school districts, which cover some 40% of African-American and Hispanic youth signed on to this initiative committing themselves to such undertakings for these boys as improved pre-schooling undertakings, college-level courses, careful counseling, and a reduction in severe discipline.[[64]](#footnote-64) Critics claimed that minority females should also be incorporated. A presidential senior advisor responded that “My Brother’s Keeper” merely augmented the ongoing work of the White House Council on Women and Girls, and that the President “strongly believes we need to improve the odds for every child in America.”[[65]](#footnote-65) My Brother’s Keeper was folded into the Obama Foundation/Museum at the end of that President’s Administration.**

**Remedial/Non-Remedial Affirmative Action; The Orfield Critique**

**President Trump has advocated school choice. By which he means that parents who think their child’s school is inadequate should be able to pick a school of their choice (irrespective of its degree of racial/ethnic integration), and the government should subsidize the costs that are involved. [[66]](#footnote-66) This position could conform with what can reasonably be called the ruling in *Brown v. Board of Education* (1954)[[67]](#footnote-67) that racial segregation in public schools imposed intentionally by law (de jure) is barred by the Constitution. But dedicated groups support the notion that balanced racial/ethnic school populations are essential for proper minority academic performance irrespective of whether the unbalance is intentional or not. Often the quest for racial/ethnic balancing is called diversification or inclusion. School-integration/balancing efforts correspond to affirmative-action thinking in employment, voting rights, criminal justice, immigration, and housing. This thinking applies racial/ethnic remedies and preferences for racial/ethnic minorities. The goal is too often to employ proportional representation, racial-ethnic/balancing mechanisms to remedy past discrimination, eradicate its lingering effects, and prevent its recurrence.**

**Legalistically, there is a dissimilarity. The Supreme Court’s *Brown* v. *The Board’s* (1954)[[68]](#footnote-68) prohibition of K-12 racial segregation is—as noted-- reasonably interpreted as applying to segregation intentionally imposed by law (*de jure*) as it was in the former Confederate States. Affirmative action policy  *presumes* unlawful discrimination where significant disproportions exist.**

**In 2007, a five‑member majority of the Supreme Court maintained the *Brown v. The Board’s de jure* emphasis in *Parents Involved v. Seattle*,[[69]](#footnote-69)but the *de jure* emerged from that case in a weakened state. Four dissenting members found the *de jure* restriction lacking in merit. Justice Kennedy (who wrote a concurring opinion siding with the conclusion of four other members) agreed that the *de jure* emphasis be maintained, but he also concluded that school districts which had not violated anti-segregation law through intentional racial segregation could seek integration on diversity grounds by using race as a factor in the student admissions process. He opined that race-conscious devices (like considering demographic patterns in selecting attendance zones) could be employed for diversification purposes so long as a student was not defined by race alone. Here, Justice Kennedy was joined by four other Justices giving rise to a Court majority allowing for voluntary K-12 school-integration policies by school districts for diversity purposes.**

**As already noted, affirmative action efforts legally are divided into two parts: remedial and non-remedial. Diversity theory is central to the non-remedial dimension of affirmative action. It has come to importantly supplement antidiscrimination as the vehicle for affirmative action. Diversity theory is legally dubbed non-remedial in that it seeks no remedies for discrimination, but theoretically seeks diversity of views (not remedies for discrimination) in the classroom and in the workplace. Diversity theory argues that ideological diversity is beneficial for education and the economy. On the other hand, remedial affirmative action advocacy seeks remedies for discrimination, and because of this is referred to in the law as remedial. While conceptually different, diversity (non-remedial) and remedial affirmative action theories typically aim to achieve the same result: an increase in the number of underrepresented, protected racial/ethnic/gender groups and individuals. In short, both theories are driven by the affirmative-action remedial motor, and, in fact, they are two sides of the same coin, even though the diversity mantra, at times, thematically suppresses the burdens imposed on minorities. Further, there seems to be an end-point for remedial affirmative action—when remedies are achieved. There is no such end-point for non-remedial affirmative action, as there is always a need for diversity.**

**President Obama’s Departments of Justice and Education blanketed the nation’s school districts with a Dear Colleague Letter dated December 2, 2011 and titled, *Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools.[[70]](#footnote-70)* The *Guidance Letter* portrayed diversity in K-12 student-body makeup as a *compelling governmental interest.* The Guidance began as follows by combining remedial and non-remedial affirmative-action themes.**

**More than 50 years ago, *Brown v. Board of Education* recognized that “education is perhaps the most important function of state and local governments. . . .It is the very foundation of good citizenship.”[[71]](#footnote-71)Providing students with diverse, inclusive educational opportunities from an early age is crucial to achieving the nation’s educational and civic goals.**

**As the Supreme Court has explained, elementary and secondary schools (also referred to in this guidance as K-12 schools) are “pivotal to sustaining our political and cultural heritage;” [[72]](#footnote-72)they teach “that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all.”[[73]](#footnote-73)Racially diverse schools provide incalculable educational and civic benefits by promoting cross-racial understanding, breaking down racial and other stereotypes, and eliminating bias and prejudice. Our “nation’s future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples.”[[74]](#footnote-74)**

**Conversely, where schools lack a diverse student body or are racially isolated (*i.e*., are composed overwhelmingly of students of one race), they may fail to provide the full panoply of benefits that K-12 schools can offer. The academic achievement of students at racially isolated schools often lags behind that of their peers at more diverse schools. Racially isolated schools often have fewer effective teachers, higher teacher turnover rates, less rigorous curricular resources (*e.g.,* college preparatory courses), and inferior facilities and other educational resources. Reducing racial isolation in schools is also important because students who are not exposed to racial diversity in school often lack other opportunities to interact with students from different racial backgrounds.[[75]](#footnote-75)**

**For all these reasons, the Departments recognize, as has a majority of Justices on the Supreme Court, the compelling interests that K-12 schools have in obtaining the benefits that flow from achieving a diverse student body and avoiding racial isolation.[[76]](#footnote-76)**

**The above-cited *Guidance* *Letter* calling for a K-12 admission policy which voluntarily used racial considerations to achieve a diverse student body claimed that it was governed by the standards of appropriate legal doctrine called “strict scrutiny.” The *Letter* insisted that a diverse student body constituted a compelling government interest. Acquiring a diverse student body, in turn, required first the seeking out of workable approaches that are “racially neutral,” e.g., considering parental education; student and neighborhood socio-economic status; and the nature of neighborhood housing--single family or multiple family. Race-conscious approaches consist of those which are “generalized” and do not consider the race of the individual student—like the racial composition of neighborhoods. Race-conscious devices could also consider a student’s race, but the race of the individual student is a reference point, and could only be used as a “plus” factor—one factor among other non-racial factors important to the achievement of a diverse student body. Race-conscious approaches should be time-limited; not unduly burden any student; be flexible; and treat students individually and not as a mass. [[77]](#footnote-77)**

**The above-cited Guidance Letter was rescinded by Trump’s Departments of Justice and Education.[[78]](#footnote-78) The Department of Education’s website strongly recommended that student admissions be race-neutral.[[79]](#footnote-79) The rescinded *Guidance Letter* was designed to encourage racial discrimination by taking the student’s race into account; and by calling for the use of generalized race-conscious and race-neutral techniques described previously. Critics could be expected to regard all these methods as the use of forbidden racial discrimination by stealth and “under the table” affirmative-action means. Indeed, four members of the Supreme Court in *Parents Involved* --a case centrally referenced as support in the *Guidance Letter*--joined in proclaiming that “The way to end racial discrimination is to stop discrimination on the basis of race,”[[80]](#footnote-80)but this commitment was not quoted in the *Letter* which insisted that race could be used as a criterion to achieve a diverse propagation of ideas. Diversity theory focuses on ideational variety. What kind of ideological differentiation can be expected in K-12, and can it be determined by skin color or eye configuration? And do K-12 administrators have the resources to differentiate among applicants as to their differing perspectives? Ending racial isolation was also critically emphasized in the *Letter*. This remedial objective is most worthy and the *Letter* should have been structured on that goal. Emphasizing differences in racial perspectives could very well impede the end of racial isolation which should be a major goal of the Obama and Trump Administrations.**

