EXHIBIT A



UNITED STATES DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS

THE ACTING ASSISTANT SECRETARY

February 14, 2025

Dear Colleague:

Discrimination on the basis of race, color, or national origin is illegal and morally reprehensible. Accordingly, I write to clarify and reaffirm the nondiscrimination obligations of schools and other entities that receive federal financial assistance from the United States Department of Education (Department). This letter explains and reiterates existing legal requirements under Title VI of the Civil Rights Act of 1964, the Equal Protection Clause of the United States Constitution, and other relevant authorities.

In recent years, American educational institutions have discriminated against students on the basis of race, including white and Asian students, many of whom come from disadvantaged backgrounds and low-income families. These institutions' embrace of pervasive and repugnant race-based preferences and other forms of racial discrimination have emanated throughout every facet of academia. For example, colleges, universities, and K-12 schools have routinely used race as a factor in admissions, financial aid, hiring, training, and other institutional programming. In a shameful echo of a darker period in this country's history, many American schools and universities even encourage segregation by race at graduation ceremonies and in dormitories and other facilities.

¹ Throughout this letter, "school" is used generally to refer to preschool, elementary, secondary, and postsecondary educational institutions that receive federal financial assistance from the Department.

² Title VI provides that: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d, *et seq.*; 34 C.F.R. § 100, *et seq.*

³ This document provides significant guidance under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007). This guidance does not have the force and effect of law and does not bind the public or create new legal standards. This document is designed to provide clarity to the public regarding existing legal requirements under Title VI, the Equal Protection Clause, and other federal civil rights and constitutional law principles. If you are interested in commenting on this guidance, please email your comment to OCR@ed.gov or write to the following address: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, D.C. 20202. For further information about the Department's guidance processes, please visit the Department's webpage here.

Educational institutions have toxically indoctrinated students with the false premise that the United States is built upon "systemic and structural racism" and advanced discriminatory policies and practices. Proponents of these discriminatory practices have attempted to further justify them—particularly during the last four years—under the banner of "diversity, equity, and inclusion" ("DEI"), smuggling racial stereotypes and explicit race-consciousness into everyday training, programming, and discipline.

But under any banner, discrimination on the basis of race, color, or national origin is, has been, and will continue to be illegal.

The Supreme Court's 2023 decision in *Students for Fair Admissions v. Harvard*⁴ (*SFFA*), which clarified that the use of racial preferences in college admissions is unlawful, sets forth a framework for evaluating the use of race by state actors and entities covered by Title VI. The Court explained that "[c]lassifying and assigning students based on their race" is lawful only if it satisfies "strict scrutiny," which means that any use of race must be narrowly tailored—that is, "necessary"—to achieve a compelling interest. To date, the Supreme Court has recognized only two interests as compelling in the context of race-based action: (1) "remediating specific, identified instances of past discrimination that violated the Constitution or a statute"; and (2) "avoiding imminent and serious risks to human safety in prisons, such as a race riot." Nebulous concepts like racial balancing and diversity are not compelling interests. As the Court explained in *SFFA*, "an individual's race may never be used against him" and "may not operate as a stereotype" in governmental decision-making.⁷

Although *SFFA* addressed admissions decisions, the Supreme Court's holding applies more broadly. At its core, the test is simple: If an educational institution treats a person of one race differently than it treats another person because of that person's race, the educational institution violates the law. Federal law thus prohibits covered entities from using race in decisions pertaining to admissions, hiring, promotion, compensation, financial aid, scholarships, prizes, administrative support, discipline, housing, graduation ceremonies, and all other aspects of student, academic, and campus life. Put simply, educational institutions may neither separate or segregate students based on race, nor distribute benefits or burdens based on race.

Although some programs may appear neutral on their face, a closer look reveals that they are, in fact, motivated by racial considerations. And race-based decision-making, no matter the form, remains impermissible. For example, a school may not use students' personal essays, writing samples, participation in extracurriculars, or other cues as a

⁴ Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

⁵ *Id.* at 207.

 $^{^6}$ Ibid.

⁷ Id. at 218.

⁸ Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

means of determining or predicting a student's race and favoring or disfavoring such students.9

Relying on non-racial information as a proxy for race, and making decisions based on that information, violates the law. That is true whether the proxies are used to grant preferences on an individual basis or a systematic one. It would, for instance, be unlawful for an educational institution to eliminate standardized testing to achieve a desired racial balance or to increase racial diversity.

Other programs discriminate in less direct, but equally insidious, ways. DEI programs, for example, frequently preference certain racial groups and teach students that certain racial groups bear unique moral burdens that others do not. Such programs stigmatize students who belong to particular racial groups based on crude racial stereotypes. Consequently, they deny students the ability to participate fully in the life of a school.

The Department will no longer tolerate the overt and covert racial discrimination that has become widespread in this Nation's educational institutions. The law is clear: treating students differently on the basis of race to achieve nebulous goals such as diversity, racial balancing, social justice, or equity is illegal under controlling Supreme Court precedent.

All students are entitled to a school environment free from discrimination. The Department is committed to ensuring those principles are a reality.

This letter provides notice of the Department's existing interpretation of federal law. Additional legal guidance will follow in due course. The Department will vigorously enforce the law on equal terms as to all preschool, elementary, secondary, and postsecondary educational institutions, as well as state educational agencies, that receive financial assistance.

The Department intends to take appropriate measures to assess compliance with the applicable statutes and regulations based on the understanding embodied in this letter beginning no later than 14 days from today's date, including antidiscrimination requirements that are a condition of receiving federal funding.

All educational institutions are advised to: (1) ensure that their policies and actions comply with existing civil rights law; (2) cease all efforts to circumvent prohibitions on the use of race by relying on proxies or other indirect means to accomplish such ends; and (3) cease all reliance on third-party contractors, clearinghouses, or aggregators that are being used by institutions in an effort to circumvent prohibited uses of race.

⁹ Students for Fair Admissions, 600 U.S. at 230 ("[U]niversities may not simply establish through application essays or other means the regime we hold unlawful today.").

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Institutions that fail to comply with federal civil rights law may, consistent with applicable law, face potential loss of federal funding.

Anyone who believes that a covered entity has unlawfully discriminated may file a complaint with OCR. Information about filing a complaint with OCR, including a link to the online complaint form, is available <u>here</u>.

Thank you in advance for your commitment to providing our Nation's students with an educational environment that is free of race, color, or national origin discrimination.

Sincerely,

/s/ Craig Trainor Acting Assistant Secretary for Civil Rights United States Department of Education

EXHIBIT B



U.S. Department of Education



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PRESS RELEASE

Office for Civil Rights Initiates Title VI Investigations into Institutions of Higher Education

MARCH 14, 2025

WASHINGTON – The U.S. Department of Education's Office for Civil Rights (OCR) opened investigations into 45 universities under Title VI following OCR's February 14 <u>Dear Colleague Letter</u> (DCL) that reiterated schools' civil rights obligations to end the use of racial preferences and stereotypes in education programs and activities. The investigations come amid allegations that these institutions have violated Title VI of the Civil Rights Act (1964) by partnering with "The Ph.D. Project," an organization that purports to provide doctoral students with insights into obtaining a Ph.D. and networking opportunities, but limits eligibility based on the race of participants.

OCR is also investigating six universities for allegedly awarding impermissible race-based scholarships and one university for allegedly administering a program that segregates students on the basis of race.

"The Department is working to reorient civil rights enforcement to ensure all students are protected from illegal discrimination. The agency has already launched Title VI investigations into institutions where widespread antisemitic harassment has been reported and Title IX investigations into entities which allegedly continue to allow sex discrimination; today's announcement expands our efforts to ensure universities are not discriminating against their students based on race and race stereotypes," said **U.S. Secretary of Education Linda McMahon.** "Students must be assessed according to merit and accomplishment, not prejudged by the color of their skin. We will not yield on this commitment."

The universities now under investigation for allegedly engaging in race-exclusionary practices in their graduate programs include:

- Arizona State University Main Campus
- Boise State University
- Cal Poly Humboldt
- California State University San Bernadino
- · Carnegie Mellon University
- Clemson University
- Cornell University
- Duke University
- Emory University
- George Mason University
- Georgetown University
- Massachusetts Institute of Technology (MIT)
- Montana State University-Bozeman
- New York University (NYU)
- Rice University
- Rutgers University
- The Ohio State University Main Campus
- Towson University
- Tulane University
- University of Arkansas Fayetteville
- University of California-Berkeley
- University of Chicago

- University of Cincinnati Main Campus
- University of Colorado Colorado Springs
- University of Delaware
- University of Kansas
- University of Kentucky
- University of Michigan-Ann Arbor
- · University of Minnesota-Twin Cities
- · University of Nebraska at Omaha
- University of New Mexico Main Campus
- University of North Dakota Main Campus
- University of North Texas Denton
- University of Notre Dame
- University of NV Las Vegas
- University of Oregon
- · University of Rhode Island
- University of Utah
- University of Washington-Seattle
- University of Wisconsin-Madison
- University of Wyoming
- Vanderbilt University
- Washington State University
- Washington University in St. Louis
- Yale University

The schools under investigation for alleged impermissible race-based scholarships and race-based segregation are:

- Grand Valley State University
- Ithaca College
- New England College of Optometry
- University of Alabama at Birmingham
- University of Minnesota, Twin Cities
- · University of South Florida
- University of Oklahoma, Tulsa School of Community Medicine

Background:

On February 14, OCR sent a <u>Dear Colleague Letter</u> to educational institutions receiving federal funding clarifying that, pursuant to federal antidiscrimination law, they must cease using race preferences and stereotypes as a factor in their admissions, hiring, promotion, compensation, scholarships, prizes, administrative support, sanctions, discipline, and other programs and activities. On March 1, the Department released <u>FAQs</u> to anticipate and answer questions that may have arisen in response to the DCL.

These OCR investigations are being conducted pursuant to Title VI of the Civil Rights Act (1964), which prohibits discrimination on the basis of race, color, and national origin in education programs and activities receiving federal funding. Institutions' violation of Title VI can result in loss of federal funds.

CONTACT

Press Office | press@ed.gov | (202) 401-1576 | Office of Communications and Outreach (OCO)

Office of Communications and Outreach (OCO)

Page Last Reviewed: March 16, 2025

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EXHIBIT C





U.S. Department of Education Office for Civil Rights

August 14, 2023

Dear Colleague:

On June 29, 2023, the U.S. Supreme Court announced its ruling in Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina et al., holding that the use of race in admissions policies applied by the University of North Carolina and Harvard College violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. This decision, which directly addressed only the universities' admissions programs, restricts approaches that institutions of higher education have been using for decades to provide students the educational benefits that derive from diverse and vibrant campus communities.

Following the Supreme Court's recent decision, the President and Vice President called on colleges, universities, and other stakeholders to seize the opportunity to expand access to educational opportunity for all students and to build diverse student bodies, including by recognizing and valuing students who have overcome adversity.¹

Today, the Departments of Justice and Education ("Departments") provide the attached Questions and Answers to help colleges and universities understand the Supreme Court's decision as they continue to pursue campuses that are racially diverse and that include students with a range of viewpoints, talents, backgrounds, and experiences.

The Departments also reaffirm our commitment to ensuring that educational institutions remain open to all, regardless of race. Learning is enriched when student bodies reflect the rich diversity of our communities. Research has shown that such diversity leads to, among other things, livelier and more informative classroom discussions, breakdown of prejudices and increased crossracial understanding, and heightened cognitive development and problem-solving skills. The benefits of diversity in educational institutions extend beyond the classroom as individuals who attend diverse schools are better prepared for our increasingly racially and ethnically diverse society and the global economy. We stand ready to support institutions that recognize that such diversity is core to their commitment to excellence, and that pursue lawful steps to promote diversity and full inclusion.

¹ See White House, Fact Sheet, "President Biden Announces Actions to Promote Educational Opportunity and Diversity in Colleges and Universities" (June 29, 2023), available at https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/29/fact-sheet-president- biden-announces-actions-to-promote-educational-opportunity-and-diversity-in-colleges-anduniversities/.

We also acknowledge that fulfilling this commitment will require sustained action to lift the barriers that keep underserved students, including students of color, from equally accessing the benefits of higher education. For decades, our Departments have sought to achieve the original promise of *Brown v. Board of Education*, that no student's educational opportunity should be limited by their race. Through that work, we have seen that there are no simple answers for unwinding the entrenched roots and sprawling branches of segregation and discrimination.

For institutions of higher education, this may mean redoubling efforts to recruit and retain talented students from underserved communities, including those with large numbers of students of color. It may likewise mean a greater focus on fostering a sense of belonging for students currently enrolled. Through such efforts, colleges and universities can effectively support and retain students from diverse backgrounds. Colleges and universities can also ensure that prospective students of color know that the schools they are considering are places where all students will be welcome and will succeed. Colleges and universities may also choose to focus on providing students with need-based financial support that allows them not just to enroll, but to thrive. Students should not be waylaid on the path to a degree because they must shoulder crushing debt, further strain their families' finances, or work long hours to pay their bills.

Colleges and universities can also play a role in growing the talent pool of college- and career-ready students. Students from disadvantaged backgrounds, who are disproportionately students of color, are more likely to attend PreK-12 schools that lack the particular courses, types of instruction, and enrichment opportunities that prepare students for college, and that colleges and universities seek in their admissions process. By partnering with school districts in underserved communities, supporting improved access to high quality advanced courses, and investing time and resources into programs that identify and nurture students' potential, colleges and universities can ensure that more students will be prepared to apply to colleges and universities, gain admission, succeed, and graduate. Colleges and universities can also participate in programs that commit them to enroll, support, and graduate students from disadvantaged backgrounds, regardless of race, who are attending or have graduated from community college.

With respect to admissions practices themselves, especially for the upcoming cycle, the Departments encourage colleges and universities to review their policies to ensure they identify and reward those attributes that they most value, such as hard work, achievement, intellectual curiosity, potential, and determination. As described in the attached Q&A document, schools can consider the ways that a student's background, including experiences linked to their race, have shaped their lives and the unique contributions they can make to campus. Students should feel comfortable presenting their whole selves when applying to college, without fear of stereotyping, bias, or discrimination. And information about an individual student's perseverance, especially when faced with adversity or disadvantage, can be a powerful measure of that student's potential.

Conversely, colleges and universities can examine admission preferences, such as those based on legacy status or donor affiliation, that are unrelated to a prospective applicant's individual merit or potential, that further benefit privileged students, and that reduce opportunities for others who have been foreclosed from such advantages. Colleges and universities can also work proactively to identify potential barriers posed by existing metrics that may reflect and amplify inequality, disadvantage, or bias.

We close by noting our continued commitment to vigorous enforcement of Titles IV and VI of the Civil Rights Act of 1964² from early childhood through postsecondary education. The Departments will continue to investigate allegations of discrimination, whether in admissions practices or in the PreK-12 programs that serve as the gateway to higher education. We will continue to use all enforcement tools at our disposal to protect students' right to equal access to the opportunities that create pathways to higher education, and those afforded by higher education itself. Members of the public may report possible civil rights violations to the Department of Justice at www.civilrights.justice.gov/, or to the Department of Education's Office for Civil Rights at https://www2.ed.gov/about/offices/list/ocr/complaintintro.html.

Our Departments' past and current enforcement work highlights the threat that persistent discrimination poses to the rights that make America a true democracy—including equal access to education at all levels. Educators, students, and communities know that we are far from attaining *Brown*'s promise of making education "available to all on equal terms." Making that promise real won't just happen. It will take hard work and resolve, not just from colleges and universities, but from all who care about preparing future generations of students to succeed and to lead our multicultural democracy. We thank you for your continued commitment.

Sincerely,

Kristen Clarke Assistant Attorney General

Civil Rights Division U.S. Department of Justice

Catherine E. Lhamon

Assistant Secretary for Civil Rights

Office for Civil Rights

U.S. Department of Education

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² The Departments enforce Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving Federal financial assistance, and its implementing regulations. The Department of Justice also enforces Title IV of the Civil Rights Act of 1964, which authorizes the Attorney General to address certain complaints of discrimination against students based on race, color, national origin, sex, or religion in public institutions of higher learning.

EXHIBIT D





QUESTIONS AND ANSWERS REGARDING THE SUPREME COURT'S DECISION IN STUDENTS FOR FAIR ADMISSIONS, INC. V. HARVARD COLLEGE AND UNIVERSITY OF NORTH CAROLINA

OVERVIEW

On June 29, 2023, the U.S. Supreme Court held that Harvard College and the University of North Carolina ("UNC") violated the Fourteenth Amendment of the U.S. Constitution and Title VI of the Civil Rights Act of 1964 ("Title VI") by impermissibly using race in their undergraduate admissions processes. See *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 20-1199; *Students for Fair Admissions, Inc. v. University of North Carolina et al.*, No. 21-707 ("*SFFA*"). [Link to decision.] Specifically, the Court held that UNC's consideration of individual students' race violated the Fourteenth Amendment's Equal Protection Clause, which applies to public colleges and universities. The Court reaffirmed that Title VI requires all colleges and universities that receive federal financial assistance—public and private—to comply with the same requirements imposed by the Equal Protection Clause. And the Court held that Harvard College's consideration of individual students' race violated those requirements as well.

This document provides institutions of higher education with information about the Court's decision. The Departments of Justice and Education will continue to address all complaints of race discrimination by applying the relevant legal standards under civil rights statutes and will vigorously enforce civil rights protections, including prohibitions against racial discrimination. We hope you find the Questions and Answers below to be helpful in implementing lawful admissions programs on your campus, consistent with the recent decision. ¹

QUESTIONS AND ANSWERS

Q1: What did the Supreme Court decide?

In SFFA, the Supreme Court held that Harvard College and UNC's admissions programs unlawfully considered individual students' race in determining whether to offer those students admission. The Court held that the schools' asserted interests in the educational benefits of

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¹ The contents of this Q&A document do not have the force and effect of law and do not bind the public or impose new legal requirements, nor do they bind the Departments of Education and Justice in the exercise of their discretionary enforcement authorities. This document is designed to provide information to the public regarding existing requirements under the Constitution and under Title VI and its implementing regulations. It does not address areas other than the application of these requirements to higher education admissions.





diversity—including, among other things, training future leaders, preparing graduates to thrive in an increasingly pluralistic society, promoting the robust exchange of ideas, fostering innovation and problem-solving, and encouraging respect, empathy, and cross-racial understanding—were not sufficiently measurable and could not "be subjected to meaningful judicial review." 600 U.S. __ (2023) (slip op. at 23). The Court held that the admissions programs also failed to articulate a meaningful connection between the means they employed and the goals they pursued. And the Court further held that the programs disadvantaged some racial groups and employed racial stereotypes by treating the fact of an applicant's race alone as saying something meaningful about the applicant's lived experiences or what qualities the applicant could bring to a campus environment. Finally, the Court held that the programs lacked a "logical end point" that would guide courts in determining when the schools' diversity goals had been achieved and the use of race in admissions was no longer necessary. *Id.* at 30 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003)).

The Court noted that its opinion did not address the permissibility of considering race in admissions to the Nation's military academies, "in light of the potentially distinct interests that military academies may present." *Id.* at 22, n.4. The Court's opinion also did not address many other admissions practices that do not involve the use of race.

Q2: In what ways can institutions of higher education consider an individual student's race in admissions?

The Court in *SFFA* limited the ability of institutions of higher education to consider an applicant's race in and of itself as a factor in deciding whether to admit the applicant.

The Court made clear that "nothing in [its] opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." Id. at 39. This means that universities may continue to embrace appropriate considerations through holistic application-review processes and (for example) provide opportunities to assess how applicants' individual backgrounds and attributes—including those related to their race, experiences of racial discrimination, or the racial composition of their neighborhoods and schools—position them to contribute to campus in unique ways. For example, a university could consider an applicant's explanation about what it means to him to be the first Black violinist in his city's youth orchestra or an applicant's account of overcoming prejudice when she transferred to a rural high school where she was the only student of South Asian descent. An institution could likewise consider a guidance counselor or other recommender's description of how an applicant conquered her feelings of isolation as a Latina student at an overwhelmingly white high school to join the debate team. Similarly, an institution could consider an applicant's discussion of how learning to cook traditional Hmong dishes from her grandmother sparked her passion for food and nurtured her sense of self by connecting her to past generations of her family.





In short, institutions of higher education remain free to consider any quality or characteristic of a student that bears on the institution's admission decision, such as courage, motivation, or determination, even if the student's application ties that characteristic to their lived experience with race—provided that any benefit is tied to "that student's" characteristics, and that the student is "treated based on his or her experiences as an individual[,]" and "not on the basis of race." *Id.* at 40.

Those institutions of higher education that do not consider the race of individual applicants when making offers of admission might not need to make any changes to their current admissions practices in light of the Court's decision. But institutions that do consider race in the manner that the Court addressed will need to re-evaluate their current practices to ensure compliance with the law as articulated in the *SFFA* decision.

Q3: Can institutions of higher education continue to take other steps to achieve a student body that is diverse across a range of factors, including race and ethnicity? If so, how?

Yes, institutions of higher education may continue to articulate missions and goals tied to student body diversity and may use all legally permissible methods to achieve that diversity. As noted above, schools can continue to use strategies that remove barriers and expand opportunity for all. This includes considering the full range of circumstances a student has faced in achieving their accomplishments, including financial means and broader socioeconomic status; information about the applicant's neighborhood and high school; and experiences of adversity, including racial discrimination. In particular, nothing in the *SFFA* decision prohibits institutions from continuing to seek the admission and graduation of diverse student bodies, including along the lines of race and ethnicity, through means that do not afford individual applicants a preference on the basis of race in admissions decisions. Indeed, seeking to enroll diverse student bodies can further the values of equality of opportunity embedded in the Fourteenth Amendment and other federal civil rights laws. While the decision does not specifically address the steps institutions may continue to take to achieve diverse student bodies, existing practices that can lawfully be used include but are not limited to the following:

Targeted Outreach, Recruitment, and Pathway Programs

To promote and maintain a diverse student applicant pool, institutions may continue to pursue targeted outreach, recruitment, and pipeline or pathway programs (referred to here as "pathway programs"). These programs allow institutions to take active steps to ensure that they connect with a broad range of prospective students—including those who might otherwise not learn about these institutions and their educational programs or envision themselves as potential candidates for admission. By ensuring that the group of applicants they ultimately consider for admission includes a robust pool of talented students from underrepresented groups, institutions





better position themselves to attain the student body diversity and related educational benefits they seek.

The Court's decision in *SFFA* does not require institutions to ignore race when identifying prospective students for outreach and recruitment, provided that their outreach and recruitment programs do not provide targeted groups of prospective students preference in the admissions process, and provided that all students—whether part of a specifically targeted group or not—enjoy the same opportunity to apply and compete for admission. Such outreach and recruitment efforts can remove barriers and promote opportunity for all, and institutions remain able to permissibly consider students' race when engaged in those efforts.

In identifying prospective students through outreach and recruitment, institutions may, as many currently do, consider race and other factors that include, but are not limited to, geographic residency, financial means and socioeconomic status, family background, and parental education level. For example, in seeking a diverse student applicant pool, institutions may direct outreach and recruitment efforts toward schools and school districts that serve predominantly students of color and students of limited financial means. Institutions may also target school districts or high schools that are underrepresented in the institution's applicant pool by focusing on geographic location (e.g., schools in the Midwest, or urban or rural communities) or other characteristics (e.g., low-performing schools or schools with high dropout rates, large percentages of students receiving free or reduced-price lunch, or historically low numbers of graduates being admitted to the institution).

In addition to outreach and recruitment programs, institutions may offer pathway programs that focus on increasing the pool of particular groups of college-ready applicants in high school and career and technical education programs. The structure and scope of pathway programs vary significantly across institutions. An institution may partner with a particular school or student-centered organization and offer mentoring or other programming throughout the school year to enhance students' academic exposure. It may also host summer enrichment camps for students attending nearby public schools.

An institution may consider race and other demographic factors when conducting outreach and recruitment efforts designed to provide information about a pathway program to potential participants. If an institution awards slots or otherwise selects students for participation in its pathway program based on non-racial criteria (e.g., all 11th graders at a particular high school are able to participate, or all 10th graders in a geographic area with a certain GPA may apply), the institution may give pathway program participants preference in its college admissions process. As with college and university admissions, institutions may not award slots in pathway programs based on an individual student's race without triggering the strict scrutiny that *SFFA* applied (though institutions may permissibly consider how race has shaped the applicant's lived experience in selecting participants).





Collection of Demographic Data

Data containing demographic information about an institution's student applicant pool, student admissions outcomes, and student enrollment and retention provide institutions with critical information related to their programs and objectives. Such data convey a range of information about students, including their race/ethnicity, age, sex, gender identity, citizenship, Tribal affiliation, disability, geographic background, language proficiency, socioeconomic status, family background and parental education level, and military background. Institutions may continue to collect this information and use it for a variety of purposes, so long as that use is consistent with applicable privacy laws and ensures that demographic data related to the race of student applicants do not influence admissions decisions. For example, an institution's review of the demographic breakdown of student applicants can be used to help the institution develop, review, and refine outreach, recruitment, and pathway programs targeted to the institution's needs. Likewise, reviewing demographic data related to student admissions outcomes can aid institutions in ensuring that their admissions practices do not discriminate based on any protected characteristics or create other artificial barriers to admission. Finally, an institution's understanding of the demographic breakdown of the students who ultimately enroll and graduate (and those who do not) may provide useful context for its development, review, and assessment of student programming needs (whether academic, co-curricular, social, or financial).

In collecting and using data, institutions should ensure that the racial demographics of the applicant pool do not influence admissions decisions. As stated above in Question 2, admissions officers need not be prevented from learning an individual applicant's race if, for example, the applicant discussed in an application essay how race affected their life. However, the Court criticized the practice of institutions adjusting their admissions priorities dynamically in response to demographic data on the race of students in the admitted class. The Court's decision does not prohibit institutions from reviewing such data for other purposes, but institutions should consider steps that would prevent admissions officers who review student applications from using the data to make admissions decisions based on individual applicants' self-identified race or ethnicity.

Evaluation of Admissions Policies

Nothing in the Court's decision prohibits institutions from carefully evaluating their policies to best determine which factors in a holistic admissions process most faithfully reflect institutional values and commitments. For example, an institution committed to increasing access for underserved populations may seek to bring in more first-generation college students or Pell-grant eligible students, among others. In addition, nothing in the decision prevents an institution from determining whether preferences for legacy students or children of donors, for example, run counter to efforts to promote equal opportunities for all students in the context of college admissions.





Similarly, institutions may investigate whether the mechanics of their admissions processes are inadvertently screening out students who would thrive and contribute greatly on campus. An institution may choose to study whether application fees, standardized testing requirements, prerequisite courses such as calculus, or early decision timelines advance institutional interests.

The Court's decision likewise does not prohibit admissions models and strategies that do not consider an individual's race, such as those that offer admission to students based on attendance at certain secondary or post-secondary institutions or based on other race-neutral criteria. For instance, institutions may admit all students who complete degree programs at certain types of post-secondary institutions (e.g., community colleges and other institutions that are more likely to enroll students from economically or educationally disadvantaged backgrounds) and meet certain criteria (e.g., minimum GPA). Where feasible, institutions may also admit all students who graduate in the top portion of their high school class. These sorts of admission programs that do not consider an applicant's race in and of itself can help ensure that opportunities are distributed broadly and that classes are made up of students from a wide range of backgrounds and experiences.

As part of their holistic review, institutions may also continue to consider a wide range of factors that shape an applicant's lived experiences. These factors include but are not limited to: financial means and broader socioeconomic status; whether the applicant lives in a city, suburb, or rural area; information about the applicant's neighborhood and high school; whether the applicant is a citizen or member of a Tribal Nation; family background; parental education level; experiences of adversity, including discrimination; participation in service or community organizations; and whether the applicant speaks more than one language.

Student Yield and Retention Strategies and Programs

Ensuring that institutions of higher education are open to all includes not only attracting, admitting, and matriculating a diverse student body, but also retaining students from all backgrounds. To that end, it is important that students—particularly those who are underrepresented—feel a sense of belonging and support once on campus. An institution may, consistent with the federal laws the Departments of Justice and Education enforce, foster this sense of belonging and support through its office of diversity, campus cultural centers, and other campus resources if these support services are available to all students. An institution may also offer or support clubs, activities, and affinity groups—including those that have a race-related theme—to ensure that students have a space to celebrate their shared identities, interests, and experiences, so long as the clubs, activities, and affinity groups are open to all students regardless of race. Similarly, an institution may host meetings, focus groups, assemblies, or listening sessions on race-related topics if all interested students may participate, regardless of their race.





If you have further questions, please contact the Department of Education's Office for Civil Rights (800-421-3481 or ocr@ed.gov) or the Department of Justice's Educational Opportunities Section (877-292-3804 or education@usdoj.gov).

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EXHIBIT E



STRATEGIES FOR INCREASING DIVERSITY AND OPPORTUNITY IN HIGHER EDUCATION

U.S. Department of Education Office of the Under Secretary

September 2023

U.S. DEPARTMENT OF EDUCATION
400 MARYLAND AVE. S.W.
WASHINGTON, DC 20202
www.ed.gov

U.S. Department of Education

Miguel A. Cardona Secretary

Office of the Under Secretary

James Kvaal Under Secretary

September 2023

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Message from the Secretary



Miguel A. Cardona U.S. Secretary of Education

This summer, when the U.S. Supreme Court issued its decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina,*President Biden wisely said, "While the Court can render a decision, it cannot change what America stands for." Colleges and universities may have lost a vital tool for creating vibrant, diverse campus communities, but this report makes clear that they need not – and must not – lose their commitment to equal opportunity and student body diversity. Our country's future depends on it.

The American people are more diverse than ever before. Our nation cannot thrive as a multiracial democracy or compete globally if growing numbers of diverse students lack access to our country's most life-changing higher education opportunities. Diversity also enhances the college experience for students of all backgrounds, by enriching campus life, boosting critical thinking, promoting the free exchange of ideas, and preparing students for success in a diverse workforce.

We have seen what can happen when states ban affirmative action: fewer students of color apply, and fewer students of color are admitted, particularly to selective institutions. We cannot afford this kind of backsliding on a national scale, especially after the COVID-19 pandemic resulted in plummeting college enrollments nationwide. We must recommit to providing students of all backgrounds with opportunities to develop their talents, unleash their creativity, and reach their potential through higher education.

A college degree remains one of America's surest pathways to a rewarding career, upward mobility, and long-term prosperity. Yet, students of color and other historically underserved students have long faced inequities in educational opportunity, college preparation, and access to higher education. These inequities persist at the postsecondary level, where nearly half of all students of color do not complete their college degrees within six years.

One of the cruelest ironies in America's current higher education system is that our most inclusive and accessible institutions have lacked adequate resources to invest in student success. Meanwhile, highly selective institutions with vast resources to invest in students and propel them to graduation day admit overwhelmingly affluent applicants with a myriad of advantages, from expensive private school education and test preparation to legacy preferences and alumni connections.

The Biden-Harris Administration's unprecedented investments in our nation's most accessible and inclusive colleges and universities reflect our commitment to leveling the playing field, but there's no

denying the considerable benefits that may come from graduating from a selective institution. Whether its access to undergraduate research opportunities, prestigious internships, or powerful alumni networks, these advantages can be game-changing for first-generation students, students of color, and other historically underserved students. As renowned as these highly selective institutions are, they can achieve even greater excellence by renewing their commitment to diversity, equal opportunity, and economic and social mobility.

This report answers President Biden's call on the U.S. Department of Education to provide leaders with a comprehensive look at the most promising strategies for promoting college diversity in the aftermath of the Supreme Court's recent decision. We strongly encourage institutions to consider students' experiences overcoming adversity, as well as their sources of personal inspiration, during the admissions process. Students who have succeeded over challenges and demonstrated resiliency possess qualities that should be valued by our colleges and universities. Institutions should consider placing applicants' achievements in the context of their financial means and the educational opportunities available to them, as well as their personal experiences, whether it be hardship resulting from discrimination or inspiration drawn from their backgrounds.

The report also offers examples of schools that have successfully advanced diversity through strategies such as retiring legacy preferences and investing in the recruitment of applicants from underserved backgrounds. It encourages greater partnership between states, K-12 schools, and higher education institutions to reduce barriers faced by underserved students, including by expanding access to college advising, increasing need-based financial aid, improving acceptance of transfer students' credits, and strengthening supports to boost degree completion. The strategies included in this report are multifaceted, but what they all share in is a need for a sense of urgency and intentional collaboration between leaders at every level of education.

Our country has long struggled to live up to the promise of equality and opportunity for all. Every generation is called upon to renew that promise, and now is our moment to answer the call. It is a moment that demands leadership, innovation, and collaboration. It is a moment that demands higher education leaders demonstrate the same fearless commitment to equal rights and justice displayed by the heroes of the civil rights movement. The Biden-Harris Administration will stand with you and continue to work with you to raise the bar for inclusivity, equity, and excellence in higher education.

Miguel A. Cardona U.S. Secretary of Education

Executive Summary

Case 1:25-cv-00091-LM

Institutions of higher education play a critical role in ensuring that all students have a fair shot at accessing educational opportunity and the economic mobility that it can provide. It is important to ensure that all people have equal access to higher education so they can reap those benefits. Unfortunately, students have unequal access to higher education, particularly at selective institutions. While higher education can be an engine of economic mobility, selective institutions that enroll few students from low-income and underrepresented backgrounds fail to provide that economic mobility and instead perpetuate privilege and increase gaps in wealth across various groups. This report calls on states and college and university leaders to consider taking a variety of actions regarding their recruitment, admissions, affordability, retention, and completion efforts and policies following the Supreme Court's ruling in Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina et al. ("SFFA"). In SFFA, the Court held that the consideration of individual students' race in the admissions practices of two institutions, Harvard College and the University of North Carolina at Chapel Hill, violated the Fourteenth Amendment of the U.S. Constitution. The Court also reaffirmed that Title VI of the Civil Rights Act of 1964 requires all colleges and universities that receive federal financial assistance – public and private – to comply with the requirements imposed by the Equal Protection Clause of the Fourteenth Amendment.

While the SFFA decision limited the ability of colleges and universities to consider an applicant's race in and of itself as a factor in deciding whether to admit the applicant, there remain legally permissible ways to advance the critical mission of socioeconomic and racial diversity in American colleges and universities.1

There is a lot at stake. Selective institutions can provide long-term benefits for graduates, including often creating the leaders of tomorrow, but these institutions disproportionately enroll students from high-income backgrounds, lessening the likelihood that these leaders can look like all of America, even though these underrepresented students can have the same academic qualifications as their wealthier peers.² In states that have previously restricted the use of race in college admissions, there was a subsequent drop in applications and enrollments of students of color, particularly at selective institutions.³ The SFFA decision may have a greater impact on those institutions that have relied on the consideration of race in admissions to build a more diverse class prior to the Supreme Court's decision.

¹ The Court noted that its opinion did not address the permissibility of considering race in admissions to the Nation's military academies in light of the potentially distinct interests that military academies may present.

² Chetty, Deming, and Freidman, "Diversifying Society's Leaders? The Causal Effects of Admission to Highly Selective

³ Backes, "Do Affirmative Action Bans Lower Minority College Enrollment and Attainment?" 2012; Bleemer "Affirmative Action, Mismatch, and Economic Mobility After California's Proposition 209," 2021; Brown and Hirschman, "The End of Affirmative Action in Washington State and Its Impact on the Transition from High School to College," 2006; Hinrichs, "The Effects of Affirmative Action Bans on College Enrollment, Educational Attainment, and Demographic Composition of Universities," 2012; Liu, "How Do Affirmative Action Bans Affect the Racial Composition of Postsecondary Students in Public Institutions?" 2022.

The country's higher education system is stratified by class and race and perpetuates these stratifications across society. While there is still much to learn about how to support low-income students and students of color from institutions across the higher education sector, there are evidence-based strategies highlighted in this report that states and higher education leaders can implement to address inequities. This is an all-hands-on-deck moment that presents an opportunity to affirm commitments to diversity, ensure equal opportunity, and maximize the great potential of each and every student. In this new legal environment, higher education institutions can take strong action to ensure they are engines of opportunity through expanding upward mobility for low-income students and students of color.

As President Biden said in his remarks after the Supreme Court announced its decision, our nation's colleges "should not abandon their commitment to ensure student bodies of diverse backgrounds and experience that reflect all of America," and, importantly, "if a student has...had to overcome adversity on their path to education, a college should recognize and value that." This report highlights evidence-based and promising strategies that institutions can take to accomplish this goal, expand socioeconomic and racial diversity in colleges and universities, and fulfill their missions. Institutions can take steps to:

- Invest in targeted outreach and in pathways programs, including with K-12 schools that serve diverse student bodies and institutions that serve and expand access for high shares of students from lower income and racially diverse backgrounds, such as community colleges, Historically Black Colleges and Universities, Tribal Colleges and Universities, and Minority Serving Institutions;
- Place meaningful emphasis on student adversity, resiliency, and inspiration in admissions by:
 - o Using effective holistic review by evaluating an applicant in the context of opportunities available to their family including their financial means, the conditions affecting quality of life or access to education within a neighborhood in which the student grew up or went to school, experiences with hardships, including racial discrimination, and other sources of inspiration or demonstration of resiliency;
 - Ending practices such as legacy admissions that can hinder socioeconomic and racial diversity and further benefit privileged students instead of expanding opportunity;
 - Exploring alternative admissions practices that can simplify the admissions process for students, including direct admissions programs, which provide proactive guarantees of admissions for qualified students.
- Increase affordability for students by:
 - o Providing need-based aid to students; and
 - o Ensuring transparency and simplicity in student aid application processes.
- Cultivate supportive environments and providing material support for students by:
 - o Developing comprehensive support programs based on successful models to increase retention and completion rates; and
 - o Ensuring campuses are a welcoming and supportive environment for students through affinity groups; diversity, equity, and inclusion programming; and shared, accessible spaces.

States and institutions can consider how they can allocate resources to expand access to students who would not otherwise be able to afford college. State leaders should also consider ways their

states can support institutions' enrollment of underserved students in the wake of the Supreme Court's decision such as:

- Providing sufficient and direct funding to higher education institutions to ensure students receive the support they need to complete their credential;
- Reviewing state financial aid and benefits eligibility requirements and enrollment processes to ensure college students can afford higher education and meet their basic needs; and
- Strengthening relationships across K–12 schools, community colleges, and four-year institutions to create stronger statewide postsecondary pathways, including seamless transfer from associate to bachelor's degree programs.

After SFFA, higher education institutions are called on to reexamine how their admissions practices may promote privilege over expanding access to educational opportunity for underserved communities, drawing from evidence-based and promising practices for expanding opportunity for socioeconomically and racially diverse student bodies. Working together, state and education leaders can help ensure underserved students can thrive across diverse college campuses.

Introduction

In June 2023, the U.S. Supreme Court held in Students for Fair Admissions v. President and Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina et al. ("SFFA") that the consideration of an individual's race in the admissions practices of two institutions, Harvard College and the University of North Carolina at Chapel Hill, violated the Fourteenth Amendment of the U.S. Constitution. The Court also reaffirmed that Title VI of the Civil Rights Act of 1964 requires all colleges and universities that receive federal financial assistance – public and private – to comply with the requirements imposed by the Equal Protection Clause of the Fourteenth Amendment. For decades prior, schools could consider race alongside other factors to build diverse college campuses where students can learn from one another. The impacts of this decision are likely to be most severe at selective higher education institutions and thus immediate action by these institutions is critical. The day of the SFFA decision, President Biden commissioned this report to outline strategies higher education institutions should consider to recruit, admit, enroll, support, and graduate underserved students.

Diverse college campuses can provide experiences that increase critical thinking, civic engagement, leadership skills, and cross-racial interaction for all students, and they allow students from all backgrounds the chance to pursue and achieve the benefits of higher education, such as economic and social mobility.⁵ Several reports have shown how diverse and inclusive teams are more innovative, more creative, better at critical thinking, and, in business, can lead to increased revenue.⁶ Ensuring that campuses are diverse and that all students have the opportunity to pursue higher education is critical to ensure a competitive workforce and a strong and thriving nation.

Higher education institutions, particularly selective institutions, defined in this report as those institutions that reject more applicants than they accept, can consider how their policies, including their admissions policies, can lawfully advance socioeconomic and racial diversity consistent with their educational mission. Although selective institutions make up a relatively small share of the entire higher education system, these institutions disproportionately educate society's leaders and enroll students from very high-income families. This is especially true at the most selective institutions. In fact, the Ivy-Plus colleges enroll more students from the top two percent of the

⁴ Bowman, "College Diversity Experiences and Cognitive Development: A Meta-Analysis," 2010; Chang, Astin, and Kim, "Cross-Racial Interaction Among Undergraduates: Some Consequences, Causes, and Patterns," 2004; Chang et al., "The Educational Benefits of Sustaining Cross-Racial Interaction Among Undergraduates," 2006; Hurtado, "The Next Generation of Diversity and Intergroup Relations Research," 2005.

⁵ Carnevale et al., "The Cost of Economic and Racial Injustice in Postsecondary Education," 2020; Smith, Goodman, and Hurwitz, "The Economic Impact of Access to Public Four-Year Colleges," 2020.

⁶ Rock and Grant, "Why Diverse Teams Are Smarter," 2016; Hunt, et al., "Delivering through Diversity," 2018.

⁷ In practice, defining selectivity often involves both an analysis of the admission rate of the institutions and the criteria of admission. For example, the NCES-Barron's Selectivity Index measures selectivity based on admission rates, high school GPA, class rank, and SAT score of accepted students. Different researchers use varying cut offs for what might be considered selective, highly selective, moderately selective, and so on.

⁸ Chetty, Deming, and Friedman., "Diversifying Society's Leaders? The Causal Effects of Admission to Highly Selective Private Colleges" 2023.

income distribution than the bottom 70 percent of incomes. Even public selective institutions do not always reflect the diverse populations in their state. 10

Leaders across higher education, in partnership with relevant state entities and K–12 schools when appropriate, should consider strategies in the following areas:

- **Recruitment:** Increase applications from underserved students by instituting or expanding targeted recruitment, outreach, and pathways programs.
- Admissions: Improve admissions practices to better reflect individual potential, such as by
 using holistic review; giving more consideration to adversity a student had to overcome,
 resiliency, and assets a student brings to their campus community; putting a student's
 achievement in the context of their family's financial means, neighborhood, high school, and
 economic disadvantage; and considering alternative admissions programs such as direct
 admissions.
- **Financial aid:** Increase affordability by investing in need-based financial aid programs and effective and transparent administration of those programs.
- Completion and climate: Encourage students to enroll and support completion through promising strategies, including comprehensive student support services and campus climate initiatives.

This report shares strategies that institutions can adopt to promote greater access to educational opportunities for underserved students. In some areas, selective institutions could glean insights from leading under-resourced institutions, such as community colleges, regional colleges, Historically Black Colleges and Universities (HBCUs), Tribal Colleges and Universities (TCUs), and Minority Serving Institutions (MSIs). Many of these institutions have significantly fewer resources than selective institutions but have prioritized investments to help ensure a welcoming campus community that supports students through the completion of their credential. Some of these strategies are discussed more in this report below. Additionally, there are examples of more selective and well-resourced institutions that have undertaken promising efforts to increase diversity on their campuses. Institutions, particularly selective institutions, can consider both how they might reprioritize resources, as needed, to better fund these strategies, as well as how the strategies may need to be altered to fit their missions. This is an all-hands-on-deck moment to reaffirm commitments to diversity, ensure equal opportunity, and maximize the potential of every student. Creative solutions and continuous assessment of results will need to come from all sectors of higher education, states, K–12 schools, the federal government, and other stakeholders.

What's At Stake

Before the SFFA decision, nine states (Arizona, California, Florida, Michigan, Nebraska, New Hampshire, Oklahoma, Texas, and Washington) restricted the use of race in college admissions. These statewide restrictions were associated with declines in applications, admission rates,

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⁹ Ivy-Plus includes the Ivy League, Stanford University, Massachusetts Institute of Technology, Duke University, and the University of Chicago; Chetty, Deming, and Friedman, "Diversifying Society's Leaders? The Causal Effects of Admission to Highly Selective Private Colleges," 2023.

¹⁰ Carnevale et al., "Our Separate and Unequal Public Colleges: How Public Colleges Reinforce White Racial Privilege and Marginalize Black and Latino Students," 2018.

enrollments, and in some cases, long-term outcomes like degree attainment and earnings for students of color.11

For example, following a statewide ban on the use of race in admissions in California, Black and Hispanic/Latino applicants to the University of California (UC) system declined by 12–13 percent, even though most of these students would have met acceptance qualifications for at least one UC campus had they applied. 12 Many of these students in California enrolled in less selective institutions, suggesting that all sectors of higher education can be affected in some way when the use of race is restricted. 13 Immediate changes in admission rates were also observed in Washington, where admission rates for underrepresented racial minorities fell at the University of Washington immediately after the state's ballot measure passed, by about 13 percentage points for Black students, 7 percentage points for Hispanic/Latino students, and 14 percentage points for Pacific Islander students, before rebounding somewhat in subsequent years. 14 Undergraduate enrollment of underrepresented racial minorities declined at selective or flagship public institutions in California, Texas, and Washington, as well as public institutions in Arizona, Michigan, Nebraska, New Hampshire, and Oklahoma. 15 Enrollment of underrepresented students of color in graduate programs also declined in medical schools, law schools, and graduate programs, including in STEM fields and social sciences, in states that restricted the use of race in admissions. 16

Institutions should consider taking immediate and effective action, such as the strategies summarized in this report, to increase equitable opportunity and affirm their commitment to diversity following the SFFA decision. This report is designed to provide information to and serve as a resource for educational institutions considering new policies or programs to advance or maintain student diversity after the Supreme Court's decision in SFFA. It presents many examples of actions that can help advance equitable opportunity in ways that do not consider an individual student's race in and of itself in admissions. These strategies have many benefits and could advance other institutional goals, in addition to diversity. Not every strategy reviewed in this report will be relevant to every institution, and this report is not meant to be exhaustive. For example, it does not

¹¹ Backes, "Do Affirmative Action Bans Lower Minority College Enrollment and Attainment?" 2012; Bleemer "Affirmative Action, Mismatch, and Economic Mobility After California's Proposition 209," 2021; Brown and Hirschman, "The End of Affirmative Action in Washington State and Its Impact on the Transition from High School to College," 2006; Hinrichs, "The Effects of Affirmative Action Bans on College Enrollment, Educational Attainment, and the Demographic Composition of Universities," 2012; Liu, "How Do Affirmative Action Bans Affect the Racial Composition of Postsecondary Students in Public Institutions?" 2022.

¹² Bleemer, "Affirmative Action, Mismatch, and Economic Mobility After California's Proposition 209," 2021.

¹³ Hinrichs, "The Effects of Affirmative Action Bans on College Enrollment, Educational Attainment, and the Demographic Composition of Universities," 2012.

¹⁴ Brown and Hirschman, "The End of Affirmative Action in Washington State and Its Impact on the Transition from High School to College," 2006.

¹⁵ Backes, "Do Affirmative Action Bans Lower Minority College Enrollment and Attainment?" 2012; Bleemer "Affirmative Action, Mismatch, and Economic Mobility After California's Proposition 209," 2021; Brown and Hirschman, "The End of Affirmative Action in Washington State and Its Impact on the Transition from High School to College," 2006; Hinrichs, "The Effects of Affirmative Action Bans on College Enrollment," 2012; Liu, "How Do Affirmative Action Bans Affect the Racial Composition of Postsecondary Students in Public Institutions?" 2022; Tienda et al., "Closing the Gap? Admissions & Enrollment at the Texas Public Flagships Before and After Affirmative Action",

¹⁶ Garces, "Racial Diversity, Legitimacy, and Citizenry: The Impact of Affirmative Action Bans on Graduate School Enrollment," 2012; Garces, "Understanding the Impact of Affirmative Action Bans in Different Graduate Fields of Study," 2013; Garces and Mickey-Pabello, "Racial Diversity in the Medical Profession: The Impact of Affirmative Action Bans on Underrepresented Student of Color Matriculation in Medical Schools," 2015.

speak to the benefits to campus climate of recruiting and retaining diverse leadership, faculty, and staff.