**Despite the inherent worthiness of ending racial isolation as expressed in the 2011 *Guidance Letter* cited above, the Obama Administration has been severely criticized for failing to take significant steps to promote school integration. And calling for K-12 school integration has not been a priority for the President or his Administration leaders. The same can be said of the Trump Administration. The momentum for school integration has declined greatly as of late. In 2012, Diane Ravitch, the K-12 school-history expert, did not recall any recent call for school integration by public officials.[[81]](#footnote-81) Gary Orfield and associates at the UCLA Civil Rights Project published a September, 2012 report which asserts that in the face of very substantial racial/ethnic segregation in K-12, the Obama Administration has emphasized improving student testing capacity, but has given little attention to problems rooted in race and poverty. The Administration has rejected--in its *Race to the Top* undertaking--ideas calling for the allocation of substantial funds for magnet[[82]](#footnote-82) schools and for voluntary integration programs. According to the Orfield Report, there have been *small* efforts to advance school integration like the 2011 *Guidance Letter* (noted previously) and the White House Initiative on Educational Excellence for African Americans. Additionally, the Administration supported a short, temporary, one round, small subsidy program for school-district voluntary school integration. But these pro-integration efforts, the Report claimed, have been undermined by the Obama Administration’s pressure to expand and financially support the creation of charter schools, particularly for black students—the schools where blacks are particularly segregated.[[83]](#footnote-83) If correct, what the Orfield report tells us is that the Obama Administration has chosen one form of affirmative action (funding the augmentation of Black charter schools) to the neglect of advancing school integration, an alternative form of affirmative action. It is possible that the Obama Administration, despite its integration-advocacy assertions, has thus far chosen a more politically palatable form of affirmative action.**

**Orfield counts majority-minority schools as segregated. And, surely, there has been an increase in majority-minority schooling. But is a White presence necessary to minority academic achievement? Is this view--so prominent in the wake of the abolition of school segregation by *Brown v. Board--*demeaning and racist? Still the quest for increasing Whites and decreasing the number of minorities continues with the insistence of such devices as magnet schools.[[84]](#footnote-84)**

**Higher Education**

**Admissions**

**Non-remedial /diversity theory has come to importantly supplement the operative theory supportive of affirmative action, playing a prominent role in higher education. During the Obama era, The U.S. Department of Justice’s *amicus brief* [[85]](#footnote-85) in the first Supreme Court’s *Fisher v. Texas* (2012) case insisted that the Supreme Court in *Grutter v. Bollinger* (2003[[86]](#footnote-86)) allowed universities**

**to conclude that the educational benefits of diversity, including racial and ethnic diversity, are essential to its educational mission, and that a university can therefore have a compelling interest in assembling a diverse student body. Diverse student enrollment not only “promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students]to better understand persons of different races”; it also prepares all students to succeed in and eventually lead” an increasingly diverse workforce and society.[[87]](#footnote-87)**

**The 2012 *Fisher* brief went on to emphasize that the University of Texas’ use of race/ethnicity as a factor in the admissions process was centered in the University’s objective of training students to become the next generation of Texas leaders by exposing them to the many diverse perspectives and cross-racial interactions that they will encounter in civic life. The University therefore concluded that the education benefits of diversity are essential to its mission.”[[88]](#footnote-88) Note that the Obama Administration brief incorporated [as did the majority opinion in *Grutter v. Bollinger* (2003)[[89]](#footnote-89) a remedial reason for the use of race/ethnicity in admissions, namely the promotion of cross-racial understanding and the breakdown of racial stereotypes. In short, the noble purpose of diversity theory was the integration of the races, but with the creation of separate buildings and dorms established for particular racial groups on campus, one must wonder whether the integration goal is being properly pursued. One should also note that in the Justice Powell Supreme Court Opinion which helped create the diversity thesis (*Regents v. Bakke*** (1978),[[90]](#footnote-90) **it was emphasized that intellectual diversity should be the aim of an admissions process. He urged careful surveys of students for the intellectual contributions they offered.[[91]](#footnote-91) Such care for intellectual diversity is not taken. Rather, large admission preferences by selective universities are afforded Blacks and Hispanics (to the disadvantage of Whites and Asians) irrespective of their intellectual/diversity contributions.[[92]](#footnote-92)**

**(The reader should also note that the Trump Administration rescinded both the K-12 and the university diversity *Guidance Letters* discussed in this chapter.[[93]](#footnote-93)) In its 2011 *Guidance* *Letter* to university administrators encouraging the achievement of diverse racial/ethnic student bodies, the U.S. Department of Justice’s Civil Rights Division and the Department of Education’s Office for Civil Rights underscored the educational benefits of diversity along with the goal of reducing racial isolation.[[94]](#footnote-94) The Guidance Letter argued that interacting with students having different perspectives “can raise the level of academic discourse both inside and outside the classroom; indeed such interaction is an education in itself. By choosing to create this kind of rich academic environment, educational institutions help students sharpen their critical thinking and analytical skills.”[[95]](#footnote-95)**

**Concurrent with the diversity *Guidance* *Letter* to university administrators, the Obama Department of Education and Justice Officials also forwarded a diversity *Guidance Memorandum Letter* to K-12 school administrators. Both documents maintained that acquiring a diverse student body via race/ethnic admissions was an essential governmental objective, but one which had to conform to the dictates of the *Equal Protection Clause* of the Constitution. This required first the seeking out of workable approaches by administrators that were “racially neutral.” As discussed, the K-12 *Guidance Memorandum Letter* provided examples of what it deemed racial neutrality such as consideration by admissions officials of: parental education; student and neighborhood socio-economic status; and the nature of neighborhood housing--single family or multiple family. When racially neutral techniques proved insufficient, diversification could constitutionally also involve, the K-12 *Guidance* continued, race-conscious approaches consisting of those which are “generalized” and did not consider the race of the individual student (*e.g.*, the racial composition of neighborhoods), and those which considered a student’s race. But the race of the *individual* student is a reference point, and could only be used as a “plus” factor—one factor among other non-racial factors important to the achievement of a diverse student body. Additionally, race-conscious approaches should be time-limited; not unduly burden any student; be flexible; and treat students individually and not as a mass. [[96]](#footnote-96)**

**The Postsecondary *Guidance Memorandum Letter* also urged that race-neutral efforts be made before race-conscious techniques were employed to achieve diversity. Listed as race-neutral were techniques that focused on socio-economic status; parental education; geographical residency, and first-generation college status. The *Guidance* continued by enumerating what it regarded as constitutionally acceptable race-conscious techniques including admission of top-percentile graduates of high school and junior colleges; taking into account hardships experience by applicants; and the pursuit of “pipeline” and other outreach programs where universities would seed K-12 student interest in college attendance, and help them prepare to gain admission. If the race of the applicant was taken into account to achieve a “critical mass” of underrepresented student, it should be done holistically—one factor among an applicant’s many attributes. Both *Guidance Letters* gave school administrators much “cover” in using race/ethnicity as factors, as has the Supreme Court for colleges.[[97]](#footnote-97) Not long ago, such considerations were considered widely as cardinal sins.**

**The notion that diversity affirmative action would ideationally enhance the college intellectual environment and reduce racial isolation has been roundly criticized. Consider Fifth Circuit’s approach in *Hopwood v. Texas[[98]](#footnote-98)*:**

**Within the general principles of the Fourteenth Amendment, the use of race in admissions for diversity in higher education contradicts, rather than furthers, the aims of equal protection. Diversity fosters, rather than minimizes, the use of race. It treats minorities as a group, rather than as individuals. It may further remedial purposes but, just as likely, may promote improper racial stereotypes, thus fueling racial hostility.**

**The use of race, in and of itself, to choose students simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants. . . . [[99]](#footnote-99) To believe that a person's race controls his point of view is to stereotype him. . . . [[100]](#footnote-100) Finally, the use of race to achieve diversity undercuts the ultimate goal of the Fourteenth Amendment: the end of racially-motivated state action. . . .[[101]](#footnote-101)**