Additionally, a combination of strategies rather than a single approach may be needed for institutions to achieve socioeconomically and racially diverse student bodies. While most of the strategies in this report are focused on actions that colleges and universities can consider taking, where appropriate, suggestions for policies and practices that states can consider are also included.

This report does not have the force and effect of law, is not meant to bind the public, states, or recipients, and does not impose new legal requirements. States and institutions should consult with legal counsel regarding any applicable requirements under federal, state, and local laws. Finally, while this report does not expressly discuss the federal role, there are many federal education programs designed to support strategies like those discussed below.

Targeted Recruitment Programs

Low-income students and students of color often attend K-12 schools that do not have adequate staffing to provide high-quality counseling resources to help students navigate college applications, complete the Free Application for Federal Student Aid (FAFSA®) form, and understand the costs and completion rates of colleges to which they are accepted. ¹⁷ As previously noted, SFFA has the potential to make these challenges more acute, as demonstrated by the drop in college applications from underrepresented groups – in both selective and less selective institutions – after some states eliminated the use of race in admissions at their public institutions. Such declines would exacerbate existing inequities in college enrollment among low-income students and students of color.

Nationally, the percentage of high school graduates who enrolled immediately in college has declined from 68 percent in 2010 to 62 percent in 2021.18 These concerning declines are shown across racial groups but are exacerbated by gaps in rates of enrollment between white and racial minority students. In 2021, 58 percent of Black and 57 percent of Hispanic/Latino high school graduates enrolled immediately in college compared to 64 percent of white students. 19 These gaps are more concerning because there are differences in the types of schools attended by students across racial groups. Underrepresented minority students disproportionately attend under-resourced institutions or for-profit colleges and white students overwhelmingly attend the most selective and highly resourced institutions. 20 Other data show that the gap in college enrollment between high-income and low-income high school graduates also remains persistently large with 79 and 48 percent collegegoing rates respectively.²¹ Mitigating these trends of lower and declining enrollment of high school graduates of color and from lower income households will require targeted recruitment, consistent with applicable law, and reducing barriers to enrollment for qualified students.

Research has shown that early engagement with potential applicants, such as higher education institutions building relationships with underserved students in K-12 schools, can increase the likelihood of enrollment.²²

To reach a diverse pool of student talent, institutions can:

- Establish, expand, and prioritize targeted outreach and K-12 pathways programs in communities with high proportions of low-income students and students of color;
- Partner with K-12 school educators, including school counselors, college access groups and community-based organizations, to get clear information about higher education options in the hands of students and their families; and
- Admit more transfer students through partnerships with community colleges and other institutions that are more likely to enroll underserved students.

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¹⁷ Clinedinst, "2019 State of College Admission," 2019.

¹⁸ National Center for Education Statistics, "Immediate College Enrollment Rate," 2023.

¹⁹ National Center for Education Statistics, "Immediate College Enrollment Rate," 2023.

²⁰ Taylor and Cantwell, "Unequal Higher Education: Wealth, Status, and Student Opportunity," 2019.

²¹ The Pell Institute, "Indicators of Higher Education Equity in the United States," 2022.

²² Bowman et al., "Improving College Access at Low-Income High Schools? The Impact of GEAR UP Iowa on Postsecondary Enrollment and Persistence" 2018.

Targeted Outreach and Pathways Programs

Targeted outreach and pathways programs, while resource intensive for institutions, can be effective strategies to encourage underserved students to apply to college.²³ Outreach programs typically include direct contact from a higher education institution to K–12 students, providing information related to the institution, including how to apply. Pathways programs offer experiences, such as programming located on college campuses or earning college credit while in high school, in order to increase the numbers of college-ready applicants in high school and career and technical education programs.

Evidence from one state that previously limited the use of race in college admissions demonstrates that outreach and pathways programs, when implemented with additional comprehensive services, can be associated with positive effects on application and enrollment rates of low-income students and underrepresented minorities.²⁴ In particular, when selective universities offered financial aid to low-income, high-achieving students, those students were likely to enroll and persist in higher education at similar rates to higher-income peers.²⁵ Rather than recruiting primarily from private and public high schools composed of predominantly high-income students, institutions can expand and prioritize their outreach to high schools with substantial populations of low-income students and students of color. As part of expanding outreach, institutions can assign admissions recruiters to high schools from which they have not typically recruited to provide equal opportunity for all students.²⁶

Strong outreach and pathways programs address comprehensive aspects of a student's college decision-making process. Prior research has shown elements of effective programs include:²⁷

- Sharing timely information and providing support and mentoring in applying to college;
- Providing support in applying for financial aid and understanding college costs and financial aid packages, including providing guidance on FAFSA® completion;
- Advising on how to best choose colleges among options;
- Offering opportunities to explore career and major interests;
- Tutoring and test preparation to help with academic preparation and possible entrance exam requirements; and
- Supporting visits to college campuses to gain exposure to a college-going culture.

²³ Reardon et al., "What Levels of Racial Diversity Can Be Achieved with Socioeconomic-Based Affirmative Action? Evidence from a Simulation Model" 2018.

²⁴ Andrews, Imberman, and Lovenheim, "Recruiting and Supporting Low-Income, High-Achieving Students at Flagship Universities," 2020.

²⁵ Hoxby and Avery, "The Missing 'One-Offs": The Hidden Supply of High-Achieving, Low-Income Students," 2012; Dynarski, et al., "Closing the Gap: The Effect of Reducing Complexity and Uncertainty in College Pricing on the Choices of Low-Income Students," 2018.

²⁶ Salazar, Jaquette, and Han, "Coming Soon to a Neighborhood Near You? Off-Campus Recruiting by Public Research Universities" 2021.

²⁷ Bettinger, et al., "The Role of Application Assistance and Information in College Decisions: Results from the H&R Block FAFSA Experiment", 2012; Carrel and Sacerdote, "Why Do College-Going Interventions Work," 2017; Castleman and Goodman, "Intensive College Counseling and the Enrollment and Persistence of Low-Income Students," 2017; Tierney et al., "Helping Students Navigate the Path to College: What High Schools Can Do: A Practice Guide," 2009.

Outreach and pathways programs can involve partnerships with K-12 schools or other institutions, such as community colleges. Institutions can work with schools that enroll large numbers of underserved students, such as schools and school districts that serve predominantly low-income students, students of color, and first-generation students, all of whom may have fewer resources to access higher education. The specific measures the institution could consider when seeking partners include schools where large percentages of students receive free or reduced-price lunch or that have low rates of enrollment in higher education.

As explained in the U.S. Department of Education and Department of Justice Questions and Answers resource regarding the Supreme Court's SFFA decision released in August 2023, institutions do not have to ignore race when identifying prospective students for outreach and recruitment programs, provided such programs do not give targeted groups of prospective students preference in the admissions process and all students – whether part of a specifically targeted group or not – have the same opportunity to apply and compete for admission. Increasing the pool of talented applicants from underrepresented groups helps improve the likelihood that institutions can advance student body diversity.

Institutions may also explore whether student body diversity could be enhanced by affording a preference in the admissions process for participants in certain pathways programs that, as one example, provide summer enrichment opportunities for high school students from underserved high schools. Institutions may employ such preferences where students are selected for participation in those pathways programs based on non-racial criteria.²⁸

Examples of outreach and pathways programs include:

- College access programs that advance a "college-going culture" among high school students and support them to take steps toward applying to and enrolling in college. Activities can include helping students complete college and financial aid applications, advising students on making an informed college choice, mentoring students to develop their college and career aspirations, providing transportation to and guidance on college visits, and tutoring and test preparation, among others. These programs can be run by states, high schools, higher education institutions, or non-profit organizations. The federal government supports many of these programs through the federal TRIO Programs and Gaining Early Awareness and Readiness for Undergraduate Programs (GEAR UP). AmeriCorps additionally sponsors College Possible, which places recent college graduates as peer mentors for students pursuing higher education in under-resourced schools. College Possible increased applications and enrollment in four-year institutions, including selective institutions.²⁹ Another example is schools that work to augment their college counseling capacity by partnering with organizations like the College Advising Corps.³⁰
 - o The Puente Project, headquartered at the University of California, Berkeley, provides culturally relevant college preparatory writing classes, college counseling, and

²⁸ U.S. Department of Education Office for Civil Rights and U.S. Department of Justice, "Questions and Answers Regarding the Supreme Court's Decision in Students for Fair Admissions, Inc. v. Harvard College and University of North Carolina," 2023.

²⁹ Avery, "Evaluation of the College Possible Program: Results from a Randomized Controlled Trial," 2013.

³⁰ Bettinger and Evans, "College Guidance for All: A Randomized Experiment in Pre-College Advising," 2019.

leadership development to middle and high school students as well as intensive English courses, mentoring, and counseling to community college students who intend to transfer to a four-year institution.³¹

- Dual enrollment and early college programs have been shown to effectively increase college access and enrollment, credit accumulation, and completion.³² Dual enrollment can help boost postsecondary enrollment and completion through early exposure to college coursework and by covering or reducing the cost of college credits. Early college programs are restructured high school models that can help students earn up to two years' worth of college credit along with their high school diplomas; some newer models help students earn an associate degree by their "13th year." However, these programs are not equally accessible to all students. Research has consistently shown that low-income students and students of color are more likely to attend schools that do not offer dual enrollment and that they are less likely to have access to or participate in dual enrollment than their peers, even when it is available, due to insufficient advising, financial barriers, and other factors that both K-12 and postsecondary institutions can work together to rectify.³⁴ States like Kentucky are collecting and reporting data on access to dual enrollment by district and student demographics.³⁵ Several states also include dual enrollment as part of their statewide accountability system under Title I, Part A of the ESEA. For example, Georgia includes a measure of accelerated enrollment in its statewide accountability system that measures the percentage of 12th-graders in the school earning credit for advanced enrollment via dual enrollment and other measures. By including this in the accountability system, the state is emphasizing its importance in how the state measures school quality, and schools are incentivized to increase dual enrollment. The state is required to publicly report measures used in the accountability system on state and local report cards, disaggregated for each school in the state. This type of transparency allows states and institutions the ability to determine where there are inequities in program offerings and make investments to ensure equal access for all students. The U.S Department of Education's Civil Rights Data Collection (CRDC) is collecting such information nationally.³⁶
 - New Mexico is currently working to build the Four Corners College and Career Pathways Partnership, which will allow students in rural regions in the state to earn 12-30 hours of early college credit while in high school as part of a 13th year pathways program. These credits will seamlessly transition to an aligned certificate or degree program, an apprenticeship program, or will prepare students for employment after high school.³⁷

³¹ Gándara, "A Study of High School Puente: What We Have Learned About Preparing Latino Youth for Postsecondary Education," 2002.

³² U.S. Department of Education, "Dual Enrollment Programs," 2017

³³ Berger et al., "Early College, Early Success: Early College High School Initiative Impact Study," 2013

³⁴ Britton, "Dual Enrollment: Increasing College Access and Success Through Opportunities to Earn College Credits in High School," 2022.

³⁵ KY Stats, "Dual Credit Feedback," n.d., https://kystats.ky.gov/Latest/DualCredit

³⁶ U.S. Department of Education, "Civil Rights Data Collection Frequently Asked Questions, n.d., https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/crdc.html

³⁷ Education Strategy Group, "Case Studies," n.d., accelerate-ed.org/case-studies/

- Summer programs expose students to college-level coursework and programming that build their college-preparedness. Unfortunately, many of the programs aimed at middle and high school students charge thousands of dollars in fees, making them inaccessible to lowincome students, though some universities offer free programs aimed at underserved populations. These programs can also include summer bridge programs that help prepare incoming freshmen for the college experience and attempt to address "summer melt," which describes the dynamic of high school graduates planning to and ultimately not enrolling in college. More recent research has found that bridge programs can also increase retention and completion rates at community colleges and less selective four-year colleges, though prior research has shown limited effects especially beyond the first year, so further evaluation is needed to understand how these programs can provide low-income students and students of color with a strong start to finishing college.³⁸
 - o The Educational Opportunity Program (EOP) at Cal Poly Pomona offers a fiveweek summer bridge transition program for first-year students who are firstgeneration and low-income students. EOP students are exposed to both residential and commuter experiences, receive support through advising services, and take one three-credit course to prepare for the rigors of college. EOP is designed to provide a built-in support system and develop a community for participating students.³⁹

Institutions can consider subsidizing these programs or offering them at no cost to ensure access for low-income students.

While the above strategies are primarily targeted toward increasing undergraduate student application and enrollment, many could also work for graduate programs. Institutions seeking to promote greater access and educational opportunity in their graduate programs can develop recruitment partnerships with institutions with high populations of underrepresented groups, including HBCUs, TCUs, and MSIs, starting as early as community college. Providing graduate preparation programs, such as undergraduate research experiences, mentoring, and career exploration, may also help recruit students for graduate programs from diverse backgrounds by providing exploration opportunities, building relationships and networks, and allowing students to develop their identity as a future professional in the field.⁴⁰

K-12 College Counseling

As mentioned earlier, K-12 and college access counselors play an essential role in ensuring underserved students can enter and succeed in college. They can encourage students to take collegelevel coursework, support students in developing college-level skills, build a college-going culture in high school, and assist students in college and financial aid application processes.⁴¹ Research also suggests that college advising increases college enrollment and completion. Using U.S. Department

³⁸ Douglas and Attewell, "The Bridge and the Troll Underneath: Summer Bridge Programs and Degree Completion,"

³⁹ Rodriguez and Jacobo, "Educational Opportunity Program, Summer Bridge: A First Year Summer Transition Program," 2021.

⁴⁰ Winkle-Wagner and McCoy, "Entering the (Postgraduate) Field: Underrepresented Students' Acquisition of Cultural and Social Capital in Graduate School Preparation Programs," 2016.

⁴¹ Tierney et al., "Helping Students Navigate the Path to College: What High Schools Can Do: A Practice Guide," 2009.

of Education data, one study found that adding one high school counselor leads to a 10 percentage point increase in four-year college enrollment. 42 Evidence from one college advising program has shown that advising students in high school and into higher education results in increased enrollment, persistence, and even degree completion. Students who received advising were 7 percentage points more likely to enroll in college at all, and 10 percentage points more likely to enroll in a four-year college. 43 Those who received advising were also 10 percentage points more likely to remain enrolled in the first three semesters. A follow-up study showed that students who received advising were almost 10 percentage points more likely to graduate with a bachelor's degree within six years.44

Despite the important role counselors can play, students in schools with large student bodies and higher levels of poverty are less likely to have access to a school counselor who can offer college information, ⁴⁵ and the national average ratio of counselors to students is 470 students per counselor compared to the ratio recommended by school counseling professionals of 250:1.46

States should consider improving funding for schools and districts so that these types of resource inequities are eliminated. Further, higher education institutions can work more with K-12 schools and systems to help ensure that students are getting the support and information they need to navigate the college application process, including helping students understand what high school courses are aligned with admission requirements. As colleges change their admissions processes, they can communicate these changes to K-12 counselors to ensure there is no confusion about what a successful application requires and when.

K-12 counselors can also provide information to colleges on behalf of applicants, including both individual letters of recommendation and aggregate information on the high school, to provide college application reviewers with a holistic view of each applicant. This is discussed more in later sections of this report. Colleges can partner with schools and districts to ensure students can participate in college fairs hosted at K-12 schools and can also ensure schools and systems have information available about application criteria so that students meet standardized testing requirements, when applicable, and complete the FAFSA®. These partnerships can play a critical role in making sure K-12 counselors have the resources needed to make holistic admissions more effective.

States can play a role by more adequately funding K-12 schools to increase counselor staffing and fund training programs for counselors to address the shortage. They can also play a role in facilitating relationships between K-12 schools and higher education institutions to get the right information into the hands of students while they are in high school.

⁴² Hurwitz and Howell, "Estimating Causal Impacts of School Counselors with Regression Discontinuity Designs,"

⁴³ Barr and Castelman, "The Bottom Line on College Counseling," 2017.

⁴⁴ Barr and Castelman, "The Bottom Line on College Counseling: Large Increases in Degree Attainment."

⁴⁵ Bryan et al., "Who Sees the School Counselor for College Information? A National Study" 2009.

⁴⁶ Bryan et al., "School Counselors as Social Capital: The Effects of High School College Counseling on College Application Rates," 2011; Patel and Clinedinst, "State-by-State Student-to-Counselor Ratio Maps by School District," 2021; Woods and Domina, "The School Counselor Caseload and the High School-to-College Pipeline," 2014.

Transfer and Community College Partnerships

Nearly 7.5 million students enroll in community colleges, making up 35 percent of undergraduate students nationwide. ⁴⁷ Many of those students are low-income students and students of color, making transfer admissions an important opportunity to enhance equitable access to four-year selective colleges for those and other students who have less direct access from high school. ⁴⁸ For example, in 2021, Black and Hispanic/Latino students made up 41 percent of two-year public institution students compared to only 31 percent of four-year public students. These percentages are even starker at private non-profit institutions where Black students make up 33 percent of students at two-year institutions but only 12 percent of students at four-year private non-profit institutions. ⁴⁹ To encourage transfer admissions, states and institutions can build and maintain a culture committed to welcoming transfer students wholeheartedly and working to improve the success of transfer students, while facilitating clear transfer pathways. ⁵⁰

Today's system leaves students behind when their credits are not accepted or they have to retake courses, ultimately extending their time in school or preventing them from ever finishing. Nearly 80 percent of students in community colleges intend to transfer and earn a bachelor's degree. ⁵¹ However, actual transfer and degree attainment rates do not match these aspirations. Only 14 percent of students who transfer from a two-year institution to a four-year institution earn a bachelor's degree. ⁵² Those students who do successfully navigate the process are not representative of community college students in general: a near-majority of community college students transferring to highly selective institutions come from the top 20 percent of the income distribution. ⁵³ As a result of the broken transfer system in higher education, students may never transfer, may lose momentum from lost credits, or may be unable to earn an intended bachelor's degree or associate's degree, potentially leaving students with debt but no degree to pay for it.

Transfer students can be successful at their initial institution and demonstrate readiness for further college-level work but still encounter barriers when institutions, both institutions from which students transfer and institutions to which students transfer, do not effectively implement credit articulation policies, which provide clear information about credits that will be accepted when a student transfers. Too often, students lose credits when they transfer colleges. For example, the Government Accountability Office estimates that community college students, who account for the

⁴⁷There are more than 100 community colleges that offer four-year degree programs and are therefore classified as four-year institutions by the U.S. Department of Education. An external analysis estimates the number of community college students to be closer to 9 million, or 41 percent of all undergraduates, see Community College Research Center, "Community College Enrollment and Completion," n.d., https://ccrc.tc.columbia.edu/community-college-faqs.html; National Center for Education Statistics, "Student Enrollment: How Many Students Enroll in Postsecondary Institutions Annually?," n.d. https://nces.ed.gov/ipeds/TrendGenerator/app/build-table/2/2?rid=5&cid=9.

⁴⁸ National Center for Education Statistics, "Student Enrollment: How Many Students Enroll in Postsecondary Institutions Annually?," n.d., https://nces.ed.gov/ipeds/TrendGenerator/app/build-table/2/2?rid=1&cid=65.

⁴⁹ National Center for Education Statistics, "Characteristics of Postsecondary Students," 2023.

⁵⁰ Lane, Khan, and Knox, "The Emerging Role of Public Higher Education Systems in Advancing Transfer Student Success: Results of a National Study," 2022.

⁵¹ Community College Research Center, "Policy Fact Sheet: Community College Transfer," 2021.

⁵² Jenkins and Fink, "Tracking Transfer: New Measures of Institutional and State Effectiveness in Helping Community College Students Attain Bachelor's Degrees," 2016.

⁵³ National Student Clearinghouse Research Center, "Transfer and Progress: Fall 2022 Report," 2023.

⁵⁴ Monaghan and Attewell, "The Community College Route to the Bachelor's Degree," 2015.

largest share of transfer students, lost 22 percent of credits on average when transferring to a fouryear public institution. 55

Some states and institutions have instituted reforms designed to address transfer enrollment and success, including common course numbering, transferable core courses, guaranteed associate degrees for transfer students, retroactive associate degrees, degree maps, guided pathways, dual admission between community colleges and four-year institutions, and general education requirements that are standardized across a statewide higher education system. ⁵⁶ How these policies are implemented, including technology solutions that make it easy for students to find information on how credits might transfer or improve the ability of an institution to analyze and articulate courses from prior institutions; consistent and quality advising by both the transferring and receiving institutions; and student-centered appeal procedures when an institution declines to accept credits can increase the likelihood of students successfully transferring between institutions.

Higher education institutions, including selective private non-profit universities, should consider increasing their accessibility through transfer initiatives and programs. Institutions can work directly with community colleges and their states to implement the aforementioned solutions that reduce barriers, build transfer pathways, and ensure transfer students are supported so they can complete their degrees. Institutions should be sure to increase slots for transfer students overall, so that more transfer students are afforded the option to attend well-resourced institutions. States have tools, such as legislative mandates and formalized discussions with key stakeholders, they can rely on to implement statewide frameworks such as common course numbering, degree maps across institutions, and transfer associate degrees with guaranteed admission to bachelor's degree programs.

Successful transfer programs demonstrate that leadership and providing the necessary resources can significantly increase the number of students transferring from a two-year to a four-year program, increasing educational opportunity for socioeconomically and racially diverse students. Northern Virginia Community College (NOVA) and George Mason University have reported seeing success through their ADVANCE program by providing advising that works to ensure students do not take unnecessary credits that would cost extra money and time and to put students on a path to an associate and bachelor's degree. The program, which is open to all NOVA students who meet eligibility criteria, is comprised of about 40 percent students from low-income backgrounds and a majority are students of color. The two institutions collaborated to provide 100 structured degree program pathways from NOVA courses to George Mason University majors, serving approximately 2,000 students and providing a dedicated student success coach throughout students' associate and bachelor's programs.⁵⁷

St. Edward's University (SEU) has implemented a transfer support program that uses multi-pronged strategy to increase the number of transfer students and improve transfer student outcomes. SEU provides a centralized advising model where students are paired with mentors across academic, career, and financial aid offices. They provide advising guides that help students align credit from

⁵⁵ Government Accountability Office, "Students Need More Information to Help Reduce Challenges in Transferring College Credits," 2017.

⁵⁶ Baker, Friedmann, and Kurlaender, "Improving the Community College Transfer Pathway to the Baccalaureate: The Effect of California's Associate Degree for Transfer," 2023; Boatman and Soliz, "Statewide Transfer Policies and Community College Student Success," 2018.

⁵⁷ American Council on Education, "Reimaging Transfer for Student Success: The National Task Force of the Transfer and Award of Credit," 2021.

their two-year programs to their major at SEU. The university also offers financial aid specific to transfer students to assist with affordability and has a support group for transfer students to provide a sense of community and belonging on campus.

Admissions for Undergraduate and Graduate Programs

As institutions reassess their admissions practices following the Supreme Court's decision in SFFA, leaders may consider how to more fully and fairly reflect the potential of all applicants and build diverse student bodies that consider students' potential contributions to campus. The below strategies can inform both undergraduate and graduate admissions, with some distinctions for graduate admissions highlighted below when appropriate.

To increase diversity in admissions, institutions may consider:

- Using effective holistic review to meaningfully take into account an applicant's lived experience by expanding considerations of who can thrive at their institutions;
- Ending practices such as legacy admissions that can negatively impact diversity, are unrelated to a prospective applicant's individual merit or potential, that further benefit privileged students, and that reduce opportunities for students who have been foreclosed from such advantages; and
- Exploring alternative admissions practices that can simplify the admission process for students, such as direct admissions programs.

Admissions Strategies that Advance Diversity

Adopting Holistic Review

Holistic review is a flexible framework that is aligned with the institution's unique mission and that assesses each applicant's contribution to the campus on a range of factors. This framework can be used by all institutions, including selective institutions, to advance diversity on their campus using a variety of factors without consideration of individual students' race. Examples of factors include, but are not limited to:58

- Academic, such as high school grade-point average (GPA), class rank, rigor of high school coursework, and standardized test scores in the context of the high school and neighborhood of an applicant;
- Non-academic, such as a student's activities that include but go beyond extracurricular activities (e.g., community service, leadership experience, after school clubs), and include responsibilities such as caregiving and after-school work, as well as skills, personality, or interests; and
- Additional race-neutral background information about a student, such as their family income and wealth, data concerning how the neighborhood where they grew up or went to school affected resources available to them and access to education, and what helps inform who they are today, including adversity they have faced and inspiration from lived experiences.

Particularly for institutions that admit a relatively low percentage of those who apply, a variety of philosophies inform how they might select students to improve equitable opportunity and diversity.

⁵⁸ Coleman and Keith, "Understanding Holistic Review in Higher Education Admissions," 2017; Bastedo, "The Urgency of Fair and Equitable Holistic Review of College Applicants," 2023.

Institutions could assess applicants for their record of academic success, personal character or hard work, talent, or potential.⁵⁹ Colleges and universities committed to recruiting and retaining a diverse class can review their holistic review processes to better reflect individual potential and opportunity and to advance diversity, including socioeconomic, racial, and other forms of diversity, consistent with their missions including by evaluating an applicant's academic accomplishments in the context of their opportunities and financial means. Many institutions already claim to consider these factors in their admissions process. However, for many selective institutions, the socioeconomic and racial diversity of their classes has not reflected the diversity of our nation. Indeed, Ivy-Plus institutions disproportionately enroll applicants from higher incomes while students from lower socioeconomic backgrounds are less likely to be enrolled in highly selective four-year institutions. ⁶⁰ Admissions practices may even penalize students from lower-socioeconomic backgrounds in their admissions processes when, for example, significantly more weight is provided to the children of alumni. However, academic researchers have estimated the effect of considering other factors, such as socioeconomic status, on improving diversity on campuses. Using a simulation model, the researchers found that placing a meaningful emphasis on socioeconomic status in a holistic admissions process, alongside targeted recruitment efforts, may potentially remedy some of the losses in diversity observed after race-based affirmative action policies have been reversed.⁶¹

Emphasizing Adversity, Resiliency, and Inspiration

Institutions can continue to use holistic admissions processes to consider how an individual's background reflects their potential and positions them to contribute to campus. In the SFFA decision, the Court stated, "nothing in [its] opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." When selecting among qualified applicants, institutions can review how factors such as overcoming adversity, demonstrating resilience when facing challenges, and responding to inspiration can contribute to assessing an applicant's potential success in and contributions to the institution's academic programs.

If a student has overcome significant adversity on their path to education, institutions can recognize and value these experiences in order to expand opportunity and be engines of upward mobility. Considerations of adversity, resiliency, and inspiration may include factors such as:

- The financial means of a student or their family;
- Whether a student grew up in a low-income community or attended an under-resourced high school; and
- Personal experience of hardship or discrimination, including but not limited to racial discrimination, that a student may have faced.

Personal experiences can also include a student's persistence against challenges, academic or otherwise, and specific motivators that inspire applicants, such as from their home life or communities.

⁵⁹ Perfetto et al., "Toward a Taxonomy of the Admissions Decision-Making Process," 1999.

⁶⁰ Chetty, Deming, and Friedman., "Diversifying Society's Leaders? The Causal Effects of Admission to Highly Selective Private Colleges," 2023; McFarland, et al., "The Condition of Education," 2019.

⁶¹ Reardon, et al., "Can Socioeconomic Status Substitute for Race in Affirmative Action College Admissions Policies? Evidence from a Simulation Model," 2017.

A student's lived experience can outline how they demonstrated resiliency in responding to adversity or the inspiration they derive from their community, including how they positively see themselves and what they would like to contribute to campus or society in their future endeavors. For example, a student's career path or interests could be inspired by the cultural assets the student brings to campus, such as languages spoken at home, traditions and cultural practices, commitments to serving their community, or whether they are the first generation in their family to attend or graduate college. A low-income student in an under-resourced school would not have the same access to opportunities as more privileged students, and therefore may demonstrate more perseverance and determination that prepares the student for college-level work.

Consideration of adversity, resiliency, and inspiration allows for evaluation of hardships applicants may have overcome that can be indicative of their capacity for success and persistence in rigorous academic environments. These considerations also take into account that applicants may not have had the same access to college preparatory classes or other school resources. For example, the opportunities available in K-12 schools often reflect longstanding socioeconomic and racial inequities. Disparities in K-12 school funding generally correlate to unequal college attainment and economic outcomes for low-income students and students of color when they reach adulthood.⁶² Access to college preparatory coursework can be associated with college admission and future success, and low-income students and students of color disproportionately attend schools with less advanced coursework and that could be more likely to track low-income students and students of color into non-college preparatory classes. 63 Institutions can consider how their admissions processes can identify and admit students who have the perseverance, talent, and potential for college success and how to take into account inequitable access to high school opportunities. Institutions can use information from the application process to understand a student's experience with adversity, resiliency, and inspiration without having to rely on a student raising or discussing their personal experience themselves, as discussed later in the report.

Colleges and universities can continue to consider aspects of a student's lived experience as part of their admissions process. As the Department of Education and Department of Justice Questions and Answers resource regarding the Supreme Court's SFFA (August 2023) states:

[U]niversities may continue to embrace appropriate considerations through holistic application-review processes and (for example) provide opportunities to assess how applicants' individual backgrounds and attributes—including those related to their race, experiences of racial discrimination, or the racial composition of their neighborhoods and schools—position them to contribute to campus in unique ways.⁶⁴

The resource goes on to describe examples of what this might look like, noting that a university could consider how a student being the first Black violinist in their city youth orchestra or

⁶² Jackson, Johnson, and Persico, "The Effects of School Spending on Educational and Economic Outcomes: Evidence from School Finance Reforms," 2015.

⁶³ Attewell and Domina, "Raising the Bar: Curricular Intensity and Academic Performance," 2008; Long, Conger, and Iatarola, "Effects of High School Course-Taking on Secondary and Postsecondary Success," 2012; Rodriguez and McGuire, "More Classes, More Access? Understanding the Effects of Course Offerings on Black-White Gaps in Advanced Placement Course-Taking" 2019.

⁶⁴ U.S. Department of Education Office for Civil Rights and U.S. Department of Justice, "Questions and Answers Regarding the Supreme Court's Decision in Students for Fair Admissions, Inc. v. Harvard College and University of North Carolina," 2023.

overcoming prejudice when transferring to a rural high school where they were the only student of South Asian descent could impact a student's life and future goals. An applicant's personal experiences with hardship or discrimination, including racial discrimination, and their ability to overcome those experiences may speak to their perseverance and resilience, demonstrating their ability to thrive academically and more broadly add value to the campus community. An institution could also consider the way a student discusses how learning to cook traditional Hmong dishes from their grandparent sparked their passion for food and connected them to past generations of their family. 65 These sources of inspiration can add to the diversity and vibrancy of the college community and, in so doing, can deeply impact the experiences of their peers.

Taking into Account Adversity, Resiliency, and Inspiration

Institutions can give more consideration to a student's experiences with adversity, resiliency, and inspiration through strategies such as:

- Increasing emphasis on adversity, resiliency, and inspiration in admissions by placing a student's achievement in context based on the educational opportunities available to them;
- Assessing qualitative measures of students' experiences such as through the use of personal statements; and
- Training staff, faculty, and supplemental readers involved in undergraduate and graduate admissions processes on how to assess applications consistently.

Increase Emphasis on Adversity, Resiliency, and Inspiration by Placing Student Achievement in Context. While there is no commonly accepted inventory or weighting of adversity measures, research suggests that providing information on applicants' background, such as their high school or neighborhood, allows admissions reviewers a consistent way to put students in context. 66 Important measures for institutions to consider may include items such as:

- The financial means of a student or their family including family income and wealth, whether a student was on free or reduced-price lunch, and in certain cases, whether a student is the first generation in their family to attend or complete college;
- Whether a student grew up in a low-income community or attended an underresourced high school including the percentage of students in a high school receiving free and reduced-price lunch, availability of college preparatory coursework, academic achievement data about the school, or neighborhood socioeconomic indicators such as median family income or college attainment levels; and
- Experiences of hardship or discrimination, including but not limited to racial discrimination, including experiences of adversity, resiliency, or inspiration that shape the applicant's contribution to higher education and are often assessed through personal statements and admissions essays, letters of recommendation, and interviews.

One way to understand the context of a student's experiences is to provide application reviewers with useful information about applicants' opportunities and potential access to resources. High

⁶⁵ U.S. Department of Education Office for Civil Rights and U.S. Department of Justice, "Questions and Answers Regarding the Supreme Court's Decision in Students for Fair Admissions, Inc. v. Harvard College and University of North Carolina," 2023.

⁶⁶ Long, "Is There a 'Workable' Race-Neutral Alternative to Affirmative Action in College Admissions?" 2015; Reardon, "What Levels of Racial Diversity Can Be Achieved with Socioeconomic-Based Affirmative Action? Evidence from a Simulation Model," 2018.

school counselors typically provide information sheets on undergraduate applicants to college admission officers that contain background data on the student's high school. Some institutions have started to use more comprehensive information dashboards that provide consistent, standardized information on applicants that is centralized for application reviewers. These dashboards, which can be created internally by an institution or sourced by an external provider, typically draw from publicly available federal data but could have limitations such as only containing information on students who have taken college entrance tests.

Putting student achievement in context is not a new approach. In states that limited the use of race in admissions, institutions often responded by implementing new forms of holistic review that better reflect potential such as changing the weight of admissions factors to better account for student experience or using additional information on applications to put student achievement in the context of their educational opportunity. 67 In California, UC campuses instituted a comprehensive review process where applicants' academic factors would be placed in the context of their available opportunities, with some campuses going further by assigning a score to applicants based on a combination of criteria, such as high school courses taken, but with no single factor receiving a determinative weight. The UC campuses that instituted this kind of review, where students' opportunities provided context to academic indicators, reported 7 percent more students of color enrolled on average over a 15-year period. ⁶⁸ Additionally, preliminary research in field experiments of admissions officers suggests that when presented with contextual information for each applicant, application reviewers were more likely to recommend applicants from schools and neighborhood contexts with more socioeconomic challenges, particularly when using a holistic rather than formulaic approach to admissions.⁶⁹

While the U.S. Department of Education does not endorse any particular product or service, there may be a variety of tools available to institutions that could facilitate the ability to put students' achievement in context beyond those that have been currently studied. Institutions can also consider how they can leverage publicly available data, such as from the National Center on Education Statistics, to enhance holistic review. The Department's CRDC contains information about high school opportunity such as math and science course-taking, advanced placement, and SAT/ACT taking by high school and school district.

Comprehensive dashboards could include socioeconomic information at both the individual and family-level. Individual-level indicators could include those collected through other benefits and administrative forms, as allowable by law, to which an institution has access, such as familial income and familial assets. Since research suggests that channels of intergenerational wealth transmission are often concentrated in early life investments, especially education, data concerning familial wealth and assets could provide insight into the level of educational adversity faced by an applicant during their formative years. 70 These wealth gaps are particularly persistent for Black individuals and interacts acutely with college access and success.⁷¹ Neighborhood or local level indicators are also important, such as the percentage of a high school's students who receive free and reduced-price lunch,

⁶⁷ Long and Tienda, "Winners and Losers: Changes in Texas University Admissions Post-Hopwood," 2008.

⁶⁸ Bleemer, "Affirmative Action and Its Race-Neutral Alternatives," 2023

⁶⁹ Bastedo, et al., "Admitting Students in Context: Field Experiments on Information Dashboards in College Admissions," 2022.

⁷⁰ Pfeffer and Killewald, "Generations of Advantage. Multigenerational Correlations in Family Wealth," 2018.

⁷¹ Levine and Ritter, "The Racial Wealth Gap, Financial Aid, and College Access," 2022.

availability of college preparatory coursework at an applicant's high school, or neighborhood socioeconomic indicators such as median family income or college attainment levels. Institutions could also receive academic achievement data about the school, so they can put an applicant's academic indicators such as test scores in context relative to the high school they come from, in addition to comparing them to the whole applicant pool. This can help institutions understand how a student's achievement compare to their immediate peers given resource differentials between high schools.

It is recommended that institutions do their own diligence in evaluating what kinds of information services may work best for them to achieve the goal of having useful contextual data on every applicant including how they can access publicly available data when appropriate.

Admitting more socioeconomically diverse students can often require both making changes to admissions considerations as well as providing financial aid to more students of limited means. Some research suggests that although applicants from lower socioeconomic backgrounds received increased probability of admission when admissions officers were given additional contextual information, this may not have translated into increased enrollment in the schools that did not also use the background data for financial aid decisions. 72 This suggests that schools will have to also meet students' financial needs to ensure admits become enrollees, as discussed later in the report.

One example of a method to ascertain student's experience with adversity could be when a graduate school uses questions on the application about a student's background, such as whether they received a fee waiver or whether they received need-based financial aid in college. 73 Incorporating this information into holistic admissions processes could help place an applicant's undergraduate GPA and/or required graduate admissions tests in context as a way to account for differences in opportunity that are related to academic achievement. While the specific approach used should be carefully studied and approached, including through institutions doing appropriate modeling and simulation, colleges and universities can consider how ascertaining measures of adversity and considering them appropriately can work in admissions going forward.

Qualitative Measures of Students' Contributions. Beyond placing academic achievement in the context of students' neighborhood and school, institutions can also still understand students' lived experience through more qualitative components of an application process, such as personal statements and admissions essays, letters of recommendation, and interviews. These application components can serve as another source to assess students' experiences, including their experiences with adversity, resiliency, and inspiration, that may contribute to the campus community and institutional needs. Institutions can consider how they can provide opportunities for students to express their whole selves, including what inspires them to pursue further education, the adversities they may have overcome, and the perspective they will bring to enrich the student body. Institutions can also make clear to applicants that they do not need to avoid discussing inspiration or adversity, including racial discrimination, as these experiences may be an important part of what has shaped the applicant's preparation for higher education.

⁷² Mabel et al., "Can Standardizing Applicant High School and Neighborhood Information Help to Diversify Selective Colleges," 2022.

⁷³ Fenton et al., "Reducing Medical School Admissions Disparities in an Era of Legal Restrictions: Adjusting for Applicant Socioeconomic Disadvantage," 2016.

There is little research on the characteristics of an effective essay prompt or how institutions should best use the personal statement. Institutions have reported re-evaluating their essay questions for the coming admissions cycle to gather more information on students' lived experience.⁷⁴ After Florida and Washington limited the use of race in college admissions, institutions in those states added essays to their application to assess students' experiences with adversity. 75 Some evidence has called into question whether the content and style of college essays might signal the opportunities associated with socioeconomic class, given that high-income students often can have more access to college counseling and coaching that can enhance their personal statement. 76 As institutions look to the personal statement as a source of information on students' lived experiences, they can consider how to work together to build the information base on how to design effective prompts and ensure that essays are evaluated holistically to take into account a student's educational opportunity and access to college counseling resources.

Effective Training of Admissions Reviewers. Institutions can also consider how they can provide training and support to admissions officers and application reviewers to ensure that all individuals involved in undergraduate and graduate admissions decisions are aligned with the institution's mission of increasing opportunity and diversity.

While there is limited research on the effectiveness of admissions training on diversity outcomes, admissions officers have reported in surveys and interviews that they either do not receive enough professional development or that they doubt the effectiveness of training they do receive, particularly training regarding diversity and inclusion. 77 Some research conducted in field experiment settings has suggested that, when admissions officers are primed, or informed ahead of time, about the use of background information, they are more likely to recommend students from lower socioeconomic backgrounds particularly if they are at a school that uses a more holistic rather than formulaic model of admissions. 78 This suggests that the use of holistic review and context data could be enhanced by admissions officers and application reviewers becoming informed on how the financial means of a student, whether a student grew up in an under-resourced neighborhood or attended an under-resourced high school, and the experiences with hardships a student had helps put their achievement in context.

Training is also an important consideration at the graduate level, particularly in academic fields where faculty lead admissions processes. Faculty involved in graduate admissions programs can use and define terms like "fit" and "merit" to describe applicants in ways that emphasize indicators of privilege and affect how students from diverse backgrounds are evaluated and recruited.⁷⁹ For example, applicants may be judged on the perceived quality of their undergraduate institution, such

⁷⁴ Hartocollis and Edmonds, "Colleges Want to Know More About You and Your 'Identity'," 2023.

⁷⁵ Long, "Affirmative Action and Its Alternatives in Public Universities: What Do We Know?," 2007.

⁷⁶ Alvero et al., "Essay Content and Style Are Strongly Related to Household Income and SAT Scores: Evidence from 60,000 Undergraduate Applications," 2021; McDonough, Choosing Colleges: How Social Class and Schools Structure Opportunity,

⁷⁷ Lee et al., "More Than Marketing: Professional Development and Learning to Integrate Diversity," 2022; National Association for College Admission Counselors, "DEI Challenges in the College Admission Counseling Profession,"

⁷⁸ Bastedo et al., "Admitting Students in Context: Field Experiments on Information Dashboards in College Admissions," 2022.

⁷⁹ Posselt, *Inside Graduate Admissions*, 2016.

as when medical schools are less likely to admit applicants who started at community colleges.⁸⁰ Research on graduate admissions has also described the tendency for some faculty and applicant reviewers to evaluate applicants based on how similar they are to current faculty or reviewers.⁸¹

In doctoral program admissions, one promising practice has been the strong use of rubrics, or tools that guide consistent reviews of materials. 82 Rubrics help standardize what information faculty receive on applicants and how faculty reviewers can consistently assess the information. 83 These processes are designed to contribute to more equitable assessments of students' potential contributions to the program, rather than relying on measures that may be more tied to privilege.⁸⁴ Given the decentralized nature of many graduate admission programs, institutions should ensure consistent training of faculty and staff on the evaluation processes of graduate program applicants.

Reconsidering Practices That May Negatively Impact Diversity

As institutions re-examine their admissions policies and practices to continue building a diverse campus community post SFFA, they can examine whether admissions processes run counter to efforts to provide equal opportunities for all students. Many admissions practices give a leg up to privileged students who come from highly educated families; those who come from families with substantial economic means; those who are children of alumni of institutions, or legacies; those who have the ability to take standardized tests multiple times; and those who attended well-resourced elementary and secondary schools that offered coursework and college preparation that low-income students may not have access to. Higher education institutions can consider re-examining these practices for their alignment with increasing diversity. Leaders can consider actions such as:

- Reevaluating legacy admissions preferences;
- Reassessing the use of entrance exams (e.g., SAT, ACT, GRE);
- Reconsidering the use of early acceptance programs; and
- Implementing alternative assessments for K–12 coursework pre-requisites.

Reevaluating Legacy Admission Preferences

Institutions are encouraged to assess whether admissions practices are consistent with institutional goals and missions related to recruiting, admitting, and graduating diverse student bodies. There is a growing body of evidence that some practices, such as preferences in admissions for legacy candidates or the relatives of alumni, may further advantage privileged communities in a manner that is at odds with expanding educational opportunity. (There are other While the exact number of institutions with legacy admissions is not well documented, one analysis of the Common Data Set,

⁸⁰ Talamantes et al., "Community College Pathways," 2014.

⁸¹ Posselt, Inside Graduate Admissions, 2016.

⁸² For more on general discussions of evaluative rubrics in education, see: Culpepper, et al., "Do Rubrics Live up to Their Promise?" 2023; Quinn, "Experimental Evidence on Teachers' Racial Bias in Student Evaluation," 2020.

⁸³ Posselt et al., "Evaluation and Decision Making in Higher Education: Toward Equitable Repertoires of Faculty

⁸⁴ Posselt et al., "Equity Efforts as Boundary Work: How Symbolic and Social Boundaries Shape Access and Inclusion in Graduate Education," 2017.

which asks institutions to indicate what factors they consider in admissions, suggested that over 700 colleges and universities reported having preferences for children of alumni. 85

Research on legacy admissions shows that legacy status is associated with a boost in admissions rates compared to non-legacy students. 86 An analysis of selective colleges suggests Asian American applicants have lower odds of acceptance than similarly qualified white students, attributed in part to white students being more likely than Asian students to have legacy status.87 At Ivy League and "Ivy-Plus" institutions, research suggests that high-income legacy admits are five times more likely to be admitted than similarly qualified non-legacy applicants.⁸⁸

For selective institutions where every detail on an application can help a student stand out from their peers, using admission practices that favor legacy students can perpetuate the cycle of excluding underserved students from higher education opportunities and can run counter to institutional goals of creating a socioeconomically and racially diverse campus.

Johns Hopkins University ended its legacy admission preferences in 2014 as part of its efforts to make the university more accessible to qualified students from all backgrounds. A third-party analysis has shown that, since ending legacy admissions, Johns Hopkins University increased the share of Pell Grant recipients from 13 percent to 22 percent and increased the share of Black, Latino, and Native American students from 18 percent to 34 percent of their student body. The percentage of legacy admits decreased from 9 percent to less than 2 percent of all students.⁸⁹

When institutions decide to end their legacy admissions practices, they should consider exploring opportunities for targeted outreach and additional financial support for low-income and firstgeneration students. In July 2023, after the SFFA decision, Wesleyan University also announced its decision to end the practice of legacy admissions. Wesleyan, for example, coupled its announcement with highlighting its efforts to strengthen outreach to community-based organizations, college access programs, Title I high schools, its community college and veteran recruiting programs, and its prison education program. Ending legacy admissions could be just one step to diversify the applicant pool, and institutions are encouraged to combine this step with other strategies described throughout this report to ensure students from all backgrounds have the opportunities and resources available to seek higher education. Institutions can also consider how other admissions practices, such as donor preferences, may benefit more affluent students.

Reassessing the Use of Entrance Exams

In addition to reevaluating legacy admissions, institutions can analyze the impact of entrance examinations such as the SAT and ACT, as well as graduate admission exams such as the Graduate Record Examination (GRE), Law School Admission Test (LSAT), or Medical College Admission Test (MCAT).

⁸⁵ Murphy, "The Future of Fair Admissions Issue Brief 2: Legacy Preferences," 2022.

⁸⁶ Espenshade, Chung, and Walling, "Admission Preferences for Minority Students, Athletes, and Legacies at Elite Universities," 2004; Hurwitz, "The Impact of Legacy Status on Undergraduate Admissions at Elite Colleges and Universities," 2011.

⁸⁷ Grossman et al., "The Disparate Impacts of College Admissions Policies on Asian American Applicants," 2023.

⁸⁸ Chetty, Deming, and Friedman "Diversifying Society's Leaders? The Causal Effects of Admission to Highly Selective Private Colleges," 2023.

⁸⁹ Svrluga and Anderson, "Racial Diversity Surged at Johns Hopkins in the Last Decade. Will it Last?" 2023.

Institutions reevaluating their reliance on entrance exams may have some concerns that high school GPAs and other measures of academic success are not consistent across high schools. However, research suggests that high school GPA can have strong predictive validity in assessing students' academic potential for college. ⁹⁰ Institutions can consider test-optional or test-free policies as a practice to diversify their applicant pool while still maintaining rigorous academic environments. While the adoption of test-optional policies is relatively new, there has been initial research showing a 3 to 4 percent increase in Pell Grant recipients and a 10 to 12 percent increase in students of color admitted. ⁹¹

Students who retake the SAT remain at a competitive advantage due to admissions practices at most universities that apply "super scoring" where only the highest score achieved within each section of the exam is used. While retaking the SAT is associated with increases in scores, low-income students are less likely to retake the exam. Retake rates increase with income, and many low-income students do not use the available fee waiver. ⁹² Retake rates are slightly lower for the ACT than for the SAT, but there are similar indicators of socioeconomic and racial gaps among students who do retake. ⁹³ Differences in scores and retake rates between groups may also reflect differential access to test preparation opportunities and high school curriculum that aligns with the test topics. Black students, on average, score lower on the SAT than their white peers, and low-income students on average score lower than high income students. ⁹⁴ In addition, students of color are 9 percent less likely to retake the SAT than white students. ⁹⁵

While institutions may have some interest in standardizing measures of student achievement, since the start of the COVID-19 pandemic, the number of four-year colleges and universities that reduced their emphasis on standardized tests nearly doubled to more than 1,300 institutions. ⁹⁶ Test policies that institutions could consider include:

- **Test-optional**: applicants can choose whether or not to submit their scores; for those who do submit, those scores will be considered as a part of the admission process.
- **Test-flexible**: applicants can choose to submit ACT, SAT, or scores on a range of other tests that will be considered in the admission process.
- **Test-free**: applicants may submit test scores, but those scores will not be considered in the admission process.

Institutions can consider various approaches to testing as they think through their admissions processes.

While the GRE may have some predictive validity for first-year graduate grades, it has limited association with long-term outcomes of graduate education, such as productivity and completion,

⁹⁰ Allensworth and Clark, "High School GPAs and ACT Scores as Predictors of College Completion: Examining Assumptions About Consistency Across High Schools," 2020.

⁹¹ Bennett, "Untested Admissions: Examining Changes in Application Behaviors and Student Demographics Under Test-Optional Policies," 2021.

⁹² Goodman, Gurantz, and Smith,"Take Two! SAT Retaking and College Enrollment Gaps," 2019.

⁹³ Harmston and Crouse, "Multiple Testers: What Do We Know About Them?" 2016.

⁹⁴ Dixon-Romàn, Everson, and McArdle, "Race, Poverty and SAT Scores," 2013.

⁹⁵ Goodman, Gurantz, and Smith,"Take Two! SAT Retaking and College Enrollment Gaps," 2019.

⁹⁶ Lovell and Mallinson, "How Test-Optional College Admissions Expanded During the COVID-19 Pandemic," 2021.

and is less valid when study samples contain more diverse students. 97 Thus, when these scores are a major factor in admissions criteria, institutions may be limited in how they can fully assess the contributions of underrepresented students to graduate programs, which may make it more difficult to recruit students to apply to the program moving forward. 98 Institutions can consider how they may in some cases change the policies regarding the use of graduate entrance exams, such as graduate programs that have stopped using the GRE; provide flexibilities, such as law schools that allow students to submit either the GRE or the LSAT; or change emphasis on test scores, such as when medical schools use holistic admissions criteria to place MCAT scores in context.

Reconsidering Early Application Programs

Institutions should consider evaluating the impact of early admission policies, as well as the practice of prioritizing applicants who have shown "demonstrated interest." Colleges that reward demonstrated interest, often shown through campus visits or interviews, may want to consider the impact these practices have on low-income students, as well as rural students, for whom it is more difficult or not financially possible to make multiple college visits. Institutions can broaden how they measure "demonstrated interest" to be more inclusive of students from underrepresented backgrounds (e.g., by considering virtual visits and engagement).

Many selective colleges and universities set multiple deadlines for application. Those applicants who apply early decision receive early notification of the admissions decision and make a commitment to attend if admitted. Early action programs offer similar early acceptance notification but are nonbinding. Previous research has found that the characteristics of students associated with enrolling through an early admissions program include markers of privilege: being from a higher socioeconomic background, receiving private college counseling, or attending a high-resourced high school. 99 Low-income students may wish to compare financial aid packages across institutions before committing, making it more difficult to take advantage of early admission programs, particularly those with binding decisions like early decision.

Reconsidering early admissions programs that require students to commit to an admissions decision without the ability to compare financial aid packages could be part of a comprehensive strategy for institutions looking to advance diversity. In early August 2023, Virginia Tech announced it would end legacy admissions and replace its early decision program with early action, with the institution stating that it was doing so to attempt to level the playing field for students regardless of income. 100 While it is too early to know the impact of these changes, these kinds of announcements suggest the kinds of considerations institutions can make in the coming school years to expand opportunity for a more socioeconomically and racially diverse student body.

Time," 2023.

97 Feldon, et al., "The Predictive Validity of the GRE Across Graduate Outcomes: A Meta-Analysis of Trends Over

⁹⁸ Posselt, Inside Graduate Admissions, 2016.

⁹⁹ Park and Eagan, "Who Goes Early? A Multi-Level Analysis of Enrolling via Early Action and Early Decision Admissions" 2011.

¹⁰⁰ Virginia Tech University, "Virginia Tech Implements Changes to Undergraduate Admissions Process for 2023–24 Admissions Cycle," 2023.

Consider Implementing Alternative Assessments to K-12 Prerequisites

In addition to reforming admissions practices to attract a diverse applicant pool, institutions should also consider the implications of policies on students who have the qualifications to contribute to a higher education institution and come from under-resourced elementary and secondary schools. Thirty-seven percent of Black students and 38 percent of Hispanic students attend a high poverty school, compared to 13 percent of Asian students and 7 percent of white students. High poverty schools are less likely to offer AP courses and other advanced level classes that both help a student prepare for college or even more importantly, meet admissions requirements or major prerequisite requirements. The most recent Department of Education CRDC College and Career Readiness Data show that nearly 15 percent of high schools do not offer Algebra I and 20 percent of high schools do not offer Algebra II. Only 50 percent of high schools offer calculus courses. Students from under-resourced schools can still demonstrate readiness and preparation for college.

While completion of high school coursework can be one way to ascertain college readiness, higher education institutions with admissions requirements that include certain advanced coursework, such as a calculus course, can be narrowing opportunities for students who attended schools where these courses are not offered. In the state context, coursework requirements for high school graduation that are not aligned with postsecondary entrance requirements could be another barrier. To open the door for a more diverse pool of low-income students and students of color to be considered for admission, institutions can consider how they can put completion of high school courses in the context of available opportunities including by allowing for alternative ways for students to demonstrate mastery of subject matter or potential for college-level work. For example, the California Institute of Technology recently announced that it would remove admissions requirements for calculus, chemistry, and physics courses due to unequal access to these courses in high school. The university will provide alternative ways students can demonstrate they have mastery in these subjects, including through taking an approved free online course or passing an approved alternative assessment.

Alternative Admissions Policies

States and institutions can also consider how they can streamline admissions processes to make the college application process easier for students, particularly for first-generation students or low-income students who may have less access to or familiarity with college application processes. Some strategies states have pursued entail automatic or near-automatic admission for students if they meet pre-determined criteria. While the ultimate impact of these programs is still being evaluated, what is clear is that students face a difficult maze of admissions and financial aid requirements on the road to college. Alleviating these burdens can help facilitate an easier path to college by making confusing admissions policies more transparent. However, states and institutions should exercise caution in how they design these programs to ensure they are not reinforcing inequity by benefiting

¹⁰¹ National Center for Education Statistics, "Concentration of Public School Students Eligible for Free or Reduced Price Lunch," 2023; Note that there are typically substantial differences in educational and economic outcomes among Asian American subgroups.

¹⁰² US Government Accountability Office, "Public High Schools with More Students in Poverty and Smaller Schools Provide Fewer Academic Offerings to Prepare for College," 2018.

¹⁰³ U.S. Department of Education Office for Civil Rights, "Civil Rights Data Collection," 2018.

¹⁰⁴ Klasik, "The College Application Gauntlet," 2012.

predominately students from higher income families or those with the most educational opportunities.

Direct Admissions

One promising strategy for increasing enrollment is direct admissions. Several states have direct admissions programs that provide guaranteed admission for students graduating from in-state high schools if they meet minimum admission requirements set by colleges, such as a threshold high school GPA or class rank. States can facilitate the identification of qualified students from shared data systems between the K-12 and higher education systems. Students then receive communication as early as fall of their senior year that they will be proactively admitted to the institutions for which they qualify.

In one model, for example, all students who graduate from a high school in the state could be admitted to open-access or broad-access institutions such as community colleges, while students who surpass minimum achievement levels are automatically admitted to more selective state institutions.

Because of the recency of direct admissions programs, evidence is only just now emerging on their effectiveness. Early outcomes from Idaho, one of the earliest adopting states, show first-time undergraduate enrollments increased by 4 to 8 percent after the establishment of a direct admissions program, though these enrollment gains were mostly concentrated in the two-year sector. 105 In another study on institutions in four states implementing a direct admissions model, students created a Common Application profile with their preliminary information including their high school achievement information. Students who met their state university's minimum GPA requirement and received a direct admission offer were 12 percent more likely to apply to college. 106 These application effects were higher for first-generation students, low-income students, and students of color. Importantly, however, this practice did not affect enrollment of these groups, suggesting that financial aid still plays a factor in students' college decisions even when receiving guaranteed admission.

As additional states consider the adoption of direct admissions programs, it will be important to align implementation with emerging best practices and evaluate the effectiveness of programs when implemented. To date, proponents of direct admissions programs argue that those programs should have practices that ensure the program lives up to the promise of streamlining the application process for students. For example, direct admissions programs should be proactive, guaranteed, universal, transparent, simple and personalized, low-cost, and involve trusted adults (i.e., parents/guardians and school teachers are involved in the process). 107 These practices can offer students clear opportunities to enroll while also clarifying for students, teachers, and school leaders the academic expectations for college readiness more broadly.

¹⁰⁵ Odle and Delaney, "You are Admitted! Early Evidence on Enrollment from Idaho's Direct Admissions System"

¹⁰⁶ Odle and Delaney, "Experimental Evidence on 'Direct Admissions' from Four States: Impacts on College Application and Enrollment," 2023.

¹⁰⁷ Delaney and Odle, "Direct admissions: Proactively pushing students into college," 2022.

Top Percent Plans

One strategy state governments may want to consider is implementing top percent plans. These programs, which have been implemented in states such as California, Florida, Texas, and Washington guarantee admission to the public universities in the state to the students at the top of their high school classes. These plans can leverage socioeconomic and racial stratification across schools within the state, regardless of resources, to increase admissions of high-performing students from under-resourced schools to state institutions. These plans can increase admissions of high-performing students from under-resourced schools to state institutions rather than those institutions serving only select schools and communities.

Evidence on the outcomes associated with top percent plans with regard to enrollment of low-income students and students of color is limited. California's Top 4 Percent Plan was associated with an estimated increase in enrollment of students of color of less than four percent (while the previous use of race in admissions increased underrepresented racial minority enrollment by nearly 20 percent). Other studies of top percent plans find that the plans recover approximately one-third of the racial diversity lost after adoption of state-level restrictions on the consideration of race in admissions. Percent on the Texas Top Percent rule has also shown that top percent plans can not only increase enrollment, but there is also evidence of earnings gains for some students due to attending a flagship university. 110

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¹⁰⁸ Bleemer, "Affirmative Action and Its Race Neutral Alternatives," 2023.

¹⁰⁹ Long, "Race and College Admissions: An Alternative to Affirmative Action?," 2004; Long, "Affirmative Action and Its Alternatives in Public Universities: What Do We Know?," 2007.

¹¹⁰ Black, Denning, and Rothstein, "Winners and Losers? The Effect of Gaining and Losing Access to Selective Colleges on Education and Labor Market Outcomes," 2020.

Lowering the Cost of College and Providing Equitable Funding

The cost of college has become one of the biggest obstacles for many individuals interested in pursuing higher education, especially for low-income students and students of color. ¹¹¹ College costs and borrowing, especially for graduate school, have increased substantially in recent decades. The average tuition and fees at public four-year colleges rose from \$4,040 in the 1990-1991 academic year to \$11,180 in the 2020-2021 academic year, even after accounting for inflation. ¹¹² Tuition at private non-profit institutions, which have substantially higher prices, has more than doubled. ¹¹³ The average amount borrowed in Federal loans annually has nearly tripled over that same time period, from \$2,210 to \$6,307 (in 2021 dollars). ¹¹⁴ As more students have had to rely on loans to pay for postsecondary education and have subsequently struggled to manage and repay their loans, there is growing concern among students and families about the value of a college degree when accompanied by burdensome debt. ¹¹⁵ Even before a student applies to college, there is evidence from academic research and public polling that students are price sensitive and experience "sticker shock" and the high price of tuition dissuades them from pursuing higher education. ¹¹⁶

The rising cost of college affects students differently. Students from low-income backgrounds lack the financial resources needed to pay for college, but they are not the only students who struggle to afford higher education. Because of a legacy of systemic racism, lack of wealth-building opportunities, and ongoing disparities in access to economic security, students of color often struggle, even those who might not be considered low-income. Students from underrepresented minority backgrounds whose families have middle-incomes often face substantial gaps in wealth compared to their white peers with similar incomes, making it more difficult to afford higher education and leaving them to bear the brunt of the student loan crisis. ¹¹⁷ For example, Black students completing an undergraduate degree are nearly 40 percent more likely to borrow, and graduate with nearly 80 percent more debt, than white students. ¹¹⁸ Black and Hispanic borrowers default on student loans at a rate that is two to three times higher than white borrowers. ¹¹⁹ Furthermore, low-income students and underrepresented minority students are more likely to face substantial unmet financial need, even after accounting for loans. ¹²⁰

Given this context, institutions and states should consider how they can increase affordability for underserved students. Potential strategies may include activities such as:

• Investing in more need-based aid for students;

¹¹¹ NORC, "Survey: Americans See Cost as the Biggest Barrier to Higher Education," 2022.

¹¹² College Board, "Trends in College Pricing, Table CP-3," 2022.

¹¹³ College Board, "Trends in College Pricing, Table CP-3," 2022.

¹¹⁴ College Board. "Trends in Student Aid, Table 3," 2022.

¹¹⁵ Gallup, "The State of Higher Education 2023," 2023.

¹¹⁶ AP-NORC, "Young Americans' Views on the Value of Higher Education," 2019; Hermelt et al., "The Impact of Tuition Increases on Enrollment at Public Colleges and Universities," 2011.

¹¹⁷ Addo, Houle, and Young, "Young Black, and (Still) in the Red," 2016.; Levine and Ritter, "The Racial Wealth Gap, Financial Aid, and College Access," 2022.

¹¹⁸ National Postsecondary Student Aid Study 18-AC

¹¹⁹ Scott-Clayton, "The Looming Student Loan Default Crisis is Worse Than We Thought," 2018.

¹²⁰ Long and Riley, "Financial Aid: A Broken Bridge to College Access?" 2007; Walizer, "When Financial Aid Fall Short," 2018.

- Implementing college promise programs;
- Ensuring institutions have the resources needed to keep tuition low, provide sufficient financial aid, and giving students the support they need to complete their credentials; and
- Ensuring transparency and predictability throughout the financial aid lifecycle, from recruitment to graduation.

Need-Based Aid

The evidence shows that lowering the cost of college for students and families through need-based aid increases enrollment, persistence, and completion in higher education. ¹²¹ For example, a need-based scholarship for Nebraska students has been shown to increase four-year degree completion by approximately 8 percentage points, and the increases in degree completion were concentrated among students who were otherwise less likely to pursue a four-year degree program. ¹²² Research has also shown that enrollment of students can increase when institutions provide easily understandable and certain need-based aid. ¹²³ Despite the importance of need-based aid to recruiting and retaining students from diverse backgrounds, research suggests that close to half of financial aid provided today at public universities goes to students who do not need financial support, with universities increasing non-need based aid faster than they do need-based aid. ¹²⁴

Institutions should consider increasing their investments in need-based aid as part of their strategy of recruiting and retaining underserved students. Institutions can consider this in their fundraising plans and could consider how their existing endowment funds could be used to accomplish this strategy. While institutions can prioritize their resources to provide need-based aid, because public institutions are heavily reliant on state funding, states should also consider increasing their need-based state financial aid programs to meet this goal. Depending on the state, this also helps students attend private non-profit institutions. Increasing investments in need-based aid is important if institutions and states want to increase enrollment and completion for underserved students.

Several institutions, both public and private non-profit, have implemented no-loan programs that result in increased enrollment of first-generation and low-income students. ¹²⁵ Generally, these programs provide sufficient grant and scholarship aid to admitted low-income students who choose to enroll to cover any unmet need. Institutional programs have varying degrees of generosity and scope. For instance, some no-loan programs are restricted to students below a certain income threshold, while others are open to all aid-eligible students. Some programs may offer fully funded need-based aid packages, while others place a cap on the costs students must cover using student

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¹²¹ Abraham and Clark, "Financial Aid and Students' College Decisions: Evidence from the District of Columbia Tuition Assistance Grant Program," 2006; Dynarski, "Does Aid Matter? Measuring the Effect of Student Aid on College Attendance and Completion" 2003; Nguyen, Kramer, and Evans, "The Effects of Grant Aid on Student Persistence and Degree Attainment," 2019.

¹²² Angrist, Autor, and Pallais, "Marginal Effects of Merit Aid for Low-Income Students," 2020.

¹²³ Dynarski, Page, and Scott-Clayton, "College Costs, Financial Aid, and Student Decisions," 2022.

¹²⁴ Burd, "Crisis Point: How Enrollment Management and the Merit Aid Arms Race are Derailing Public Higher Education," 2020.

¹²⁵ Bennett, Evans, and Marsicano, "Taken for Granted? Effects of Loan-Reduction Initiatives on Student Borrowing, Admission Metrics, and Campus Diversity," 2021; Hillman, "Economic Diversity in Elite Higher Education: Do No-Loan Programs Impact Pell Enrollments?," 2016; Ortagus and Kramer, "The Impact of No-Loan Program Participation on the Likelihood of Graduate School Enrollment Among Low-Income, First-Generation Students," 2022.

loans. Some institutions may also couple their program with additional student support services and requirements.

Need-based programs, including no-loan initiatives and other grant funding for students that base eligibility or aid levels on the student's demonstrated financial capability, should strive to eliminate or reduce student debt for low-income students. Institutions can craft need-based aid programs that encompass the full spectrum of student need, including by evaluating both parental income and wealth and accounting for gaps in federal and state eligibility determinations that do not capture the full picture of a family's financial situation and therefore a student's ability to pay. Ultimately, institutions should work to ensure they are meeting the full need of underserved students and that students are not penalized in the admissions process because of their ability to pay. 126

Additionally, some evidence suggests that eligibility requirements in state need-based aid programs, such as including only full-time students, can contribute to racial disparities. 127 States should also consider reviewing their policies on need-based aid to identify unnecessary barriers to access the programs and consider how their programs can fill important gaps in unmet need. As detailed elsewhere in this report, institutions and states can work to make these programs well-known to students and make the process for obtaining aid as simple as possible.

Tuition-Free Programs

One way to lower the cost of college is by creating tuition-free programs, also known as "college promise" programs. College promise programs provide financial aid, typically through a tuition-free guarantee to students within a specified state or locale. More than 400 local college promise programs and more than 30 statewide promise programs currently exist and have been created by states, local governments, and philanthropic efforts. Some programs are limited to community colleges, while others include public and even private non-profit four-year institutions. In some instances, they are targeted towards specific programs, such as those that train students for employment in high-demand fields. 128 Promise programs vary in eligibility requirements and the generosity of the aid provided. For example, they may have income limits or academic requirements. In terms of generosity, some are "first-dollar" where they eliminate tuition before other aid is applied, while others are "last-dollar" and cover remaining tuition not covered by federal or other aid money.

Generally, research finds that promise programs are associated with increases in enrollment and can specifically drive increases in enrollment among students of color. 129 Most of the research has been focused on promise programs that eliminate tuition at community colleges, as those are the most prevalent, though four-year programs have expanded in recent years. Taken together, those studies

¹²⁶ Heller, "Financial Aid and Admission: Tuition Discounting, Merit Aid and Need-aware Admission," 2008. ¹²⁷ Baum, "Students of Color May Be Disproportionately Harmed by States' Need-Based Aid Eligibility Requirements,"

¹²⁸ Work Ready Kentucky, "Work Ready Scholarship Program," 2023.

¹²⁹ Andrews, DesJardins, and Ranchhod, "The Effects of Kalamazoo Promise on College Choice," 2010; Bartik, Hershbein, and Lachowska, "The Effects of Kalamazoo Promise Scholarship on College Enrollment and Completion," 2021; Gándara and Li, "Promise for Whom? 'Free College' Programs and Enrollments by Race and Gender Classifications at Public, 2-Year Colleges" 2020.

have found increased enrollment, completion, and even rates of transfer to four-year institutions. ¹³⁰ Some studies have also shown an increased likelihood of bachelor's degree completion. ¹³¹ Moreover, the evidence suggests these results may be particularly promising for students of color. ¹³² This evidence demonstrates that these programs may be a vital investment to help students, including those who want to ultimately transfer and complete a four-year degree. However, evidence suggests that the different design components of the programs discussed above are likely to be related to how big of an effect they can have. ¹³³ The evidence also suggests that students are more responsive when aid is guaranteed, so these programs may be more effective than other aid programs at inducing students to enroll in higher education. ¹³⁴

Direct State Funding for Higher Education Institutions

At a time when states and institutions are assessing how to better recruit and support underserved students, state funding plays a critical role. Most importantly, state funding directly impacts the tuition that students need to pay. Research has shown that for every \$1,000 in per student funding that is cut from state higher education appropriations, students pay \$257 more in tuition and fees, on average. 135 When states provide sufficient funding to institutions, they help keep higher education more affordable for students. Direct appropriations to institutions can reduce or eliminate tuition, or they can enable institutions to invest in their need-based aid programs. Reducing college costs is also critical to ensure that students enroll and persist in higher education. Research has shown that for every \$1,000 decrease in community college tuition, enrollment increased by 5.1 percentage points. 136 Reducing tuition has also been shown to increase transfer from community colleges to four-year colleges and universities. 137 Furthermore, research shows that state investment in higher education provides substantial benefits for states through increased tax revenue and reduced reliance on social programs due to increased earnings of individuals with higher educational attainment. 138 One estimate suggests that governments received more than twice what they would have in tax revenue over the lifetime of an individual who earned a bachelor's degree compared to only having a high school diploma. 139

Beyond financial aid, state funding for institutions is also important so that colleges and universities have the resources to invest in programs and support services that help students persist and complete their programs. As discussed throughout this report, with adequate funding, institutions

130 Bell, "Does Free Community College Improve Student Outcomes?" 2021; Bell and Gándara, "Can Free Community College Close Racial Disparities in Postsecondary Attainment?" 2021; Carruthers and Fox, "Aid for All," 2016.

¹³¹ Bell and Gándara, "Can Free Community College Close Racial Disparities in Postsecondary Attainment? How Tulsa Achieves Affects Racially Minoritized Outcomes" 2021; Bell, "Does Free Community College Improve Student Outcomes?" 2021; Swanson and Ritter, "Start to Finish: Examining the Impact of the El Dorado Promise Program on Postsecondary Outcomes," 2020.

¹³² Swanson and Ritter, "Start to Finish: Examining the Impact of the El Dorado Promise Program on Postsecondary Outcomes," 2020; Bell and Gándara, "Can Free Community College Close Racial Disparities in Postsecondary Attainment? How Tulsa Achieves Affects Racially Minoritized Outcomes" 2021.

 ¹³³ Swanson, Watson, and Ritter, "Promises Fulfilled? A Systematic Review of the Impacts of Promise Programs," 2020.
 134 Burland et al., "The Power of Certainty: Experimental Evidence on the Effective Design of Free Tuition Programs, 2022.

¹³⁵ Webber, "State Divestment and Tuition at Public Universities, 2017.

¹³⁶ Denning, "College on the Cheap: Consequences of Community College Tuition Reductions," 2017.

¹³⁷ Denning, "College on the Cheap: Consequences of Community College Tuition Reductions," 2017.

¹³⁸ Blagg and Blom, "Evaluating the Return on Investment in Higher Education," 2018.

¹³⁹ Trostel, "It's Not Just The Money: The Benefits of College Education to Individuals and Society," 2015.

can invest in proven programs to support students, including emergency grant aid, advising, and more. Research has shown that increasing expenditures on higher education to improve quality can increase both enrollment and degree completion. However, while state investment is essential to addressing college affordability, institutions may also need to re-prioritize resources and expand their fundraising efforts and partnerships.

However, state disinvestment in higher education is a serious concern. Recent reports show that 28 states provide less higher education funding than prior to the 2008 Great Recession. Additionally, states have not always provided equitable funding across institutions. States allocate disproportionately lower funding to community colleges and public regional colleges, including HBCUs and MSIs, in comparison to selective universities, despite these open- and broad-access institutions enrolling larger shares of Black, Hispanic/Latino, Native American/American Indian/Alaska Native, and Native Hawaiian/Pacific Islander students. This is despite the contribution these institutions make in helping us understand what works to ensure our most underserved students attend and complete college. Yet, in 2015, selective public colleges received per student appropriations that were more than twice that of open-access public colleges.

Many states have also historically failed to invest equitably in public HBCUs relative to the predominately white flagship institutions. A recent analysis by the U.S. Department of Education showed that states provided between \$172 million to \$2.1 billion less in state funding to land-grant HBCUs created under the Second Morrill Act of 1890 than to the land-grant institutions founded in 1862 in the state. States have also failed to provide sufficient funding required to receive federal funding under the Second Morrill Act of 1890. For example, one analysis showed that 61 percent of those HBCUs did not receive all of the matching funds from their state. This failure cost those institutions nearly \$200 million between 2011 and 2022, according to one estimate. Despite being underfunded and under-resourced, HBCUs have been essential to providing higher education opportunity to Black students and other students of color. For example, 26 percent of Black STEM PhD graduates received their undergraduate degrees from an HBCU. They have also had a significant economic impact for their alumni and the economy.

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¹⁴⁰ Deming and Walters, "The Impact of Price and Spending Cuts on U.S. Postsecondary Attainment," 2017.

¹⁴¹ State Higher Education Executive Officers Association, "State Higher Education Finance FY 2022," 2023.

¹⁴² Carnevale, et al., "Our Separate and Unequal Public Colleges: How Public Colleges Reinforce White Racial Privilege and Marginalize Black and Latino Students," 2018; Hillman, "Why Rich Colleges Get Richer and Poor Colleges Get Poorer: The Case for Equity-Based Funding in Higher Education," 2020.

¹⁴³ Carnevale, et al., "Our Separate and Unequal Public Colleges: How Public Colleges Reinforce White Racial Privilege and Marginalize Black and Latino Students," 2018.

¹⁴⁴ Harris, The State Must Provide, 2021.

¹⁴⁵ U.S. Department of Education, "Secretaries of Education, Agriculture Call on Governors to Equitably Fund Land-Grant HBCUs," 2023.

¹⁴⁶ Lee and Keys, "Land-Grant But Unequal: State One-to-One Match Funding for 1890 Land-Grant Universities," 2013.

¹⁴⁷ Smith, "Nourishing the Nation While Starving: The Underfunding of Black Land-Grant Colleges and Universities," 2023.

¹⁴⁸ Einaudi, Gordon, and Kang, "Baccalaureate Origins of Underrepresented Minority Research Doctorate Recipients," 2022

¹⁴⁹ Saunders and Nagle, "HBCUs Punching Above Their Weight: A State-Level Analysis of Historically Black College and University Enrollment and Graduation," 2018.

TCUs also face funding inequities from states. States have no obligation to fund TCUs and the majority of states provide no funding to them at all. ¹⁵⁰ Additionally, federal funding for TCUs is limited and is further exacerbated by only allocating funds based on the number of Native students enrolled. According to Department data, approximately 20 percent of TCU students are non-Native, meaning the formula for federal funds does not account for approximately one-fifth of students at TCUs. ¹⁵¹

Transparency for Applicants

Some students are discouraged from applying to schools based on the sticker price, which is often higher than a student's true cost after financial aid. Additionally, transparent, clear information on a student's net price can be difficult to find or interpret. The Department's College Scorecard is a free online tool to help students of all ages, families, educators, counselors, and other college access professionals make data-informed decisions when choosing a college or university to attend. States, high schools, and institutions can encourage applicants to use the Scorecard to better understand college costs, student debt, graduation rates, admissions test scores and acceptance rates, student body diversity, post-college earnings, and much more.

Students may also be deterred by onerous financial aid application processes. Applicants need clear information about the intricacies of financial aid, including how to apply and what aid is available. Federal Student Aid is working to launch an improved FAFSA later this year, which will include a more streamlined application process, expanded eligibility for federal student aid, and a new user experience for the FAFSA form. States and institutions can similarly simplify forms that applicants are required to submit. Institutions should better distinguish net price from sticker price on their websites. In addition, they can ensure that potential students are able to easily find understandable information on what need-based aid is available and the criteria for eligibility and selection.

Institutions should also work to ensure that students and families are able to review their financial aid offers, understand the aid they are offered, and the cost to attend so they can make decisions about where to enroll and how to pay for their education. One analysis of financial aid offers found confusing and inconsistent information that made it difficult to interpret the true cost of attending and understand the differences between types of aid such as grants and loans. Financial aid offers should be clear, easily understandable, and adequately reflect all costs, including non-tuition costs, associated with attending the institution. Institutions should review the Department's guidance on financial aid offers and consider adopting the Department's College Financing plan. States can also require that institutions follow best practices on financial aid offers, ensuring that offers are easily understandable and standardized, as much as is practicable, across institutions.

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¹⁵⁰ Nelson and Frye, "Tribal College and University Funding: Tribal Sovereignty at the Intersection of Federal, State, and Local Funding," 2016.

¹⁵¹ National Center for Education Statistics, "Digest of Education Statistics, Table 312.50," 2022.

¹⁵² Levine, "College Prices Aren't Skyrocketing—But They're Still Too High For Some," 2023; Levine, Ma, and Russell, "Do College Applicants Respond to Changes in Sticker Prices Even When They Don't Matter?" 2020.

¹⁵³ Burd et al., "Decoding the Cost of College: The Case for Transparent Financial Aid Award Letters," 2018.

¹⁵⁴ U.S. Department of Education, "GENERAL-21-70: Issuing Financial Aid Offers—What Institutions Should Include and Avoid," 2021.

¹⁵⁵ Cummings et al., "Investigating the Impacts of State Higher Education Appropriations and Financial Aid," 2021.

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While providing sufficient need-based aid is important, institutions can also ensure that the availability of aid is widely communicated. For instance, institutions can help ensure that prospective students, their families, and their school counselors are aware of their aid programs and engage in early direct outreach to all stakeholders. Institutions should also consider guaranteed tuition programs that lock in a student's tuition for a specific period of time, typically four years, without increase. While these particular programs come with tradeoffs in their design, having predictable, transparent prices is important for students to understand their upfront costs. ¹⁵⁶ For example, researchers found that an upfront guarantee of aid without a complex application at a selective flagship public university increased the application rate of low-income students by 42 percentage points and increased their rate of enrollment by 15 percentage points. 157 By providing an explicit and guaranteed aid package for four years and using regular communication early and throughout the application cycle, institutions can be better positioned to increase the number of low-income, highachieving students who both apply and enroll.

¹⁵⁶ Delaney, Kearney, and Hemenway, "Balancing Tuition Predictability and Affordability: The Pitfalls of Guaranteed Tuition Plans," 2016.

¹⁵⁷ Dynarski et al., "Closing the Gap: The Effect of Reducing Complexity and Uncertainty in College Pricing on the Choices of Low-Income Students," 2021.

Completion and Climate

A positive and welcoming campus climate can attract students from diverse backgrounds. However, ensuring a diverse campus community is inclusive can be difficult if underrepresented students do not feel like they belong and are not supported through the completion of their credential. By providing comprehensive support to students from under-resourced K-12 schools or who are the first in their family to attend college, colleges and universities can deepen their commitment to diverse student bodies.

While 64 percent of white students graduate with a bachelor's degree at a four-year institution within six years, 54 percent of Hispanic/Latino students, 51 percent of Native Hawaiian/Pacific Islander students, 40 percent of Black students, and 39 percent of American Indian/Alaska Native students do so. 158 Students do not complete their degrees for many reasons, including balancing work and family, childcare costs, needed academic supports, and more. Research shows that, in addition to financial aid, the combination of integrated and intensive advising and support services provided over multiple years can help students overcome barriers and ensure timely progress toward completion. 159 Closing gaps in college completion could have both individual benefits, through increased earnings of graduates, and societal benefits, through increased tax revenue that would pay for the cost of investing in student success. 160 Institutions benefit when students are retained through to completion, as the cost per student decreases (see the discussion below for more details).

To support students' sense of belonging and their college completion, institutions should consider activities such as:

- Developing comprehensive support programs to increase retention and completion rates, particularly for students with the greatest needs;
- Providing support to students to ensure basic needs are met, including offering emergency aid for unexpected expenses; and
- Ensuring campuses provide a welcoming and supportive environment for students from all backgrounds through affinity groups; diversity, equity, and inclusion (DEI) programming; and shared, accessible spaces.

Comprehensive Support Services

Comprehensive support services for student success are designed to improve student completion outcomes by addressing the full range of student needs: academic, social, health, emotional, and economic. Institutions can inventory the supports they currently offer and consider how they can be more comprehensive and coordinated to ensure students who need them can easily understand and

¹⁵⁸ National Center for Education statistics "Indicator 23: Postsecondary Graduation Rates," 2019.

¹⁵⁹ Karp et al., "Effective Advising for Postsecondary Students: A Practice Guide for Educators," 2021; What Works Clearinghouse, Institute of Education Sciences, U.S. Department of Education, "Supporting Postsecondary Success Intervention Report: Accelerated Study in Associate Programs," 2020.

¹⁶⁰ Carnevale, et al., "The Cost of Economic and Racial Injustice in Postsecondary Education," 2020.

access them. 161 See the discussion under Data-Driven Retention and Completion Strategies for how to identify which students would benefit from these support services.

There are numerous evidence-based programs being implemented by institutions that can serve as models, even for selective institutions. The City University of New York's (CUNY) Accelerated Study in Associate Programs (ASAP) model is one of the most researched and well-known models of comprehensive support. An independent evaluation of the program showed this model nearly doubled graduation rates over three years. 162 Another evaluation conducted in 2023 showed strong results at three Ohio community colleges that replicated the CUNY ASAP model—program participants' earnings increased an average of 11 percent and program graduation rates increased over 50 percent. 163 These programs do require an investment from an institution but have been shown to be cost-effective. One analysis on ASAP found that despite the increases in costs needed to implement the program, ultimately the cost per degree decreased. The cost per degree for those in the control group was \$25,781 versus \$42,065 for ASAP participants. However, 40.1 percent of ASAP participants had earned a degree in three years versus 21.8 percent in the control group. Specifically, the 18.3 percentage point increase in earning a degree was large enough to lower the cost per degree earned by \$13,423 (11.4 percent). 164

The What Works Clearinghouse's Practice Guide on Effective Advising for Postsecondary Students provides evidence-based recommendations to help institutions implement advising reform to improve student outcomes. These include designing and delivering comprehensive, integrated advising that incorporates academic and non-academic supports; transforming advising to develop sustained, personalized relationships with students throughout college; using mentoring and coaching to enhance advising; and embedding positive incentives, such as scholarships connected to specific academic milestones, for students in advising structures. 165

Some selective institutions are taking steps to implement promising and evidence-based practices to help increase belonging and support for students, although more work needs to be done to ensure these practices are having an impact on the retention and completion rates for underrepresented students. For example, Brown University is making institutional shifts to level the playing field for students once they are admitted. 166 The institution has established an Undocumented, First-Generation College and Low-Income Student Center to ensure students who identify with the experiences of these populations have shared physical space and programming that connects students with each other and opportunities and resources around campus.

¹⁶¹American Association of State Colleges and Universities, "Senior Leadership Guidebook for Holistic Advising Redesign," 2021; Community College Research Center, Implementing Holistic Support: A Practitioner's Guide to Key Structure and Processes," 2017.

¹⁶² Scrivener, et al., "Doubling Graduation Rates: Three-Year Effects of CUNY's Accelerated Study in Associate Programs (ASAP) for Developmental Education Students," 2015.

¹⁶³ Hill, Sommo, and Warner, "From Degrees to Dollars: Six-Year Findings from the ASAP Ohio Demonstration," 2023.

¹⁶⁴ Scrivener, et al., "Doubling Graduation Rates: Three-Year Effects of CUNY's Accelerated Study in Associate Programs (ASAP) for Developmental Education Students," 2015.

¹⁶⁵ Karp et al., "Effective Advising for Postsecondary Students: A Practice Guide for Educators," 2021.

¹⁶⁶ During the National Summit on Equal Opportunity in Higher Education hosted at the U.S. Department of Education on July 26, 2023, President Christina H. Paxson spoke about these changes being implemented on campus.

The University of Texas at Austin made efforts to create an inclusive climate supporting a large population. They expanded their typical counseling support programs to also provide specialized services through identity-based support groups, faculty and staff diversity trainings, and outreach to

Data-Driven Retention and Completion Strategies

students to make them aware that these resources exist. 167

Using data and early warning systems to identify and provide targeted support to students at risk of dropping out can be another method of increasing completion rates. Data can be used to identify students who need additional supports or advising and to promote equity and inclusion to close achievement gaps. Comprehensive advising typically also requires institutions to assess and upgrade their ability to collect and use real-time data and technology to connect the right supports to the right students at the right time.

Institutions can focus on a wide array of data points that inform additional supports and outreach that students may need. Key focus areas that have been shown to be useful in early warning systems include pre-enrollment data such as high school GPA, academic data once enrolled, self-reported data about motivation, information on use of campus resources such as a writing or career center, and attendance at campus events and on-campus engagement. 168 This information can be helpful to identify students who are at risk of dropping out and connect them to campus academic and nonacademic resources. 169

Georgia State University created a graduation and progression system advising tool that allows advisors to provide students with individualized academic guidance. Their data-informed student success initiatives have been estimated to have saved students approximately \$12 million in tuition by accelerating their graduation timeline. ¹⁷⁰ They were also able to eliminate completion gaps for first-generation students, low-income students, and students of color. Key principles for the success of Georgia State's initiative were buy-in from leadership and system-wide commitment to supporting underserved students, which involved cross-functional teams, and effective data warehousing. 171 The Georgia State model has influenced and guided the use of data and predictive analytics for institutions across the country.

Morgan State University is also taking a data-driven approach to increasing completion rates through its "50 by 25" Initiative. The initiative uses predictive analytics and early warning systems to proactively identify students in need of targeted support and subsequently provide such services. Morgan State reports that its graduation rate rose from 29 to 46 percent in ten years. 172

While predictive analytics and early warning systems show promise for aspects of higher education like improving retention and completion and distributing intuitional aid, institutions should be

¹⁶⁷ Lipson et al., "Investing in Student Mental Health: Opportunities & Benefits for College Leadership," 2019.

¹⁶⁸ Burke et al., "Predictive Analysis of Student Data: A Focus on Engagement and Behaviors," 2017.

¹⁶⁹ Klempin, Grant, and Ramos, "Practitioner Perspectives on the Use of Predictive Analytics in Targeted Advising for College Students," 2018.

¹⁷⁰ Gagliardi and Turk, "The Data-Enabled Executive: Using Analytics for Student Success and Sustainability," 2017.

¹⁷¹ Kurzweil, Martin, and Wu, "Building a Pathway to Student Success at Georgia State University," 2015.

¹⁷² Wilson, "Legislative Testimony: FY 2023 Operating Budget," 2022.

cautious and intentional when employing such models. Concerns over student data privacy and whether these types of models embed bias into their processes should be carefully considered, including having a clear understanding of the design, data, and associated weights that undergird these models and their assessment of student risk.¹⁷³

Basic Needs and Emergency Aid

Basic Needs

Despite receiving some financial aid, many college students struggle to afford housing, health care, transportation, food, books, child care, or some combination of these and other basic needs. The Among undergraduate students, nearly 35 percent of Black students, 33 percent of Native Hawaiian/Pacific Islander students, and 30 percent of American Indian/Alaska Native students reported food insecurity in a recent Federal survey. This can make persistence and completion difficult and unaffordable. With such financial insecurity, too many students are just one emergency—be it illness or a car breakdown—away from being forced to make difficult decisions about how and whether they can afford to continue in higher education.

Institutions can play an important role in helping to ensure that the basic needs of underserved students are met. This includes strengthening institutional capacity to comprehensively address student basic needs, including by conducting audits and identifying gaps in institutional resources; investing in evidence-based interventions, best practices, or promising practices; developing a long-term, campus-wide strategy; coordinating with communities, states, and state entities to identify and help students access relevant local, state, and federal resources, including the Supplemental Nutrition Assistance Program (SNAP), Medicaid, and the Affordable Connectivity Program (broadband); expanding staffing and providing evidence-based training and professional development to coordinate resources; and upgrading their data and technology capabilities to target supports to students in real-time.¹⁷⁶ Public colleges in California receive state funding to encourage them to provide resources such as those listed above to their students. These state dollars allow them to establish food pantries, share information about SNAP with students, and create meal point donation programs where students with extra meal points can donate to students experiencing food insecurity.¹⁷⁷

Campus-based interventions that coordinate access to basic needs, such as Single Stop, have been shown to have a positive effect on student retention. ¹⁷⁸ Institutions can also dedicate resources to

¹⁷³ Acosta and Ositelu, "The Automation of Admissions: Predictive Analytics Use in Enrollment Management," 2021; Ositelu and Acosta, "The Iron Triangle of College Admissions: Institutional Goals to Admit the Perfect First-Year Class May Create Racial Inequities to College Access," 2021.

¹⁷⁴ McKibben, Wu, and Abelson, "New Federal Data Confirm," 2023.

¹⁷⁵ McKibben, Wu, and Abelson, "New Federal Data Confirm," 2023.

¹⁷⁶ Karp et al., "Effective Advising for Postsecondary Students: A Practice Guide for Educators," 2022; American Association of State Colleges and Universities, "Senior Leadership Guidebook for Holistic Advising Redesign," 2021; Advising Success Network, "Success Factors for Advising Technology Implementation," n.d.

¹⁷⁷ U.S. Government Accountability Office, "Food Insecurity: Better Information Could Help Eligible College Students Access Federal Food Assistance Benefits," 2019.

¹⁷⁸ U.S. Department of Education, "Intervention Report: Single Stop USA's Community College Initiative," 2020.

addressing student mental health including by auditing existing campus mental health supports for effectiveness, to identify gaps, and to tailor interventions to better meet the needs of vulnerable populations and by hiring additional mental health providers who, whenever possible, and in accordance with federal law, have similar backgrounds to their student bodies. 179 Institutions can ensure they are prioritizing funds, including fundraising and endowments, for these efforts.

The University of California, Los Angeles, takes a comprehensive, multi-tiered approach to campus mental health and basic needs insecurities. The University begins by screening students through a brief survey measuring mental health symptoms. The students are triaged and assigned levels of care while the university monitors their ongoing health through continuing surveys. The program offers various treatment recommendations based on that monitoring progression, which can include crisis intervention, preventative therapies, and addressing other insecurities including housing and food to connect students with available resources. 180

The University of Massachusetts, Amherst, takes a holistic approach that incorporates mental health into their curriculum by offering two courses on wellness; providing suicide prevention and intervention trainings to students and those who interface most with students; and making counselors available for informal, confidential conversations 24/7. 181

States can also help meet the basic needs of students. In addition to providing direct funding for these initiatives, states should consider whether changes are needed to ensure college students are eligible for statewide benefits programs; whether to adopt promising practices for how to make students aware of their potential eligibility for benefits programs; and how to simplify forms and processes so students can easily access state benefits. Students should be able to quickly and easily find information through the state on what aid is available and the criteria for eligibility and selection. The process to apply for such aid should be simple and clear.

In 2021, Oregon passed legislation to require a new benefits navigator position in all public universities and community colleges in order to better support students in meeting basic needs. The state also provided supplemental funding to establish these positions that are designed to assist students in determining eligibility for benefits programs and applying for assistance under benefits programs.

States can help institutions build capacity by providing training to help ensure those working with students understand benefits eligibility requirements and application processes. States can also facilitate partnerships between the state-level agencies to provide coordinated support across transportation, health care, and housing.

¹⁷⁹ Abelson, Lipson, and Eisenberg, "What Works for Improving Mental Health in Higher Education?" 2023.; Substance Abuse and Mental Health Services Administration (SAMHSA), "Prevention and Treatment of Anxiety, Depression, and Suicidal Thoughts and Behaviors among College Students," 2021.

¹⁸⁰ SAMHSA, "Prevention and Treatment of Anxiety, Depression, and Suicidal Thoughts and Behaviors among College

¹⁸¹ SAMHSA, "Prevention and Treatment of Anxiety, Depression, and Suicidal Thoughts and Behaviors among College Students," 2021.

Emergency Aid

Emergency aid programs offer another way that institutions can support and retain students, many of whom may find themselves struggling with unexpected expenses at some point during their higher education enrollment. Generally, these programs provide small grants ranging from a few hundred to a thousand dollars or more to cover unexpected expenses. These programs usually require an application and for students to demonstrate or certify some level of emergent need.

One of the most comprehensive analyses of the outcomes associated with these types of programs stems from the distribution of funds during the COVID-19 emergency. Higher education institutions carried out one of the largest and most comprehensive emergency aid programs by using the funding made available through the Higher Education Emergency Relief Fund (HEERF). In a survey of institutions receiving HEERF funds, nearly 90 percent of institutions agreed or strongly agreed that the program allowed them to keep students enrolled who were otherwise at risk of dropping out by providing financial support. 182

Some institutions distribute a specific form of emergency grants to help students complete their programs. 183 These completion grants are generally awarded to students in their last year of college to cover expenses when other need-based financial aid or other sources of funds are unavailable or insufficient. They are designed to provide students with some financial cushion to enable them to finish their studies. Some programs also provide these emergency grants to students throughout their education. One example is Georgia State University's Panther Retention Program which provides up to \$2,500 to clear a student's debt each term. An analysis of that program found large and significant positive effects on graduation and reduced time to completion, resulting in reduced debt for students. 184 Other variations of completion grants are emerging in the form of grants given to students earlier in their career and grants provided to students who have dropped out to support them in returning and finishing their degree. Because financial need can serve as a barrier for many students throughout their time in postsecondary education, not just at first enrollment, institutions should consider exploring how aid given at various points during a student's college career can help ensure that students are able to remain enrolled and complete their degrees.

Institutions should consider creating completion and emergency aid programs that are flexible and accessible, with eligibility criteria that account for all students who are often most likely to need aid and the infrastructure to easily and quickly disburse aid. Institutions can work to ensure that all potentially eligible students are aware of the availability of completion and emergency aid programs and that any application processes are not unduly burdensome. This may include clearly communicating the eligibility criteria, application process, and approval and disbursal timelines. Institutions can evaluate existing completion and emergency aid programs to measure impact and outcomes.

¹⁸² U.S. Department of Education, Office of Planning, Evaluation and Policy Development and Office of Postsecondary Education, "Higher Education Emergency Relief Fund: 2021 Annual Performance Report," 2023.

¹⁸³ Association of Public Land-Grant Universities, "Completion Grants: A Practitioner's Guide," 2023.

¹⁸⁴ Rossman, Karon, and Alamuddin, "The Impacts of Emergency Micro-Grants on Student Success: Evaluation Study of Georgia State University's Panther Retention Grant Program," 2022.

Campus Climate and Sense of Belonging

The environment that students experience throughout their higher education career is an important consideration for institutions. Particularly for underrepresented students, campus climate, or the perceptions and feelings students have about a campus environment, can influence enrollment and retention rates by shaping their sense of belonging at an institution. ¹⁸⁵ Research has documented the difference in perception of racial campus climate, with students of color often reporting prejudicial and alienating environments. ¹⁸⁶ College leaders can focus on the student experience and retaining students from underrepresented backgrounds once they have enrolled.