**Stanley Rothman, Seymour Martin Lipset, and Neil Nevitte also challenged the notion of diversity benefits.[[102]](#footnote-102) They conducted a 1999-2000 survey covering 140 (non-Historically Black) colleges, 4,088 students, 1,632 faculty, and 808 administrators. The results of the survey clearly demonstrated that the greater race/ethnic diversity in student body populations, the greater student dissatisfaction with their educational experience; and the greater faculty and administrator dissatisfaction with student preparedness.[[103]](#footnote-103) These results were produced despite strong efforts by faculty and administrators to convince students that racial/ethnic diversity was a must. [[104]](#footnote-104)**

**More recently, Princeton Professor Thomas J. Espenshade (a self-proclaimed friend of affirmative action in college admissions) reported the following in connection with his study of eight elite universities (four private and four public) between 1999 and 2003:[[105]](#footnote-105)**

* **Students who are admitted through affirmative action preferences are more likely to graduate toward the bottom of their classes.**
* **One-half of African-American students and one-third of Hispanic students graduated in the lower 20% of their classes.**
* **Only half of the respondents in the sample reported that they had a roommate or a close friend of a different race/ethnicity.**

**UCLA Professor Richard Sander and Stuart Taylor Jr., studying “very good” schools --where preferentially admitted students were academically better matched with other students than in more elite schools-- found that sizeable numbers of preferential admittees initially declare science or engineering as majors, but, scholastically overwhelmed, drift dramatically to easier majors. To Sander and Taylor, affirmative-action students “are 30 to 40% less likely to get science degrees; they are twice as likely to fail the bar exam after law school, and they are likely to have less social interaction across racial lines.” Campus presidents reject notions of preferential admissions mismatch out of hand. They passionately embrace racial and ethnic student body diversity. [[106]](#footnote-106)**

**In her *Gratz v. Bollinger* (2003[[107]](#footnote-107))dissent Justice Ginsburg focused on the reasonable anticipation that higher education will continue its quest for diversity enrollments, using race/ethnic criteria in the process. At issue was the University of Michigan granting of 20 points to underrepresented minorities in an undergraduate admissions process where 100 points resulted in automatic admission:**

**The stain of generations of racial oppression is still visible in our society, see Krieger, 86 Calif. L. Rev. [1251], at 1253, and the determination to hasten its removal remains vital. One can reasonably anticipate, therefore, that colleges and universities will seek to maintain their minority enrollment--and the networks and opportunities thereby opened to minority graduates--whether or not they can do so in full candor through adoption of affirmative action plans of the kind here at issue. Without recourse to such plans, institutions of higher education may resort to camouflage. For example, schools may encourage applicants to write of their cultural traditions in the essays they submit, or to indicate whether English is their second language. Seeking to improve their chances for admission, applicants may highlight the minority group associations to which they belong, or the Hispanic surnames of their mothers or grandparents. In turn, teachers' recommendations may emphasize who a student is as much as what he or she has accomplished. See, *e.g.,* Steinberg, Using Synonyms for Race, College Strives for Diversity, N. Y. Times, Dec. 8, 2002, section 1, p 1, col. 3 (describing admissions process at Rice University); cf. Brief for United States as *Amicus Curiae* 14-15 (suggesting institutions could consider, *inter alia*, "a history of overcoming disadvantage," "reputation and location of high school," and "individual outlook as reflected by essays"). If honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises. [[108]](#footnote-108)**

**The Trump administration has rejected the use of race/ethnicity in the admissions process, rescinding the Obama Administration K-12 and Postsecondary Guidance Letters which accepted the use of race in school admissions. In rescinding the Guidance letters, a U.S. Department of Justice press release of 7/3/18 said:**

**Attorney General Jeff Sessions today announced that. … “The American people deserve to have their voices heard and a government that is accountable to them. When issuing regulations, federal agencies must abide by constitutional principles and follow the rules set forth by Congress and the President. In previous administrations, however, agencies often tried to impose new rules on the American people without any public notice or comment period, simply by sending a letter or posting a guidance document on a website. That’s wrong, and it’s not good government.**

**“In the Trump administration, we are restoring the rule of law. That’s why in November I banned this practice at the Department and we began rescinding guidance documents that were issued improperly or that were simply inconsistent with current law. ….”**

**Additionally, the Trump Administration joined the suit against Harvard for using race/ethnicity in admissions, arguing that Harvard in so doing frustrated Supreme Court prohibitions against quotas (racial balancing) and neglecting to consider race-neutral techniques to achieve a diverse student body. The Trump Administration also produced an agreement with the medical school at Texas Tech not to employ race in admissions. The Trump case against racial quotas (racial balancing) at Harvard underscored the following statement and figures:[[109]](#footnote-109)**

**Class of 2014 Class of 2015 Class of 2016 Class of 2017**

**Asian-Americans 18% 18% 20% 20% African Americans 11% 12% 12% 11%**

**Hispanics 10% 12% 10% 11%**

**Native Americans 3% 2% 2% 2%**

**Whites 48% 49% 52% 53%**

**The District Court ruled in favor of Harvard, but the Trump Department of Justice –pursuing a disparate-treatment theme in its appellate brief argued that Harvard had intentionally discriminated against Asian applicants. A summary of this brief was provided by the Department of Justice as follows:[[110]](#footnote-110)**

***Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* . … In its amicus brief, the United States explains that Harvard’s expansive use of race in its admissions process violates federal civil-rights law and Supreme Court precedent.**

**“Race discrimination hurts people and is never benign,” said Assistant Attorney General Eric Dreiband for the Civil Rights Division. “Unconstitutionally partitioning Americans into racial and ethnic blocs harms all involved by fostering stereotypes, bitterness, and division among the American people. The Department of Justice will continue to fight against illegal race discrimination.” …**

**In this case, Students for Fair Admissions, an organization of students and parents, alleged that Harvard College intentionally discriminates against Asian-American applicants when making admissions decisions, in violation of Title VI. …**

**The Supreme Court has held that colleges receiving federal funds may consider applicants’ race in certain limited circumstances, the district court’s factual findings demonstrated that Harvard’s use of race is anything but limited. The district court concluded that “more than one third of the admitted Hispanics and more than half of the admitted African Americans, would most likely not be admitted in the absence of Harvard’s race-conscious admissions process.” And these race-based bonuses come at a significant cost to Asian-American applicants, who collectively suffer a substantial penalty under Harvard’s race-based admissions regime. Nevertheless, the district court concluded that Harvard’s use of race in the admissions process did not violate federal law or Supreme Court precedent.**

**The United States’ amicus brief explains that the evidence at trial showed “that Harvard actively engages in racial balancing that Supreme Court precedent flatly forbids.” The evidence also demonstrated that Harvard’s admissions officers consistently score Asian American applicants lower on the so-called “personal rating.” “In other words,” the brief explains, “Harvard’s admissions officers tended to evaluate Asian Americans, as compared to members of other racial groups, as having less integrity, being less confident, constituting less-qualified leaders, and so on.” “That disparity,” the brief points out, “is undisputed, and unexplained.” For these and other reasons, the United States urged the appellate court to reverse the district court’s judgment.**

## **A U.S. Court of Appeals found for Harvard, saying that Harvard had used race in admissions properly.**[**[1]**](https://word-edit.officeapps.live.com/we/wordeditorframe.aspx?ui=en-US&rs=en-US&WOPISrc=https%3a%2f%2fattachments.office.net%3a443%2fowa%2fwopi%2ffiles%2fd3c4aa95-b75f-4904-bc15-92847e191c45%40csulb.edu%2fAAMkAGQzYzRhYTk1LWI3NWYtNDkwNC1iYzE1LTkyODQ3ZTE5MWM0NQBGAAAAAAB.8LLa-C0-Qqw.LDXzA9sjBwA1I47ctst0Q42h5yqU07-TAAAAla.jAAAEVa2khgIZTZSfSUkf5FsDAALiybLrAAABEgAQAGjSkYNuyx5MuS2ZFJcerI4%3d_Q3.Z-Xe92AgBAQABAAA%3d%3fpostmessageorigin%3dhttps%253a%252f%252foutlook.office.com%252f%26ui%3den-US&&hh=1&mscc=1&sdr=1&uiembed=1&wdorigin=OWA-SXS#_ftn1) **In October, 2020, the Trump Administration sued Yale College for racial discrimination against Whites an d Asians.**[**[2]**](https://word-edit.officeapps.live.com/we/wordeditorframe.aspx?ui=en-US&rs=en-US&WOPISrc=https%3a%2f%2fattachments.office.net%3a443%2fowa%2fwopi%2ffiles%2fd3c4aa95-b75f-4904-bc15-92847e191c45%40csulb.edu%2fAAMkAGQzYzRhYTk1LWI3NWYtNDkwNC1iYzE1LTkyODQ3ZTE5MWM0NQBGAAAAAAB.8LLa-C0-Qqw.LDXzA9sjBwA1I47ctst0Q42h5yqU07-TAAAAla.jAAAEVa2khgIZTZSfSUkf5FsDAALiybLrAAABEgAQAGjSkYNuyx5MuS2ZFJcerI4%3d_Q3.Z-Xe92AgBAQABAAA%3d%3fpostmessageorigin%3dhttps%253a%252f%252foutlook.office.com%252f%26ui%3den-US&&hh=1&mscc=1&sdr=1&uiembed=1&wdorigin=OWA-SXS#_ftn2)