Leadership Responsibilities

Creating a positive campus climate begins with leadership setting a tone of inclusiveness in all aspects of a student's life across the entire campus community, from curriculum to programming to hiring diverse faculty and staff. While the responsibility for campus climate does not belong to one person, college presidents and chancellors play a critical role in building the culture that allows student success strategies to develop and sustain themselves. ¹⁸⁷ Campus leadership can also set policies and practices such as using climate surveys to assess the current perceptions of climate on campus and set goals for improvement. ¹⁸⁸ Without leadership showing a commitment to student belonging, efforts are unlikely to be viewed by the rest of the campus community as a priority – both for students looking for a welcoming place and by faculty and staff who are tasked with implementing initiatives. ¹⁸⁹

The University of Maryland, Baltimore County (UMBC) made intentional efforts to recruit and serve first-generation, low-income, and underserved minority students by taking a holistic approach to creating a campus-wide culture change to make all students feel welcome. These efforts were led by the university president and carried out from the top down. UMBC called for a collective responsibility for student success. Leadership set the tone that students from underrepresented backgrounds should feel welcome in all spaces on campus and all parts of campus life. They reviewed data and information about students, created dialogue through campus-wide focus groups with students, and audited policies and practices that were exclusionary or might impede change. One example of a program that UMBC had implemented is the Meyerhoff Scholars Program, which focuses on highly able students who seek to become leading research scientists and engineers. The program is open to students of all backgrounds and has 13 components, financial aid, a summer bridge program, tutoring, mentors, and more. This program and the broader institutional efforts were centered around the concept of inclusive excellence with the goal of examining inequities to create a lasting, positive change for all students.

¹⁸⁵ Hurtado et al., "Enacting Diverse Learning Environments: Improving the Climate for Racial/Ethnic Diversity in Higher Education," 1999.

¹⁸⁶ Harper and Hurtado, "Nine Themes in Campus Racial Climates and Implications for Institutional Transformation," 2007.

¹⁸⁷ Wyner, "The Role of Presidents, Trustees, and College Leaders in Student Success," 2021.

¹⁸⁸ Elliot and Jones, "Ensuring a More Equitable Future: The Role of Colleges in Educating Students to Become Change Agents," 2021.

¹⁸⁹ Kezar et al., "Shared Equity Leadership: Making Equity Everyone's Work," 2021

¹⁹⁰ Kezar, "Creating a Diverse Student Success Infrastructure," 2019.

¹⁹¹ UMBC Meyerhoff Scholarship Program, "13 Key Components," n.d.

Academic and Curricular Initiatives

Institutions should also consider how their academic offerings and policies advance diversity and foster a sense of belonging among all students. Institutions should both consider implementing new initiatives and re-evaluating existing policies that may inadvertently harm underrepresented students. For example, offering diversity courses, or classes with content and instructional methods that reflect society's diversity such as ethnic studies, gender studies, or diversity general education requirements,, to all students can facilitate positive learning outcomes and equip students to participate in a global society. 192 Conversely, academic achievement restrictions or requirements on entering certain majors could lead to racial stratification by program of study preventing students who did not have access to pre-requisite coursework in their K-12 schooling from pursuing their interest, particularly in high-earning fields. 193 Institutions can consider whether these pre-requisites are indeed indicative of future success in the institution or if they are a barrier to underserved students. Institutions can eliminate unnecessary requirements and provide supportive developmental coursework and programming to ensure all students who show the potential to succeed have access to the same degree opportunities. Leaders at institutions can also invest in training for faculty to improve teaching practices that would allow students to feel a greater sense of belonging, a practice that has evidence of improving overall student outcomes. One analysis showed that providing professional development to faculty targeted at creating more supportive and equitable learning environments was strongly associated with an increase in students reporting globally positive experiences in their learning environments, as well as an increase in academic outcomes and engagement. 194

Extracurricular Initiatives

To fully support a diverse student body, campuses may also decide to invest in programming and activities to support students' sense of belonging, including campus cultural centers, affinity groups, DEI offices, clubs, and other programming that addresses issues relevant to student identity groups.

In August 2023, the Department of Education's Office for Civil Rights released a Dear Colleague Letter (DCL) on Race and School Programming that clarified how institutions can lawfully engage in activities that promote racially inclusive school communities under federal civil rights law. ¹⁹⁵ As stated in the DCL, Title VI of the Civil Rights Act of 1964 does not generally restrict a school from sponsoring or recognizing extracurricular activities and spaces with race-related themes as long as they are open to all students regardless of race. Activities intended to further objectives such as diversity, equity, accessibility, and inclusion are not generally prohibited under federal civil rights law. In fact, these activities and spaces may demonstrate to current and prospective students that the campus has a supportive, welcoming environment.

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¹⁹² Denson, et al., "Do Diversity Courses Improve College Student Outcomes? A Meta-Analysis," 2020; Nelson Laird, Engberg, Hurtado, "Modeling Accentuation Effects: Enrolling in a Diversity Course and the Importance of Social Action Engagement, 2005.

¹⁹³ Bleemer, Davidson, and Mehta, "Restricted Access to Lucrative College Majors Harms Underrepresented Students Most," 2023.

¹⁹⁴ Student Experience Project, "Increasing Equity in College Student Experience: Findings from a National Collaborative," 2022.

¹⁹⁵ U.S. Department of Education Office for Civil Rights, "Race and School Programming," 2023.

Affinity groups, cultural centers, and DEI offices are among the most requested resources by students to create a sense of belonging and welcoming space for students who desire a place where they can be themselves. ¹⁹⁶ These spaces are designed to provide a place for students to explore their full identities, particularly at predominantly white institutions. Students of color may be discouraged from applying to or enrolling in selective institutions if they do not see their identities reflected at the institution.

Institutions should consider how they can create a campus climate where students feel welcome and accepted. These actions may require examining the underlying policies and practices that shape an institution from the leadership level down and putting resources into programs and facilities, such as cultural centers or spaces to host affinity groups, that provide students with spaces to feel safe and included.

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¹⁹⁶ Patton, Culture Centers in Higher Education: Perspectives on Identity, Theory, and Practice, 2010.

Conclusion

This report reviews strategies that institutions can implement to advance diversity in higher education. States can also support the efforts of colleges and universities. Establishing targeted outreach programs, reimagining holistic admissions to give greater emphasis to considerations of adversity and resilience and less to considerations of privilege, increasing investments in need-based aid and in institutions that serve diverse students, and expanding completion and campus climate programming can be part of a comprehensive plan to recruit and retain underrepresented students.

Institutions can analyze their student admissions, enrollment, and success efforts to ensure their admissions framework, targeted outreach strategies, financial aid offerings, campus climate, and institutional policies are aligned with the goal of creating vibrant and diverse college campuses. Policies and practices producing inequitable outcomes can be revisited to ensure all students receive the opportunity to fully benefit from the educational opportunities available to their peers. It is possible that no one strategy alone can fully achieve these goals. As Secretary Miguel Cardona has said, "For higher education to be an engine of equal opportunity, upward mobility, and global competitiveness, we need campus communities that reflect the beautiful diversity of our country." The strategies in this report can enable institutions to advance equal opportunity and the promise of social mobility.

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U.S. Department of Education Office of the Under Secretary

EXHIBIT F

An official website of the United States government Here's how you know

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PRESS RELEASE

U.S. Department of Education Launches "End DEI" Portal

U.S. Department of Education Launches "End DEI" Portal

FEBRUARY 27, 2025

WASHINGTON - Today, the U.S. Department of Education launched EndDEI.Ed.Gov, a public portal for parents, students, teachers, and the broader community to submit reports of discrimination based on race or sex in publicly-funded K-12 schools.

The secure portal allows parents to provide an email address, the name of the student's school or school district, and details of the concerning practices. The Department of Education will use submissions as a guide to identify potential areas for investigation.

"For years, parents have been begging schools to focus on teaching their kids practical skills like reading, writing, and math, instead of pushing critical theory, rogue sex education and divisive ideologies—but their concerns have been brushed off, mocked, or shut down entirely," said Tiffany Justice, Co-Founder of Moms for Liberty. "Parents, now is the time that you share the receipts of the betrayal that has happened in our public schools. This webpage demonstrates that President Trump's Department of Education is putting power back in the hands of parents."



CONTACT

Press Office | press@ed.gov | (202) 401-1576 | Office of Communications and Outreach (OCO)

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Page Last Reviewed: February 27, 2025

Pay for College
Fill out the FAFSA
529 Plans
Loan Forgiveness
1098 Tax Forms
Educational Resources
504 Plans
FERPA
IEPs (Individualized Education Program)
Teaching Resources
Become a Teacher
Professional Resources
School Safety and Security
Teaching Abroad
File a Report
Report Fraud, Waste, or Abuse
Report a Civil Rights Violation
Student Privacy Complaint Forms
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EXHIBIT G

Your email: 50 Character Limit

Schools should be focused on learning.

The U.S. Department of Education is committed to ensuring all students have access to meaningful learning free of divisive ideologies and indoctrination. This submission form is an outlet for students, parents, teachers, and the broader community to report illegal discriminatory practices at institutions of learning. The Department of Education will utilize community submissions to identify potential areas for investigation.

School or s	school district:
50 Character Lim	iit
School or s	school district ZIP Code:
	cribe in as much detail as possible the tory practice taking place:
450 Word Limit	
Words: 0 / 450	

Upload File (Optional):

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https://enddei.ed.gov

Accepted formats: JPG, JPEG, PNG, PDF. Maximum size: 10MB

Choose File No file chosen

Submit

3/19/25. 10:47 AM

The U.S. Department of Education will maintain the confidentiality of these submissions to the fullest extent permitted by law. The information requested on this form, and the associated evidence or documentation that you submit, is collected under Section 102 of the Department of Education Organization Act, 20 U.S.C. 3402; Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, et seq.: Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, et seq.; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, et seq.; Age Discrimination Act of 1975, 42 U.S.C. 6101, et seq.; Title II of the Americans With Disabilities Act, 42 U.S.C. 12131, et seq.; and the Boy Scouts of America Equal Access Act, 20 U.S.C. 7905. The primary purposes for providing the requested information on this form are: (a) to allow for the U.S. Department of Education ("Department") to contact you, as needed, in response to your report of alleged illegal discriminatory practices at institutions of learning; (b) to determine and to document whether there was discrimination against you or others; (c) to strengthen the Federal commitment to ensuring access to equal educational opportunity for every individual; (d) to encourage the increased involvement of the public, parents, and students in Federal education programs; and (e) to increase the accountability of Federal education programs to the President, the Congress, and the public. The information you provide is voluntary. However, failure to provide the requested information, and any requested evidence, may delay an investigation regarding your complaint. The Department may share the information you provide on this form and any additional requested evidence or documentation in accordance with approved routine uses described in the "Complaint Files and Log" (18-08-01) system of records notice (modifications in progress), which is accessible on the Department's systems of records notice website at Privacy Act System of Record Notice Issuances | U.S. Department of Education. Additional information about this system can be found in the Privacy Impact Assessment.



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https://enddei.ed.gov 2/2

EXHIBIT H



UNITED STATES DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS

Frequently Asked Questions About Racial Preferences and Stereotypes Under Title VI of the Civil Rights Act

This frequently asked questions document is intended to anticipate and answer questions that may be raised in response to the <u>Dear Colleague Letter: Title VI of the Civil Rights Act in Light of Students</u> <u>for Fair Admissions v. Harvard</u> issued by the U.S. Department of Education's Office for Civil Rights (OCR)¹ on February 14, 2025. This document seeks to provide helpful information about how the decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023) ("Students v. Harvard" or "SFFA"), applies to racial classifications, racial preferences, and racial stereotypes² as well as how OCR will interpret the ruling in its enforcement of Title VI of the Civil Rights Act of 1964 and its implementing regulations.³

Question 1: Where can I report discriminatory conduct?

Answer 1: Anyone who believes that a school has engaged in discrimination may file a complaint with the Department of Education's Office of Civil Rights. Information about filing a complaint with OCR, including a link to the online complaint form, is available at How to File a Discrimination Complaint with the Office for Civil Rights on the OCR website.

Question 2: What did the U.S. Supreme Court decide in *Students for Fair Admissions v. Harvard*?

<u>Answer 2</u>: The U.S. Supreme Court held that the admissions programs of the University of North Carolina and Harvard College violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and, coextensive with the Equal Protection Clause, Title VI of the Civil Rights Act by considering students' race when making admissions decisions. The Court articulated a broad

¹ OCR is responsible for determining whether entities that receive federal financial assistance from the U.S. Department of Education comply with Title VI of the Civil Rights Act of 1964, which prohibits race, color, or national origin discrimination; Title IX of the Education Amendments of 1972, which prohibits sex discrimination; Section 504 of the Rehabilitation Act of 1973, which prohibits disability discrimination; and the Age Discrimination Act of 1975, which prohibits age discrimination. OCR also shares in the enforcement of Title II of the Americans with Disabilities Act of 1990 (Title II) with the U.S. Department of Justice. Title II prohibits discrimination against individuals with disabilities by public entities, regardless of whether they receive federal financial assistance. Throughout this FAQ, "school" is used generally to refer to recipients of federal financial assistance and public entities, including elementary, secondary, and postsecondary institutions.

² Racial classifications, racial stereotypes, racial preferences, and polices that distinguish among individuals based on race are all forms of discrimination in that they intentionally treat people as members of racial groups, rather than as individuals. For the purpose of this document, these terms refer to policies and conduct that are motivated by racial considerations.

³ The contents of this Q&A document do not have the force and effect of law and do not bind the public or impose new legal requirements; nor do they bind the Department of Education in the exercise of its discretionary enforcement authority. The purpose of this document is to provide clarity about existing law for the benefit of the public.

principle: "Eliminating racial discrimination means eliminating all of it." The Court emphasized that students must be treated based on their experiences as individuals and not based on their race. It declared the admissions programs were unlawful because they employed racial stereotypes, disadvantaged members of particular races, were not sufficiently measurable, and lacked a logical endpoint. 6

Question 3: What did the Supreme Court say about racial preferences in *Students for Fair Admissions v. Harvard*?

Answer 3: While the facts of the case before the Supreme Court were specifically about racial preferences in university admissions, the Court applied broad reasoning to its decision, which has broad implications for race-based policies in education generally. Citing several of its previous rulings, the Court articulated two rules about school policies or programs that use race:

First, a school may never use a student's race as a "stereotype or negative." This means schools cannot assume that a person's race necessarily implies something about that person, including something about that person's perspective, background, experiences, or socioeconomic

The Supreme Court has held that Title VI is "coextensive" with the Equal Protection Clause of the Fourteenth Amendment. In other words, discrimination based on race, color, or national origin by a public institution that violates the Equal Protection Clause of the Fourteenth Amendment also violates Title VI if committed by a private institution that accepts federal funds, and vice versa.

You can find more information about OCR's enforcement of Title VI on the Department's <u>website</u>.

status. It also means that, in any competitive admissions process, and by the same logic any other competitive process for a benefit at an educational institution, a school cannot legally treat membership in any racial group as a plus factor, because a plus factor for one racial group is necessarily a negative factor for those not in that racial group. As the Court stated: "College admissions are zero-sum, and a benefit provided to some applicants but not to others necessarily advantages the former at the expense of the latter."

Second, in quoting an earlier ruling, the Court stated: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Therefore, even when racial classifications or distinctions do not necessarily involve making conscious stereotypes about members of a particular race or placing members of a particular race at a disadvantage in a zero-sum process by treating their race as a

⁴ Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

⁵ *Id.* at 206.

⁶ Students for Fair Admissions, Inc., 600 U.S. 181.

⁷ *Id.* at 218.

⁸ *Id.* at 27.

⁹ Id. at 208 (quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000)).

"negative" consideration, they still raise constitutional concerns under the Fourteenth Amendment, triggering the highest level of judicial review known as "strict scrutiny." ¹⁰

Strict scrutiny is a "daunting" two-part test. ¹¹ First, the racial classification must serve a "compelling government interest." ¹² Second, it must be "narrowly tailored" to achieve that interest. ¹³ Strict scrutiny has famously been described as "strict in theory, fatal in fact" because satisfying both parts of the test is exceedingly difficult. The *SFFA* Court recognized only one interest as sufficiently compelling in the educational context to justify race-based preferences: "remediating specific, identified instances of past discrimination that violated the Constitution or a statute" ¹⁴ committed by the specific educational institution in question. ¹⁵ Finally, to satisfy strict scrutiny, an interest must be "sufficiently measurable to permit judicial review," rather than amorphous, general, or intrinsically unmeasurable. ¹⁶

For these reasons, the asserted compelling interest in "diversity" at issue in *Students v. Harvard* failed strict scrutiny because "the question whether a particular mix of minority students produces 'engaged and productive citizens,' sufficiently 'enhance[s] appreciation, respect, and empathy,' or effectively 'train[s] future leaders' is standardless." ¹⁷ Equally, schools may not grant preferential benefits to members of certain races for the purpose of achieving a student-body composition that mirrors the racial makeup of the country, remedying general societal discrimination, or otherwise rectifying societal injustice. ¹⁸

Even if a racial classification furthers a compelling government interest, it must past the second part of the strict scrutiny test: the method used to achieve the compelling interest must be "narrowly tailored" or "necessary." This requires that, even if a school's goal qualifies as compelling, the school engaged in a "serious, good faith consideration of workable race-neutral alternatives" by which to achieve that goal and found that none were available. In addition, a policy "is not narrowly tailored if it is either overbroad or underinclusive in its use of racial classifications." In *SFFA*, the Court held that the policies were not narrowly tailored because they were overbroad in grouping together all Asian students, underinclusive in not accounting for students from Middle Eastern countries, and arbitrary or undefined in using "Hispanic" to refer to different nationalities that were cobbled together in a classification that changed over time. As a result, race cannot be

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<sup>10</sup> Id. at 206.
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¹¹ *Id*.

¹² *Id*. at 207.

¹³ *Id*.

¹⁴ *I.*

¹⁵ Vitolo v. Guzman, 999 F.3d 353, 361 (6th Cir. 2021) (summarizing the Supreme Court's criteria for satisfying a compelling remedial interest as held in City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) and Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)).

¹⁶ *Id.* at 214 (internal quotations and brackets omitted).

¹⁷ *Id.* at 226-27 (syllabus).

¹⁸ Students for Fair Admissions, Inc., 600 U.S. at 226.

¹⁹ *Id*. at 207.

²⁰ Grutter v. Bollinger, 539 U.S. 306, 339 (2003)

²¹ Vitolo v. Guzman, 999 F.3d 353, 362–63 (6th Cir. 2021) (citing J.A. Croson Co., 488 U.S. at 507–08 and Gratz v. Bollinger, 539 U.S. 244, 273–75 (2003)).

²² Students for Fair Admissions, Inc., 600 U.S. at 207.

used as a proxy for socioeconomic disadvantage. Even if there is a correlation between race and socioeconomic status, there are race-neutral alternatives by which to assess socioeconomic status.

Finally, the *SFFA* Court stated that policies based on racial classifications must be time-bound.²³ Schools may not engage in race-based policies in perpetuity. This means that a school's use of racial preferences, even if narrowly tailored to serve a compelling governmental interest, must come with sunset provisions.

Question 4: What does the Supreme Court's decision regarding the Equal Protection Clause mean for Title VI?

Answer 4: Title VI prohibits recipients of federal funding from discriminating on the basis of race, color, or national origin. In *Students v. Harvard*, the Supreme Court held that Title VI is "coextensive" with the Equal Protection Clause of the Fourteenth Amendment. In other words, discrimination based on race, color, or national origin that violates Title VI necessarily violates the Equal Protection Clause of the Fourteenth Amendment and vice versa. This subjects public institutions, which are directly subject to the Equal Protection Clause, and private institutions that accept federal financial assistance, to the same legal standard. All educational institutions, including pre-K, elementary, and secondary public schools and school districts, and public and private colleges, universities, and other postsecondary institutions that receive federal financial assistance, are required to comply with Title VI.²⁴

Question 5: What did the Supreme Court mean by using a student's race as a stereotype?

Answer 5: In its SFFA decision, the Court referred to race qua race, or "race for race's sake"—that is, the belief that a person's race necessarily implies that an individual has a certain personality trait, viewpoint, characteristic, or value simply by virtue of being a member of that race. That can involve treating members of a racial classification as fungible, assuming that a member of a particular racial classification will think the same way, reflect a particular culture, or contribute to diversity in the same predictable manner as another member of that race. And, as discussed above, racial classifications further risk devolving into unlawful racial stereotypes when they lump students into categories that are overbroad, underinclusive, or arbitrary and undefined.

²³ *Id.* at 212.

²⁴ Title VI provides that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 42 U.S.C. § 2000d, *et seq.*; 34 C.F.R. § 100, *et seq.* Throughout this document, "race" is used generally to refer to all three protected bases, race, color, and national origin.

²⁵ Students for Fair Admissions, Inc., 600 U.S. at 220.

Question 6: What did the Supreme Court mean by using a student's race as a negative?

Answer 6: The SFFA Court meant that when there is a limited number or finite amount of educational benefits or resources—such as, *inter alia*, admissions spots in an incoming class, financial aid, scholarships, prizes, administrative support, or job opportunities—a school may not legally take account of a student's race in distributing those benefits or resources, even if race is only being considered as a positive or plus factor, because to advantage members of one race in a competitive or zero-sum process is necessarily to disadvantage those of a different race. As the Court reasoned: "College admissions are zero-sum, and a benefit provided to some applicants but not to others necessarily advantages the former at the expense of the latter." Likewise, schools may not administer or advertise scholarships, prizes, or other opportunities offered by third parties based on race.

Question 7: Can schools separate students by race if they treat all students equally?

Answer 7: Segregation is illegal. As the Supreme Court held in Brown v. Board of Education, a

school cannot engage in any programming, graduation ceremonies, housing, or any other aspect of school life that allows one race but not another or otherwise separates students, faculty, or staff based on race.²⁷ Intentional segregation or exclusion based on race remains legally indefensible if the programming, graduation ceremonies, housing, or other aspects of campus life are putatively equal or intended for a putatively beneficent purpose: that is simply an updated version of the "separate but equal" rationale of *Plessy v. Ferguson*²⁸ that the Court overruled in *Brown*.

Therefore, school-sponsored or school-endorsed racially segregated aspects of student, academic, and campus life, such as programming, graduation ceremonies, and housing, are legally indefensible under the

Joint DOJ/OCR Guidance on Segregated Proms

OCR has previously issued

guidance explaining how

extracurricular activities,

proms, honors, awards, and

superlatives are inconsistent

racially segregated

with Title VI:

same "separate but equal" rationale that the Court rejected in *Brown*. In other words, these segregationist activities violate Title VI.

Question 8: Are Diversity, Equity, and Inclusion (DEI) programs unlawful under SFFA?

<u>Answer 8</u>: Schools may not discriminate on the basis of race, color, or national origin in their programs or activities. Many schools have advanced discriminatory policies and practices under the banner of "DEI" initiatives. Other schools have sought to veil discriminatory policies with terms like "social-emotional learning" or "culturally responsive" teaching. OCR's assessment of school policies and programs depends on the facts and circumstances of each case.

²⁶ *Id.* at 27.

²⁷ Id. at 204 (citing Brown v. Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., 347 U.S. 483, 494, (1954)).

²⁸ 163 U.S. 537 (1896).

Whether a policy or program violates Title VI does not depend on the use of specific terminology such as "diversity," "equity," or "inclusion." Schools may not operate policies or programs under any name that treat students differently based on race, engage in racial stereotyping, or create hostile environments for students of particular races. For example, schools with programs focused on interests in particular cultures, heritages, and areas of the world would not in and of themselves violate Title VI, assuming they are open to all students regardless of race. Nor would educational, cultural, or historical observances—such as Black History Month, International Holocaust Remembrance Day, or similar events—that celebrate or recognize historical events and contributions, and promote awareness, so long as they do not engage in racial exclusion or discrimination. However, schools must consider whether any school programming discourages members of all races from attending, either by excluding or discouraging students of a particular race or races, or by creating hostile environments based on race for students who do participate.

Question 9: The February 14, 2025, Dear Colleague Letter states that many DEI programs "deny students the ability to participate fully in the life of a school" when they "stigmatize students that belong to particular racial groups" based on "crude racial stereotypes," and teach that students of those racial groups "bear unique moral burdens that others do not." Does this mean that students, teachers, and school employees may not discuss topics related to race or DEI under Title VI?

<u>Answer 9</u>: OCR enforces federal civil rights law consistent with the First Amendment of the U.S. Constitution. Nothing in Title VI, its implementing regulations, or the Dear Colleague Letter requires or authorizes a school to restrict any rights otherwise protected by the First Amendment.

Additionally, the Department of Education Organization Act, 20 U.S.C. § 3403(b), and the Elementary and Secondary Education Act, 20 U.S.C. § 7907(a), prohibit the Department from exercising control over the content of school curricula. However, the First Amendment rights of students, faculty, and staff, and the curricular prerogatives of states and local school agencies do not relieve schools of their Title VI obligations not to create hostile environments through race-based policies and stereotypes; nor does it relieve them of their duty to respond to racial harassment that creates a hostile environment.

In determining whether a racially hostile environment exists, OCR will examine the facts and circumstances of each case, including the nature of the educational institution, the age of the students, and the relationships of the individuals involved. For example, an elementary school that sponsors programming that acts to shame students of a particular race or ethnicity, accuse them of being oppressors in a racial hierarchy, ascribe to them less value as contributors to class discussions because of their race, or deliberately assign them intrinsic guilt based on the actions of their presumed ancestors or relatives in other areas of the world could create a racially hostile environment. But similar themes in a class discussion at a university would be less likely to create a racially hostile environment. In all cases, the facts and circumstances of that discussion will dictate the answer to that inquiry.

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However, the more extreme practices at a university—such as requiring students to participate in privilege walks, segregating them by race for presentations and discussions with guest speakers, pressuring them to participate in protests or take certain positions on racially charged issues, investigating or sanctioning them for dissenting on racially charged issues through DEI or similar university offices, mandating courses, orientation programs, or trainings that are designed to emphasize and focus on racial stereotypes, and assigning them coursework that requires them to identify by race and then complete tasks differentiated by race—are all forms of school-on-student harassment that could create a hostile environment under Title VI.

Moreover, schools must not discriminate against students based on race in how they discipline or sanction students in response to complaints or allegations of harassment, or in response to speech that would be protected under the First Amendment, whether through use of "bias response teams," mandatory trainings, or compelled statements. Nor can schools use race as a reason not to discipline or sanction a student for conduct that would otherwise warrant these corrective measures if applied to members of another race.

For more information about these topics:

OCR, Dear Colleague Letter: First Amendment (July 2003)

OCR, <u>Racial Incidents and Harassment against Students at Educational Institutions:</u> Investigative Guidance (Mar. 1994)

Question 10: As part of their admissions process, may schools include application essay prompts that invite discussions of race?

Answer 10: In *Students v. Harvard*, the Court held that race-based admissions policies that fail strict scrutiny are illegal but added that "nothing prohibits universities from considering an applicant's discussion of how race affected the applicant's life, so long as that discussion is concretely tied to a quality of character or unique ability that the particular applicant can contribute to the university."²⁹ However, the Court cautioned in the same paragraph that schools "may not simply establish through application essays or other means the regime we hold unlawful today[,]" adding that "[w]hat cannot be done directly cannot be done indirectly."³⁰

Schools that craft essay prompts in a way that require applicants to disclose their race are illegally attempting to do indirectly what cannot be done directly, as are admissions policies that hold brief interviews in order to visually assess an applicant's race. It is ultimately racial preferences that are illegal, however accomplished. OCR is aware that certain schools and universities are attempting to circumvent *SFFA*'s holding by engaging in what some commentators call the "essay loophole." Schools can credit what is unique about the individual in overcoming adversity or hardship but never the person's race.

²⁹ Students for Fair Admissions, Inc., 600 U.S. at 230.

³⁰ Id

<u>Question 11</u>: The February 14, 2025, Dear Colleague Letter advises schools to take steps to ensure compliance with Title VI, including by reviewing their policies and by "ceas[ing] all reliance on third-party contractors, clearinghouses, or aggregators that are being used by institutions in an effort to circumvent prohibited uses of race." What is the scope of Title VI coverage as it applies to schools?

<u>Answer 11</u>: Title VI applies to "any program or activity receiving Federal financial assistance from the Department of Education," and a school's responsibility not to discriminate against students applies to the conduct of everyone over whom the school exercises some control, whether through a contract or other arrangement. A school may not engage in racial preferences by laundering those preferences through third parties.

Question 12: How does Title VI apply to a school's procurement of goods and services?

<u>Answer 12</u>: A school that receives federal financial assistance is subject to Title VI's nondiscrimination mandate in how it selects contractors to carry out its many functions. In other words, a school may not discriminate based on race, color, or national origin in choosing its provision of after-school programs, substitute teachers, cafeteria services, and special education service providers.

<u>Question 13</u>: Aside from express racial classifications, the February 14, 2025, Dear Colleague Letter refers to policies that appear neutral on their face but are made with a racially discriminatory purpose. How will OCR investigate allegations of covert discrimination?

Answer 13: To determine whether a school acted with a racially discriminatory purpose, OCR may analyze different types of circumstantial evidence that, taken together, raise an inference of discriminatory intent. A non-exhaustive list may include (1) whether members of a particular race were treated differently than similarly situated students of other races; (2) the historical background or administrative history of the policy or decision; (3) whether there was a departure from normal procedures in making the policy or decision; (4) whether there was a pattern regarding policies or decisions towards members of a particular race; (5) statistics demonstrating a pattern of the policy or decision having a greater impact on members of a particular race; and (6) whether the school was aware of or could foresee the effect of the policy or decision on members of a particular race.³³ A school's history and stated policy of using racial classifications and race-based policies to further DEI objectives, "equity," a racially-oriented vision of social justice, or similar goals will be probative in OCR's analysis of the facts and circumstances of an individual case.

³² The nondiscrimination requirements of Title VI extend to conduct undertaken by entities that carry out some or all of the schools' functions through "contractual or other arrangements." 34 C.F.R. § 100.3(b)(1), (2).

³¹ 34 C.F.R. § 100.1.

³³ See Village of Arlington Heights v. Metro Housing Development Corp., 429 U.S. 252, 266-68 (1977).

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OCR may also apply a three-step test to assess indirect evidence of intentional discrimination.³⁴ First, did a school treat a student or group of students of a particular race differently from a similarly situated student or group of students of other races? Then, if so, can the school provide a legitimate, nondiscriminatory reason for the different treatment that isn't pretextual? Finally, if the school is unable to offer a legitimate, nondiscriminatory reason, or if the offered reason is found to be a pretext or cover for discrimination, OCR will conclude that unlawful discrimination has occurred.

Question 14: How will OCR proceed with schools that it determines are out of compliance with Title VI?

Answer 14: If OCR determines that a school failed to comply with the civil rights laws that it enforces, OCR will contact the school and will attempt to secure its willingness to negotiate a voluntary resolution agreement. If the school agrees to resolve the complaint, OCR and the school will negotiate a written resolution agreement to be signed by the school that describes the specific remedial actions it will take to address the area(s) of noncompliance identified by

You can learn more about OCR's process by reviewing its updated Case Processing Manual:

2025 Case Processing Manual

OCR. OCR will monitor implementation of the resolution agreement's terms. If a school is unwilling to negotiate a resolution agreement, OCR will inform the school of the consequences, which may result in OCR initiating enforcement through administrative proceedings or referring the case to the Department of Justice for judicial proceedings.

Question 15: Where can I learn more about this topic?

<u>Answer 15</u>: To learn more, you can visit <u>OCR's website</u> or contact the OCR regional enforcement office serving your area, by phone or email, to request technical assistance about the laws OCR enforces and about OCR's complaint process. You can find contact information for local OCR regional offices on OCR's <u>Contact OCR</u> website.

February 28, 2025

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³⁴ See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

EXHIBIT I

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

NATIONAL EDUCATIONAL
ASSOCIATION, et al.,

Plaintiffs,

Case No. 1:25-cv-00091-LM

V.

UNITED STATES DEPARTMENT OF EDUCATION, et al.,

Defendants.

DECLARATION OF MEMBER A

- I, pursuant to 28 U.S.C. § 1746, depose and say as follows:
- 1. I am NEA Member A as identified in the Complaint.
- 2. I am a high school English teacher at High School in High School in New Hampshire. I teach Advanced Placement ("AP") English Literature and Composition ("AP English"), Honors Senior English, and Grade 9 English. I have been teaching for 24 years.
 - 3. I am a member of NEA-NH and the Education Association.
- 4. I am offering this Declaration in my individual capacity and not on behalf of the District that employs me.
- 5. I have been directly impacted and harmed by the Dear Colleague Letter, the subsequent FAQs, and the "End DEI" complaint portal (together, the "Letter"), as I have experienced and will continue to experience significant chill and confusion regarding my teaching practices for fear that it might violate the Letter's prohibitions.
- 6. In particular, I fear that my teaching will be considered discrimination because of the ways my courses explore themes and permit discussion of "systemic and structural racism," "discriminatory policies and practices," or gender roles—concepts which are explicitly or potentially implicated by the Letter's prohibitions, including in the Letter's prohibitions on "diversity," "equity," and "inclusion," and on teaching "that certain racial groups bear unique moral burdens that others do not." I fear that I may be subjected to complaints, investigation, discipline, or adverse employment action as a result of my teaching.

- 7.
- . The district court declared that the Banned Concepts Act was unconstitutional,² but I am now facing similar apprehensions in response to the Dear Colleague Letter.
- 8. I am particularly concerned with the Department of Education's invocation of Moms for Liberty in the press release of the "End DEI" complaint portal, as Moms for Liberty is the group that offered a bounty in New Hampshire for complaints against teachers when the Banned Concepts Act was in effect. It is clear that a witch hunt against teachers is ensuing. If such a complaint were lodged, even if meritless, my reputation would be harmed by the allegations themselves.
- 9. As an AP English teacher, my course is designed to prepare students for college level courses and also the AP Exam, which focuses on reading, analyzing, and writing about imaginative literature, poetry, and drama. As they read, students consider a work's structure, style, and themes, as well as its use of figurative language, including imagery and symbolism. Writing assignments include expository, analytical, and argumentative essays that require students to analyze and interpret literary works.
- 10. AP English teachers select literary works that require students to read and evaluate complex text by identifying, analyzing, and applying those aforementioned literary devices, as well as a plethora of other literary elements. The AP exam does not require students to have read any specific texts, but certain literary texts are often present on the exam.

<u>Implications on my ability to teach literature involving themes</u> of race, racism, or racial stereotypes

- 11. In recent years I have assigned Joseph Conrad's *Heart of Darkness*. This is a well-known literary work which often shows up on the AP exam. It has been equally criticized and celebrated for its depiction of race and 19th Century European imperialism. It remains a staple of AP and college English courses not only in the United States but across Europe.
- 12. Heart of Darkness may not feel particularly relevant to students in 2025. Students often say things along the lines of "This book is boring, what does it have to do with me?" So I typically

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² Loc. 8027 v. Edelblut, No. 21-CV-1077-PB, 2024 WL 2722254, at *18 (D.N.H. May 28, 2024).

ask students to draw on things they have seen in the news, popular culture, or their own experiences and use these frameworks to inform their analysis of the text. I do this because the state certification standards require me to teach students how to talk about experiences (both their own and others), understand different cultures and experiences other than their own, and critically examine the information they receive in the media every day.³ I also do this because this is what gets students to listen and become inspired and engaged—we're competing against TikTok for student's attention, and they are a lot less likely to engage in the curriculum if you do not make it relevant to their lives. However, in light of the "Dear Colleague Letter," I am concerned about doing that now.

13. Along with *Heart of Darkness*, which is the anchor text featured in a unit on imperialism, I also teach the 1899 poem by Rudyard Kipling entitled "The White Man's Burden." This poem reflects and reinforces 19th Century notions of imperialism, specifically as it pertains to a racial hierarchy—with the Caucasian race firmly seated atop the hierarchy, and therefore promotes and expresses a White supremacist ideology. As such, the poem is a reflection of a virulent strain of racist ideology, not only alive at the time in which Conrad's novella was first published, but also arguably manifest in the culture in which students are reading the text.

14. Further, a technique I might have incorporated in the past during the *Heart of Darkness* unit, and with respect to "The White Man's Burden" as well, is to ask students to identify and analyze contemporary forms of imperialism, colonialism, and/or racism. However, in light of the Dear Colleague Letter, I am no longer comfortable asking students to freely identify instances of racism or colonialism, or the movements opposing those ideologies, in contemporary society for fear that it will be perceived that I am engaging in discrimination by permitting discussion about racism or racial stereotypes in the United States.

15. Further, the FAQs specifically highlight the concept of "being oppressors in a racial hierarchy" as something that might create a "racially hostile environment," a term that the FAQs only vaguely describe. FAQ at 6. While I certainly do not accuse anyone of any race of being

³ For example, under New Hampshire regulations for certification of educational personnel, Ed 507.24, English Language Arts Teachers for Grades 5-12 are required to:

^{• &}quot;Provide an environment in which students develop and support critical insights in response to literature"

^{• &}quot;Guide students to read, discuss, and write about literature through various critical lenses such as but not limited to gender, religion, ethnicity, or socio-economic conditions as appropriate"

^{• &}quot;Provide opportunities for students to practice different forms of classroom discourse, including formal and informal conversations and presentations"

^{• &}quot;Guide students to listen critically and speak purposefully and articulately"

oppressors in a racial hierarchy, discussion of *Heart of Darkness* and "The White Man's Burden" necessarily requires discussion of the fact that European imperialism was in part based on the idea of racial hierarchy. I am now concerned that discussing this fact could result in me being accused of creating a racially hostile environment.

- 16. I have the same concerns with other classic books I assign. *Beloved* by Toni Morrison is a fictional account of an African American woman's experience as an enslaved person and her life afterward. The theme of the book is how the destructive legacy of slavery impacts this character. *To Kill a Mockingbird* by Harper Lee explores themes of racial injustice, morality, and empathy through the eyes of a young girl, Scout Finch, in the segregated South during the 1930s as her father, Atticus Finch, a public defender, defends a Black man falsely accused of raping a white woman.
- 17. Prior to the Letter, a technique I would use while assigning *Beloved* would be to ask students to identify whether the legacy of slavery is evident in the modern world and if they could connect any of the characters' stories to their own experiences or observations. When assigning *To Kill a Mockingbird*, I might ask students to research the case of Emmett Till and ask them why they think the suspects were acquitted, and how it might or might not be similar in this fashion to the case of Tom Robinson in *Mockingbird*.
- 18. Given the Letter's restrictions, I feel less comfortable placing these books in a contemporary framework and asking students, for example, if they think the Black Lives Matter movement could be considered a result of the destructive legacy of slavery, or asking, "does the legacy of slavery continue and if so, how?" The Letter keeps me from engaging in that discussion because I know it could easily be misunderstood as me "indoctrinating" students to concepts of racism and racial stereotypes in a way that the Letter suggests constitutes illegal discrimination.

Implications on my ability to teach literature involving themes of gender roles

19. During my tenure as a high school English teacher, I have regularly assigned classic and contemporary texts that explore the concept of gender such as in Jane Austen's *Pride and Prejudice*, Margaret Atwood's *Alias Grace*, and a myriad of other works by notable authors including, but certainly not limited to, Shakespeare, Shelley, Bronte, Salinger, and Vonnegut. For example, gender roles and gender discrimination are very common themes in these works. Again, to make these works relevant and engaging for students, I often ask them to juxtapose

contemporary issues in the media to the way that gender is portrayed in the novel. Indeed, these are all texts gleaned from the Western cannon of literature and are regarded as, in the language of the AP, "works of great literary merit." Subsequently, these works commonly appear on the AP Literature and Composition exam and, moreover, are staples of high school English classes wherein—contrary to any belief that students are being indoctrinated with specific political ideologies—critical and independent thinking is promoted and allowed to flourish. This critical thinking promotes the democratic principles enshrined in our Constitution, where our students are given the tools to become fully-informed participants of our society.

20. Because the Letter refers to "toxic[] indoctrinat[ion]" and DEI programs generally, which could be read to incorporate this administration's idea of "gender ideology," I fear that any discussion of gender discrimination and gender roles could result in me being accused of "indoctrinating" students in a way that the Letter suggests constitutes illegal discrimination.

Implications on my ability to teach in a way that is responsive to students' interests and individuality

- 21. In my AP English course, I sometimes have assignments wherein students can identify a theme in a work we are studying and write an essay that stakes a claim and provides evidence to support that claim. Students have freedom to choose the theme they want to address in their essays, and students in the past have brought in themes of race or gender, particularly when those themes are central to their identity or life. The Letter appears to be aimed at eliminating conversations around race, diversity, or discrimination generally, so I fear that permitting students to write about these themes, even when they have chosen the theme themselves, could subject me to negative consequences.
- 22. This means my hands are tied. If I permit students to pursue an individualized education that is engaging and relevant to them, I risk complaints, discipline, or losing my job.
- 23. Further, the FAQs concerningly call out "social-emotional learning" and "culturally responsive" teaching as efforts that "veil discriminatory policies," without providing any proof. FAQ at 5. Social-emotional learning is taught by my district and state as a best practice for teaching, and I incorporate it in my lessons. For example, I recently had students complete a group project on beauty standards where they created a collage and wrote a reflective piece as related to

the theme of healthy vs. unhealthy beauty standards. This practice falls under "social-emotional learning" but certainly does not mask any type of discriminatory policy. And yet I now will have to worry that incorporating a lesson of this nature could subject me to accusations of veiled discrimination.

<u>Fear of potential consequences,</u> <u>such as complaints, discipline, or adverse employment action</u>

- 24. Our students need to learn critical thinking skills such as taking in material, analyzing it, finding their own conclusions, and then formulating and defending an argument based on their conclusions. I don't tell my students what to think, because that is not teaching. I hope they will formulate their own arguments and draw their own conclusions. I fear my students are losing valuable analytical training and will be ill-prepared at the college level if they cannot practice generating their own opinions on challenging works from our past and connecting them to their world today.
- 25. But in the wake of the Letter, my job is more challenging because I am concerned a complaint will be made to the Department of Education that I have attempted to indoctrinate my students to the notion that white people are inherently racist, men are inherently sexist, or "that certain racial groups bear unique moral burdens that others do not." I do not believe this to be true in the least, but the Letter is written so that any contemporary investigation of race, gender, or any form of diversity, equity, and inclusion, invites a claim that my lessons amount to discrimination.
- 26. I have found that the Letter is particularly limiting because it invites any parent or student to file a complaint based on its broad and confusing prohibitions. Parents and students often misunderstand instruction techniques, such as using the Socratic method, playing devil's advocate, or seemingly agreeing or disagreeing with a student in order to draw out analytical thinking. Because the Letter characterizes teaching about race, diversity, equity, and inclusion as discriminatory, it means a parent or anyone else could easily misunderstand a classroom exercise, or ignore the context of a particular statement, and file a complaint based on their perception of what I have said, or what students have said in class discussions based on the materials I teach. Since any new book I want to use would need to be approved by the

, comprised of teachers, administrator, and

open to parents, citizens, and students,⁴ my teaching is under particular scrutiny, subjecting me to heightened risk of complaints or discipline.

27. This also means it would be quite burdensome for me to revise my curriculum. To revise my curriculum, I would have to consult with the other English teachers at my school, seek approval for changes from the curriculum director at the school, and then also seek Committee approval. This is typically done over the summer prior to the school year starting. Doing so during the school year would be akin to fixing a plane while flying, which would take a toll on me as an instructor and also the students because I could not be the best instructor possible if forced to modify my curriculum on short notice. Students preparing for the AP Exam would be most affected, as it would be difficult to modify the curriculum quickly enough to cover all the necessary components that the AP Exam tests.

28. I wish to have personally identifiable information concerning this declaration not made public. Given the climate we are currently in with educators constantly being under attack, I fear that, if my name were to become public in a lawsuit challenging the President's education policies, I could be harassed or experience unwarranted employment consequences.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 20 day of March, 2025.

EXHIBIT J

DECLARATION OF VALERIE WOLFSON

- I, Valerie Wolfson, pursuant to 28 U.S.C. § 1746, depose and say as follows:
- 1. I am NEA Member B as identified in the Complaint.
- 2. I am an 8th Grade Social Studies teacher at Oyster River Middle School in Durham, New Hampshire. I have been teaching for 26 years.
 - 3. I am a member of NEA-NH and the Oyster River Teacher's Guild.
- 4. I am offering this Declaration in my individual capacity and not on behalf of the District that employs me.
- 5. I have been directly impacted and harmed by the Dear Colleague Letter (the "Letter") as I have experienced significant chill and confusion regarding my teaching practices for fear that it might violate the Letter's prohibitions.
- 6. In particular, I fear that my teaching will be considered discrimination because of the ways my courses explore themes and permit discussion of "systemic and structural racism," "discriminatory policies and practices," or gender roles, concepts which are explicitly or potentially implicated by the Letter's prohibitions, including in the Letter's prohibitions on "diversity," "equity," and "inclusion," and on teaching "that certain racial groups bear unique moral burdens that others do not." I fear that I may be subjected to complaints, investigation, discipline, or adverse employment action as a result of my teaching.
- 7. The February 28, 2025 FAQ only adds to the uncertainty, as it makes vague references to "creating hostile environments" and suggests that educational institutions are seeking out "loopholes," "laundering" racial preferences, and engaging in "covert discrimination." The FAQ thus invites distrust in the ethics and professionalism of schools and educators, compounding the risk of complaints invited by the Letter.
- 8. I expressed similar fears as a public advocate¹ against New Hampshire's Banned Concepts Act, which purported to ban education around similar concepts. A court declared that the Banned Concepts Act was unconstitutional, but I am now facing similar fears in response to the Dear Colleague Letter.

1

¹ See, e.g., Opinion: The culture wars have come to the classroom. Now what?, CNN, Nov. 3, 2022, https://perma.cc/S79G-2LE2; Haley Yamada, Teachers in New Hampshire face new legal threats for teaching so-called 'divisive concepts' on race: "It's psychological warfare," ABC NEWS, Nov. 16, 2021, https://perma.cc/73CR-RVAT.

- 9. My role as a social studies teacher is to provide as complete and well-rounded of a history education as possible. I am passionate about education for everyone and have committed myself to continued learning and growth, regularly updating my pedagogical practices and curriculum to ensure that students are engaged in learning history. This often involves having complex conversations with students of varying backgrounds and opinions. My students disagree with each other during discussions and may at times feel challenged and uncomfortable when confronting aspects of U.S. history, but this is all necessary to developing students' sense of critical thinking and logic—not indoctrination or political intention.
- 10. To be successful in this endeavor, I must create a foundation of trust, joy, understanding, respectful discourse, care, and acceptance in my classroom. Being inclusive in my approach to education brings in multiple voices that create a robust learning environment. My fellow teachers and I are being accused of indoctrination when in fact we approach the profession with only love, kindness, and compassion. In no sense are we discriminating against students or teaching that any group is inferior or superior, but the Letter opens the door to accusing us of doing so, putting our certifications and jobs at risk.

<u>Implications on my ability to teach history involving references to race, ethnicity, racism, or racial stereotypes</u>

- 11. Until recently, I taught early American history beginning with the founding of the United States of America. I structured my curriculum to teach this history from three perspectives: the Indigenous perspective, the European perspective, and the African perspective. Objectively, there is history students should learn about each of these groups. That history requires acknowledgement and discussion of the concepts of race, genocide, slavery, and colonialism—it is impossible to accurately teach this portion of history without reference to those concepts.
- 12. In teaching this history, I do not tell students what to believe or how to feel about history. I also do not tell them that any group is inherently inferior or superior to another group or that anyone should feel any guilt or shame because of their race, ethnicity, or national origin. Rather, I present resources and create space for discussions, questions, and further research around topics that students are passionate about and align with best teaching practices, including focusing on skill development and broad themes as a vehicle for critical thinking rather than specific topics

and require me to present multiple sides of an issue, promote discussion, and develop students' critical thinking.