[[1]](https://word-edit.officeapps.live.com/we/wordeditorframe.aspx?ui=en-US&rs=en-US&WOPISrc=https%3a%2f%2fattachments.office.net%3a443%2fowa%2fwopi%2ffiles%2fd3c4aa95-b75f-4904-bc15-92847e191c45%40csulb.edu%2fAAMkAGQzYzRhYTk1LWI3NWYtNDkwNC1iYzE1LTkyODQ3ZTE5MWM0NQBGAAAAAAB.8LLa-C0-Qqw.LDXzA9sjBwA1I47ctst0Q42h5yqU07-TAAAAla.jAAAEVa2khgIZTZSfSUkf5FsDAALiybLrAAABEgAQAGjSkYNuyx5MuS2ZFJcerI4%3d_Q3.Z-Xe92AgBAQABAAA%3d%3fpostmessageorigin%3dhttps%253a%252f%252foutlook.office.com%252f%26ui%3den-US&&hh=1&mscc=1&sdr=1&uiembed=1&wdorigin=OWA-SXS#_ftnref1) Melissa Korn, *Court Finds for Harvard in Race Case,* The Wall Street Journal, November 13, 2020, p. A3.

[[2]](https://word-edit.officeapps.live.com/we/wordeditorframe.aspx?ui=en-US&rs=en-US&WOPISrc=https%3a%2f%2fattachments.office.net%3a443%2fowa%2fwopi%2ffiles%2fd3c4aa95-b75f-4904-bc15-92847e191c45%40csulb.edu%2fAAMkAGQzYzRhYTk1LWI3NWYtNDkwNC1iYzE1LTkyODQ3ZTE5MWM0NQBGAAAAAAB.8LLa-C0-Qqw.LDXzA9sjBwA1I47ctst0Q42h5yqU07-TAAAAla.jAAAEVa2khgIZTZSfSUkf5FsDAALiybLrAAABEgAQAGjSkYNuyx5MuS2ZFJcerI4%3d_Q3.Z-Xe92AgBAQABAAA%3d%3fpostmessageorigin%3dhttps%253a%252f%252foutlook.office.com%252f%26ui%3den-US&&hh=1&mscc=1&sdr=1&uiembed=1&wdorigin=OWA-SXS#_ftnref2) U.S. Department of of Justice, *Press Release,* October 8, 2020 at <https://www.justice.gov/opa/pr/justice-department-sues-yale-university-illegal-discrimination-practices-undergraduate>

**In its strict scrutiny jurisprudence, the Supreme Court over the years has granted much discretion to school officials to pursue diversity affirmative action. The Constitution’s equal protection of the laws dictate requires that *racial and ethnic classifications* pass strict scrutiny as the condition for their maintenance. The satisfaction of strict judicial scrutiny requires both the demonstration of a compelling governmental interest and a racial/ethnic policy which is narrowly tailored to achieve that compelling interest. In the realm of attracting a racially/ethnically diverse student body, the Supreme Court has determined a diverse university student body is a compelling government interest. The Court has also afforded university administrators great leeway in connection with narrow-tailoring by allowing them to pursue an undefined *critical mass* of minority students by using race as a factor in the selection process so long as racially neutral factors are unavailable. “Holistic” admission procedures which take into account factors other than academic (like extracurricular activities, awards, work experience, and the like) to determine student potential are racially neutral if they do not formally take a student’s race or ethnicity explicitly into account.[[111]](#footnote-111) Also deemed racially neutral are percentage plans which afford top-scoring high school graduates automatic admission to state universities.[[112]](#footnote-112) Considerable deference is given to administrators to determine on their own when race-neutral factors are insufficient to achieve critical-mass diversity. [[113]](#footnote-113)**

**In *Grutter v. Bollinger* (2003),[[114]](#footnote-114) a Supreme Court majority ruled that a racially/ethnically diverse student body is a compelling governmental interest as a remedial aid to cross-racial understanding and the reduction of racial stereotypes.[[115]](#footnote-115) Further in that case, the Court accepted the University of Michigan Law School’s approach to the second prong of strict scrutiny, namely, *narrow tailoring*. To the Law School, narrow tailoring was achieved by an admissions process which focused on achieving a *critical mass* of underrepresented minorities. A critical mass was not associated with a specific number. Rather, it required that number of minorities designed to reduce feelings of isolation and racial/ethnic stereotypes.[[116]](#footnote-116)**

**The vagueness of the *critical mass* standard prompted much commentary and questioning from members of the Supreme Court during the *Fisher v. Texas* (2012) oral arguments, a case that involved the University of Texas’ effort to use racial diversity techniques to obtain a *critical mass* of underrepresented minorities. How much of a minority should one be to qualify as one? Is a small percentage of minority blood sufficient? Is a *critical mass* needed for each class? How does a justice determine that the narrow tailoring/*critical mass* prong of strict scrutiny review has been satisfied? Illustrative are the questions posed by the Chief Justice: “What is that number? What is the critical mass of African Americans and Hispanics at the university that you are working toward…? [H]ow are we supposed to tell whether this plan is narrowly tailored…?”[[117]](#footnote-117)**

**The spokesperson for the Obama Administration at the *Fisher* Oral Arguments, Solicitor General Verrilli, agreed with Justice Scalia’s recommendation to abandon the concept of *critical mass* –important to both the *Guidance Letters* described above *--*as it clouded the focus of the Solicitor General’s equally vague “flexibility” standard[[118]](#footnote-118) which was to allow universities “flexibility to shape their environments and their education experience to make a reality of the principle …that our strength comes from people of different race, different creed, different cultures, uniting in a commitment to freedom, and to a more perfect union.”[[119]](#footnote-119)**

**The question of narrow tailoring in connection with the University of Texas’ effort to achieve a critical mass of minority students by explicitly using race as one factor in determining the admission of some students was addressed by the Supreme Court in two opinions. In the first, the Court remanded the issue to the lower courts to determine whether racially neutral approaches could achieve the critical mass desired by the University and thus satisfy narrow tailoring. See *Fisher v. Texas* (2013) [[120]](#footnote-120) The University insisted that race neutral programs were insufficient. These included the State of Texas’ 10% plan which afforded top-scoring students in high school courses admission to the University, as well as a “holistic” policy which, in addition to grades, relied on a variety of extracurricular activities such as community service. The Supreme Court majority in the second *Fisher v. Texas* (2016)[[121]](#footnote-121) found the University’s position on the inefficacy of the race-neutral programs convincing. Justice Alito, speaking for three other Justices, dissented by cogently noting that there was no thorough judicial investigation of diversity-producing race neutral programs; and that the majority had not taken strict scrutiny’s narrow-tailoring prong seriously, allowing college administrators excessive freedom to use racial/ethnic criteria.[[122]](#footnote-122) In the first *Fisher v. Texas* (2013) case Justice Ginsburg repeated her view that “holistic” review could camouflage the use of race. She also rejected the notion that the Texas percentage plan was race neutral:**