- 13. However, I fear that these lessons would leave me vulnerable to accusations of discrimination under the Letter's interpretation of what constitutes discrimination since these lessons could lead to discussions around "systemic and structural racism" or "discriminatory policies and practices," which the Letter takes issue with. Such accusations could threaten my certification and my job.
- 14. In the past two years, I have shifted my curriculum forward in time to focus on the time period from the Civil War to the modern era to ensure that I include sufficient instruction on genocide and antisemitism as required by RSA § 189:11(I-c(j)), a New Hampshire law that went into effect before the 2023–24 school year. I fear that it is not possible to teach about the Holocaust or other examples of antisemitism without reference to concepts like white privilege or racial oppression which might open me up to accusations of discrimination under the Letter.
- 15. This curriculum also includes the history of the Reconstruction era. In this unit, I include lessons on Juneteenth, the Civil Rights Act of 1866, and the Fourteenth and Fifteenth Amendments, leading up to the Black Codes, the founding of the KKK, the Jim Crow Era, and the Compromise of 1877, among other historical events. All of this history is directly tied to concepts of race, racism, and slavery, and I do not know how I could discuss them without creating a risk of being accused of presenting a narrative of the United States as racist.
- 16. I also now worry about having to change how I teach incidents like the Tulsa race massacre of 1921, in which white residents of Oklahoma attacked Black businesses and homes, destroying a wealthy Black community known as "Black Wall Street." I discuss the Tulsa massacre to, among other reasons, help students understand the idea of generational wealth, its connections to slavery and race, and its impact on today's economy, not at all to inculcate feelings of shame, superiority, or inferiority. However, I fear this lesson leaves me vulnerable to accusation of discrimination under the Letter because of the Letter's vague and expansive theory of what constitutes illegal discrimination.
- 17. Given the Letter's restrictions and reporting mechanism, I feel as if I am being held hostage to students and parents' feelings and vague conceptions of discrimination and DEI. I would be risking my career to continue to teach these topics in the manner that I have. I have met

and advocated alongside teachers that have lost their jobs for far less in other states that have attempted to impose curriculum censorship.

Implications on my ability to teach history involving reference to gender roles or LGBTQ history

- 18. Class time is limited, and it is impossible to cover all aspects of history over the course of a year. For this reason, I encourage and permit students to pursue "passion projects" wherein they research, create a project outcome of their choosing, and present to their classmates an aspect of history that I haven't covered in my syllabus. These projects are often where students are most engaged in their learning, since it often links history to their personal lives and modern times. I have had many students work on projects related to feminism and the question of how one's identity is impacted by one's sex. I have also had many students research LGBTQ history. Gender roles and sex discrimination are very common themes in these projects.
- 19. Because the Letter refers to "toxic[] indoctrinat[ion]" and DEI programs generally, which could be read to incorporate this administration's idea of "gender ideology," I fear that any discussion of gender discrimination and gender roles could result in me being accused of "indoctrinating" students in a way that the Letter suggests constitutes illegal discrimination.

Implications on my ability to respond to student questions and provide culturally responsive teaching

- 20. In my courses, particularly when learning about the Civil War and slavery, past students have asked out loud "why were we so racist back then?" In response, I always note that no one in the room is personally responsible for any aspect of history, but that the lessons of the past help us understand where we came from so that we can better understand today. However, I understand that even responding to this question, which is inflammatory, creates a risk for me.
- 21. I have always been committed to respectfully answering students' questions to encourage their continued curiosity and engagement. I sometimes provide neutral academic resources to unpack difficult concepts further without imposing any particular viewpoint. But the truth is that slavery is difficult for a 13- or 14-year-old to understand, and they have emotions and questions

around the issue. It is my responsibility to help them think through difficult questions and critically examine their thoughts and the arguments of others, which I can't do without fear of being accused of indoctrination.

- 22. This is a particular issue because it is common for students to misrepresent what happens in the classroom. For example, a student might go home at the end of the day and say that I presented a particular conclusion that they did not agree with when really it may have been a peer that said something they disagreed with and all I did was facilitate a discussion to help students think critically, without affirmatively stating any position for or against whatever is being discussed. This reality puts me at great risk under the Letter's interpretation of discrimination.
- 23. Further, I am concerned about the Letter and subsequent FAQ's labeling of effective and important practices like social-emotional learning and culturally responsive teaching as "veil[ed] discriminatory policies." In my school, if I have a student who is fasting for Ramadan when a test is scheduled, that student can reschedule their exam as a matter of "culturally responsive teaching" with the goal of building relationships, appreciation for other cultures, sensitivity, and inclusion—quite the opposite of discrimination. Similarly, we teach social-emotional learning to help students solve problems, identify conflicts, manage stress, and build resilience. Now we are vulnerable to accusations that these important lessons might be disguising discriminatory motives.

Fear of potential consequences, such as complaints, discipline, or adverse employment action

- 24. When the government threatens to censor teachers and their curriculum, it hurts students the most by removing tools from a teacher's toolbelt that help us develop students into informed, compassionate scholars. And of course, the threat I face of investigation, discipline, or adverse employment action is existential to my career.
- 25. Whereas in the past, if a parent or student had a concern about a particular topic I was teaching, they would come directly to me and my school to discuss their concerns and potential solutions, the Letter now gives an opportunity for anyone to allege that I am illegally

discriminating under the Letter's vague conception of discrimination in a way that threatens to destroy my livelihood.

26. I put my heart into my lesson plans. It takes a lot of time to create a cohesive narrative, find sources, and organize a syllabus, which is done in collaboration with colleagues and with the approval of my assistant superintendent. I even meet with students before they take my class to let them know what they will be learning about. Students often get excited to learn particular topics from me. I fear that any changes I would have to make would be extremely disruptive to not only my time but also to students, who look forward to learning and expect cohesive, organized lessons. The quality of my teaching would suffer if I had to suddenly change plans, for example by having to skip essential topics to accommodate a sudden change, ultimately impacting the students' educational experience.

27. English language learner students and students with disabilities would suffer the most, as it is difficult to quickly pivot to inform the English Language Learner ("ELL") teacher of alternate lesson plans, or to find accessible resources for students with disabilities and work with the special education teacher to support students with disabilities.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 3rd day of March, 2025.

Valerie Wolfson

EXHIBIT K

DECLARATION OF SARAH GAHM

- I, Sarah Gahm, pursuant to 28 U.S.C. § 1746, depose and say as follows:
- 1. I am NEA Member C as identified in the Complaint.
- 2. I am a middle school counselor at Oyster River Middle School in Durham, New Hampshire. I have been teaching for 7 years.
 - 3. I am a member of NEA-NH and the Oyster River Teacher's Guild.
- 4. I am offering this Declaration in my individual capacity and not on behalf of the District that employs me.
- 5. I have been directly impacted and harmed by the Dear Colleague Letter (the "Letter") as I have experienced significant chill and confusion regarding my teaching practices for fear that it might violate the Letter's prohibitions.
- 6. In particular, I fear that my teaching will be considered discrimination because of the ways my curriculum, both in an advisory capacity and during "SEL (social-emotional learning) takeover" sessions, and work as a counselor requires me to discuss issues related to "systemic and structural racism" and "discriminatory policies and practices," concepts which are explicitly implicated by the Letter's prohibitions, including in the Letter's prohibitions on "diversity," "equity," and "inclusion," and on teaching "that certain racial groups bear unique moral burdens that others do not." I fear that I may be subjected to complaints, investigation, discipline, or adverse employment action as a result of my teaching.
- 7. My role as a counselor is to prepare students to be successful learners and members of our society. This requires that students have a well-developed sense of self and an honest and accurate understanding of the broader world and how their actions and the actions of others might be received. I worry that the Letter's broad conception of discrimination actually presents a biased and censored view of reality by prohibiting accurate instruction, which ultimately will hurt students by not giving them knowledge and tools they need.
- 8. For example, a common topic of conversation with middle schoolers is hurtful language. There have been instances where students use the word "monkey" to describe a student of color. It is my job to educate students on the history and racist connotations of the word "monkey" as a slur for people of color to teach students why that term is hurtful to others.

- 9. As another example, in my advisory curriculum, I provide instruction on social-emotional learning. I have facilitated classroom and advisory lessons on hurtful language, identity, gender inclusivity, developing empathy, understanding bullying, and diversity. The hurtful language lessons focus on understanding the power of words and where they come from, including language specific to marginalized groups of people. Lessons on identity focus on increasing a deeper level of self-awareness of the characteristics individuals have, and who they are and want to be. The gender inclusivity lesson focuses on stereotypes, where they come from, and how to challenge them. The developing empathy lessons focus on building natural empathy by actively imagining the feelings of others and exploring why it is important to do so. Students identify and discuss other students' emotions and imagine how people in different situations may feel. Understanding bullying lessons focus on understanding what bullying is, how it impacts individuals, and their community. Lessons about diversity focus on fostering the students' capacity to understand and appreciate diversity. The students explore how they are similar to and different from one another, how diversity helps the community, and how to be respectful of others' differences. The goal of these lessons is to foster students with the social and emotional competencies they need to feel successful as learners and citizens of their communities.
- 10. I approach these conversations with sensitivity to all students involved and always aim not to cast blame or shame on anyone. My goal is to educate students to help them make their own decisions, not to indoctrinate. However, I worry that broaching conversations like this at all will put me at risk of complaints that I am engaging in illegal "toxic[] indoctrinat[ion]," DEI, or stigmatizing of students based on racial stereotypes. I am particularly worried given the FAQ regarding the Letter, which specifically identifies social-emotional learning as a practice that "veil[s] discriminatory policies." Beyond impacting my ability to engage in effective teaching practices and prepare students to understand the world, such complaints could subject me to investigation, discipline, or impact my job.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this day of March, 2025.

EXHIBIT L

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

NATIONAL EDUCATION ASSOCIATION;

Case No.: 1:25-cv-00091

et. al.,

Plaintiffs,

v.

DECLARATION OF MEMBER D IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

UNITED STATES DEPARTMENT OF EDUCATION;

et al.,

Defendants.

DECLARATION OF MEMBER D IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

- I, Member D, hereby declare that
- 1. My name is Member D. I am over the age of 18 years. I have personal knowledge of the following facts and if called to testify could and would competently do so.
- 2. I currently serve as an Assistant Professor without tenure at a university in the southwest United States, which receives federal funding.
- 3. I am a member of the National Education Association.

- 4. I received a BA and MA in English, and I am a Ph.D Candidate in Composition and Applied Linguistics.
- 5. I have 14 years of professional experience in higher education, including teaching at several community colleges and universities. I joined my current university in 2024.
- 6. My coursework and research center on Indigenous research and narrative inquiry, the latter of which is a research method that involves discussing how researchers and others think narratively about their life experiences of learning at the intersection of Indigenous and Western knowledge frameworks. I teach courses in first and second year composition. My teaching has included the topics of settlerism and colonialism. I also taught La Llorona and spoke about it as a metaphor for Maliche, Mexican colonialism, feminist power and representation. I also have a course that won a teaching award from my graduate school about Indigenous identity, activism, and storytelling.
- 7. I am aware that the U.S. Department of Education issued a Dear Colleague letter on February 14, 2025, which threatens investigation and enforcement of civil rights laws based on teaching and scholarship related to diversity, equity and inclusion.
- Since February 14, 2025, I have self-censored some topics in the courses I teach, including feminist theory and Indigenous worldviews.
- 9. I continue to fear that teaching content related to race, diversity, equity and inclusion will have negative impacts on my career and limit conversations in class thus impede student growth and understanding of alternative perspectives.
- 10. I am worried that a student in my classes, or anyone who might hear about my classes or my scholarship might report me for violating the Dear Colleague Letter's prohibitions on DEI programming. For example, my teaching and scholarship focuses on Indigenous

narratives and identity. I believe that all students can learn and engage in this subject matter and I have students form many backgrounds in my courses. However, I worry that someone could view this as an impermissible preference for a certain racial group. I teach about topics of colonialism and settlerism where white European settlers oppressed Native peoples. I worry that students could perceive this to teach that "certain racial groups bear unique moral burdens," or draw this conclusion on their own behalf.

- 11. Teaching about this history, we also discuss how certain government systems and structures were used to advance racism against Indigenous people and cultures. I worry that this could be construed as impermissibly teaching about systemic or structural racism.
- 12. Students in my courses often bring into their written assignments and classroom discussions their own personal experiences with race, diversity, equity, or inclusion. Under the Dear Colleague Letter's prohibitions, I am not sure whether I should continue encouraging my students to engage with the material in my class through written assignments that invite this discussion or can give credit to student assignments that address their own experiences and viewpoints related to race, diversity, equity and inclusion. I am not sure how I can respond to questions or classroom discussions that touch on these issues.
- 13. For these reasons, I have been chilled in my speech on a topic of critical importance and changed my courses and altered my research pursuits to the detriment of me and my students.
- 14. My students no longer have the chance to learn about certain aspects of diversity, equity and inclusion or hear their classmates' viewpoints, to understand the sheer breadth of possible arguments related to diversity, equity and inclusion, and to learn to respectfully debate this subject with their peers. My syllabus states that a peaceful world begins with

positive personal interactions. I am committed to hearing all my students' voices. I am concerned that this commitment will become illegal. I am worried that I will need to substantially revise my syllabus, course materials, and approaches to teaching, which will take significant time and resources.

- 15. The Dear Colleague letter has impacted me outside the classroom as well, including my research focusing on the Mescalero Apache through a TribalCrit, narrative inquiry and feminist lens. I worry that someone will file a complaint against me and that I could face investigation and my school risk the loss of federal funds, based on an allegation that my teaching constitutes "indoctrination" related to systemic or structural racism. I am worried that I may not be able to continue this scholarship, or that if I do, I will lose opportunities for advancement within my university and my field.
- 16. The Dear Colleague letter and the Department of Education's related guidance should not be permitted to stifle my academic speech related to diversity, equity and inclusion. As long as the letter is effective, I will be unable to fully perform my role as an educator and speak freely on these important topics.
- 17. I am submitting this declaration anonymously because I fear retaliation from my employer as well as harassment and threats from members of the public for challenging the policies of the Trump administration restricting teaching and discussion that deals with issues of race and gender.

I declare under penalty of perjury that the above is true and correct.

Executed this $\[\underline{\ }\]$ day of March, 2025.



EXHIBIT M

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

NATIONAL EDUCATION ASSOCIATION;

Case No.: 1:25-cv-00091-LM

et al.,

Plaintiffs,

v.

DECLARATION OF NADIA BEHIZADEH IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

UNITED STATES DEPARTMENT OF EDUCATION;

et al.,

Defendants.

DECLARATION OF NADIA BEHIZADEH IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

- I, Nadia Behizadeh, hereby declare that
- 1. My name is Nadia Behizadeh. I am over the age of 18 years. I have personal knowledge of the following facts and if called to testify could and would competently do so.
- 2. I am offering this Declaration in my individual capacity and not on behalf of the institution that employs me.
- 3. I currently serve as a Full Professor with tenure at Georgia State University, which receives federal funding. I am an NEA member.

- 4. I received a bachelor's degree in English from the University of Georgia in 2002, a master's degree in Educational Studies from Emory University in 2011, and a Ph.D. in Educational Studies from Emory University in 2012.
- 5. I have more than 12 years of professional experience in higher education. In 2012, I joined the faculty at Georgia State University as an Assistant Professor in the Department of Middle and Secondary Education in the College of Education and Human Development. In 2018, I was promoted to Associate Professor, and in 2024, I was promoted to Full Professor.
- 6. My coursework and research center on social justice teacher education. I teach courses on English language arts methods to preservice teachers (undergraduates) and also research courses for doctoral students in the Ed. D. and Ph.D. programs. My research focuses on writing instruction, critical pedagogy, English language arts ("ELA"), ELA classrooms, and teachers as policy advocates.
- 7. I have authored more than 50 publications including Behizadeh, N. (2017), Reframing for Social Justice: The Influence of Critical Friendship Groups on Preservice Teachers' Reflective Practice, *Journal of Teacher Education*, and Behizadeh, N. (2023). Complexities in social justice teacher preparation: A CHAT analysis of a preservice teacher navigating university and school contexts. *Teaching and Teacher Education*.
- 8. I am aware that the U.S. Department of Education issued a Dear Colleague Letter on February 14, 2025, which threatens colleges with investigations and the loss of federal funding based on teaching and scholarship related to diversity, equity and inclusion.
- 9. My scholarship and teaching include themes related to social justice. I also teach and write about issues of systemic and structural racism, for example critiquing White hegemonic narratives taught in schools and pushing for teacher preparation programs to be more

responsive to the assets and experiences of preservice teachers of color (e.g., Behizadeh, Davis, & Williams, 2023). I teach about equity and inclusion, for example the importance of including LGBTQIA+ literature and experiences in ELA curricula (e.g., Behizadeh & Rabalais, 2024). I worry that a student or anyone else could perceive my scholarship and classroom instruction to teach that people of some races or gender/sexuality carry a moral burden that others do not in violation of the Dear Colleague Letter.

- 10. I am concerned that the Dear Colleague Letter will affect student expression in the courses I teach. For example, students may feel like they cannot discuss their own or others' experiences with ableism, racism, sexism, and other forms of discrimination because of a perceived ban on discussing topics related to diversity and equity.
- 11. I am concerned that the Dear Colleague Letter will affect the methods of student assessment that I use in my courses. For example, I ask preservice teachers to develop a critical literacy unit plan that they could use in a middle school classroom. Because critical literacy involves analyzing power and representation in texts and society, I worry that my administration will seek to restrict this form of assessment to comply with the Dear Colleague Letter.
- 12. I am concerned that the Dear Colleague Letter prohibits the methods of instruction that I use in my courses. For example, I often assign readings that center on the experiences of marginalized peoples in the U.S. and that take a social justice approach, such as Linda Christensen's (2017) *Reading, Writing and Rising Up.* I worry that readings such as these will be perceived as discriminatory as (mis)defined by the Dear Colleague Letter and subject to censorship.

- 13. My work has already been subject to negative consequences by the federal government because it related to diversity, equity, and inclusion. I have received numerous grants related to education, including U.S. Department of Education grants on "Collaboration and Reflection Enhancing Atlanta Teacher Effectiveness (CREATE)." The CREATE grant, which focused on creating a pipeline of highly qualified teachers for Atlanta area schools with a focus on increasing racial diversity, was recently terminated as part of the Trump administration's \$900 million cut to contracts funded by the U.S. Department of Education. This experience makes me fear that the Dear Colleague Letter will be used against me in the same way.
- 14. In 2019, I was appointed as co-director for the Center for Equity and Justice in Teacher Education, for which I have received a course release in the past and credit as service to the college.
- 15. The Center has provided resources such as teaching tools and research on best practices in teaching. The Center for Equity and Justice in Teacher Education has also sponsored regular Learning Hours for students, faculty, and the community that highlight essential theory and practices for teaching and teacher education. During these learning hours, speakers with expertise in pedagogy, research, and policy related to teaching and teacher education share their expertise with the purpose of sharing knowledge with a broad community of stakeholders in education. The Center's website included resources for teachers in teacher education as well as students at Georgia State. As an example of the work of the Center, in 2021 when rhetoric around Critical Race Theory was being used to stifle culturally responsive teaching, we hosted a "Dialogue Circle on Critical Race Theory in Teaching and Teacher Education" in 2021, and I served as a co-facilitator of this event. As another

- example, in 2023 the Center hosted Dr. Francesca López to discuss the National Education Policy Center Report from 2021 entitled "Understanding the Attacks on Critical Race Theory" that she co-authored.
- 16. After the issuance of the Dear Colleague Letter, the website for the Center for Equity and Justice in Teacher Education no longer appears on the Georgia State website. I did not receive any communication from school administrators regarding the removal of the website and to my knowledge, none of my other co-directors received any communication.
- 17. After February 14, 2025, the resources of the Center for Equity and Justice in Teacher Education's website are no longer available for students at Georgia State University and the broader education community.
- 18. On February 28, 2025, I was told by the Dean of my college that we need to rework the name and website for the Center for Equity and Justice in Teacher Education at Georgia State University. The Dean also told the Center leaders, including me, that we needed to include a conservative or opposing viewpoint in an upcoming event on teaching the Black freedom struggle scheduled for April 2025. As a result of these changes to the Center and its work, my expertise as a social justice scholar is being undermined, and I feel disturbed by this interference with my academic freedom. These actions send a message that anything related to diversity or inclusion is being censored and have a chilling effect on my and others' speech. I have also lost the opportunity to fully participate in this service for my college, which is part of my academic responsibilities on which I am evaluated, because Center activities have fully paused as we are being required to focus our energies on developing a new name and mission statement for the Center that does not include diversity, equity, and inclusion.

19. The Dear Colleague letter and the Department of Education's related guidance should not be permitted to stifle my academic speech related to diversity, equity and inclusion. As long as the letter is enforced, I will be unable to fully perform my role as an educator and speak freely on these important topics.

I declare under penalty of perjury that the above is true and correct.

Executed this 13 day of March, 2025.



EXHIBIT N

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

NATIONAL EDUCATION ASSOCIATION; et. al.,

Case No.: 1:25-cv-00091

Plaintiffs.

v.

DECLARATION OF MEMBER E IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

UNITED STATES DEPARTMENT OF EDUCATION;

et al.,

Defendants.

DECLARATION OF MEMBER E IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

- I, hereby declare that:
 - 1. My name is Member E. I am over the age of 18 and have personal knowledge of the facts stated herein. If called to testify, I could and would do so competently.
 - 2. I submit this Declaration in my individual capacity and not on behalf of the institution that employs me.
 - 3. I am a member of NEA.

- 4. I am a professor at a university in the southeastern United States. My university receives funding from the Department of Education.
- 5. I hold a bachelor's degree in social science education, a master's degree in instruction and curriculum leadership with an emphasis in special education, and a doctorate in instruction and curriculum leadership with an emphasis in special education and applied behavior analysis.
- 6. I have 13 years of professional experience in higher education and 13 years of experience as a middle and high school special education teacher. I teach courses in special education, preparing pre-service special education teachers on topics such as learning disabilities, autism, ADHD, intellectual disabilities, sensory impairments, physical disabilities, and emotional/behavioral disorders. My instruction includes inclusive strategies such as Universal Design for Learning (UDL), differentiated instruction, assistive technology, Positive Behavior Interventions and Supports (PBIS), socialemotional learning, and trauma-informed teaching. Additionally, I educate future educators on the history of disability and principles of inclusive education to help them understand systemic barriers that marginalize students with disabilities and to equip them with the tools needed to support students academically and socially. We often have class discussions that revolve around racial disparities within treatment of students with disabilities as well as discussing the 1954 case Brown vs Board being foundational for the civil rights for those with disabilities. We also discuss the fight for civil rights when we discuss the passing of the Vocational Rehabilitation Act in 1973 and the work of Judy Heumann and others who fought for their rights in the workplace.

- 7. I am aware that on February 14, 2025, the U.S. Department of Education issued a Dear Colleague Letter and related guidance threatening colleges with investigation and the potential loss of federal funding for teaching or scholarship related to diversity, equity and inclusion (DEI).
- 8. Since February 14, 2025, my teaching has been impacted by concerns that my students will no longer have the opportunity to learn about diversity, equity, and inclusion (DEI) in the context of working with students with disabilities. My courses foster a culture of belonging, reduces stigma, helping students understand that perceptions matter and how to change perceptions, and increasing disability awareness. My fear this that the Dear Colleague Letter will restrict or eliminate these important conversations.
- 9. I worry that these programs, including the programs I teach, will be targeted as impermissible DEI because, for example, they involve social-emotional learning, learning about systemic barriers, and inclusion. The demand for special education services continues to grow due to factors such as improved identification of disabilities, increased autism diagnoses, and heightened awareness of learning differences. Special education teachers require training in differentiated instruction, behavior management, assistive technology, and inclusive practices. However, there is a nationwide shortage of special education teachers, exacerbated by high burnout rates, lower retention, and fewer graduates entering the field. The need for qualified professionals is critical to ensuring that students with disabilities receive the support necessary to succeed academically, socially, and emotionally.
- 10. On March 7, 2025, my Provost instructed department chairs and faculty in my department to revise course descriptions to remove any language related to DEI. It is my

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understanding that this directive was in response to the Dear Colleague Letter. As a result of the Dear Colleague Letter, we have had to revise our course descriptions, removing terms such as "disability," "inclusion," and "culturally responsive."

11. The Provost's directive to follow the Dear Colleague Letter has directly affected my role as a professor, as it conflicts with national standards set by the Council for Exceptional Children, which I use in designing my courses and instruction. These standards require that beginning special education professionals demonstrate understanding of "the multiple influences on development, individual difference, diversity, including exceptionalities, and families and communicates to plan and implement inclusive learning environments." ¹ For example, CEC Initial Preparation Standard 1.1 states, "Beginning special education professionals understand how language, culture, and family background influence the learning of individuals with exceptionalities. Additionally, CEC Initial Preparation Standard 2.1 states, "Beginning special education professionals, through collaboration with general educators and other colleagues, create safe, inclusive, culturally responsive learning environments to engage individuals with exceptionalities in meaningful learning activities and social interactions." The directive also conflicts with the standards of the Council for the Accreditation of Educator Preparation (CAEP), another set of standards that I incorporate in my teaching and instruction, which establish, for example, that teaching candidates should demonstrate competency in "creating safe and supportive learning environments . . . in order to work effectively with diverse P-12 students and their families," skills associated with diversity, equity, and inclusion.. My

 $^{^1\} https://exceptionalchildren.org/standards/initial-practice-based-professional-preparation-standards-special-educators$

² https://caepnet.org/standards/2022-itp/standard-1

teaching is designed to train students to meet these standards, but the changes I am required to make undermine my ability to prepare students to meet the standards set by the profession.

- 12. I fear that additional changes to our curriculum related to DEI will be required, further diminishing the quality of education we provide to future special educators. There is a widespread misunderstanding of how DEI practices support all students. Eliminating DEI-related coursework and terminology will negatively impact student success. The majority of our students are economically disadvantaged, and the potential loss of resources due to restrictions on DEI instruction is a significant concern. These funds are critical to ensuring that students receive the support they need to succeed.
- 13. As a result of these restrictions, I have been compelled to alter my speech, modify course descriptions, and fear that I will need to further change my assignments and curriculum. For example, I typically assign a reflection based on the movie Crip Camp which allows students to see the fight for social justice for people with disabilities as they tried to build a movement to pass the Vocation Rehabilitation Act in 1973. I am considering removing this assignment from my course from this point forward because topics of diversity, equity, and inclusion in the movement, the film, and student reflections, could be prohibited by the Dear Colleague Letter. These changes will ultimately harm my students, leaving them unprepared to become effective special education teachers.
- 14. The Dear Colleague Letter and related guidance from the Department of Education should not be permitted to suppress academic speech on DEI. As long as these restrictions remain in place, I fear I will be unable to fully fulfill my role as an educator or speak freely on this essential topic.

15. I am submitting this declaration anonymously because I fear retaliation from my employer as well as harassment and threats from members of the public for challenging the policies of the Trump administration restricting teaching and discussion that deals with issues of race, disability, and gender.

I declare under penalty of perjury that the above is true and correct.

Executed this 18 day of March 2025.



EXHIBIT O

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

NATIONAL EDUCATION ASSOCIATION et al.,)
Plaintiffs,)
v.)
UNITED STATES DEPARTMENT OF EDUCATION et al.,) Case No. 1:25-cv-00091
Defendants.)))

DECLARATION OF NATIONAL EDUCATION ASSOCIATION-NEW HAMPSHIRE IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

- I, Rick Trombly, pursuant to 28 U.S.C. § 1746, declare the following:
- 1. The facts set forth in this declaration are based on my personal knowledge, and if called as a witness, I could and would competently testify to the following matters under oath.
- 2. I am the Executive Director of National Education Association-New Hampshire ("NEA-NH"). I am authorized to provide this declaration on behalf of the NEA-NH, which is a plaintiff in the above captioned matter. I have held the position of Executive Director since May of 2012.
- 3. I make this declaration to describe the effects that the Dear Colleague Letter issued on February 14, 2025 (the "Letter") by the Defendant U.S. Department of Education (the "Department"), is having, and will continue to have, on NEA-NH and its members.

Background on NEA-NH

4. Plaintiff National Education Association-New Hampshire (NEA-NH) is one of the "founding ten" state education associations that formed the National Education Association in 1857. At that time, NEA-NH was called the New Hampshire Teachers Association.

- 5. As currently comprised, NEA-NH represents the majority of all public-school employees in NEA Hampshire and has more than 17,000 members. NEA-NH members are public school educators including classroom teachers and other certified professionals, education support personnel, instructors and staff at public higher education institutions, as well as students preparing for a teaching career, and those retired from the profession.
- 6. NEA-NH's mission is to strengthen and support public education and serve their members' professional, political, economic, and advocacy needs.
- 7. NEA-NH is the state affiliate of the National Education Association (NEA) for the State of New Hampshire. NEA-NH is a legally separate entity that is incorporated as a domestic non-profit under New Hampshire law, and it is headquartered in Concord, New Hampshire.

Impact of the Letter on NEA-NH and Its Members

- 8. The Letter harms NEA-NH and its members in multiple ongoing ways.
- 9. The Letter has a direct and immediate impact on NEA-NH members, who fear arbitrary and discriminatory enforcement under the Letter because it threatens enforcement actions against educational institutions within days, which effectively coerces the state and local school districts to attempt to abide by its terms or risk a substantial amount of federal funding critical to the provision of education for their students. Even with clear guidelines, this timeline would not allow educational institutions to carefully evaluate programs. The Letter provides no standards for states or educational institutions to determine what conduct is prohibited or permissible under the Letter, and, accordingly, NEA-NH members fear it will result in discipline across a variety of common practices that NEA-NH members engage in every day as part of their professional practice and interactions with their colleagues and their students.

- 10. NEA-NH members are particularly attuned to how threats to enforce vague standards of censorship can cause confusion and chill classroom instruction, given their experience with the state law invalidated by the U.S. District Court for the District of New Hampshire in *Local 8027 v. Edelblut*, No. 21-CV-1077-PB, 2024 WL 2722254 (D.N.H. May 28, 2024). While that law was in effect, many NEA-NH members self-censored and changed a wide range of their day-to-day professional activities both inside and outside of the classroom. For example:
 - A. A middle school teacher stopped using Tiffany Jewell's 2020 book entitled *This Book* is Anti-Racist and Beverly Daniel Tatum's 2017 book *Why are All the Black Kids* Sitting Together in the Cafeteria (Revised and Updated edition), which were being used by a teacher group for professional development.¹
 - B. A former World History high school teacher identified the state's censorship law as one of the reasons why she left the profession. The teacher had to change her teaching methods significantly out of fear that she would be accused of violating the law. For example, she significantly reduced open discussion and debate of ideas in her classroom because her World History units covered topics like Marxism, Stalinism, Naziism, and other dictatorship regimes, and she feared that allowing students to analyze and critique these dictatorships may raise discussions that would run afoul of the laws' prohibitions. For similar reasons, she shifted from assessing students' comprehension of material by using essays and open-ended short answer responses to multiple-choice questions out of fear that students would analyze her course's topics in ways that would implicate the banned concepts.²
 - C. An AP high school English teacher changed the way he teaches several core texts in his classroom. He also changed a variety of practices he employed to develop his students' ability to meet state standards requiring students to be able to write about both their own and others' experiences, understand different cultures and experiences, and critically examine information they receive in the media each day.³
 - D. An eighth-grade social studies teacher abandoned his efforts to plan for grade-wide engagement with Stamped: Racism, Antiracism, and You: A REMIX of the National Book Award-winning 'Stamped from the Beginning" as part of teaching about American history and addressing the history of racism in America. He understood

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¹ See ECF No. 85-111, at 68, Local 8027 v. Edelblut, No. 21-CV-1077-PB (D.N.H. Aug. 14, 2023)

² Id. at 68-69.

³ Id. at 69-70.

that school administrators had asked educators to put the project aside.⁴ In New Hampshire, one teacher restricted access to his Twitter feed following a New Hampshire Department of Education presentation regarding the law.⁵

- 11. The release of the Letter has had similar effects. The individuals identified as Member A, Member B, and Member C are members of NEA-NH. They are examples of NEA-NH members directly affected by the Letter:
 - A. Member A teaches high school English in New Hampshire and often teaches literature that touches on topics related to race and gender. He is concerned that he could be accused of discrimination under the Letter's vague descriptions because of the ways issues related to diversity, systemic racism, and moral burdens come up in his classroom, subjecting him to potential risk of investigation, discipline, or adverse employment action.
 - B. Member B teaches 8th Grade Social Studies in New Hampshire, including United States history from the Civil War to modern day. Member B is concerned that classroom discussions about matters of race and discrimination, important parts of teaching certain aspects of American history, could be construed to violate the Letter's prohibitions related to "systemic and structural racism" or "discriminatory policies and practices," Letter at 2, leaving her vulnerable to allegations of discrimination under the Letter.
 - C. Member C is a middle school counselor in New Hampshire. An important part of her work is creating a school culture that fosters safe and positive identity development for middle schoolers. Member C is concerned that she might be accused of violating the Letter's vague prohibitions on toxic indoctrination and discrimination.
- 12. It is unavoidable that educators will experience substantial confusion regarding whether and how to continue exercising effective pedagogical approaches because of the Letter and, as a result, fear about whether their teaching may subject them to enforcement actions. For example, educators routinely invite discussion or assign work that requires students to analyze and critically engage with a variety of topics that are likely to implicate ideas related to race,

⁴ Id. at 70-71.

⁵ *Id*. at 33.

gender, and other prohibited topics. These practices are not only required by sound educational pedagogy but are necessary for NEA-NH members to meet state and local standards, including those related to critical thinking, analyzing different perspectives, and making connections between subject matter areas and materials and their own lives and current events. The Letter will cause NEA-NH members to fear using or to stop using effective practices and methods of teaching that may result in discussions around the prohibited concepts.

- 13. Additionally, educators are professionally and legally obligated to design and implement instructional materials and approaches that ensure inclusivity and accessibility, particularly for students who are disabled and multi-lingual learners. Many of our members are special education teachers and paraprofessionals whose core job duties involve ensuring that students with disabilities are integrated with their non-disabled peers, and are included and able to equally access education. By targeting training programs related to diversity, equity, inclusion, and accessibility, the Letter leaves in doubt whether and how teachers will be able to continue key practices and programs to serve students with disabilities and multi-lingual learners, including in Integrated Co-Teaching classrooms or dual language classrooms.
- 14. Given the backdrop of the prior censorship law in New Hampshire, the Letter also causes substantial confusion and fear of adverse consequences with respect to core educational principles, practices, and responsibilities that NEA members have outside of the classroom and in their professional and personal interactions with one another and the students they serve. For example, many of NEA's members lead the development of curriculum or professional development for other teachers at the district or school level. The contradictions between the Letter's prohibitions, effective teaching practices, and learning and teaching standards will leave these educators guessing at a minimum, and at worse will cause them to abandon certain

practices and materials relevant to student and educator learning out of fear of adverse consequences.

- outside of the classroom, including through the development and instruction of extra-curricular activities, or in planning field trips to broaden and deepen student knowledge. The Letter raises questions regarding whether these activities must now meet some vague neutrality standard and not focus student attention on the experiences of particular groups of people. For example, are field trips to civil rights sites now in question? What about to museums that focus on the historical and cultural experience of a particular group of people such as the National Museum of African American History or the National Museum of the American Indian?
- 16. Members' concerns have been exacerbated by the fact that, within a week of the Department's Letter, the Department launched a public Anti-DEI tipline, explaining that the Department "is committed to ensuring all students have access to meaningful learning free of divisive ideologies and indoctrination," and asking "students, parents, teachers, and the broader community to report illegal discriminatory practices at institutions of learning." See Department of Education website, https://enddei.ed.gov. The national solicitation of reports from anyone about alleged "divisive ideologies and indoctrination" in schools places NEA-NH members at risk of investigations based on complaints about their teaching and instruction that cross into the vague category of impermissible action under the Dear Colleague Letter.
- 17. The existence of the national tipline in itself has raised concerns among NEA-NH leaders and members, who worry that it will be used to target educators whose teaching and instruction is viewed as too inclusive. And there is no doubt that the complaints fueled by the Department's solicitation of anti-DEI submissions will result in educators' being targeted for

their teaching even though that instruction is aligned with state standards and reflects best pedagogical practice. NEA-NH has had members targeted by anti-DEI activities. NEA-NH's experience has been that such complaints against members can fuel calls for discipline or even the dismissal of educators for unprofessional conduct.

- 18. The Letter has also forced NEA-NH to divert its organizational resources to identify and counteract the Letter's impermissibly vague restrictions, and it has frustrated NEA-NH's mission of advocating for public school employees and for the kind of robust public education that will prepare the children of New Hampshire as citizens and members of society.
- 19. NEA-NH advises members regarding job security, adverse employment actions, and what would rise to the level of termination of employment or discipline, including with respect to classroom instruction and conduct. NEA-NH also advises members regarding issues related to its members' ability to teach, including under collective bargaining agreements with local school districts, and the parameters of the New Hampshire's Educator Code of Conduct. NEA-NH is unable to properly advise their members on these issues because of the Letter's impermissibly vague terms and prohibitions.
- 20. NEA-NH also provides its members with the benefit of extensive professional development programming, which will be affected by the Letter's vague terms and prohibitions. For example, the Letter's vague terms and prohibitions and federal and state efforts to implement it will make it impossible for NEA-NH to provide meaningful professional development about what conduct may or may not result in threats of investigation or adverse enforcement under the Letter. NEA-NH engages members in an annual professional development and leadership program which typically spans a week during the summer. During this programming members are trained on a variety of topics, including, the Code of Conduct, what conduct in the classroom

and with respect to students may give rise to employment discipline or adverse action from the Department of Education against a credential holder. Members have already expressed confusion and concern regarding how to approach classroom instruction in order to protect themselves. Given the vague nature of the Letter, it is likely that this training, and others, would need to be revised to address the additional potential bases of potential discipline that could arise related to the Letter, and its impacts.

21. NEA-NH also represents members in matters before the New Hampshire State Board of Education—both in licensure actions contesting alleged violations of the New Hampshire Educator Code of Conduct, and in actions representing educators appealing the nonrenewal of their teaching contracts. Based on NEA-NH's experience with the enforcement of state censorship efforts by the New Hampshire Department of Education, NEA-NH will likely face questions from educators about how the enforcement of the Letter may impact their credentials.

I declare under penalty of perjury that the foregoing is true and correct.

Executed the $\frac{1}{2}$ of March, 2025

EXHIBIT P

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

NATIONAL EDUCATION ASSOCIATION, et. al.

Case No.: 1:25-cv-00091

Plaintiffs,

v.

DECLARATION OF MEMBER I IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

UNITED STATES DEPARTMENT OF EDUCATION; et al.

Defendants.

DECLARATION OF MEMBER I IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

- I, hereby declare that
 - 1. My name is Member I. I am over the age of 18 and have personal knowledge of the facts stated herein. If called to testify, I could and would do so competently.
 - 2. I submit this Declaration in my individual capacity and not on behalf of the institution that I attend.
 - 3. I am a member of NEA.

- 4. I am a student at a large Midwest university. My university receives funding from the Department of Education.
- 5. I am currently studying elementary education and will soon be entering my sixth and final year of higher education. My courses have focused on special education, methods courses, and the science of reading. My courses include information on inclusive strategies such as Universal Design for Learning (UDL), differentiated instruction, assistive technology, Positive Behavior Interventions and Supports (PBIS), social-emotional learning, and trauma-informed teaching. My curriculum encourages fostering a culture of belonging through culturally responsive teaching.
- 6. I am aware that on February 14, 2025, the U.S. Department of Education issued a Dear Colleague Letter and related guidance threatening colleges with investigation and the potential loss of federal funding for teaching or scholarship related to diversity, equity and inclusion (DEI).
- 7. Since February 14, 2025, the content of my courses have changed so as to deprive me of the opportunity to learn about diversity, equity, and inclusion (DEI) in the context of working with students from different backgrounds. The children's literature classes have removed the focus on cultural responsiveness, and my university will be removing the education DEI course. As I learn to work with children, I am aware of the different backgrounds of the students I will get to teach. I worry that these students will get less access to education by taking away the focus on how to understand and respond to different cultures and backgrounds.
- 8. I fear that additional changes to our curriculum related to DEI will be required, further diminishing the quality of education that I receive.

- 9. As part of my preparation to be a K-12 teacher, I will be student teaching this upcoming year. I worry about the impact the Dear Colleague Letter on my ability to student teach using the course content and teaching methods that will be accessible and meaningful for all students. I live in a city that has a large immigration population, with the majority being from Mexico or West Africa. I want to be able to ensure that my students are able to see themselves in the learning, and feel welcome in their class.
- 10. The Dear Colleague Letter and related guidance from the Department of Education should not be permitted to suppress academic speech on DEI. I personally find the Dear Colleagues Letter to be extremely concerning as the language feels accusatory and vicious towards readers. As long as these restrictions remain in place, I fear I will be unable to fully fulfill my role as an education student or an educator in the future by speaking freely on this essential topic.
- 11. I am submitting this declaration anonymously because I fear retaliation from my university as well as harassment and threats from members of the public for challenging the policies of the Trump administration restricting teaching and discussion that deals with issues of race, disability, and gender.

I declare under penalty of perjury that the above is true and correct.

Executed this 20th day of March, 2025.



Case 1:25-cv-00091-LM Document 34-19 Filed 03/21/25 Page 1 of 7

EXHIBIT Q

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

NATIONAL EDUCATION ASSOCIATION;

et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF EDUCATION;

et al.,

Defendants.

DECLARATION OF OLGA DARLENE MOSLEY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Case No.: 1:25-cv-00091-LM

DECLARATION OF OLGA DARLENE MOSLEY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

- I, Olga Darlene Mosley, hereby declare that
- 1. My name is Olga Darlene Mosley. I am over the age of 18 years. I have personal knowledge of the following facts and if called to testify could and would competently do so.
- 2. I currently serve as a Professor at Pensacola State College, which receives federal funds.
- 3. I am an NEA member.
- 4. I am offering this Declaration in my individual capacity and not on behalf of the institution that employs me.

- 5. I received a Master's degree in Counseling & Psychology from Troy University in 2004, and a Ph.D. in Psychology from Capella University in 2012.
- 6. I have 20 years of professional experience in higher education. From 2005 to 2010, I was an adjunct professor at Pensacola State College. In 2011, I joined the faculty at Pensacola State College as an Assistant Professor in the Humanities and Social Sciences Department. In 2022, I was promoted to Professor.
- 7. I teach courses on General Psychology, Human Growth & Development, and Drugs & Behavior for the purpose of fulfilling qualifications for an associate's degree.
- 8. My research focuses on transgenerational trauma and lynchings committed in Escambia and Santa Rosa Counties, Florida.
- 9. I have made several presentations at regional conferences, including *Dixieland and the Fatherland: Chosen by Nature* (2016); *The Pensacola Streetcar Strike of 1908* (2019); *Fathers are the Head of the Household, but Mothers are the Heart* (2016); *Dixieland and the Fatherland* (2017); *Strikers and Lynchers* (2018); *The Ghost White Stars* (2019); *Secrets or Redemption: Why it is important to talk about lynching;* (2020); *Two Lynchings in Ferdinand Plaza* (2024).
- 10. My department offers the opportunity for faculty to present material they are researching to the college family and the general public. These are Faculty Research Presentations given in a colloquium format. The Presentations began a year ago as an opportunity for faculty in the Humanities & Social Sciences Department to share and discuss their research projects. In the fall of 2024, they were expanded to include all college personnel, and in January 2025, they were opened to students and the general public. They have been attended by 15-20 people on average, occurring once a month. The purpose includes highlighting research and

- offering an opportunity to discuss that research with colleagues and interested others.

 Presenting at the colloquium is outside of my regular teaching duties.
- 11. I am aware that the U.S. Department of Education issued a Dear Colleague letter on February 14, 2025, which threatens colleges with investigations and the loss of federal funding based on teaching and scholarship related to diversity, equity and inclusion.
- 12. In February 2025, I approached the coordinator of the Faculty Research Presentations with a request to present a paper I was writing for APA Division 32 Society for Humanistic Psychology national conference at the colloquium scheduled for March 4, 2025, as a "dry run" before the conference. The APA has a number of divisions which emphasize a particular area of research or expertise. The Conference theme is *Toward a Human*(us)*tic Psychology: Actualizing Hope and Healing through Liberation and Justice for All.*The paper is titled, *Beyond Atticus Finch: Accepting our ancestors' sins to achieve liberation.* It is a discussion of genealogy (my family's history in the South), perpetrator-induced trauma, and transgenerational transmission of trauma. There are references to racism and the need to overcome a history of white supremacy. Since my paper addressed familial secrets in regard to a lynching, I cannot control how anyone will feel when confronted with the ghosts in their family heritage.
- 13. After the Presentation was advertised, my department chair contacted me on February 27, 2025, and asked if I would share with him the abstract for the paper. I had the rough draft complete and sent it to him. His intent was to be able to say the paper was vetted before it was presented, just in case any questions came up. The next afternoon, my department chair contacted me and said there might be some issues. On February 28, 2025, my chair and I had a meeting with the Assistant Vice President of Academic Affairs, who said, "You aren't

crossing the legal line with this paper, but you are so close to it..." And I interjected, "Let's be honest. I'm kickin' some dust across it!" I believe that they were referring to the Florida Anti-WOKE legislation, but because the Dear Colleague Letter prohibits similar things, I later understood them to be referring as well to the Dear Colleague Letter and its prohibitions on programs and scholarship related to race, diversity, equity, and inclusion.

- 14. At the February 28 meeting, the Assistant Vice President and my chair decided to cancel my presentation at the colloquium. While I am disappointed I will not have the opportunity to share my research with colleagues, I understand the position to which my administration has been relegated. Both of the individuals I met with were supportive, but they had a legal mandate which requires adherence.
- 15. I cannot share my research in an open forum at the college where I teach and share knowledge because of a poorly written, poorly thought out law. I am gratified that individuals have asked to read the paper, and I look forward to presenting it at the conference, but I am disheartened that a much needed discussion will go unheard in MY voice.
- 16. Often, it is the sense of "guilt, anguish, or other forms of psychological distress because of actions" that spur individuals to make needed change. To limit research only to those spaces where everyone can emerge with their egos intact is to engage in confirmation bias of the worst kind.
- 17. Education is about debate, healthy debate, to cull through all the noise and find the truth.

 Restrictions on faculty research reduce us to an echo chamber, a voice of propaganda,
 which will only parrot the meme of the day. It does nothing to help us move beyond the
 myths which make us feel good, navigate the stormy waters of reality, and arrive on a new

shore with expanded opportunity for healing and growth. It means we tell students to avoid anything that might challenge their current worldview. We abandon them to a society in which the loudest voice wins, the snappiest comeback dominates, and truth does not matter.

- 18. I continue to fear that my research related to race, diversity, equity and inclusion will be restricted by my institution and the federal and state governments.
- 19. Those who are interested in my research no longer have the chance to learn about diversity, equity and inclusion or hear their classmates' viewpoints, to understand the sheer breadth of possible arguments related to diversity, equity and inclusion.
- 20. The Dear Colleague letter and the Department of Education's related guidance should not be permitted to stifle my academic speech related to diversity, equity and inclusion. As long as the letter is effective, I will be unable to fully perform my role as an educator and speak freely on this important topic. I have definite "concern" about the ramifications of the Dear Colleague Letter along the same lines as past issues caused by similar state legislation. My discipline, psychology, has had two General Learning Outcome assignments (writing assignments given and assessed by ALL faculty members in fulfillment of requirements for accreditation) challenged on the basis of current Florida anti-WOKE legislation.
 Personally, my office door was vandalized in October 2024 because a custodian took issue with my anti-racist posters. I participated on a panel discussion discussing Academic Freedom in Florida last fall, and it is increasingly common for faculty to be instructed to self-censor topics that might become problematic. The Dear Colleague Letter will only exacerbate these issues and give a new avenue to attack education.