**The University of Texas at Austin (University) is candid about what it is endeavoring to do: It seeks to achieve student-body diversity through an admissions policy patterned after the Harvard plan referenced as exemplary in Justice Powell's opinion in *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 316-317, (1978). The University has steered clear of a quota system like the one struck down in *Bakke*, which excluded all nonminority candidates from competition for a fixed number of seats. . . . And, like so many educational institutions across the Nation, 1 the University has taken care to follow the [critical mass] model approved by the Court in *Grutter* v. *Bollinger*, 539 U. S. 306, . . .**

**Petitioner urges that Texas' Top Ten Percent Law and race-blind holistic review of each application achieve significant diversity, so the University must be content with those alternatives. I have said before and reiterate here that only an ostrich could regard the supposedly neutral alternatives as race unconscious. . . . As Justice Souter observed, the vaunted alternatives suffer from "the disadvantage of deliberate obfuscation." *. . .***

**Texas' percentage plan was adopted with racially segregated neighborhoods and schools front and center stage. See House Research Organization, Bill Analysis, HB 588, pp. 4-5 (Apr. 15, 1997) ("Many regions of the state, school districts, and high schools in Texas are still predominantly composed of people from a single racial or ethnic group. Because of the persistence of this segregation, admitting the top 10 percent of all high schools would provide a diverse population and ensure that a large, well-qualified pool of minority students was admitted to Texas universities."). It is race consciousness, not blindness to race, that drives such plans. As for holistic review, if universities cannot explicitly include race as a factor, many may "resort to camouflage" to "maintain their minority enrollment." *Gratz* v. *Bollinger* 539 U. S., at 304. . . .**

**I have several times explained why government actors, including state universities, need not be blind to the lingering effects of "an overtly discriminatory past," the legacy of "centuries of law-sanctioned inequality." *Id.*, at 298, . . . See also *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 272-274, . . . Among constitutionally permissible options, I remain convinced, "those that candidly disclose their consideration of race [are] preferable to those that conceal it." *Gratz*, 539 U. S., at 305, n. 11, . . .**

**Accordingly, I would not return this case for a second look. As the thorough opinions below show, 631 F. 3d 213 (CA5 2011); 645 F. Supp. 2d 587, the University's admissions policy flexibly considers race only as a "factor of a factor of a factor of a factor" in the calculus, *id.*, at 608; followed a yearlong review through which the University reached the reasonable, good-faith judgment that supposedly race-neutral initiatives were insufficient to achieve, in appropriate measure, the educational benefits of student-body diversity, see 631 F. 3d, at 225-226; and is subject to periodic review to ensure that the consideration of race remains necessary and proper to achieve the University's educational objectives, see *id.*, at 226. 3 Justice Powell's opinion in *Bakke* and the Court's decision in *Grutter* require no further determinations. See *Grutter*, 539 U. S., at 333-343; *Bakke*, 438 U. S., at 315-320. . . .**

**Higher Education’s Costs and Value**

**Higher education for President Obama was important to personal and national renaissance. Yet needing dramatic remediation was the extraordinary increase in postsecondary education’s costs. The President voiced his concerns in his August, 2013 address at the State University of New York at Buffalo:[[123]](#footnote-123)**

**[W]hat I want to talk about today is what’s become a barrier and a burden for too many American families -– and that is the soaring cost of higher education.  (Applause.)**

**This is something that everybody knows you need -- a college education.  On the other hand, college has never been more expensive.  Over the past three decades, the average tuition at a public four-year college has gone up by more than 250 percent -- 250 percent.  Now, a typical family's income has only gone up 16 percent.  So think about that -- tuition has gone up 250 percent; income gone up 16 percent.  That’s a big gap.**

**Now, it's true that a lot of universities have tried to provide financial aid and work-study programs.  And so not every student -- in fact, most students are probably not paying the sticker price of tuition.  We understand that.  But what we also understand is that if it's going up 250 [percent] and your incomes are only going up 16 [percent], at some point, families are having to make up some of the difference, or students are having to make up some of the difference with debt.**

**And meanwhile, over the past few years, states have been cutting back on their higher education budgets.  New York has done better than a lot of states, but the fact is that we've been spending more money on prisons, less money on college.  (Applause.)  And meanwhile, not enough colleges have been working to figure out how do we control costs, how do we cut back on costs.  So all this sticks it to students, sticks it to families, but also, taxpayers end up paying a bigger price.**

**The average student who borrows for college now graduates owing more than $26,000.  Some owe a lot more than that.  And I’ve heard from a lot of these young people who are frustrated that they’ve done everything they're supposed to do –- got good grades in high school, applied to college, did well in school -- but now they come out, they've got this crushing debt that’s crippling their sense of self-reliance and their dreams.  It becomes hard to start a family and buy a home if you're servicing $1,000 worth of debt every month.  It becomes harder to start a business if you are servicing $1,000 worth of debt every month, right?  (Applause.)**

**And meanwhile, parents, you're having to make sacrifices, which means you may be dipping into savings that should be going to your retirement to pay for your son or daughter's -- or to help pay for your son or daughter's education.**

**So at a time when a higher education has never been more important or more expensive, too many students are facing a choice that they should never have to make:  Either they say no to college and pay the price for not getting a degree -- and that's a price that lasts a lifetime -- or you do what it takes to go to college, but then you run the risk that you won’t be able to pay it off because you've got so much debt.**

**Now, that's a choice we shouldn’t accept.  And, by the way, that's a choice that previous generations didn't have to accept. This is a country that early on made a commitment to put a good education within the reach of all who are willing to work for it. And we were ahead of the curve compared to other countries when it came to helping young people go to school.  (Applause.)**

**The President referred to the college-attendance financial barriers facing low-income persons as a “crisis,”[[124]](#footnote-124) and his Administration has attempted crisis amelioration. A number of these efforts were summarized by the Department of Education (DED) in March, 2016.[[125]](#footnote-125) Federal government student loans--traditionally administered by private banks and governmentally subsidized came, in large measure, to be handled by the DED, resulting in the reallocation of $60 billion in savings channeled back to students and taxpayers. Pell Grants, the cornerstone of Federal grant assistance to lower-income groups, were increased by 67% which lowered the average annual college cost for 8 million students. Tuition tax credits reduced tax impositions for nearly 10 million. Making student loans more manageable by, among other ways, making most borrowers eligible for “income-based” repayment plans which required only 10% of discretionary income repayment for 20 years after which the loan is to be forgiven.**

**President Trump ordered the DED to stop collecting student loan-repayments until the end of 2020, with interest waived. This action was taken in connection with the coronavirus crisis.[[126]](#footnote-126)**

**For-Profit Schools and Loan Forgiveness**

**As part of his advocacy of the common worker during his campaign and later in the presidency, President Trump has been a strong supporter of vocational training (often provided by for-profit schools) to fill the need for skilled labor in a revived economy, and to demonstrate his concern for ‘blue-collar” America.[[127]](#footnote-127) However, during the Obama Administration, for-profit vocational training was seen as engaging in misconduct such as overpromising jobs. That Administration adopted the Gainful Employment Rule requiring for-profits to demonstrate that their graduates acquired gainful employment, and that demonstration was required as a condition for Federal financial aid such as loans to students. This Rule was rescinded by the Trump Administration with the argument that not for-profit schools were largely not covered even when they had poor performers in the realm of gainful employment. Rather than the Gainful Employment Rule, an improved (over that presented by the Obama Administration) scorecard /publication of student debt/wage ratios was promised.[[128]](#footnote-128)**

**The Gainful Employment Rule covered the large number of minorities who attended the for-profits.[[129]](#footnote-129) Among others, this affirmative-action policy was designed to assist African Americans and single-mother students at for-profit schools as these students experienced the greatest Federal loan-default rates,[[130]](#footnote-130) and many of the for-profit schools relied heavily on students receiving Federal loans.[[131]](#footnote-131) The Rule required the publication of student earnings and student-loan debt. If average earnings exceeded average debt by 8% for two out of three years, the school was to be judged a “failure,” resulting in prohibiting students from getting federal loans for that failed school.[[132]](#footnote-132) Thus, students could determine salaries they might earn and handle their debt obligations accordingly. An abundance of for-profit schools which failed during the Obama years would have been judged ineligible for Federal student loans by the Gainful Employment Rule.[[133]](#footnote-133)**