I declare under penalty of perjury that the above is true and correct.

Executed this 14th day of March, 2025.

Olga Darlene Mosley

EXHIBIT R

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

NATIONAL EDUCATION ASSOCIATION;

Case No.: 1:25-cv-00091

et al.,

Plaintiffs,

v.

DECLARATION OF MEMBER F IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

UNITED STATES DEPARTMENT OF EDUCATION;

et al.,

Defendants.

DECLARATION OF MEMBER F IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

- I, Member F, hereby declare that
- 1. My name is Member F. I am over the age of 18 years. I have personal knowledge of the following facts and if called to testify could and would competently do so.
- 2. I am offering this Declaration in my individual capacity and not on behalf of the institution that employs me.
- 3. I currently serve as an instructor and fellow at a community college in the Midwest. My college receives funding from the Department of Education. I am an NEA member.

- 4. I hold a bachelor's degree in English, and a masters in writing and publishing. I am currently pursuing a Doctor of Education (Ed.D.) degree, with a focus on Leadership in Community Colleges.
- 5. I have 13 years of professional experience in higher education. From 2013 to 2019, I was an adjunct professor at several community colleges in the Midwest. In 2019, I joined the faculty at my current college as an Instructor.
- 6. I teach courses on English composition. One of the teaching methods I use is to ask students to choose a topic to write papers about. This year, one of the assignments that I gave my students was to write an argumentative paper, meaning a paper making an argument about an issue. I let students choose the topic on which they would like to write, as I have found this practice increases students' interest and engagement in the assignment.
- 7. I am aware that the U.S. Department of Education issued a Dear Colleague letter on February 14, 2025, and related guidance which threatens colleges with investigation and the loss of federal funding based on teaching and scholarship related to diversity, equity and inclusion.
- 8. Since February 14, 2025, my teaching has been affected because some students choose argumentative paper topics related to topics related to race, diversity, equity, and inclusion, and I wonder if that is going to be okay or if it will be considered to violate the Dear Colleague Letter. For example, students have chosen topics related to immigration issues, women's rights, and other similar topics.
- 9. I fear that my students will no longer have the chance to learn about diversity, equity and inclusion or hear their classmates' viewpoints, to understand the sheer breadth of possible

- arguments related to diversity, equity and inclusion, and to lean to respectfully debate this subject with their peers.
- 10. In my role as a teaching fellow, I assist in developing training for faculty, staff, and administrators to help them develop best teaching and pedagogical practices in the classroom. We provide many resources, technology assistance, accessibility support, LMS (Learning Management System), best teaching practices, and other resources to improve overall instruction at the college.
- 11. The training that I developed has included many books that include "diversity, equity and inclusion" in the title or have practices associated with these values embodied in the best teaching practices the books describe.
- 12. My College's Director of Compliance instructed the office that oversees training and where I am a fellow to identify any training potentially related to DEI to be reviewed.
- 13. Since February 14, 2025, my work as a Fellow has been affected because the state system of standards for technical colleges requires us to meet standards related to diversity, equity and inclusion. As the result of the Dear Colleague Letter, we have had to gut so much of the training on best teaching practices in this curriculum for faculty training. Our Director of Compliance is using this website from an organization called the Center for Renewing America¹ to determine what materials we have to remove from the training if they include certain words, such as diversity, equity, inclusion, and culturally responsive. I also understand that words we use with respect to best teaching practices are under scrutiny; e.g., I was told not to use "economically disadvantaged," and anything with "diversity, equity, and inclusion" is being removed from faculty and staff training.

¹ https://americarenewing.com/issues/defining-woke-key-definitions-and-concepts/

- 14. I continue to fear that we will need to make additional changes to the content of our training
 - related to diversity, equity and inclusion.
- 15. On February 20, 2025, my college decided to eliminate the position of Vice President of DEI, which oversaw different multicultural programs on campus.
- 16. I believe there's a great deal of misunderstanding of how diversity, equity and inclusion practices help support all students. By eliminating culturally responsive teaching at two year colleges, we are negatively impacting student success. The majority of our students are economically disadvantaged, so the loss of resources and fear of losing those additional resources is a very big concern. Those funds are needed for our institution for students to be successful.
- 17. In my Leadership in Community College Ed. D. program, I'm currently enrolled in a course on public policy where I'm working with a classmate to write a paper on anti-DEI legislation and its negative impact on student success. The Department of Education's guidance on diversity, equity and inclusion affects this scholarship by making me question what topics I can cover if they relate to diversity, equity and inclusion. I am worried that my scholarship will be viewed as impermissible under the Dear Colleague Letter and I will either have to stop my work or face negative outcomes in my course and in my continued enrollment in the program. In higher education, we look at equity gaps and where we can help bridge those gaps in disparities. Whether it is the searching or the solutions, will those questions and answers be considered inappropriate? If I am looking at why minority males are not successful in writing courses, could this be a problem? In most cases, the solutions help benefit all students because we help remove barriers or improve the instruction in teaching to support all students.

- 18. For these reasons, I have been chilled in my speech on a topic of critical importance, changed my training courses, and altered my research pursuits to the detriment of me and my students.
- 19. The Dear Colleague letter and the Department of Education's related guidance should not be permitted to stifle my academic speech related to diversity, equity and inclusion. As long as the letter is effective, I will be unable to fully perform my role as an educator and speak freely on these important topics.
- 20. I am submitting this declaration anonymously because I fear retaliation from my employer as well as harassment and threats from members of the public for challenging the policies of the Trump administration restricting teaching and discussion that deals with issues of race and gender.

I declare under penalty of perjury that the above is true and correct.

Executed this _14 day of March, 2025.

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EXHIBIT S

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

NATIONAL EDUCATION
ASSOCIATION;

et al.,

Plaintiffs,

v.

Case No.: 1:25-cv-00091

UNITED STATES DEPARTMENT OF EDUCATION;

et al.,

Defendants.

DECLARATION OF NATIONAL EDUCATION ASSOCIATION PRESIDENT REBECCA PRINGLE IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I, Rebecca Pringle, pursuant to 28 U.S.C. § 1746, declare the following:

- 1. My name is Rebecca Pringle. The facts set forth in this declaration are based on my personal knowledge. If called as a witness, I could and would competently testify to the following matters under oath.
- 2. I am the President of the National Education Association (NEA). I am authorized to provide this declaration on behalf of the NEA, which is a plaintiff in the above captioned matter. I have served as President of NEA since 2020 and have held other national offices in NEA (initially as Secretary-Treasurer and then as Vice President) since 2008.

3. I make this declaration to describe the effects that the Dear Colleague Letter that the Department of Education (the "Department") issued on February 14, 2025 (the "Letter"), is having, and will continue to have, on NEA and its members.

Background on the NEA

- 4. NEA is the nation's oldest and largest education union, which represents nearly 3 million members who work at every level of education—from pre-school to university graduate programs. Our members include aspiring educators, K-12 classroom teachers, education support professionals, counselors, psychologists, and other professional support personnel as well as higher education faculty and staff who engage in a variety of educational activities both inside and outside of the classroom.
- 5. NEA has statewide and local affiliate organizations in almost 14,000 communities in every state across the United States.
- 6. NEA is a democratically governed union. Our mission, as adopted by the duly elected delegates to the 2006 NEA Representative Assembly, "is to advocate for education professionals and to unite our members and the nation to fulfill the promise of public education to prepare every student to succeed in a diverse and interdependent world."
- 7. NEA's work in furtherance of that mission is guided by our core values, as adopted by the NEA Representative Assembly, including that "public education is the gateway to opportunity"; is "vital to building respect for the worth, dignity, and equality of every individual in our diverse society"; and "provides individuals with the skills to be involved, informed, and engaged in our representative democracy."
- 8. NEA and its members also believe, as reflected in our agreed upon core values, "that the expertise and judgment of education professionals are critical to student success," and advocate for educators to receive the status, compensation, and respect due all professionals. NEA and its members also "believe that partnerships with parents, families, communities, and other stakeholders are essential to quality public education and student success."
- 9. As our nation has grown ever more diverse with over half of the students in K-12 schools identifying as Black, Hispanic, Asian, Multiracial, Native American or Alaskan Native there has been a growing need to diversify the content and curriculum of K-12 teacher preparation, instruction, and curriculum standards and educational programs. As a result, many states have taken steps to diversify the required and provided K-12 curriculum and/or the required teacher education and certification standards including education preparation standards that guide curriculum and instruction at colleges of education.

- 10. NEA has worked as well to expand its support for efforts to diversify the breadth and strength of educational offerings and educator preparation in the country. That work is reflected in NEA's six overall strategic objectives for the 2024-2026 time period, which include: (i) "supporting educators' growth in the professional knowledge, skills, and competencies necessary to maximize students' academic and social-emotional learning and shape the future of learning," (ii) safeguarding "the freedom to teach in the most effective manner for their students," (iii) supporting "the development of modern, safe, and supportive public schools that are affirming to all students and employees," (iv) supporting members "in advancing racial and social justice in education," and (v) safeguarding "the rights of students" and ensuring "that students are prepared to participate fully in our democratic society."
- 11. NEA advances these strategic objectives through its core activities, including providing professional and leadership development to its members, funding key education improvement efforts and defending its members freedom to teach in the most effective manner possible.

NEA's Professional Development Work

- 12. The core of NEA's professional excellence work consists of supporting educators teaching professional skills to other educators, including skills in racial and cultural competence. This work includes many different types of professional training, including several that are primarily focused on improving the skills of educators in engaging, teaching and supporting students of different races, national origins, sexual orientations and/or gender identities.
 - a. Examples of NEA's currently offered trainings and resources include 15-hour blended learning courses on "Culture, Ability, Resilience & Effort (CARE)," "Bully Prevention," "Diversity, Equity, and Cultural Competence," "Disability, Rights, and Inclusion," "LGBTQ+ Blended Learning Series," "Trauma-Informed Pedagogy," "Mental Health Awareness" and "Social Emotional Learning."
 - b. NEA also offers stacked courses that enable educators to earn micro-credentials in certain subjects, including "Teacher Leadership: Diversity Equity and Cultural Competence Pathway," "Bully Free Schools,": Diversity, Equity, and Culture Competence," "Native Education," "Restorative Practices," "Supporting LGBTQ+ Students," and "Trauma-Informed Pedagogy."
 - c. Thousands of NEA members take these trainings and earn these micro-credentials, which in many instances are accepted by employers to fulfill continuing professional development requirements and, in some instances, qualify members for additional compensation.
 - d. Since the issuance of the Dear Colleague Letter, NEA members have raised concerns about the value of NEA's offerings given the uncertainties created by

the Letter as to what types of diversity, equity and inclusion approaches are permitted and which are not. Those concerns undermine the perceived value of NEA's professional development offerings and harm NEA's professional excellence work by deterring individuals from pursuing and completing those trainings and credentials.

13. NEA devotes substantial resources to improving the racial and cultural competence of its members and staff. In the 2023-24 school year, for example, NEA conducted more than 50 trainings on diversity, equity, inclusion, racial and social justice for more than 1,800 members and staff. Many of the trainings for members were offered in conjunction with, or with the approval of school districts, as valuable professional development opportunities. But as a result of the Dear Colleague Letter and the threat to federal funding, NEA fears that school districts will cease their support of such training, thereby limiting the scope and reach of such trainings and further harming NEA's professional development work.

NEA's Funding of Educational Improvement Efforts

- 14. NEA also engages in significant work to advance professional expertise through grant programs that fund professional practice initiatives and the delivery of professional practice instruction.
 - a. Since September 2024, NEA's professional excellence work has included awarding \$3,900,000 in grants for professional excellence work including work to expand and elevate the skills of educators in engaging, teaching, and supporting students of all races, national origins, sexual orientations, and gender identities. Examples of topics funded include: grants that improved the professional practice of educators by supporting induction and mentoring resources for new educators as they enter the profession, PRAXIS test preparation supports for new educators, and after-school mentoring and meal programs for rural students.
 - b. The work to implement NEA's professional excellence grants is often done in coordination with, and with the support, of school districts, colleges and universities, who rely on the NEA grants to advance their mission of educational excellence.
- 15. NEA also provides a "Read Across America Grant" for state affiliates to enhance state affiliate coordinated Read Across America events and/or activities grounded in celebrating key ingredients in building a nation of diverse readers—books, reading, and the freedom to learn. This small grant program encourages proposals that use funds as a way to get books from diverse perspectives into the hands of students. Proposals that further that objective are strongly encouraged.
- 16. The Dear Colleague Letter will impact the purpose, execution of, and member and school interest in these grant programs. For example, it is unclear how the grant programs will

- continue to work in light of the Letter's prohibition of state and school district practices related to diversity, equity, and inclusion, which are at the core of much of NEA's grant work. Similarly, as a result of the Dear Colleague Letter, NEA will need to respond to concerns that Read Across America selected books are inappropriate or at odds with the dictates of the Letter and its vague condemnation of celebrations of diversity.
- 17. NEA also supports increasing educational opportunities by partnering with school districts and communities to develop and support community schools, with the approval of and in coordination with school districts. In those community schools, the needs of the community surrounding a school inform the educational offerings and approach of the school. NEA is currently supporting over 750 community school practitioners in 90 school districts across 27 states in utilizing the community school strategy. Many of the schools recognize, support, and celebrate the diversity of the school community by shifting their curricula so as to be grounded in the cultural and linguistic assets of the local community. The Dear Colleague Letter undermines these arrangements as well, by pressuring school districts to shift away from efforts that could be perceived to cross into the category of activities targeted by the Letter.

Defending Educators' Freedom to Teach Effectively

- 18. NEA also provides advice and assistance regarding labor and employment matters, individual rights, education reform, and other matters with legal implications for its members. The primary vehicle by which NEA supports the legal needs of its members is through its Unified Legal Services Program, under which NEA funds the legal representation of NEA members and affiliates in covered matters including approved employment-related matters and matters that NEA and the relevant state affiliate agrees are significant for NEA members. Such matters include advice and counsel to educators facing restrictions on how and what they teach, representation for members facing discipline or termination for their instructional choices, work to protect the rights of educators to engage in protected advocacy to advance educational opportunities and equity, and work representing members and affiliates in other education and employment related matters.
- 19. Since 2020, NEA's legal work has increased as a result of various censorship initiatives. At the end of his first term in office, President Trump issued Executive Order 13950 (2020), which prohibited federal agencies and federal contractors from promoting a list of so-called "divisive concepts" in workplace training and directed agency heads to identify grant programs for which grants could be conditioned on the recipient's certification that it would not use federal funds to promote the "divisive concepts," many of which related to race, gender, sexual orientation, and identity. That Order was rescinded in January of 2021 but some 20 states including Indiana, Iowa, New Hampshire, Tennessee, Florida and Oklahoma subsequently adopted similar restrictions on instruction and curriculum that barred certain instruction on race and gender in elementary, secondary, and higher education (the "State Censorship Laws").

- 20. NEA members in these states experienced and reported substantial confusion and concern to NEA and its affiliates regarding the meaning and implementation of the State Censorship Laws. NEA fielded questions from members about, for example:
 - a. Whether the prohibitions on instruction that an individual was inherently racist prohibited instruction about institutional or systemic bias;
 - b. Whether specific categories of literature or written subject matters were prohibited from assignment or dissemination to students, including whether educators could assign students the writings of certain authors that express the author's particular view or theory about discrimination, racism, or other prejudices;
 - c. Whether particular books or authors were prohibited under the law;
 - d. Whether topics related to racial and/or social justice were prohibited from teaching and discussion;
 - e. Whether or not they could still teach or have discussions with students regarding historical racism, including, in relation to slavery, segregation, the civil rights movement, and structural racism;
 - f. What parameters they must follow when answering questions from students about current events that touch upon current manifestations of racism, including the events precipitating the Black Lives Matter movement;
 - g. Whether or not they could still teach about historical systems and practices which have led to discriminatory outcomes like "redlining" by the Federal Housing Administration that led to racially segregated neighborhoods and inequitably funded schools;
 - h. How to adhere to the law and state and local curriculum requirements or standards that require in many instances that educators instruct students on the subjects and issues identified above.1
- 21. Because of this confusion and fear, many NEA members subject to these State Censorship Laws have self-censored and changed a wide range of their day-to-day professional activities both inside and outside of the classroom. In Florida, a detailed survey and interview of educators in 2024 found that over 82% of those surveyed had restricted in some way how they taught about issues of race and racism, 71% restricted

¹ See ECF No. 85-111, at 29 & Ex. 42, Loc. 8027 v. Edelblut, No. 21 Civ. 1077 (PB) (D.N.H. Aug. 14, 2023).

how they taught Black history and 62% restricted how they taught ethnic studies.² Similarly, national surveys conducted by RAND in 2022, 2023 and 2024 all found that substantial percentages of educators reacted to state level censorship laws by restricting what and how they taught.³

- 22. To respond to these concerns consistent with its overall mission and strategic objectives, NEA has had to expend substantial resources to ensure its members understood their rights to continue to teach in alignment with state standards and to defend members for teaching inclusively aligned with state standards. For example, since 2020, NEA has devoted substantial staff time and funded substantial legal work to (1) win back the job of a high school contemporary issues teacher who was terminated for playing a spoken word poem addressing white privilege to his high school juniors and seniors; (2) defeat an effort to strip a teacher of her teaching credentials for declining to remove a Black Lives Matter flag from a school hallway; (3) defend the right of a teacher to assign a powerful essay by an award winning African American author to her AP English class as an example of how to write a persuasive essay; (4) challenge the termination of a middle school teacher for reading an age appropriate book My Shadow is Purple that her students picked for a class read aloud; and(5) challenge the termination of a music teacher for raising concerns about her school's decision to prevent the school choir from singing, "Rainbow Land." NEA also has supported litigation challenging these State Censorship laws on the ground that they are impermissibly vague.
- 23. The Dear Colleague Letter includes similar prohibitions to the State Censorship law prohibitions. For example the Letter prohibits "toxic[] indoctrination[] [of] students with the false premise that the United States is built upon "systemic and structural racism." Letter at 2. As a result, NEA expects that it will need to respond through its ULSP program to defend members ability to teach inclusively aligned with state standards

NEA & Its Members Have Been and Will Continue to Be Harmed by the February 14th Dear Colleague Letter

24. The Dear Colleague Letter harms NEA's members and NEA itself in multiple ongoing ways.

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² M. Pollack & H. Yoshikawa, *The Limitation Effect: A White Paper* at pg. 24 (New York University & University of California at San Diego 2024).

³ A. Woo, M. Dilberti, E. Steiner, *Policies Restricting Teaching about Race and Gender Spill Over into Other States and Localities* (RAND Feb. 15, 2024) (reporting based on national survey data that "65 percent of teachers nationally reported deciding to limit discussions about political and social issues in class"); A. Woo, M. Dilberti, E. Steiner, *Seven Takeaways on How Teachers Are Reacting to Restrictions on Discussing Race and Gender* (RAND May 17, 2024) (reporting based on synthesize of nationally representative surveys of K-12 public school educators that "one-third of teachers" had changed instruction or curriculum in response to state limitations and that social studies and English language arts teachers were especially likely to have made such changes).

- 25. By placing in doubt what educators may and may not teach and what educational programming schools and colleges may or may not offer without losing federal funding, the Letter has already resulted in and will continue to cause:
 - a. Harm to NEA's core work of providing professional development training and resources by undermining the value of, and interest in, NEA's offerings;
 - b. Harm to NEA's core work of funding educational improvement work through grants by deterring schools and colleges from supporting the programs funded through such grants and thereby limiting the scale and scope of that work;
 - c. Harm to NEA's core work of advancing effective public education by addressing concerns by members about whether they can teach aligned to state standards and whether inclusive education instruction, curriculum and practices are permitted;
 - **d.** Harm to NEA's core work of defending educators targeted for providing effective instruction by placing in doubt whether instruction and curriculum aligned to state standards may nevertheless be prohibited for crossing into the vaguely defined category of impermissible "DEI" work described in the Dear Colleague Letter.
- 26. Just as the State Censorship Laws have caused confusion, fear, and self-censorship among educators, the Letter has already caused and will continue to cause substantial confusion, fear, and self-censorship for NEA's members both inside and outside of the classroom.
- 27. NEA has heard from higher education members, who have, for example,
 - a. Have raised concerns regarding whether or not they will be able to continue to teach Indigenous studies, ethnic studies, or courses that mention diversity, equity, and inclusion in their title or course descriptions;
 - b. Have been required to remove references to diversity, equity and inclusion in their course and training materials and grant applications;
 - c. Have been directed to cease supportive programs for students from diverse backgrounds;
 - d. Have been demoted and stripped of positions advancing equity concerns in teacher preparation and had resources, websites, and programs advancing such concerns shut down and shuttered;
 - e. Fear teaching content and providing students with support related to diversity, equity and inclusion work;
 - f. Fear accurately describing their research and prior work on their C.V.'s as doing so may prevent them from obtaining employment;
 - g. Fear that funding for their research will be impacted and therefore that they will need to discontinue research that would advance topics related to race, diversity, equity and inclusion.
- 28. At the K-12 level, educators have raised concerns with NEA about whether they can continue to take, or provide, professional development courses aimed at increasing the

racial and cultural competence of educators, diversifying the curriculum, and educating students or staff about the impacts of conscious and unconscious racial bias. Educators have also raised concerns about whether their efforts to ensure a school's curriculum and educational programming reflects the rich diversity of the surrounding community and the country may be prohibited under the Department's newly announced views.

- 29. Based on NEA member educators' experiences under the State Censorship Laws, it is unavoidable that educators will experience substantial confusion regarding whether and how to continue exercising effective pedagogical approaches because of the Letter and, as a result, fear about whether their teaching may subject them to enforcement actions. For example, educators routinely invite discussion or assign work that requires students to analyze and critically engage with a variety of topics that are likely to implicate ideas related to race, gender, and other prohibited topics. These practices are not only required by sound educational pedagogy but are necessary for NEA members to meet state and local standards, including those related to critical thinking, analyzing different perspectives, and making connections between subject matter areas and materials and their own lives and current events. Like teachers censored by similar state laws, the Letter will cause teachers across the country to fear using or to stop using effective practices and methods of teaching that may result in discussions around the prohibited concepts.
- 30. Moreover, principles and practices of diversity, equity, inclusion, and accessibility are deeply embedded in effective practices of teaching. For example, studies have shown that teaching ethnic studies and a culturally responsive and racially inclusive curriculum is the most effective educational approach for all students, and particularly for students of color. Such practices build critical thinking skills, prepare students for active democratic participation, instill cultural values, expose students to diverse epistemologies, and cultivate a culturally literate workforce that can compete in the global marketplace. Similar to the confusion and fear of adverse actions experienced by educators in response to the State Censorship Laws, NEA member educators across the country have already and will continue to experience confusion regarding whether certain materials, books, and sound educational practices like culturally responsive practices are permitted under the Letter, and may abandon them altogether.
- 31. Additionally, educators are professionally and legally obligated to design and implement instructional materials and approaches that ensure inclusivity and accessibility, particularly for students who are disabled and multi-lingual learners. Many of our members are special education teachers and paraprofessionals whose core job duties involve ensuring that students with disabilities are integrated with their non-disabled peers, and are included and able to equally access education. By targeting training

⁴ The Very Foundation of Good Citizenship: The Legal and Pedagogical Case for Culturally Inclusive and Racially Inclusive Public Education for All Students (NEA & LFAA 2022).

⁵ *Id.* at 6.

- 32. The Letter also causes substantial confusion and fear of adverse consequences with respect to core educational principles, practices, and responsibilities that NEA members have outside of the classroom and in their professional and personal interactions with one another and the students they serve.
- 33. For example, many of NEA's members lead the development of curriculum or professional development for other teachers at the district or school level. The contradictions between the Letter's prohibitions, effective teaching practices, and learning and teaching standards will leave these educators guessing at a minimum, and at worse will cause them to abandon certain practices and materials relevant to student and educator learning out of fear of adverse consequences.
- 34. NEA members also regularly engage in activities that support student learning outside of the classroom, including through the development and instruction of extra-curricular activities, or in planning field trips to broaden and deepen student knowledge. The Letter raises questions regarding whether these activities must now meet a new vague standard of neutrality and not focus student attention on the experiences of particular groups of people. For example, are field trips to civil rights sites now in question? What about to museums that focus on the historical and cultural experience of a particular group of people such as the National Museum of African American History or the National Museum of the American Indian?

The Letter, Particularly Combined with the Department of Education's Anti-DEI Tipline Invites Arbitrary Enforcement Against NEA Members

- 35. Within a week of the Department's Letter, the Department launched a public Anti-DEI tipline, explaining that the Department "is committed to ensuring all students have access to meaningful learning free of divisive ideologies and indoctrination," and asking "students, parents, teachers, and the broader community to report illegal discriminatory practices at institutions of learning." *See* Department of Education website https://enddei.ed.gov. The national solicitation of reports from anyone about alleged "divisive ideologies and indoctrination" in schools places educators at risk of investigations based on complaints that their teaching and instruction has crossed into the vague category of impermissible action under the Dear Colleague Letter.
- 36. The existence of the national tipline in itself has raised concerns among NEA leaders and members, who worry that it will be used to target educators whose teaching and instruction is viewed as too inclusive. And there is no doubt that the complaints fueled by the Department's solicitation of anti-DEI submissions will result in educators' being

targeted for their teaching even though that instruction is aligned with state standards and reflects best pedagogical practice. NEA has had members targeted by anti-DEI activities in several states and in some educators have been terminated by school boards for their inclusive education approaches. NEA's experience has been that even anonymous complaints against members can touch off lengthy investigations during which members are placed on administrative leave with the consequent reputational injury. As teacher dismissals are usually initiated by, and often resolved as well by, local school boards – the process can be both lengthy and painful for educators who, despite stellar evaluations and lengthy records of public service, find themselves publicly targeted in culture war disputes. Even though NEA has fought such dismissals, and won several cases (see supra at para 22), the mere fact of the dismissal and the lengthy effort to reverse the dismissal sends a clear message to other educators not to engage in the challenged instruction or curriculum choices.

37. NEA members fear arbitrary and discriminatory enforcement under the Letter including because it threatens enforcement actions against educational institutions within days, which effectively coerces states and local school districts, colleges and universities to attempt to abide by its terms or risk a substantial amount of federal funding critical to the provision of education for their students. Even with clear guidelines, this timeline would not allow educational institutions to carefully evaluate programs. The Letter provides no standards for states or educational institutions to determine what conduct is prohibited or permissible under the Letter, and, accordingly, NEA members fear it will result in discipline across a variety of common practices that NEA members engage in every day as part of their professional practice and interactions with their colleagues and their students.

I declare under penalty of perjury that the above is true and correct.

Executed this 18th day of March, 2025

National Education Association President Pringle

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EXHIBIT T

Tennessee Social Studies Standards

Introduction

The Process

The Tennessee State Social Studies Standards were reviewed and developed by Tennessee teachers for Tennessee students. The rigorous process used to develop the standards in this document began with a public review of the then-current standards during spring 2016. After receiving approximately 63,000 reviews and 14,000 comments, a committee comprised of 25 Tennessee social studies educators spanning elementary through higher education reviewed each standard. The committee considered every standard, utilizing the public feedback and the expertise of the group. The committee kept some standards as written, edited or revised others, added examples, clarified the wording of standards, moved standards to different grades, and wrote new standards to support coherence and rigor.

The revised standards were again posted online for public review during fall 2016. Nearly 54,000 reviews and 10,000 comments were submitted by Tennesseans in this additional review period. Following the second public review period, the standards were reviewed by the Social Studies Standards Recommendation Committee (SRC).

The 10-member SRC, appointed by the Governor, Lieutenant Governor, and Speaker of the House of Representatives, convened for 13 meetings and met for nearly 100 hours in person to consider the revised standards. The SRC utilized the various forms of public feedback (e.g., website comments and data, roundtable sessions, higher education review) to guide their final recommendations for the draft standards. The SRC approved a final draft of the standards at their March 29, 2017 meeting. These draft standards went before the Tennessee State Board of Education on first reading at their April 21, 2017 board meeting.

On May 9, 2017, the 110th Tennessee General Assembly passed the Senator Douglas Henry Tennessee History Act, mandating that a required Tennessee history course be taught in grades K-12. This legislative action (Pub. Ch. 482) prompted further changes to the draft standards, and a small group of educators and SRC members convened on May 30, 2017 to create this new course. The committee crafted a Tennessee history course for the second semester of fifth grade, while also opting to maintain Tennessee history content within third, fourth, and eighth grades; high school U.S. history; and a Tennessee history elective course for high school.

The final reading and adoption of the revised social studies standards occurred during the state board's July 28, 2017 meeting, and the revised social studies standards will be implemented in the 2019-20 school year.

It should be noted that the standards are what students should know, understand, and be able to do by the end of a grade level or course; however, the standards do not dictate how a teacher should teach them. In other words, the standards do not dictate curriculum.

Preparing Students for the Future

In order to become college and career ready, Tennessee students must have a strong background in social studies. It is through social studies that students prepare for their futures by opening doors to a more diverse, competitive workforce and responsible citizenry. Teachers should center instruction on inquiry-based models, which require students to engage in critical thinking, self-assessment, reasoning, problem-solving, collaboration, and investigation in order to make connections in new and innovative ways as they progress through social studies education. Our current students are our future leaders, and, as such, they need to be able to understand the complexity of the world. Students should be aware of the changing cultural and physical environments of Tennessee, the United States, and the world; know and understand the past; read, write, and think deeply; and act in ways that promote the common good. Social studies offers the critical knowledge necessary to create a framework for understanding the systems of society and becoming college, career, and civics ready.

The Tennessee Social Studies Standards lay out a vision of these vitally important disciplines and describe what all students should know and be able to do at the end of each grade/course level. The diverse committee of educators involved in the review and development of the social studies standards came together from across the state of Tennessee and focused on ensuring that the standards are:

- ✓ Challenging, but age appropriate
- ✓ Attainable for teachers and students
- ✓ Clear and measurable
- ✓ Focused on key ideas with real-world relevancy
- ✓ Connected to overarching themes that support social studies skills and thinking
- ✓ Comprehensive and have a clear progression from grade to grade

Social Studies in Elementary Grades

Research consistently demonstrates that social studies receives the least amount of instructional time in the elementary grades, when compared to ELA/literacy and math. In particular, students from low socioeconomic backgrounds have less access to social studies instruction compared to peers with higher socioeconomic backgrounds. However, social studies instruction in elementary grades is necessary to ensure that students develop literacy skills and prepare for college, careers, and civic life. In elementary schools, an increase in time devoted to social studies instruction resulted in higher scores on the NAEP (National Assessment of Educational Progress)—which is often referred to as the Nation's Report Card—for fourth grade U.S. History, which demonstrates a correlation between time spent on social studies-specific instruction and learning.

Moreover, the benefits of social studies instruction extend beyond the discipline itself; social studies instruction develops content knowledge which makes struggling readers stronger readers. Struggling readers with strong background knowledge display better reading comprehension than strong readers with low background knowledge (Recht and Leslie, 1988). In a study of second graders who had 60 lessons of literacy-

rich social studies instruction, students scored 23 percent higher on reading assessments (Halvorsen and Duke, 2012).

Beyond literacy development, social studies instruction prepares students for citizenship. Students who receive effective social studies instruction are more likely to vote and discuss politics at home, are four times more likely to volunteer and work on community issues, and are more confident in their ability to speak publicly and communicate with their elected representatives (Campaign for the Civic Mission of Schools, "Guardian of Democracy: The Civic Mission of Schools." 2011).

The Council of Chief State School Officers created a graphic that shows the marginalization of social studies and the impact it has on student learning (See Appendix A). This graphic is included in this document to show the importance of social studies education and the impact that effective social studies instruction can have on students.

The Tennessee Academic Standards for Social Studies Document

By presenting all of Tennessee's social studies standards in one document, rather than breaking up the standards into separate grade levels, the structure of this document emphasizes how the content builds as students progress through school, leading to postsecondary and workforce readiness. The connections shown from grade to grade and course to course through the seven content strands and six social studies practices, are outlined on the following pages; these connections are highlighted by presenting content linearly. The K-12 standards were intentionally designed to move through content sequentially, because it is important to understand the progression of history through time.

In grades K-5, the standards signal the importance of laying a solid foundation in how the world works, geography, Tennessee history, and United States history. The middle grades, 6-8, solidify that foundation while increasing the rigor of the content through learning about both world and United States history. Finally, grades 9-12 focus on contemporary topics that may not be appropriate for younger students, as well as the purposeful preparation of students to be citizens of both the United States and the world.

As students progress from one grade level to the next, it is important that they have learned the entirety of the previous years' content. Because of the linear nature of the standards, it is important that teachers familiarize themselves with standards in the previous and subsequent grades to understand how the grade-level content that they teach fits into students' overall development of historical content. The standards are a progression, and teachers will need to assess students' understanding of the previous year's standards before they build students' knowledge with the standards for their current grade.

How to Read the Standards

Each course/grade level contains a theme and broad topics, which are further clarified with content standards. The revised social studies standards are organized using the following components: **Course Title/Abbreviation**, **Course Description**, **Topic**, **Standard Number**, **Content Standard**, and **Content Strand** (see fig. 1).

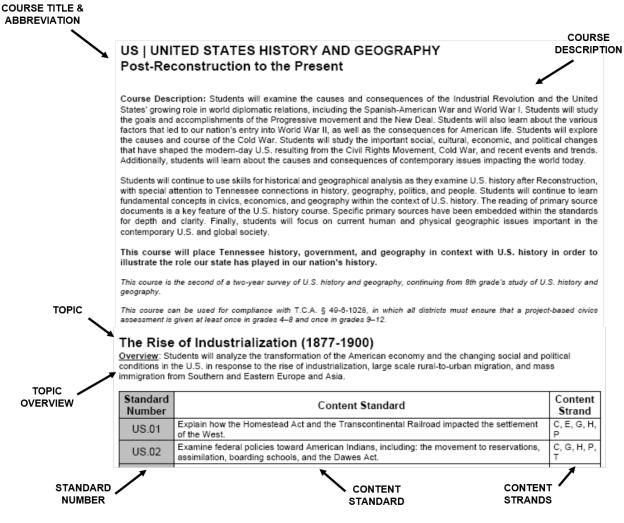


Figure 1

Course Title & Abbreviation: the grade level or course title along with a shortened corresponding letter or number.

Example: US | United States History and Geography: Post-Reconstruction to the Present

Course Description: the focus for a particular grade/course, given through a descriptive narrative.

Example: (See Tables 1 and 2)

Topic: the overarching topics for a particular set of standards; can also be known as time period or era.

Example: The Progressive Era (1890-1920)

Topic Overview: a brief statement explaining each topic of a particular set of standards.

Example: Students will analyze the changing national landscape, including the growth of cities and the demand for political, economic, and social reforms during the early 20th century.

Standard Number: the course abbreviation and the corresponding number that accompanies each standard.

Example: US.08

Content Standard: the essential knowledge to be learned at each grade level or within each course.

Example: Explain the concepts of social Darwinism and Social Gospel.

Content Strands: the seven disciplines within social studies: Culture (C), Economics (E), Geography (G), History (H), Politics/Government (P), Tennessee (T), and Tennessee Code Annotated (TCA). Tennessee (T) signifies a specific connection to Tennessee. Tennessee Code Annotated (TCA) indicates that the content of that standard is required by state law. Additionally, the applicable statute is cited within the standard.

Examples: C, E, H

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<u>Overview</u>: Students will explore the events that led to the Civil War, focusing on the impact of slavery, the abolition movement, and the major differences of the states.

Standard Number	Content Standard	Content Strand
4.25	Analyze the sectional differences between the North and the Antebellum South, including:	C, E, G, H, P, T
4.26	 Identify abolitionist leaders and their approaches to ending slavery, including: Frederick Douglass William Lloyd Garrison Sojourner Truth Harriet Tubman 	C, H, P
4.27	Explain how slavery became a national issue during the mid-19th century, including the significance of: • Missouri Compromise • Compromise of 1850 • Uncle Tom's Cabin • Wissouri Compromise • Kansas-Nebraska Act • Dred Scott v. Sandford decision • John Brown's Raid (on Harper's Ferry)	C, E, G, H, P
4.28	Compare and contrast the various sectional stances on states' rights and slavery represented by the presidential candidates in the election of 1860, including Abraham Lincoln and Stephen A. Douglas.	C, G, H, P, T
4.29	Evaluate the significance of the Battle of Fort Sumter and the impact it had on secession.	G, H, P, T

African American Life after Emancipation through World War I (1890s-1920s)

Overview: Students will analyze the rise of Jim Crow laws, achievements of African Americans, the role African Americans played in military endeavors, and the life experiences of African Americans in the late 19th and early 20th centuries.

Standard Number	Content Standard	Content Strand
AAH.21	Assess the economic and social impact of Jim Crow laws on African Americans.	C, E, H, T
AAH.22	Analyze the legal ramifications of segregation laws and court decisions (e.g., <i>Plessy v. Ferguson</i>) on American society.	C, P, T
AAH.23	Compare and contrast organized responses to Jim Crow laws (e.g., the Niagara Movement, the NAACP, the Urban League, the Atlanta compromise, the Farmers' Alliance, Brotherhood of Sleeping Car Porters, and the anti-lynching crusade).	C, H, P, T
AAH.24	Identify influential African Americans of the time period, and analyze their impact on American and Tennessee society (e.g., Robert R. Church, Samuel McElwee, Randolph Miller, James Napier, Ida B. Wells).	C, H, P, T
AAH.25	Describe the progress of African American institutions, such as religion, education, and benevolent organizations, during this era.	C, H, T
AAH.26	Describe the economic, cultural, political, and social impact of African American migration within and from the South (e.g., Exodusters, Benjamin "Pap" Singleton, First Great Migration).	C, E, G, H, T

Rise of Totalitarianism and World War II (1930s-1945)

Overview: Students will analyze the rise of fascism and totalitarianism after World War I, the causes and course of World War II, and the military, economic, and political effects of the war.

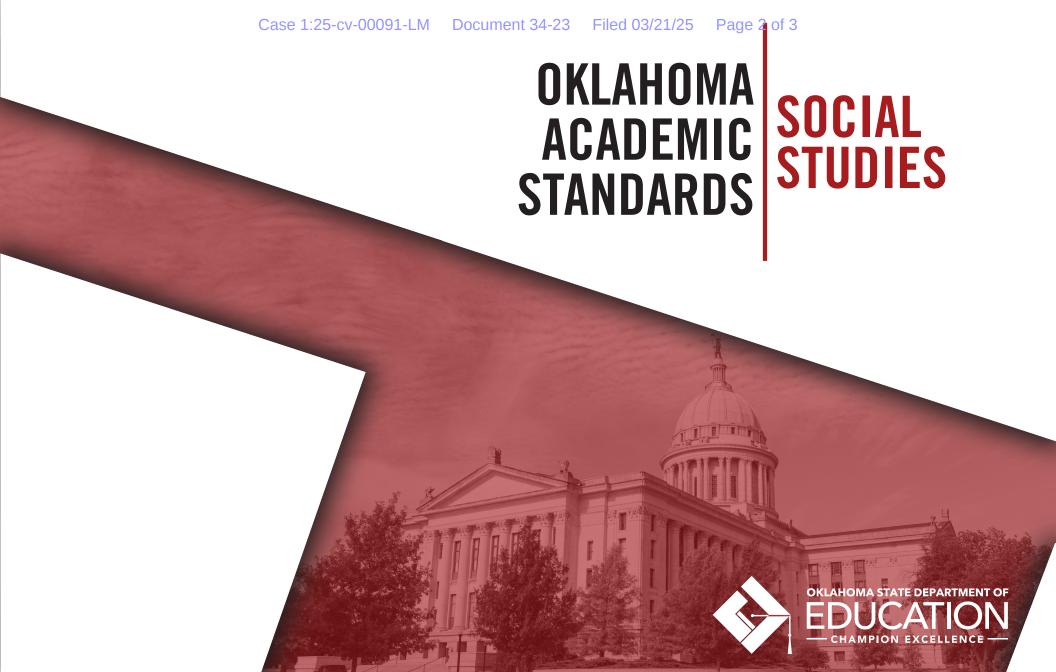
Standard Number	Content Standard	Content Strand
W.41	Explain how economic instability, nationalism, and political disillusionment in Germany and Japan led to the rise of totalitarian regimes.	C, E, G, H,
W.42	Compare and contrast the rise to power, goals, and characteristics of Adolf Hitler, Benito Mussolini, and Joseph Stalin's totalitarian regimes.	C, E, G, H, P
W.43	Analyze the role of geographic features and natural resources in increasing tensions prior to and during World War II.	E, G, H, P
W.44	Compare the Italian, German, and Japanese efforts to expand their empires in the 1930s, including: the invasion of Ethiopia, German militarism, and atrocities in China.	C, E, G, H, P
W.45	Explain the role of military alliances, appeasement, isolationism, and the domestic distractions in Europe and the U.S. prior to the outbreak of World War II.	C, E, G, H,
W.46	Describe how geography and technology (e.g., airplanes, advanced medicine, propaganda, radar) influenced wartime strategies, including: blitzkrieg, "island hopping," kamikaze, and strategic bombing.	E, G, H, P
W.47	Describe the geography and outcomes of major battles and turning points of World War II in both the European and Pacific theaters, including: Battle of Britain Battle of Midway Battle of Stalingrad Battle of the Bulge	G, H, P

C—Culture, E—Economics, G—Geography, H—History, P—Politics/Government, T—Tennessee TCA—Tennessee Code Annotated: These standards are legally required to be taught.

Standard Number	Content Standard	Content Strand
W.48	Describe the roles of leaders during World War II, including the significance of: • Winston Churchill • Adolf Hitler • Benito Mussolini • President Franklin D. Roosevelt	H, P
W.49	Describe the persecution of Jews and other targeted groups in Europe leading up to World War II, and explain why many people were unable to leave and their efforts to resist persecution.	C, E, G, H, P
W.50	Explain the state-sponsored mass murder of the Jews in Nazi-controlled lands, and describe the varied experiences of Holocaust survivors and victims.	C, G, H, P
W.51	Explain the decisions made in the Atlantic Charter and at the Tehran, Yalta, and Potsdam Conferences.	G, H, P, T
W.52	Describe the development of atomic bombs, and evaluate both the decisions to use them and the impact of their use.	C, G, H, P, T
W.53	 Describe the cultural, economic, geographic, and political effects of World War II, including: Casualties of the war (military and civilian) Changes to geopolitical boundaries Creation of the United Nations Destruction of cultural heritage Division of Germany Impact of the Nuremberg trials Refugees and displaced populations 	C, E, G, H, P, T
W.54	Summarize the nature of reconstruction in Europe after 1945, including both the economic and political purposes of the Marshall Plan.	C, E, G, H, P
W.55	Explain the origins and significance of the establishment of the State of Israel, and describe the reactions by surrounding Arab countries to the United Nations' decision to establish Israel.	C, G, H, P
W.56	Describe the economic and military power shift at the end of World War II, such as Soviet control over Eastern Europe and the economic recoveries of Germany and Japan.	C, E, G, H, P

C—Culture, E—Economics, G—Geography, H—History, P—Politics/Government, T—Tennessee TCA—Tennessee Code Annotated: These standards are legally required to be taught.

EXHIBIT U





Oklahoma Academic Standards for Social Studies Introduction

Introduction

The Oklahoma Academic Standards for Social Studies is the result of the contributions of hundreds of social studies educators, representatives of higher education, tribal representatives, and community members. This document reflects a balanced synthesis of the work of all members of the Oklahoma Academic Standards for Social Studies Writing and Draft Committees.

The standards specify what students should know and be able to do as learners of social studies at the end of each grade level or social studies course. The order of the standards at any grade level is not meant to imply a sequence of topics and should be considered flexible for the organization of any course.

The Oklahoma Academic Standards for Social Studies were informed by the National Council of the Social Studies (NCSS) Skills Framework, the Center for Civic Education Civics Standards, the National Council for Geographic Education (NCGE) Geography for Life Standards, the Council for Economic Education Voluntary National Content Standards in Economics, the National Council for History Education (NCHE) Habits of Mind, the National Center for History in the Schools Standards for Historical Thinking, the Oklahoma Academic Standards for English Language Arts and Social Studies, and other states' standards documents.

Standards Overview

Having a literate citizenry rests on a commitment to democratic values and the practice of them. It requires the ability to use knowledge about one's community, nation and world, apply inquiry processes, and employ skills of data collection and analysis, collaboration, decision-making; and problem-solving. Young people who are knowledgeable, skillful, and committed to democracy are necessary to sustaining and improving the democratic way of life. This will also enable our students to become participating members of a global community. A well-rounded, vigorous social studies education encourages and enables each student to acquire a core of basic knowledge, an arsenal of useful skills, and a way of thinking drawn from many academic disciplines. Thus equipped, students are prepared to become informed, contributing, and participating citizens in this democratic republic – the United States of America.

The standards are comprised of two primary components, content standards and social studies practices. The content standards designate specific learning targets at each grade level or course. These content standards are derived from the major disciplines of the social sciences: history, geography, civics and economics. The social studies practices define basic skills and disciplinary tools to prepare students for college, career, and civic life. These practices are meant to be integrated with the instruction of content standards.

EXHIBIT V



Oklahoma Academic Standards

ENGLISH LANGUAGE ARTS



Guiding Principles

Teachers use standards as guides for developing curriculum and instruction that is engaging, challenging, and sequenced for the students in their care. By nature, acquiring language arts knowledge and skills is a recursive learning endeavor: students revisit concepts again and again as they use language at increasingly sophisticated levels. Because of this recursive learning process, language arts learning will not progress for students in the strictly linear way it may in other content areas. Nonetheless, it is important for any set of standards to provide "concise, written descriptions of what students are expected to know and be able to do at a specific stage of their education" (Great Schools Partnership, 2014). In order to make this document a clear, coherent description of what students are expected to know and be able to do at specific stages, the writers have adopted some guiding principles for design and organization: clarity, coherence, and purpose.

Clarity

- Standard statements are written with verbs that indicate specifically what learning students must demonstrate and at what depth. When students compare, paraphrase, predict, or summarize, they are able to show a broader range of mastery of a concept than when they are expected to identify or recognize. However, the writers also have given full consideration to the complexity of the content itself. For example, it is more challenging to identify the implied theme of an extended essay than to identify the subject of a sentence. The progression of English language arts learning from pre-kindergarten through high school should reflect the relationship between the level of critical thinking students use and the actual listening, speaking, reading, and writing experiences students have.
- Content to be emphasized and assessed at specific grade levels is clearly identified.
 - o Some objectives are formatted with bullets for easier reading; bulleted skills can be learned in any particular order.
 - o In order to align with research on the science of reading, some objectives in Standard 2 Reading and Writing Foundations use lowercase letters for their bullets to indicate a researched-based sequence of learned skills. When lowercase letters are used instead of bullets, this shows a general sequence for how these skills would build upon one another. In this sequence, students practice "a" skills before practicing "b" skills and so on. While research supports this general sequence, some curriculum resources may use a slightly different sequence, and the fidelity of the curriculum resource should be honored.
- When a parenthetical phrase or statement is used to provide further clarity to an objective, i.e. and e.g. are sometimes used.
 - i.e. = those are the only things to consider (Latin for "that is")
 - o e.g. = those are just some possible examples (Latin for "for example")
- Additional guidance and support documents will be provided on the ELA website (https://sde.ok.gov/language-arts) and the Oklahoma Curriculum Framework for English Language Arts (http://elaokframework.pbworks.com).