**The Gainful Employment Rule was applicable overwhelmingly to for-profit schools and was much criticized for this reason,[[134]](#footnote-134) and also for the fact that it did not attempt to note the successes—actual and potential-- experienced by for-profit training.[[135]](#footnote-135) During the Trump Administration, the Rule was, as noted, rescinded (effective July 1, 2020), and in its place an expanded and improved version of the Obama-era college scorecard’s information on student earnings and debt was promised without further governmental regulation of for-profits.[[136]](#footnote-136) For-profits were seen as minority “rip-off” schemes by some.[[137]](#footnote-137) But President Trump has insisted on more vocational training as important to making America Great Again.[[138]](#footnote-138)**

**What about loan forgiveness for those who had taken Federal Government student-loans to attend for-profits which had closed their doors, and those who felt duped by the for-profit promises. The Obama Administration was quite liberal in treating loan forgiveness for these reasons. Thus, total loan-forgiveness was provided by the Obama Administration to 85,000 Corinthian school students at a cost of up to $3.2 Billion to taxpayers.[[139]](#footnote-139) A new Obama policy (to be distinguished from the Gainful Employment Rule) was established during the last months of that Administration. This policy promised loan forgiveness which would cost the taxpayers between $199 Million to $4.2 Billion annually.[[140]](#footnote-140) The new Obama rule permitted loan forgiveness if significant misrepresentation was found. But the Trump Administration rescinded that program also. In its place, loan forgiveness depended on student earnings, with full loan forgiveness afforded to those whose earnings amounted to 50% or less of the earnings made by those who went to similar schools. If earnings were more than 50%, proportional loan forgiveness was provided, with the argument that this was fair both to the student and the taxpayer.[[141]](#footnote-141) A Federal District Court Judge later ordered total loan forgiveness to those who attended closed schools (and some 1000 for-profits closed between 2013 and 2017), wiping $150 million in student loans off the books.[[142]](#footnote-142) The rule for those who seek forgiveness for new Federal student-loans made from July1, 2020 will require that they prove that they were intentionally defrauded by the college; that the intentional fraud (or reckless disregard of the truth) led to their attendance; and that attendance was financially penalizing.[[143]](#footnote-143) However, as a consequence of the coronavirus pandemic, Federal DED student-loan repayment is not required until the end of 2020 by order of President Trump.[[144]](#footnote-144)**

**The scorecard referred to above was to be an expansion of the scorecard created by the Obama Administration. But whether the Trump scorecard should guide students is problematical. One learns from the Trump Scorecard--not surprisingly enough-- that those who major in the sciences are afforded initially higher salaries, but salaries may be equalized with those who major in the liberal arts later in one’s working life.[[145]](#footnote-145) To expand college cost-saving efforts, President Obama called for the value-ranking of postsecondary institutions, and the distribution of Federal student-aid commensurate with these rankings. Information was to be provided potential students about the monetary/earnings value of postsecondary schools so that appropriate value-based decisions could be made.[[146]](#footnote-146) However, colleges have not been ranked. The data provided (by both Administrations) to students (via the internet College Scorecard) while perhaps helpful, surely could not be used to determine educational value. Moreover, at best, college costs seem to have been affected only marginally by the Obama and Trump scorecard efforts. And the Scorecards from both Administrations has not prevented some 40% of student borrowers from defaulting on their required Federal student-loan payments.[[147]](#footnote-147)**

**The Historically Black Colleges and Universities**

**In recent times, there were some 103 Historically Black Colleges and Universities (HBCUs) serving an estimated 300,000 students, that is, colleges created to serve the academic needs of African Americans where they were socially and /or legally barred from attending Traditionally White Institutions (TWIs). They exist primarily in the “Old South.” Fourteen are two-year junior colleges. Of the 89 four-year, senior colleges, 40 are public institutions with the remainder private. The junior colleges are a mix of private (11) and public (3). When racial segregation was imposed by law (*de jure*), some 90% of Blacks who attended college went to HBCU’s. Now Blacks are in great demand at formerly White universities, and their attendance at HBCUs has fallen to about 9% where the graduation rate is 55%, while the graduation rate for Blacks in non-Black colleges is 65%. HBCUs are heavily financed with public funds which have neither prevented their frequent financial shortfalls, nor augmented their academic stature in the status-obsessed world of American higher education.[[148]](#footnote-148)**

**In *U.S. v. Fordice* (1992),[[149]](#footnote-149) the U.S. Supreme Court ruled that when “educationally practicable” the *de jure* -segregation States were obliged by the Equal Protection Clause to end and remedy segregation-inspired practices interfering with the integration of the HBCUs. *Fordice* has been reasonably interpreted by some as requiring “just schools,” not White or Black schools.[[150]](#footnote-150) HBCU supporters often insist that HBCU’s be regarded as inherently and essentially non-diverse, this at a time when racial/ethnic diversity is much insisted upon. Nevertheless, HBCUs remain quite racially identifiable on the whole (about 82% Black[[151]](#footnote-151)) and generally unattractive to Whites. Does not HBCU existence and public subsidization denote scurrilous hypocrisy in this age of diversity and inclusion? [[152]](#footnote-152) Besides, it is argued, HBCUs are academically substandard and the African-American young would do better at non-Black schools.[[153]](#footnote-153)Justice Scalia found the majority in *Fordice* to be terribly in error. To impose integration requirements on colleges was inappropriate (and productive of much confusion) as students were—unlike K-12—free to attend them or not. Consequently, he argued, allow students to choose HBCUs or traditionally White institutions (TWIs) as they saw fit.[[154]](#footnote-154) Justice Scalia said:**

**It is my view that the requirement of compelled integration (whether by student assignment, as in *Green* itself, or by elimination of nonintegrated options, as the Court today effectively decrees) does not apply to higher education. Only one aspect of a historically segregated university system need be eliminated: discriminatory admissions standards. The burden is upon the formerly *de jure* system to show that that has been achieved. Once that has been done, however, it is not just unprecedented, but illogical as well, to establish that former *de jure* States continue to deny equal protection of the law to students whose choices among public university offerings are unimpeded by discriminatory barriers. Unless one takes the position that *Brown I* required States not only to provide equal access to their universities but also to correct lingering disparities between them, that is, to remedy institutional noncompliance with the "equal" requirement of *Plessy*, a State is in compliance with *Brown I* once it establishes that it has dismantled all discriminatory barriers to its public universities. Having done that, a State is free to govern its public institutions of higher learning as it will, unless it is convicted of discriminating anew -- which requires both discriminatory intent and discriminatory causation. See *Washington v. Davis*, 426 U.S. 229, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976).[[155]](#footnote-155)**

**Friends of HBCUs could find much solace and comfort in the Scalia dissent. They are fervent and passionate in their defense of HBCUs, insisting that HBCUs have educated many of the Black leaders in the arts and sciences; that students interact with HBCU instructors to a greater extent than Blacks do at TWIs; and that HBCUs provide an emotional climate that provides Black youth with a welcoming psychological succor unobtainable at non-Black colleges. Should we be concerned about HBCU racial identifiability? Absolutely not! No more than we should oppose BYU because of the number of Mormons there, or Yeshiva University because of its Jewish population, or the number of Catholics at Notre Dame. And this kind of thinking has kept HBCUs very much intact irrespective of what the Supreme Court majority said in *U.S. v. Fordice*. Would not the abolition of the Black colleges attempt to cure the deficiencies of the segregationist oppressors by punishing their victims? Besides, the HBCUs arguably help curb the so-called mismatch problem so central to critics of preferential racial/ethnic admissions at elite TWI colleges. In 2010, the U.S. Civil Rights Commission recommended that “African-American students interested in STEM [science, technology, engineering, math] majors may also particularly wish to consider attending a college or a university, including an HBCU, at which their academic credentials match those of the typical student so that they avoid experiencing the negative effects of academic mismatch.”[[156]](#footnote-156)**

**In proclamations, initiatives, executive orders, and speeches, President Obama and his Administration have outwardly been firm supporters of HBCUs, while insisting on their improvement. President Obama’s Administration has not made a priority of HBCU integration save for trying to improve their operations, and thus potentially make them more attractive to non-Blacks. Consider the President’s response to a question at Baton Rouge (January 14, 2016) “Town Hall” event:[[157]](#footnote-157)**

**Q: But one of my main questions for you, sir, Mr. President -- I’m going to an HBCU institute -- Southern University.  Most times, when I go recruit off of high schools, most of the time a lot of them say, oh, I don’t want to go to an HBCU college; I feel like if I go to an HBCU, I won’t get as many opportunities as a student at university as LSU or Tulane.  So what is your take of -- or advice to students like me, thousands of students like me who go to HBCUs, and us finishing the course in order to be great leaders in this society?  (Applause.)**

**THE PRESIDENT:  Okay.  See, you got some folks voting for you already.**

**Well, first of all, the role of the historically black colleges and universities in producing our leadership and expanding opportunity -- training doctors and teachers and lawyers and ministers who change the landscape of America -- I hope most people know that story, and if not, you better learn it.  Because it has been powerful and continues to be a powerful tradition.**

**And I will tell you that if you have done well at an HBCU and graduated, and you go to an employer and are making the kind of presentation you make or a Morehouse man makes or a Spelman young lady makes, you will do just fine.  I don’t think it’s true that actually people don’t take -- or discount that tradition.  And you will be credentialed.  You’ll succeed.**

**I do think that there’s a range of challenges that HBCUs face.  Some are doing great; some are having more difficulty.  And some of that’s good.  Look -- or some of it is the result of good things.  We don’t live in a society where African Americans are restricted in what colleges they can go to.  And I want them to be able to go to an LSU or a Tulane as well as a Southern, as well as a Morehouse, as well as a Howard or a Spelman.  So more opportunities open up -- that’s good.**

**We have been very supportive of HBCUs over the last several years.  And to their credit, the previous administration had supported them, as well.  There are some HBCUs that are having trouble with graduation rates.  And that is a source of concern.  And what we’ve said to those HBCUs is we want to work with you, but we don’t want a situation in which young people are taking out loans, getting in debt, thinking that they're going to get a great education and then halfway through they're dropping out.**

**Now, some of it is those HBCUs may be taking chances on some kids that other schools might not.  And that's a positive thing, and that has to be taken into account.  But we also have to make sure that colleges -- any college, HBCU or non-HBCU -- take seriously the need to graduate that student and not load them up with debt.**

**Everybody needs a college education or a secondary -- an education beyond high school.  If it’s a community college, if it’s a technical school, if it’s a training program, you're going to need more training as your career goes on.**

**But I don't want you taking out a Pell grant or a bunch of -- not a Pell grant -- like a federal loan or a private loan, and you walk out with $50,000, $60,000, $100,000 worth of debt, and you didn't get your degree.  So we are working very hard with every school, all colleges and universities, not just to reduce costs, but also to increase graduation rates, give students a better sense as they come in -- here’s what it’s going to take for you to finish; here’s why you got to not lollygag and not take enough credits and think going to college is about partying, because it’s actually about getting your degree.  (Applause.)  And we want students and parents to be better informed about …[that my Administration’s policies on] HBCU accountability have met with resistance.**

**Thus, an administrative loan policy limited Federal lending to parents with poor credit histories gained from borrowing government money for student tuition. This Obama Administration limit on parental borrowing was seen by the passionate HBCU supporters as greatly lowering HBCU student attendance. Before intense pressure from these supporters changed the loan policy, the President was bitterly attacked as in this cynical opinion piece of June 26, 2013 by Courtland Milloy of the Washington Post:[[158]](#footnote-158)**

**When it comes to dashing the hopes of thousands of college-bound African Americans, you'd hardly think of President Obama as a culprit. Maybe the right-wing-dominated Supreme Court. But not Obama, the black Harvard law grad who likes to cite higher education as a path into the middle class and who pledges to make student loans more accessible to black scholars.**

**And yet, in what United Negro College Fund President Michael Lomax calls "a nasty surprise," the Obama administration has begun denying student loans to disproportionately large numbers of black parents because of blemished credit histories. …**

**In the past year, for historically black colleges and universities (HCBU), the Obama administration's policies have led to a 36 percent drop in the volume of parent loans. That translated into an annual cut of more than $150 million. The reason, according to Education Secretary Arne Duncan, is to prevent parents from taking on too much debt - which is as patronizing as it is hypocritical. In April, Obama announced that he was pushing to make more home loans available to people with weak credit. …**

**President Trump invited dozens of HBCU presidents to the Oval Office early in his presidency. There he pledged his wholehearted support of those institutions, issuing an Executive Order noting their contributions and calling for their continued improvement.[[159]](#footnote-159) Black leaders, however, were chagrined by a Presidential signing statement attached to the first appropriation measure in the Trump years. In that signing statement, the President suggested that he would not fund programs that focused on racial restriction.[[160]](#footnote-160) Trump was notified that HBCUs—though racially identifiable on the whole—were no longer restricted to Blacks as all races could matriculate at HBCUs, and at some HBCUs there were more Whites than Blacks, e.g., Bluefield in West Virginia. [[161]](#footnote-161) Thereafter, the President repeated his full -fledged support of HBCUs.[[162]](#footnote-162) Nevertheless, HBCUs are fighting for their survival. Some prestigious ones like Morehouse, Howard, and Spelman are financially and enrollment-wise sound, but others are struggling living check by check, and facing severe enrollment declines. Three HBCUs have closed since 2000, and at least a quarter of the HBCUs have been placed under a warning or probation by accreditation agencies[[163]](#footnote-163)**

**Gender Discrimination/Harassment**

**Women were very important to President Obama’s electoral considerations.[[164]](#footnote-164) Throughout his presidency, he championed such female-oriented policies as birth control rights, expanded Head Start, medical care for females, expanded school athletic opportunities for women, and protections against sexual assault at schools, and in the military. Early on in his presidency, President Obama created[[165]](#footnote-165) the Commission on Women and Girls whose signature efforts was to dampen the alleged systemic culture of violence against females on campus. This effort received the heralded affirmative-action support of the President and the Vice President. Both of these executive leaders employed the “bully pulpit” (which now included the internet) to promote the notion that women were under attack on campus, and that `it was the responsibility of all students/faculty/administrators to change this rapacious culture.[[166]](#footnote-166) The Obama Administration’s proclamations regarding sexual assault on campus were protested as being both ridiculously overstated (by skeptics), and woefully inadequate (by feminists). Interpretative *guidance* [[167]](#footnote-167)(not *regulations*!) from the U.S. Department of Education’s Office for Civil Rights (OCR) insisted upon college procedures regarding the determination/punishment of campus sexual assault infuriated critics as being totally contrary to accepted notions of due process. An example of this outrage is an open letter from sixteen University of Pennsylvania law professors, dated February 18, 2015:[[168]](#footnote-168)**

**[W]e believe that OCR’s approach exerts improper pressure upon universities to adopt procedures that do not afford fundamental fairness. We do not believe that providing justice for victims of sexual assault requires subordinating so many protections long deemed necessary to protect from injustice those accused of serious offenses. We also believe that, given the complexities of the problem, OCR’s process has sacrificed the basic safeguards of the lawmaking process and that those safeguards are critically necessary to formulate sound regulatory policy. …**

**Ultimately, however, a student who denies the charges is entitled to a fair hearing before being subjected to serious, life-changing sanctions. These cases are likely to involve highly disputed facts, and the “he said/she said” conflict is often complicated by the effects of alcohol and drugs. …**

**[I]n addressing the issue of sexual assault, the federal government has sidestepped the usual procedures for making law. Congress has passed no statute requiring universities to reform their campus disciplinary procedures. OCR has not gone through the notice-and-comment rulemaking required to promulgate a new regulation. Instead, OCR has issued several guidance letters whose legal status is questionable. It is this guidance that purports to require universities to retreat from the clear-and-convincing standard of proof to a preponderance-of-the-evidence standard, which requires a finding of responsibility even if the factfinder is almost 50% sure that the accused student is not guilty. In addition, OCR has used threats of investigation and loss of federal funding to intimidate universities into going further than even the guidance requires. …**