Coherence

- The Oklahoma Academic Standards for English Language Arts identify the knowledge and skills that Pre-K—12 students should know and be able to do by the end of a grade level; each standard for every grade is delineated at the appropriate level.
- The standards are presented by individual grade level with the reading and writing strands in a side-by-side format, encouraging an integrated approach to English language arts. When a skill is no longer present, mastery is implied; however, teachers must support previous grade-level skills according to the mastery level of their students.
 - o For some grade levels in the Standard 5 Language writing strand, the grade of mastery is indicated for some mechanics skills.
 - The encoding objectives in the Spelling/Encoding section of Standard 2 Reading and Writing Foundations will often mirror the decoding standards from the previous grade in the Phonics and Word Study section of the same standard.
- Users must examine all of the standards for each grade level as a whole to have a coherent understanding of what is required of learners.
- Because of the interconnectedness of language arts concepts and skills, various aspects of what students know and can do may be
 described in more than one standard.
 - For example, learners conducting research (Standard 6) should use listening and speaking (Standard 1), reading and writing processes (Standard 2), academic vocabulary (Standard 4), critical reading and writing (Standard 3), formal grammar and usage (Standard 5), and more than likely, they will access research and complete their research products because they are competent in multimodal literacies (Standard 7).
- As students progress through grade levels, expectations encompass the content of the previous grades. Specifically, in connection to reading assignments, the complexity of texts increases as students advance to later grades; however, simpler texts can be used effectively in order for learners to develop a deeper understanding of content such as theme, figurative language, genre, and structure.

Purpose

In addition to a commitment to clear and coherent standards, the writers were guided by four fundamental purposes of English language arts education.

- 1. The language arts classroom is a place that is inclusive of the identities that reflect the richness and diversity of the human experience. All learners must hear the voices of their own heritage in the literature they encounter. They must also be given the opportunity to speak with the voices they choose for themselves in the writing they create.
- 2. **All learners are supported to become independent readers in a range of disciplines**. The ability to interpret literature as well as informative, highly technical, and often lengthy reading passages on one's own is paramount in achieving academic and career success. Furthermore, learners who possess the skills required to read independently have the power to choose both what they *need* and what they *want* to read.
- 3. All learners are supported to become independent writers for a variety of audiences and a range of purposes. Independent writers are able to access multiple strategies and formats to communicate and craft their message, so it resonates with their intended audience. After students graduate high school, their writing skills remain critical, empowering them to express themselves in multiple modes and avenues, both professionally and personally.
- 4. A literate citizenry possesses the skills required to analyze, evaluate, act upon, and compose a wide range of communications. An ultimate goal of language arts education is the development of informed citizens who can contribute to the common good.

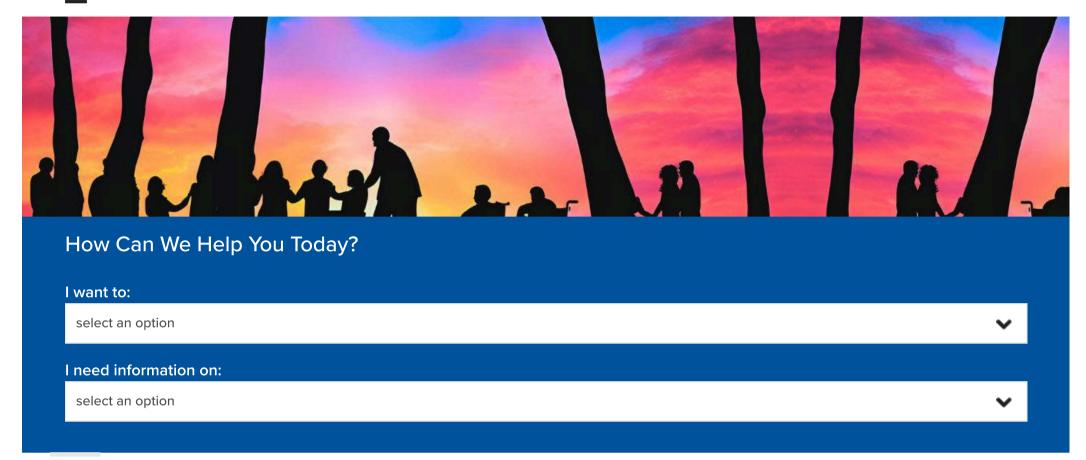
EXHIBIT W

♦ <u>Change Site Language</u> **Q** <u>Search The Site</u>

New Hampshire Commission for Human Rights



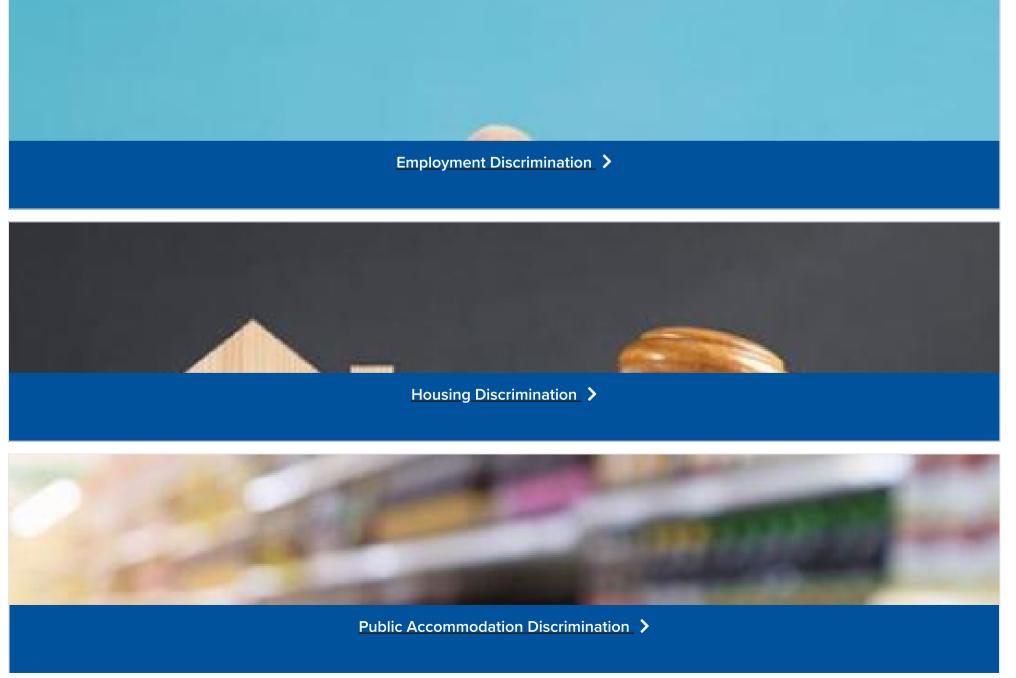




Welcome to the New Hampshire Commission for Human Rights

We are a state agency established by RSA 354-A for the purpose of education and enforcement of the law against discrimination in employment, housing, places of public accommodation and K-12 public schools, because of age, sex, sexual orientation, gender identity, race, creed/religion, color, marital status, familial status, disability or national origin.

Types of Discrimination





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EXHIBIT X

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

NATIONAL EDUCATION ASSOCIATION;

et al.,

Plaintiffs,

v.

DECLARATION OF CENTER FOR BLACK EDUCATOR DEVELOPMENT IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Case No.: 25-cv-00091-LM

UNITED STATES DEPARTMENT OF EDUCATION;

et al.,

Defendants.

I, Sharif El-Mekki, pursuant to 28 U.S.C. § 1746, declare the following:

- 1. The facts set forth in this declaration are based on my personal knowledge, and if called as a witness, I could and would competently testify to the following matters under oath.
- 2. I am the founder and Chief Executive Officer of the Center for Black Educator Development (CBED). I am authorized to provide this declaration on behalf of CBED, which is a plaintiff in the above captioned matter. I founded CBED in 2019. My experiences as a teacher of ten years, sixteen years as a principal, and as a former inaugural Principal Ambassador Fellow at the U.S. Department of Education all contributed to my decision to launch CBED. My Fellowship was particularly instructive as I was able to learn from and contribute to policies that impacted schools and districts that were generated at the U.S. Department of Education. By using in-reach and outreach strategies and best practices, my two colleagues and I were able to inform the U.S. Secretaries of Education and their cabinets about the impact of their decisions, messages, and policies on school and district leaders, and in particular, school principals and their leadership teams.
- 3. I make this declaration to describe the effects that the Dear Colleague Letter the Department of Education (the "Department") issued on February 14, 2025 (the "Letter"), is having, and will continue to have, on CBED. The information I provide in this declaration is based upon my best understanding of information available to my

organization, including information, data, and research that I have asked my staff to furnish and compile in support of the statements herein.

Background on CBED

- 4. CBED is a 501(c)(3) organization founded in 2019 with the mission of achieving educational equity and racial justice by rebuilding a national pipeline of Black teachers. Presently, not enough is being done to effectively recruit, train, and retain Black teachers or to make schools and school districts successful employers of Black teachers.
- 5. According to our review of public data, most teachers in K-12 are white, a remnant of the fact that many Black teachers were pushed out of education when schools became desegregated. This gap is starkly evident even in districts with large Black student populations. For instance, around 49% of students in Philadelphia are Black, while less than a quarter of teachers are Black, only 4% being Black male teachers. In the 2020-21 school year, Philadelphia schools employed nearly 1,200 fewer Black teachers than they did 20 years prior, while the percentage of non-Black teachers has increased, highlighting the need for solutions specific to the Black teacher shortage.
- 6. This is critical because research has demonstrated that Black students who have just one Black teacher in K-3 are 9 percentage points more likely to graduate from high school and 6 percentage points more likely to go to college.³
- 7. Without examples of Black teachers, Black students are unlikely to consider a career in teaching for themselves. For example, Pennsylvania has seen a 60% decrease in Black students enrolling in teacher's colleges from 2009 to 2020. The percentage of Black teachers in Pennsylvania is only 4%, despite the fact that Black students make up 14% of the student population.
- 8. Black individuals who do become teachers face tougher worker conditions and leave the profession at higher rates than their white peers. Some of the reasons for this include the fact that Black teachers are often tasked with handling the bulk of student disciplinary

¹ Fast Facts, The School District of Philadelphia, https://perma.cc/V5US-YZTP (last modified Mar. 6, 2025); Dale Mezzacappa, *Pennsylvania Changes Culturally Responsive Teaching Guidelines, Raising Concerns*, Chalkbeat Philadelphia, Nov. 27, 2024, https://perma.cc/8KSX-3657.

² Leana Cabral et al., *The Need for More Teachers of Color*, Research for Action, https://www.researchforaction.org/research-resources/k-12/the-need-for-more-teachers-of-color/.

³ Seth Gershenson et al., *The Long-Run Impacts of Same-Race Teachers* 1–2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 25254, 2021), https://perma.cc/PH7L-767L.

⁴ Ed Fuller, *Pennsylvania Teacher Staffing Challenges*, https://ed.psu.edu/sites/default/files/inline-files/CEEPA report V2.pdf.

⁵ Pennsylvania Educator Diversity Research, Research for Action, https://www.researchforaction.org/pennsylvania-educator-diversity-research/.

- challenges and are often expected, whether formally or informally, to be spokespeople and trainers of colleagues in instructional practice that meet students' needs. ⁶
- 9. Teachers who are not Black also need to be prepared to teach Black students in an engaging, effective, and culturally responsive way, but often do not receive training or instruction on best practices for doing so. Further, school districts need support and training to meet Black and non-Black teachers' needs in these areas.
- 10. Further, there is a national shortage of qualified teachers, so it is critical to recruit, support, and retain as many qualified teachers as possible to ensure the successful functioning of our public education system.⁷
- 11. CBED works to remedy these issues through three main categories of core activities, all of which are open to and support students and educators of all races: our "Teaching Pathways" program, our "Professional Learning" program, and our "Policy & Advocacy" work. These programs are designed to rectify past inequities by enhancing diversity within the teaching workforce, with the ultimate goal of providing all students with a more inclusive and representative educational experience. These programs have always centered fairness and equal opportunities for all candidates, regardless of race, color, religion, sex, or national origin, adhering to all relevant anti-discrimination laws and striving to create a balanced and equitable environment for everyone involved.
- 12. The Letter and subsequent FAQ, along with the End DEI portal, has limited our ability to do this important work by calling into question the legality of our programs through its vague and overly broad conceptions of illegal DEI work. Our partnerships with schools, curriculum materials, training and professional development programs for educators, and programs for students all relied on an understanding of federal anti-discrimination law that the Letter now departs from, threatening our partnerships and contracts with educational institutions and impacting these core services, as well as our mission to grow the Black teacher pipeline, which helps, among other things, to ensure that all students, especially Black students, are able to succeed in their education.

CBED's Teaching Pathways Program

13. CBED's Teaching Pathways Program meets students where they are in high school and provides them with the tools to become successful teachers, with an emphasis on rebuilding the Black teacher pipeline. As part of Teaching Pathways, we conduct Teaching Academies that incorporate our curriculum program. We also offer a Freedom Schools Literacy Academy and a Future Teachers of Excellence Fellowship.

⁶ Madeline Will, *Teachers of Color Pay an "Invisible Tax" that Leads to Burnout, Ed. Sec. Writes*, Education Week, May 18, 2016, https://perma.cc/FEF4-SKSD.

⁷ Tiffany S. Tan et al., *State teacher shortages 2024 update: Teaching positions left vacant or filled by teachers without full certification*, Learning Policy Institute (Jul. 31, 2024), https://learningpolicyinstitute.org/product/state-teacher-shortages-vacancy-resource-tool-2024.

- 14. The Teaching Academy is a year-round high school Career & Technical Education (CTE)⁸ course open to all students interested in teaching, with a particular focus on recruiting Black students as future teachers. One of the roadblocks to rebuilding the Black teacher pipeline is that the pedagogy employed by schools is culturally non-responsive to Black teachers and students. This leads many Black teachers to an early exit from the profession, and deters Black students from ever considering a career as a teacher. Our CTE program, which is open to participants of all races, attempts to solve this problem through a curriculum grounded in Black pedagogy—instructional practices that center the historic frameworks, philosophy and strategies that cultivate positive racial identities and social consciousness while deepening academic knowledge and skills. Participants are matched with a course facilitator who provides targeted instructional coaching and professional development to prepare students to serve as teaching assistants and instructors in mentor classrooms.
- 15. CBED partners with higher education institutions to provide dual enrollment college credits to participants so that they have an opportunity to graduate with an associate's degree in education or certification as an educational paraprofessional. CBED provides guidance on course content to schools implementing the program.
- 16. CBED piloted the Teaching Academy program during the 2021-22 school year at four sites in three states (Pennsylvania, New Jersey, and Michigan). These sites were selected in part because the schools and districts valued CTE opportunities and had preexisting CTE success, or had a vision of putting CTE courses in place. These locations also had an interest in shaping a self-sustaining Black teacher pipeline because of its benefits in increasing workforce diversity and positive student outcomes.
- 17. The pilot program enrolled 160 high school students and saw a 35% rate of increase in an interest in teaching, 94% interest in attending college, and statistically significant outcomes across five targeted growth categories, including interest in teaching and higher education, knowledge of curriculum content, positive racial identity, academic self-efficacy, and social-justice orientation.⁹
- 18. Currently, CBED runs Teaching Academies in Philadelphia, Pennsylvania, Rochester, New York, and at a school in Harlem, New York. CBED has contractual partnerships with these school districts, which pay for our programming, sometimes with federal funding such as Teacher Quality Partnership grants or CTE funding. Similarly to how we selected our pilot program sites, we seek to partner with schools and districts that, among other things, value CTE opportunities and are interested in shaping a self-sustaining Black teacher pipeline due to its benefits to workforce diversity and positive student outcomes.

⁸ CTE courses provide academic and technical instruction to prepare students for employment opportunities in specific fields.

⁹ Ctr. for Black Educator Dev., 2022 Program Report: Teaching Academy Pilot 18 (2022), https://perma.cc/H2J9-9QYC.

- 19. CBED has been growing our Teaching Academy programs, with an additional contract launching in Michigan in the Fall, and further contracts under discussion. CBED's goal is to launch 40 Teaching Academies by 2030 across the country.
- 20. The Teaching Academies include our "Grow Your Own" curriculum for high schoolers. The curriculum aims to help communities "grow their own" teachers who are best situated to provide community- and culturally-responsive education as educators that grew up in that same community. This curriculum, like other CBED programs, has a specific emphasis on Black history and Black pedagogy.
- 21. CBED's Freedom Schools Literacy Academy (FSLA) is a seven-week summer program that offers college-aged individuals and high school students paid apprenticeships wherein participants receive professional development and provide rising First through Third graders with literacy intervention and an affirming space that celebrates their culture and racial identity. FSLA provides specific instruction on Black culture, history, and pedagogy in an effort to advance racial justice and educational equity.
- 22. The Future Teachers of Excellence Fellowship, open to individuals from all races who participate in either a Teaching Academy or FSLA, is a program that provides financial support as well as academic support and professional coaching to students enrolled at a college or university with an interest in teaching. The goal of the program is to further build the pipeline of teachers who work to advance educational equity and racial justice. While many of our fellows are Black, we have awarded and will continue to award the fellowship to non-Black applicants who participate in our programming and are committed to educational equity, as we recognize that Black pedagogy is important for all teachers. ¹⁰

CBED's Professional Learning Program

- 23. CBED also provides a variety of professional learning resources, including professional development workshops and consultation services.
- 24. CBED has created on-demand e-learning series and in-person workshops designed to educate teachers, student-teachers, school administrators, advocates, and allies on culturally responsive, affirming, and sustaining teaching practices. Topics covered in these resources include:
 - Cultural identity
 - Implicit Bias
 - Microaggression Nuance
 - Culturally-Proficient Relationships with Students
 - Culturally-Proficient Collaborations with Families
 - Ableist Language

¹⁰ See, e.g., Seth Gershenson et al., Spillover Effects of Black Teachers on White Teachers' Racial Competency: Mixed Methods Evidence from North Carolina, https://docs.iza.org/dp16258.pdf.

- Addressing Biases that Impact Learning
- Tips for Making Academic Language Instruction Culturally-Proficient
- Difference Between Individualist and Collectivist Cultures
- How to Identify Cognitive Bias
- Culturally-Proficient Writing Activities
- Culturally-Proficient Read Aloud Strategies
- Validating and Affirming Cultural Behavior
- Grading with Equity
- 25. CBED's workshops are approved as Act 48 ongoing professional education courses in Pennsylvania. Educators in Pennsylvania are required to complete Act 48-approved continuing education requirements every five years to maintain an active certification.¹¹
- 26. CBED partners with school districts, universities, and community organizations to support diverse educators through anti-racist professional development opportunities. As one example, we host our Black Men in Education Convening, an annual conference open to all educators that centers the experiences, perspectives, needs, voices, and concerns of Black male educators. Schools often purchase tickets for their educators to attend this conference as a valuable professional development experience. Over 1,400 educators attended last year's convening.
- 27. CBED also provides consultation services to other non-profit organizations and school districts. These services include consultation around:
 - Strategic planning, including research, analysis and goal-setting on DEI and antiracist teaching
 - Teacher recruitment, hiring and retention toolkits and best practices
 - Direct training and train-the-trainer facilitation, including: implicit bias in hiring; engaging in DEI dialogue; anti-racist, anti-bias and equity-centered approaches to school leadership
 - Educator ecosystem assessments and co-production
 - Design and progress monitoring of professional learning communities
 - Targeted intervention services to address racial tensions among students and staff
- 28. CBED further provides Cultural Proficiency Workshops to educators, schools, and districts on topics including:
 - Reflecting on One's Cultural Identity
 - Redressing Bias
 - Microaggressions' Impact on Diverse Learners
 - Collaborating with Families
 - Building Culturally-Proficient Relationships with Students

¹¹ General Act 48 Frequently Asked Ouestions, Commonwealth of Pa., https://perma.cc/3BF4-ENMJ.

- Modeling High Expectations
- Drawing on Student's Cultural Knowledge to Inform Instruction
- Formulating an Anti-Racist, Anti-Bias and Equity Driven Leadership Approach
- Engaging in Difficult Conversations on Diversity, Equity, Inclusion, Justice and Belonging
- 29. Both our Teaching Pathways and Professional Development programming are geared towards the goal of having more effective teachers of underserved and marginalized students—particularly students of color and Black students. By providing high school and college students with career exploration opportunities in communities that have high numbers of students of color, CBED helps to ensure that early exposure and clinical experiences align with effective teaching and leadership practices that individuals can practice employing and later implementing as teachers themselves.
- 30. Professional development is aligned to researched best practices in how to effectively accelerate student achievement and is consistent with both short-term and longitudinal research that highlights the impact of Black teaching techniques, frameworks, and pedagogy.

CBED's Policy & Advocacy Work

- 31. CBED forms partnerships to advocate for systemic change elevating the teaching profession and promoting teacher diversity and cultural pedagogy at all government levels. For example, federally and nationally, CBED is on the steering committee for the "1 Million Teachers of Color" National Campaign to add one million teachers of color to the education workforce over the next decade. CBED also endorses various federal legislation, such as the Pay Teachers Act and the American Teachers Act, which aim to diversify the teacher workforce, expand the teacher pipeline, and sustain higher teacher salaries.
- 32. At the state level, CBED has partnered with Pennsylvania Educator Diversity Consortium to develop Culturally Responsive-Sustaining Education (CR-SE) competencies, which were implemented into all education preparation programs in 2024. CBED also developed a Teachers of Color Retention Toolkit and contributed to toolkits for Recruitment and Mentoring.
- 33. All of these policy and advocacy efforts will be in vain if the Department's vague and overly broad conception of illegal discrimination prevails, as all of CBED's efforts to diversify the teacher pipeline and enhance educational practices around diversity and cultural competency will be recast as efforts to discriminate on the basis of race.

CBED Has Been and Will Continue to Be Harmed by the Letter

- 34. Having reviewed the Letter, CBED has serious concerns about its impact on our Teaching Pathways and Professional Learning programs. The Letter specifically calls out "training" and "other institutional programming," Letter at 1, as potential vehicles for the Department's broad and vague conception of discrimination. The Letter further highlights "diversity, equity, and inclusion" programs, which the Department describes as "smuggling racial stereotypes and explicit race-consciousness into everyday training[and] programming," Letter at 2, or as "preferenc[ing] certain racial groups and teach[ing students] that certain racial groups bear unique moral burdens that others do not," Letter at 3, which the Letter claims "stigmatize[s] students who belong to particular racial groups based on crude racial stereotypes." Letter at 3.
- 35. The Letter demands that educational institutions "cease all reliance on third-party contractors . . . that are being used by institutions in an effort to circumvent prohibited uses of race," or else risk loss of federal funding, calling CBED's partnerships with school districts and training programs into focus for potential enforcement. Letter at 3–4.
- 36. The Letter also invites complaints from "[a]nyone" who believes unlawful discrimination has occurred, deputizing individuals without any connection to CBED's work to find fault with it. Letter at 4.
- 37. While CBED's Teaching Pathways and Professional Learning programs do not discriminate on the basis of race and are open to all aspiring and current educators, they do invoke concepts that relate to "diversity," "equity," and "inclusion." This has never been considered illegal discrimination. Our focus on Black pedagogy and the importance of Black teachers, and discussion of topics like cultural proficiency, anti-racism, implicit bias, cultural identity, microaggressions, equity, and bias, as described above, are intended to redress or prevent discrimination. Yet the Department now casts doubt on any effort to acknowledge racial issues plaguing our education system, and threatens punishment to districts who partner with those who attempt to bring awareness to these issues, like our organization.
- 38. The Letter thus impacts the purpose, execution of, and educational institutions' interest in these programs, which are at the core of CBED's work to grow the Black teacher pipeline and teach Black pedagogy, including to ensure that all students, and especially Black students, thrive.
- 39. The FAQ raises similar concerns, for example by stating that "schools cannot assume that a person's race necessarily implies something about that person, including something about that person's perspective, background, experiences, or socioeconomic status," FAQ at 2, or that "racial classifications . . . risk devolving into unlawful racial stereotypes when they lump students into categories that are overbroad, underinclusive, or arbitrary and undefined." Letter at 4. CBED's work addresses racial biases because it is critical

for all educators, including Black educators, to identify biases they may have that can negatively impact their students' sense of self, or undermine having high expectations and support for said students. However, CBED fears that this instruction could be construed to violate these terms in the FAQ.

- 40. The FAQ further states that "[m]any schools have advanced discriminatory policies and practices under the banner of 'DEI' initiatives. Other schools have sought to veil discriminatory policies with terms like 'social-emotional learning' or 'culturally responsive teaching." FAQ at 5. The FAQ specifically calls out "courses, orientation programs, or trainings that are designed to emphasize and focus on racial stereotypes" as "forms of school-on-student harassment that could create a hostile environment under Title VI." FAQ at 7. In the FAQ as well, the Department specifically targets third parties like CBED, suggesting that schools are "laundering" racial preferences through third party contracts and other arrangements. FAQ at 8.
- 41. We are concerned that the Department's publications will deter others from working with us. For example, current and potential partners reading them may conclude that CBED's trainings and programs on implicit bias, cultural identity, microaggressions, bias, cultural proficiency, and equity constitute illegal race discrimination, when these are sound, important educational practices. Just due to the careless language used by the Department alone, CBED may have to invest significant time and resources into modifying, expanding, or eliminating our offerings to educational institutions. Further, it would be difficult if not impossible to continue partnerships and contractual relationships with educational institutions due to schools' fears of complaints, enforcement, and federal funding rescission, significantly hampering CBED's core activities in frustration of its mission.
- 42. The "End DEI" portal further heightens the impact on CBED's core activities and contracts and partnerships with educational institutions by providing a second, informal route to report alleged violations of law. As a result of the Letter, FAQ, portal, and the threat to federal funding, CBED fears that educational institutions will cease their support of CBED's programs, for example by canceling contracts and partnerships.
- 43. Indeed, one school district that was planning to start a Teaching Academy for Ninth and Tenth graders has already indicated that it is not sure whether it can proceed with the Academy following the issuance of the Letter.
- 44. CBED thus has significant concern that none of our contracts and partnerships are safe from impairment due to the Letter's vague and broad prohibitions. While we do not discriminate in any way, Black pedagogy, Black teachers, and the effective teaching of Black students are at the heart of our work. The word "Black" is in our name. The Letter now makes this a liability. As a small organization that cannot adapt its programming and

funding sources quickly, these developments from the Department pose an existential threat to our organization.

45. Ultimately, the Letter, FAQ, and Portal are an enormous obstacle, and an existential threat. to CBED's goal of growing the pipeline of Black educators. We believe that these publications will inhibit the educational content and practices of Black educators, including those who seek to apply the lessons learned in our programs. We also believe these publications will also dissuade future educators, and particularly Black students and students of color, from pursuing a career in education. The Department's actions have consequences not only for CBED's core activities and mission, but also for the broader issue of teacher shortages, ultimately undermining the successful education of students of all races. Based on our experience and research, there is a significant risk that potential teachers will seek other opportunities where they will not fear reprisal, scrutiny, or harassment for discussing their own culture or history or for practicing cultural sensitivity.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 20 day of March, 2025

Sharif El-Mekki

Case 1:25-cv-00091-LM Document 34-27 Filed 03/21/25 Page 1 of 9

EXHIBIT Y

ANALYTICAL PERSPECTIVES

BUDGET OF THE U.S. GOVERNMENT

FISCAL YEAR 2025



THE BUDGET DOCUMENTS

Budget of the United States Government, Fiscal Year 2025 contains the Budget Message of the President, information on the President's priorities, and summary tables.

Analytical Perspectives, Budget of the United States Government, Fiscal Year 2025 contains analyses that are designed to highlight specified subject areas or provide other significant presentations of budget data that place the Budget in perspective. This volume includes economic and accounting analyses, information on Federal receipts and collections, analyses of Federal spending, information on Federal borrowing and debt, baseline or current services estimates, and other technical presentations.

Supplemental tables and other materials that are part of the *Analytical Perspectives* volume are available at https://whitehouse.gov/omb/analytical-perspectives/.

Appendix, Budget of the United States Government, Fiscal Year 2025 contains detailed information on the various appropriations and funds that constitute the Budget and is designed primarily for the use of the Appropriations Committees. The Appendix contains more detailed financial information on individual programs and appropriation accounts than any of the other Budget documents. It

includes for each agency: the proposed text of appropriations language; budget schedules for each account; legislative proposals; narrative explanations of each budget account; and proposed general provisions applicable to the appropriations of entire agencies or groups of agencies. Information is also provided on certain activities whose transactions are not part of the budget totals.

BUDGET INFORMATION AVAILABLE ONLINE

The President's Budget and supporting materials are available online at https://whitehouse.gov/omb/budget/. This link includes electronic versions of all the Budget volumes, supplemental materials that are part of the Analytical Perspectives volume, spreadsheets of many of the budget tables, and a public use budget database. This link also includes Historical Tables that provide data on budget receipts, outlays, surpluses or deficits, Federal debt, and Federal employment over an extended time period, generally from 1940 or earlier to 2029. Also available are links to documents and materials from budgets of prior years.

For more information on access to electronic versions of the Budget documents, call (202) 512-1530 in the D.C. area or toll-free (888) 293-6498. To purchase the printed documents, call (202) 512-1800.

GENERAL NOTES

- All years referenced for budget data are fiscal years unless otherwise noted. All years referenced for economic data are calendar years unless otherwise noted.
- 2. At the time the Budget was prepared, none of the full-year appropriations bills for 2024 have been enacted, therefore, the programs and activities normally provided for in the full-year appropriations bills were operating under a continuing resolution (Public Law 118-15, division A, as amended). References to 2024 spending in the text and tables reflect the levels provided by the continuing resolution.
- 3. Detail in this document may not add to the totals due to rounding.

U.S. GOVERNMENT PUBLISHING OFFICE, WASHINGTON 2024

8. AID TO STATE AND LOCAL GOVERNMENTS

The analysis in this chapter focuses on Federal spending that is provided to State and local governments, U.S. Territories, and American Indian Tribal governments to help fund programs administered by those entities. This type of Federal spending is known as Federal financial assistance, primarily administered as grants.

In 2023, the Federal Government spent roughly \$1.1 trillion, approximately 4 percent of GDP, on aid to State, local, tribal, and territorial governments. The Budget continues to estimate \$1.1 trillion in outlays in both 2024 and 2025. Total Federal grant spending to State and local governments is estimated to be 3.7 percent of GDP in 2025.

Federal grants to State and local governments reached a historic high in 2021, at 5.5 percent of GDP, in large part due to significant Federal financial assistance provided in response to the health and economic crisis caused by the COVID-19 pandemic. Outlays remain elevated in 2023, continuing to reflect this assistance, while dipping in 2024 and 2025 as COVID-19 aid programs wind down. At the same time, higher outlays for infrastructure and community development reflect investments made in the Infrastructure Investment and Jobs Act (IIJA; Public Law 117-58), the Bipartisan Safer Communities Act (BSCA; Public Law 117-159), and Public Law 117-169, commonly referred to as the Inflation Reduction Act (IRA).

BACKGROUND AND ANALYSIS

Federal grants are authorized by the Congress in statute, which then establishes the purpose of the grant and how it is awarded. Most often, Federal grants are awarded as direct cash assistance, but Federal grants can also include in-kind assistance—non-monetary aid, such as commodities purchased for the National School Lunch Program—and Federal revenues or assets shared with State and local governments.

In its 2023 State Expenditure Report, the National Association of State Budget Officers (NASBO) estimates that, of the approximately \$2.96 trillion¹ in total State spending in State fiscal year 2023², 35.3 percent, or \$1.04 trillion, came from Federal funds. The NASBO reports that total State expenditures (including general funds, other State funds, bonds and Federal funds) increased 12.3 percent in 2023, with all program areas experiencing growth in State funds.³

Table 8-1, below, shows Federal grants spending by decade, actual spending in 2023, and estimated spending in 2024 and 2025. Table 8-2 shows the Budget's funding level for grants in every Budget account, organized by functional category, Budget Enforcement Act (BEA) category, and by Federal Agency.

The Federal Budget classifies grants by general area or function. Of the total proposed grant spending in 2025, 58.2 percent is for health programs, with most of the funding for Medicaid. Beyond health programs, approximately 15.4 percent of Federal aid is estimated to go to income se-

curity programs; 9.9 percent to transportation programs; 7.4 percent to education, training, and social services; and 9.1 percent for all other functions.

The Federal Budget also classifies grant spending by BEA category—discretionary or mandatory.⁴ Funding for discretionary grant programs is generally determined through annual appropriations acts. Outlays for discretionary grant programs are estimated to account for 30 percent of total grant spending in 2025. Funding for mandatory programs is provided directly in authorizing legislation that establishes eligibility criteria or benefit formulas; funding for mandatory programs is not usually limited by the annual appropriations process. Outlays for mandatory grant programs are estimated to account for 70 percent of total grant spending in 2025. Section B of Table 8-1 shows the distribution of grants between mandatory and discretionary spending.

In 2025, grants provided from discretionary funding are estimated to have outlays of \$334 billion, a decrease of roughly 1.8 percent from 2024. The five largest discretionary programs in 2025 are estimated to be Federal-aid Highway programs, with outlays of \$52 billion; Tenant-Based Rental Assistance, with outlays of \$32 billion; Education for the Disadvantaged (Title I), with outlays of \$20 billion; the Community Development Fund, with outlays of \$16 billion; and Special Education, with outlays of \$14 billion.

In 2025, outlays for mandatory grant programs are estimated to be \$761 billion, a decrease of 0.8 percent from spending in 2024, which is estimated to be \$768 billion. This estimated decline reflects the winding down of pandemic-related aid programs, as discussed above. Medicaid is by far the largest mandatory grant program with estimated outlays of \$587 billion in 2025. After Medicaid, the four largest mandatory grant programs by outlays

 $^{^1}$ "2023 State Expenditure Report." National Association of State Budget Officers, 2023. p. 1, 3.

² According to "The Fiscal Survey of States" published by the National Association of State Budget Officers (Fall 2022, p. VI), "Forty-six States begin their fiscal years in July and end them in June. The exceptions are New York, which starts its fiscal year on April 1; Texas, with a September 1 start date; and Alabama and Michigan, which start their fiscal years on October 1."

 $^{^3}$ "2023 State Expenditure Report." National Association of State Budget Officers, 2023. p. 3.

 $^{^4}$ For more information on these categories, see the "Budget Concepts" chapter of this volume.

Table 8–1. TRENDS IN FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS (Outlays in billions of dollars)

			(Outi	ays in billions	or dollaro)				F-ti	
									Estim	
	1980	1990	2000	2005	2010	2015	2020	2023	2024	2025
A. Distribution of grants by function:										
Natural resources and	5.4	3.7	4.6	E 0	0.1	7.0	7.0	10.0	20.6	10.0
environment	0.6	1.1	4.6 0.7	5.9 0.9	9.1 0.8	7.0 0.7	7.2 0.8	10.9	38.6 0.9	18.0 1.1
Agriculture Transportation	13.0	19.2	32.2	43.4	61.0	60.8	69.3	87.7	97.3	108.0
Community and regional	10.0	10.2	02.2	70.7	01.0	00.0	03.0	07.7	37.5	100.0
development	6.5	5.0	8.7	20.2	18.9	14.4	52.5	38.3	72.8	42.6
Education, training, employment,	01.0	01.0	26.7	57.0	07.6	60.5	67.0	00.0	07.5	01.4
and social services	21.9 15.8	21.8	36.7	57.2 197.8	97.6 290.2	60.5 368.0	67.9 493.4	92.2 663.7	87.5 615.1	81.4 637.8
Health	l l	43.9	124.8		115.2			166.9		168.7
Income security	18.5 0.5	36.9 0.6	68.7 5.3	90.9 4.8	5.1	101.1 3.7	118.2 9.4	6.2	167.2 8.6	8.8
Administration of justice	8.6	2.3	2.1	4.6	5.1	3.8	4.3	9.4	8.3	11.2
Other	0.7	0.8	2.1	2.6	5.3	4.3	6.1	7.2	11.2	17.6
Total	91.4	135.3	285.9	428.0	608.4	624.4	829.1	1,083.4	1,107.6	1,095.3
B. Distribution of grants by BEA category:	0	10010	200.0	12010	30311	02	02011	1,00011	1,10110	1,00010
Discretionary	53.4	63.5	116.7	182.3	247.4	189.6	259.4	289.1	340.1	334.0
Mandatory	38.0	71.9	169.2	245.7	361.0	434.7	569.7	794.3	767.5	761.4
Total	91.4	135.3	285.9	428.0	608.4	624.4	829.1	1,083.4	1,107.6	1,095.3
C. Composition:										
Current dollars:										
Payments for individuals 1	33.1	77.4	186.5	278.8	391.4	463.4	608.6	816.4	770.7	799.1
Physical capital 1	22.6	27.2	48.7	60.8	93.3	77.2	85.3	111.9	132.0	161.1
Other grants	35.8	30.7	50.7	88.4	123.7	83.7	135.2	155.1	204.8	135.1
Total	91.4	135.3	285.9	428.0	608.4	624.4	829.1	1,083.4	1,107.6	1,095.3
Percentage of total grants:										
Payments for individuals 1	36.2%	57.2%	65.3%	65.1%	64.3%	74.2%	73.4%	75.4%	69.6%	73.0%
Physical capital ¹	24.7%	20.1%	17.0%	14.2%	15.3%	12.4%	10.3%	10.3%	11.9%	14.7%
Other grants	39.1%	22.7%	17.7%	20.7%	20.3%	13.4%	16.3%	14.3%	18.5%	12.3%
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
Constant (FY 2017) dollars:		400.0	2544	244.0	400.0	47.4.5	=00.0	270.4	201.0	
Payments for individuals 1	86.7	130.9	254.1	341.2	432.3	474.5	580.8	679.4	621.9	629.7
Physical capital ¹	61.9	51.6	77.3	83.6	105.9	79.0 85.4	79.1	86.1 125.9	99.0	117.2
Other grants Total	157.1 305.7	73.4 255.9	84.5 415.9	120.9 545.7	141.9 680.1	638.8	124.9 784.8	891.4	161.9 882.8	103.6 850.4
	303.7	255.5	413.3	343.7	000.1	030.0	704.0	031.4	002.0	030.4
D. Total grants as a percent of:										
Federal outlays:	45 50/	10.00/	10.00/	17.00/	47.00/	10.00/	10.70/	47.70/	40.00/	45 40/
Total Domestic programs ²	15.5%	10.8% 17.1%	16.0% 22.0%	17.3% 23.5%	17.6%	16.9%	12.7%	17.7%	16.0%	15.1% 20.1%
State and local expenditures	22.2% 26.4%	18.0%	21.0%	23.5%	23.4% 25.6%	21.2% 23.9%	15.0% 26.1%	23.0% 28.3%	21.2% N/A	20.1% N/A
Gross domestic product	3.3%	2.3%	2.8%	3.3%	4.1%	3.5%	3.9%	4.0%	3.9%	3.7%
E. As a share of total State and local	3.3 /6	2.5 /6	2.0 /6	3.3 /6	4.170	0.076	0.976	4.076	5.5 /6	0.7 /6
gross investments:	04.50/	04.00/	04.00/	04.00/	00.00/	01.70/	10.00/	04.00/	NI/A	NI/A
Federal capital grants State and local own-source	34.5%	21.0%	21.3%	21.2%	26.8%	21.7%	19.0%	21.3%	N/A	N/A
financing	65.5%	79.0%	78.7%	78.8%	73.2%	78.3%	81.0%	78.7%	N/A	N/A
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%		

N/A: Not available at publishing.

¹ Grants that are both payments for individuals and capital investment are shown under capital investment.

² Excludes national defense, international affairs, net interest, and undistributed offsetting receipts.

in 2025 are estimated to be: Child Nutrition programs, which include the School Breakfast Program, the National School Lunch Program and others, \$32 billion; Children's Health Insurance Program, \$18 billion; the Temporary Assistance for Needy Families program, \$16 billion; and the Refundable Premium Tax Credit, \$14 billion.

Federal spending by State for major grants may be found in supplemental material available on the Office of Management and Budget (OMB) website. This material includes two tables that summarize State-by-State

spending for major grant programs, one summarizing obligations for each program by agency and bureau, and another summarizing total obligations across all programs for each State, followed by 46 individual tables showing State-by-State obligation data for each grant program. The programs shown in these State-by-State tables cover the majority of total grants to State and local governments. The sections that follow include highlights of grant proposals from the Budget listed by function.

HIGHLIGHTS

Energy

Building on the more than \$15 billion in the IIJA and the IRA funding for the Department of Energy's Office of State and Community Energy Programs and other programs, the Administration is committed to continue creating jobs through support for State and community action to deploy clean energy infrastructure. The Budget invests \$1.6 billion in clean energy infrastructure and projects through the Department of Energy, providing more than \$385 million to weatherize and decarbonize low-income homes through efficiency and electrification retrofits, and \$102 million to support utilities and State and local governments in building a more resilient electrical grid that utilizes clean energy sources. In addition, the Budget provides \$95 million to electrify tribal homes and transition tribal colleges and universities to renewable energy.

Natural Resources and Environment

The Budget commits to tackling the climate crisis with urgency by investing in Environmental Protection Agency (EPA) grants to States and Tribes that will support the implementation of on-the-ground efforts in communities across the Nation, such as providing \$100 million for the Diesel Emissions Reduction Act (DERA) grant program, which funds grants and rebates to States and tribal governments to reduce harmful emissions from diesel engines, and \$70 million for the Targeted Airshed Grants (TAG). Also included is a total of \$101 million for two EPA grant programs dedicated to remediating lead contamination in drinking water.

To protect communities from hazardous waste and environmental damage, the Budget also requests \$208 million for EPA's Brownfields program to provide technical assistance and grants to communities, including disadvantaged communities, so they can safely clean up and reuse contaminated properties.

Agriculture

The Budget continues to invest in rural communities by providing \$10 million in Rural Community Facilities Grants to facilitate the energy transition and modernization of infrastructure. Building on the \$2 billion for broadband programs initiated in the IIJA, the Budget further supports rural communities by funding \$112 million for the ReConnect Program, which provides grants and loans to deploy broadband to underserved areas, especially tribal areas.

To support tribal communities, the Budget invests \$64 million for agriculture research, education and extension grants to tribal institutions; and \$2 million to support Native American farmers and ranchers through the Intertribal Technical Assistance Network.

Transportation

The Budget provides robust support for transportation projects that cut commute times, improve safety, reduce freight bottlenecks, better connect communities, and reduce greenhouse gas emissions. Investments include: a total of \$800 million for the Rebuilding American Infrastructure with Sustainability and Equity (RAISE) and the National Infrastructure Project Assistance (Mega) competitive grant programs to promote innovative highway, transit, passenger rail, freight, port, and other transportation projects; \$250 million for the Consolidated Rail Infrastructure and Safety Improvements competitive grant program; and \$2.4 billion for the Capital Investment Grants program, which will advance the construction of new, high-quality transit corridors to reduce travel time and increase economic development.

The Budget provides a total of \$78.4 billion for highway. highway safety, and transit formula programs, including \$61.3 billion in obligation limitation for the Federal-aid Highway program to modernize and upgrade roads and bridges. It also supports core capital and planning programs, transit research, technical assistance, and data collection with \$14.3 billion in Transit Formula Grants. an increase of \$645 million above the 2023 enacted level. It also reflects \$9.5 billion in advance appropriations provided by the IIJA for bridge replacement and rehabilitation, electric vehicle charging infrastructure, and other programs to improve the safety, sustainability, and resilience of America's highway network.

Building on investments initiated under the IIJA, the Budget supports efforts to modernize America's port and waterway infrastructure, improve supply chain efficiency, and strengthen maritime freight capacity by providing \$80 million for the Port Infrastructure Development Program.

Community and Regional Development

The Budget invests in underserved communities by providing \$2.9 billion for the Community Development Block Grant program to help communities modernize infrastructure, invest in climate resilience and economic development, create parks and other public amenities, and provide social services. Within this amount, up to \$100 million is provided to expand PRO Housing, a competitive program that builds upon ongoing Department of Housing and Urban Development (HUD) research on land use and affordable housing by rewarding State, local, and regional jurisdictions that make progress in removing barriers to affordable housing developments, such as restrictive zoning.

Additionally, to create jobs and drive growth in economically distressed communities across the Nation, the Budget prioritizes continued funding for the U.S. Economic Development Administration (EDA). It requests \$41 million for the EDA's Recompete Pilot Program, which provides flexible, place-based funding to communities working to reduce economic distress and prime-age employment gaps by creating good-paying jobs. The Budget also boosts competitiveness and expands career opportunities in persistently distressed communities by investing \$25 million in the Good Jobs Challenge to fund high-quality, locally-led workforce systems, and \$5 million at the EDA to support grants focused exclusively on the economic development needs of tribal governments and Indigenous communities.

The Budget also includes \$4 billion in mandatory funding for EDA's Regional Technology and Innovation Hub Program and \$41 million in discretionary funding for smaller grants that enable tech and innovation in underrepresented regions. Together, these investments support cutting-edge technology and foster geographic diversity of technology jobs. The Budget also proposes \$1 billion for the Federal Emergency Management Agency's (FEMA) Building Resilient Infrastructure and Communities grant program, which helps States, local communities, Tribes, and Territories build climate resilience. This grant program is one of several climate resilience grant programs, and supports the Administration's resilience goals described in the National Climate Resilience Framework.

Education, Training, Employment, and Social Services

Disruptions caused by the COVID-19 pandemic continue to take a toll on the physical and mental health of students, teachers, and school staff. Recognizing the profound effect of physical and mental health on academic achievement, the Budget includes a \$216 million investment to increase the number of counselors, nurses, and mental health professionals in schools, colleges and universities, including \$200 million from the BSCA.

To advance the goal of providing a high-quality education to every student, the Budget includes \$18.6 billion for Title I schools. Title I, which reaches 90 percent of school districts across the Nation, helps schools provide students from low-income families the learning opportu-

nities they need to succeed. This substantial support for the program reflects a major step toward fulfilling the Administration's commitment to address long-standing funding disparities between under-resourced schools—which disproportionately serve students of color—and their wealthier counterparts.

ANALYTICAL PERSPECTIVES

The Budget also funds voluntary, universal, free preschool for all four million of the Nation's four-year-olds and charts a path to expand preschool to three-year-olds. High-quality preschool would be offered in the setting of the parent's choice—from public schools to child care providers to Head Start. In addition, the Budget increases Head Start funding by \$544 million to support the Administration's goal to reach pay parity between Head Start staff and public elementary school teachers with similar qualifications over time. Together these proposals would support healthy child development, help children enter kindergarten ready to learn, and support families by reducing their costs prior to school entry and allowing parents to work.

The Administration is also committed to ensuring that children with disabilities receive the services and support they need to thrive. The Budget provides \$14.4 billion for Individuals with Disabilities Education Act (IDEA) grants to States to support special education and related services for students in grades Pre-K through 12. The Budget also invests \$545 million in IDEA Grants for Infants and Families to provide early intervention services to infants and toddlers with disabilities. To address nationwide special educator shortages, the Budget also invests \$125 million, \$10 million above 2023 enacted, in grants for special education and early intervention training.

To increase institutional capacity at Historically Black Colleges and Universities (HBCUs), Tribally Controlled Colleges and Universities (TCCUs), Minority-Serving Institutions (MSIs), and low-resourced institutions, including community colleges, the Budget provides over \$1 billion, an increase of \$83 million over the 2023 enacted level, for these programs. This funding includes \$100 million for four-year HBCUs, TCCUs, and MSIs to increase research and development infrastructure at these institutions.

Health

The Budget includes increased funding to build public health capacity, infrastructure, and data systems and collection at the State and local government levels. It invests in resources for behavioral, mental, and maternal health and supports the health and wellbeing of children.

To combat the substance use crisis, the Budget builds on the accomplishments of grant programs for States, Territories, and Tribes, including the State Opioid Response grant program, by providing additional grant funding for expanded access to prevention, harm reduction, treatment, and recovery support services. In addition, the Budget expands mental health assistance and support services in schools, and expands the Center for Disease Control's suicide prevention program to additional States, tribal, and territorial jurisdictions.