**[T]his lawmaking process has sacrificed the traditional safeguards that accompany traditional lawmaking procedures. Both the legislative process and notice-and-comment rulemaking are transparent, participatory processes that afford the opportunity for input from a diversity of viewpoints. That range of views is critical because this area implicates competing values, including privacy, safety, the functioning of the academic community, and the integrity of the educational process for both the victim and the accused, as well as the fundamental fairness of the disciplinary process. A formal lawmaking process would have required the federal government to deliberate, strike reasonable balances, and offer an explicit justification for its policy judgments. Formal lawmaking would have required the federal government, as in other areas of regulatory policy, to consider explicitly the costs of its proposed policies as well as the benefits. In addition, adherence to a rule-of-law standard would have resulted in procedures with greater legitimacy and buy-in from the universities subject to the resulting rules. …**

**We recognize that student disciplinary hearings are not criminal trials and therefore do not require all constitutional guarantees. What is required is fundamental fairness, including (1) the right to the assistance of counsel in preparation for and conduct of the hearing, (2) the right to cross-examine witnesses against the accused student and to present defense witnesses and evidence, and (3) the right to a fair and unbiased hearing panel.**

**Procedures that universities have adopted in response to the threatened loss of federal funding are deficient. …**

**Although the Department of Education’s guidance strongly discourages allowing the *accused* to cross-examine the complainant personally, it permits the accused student’s lawyer or other representative to do so, as long as each side has equal rights to cross-examine. Cross-examination has long been considered as perhaps the most important procedure in reaching a fair and reliable determination of disputed facts.**

**An evidentiary standard of clear and convincing [highly probable] evidence to convict provides a more durable safeguard against wrongful “convictions.” The preponderance standard [50 plus percent] may be required by the OCR guidance, but that mandate provides all the more reason for otherwise scrupulously fair procedures and a unanimous decision before a student can be expelled from the University and be stigmatized as a sexual offender. To require anything less than unanimity for the imposition of serious sanctions is unacceptable. …**

**The preponderance standard in campus sexual-assault cases was the target of much criticism, but it also generated support. For example, ninety law professors wrote as follows in a paper embracing the Obama Administration’s guidance regarding campus sex attacks: [[169]](#footnote-169)**

**The preponderance of the evidence standard is the standard that has always been used to adjudicate discrimination claims. As the 2011 Dear Colleague letter makes clear, civil rights laws prohibiting discrimination, such as Title IX, consistently use a preponderance of the evidence standard of proof. Other educational civil rights statutes like Title VI of the Civil Rights Act of 1964, which prohibits race discrimination by educational institutions and is also enforced by OCR, use a preponderance of the evidence standard. So does Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment, including sexual harassment.**

**Betsy DeVos—The Trump Secretary of Education—found the Obama guidelines on sexual assault to be contrary to fundamental fairness.[[170]](#footnote-170) These guidelines were rescinded in September 2017.[[171]](#footnote-171) They were replaced by Interim Guidelines which gave schools a standard of evidence option: they could use the “Preponderance” or the “Clear and Convincing” standard. Further, if one side was granted the right of cross-examination, the other would have to be granted the same right. The Clear and Convincing Standard was incorporated in the proposed Sexual Assault Regulations made public in November, 2018.[[172]](#footnote-172) It is to be used unless the school has adopted the preponderance approach to determine whether its standards of conduct are breached. That proposed document also granted the right of cross-examination to both parties who must use lawyers or advisors in this effort. Direct confrontation by the parties in the controversy was not allowed. Sixty days were allocated for comments regarding the proposed regulations, and more than 100,000 comments were received by the Secretary who was required by law to consider the comments. The interim guidelines, cited above, were adopted in the final regulations presented in May, 2020.**

**Athletic Participation**

**The U.S. Department of Education’s Office for Civil Rights (OCR) has also provided guidance concerning girls and women in connection with athletic participation. In the wake of Title IX’s 1972 inaugural, OCR opined that the prohibition of gender discrimination included gender discrimination in school athletics. That Title could be honored if one of the following conditions (prongs) was met:[[173]](#footnote-173)**

**1. male and female representation in school athletics which was substantially proportional to their numbers in the school’s student population; 2. a school history of expanding school athletic opportunities for the underrepresented group (very typically female); 3. full and effective accommodation of the underrepresented group’s athletic interests and abilities.**

**Critics of OCR’s guidance insisted that 2 and 3 of the aforementioned were vague, leading to the widespread default, “safe harbor” of proportional representation. Girls, it has been insisted, were simply not very much interested in sports. The George W. Bush Administration was sufficiently impressed with this view that its OCR instituted a survey of female attitudes concerning sports activity.[[174]](#footnote-174) The U.S. Civil Rights Commission concluded that:[[175]](#footnote-175)**

**In its 2003 clarification of Title IX regulations, the U.S. Department of Education encouraged the use of student interest surveys in order to achieve Prong Three compliance. For compliance under Prong Three, an institution must consider student interest, student ability, and availability of competition. More specifically, an institution must show: a) there is no unmet interest among students; b) if there is unmet interest, it must show insufficient ability among students to sustain a team in the sport; and c) if there is interest and ability, it must show no likelihood of competition in the region in which the institution is located. Satisfaction of these three elements is sufficient to comply with Prong Three.**

**In its 2005, the Department of Education developed the Model Survey method, which the Obama Administration found wanting. That Administration instituted a multi-dimensional analysis requirement for Prong Three which could easily elicit a reliance on proportional representation for females in school sports. To establish female interest, the Obama guidance required schools to answer the following:[[176]](#footnote-176)**

**Is there unmet interest in a particular sport?**

**Is there sufficient ability to sustain a team in the sport?**

**Is there a reasonable expectation of competition for the team?**

**If the answer to all three questions is “Yes,” OCR will find that an institution is not fully and effectively accommodating the interests and abilities of the underrepresented sex and therefore is not in compliance with Part Three. …**

**Additionally, in determining whether an institution has not met the interest and ability to support intercollegiate teams, OCR, during the Obama years, was charged with evaluating a broad controversial range of indicators, including:**

**whether an institution uses nondiscriminatory methods of**

**assessment when determining the athletic interests and**

**abilities of its students; whether a viable team for the**

**underrepresented sex recently was eliminated;**

**[whether there were multiple indicators of interest;**

**[whether there were] multiple indicators of ability; and**

**[the ] frequency of conducting assessments.**

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**New guidance was provided by the Trump Administration on September 25, 2018. [[177]](#footnote-177)It invites and prompts a continuation of the controversy over the expansion of athletic opportunities as did the Obama “rules.” Consider the Trump guidance on determining student interest and the ability to support an intercollegiate team:**

**The athletic interests and abilities of male and female students must be equally and effectively accommodated. Compliance with this factor is assessed by examining a school's: (a) determination of the athletic interests and abilities of its students; (b) selection of the sports that are offered; and (c) levels of competition, including opportunity for team competition. …**

**Colleges and universities have discretion in selecting the methods for determining the athletic interests and abilities of their students, as long as those methods are nondiscriminatory. The only requirements imposed are that institutions used methods that:**

* **take into account the nationally increasing level of women's interests and abilities;**
* **do not disadvantage the underrepresented sex (i.e., that sex whose participation rate in athletics is substantially below its enrollment rate);**
* **take into account team performance records of both male and female teams; and**
* **respond to the expressed interests of students capable of intercollegiate competition who belong to the underrepresented sex. …**

**Colleges and universities are not required to develop or upgrade an intercollegiate team if there is no reasonable expectation that competition will be available for that team within the institution's normal competitive region. However, an institution may be required to encourage development of such competition when overall athletic opportunities within that region have been historically limited for the members of one sex.**

**Discriminatory rules established by a governing athletic organization, or league do not relieve recipients of their Title IX responsibilities. For example, a college or university may not limit the eligibility or participation of women based on policies or requirements imposed by an intercollegiate athletic body.**

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27. Daniel J. Losen and Jonathan Gillespie,  *Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School*, UCLA, Civil Rights Project , August, 2012, 7. At <http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-ccrr-research> [↑](#footnote-ref-27)
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75. See *Parents Involved*, 551 U.S. at 798 (“[N]eighborhoods in our communities do not reflect the diversity of our Nation as a whole.” (Kennedy, J., concurring in part and concurring in the judgment)). [↑](#footnote-ref-75)
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86. 539 U.S. 306 at <https://supreme.justia.com/cases/federal/us/539/306/case.html> [↑](#footnote-ref-86)
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