8. AID TO STATE AND LOCAL GOVERNMENTS

In addition, the Budget proposes a Vaccines for Adults program to provide uninsured adults with access to routine and outbreak vaccines at no cost. The Budget also expands the Vaccines for Children (VFC) program to include all children under age 19 enrolled in the Children's Health Insurance Program (CHIP) and covers the vaccine administration fee for all VFC-eligible uninsured children.

To address racial disparities in maternal and perinatal health and reduce maternal mortality and morbidity rates, the Budget provides funding for the ongoing implementation of the White House Blueprint for Addressing the Maternal Health Crisis. The Budget promotes maternal health equity by expanding Medicaid maternal health support services during the pregnancy and post-partum period by incentivizing States to reimburse a broad range of providers including doulas, community health workers, peer support initiatives, and nurse home visiting programs. Additionally, the Budget eliminates gaps in maternal health insurance coverage by requiring all States to provide continuous Medicaid coverage for 12 months post-partum.

The Budget also provides \$350 million within HUD for States, local governments, and nonprofits to reduce lead-based paint and other health hazards, especially in the homes of low-income families with young children. Of that, the Budget proposes \$206 million for a new formula grant program to improve efficiency in lead and other home health hazard mitigation efforts.

Income Security

The Budget strengthens families—and the economy—by investing in high-quality child care. The Budget creates a historic new program under which working families with incomes up to \$200,000 per year would be guaranteed affordable, high-quality child care from birth until kindergarten, with most families paying no more than \$10 a day, and the lowest income families paying nothing. This would provide a lifeline to the parents of more than 16 million children, saving the average family over \$600 per month in care costs, per child. In addition, the Budget provides \$8.5 billion for the Child Care and Development Block Grant, a \$500 million increase over the 2023 enacted level.

The Budget makes a historic investment in lowering housing costs for renters and homebuyers through \$185 billion in mandatory spending and tax proposals, a portion of which will be distributed via State and local governments. For instance, the Budget provides \$3 billion in mandatory funding for competitive grants to promote and solidify State and local efforts to reform eviction policies by providing access to legal counsel, emergency rental assistance, and other forms of rent relief. In addition to the mandatory and tax proposals, the Budget includes \$10 million for the Eviction Protection Grant Program, which provides legal assistance to low-income tenants at risk of or subject to eviction. To increase affordable rental housing supply and homeownership opportunities, the Budget also invests \$1.25 billion in the HOME Investment Partnerships Program (HOME).

The Budget further supports households through the Low Income Home Energy Assistance Program (LIHEAP) for States and Territories by providing \$4 billion for the program. LIHEAP helps families access home energy and weatherization assistance—vital tools for protecting vulnerable families' health in response to extreme weather and climate change. As part of the Justice 40 initiative, Health and Human Services (HHS) plans to continue its efforts to prevent energy shutoffs and increase support for households with young children and older people or high energy burdens. The Budget also proposes to expand LIHEAP to advance the goals of both LIHEAP and the Low Income Household Water Assistance Program (LIHWAP). Specifically, the Budget gives States the option to use a portion of their LIHEAP funds to provide water bill assistance to low-income households.

The Budget also includes \$2.5 million for Department of Labor's Women's Bureau to help States expand access to paid leave benefits, including through grants to support States in implementing new paid leave programs and through the creation of a Technical Assistance Hub to share best practices among States.

The Budget also provides competitive grants for States and localities with a focus on improving the child welfare workforce, advancing reforms that would reduce the overrepresentation of children and families of color in the child welfare system, respecting the rights of LGBTQ+ individuals, as well as \$195 million for States and community-based organizations to respond to and prevent child abuse, with a focus on Tribes and other underserved populations.

The Budget supports a strong nutrition safety net by providing \$8.5 billion for critical nutrition programs, including \$7.7 billion for the Special Supplemental Nutrition Program for Women, Infants, and Children, to help vulnerable families put healthy food on the table and address racial disparities in maternal and child health outcomes.

Additionally, the Budget includes several investments to help States modernize and strengthen the Unemployment Insurance (UI) program. The Budget proposes a comprehensive legislative package designed to provide States with tools and resources to combat UI fraud and improper payments, while ensuring equity and accessibility for all claimants. The Budget also includes principles to guide future efforts to reform the UI system, including improving benefit levels and access, scaling UI benefits automatically during recessions, expanding eligibility to reflect the modern labor force, improving State and Federal solvency through more equitable and progressive financing, expanding reemployment services, and further safeguarding the program from fraud.

Administration of Justice

The Budget provides \$3.7 billion in discretionary resources to the Department of Justice for State and local grants and \$30 billion in mandatory resources to support efforts to hire police officers, reform criminal justice systems, and combat violent crime, as detailed in the President's Safer America Plan. Additionally, the

Budget proposes \$100 million for Community Violence Intervention programs, an increase of \$50 million over the 2023 enacted level, to bolster evidence-based strategies to reduce gun violence in U.S. communities.

The Administration remains committed to addressing substance use, proposing \$429 million in grant funding in

the Budget, including \$190 million for the Comprehensive Opioid, Stimulant, and Substance Use Program, \$95 million to support Drug Courts, and \$51 million for anti-drug task forces.

OTHER SOURCES OF INFORMATION ON FEDERAL GRANTS

A number of other sources provide State-by-State spending data and other information on Federal grants but may use a broader definition of grants beyond what is included in this chapter.

The website *Grants.gov* is a primary source of information for communities wishing to apply for grants and other Federal financial assistance. *Grants.gov* hosts all competitive open notices of opportunities to apply for Federal grants.

The *System for Award Management* hosted by the General Services Administration contains detailed Assistance Listings (formerly known as the Catalog of Federal Domestic Assistance) of grant and other assistance programs; discussions of eligibility criteria, application procedures, and estimated obligations; and related information. The *Assistance Listings* are available on the internet at *SAM.gov*.

Current and updated grant receipt information by State and local governments and other non-Federal entities can be found on *USASpending.gov*. This public website includes additional detail on Federal spending, including contract and loan information.

The Federal Audit Clearinghouse maintains an online database that provides public access to audit reports conducted under OMB guidance located at 2 CFR part 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards. Information is available for each audited entity, including the amount of Federal money expended by program and whether there were audit findings.

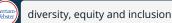
The Bureau of Economic Analysis in the Department of Commerce produces the monthly *Survey of Current Business*, which provides data on the national income and product accounts, a broad statistical concept encompassing the entire economy. These accounts, which are available at https://apps.bea.gov/scb/, include data on Federal grants to State and local governments.

In addition, information on grants and awards can be found through individual Federal Agencies' websites:⁵

- USDA Current Research Information System, https://cris.nifa.usda.gov/
- Department of Defense Medical Research Programs, https://cdmrp.health.mil/
- Department of Education, Institute of Education Sciences, Funded Research Grants and Contracts, https://www2.ed.gov/fund/
- HHS Grants, https://www.hhs.gov/grants/
- HHS Tracking Accountability in Government Grants System, https://taggs.hhs.gov/
- National Institutes of Health Grants and Funding, https://grants.nih.gov/
- HUD Grants, https://hud.gov/program_offices/ cfo/gmomgmt/grantsinfo
- DOJ Grants, https://www.justice.gov/grants
- DOL Employment and Training Administration, Grants Awarded, https://dol.gov/agencies/eta/ grants/awards
- Department of Transportation Grants, https://www.transportation.gov/grants
- EPA Grants, https://www.epa.gov/grants
- National Science Foundation Awards, https://nsf. gov/awardsearch/
- Small Business Innovation Research and Small Business Technology Transfer Awards, https:// www.sbir.gov/sbirsearch/award/all

⁵ https://www.cfo.gov/wp-content/uploads/2021/Managing-for-Results-Performance-Management-Playbook-for-Federal-Awarding-Agencies.pdf

EXHIBIT Z





Example Sentences Word History Rhymes Entries Near Show More >

Save Word

diversity, equity and inclusion noun

variants or less commonly diversity, equity, and inclusion

: a set of values and related policies and practices focused on establishing a group culture of equitable and inclusive treatment and on attracting and retaining a diverse group of participants, including people who have historically been excluded or discriminated against

Through our continued focus on diversity, equity and inclusion, we are increasing the number of female attorneys, people of color, and members of the LGBTQ+ community in the leadership

- Phillip G. Hampton, II, quoted in The Madison-St. Clair (Illinois) Record
- ... we strongly believe in diversity, equity, and inclusion and take many steps toward promoting this through mentoring, internship programs and ensuring equity in pay and opportunity ...
- Jonathan Garcia, quoted in *The San Antonio (Texas) Business Journal*

This means we practice diversity, equity and inclusion in all we do. It includes investing in our people and creating a culture of care.

- Lisa Toppin

→ often used before another noun

Virtually every university, government agency and major corporation has embraced some type of diversity, equity and inclusion policies ... to ostensibly promote a more open, equitable and, well, inclusive workplace.

- Orange County (California) Register

The legal battle comes amid a string of attacks against diversity, equity and inclusion (DEI) programs in corporate America, schools and higher education in recent months.

- Niquel Terry Ellis
- → abbreviation *DEI*
- : the state of having a diverse group of participants as well as policies and norms that are equitable and inclusive

Whether within a company or in the community, achieving diversity, equity and inclusion (DEI) is a journey and a job that is far from done.

- David M. Velazquez and Laron Evans
- → abbreviation *DEI*

Examples of diversity, equity and inclusion in a Sentence

Recent Examples on the Web

(i) Examples are automatically compiled from online sources to show current usage. Read More

The letter is critical of *diversity, equity and inclusion* practices and programs, which conservatives have criticized for years.

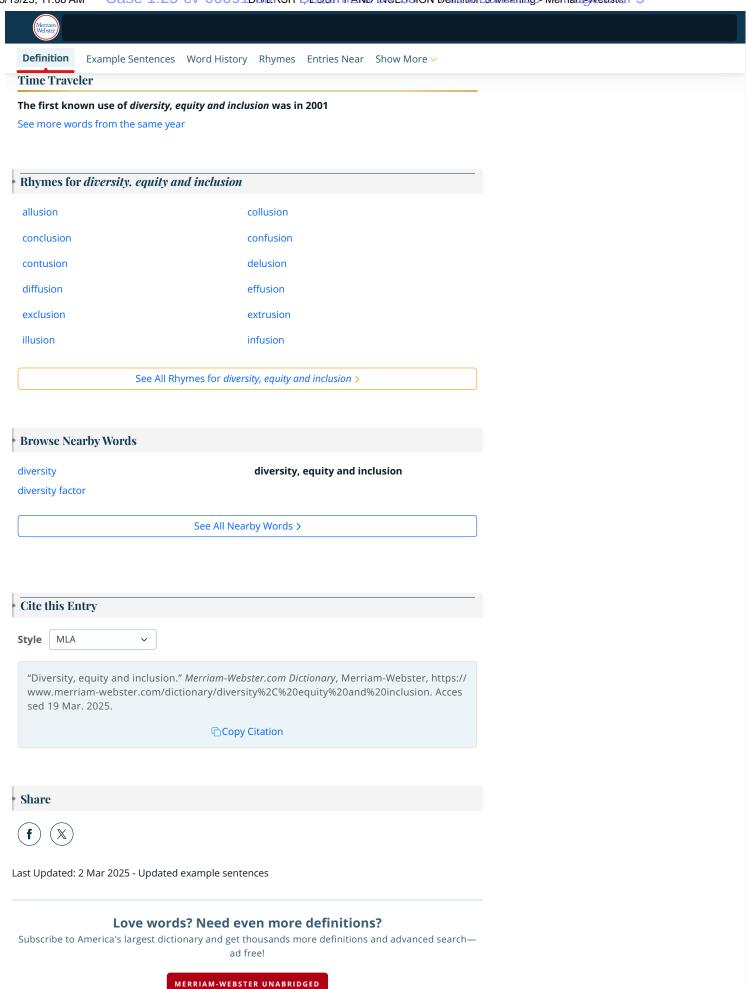
- Arthur Jones Ii, ABC News, 27 Feb. 2025

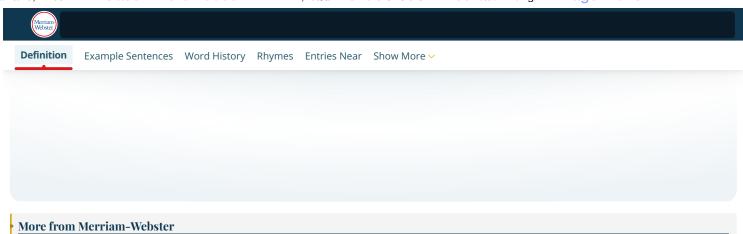
Paramount has taken part in a number of diversity, equity and inclusion efforts.

- Russell Leung, lillian Rizzo, CNBC, 27 Feb. 2025

See More >

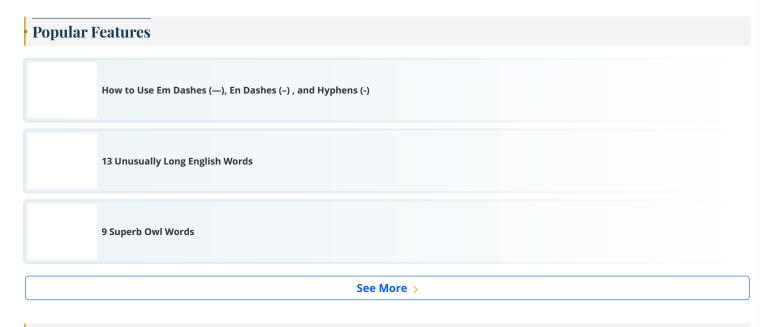
Word History

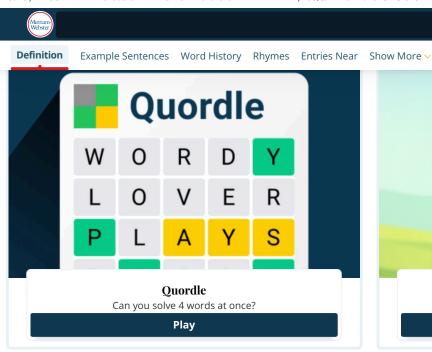






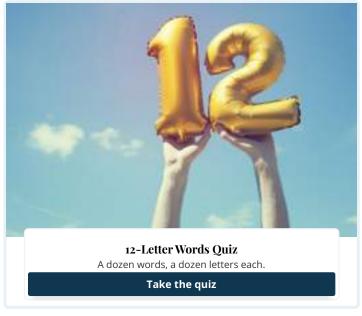












See All >

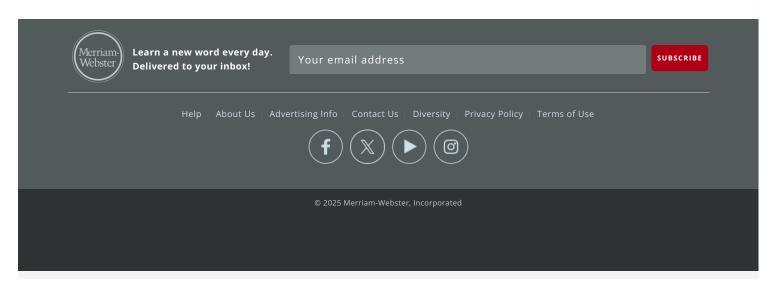


EXHIBIT AA

diversity noun

di·ver·si·ty (də-'vər-sə-tē ◄)) dī-

group or organization

plural diversities

3/19/25, 11:12 AM

Synonyms of diversity >

the condition of having or being composed of differing elements: VARIETYespecially: the inclusion of people of different races (see RACE entry 1 sense 1a), cultures, etc. in a

programs intended to promote diversity in schools

- → see also DIVERSITY, EQUITY AND INCLUSION
- : an instance of being composed of differing elements or qualities: an instance of being diverse
 | a diversity of opinion

assortment diverseness heterogeneity heterogeneousness manifoldness miscellaneousness multifariousness multiplicity variety variousness See All Synonyms & Antonyms in Thesaurus >

Examples of diversity in a Sentence

Another factor in Burns' rise has been the strength and depth of Xerox's commitment to *diversity*. One-third of Xerox's 3,819 executives are women and 22% are minorities.

– Nanette Byrnes et al., Business Week, 8 June 2009

Jim, a lanky, bearded 35-year-old, knows a lot about heirloom fruits and vegetables. He works with the Southern Seed Legacy in Athens, Georgia, an organization devoted to preserving the seeds of heirloom plants in order to restore some of the genetic *diversity* that industrial agriculture has eroded over the years.

- Gary Paul Nabhan, *Saveur*, October 2009

Even more eccentric is the treatment of the British Empire. Stretching over three centuries and six continents, you might have expected that its extent, duration, and *diversity* would have made it immune to facile interpretation.

– David Gilmour, New York Review, 2 Nov. 2006

The media flood the nation's editorial markets with testimonies to the piebald character of the American democracy jumbled together from a wonderful *diversity* of colors, creeds, and cultural dispensations, which is a swell story, but in the United States Senate not one visible to the naked eye.

– Lewis H. Lapham, *Harper's*, March 2005

See More 🗸

Recent Examples on the Web

(i) Examples are automatically compiled from online sources to show current usage. Read More

Iconic Architecture in Puglia Photo: Getty Images Often referred to as the heel of Italy's boot, Puglia is a landscape of raw beauty and intense *diversity* (just look to its rocky coastlines, ancient olive groves, and quiet countrysides for proof).

- Nicole Kliest, Vogue, 10 Mar. 2025

They were also surveyed about whether their research included any *diversity* or climate change initiatives -- among other questions that roughly align with recent executive orders.

- Sony Salzman, ABC News, 9 Mar. 2025

O'Dwyer is the British Fashion Council NewGen recipient for 2022–23 and 2023–24, and one of fashion's most celebrated champions of *diversity* today.

- The Glamour Editors, *Glamour*, 8 Mar. 2025

See All Example Sentences for *diversity* >

Word History

Etymology

Middle English *dyversite* "difference, separateness, variety," borrowed from Anglo-French & Latin; Anglo-French *diverseté, diversité,* borrowed from Latin *dīversitāt-, dīversitās* "separateness, condition of being different, difference of opinion," from *dīversus* "turned in different directions, situated apart, differing" + -itāt-, -itās -ITY — more at DIVERSE

First Known Use

14th century, in the meaning defined at sense 1

Time Traveler

The first known use of diversity was in the 14th century

See more words from the same century

Phrases Containing diversity

diversity, equity, and inclusion

Rhymes for diversity

adversity perversity

biodiversity polydispersity

university

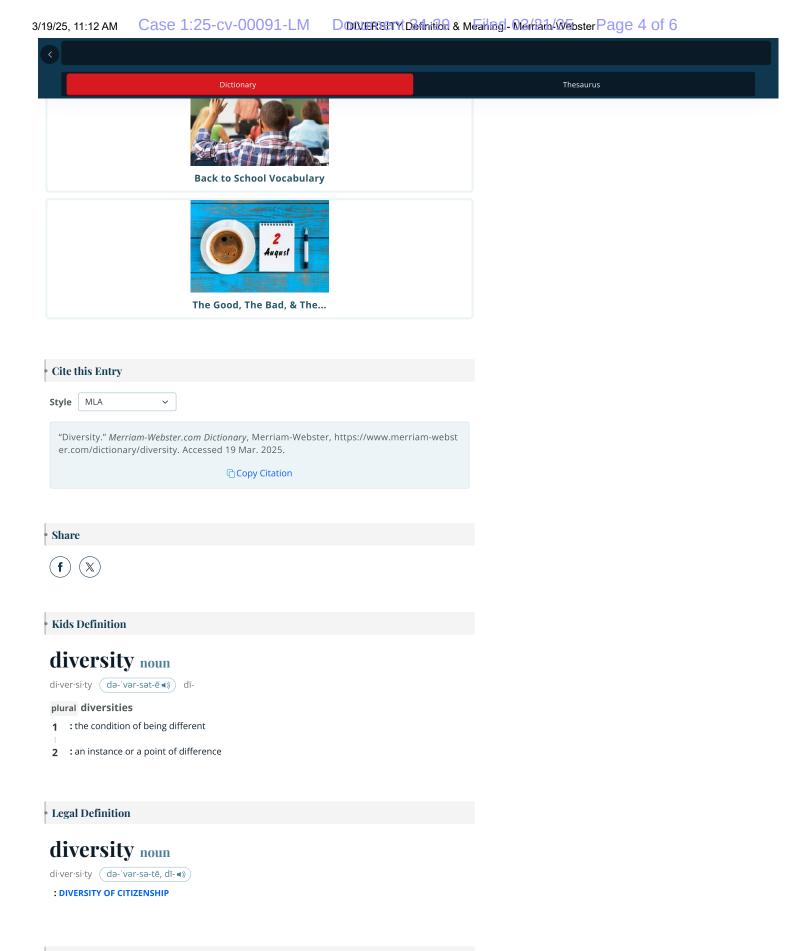
See All Rhymes for diversity >

Browse Nearby Words

diversionist diversity

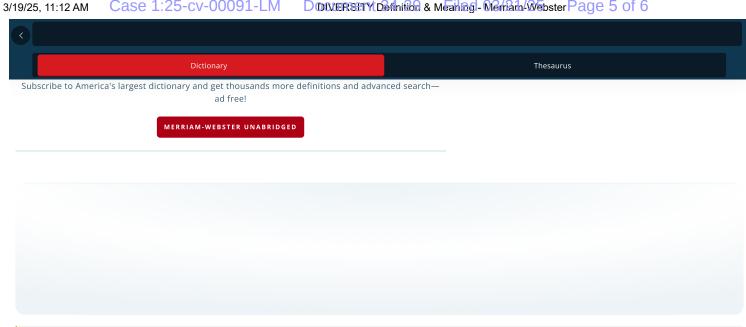
diversity, equity and inclusion

See All Nearby Words >



More from Merriam-Webster on diversity

Nglish: Translation of *diversity* for Spanish Speakers

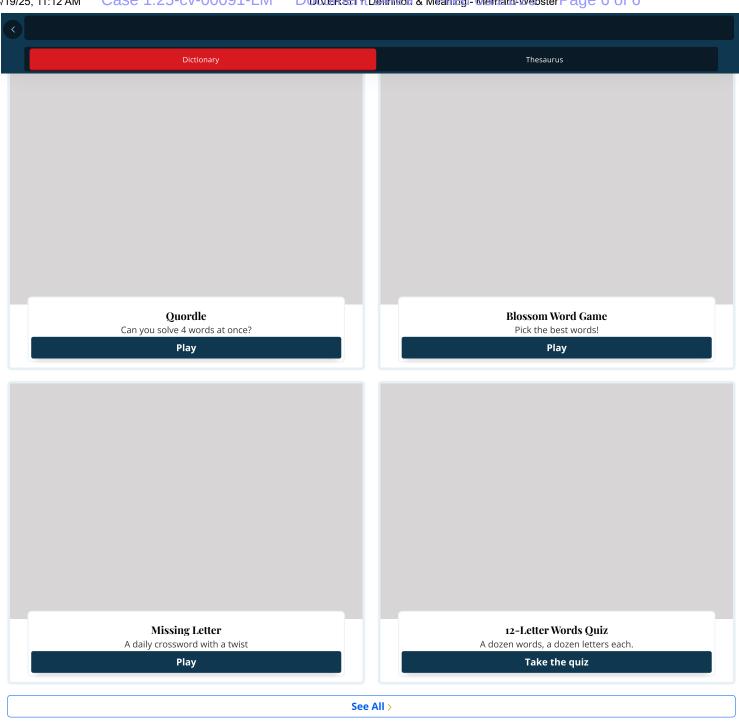


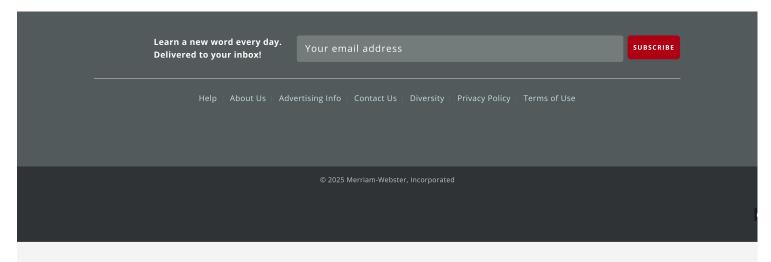
More from Merriam-Webster











Case 1:25-cv-00091-LM Document 34-30 Filed 03/21/25 Page 1 of 7

EXHIBIT AB

Definition

equity noun

eq·ui·ty ('e-kwə-tē ◄))

plural equities

Synonyms of equity >

1 a : fairness or justice in the way people are treated

often, specifically: freedom from disparities in the way people of different races, genders, etc. are treated

- ... salaries in North America have long been considered a private matter between employer and employee. ... But a growing number of advocates say that needs to change, in part to address problems of gender and racial equity, but also to keep talented employees in the workforce
- Amanda Stephenson

The fact that more money is spent on white Americans than those who identify as Black, Asian or Hispanic shouldn't come as a shock given a growing body of research around health equity.

- Katie Jennings

b: something that is equitable

social equities and inequities

- 2 a: the money value of a property or of an interest in a property in excess of claims or liens against
 - b: the common stock of a corporation
 - c: a risk interest or ownership right in property
 - d: a right, claim, or interest existing or valid in equity
- 3 a : a system of law originating in the English chancery and comprising a settled and formal body of legal and procedural rules and doctrines that supplement, aid, or override common and statute law and are designed to protect rights and enforce duties fixed by substantive law
 - **b**: trial or remedial justice under or by the rules and doctrines of equity
 - c: a body of legal doctrines and rules developed to enlarge, supplement, or override a narrow rigid system of law

Did you know?

Equity usually appears in courts of law as a term related to justice or proportional fairness, or in financial offices to property or one's share of a company. The derivative root of the noun, which gained stability in the English language during the 1300s, is Latin aequus, meaning "even," "fair," or "equal"; however, to be fair, it was introduced to English by the French, whose adaptation of the Latin was equité. The French word has clear legal connotations; it means "justice" or "rightness," and those meanings, plus a splash of "fairness," carried over to the English word equity. Noah Webster, himself a lawyer, notes the legal term equity of redemption in his 1828 dictionary defining it as "the advantage, allowed to a mortgager, of a reasonable time to redeem lands mortgaged, when the estate is of greater value than the sum for which it was mortgaged." This use led to the modern financial meanings of equity: "the value of a piece of property after any debts that remain to be paid are subtracted" and "a share in a company or of a company's stock."

objectiveness

Synonyms

nonpartisanship

detachment disinterest disinterestedness evenhandedness

fair-mindedness fairness impartiality justice neutralism neutrality

Examples of equity in a Sentence

3/19/25. 11:21 AM

In making these decisions we should be governed by the principle of *equity*.

We've been slowly paying off our mortgage and building up equity in our house.

Recent Examples on the Web

(i) Examples are automatically compiled from online sources to show current usage. Read More

Telemedicine providers, hospitals, health care systems, public health agencies, physician groups and policymakers all must actively pursue the goal of expanding care through pay *equity*.

- Jason Povio, Forbes, 13 Mar. 2025

Some commentators say that any economic downturn will be brief, and that falling stocks are merely reflecting a lower appetite for riskier assets like *equities* in tech firms, which have seen the biggest draw-downs, and cryptocurrencies, which have also taken heavy losses.

- Rob Wile, NBC News, 13 Mar. 2025

Last year's work plan, meanwhile, featured a section on equity in underserved communities.

- Sammy Roth, Los Angeles Times, 13 Mar. 2025

The transaction converted debt into equity for major creditors.

– Leslie Josephs, *CNBC*, 13 Mar. 2025

See All Example Sentences for equity >

Word History

Etymology

Middle English equite, from Anglo-French equité, from Latin aequitat-, aequitas, from aequus equal, fair

First Known Use

14th century, in the meaning defined at sense 1a

Time Traveler

The first known use of equity was in the 14th century

See more words from the same century

Phrases Containing equity

diversity, equity, and inclusion equity capital

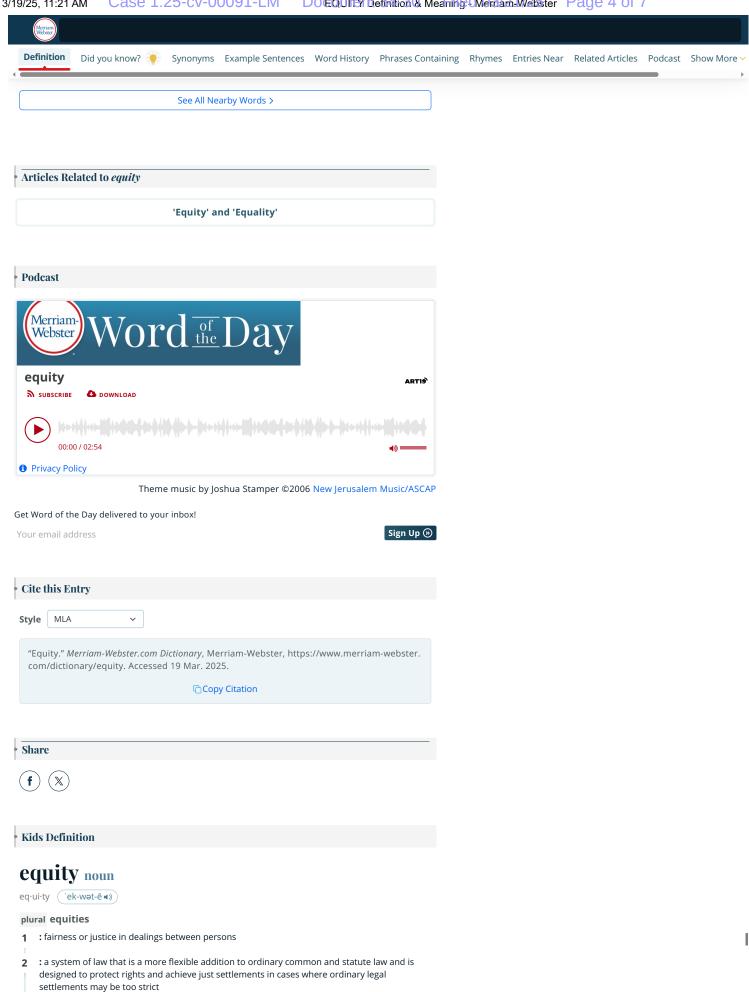
home equity loan negative equity

sweat equity

Rhymes for equity

inequity

See All Rhymes for equity >



Legal Definition

equity noun

eq·ui·ty (e-kwə-tē ◄)

plural equities

1 a : justice according to fairness especially as distinguished from mechanical application of rules

prompted by considerations of equity

comity between nations, and equity require it to be paid for

- F. A. Magruder

b: something that is equitable: an instance of equity

the inequities produced by the system are outnumbered by the equities

2 a : a system of law originating in the English chancery and comprising a settled and formal body of substantive and procedural rules and doctrines that supplement, aid, or override common and statutory law

the judicial power shall extend to all cases, in law and *equity*, arising under this Constitution – *U.S. Constitution* art. III

- → see also CHANCERY
- → compare COMMON LAW, LAW

NOTE: The courts of equity arose in England from a need to provide relief for claims that did not conform to the writ system existing in the courts of law. Originally, the courts of equity exercised great discretion in fashioning remedies. Over time, they established precedents, rules, and doctrines of their own that were distinct from those used in the courts of law. Although for a time the courts of equity rivaled the law courts in power, the law courts maintained an advantage partly as a result of forcing the equity courts to hear only those cases for which there was no adequate remedy at law. The courts of law and equity were united in England in 1873. Courts of equity also developed in the United States, but in most states and in the federal system courts of law and courts of equity have been joined. The courts apply both legal and equitable principles and offer both legal and equitable relief, although generally equitable relief is still granted when there is no adequate remedy at law.

 $\boldsymbol{\mathsf{b}}\,$: the principles that developed in the courts of equity : justice in accordance with equity

equity treats a devisee who procures a will by fraud as a constructive trustee – W. M. McGovern, Jr. et al.

also: justice in accordance with natural law

 $\mathbf{c}:$ a court of equity

sat alone for some time in equity

- O. W. Holmes, Jr.

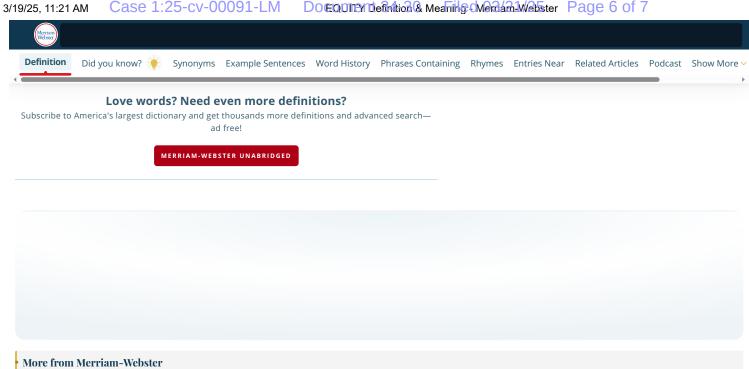
- a body of doctrines and rules developed to enlarge, supplement, or override any narrow or rigid system of law
- 4 a: a right, claim, or interest existing or valid in equity
 - **b**: the money value of a property or of an interest in property in excess of any claims or liens (as mortgage indebtedness) against it
 - c: a risk interest or ownership right in property

 specifically: the ownership interests of shareholders in a company
 - d: the common stock of a corporation
 - → compare ASSET, DEBT

Etymology

Latin aequitat-, aequitas fairness, justice, from aequus equal, fair

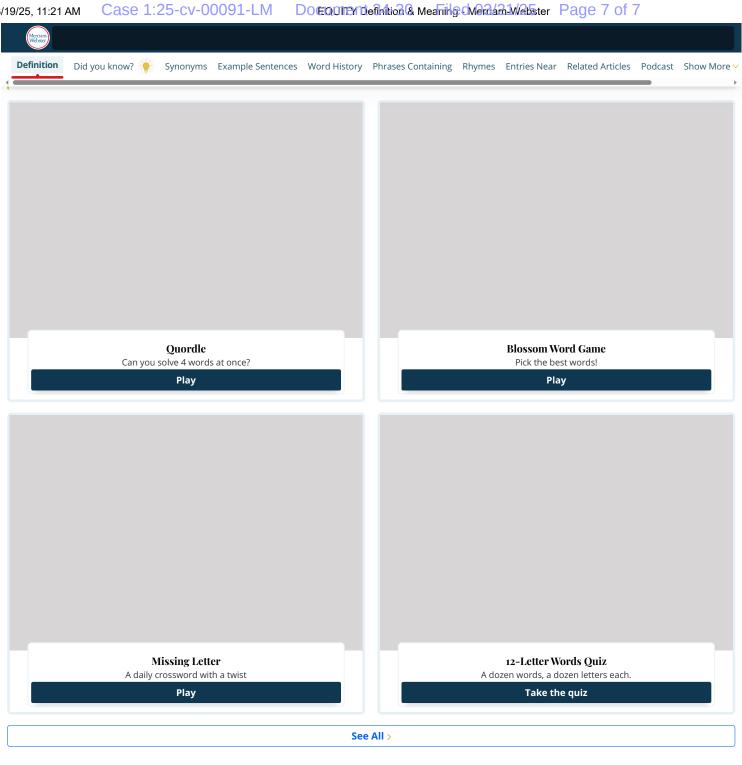
More from Merriam-Webster on equity











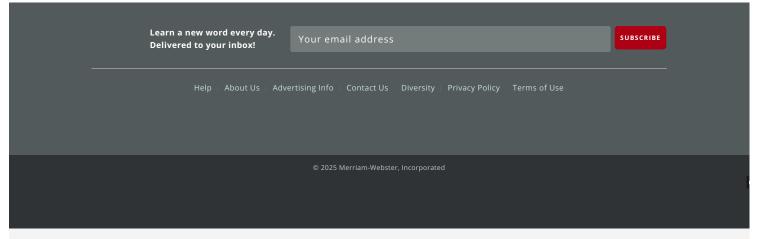


EXHIBIT AC

inclusion noun

in·clu·sion (in-'klü-zhən ◄))

Synonyms of inclusion >

3/19/25. 11:22 AM

- 1 : the act of including: the state of being included
- 2 : something that is included: such as
 - a: a gaseous, liquid, or solid foreign body enclosed in a mass (as of a mineral)
 - **b**: a passive usually temporary product of cell activity (such as a starch grain) within the cytoplasm or nucleus
- the act or practice of including students with disabilities with the general student population

Inclusion refers to a variety of integration approaches, but the goal is to blend special education students into the traditional classroom.

- Suevon Lee
- → sometimes used before a noun

an inclusion classroom/school

- 4 : the act or practice of including and accommodating people who have historically been excluded (as because of their race, gender, sexuality, or ability)
 - ... academic libraries have traditionally struggled to address problems of equity, diversity and *inclusion*. The low representation of people of color in library staff has been a particular shortcoming, despite many initiatives to attract minority staff to the field.
 - Lindsay McKenzie

Tech workers say they are more interested in diversity and are more willing to work to promote *inclusion* in their workplace ...

– Jessica Guynn

Meaningful civic *inclusion* even now eludes many of our fellow citizens who are recognizably of African descent.

- Glenn C. Loury
- 5 mathematics: a relation between two classes (see CLASS sense 3c) that exists when all members of the first class are also members of the second
 - → compare MEMBERSHIP sense 3

inclusionary (in-'klü-zhə-ner-ē ◄)) adjective

Examples of inclusion in a Sentence

Recent Examples on the Web

(i) Examples are automatically compiled from online sources to show current usage. Read More

Embrace Communities Around Inclusive Leadership Finding safe spaces to process the firehose of misinformation and disappointment around the attack on diversity, equity, and *inclusion* is prudent.

- Simone E. Morris, Forbes, 15 Mar. 2025

Slusser is the most recent of the group to enter the battle against trans *inclusion* in women's sports after joining the Gaines lawsuit in September over her experience with transgender teammate Blaire Fleming.

Thesaurus

But in concessions to Merz's Conservatives, the version of the law that passed excised a clause that would have required all German film productions to meet specific diversity, gender equality, inclusion and anti-discrimination standards.

- Scott Roxborough, The Hollywood Reporter, 13 Mar. 2025

See All Example Sentences for *inclusion* >

Word History

Etymology

Latin inclusion-, inclusio, from includere

First Known Use

15th century, in the meaning defined at sense 1

Time Traveler

The first known use of inclusion was in the 15th century

See more words from the same century

Phrases Containing inclusion

inclusion body diversity, equity, and inclusion

Rhymes for inclusion

allusion collusion conclusion confusion contusion delusion diffusion effusion exclusion extrusion

See All Rhymes for inclusion >

Browse Nearby Words

incluse inclusion

inclusion body

illusion

See All Nearby Words >

infusion

"Inclusion." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webst er.com/dictionary/inclusion. Accessed 19 Mar. 2025.

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Kids Definition

inclusion noun

in·clu·sion (in-'klü-zhən ◄))

: the act of including : the state of being included

: something that is included

Medical Definition

inclusion noun

in·clu·sion (in-'klü-zhən ◄))

: something that is included

especially: a passive usually temporary product of cell activity (as a starch grain) within the cytoplasm or nucleus

More from Merriam-Webster on inclusion

Thesaurus: All synonyms and antonyms for inclusion Nglish: Translation of inclusion for Spanish Speakers

Last Updated: 18 Mar 2025 - Updated example sentences

Love words? Need even more definitions?

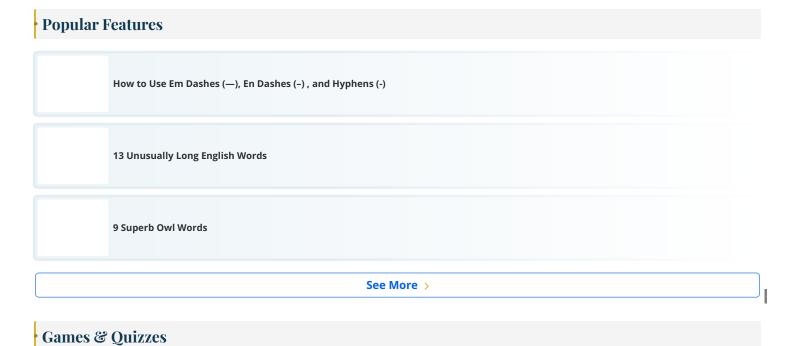
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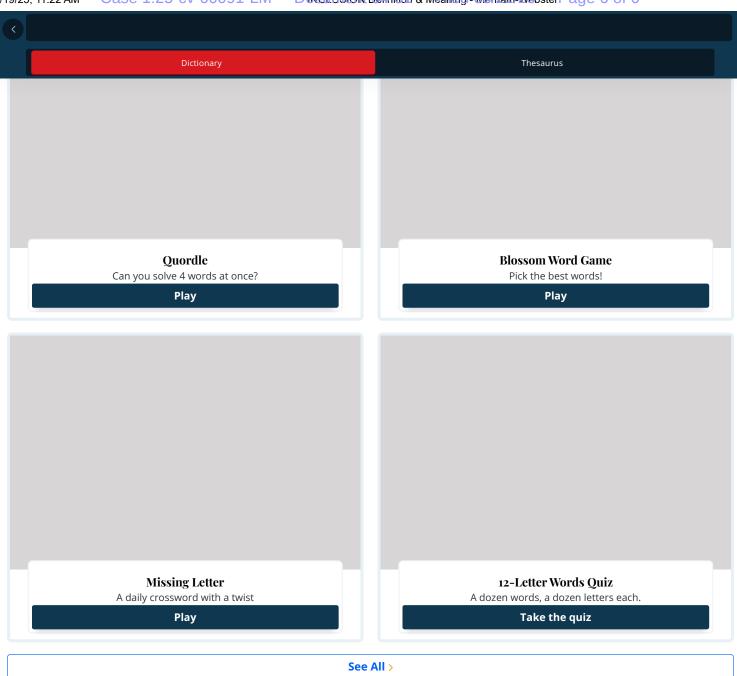
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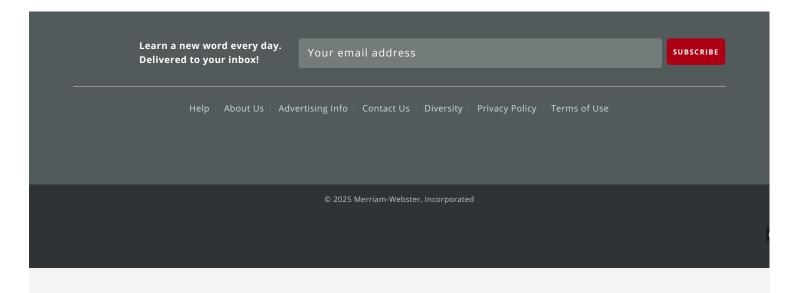


EXHIBIT AD



President Pinto shares message regarding future of DEI at UC



By John Bach 513-556-2019

4 minute read February 21, 2025 😝 💆 🛅 📵 🖶







Like ♡

SEE FAQ FOR LATEST DETAILS (HTTPS://WWW.UC.EDU/ABOUT/PRESIDENT/OFFICE/GOVERNMENTAL-RELATIONS/LEGISLATIVE-**UPDATES.HTML)**

Dear UC Community,

I write to you today to share some challenging truths about the future of diversity, equity and inclusion (DEI) at the University of Cincinnati. As you are no doubt aware, the federal government has effectively outlawed DEI programs and practices within government entities, including public universities nationwide.

If you haven't already, please take the time to read President Trump's Executive Order 14173 (https://www.whitehouse.gov/presidential-actions/2025/01/ending-illegal-discrimination-and-restoring-merit-basedopportunity/) from January 21 as well as the February 14 "Dear Colleague (https://www.ed.gov/media/document/dearcolleague-letter-sffa-v-harvard-109506.pdf)" letter from the U.S. Department of Education Office of Civil Rights (OCR), which calls for the elimination of DEI in higher education.

Taken together, these federal actions are sweeping in their scope, categorical in their conclusions and pressing in their timing. The OCR letter specifically states that we must comply with these new rules by February 28, after which OCR will begin holding noncompliant universities accountable.

In response to these mandates, Provost Kristi Nelson and I spent this week informing our deans and vice presidents of the initial steps we must take to ensure compliance. We also met with Faculty Senate Cabinet to inform them of the implications of these developments. Our message to them — and to you — is this: Given the extent to which our university, like most educational institutions, relies on federal funding to deliver and sustain our core mission, it is untenable to operate as if noncompliance with these directives is an effective option. In addition, Ohio's 136th General Assembly is in the process of fast-tracking Senate Bill 1 (https://www.legislature.ohio.gov/legislation/136/sb1), which, in its current form, reinforces federal DEI prohibitions.

Given this new landscape, Ohio public and federally supported institutions like ours have little choice but to follow the laws that govern us. Meanwhile, we will continue to work through our state and federal Government Relations channels to encourage legislators to support policies that honor the mission of public higher education, which is so essential for the development of citizens for our democracy.

What does all of this mean for UC as of today?

Our leaders have begun evaluating jobs and duties related to DEI and examining our DEI programming, initiatives and projects to bring all areas into compliance. In addition, we have begun removing references to DEI principles across university websites, social media and collateral materials. This will be a heavy lift, and I am thankful for our university leaders and their teams who grasp what is at stake in this moment. We must approach this process with the thoughtfulness and thoroughness that such complex comprehensive endeavors entail, while always keeping the well-being of the people most affected at the heart of our efforts.

I recognize that these decisions are weighty, and these actions are a departure from decades of established practice within academic communities. I also continue to ask for your patience and understanding as we do the hard work that will be required to unwind many years of DEI efforts under an extremely compressed timeline.

We are committed to meet both our compliance obligations and our mission to provide a supportive learning and working environment where all are welcome, safe and free to be successful. Indeed, there remain many unanswered questions, and we are working diligently to arrive at answers. As we move forward, we will share updates as information becomes available.

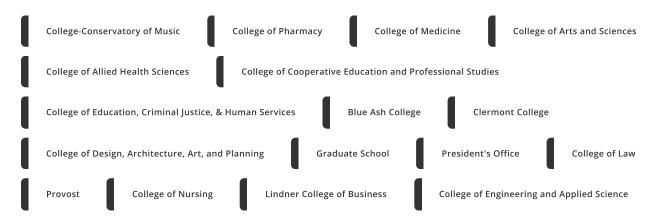
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Neville G Pinto

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EXHIBIT AE



Feb. 18: New federal directives

February 18, 2025

Dear Colorado State University Community,

Colorado State University was founded on the powerful idea that a world-class education should be available to anyone with the ability and desire to attend college. That's been our mission since 1870, and it is as important and relevant today as it was when we were founded. At a time when our nation is facing shifting federal priorities, the success of all CSU students as both scholars and members of democratic society is steadfastly our top priority as we continue to strengthen our mission of teaching, research and service for the benefit of Colorado, the nation and the world.

At CSU, our leadership team has been carefully monitoring and analyzing all federal directives coming from the new presidential administration. Today I write to share how the most recent guidance, published Friday by the U.S. Department of Education, may impact our university. As we navigate these changes, we will keep our focus on CSU's land-grant mission, put service to our students first and prioritize faculty and staff.

The Department published what is known as a "<u>Dear Colleague letter</u>" directed to all K-12 schools, colleges and universities in the nation. This letter follows an earlier DEI-centered executive order titled "<u>Ending illegal discrimination and restoring merit-based opportunity."</u> Friday's letter describes how the administration interprets and intends to enforce federal nondiscrimination laws in an educational setting. It makes it clear that organizations which fail to comply will put their federal funding at risk.

CSU must follow state and federal law. We are confident that the institution currently complies with the law, as we do not use race as a factor in admissions, financial aid, employment or housing, and our cultural centers and identity-based support resources are open to all students. However, the new administration's interpretation of law marks a change. Given the university's reliance on federal funding, it is necessary to take additional steps to follow the federal administration's new interpretations. Federal funding makes up roughly one-third of CSU's overall budget and includes funding for research, student programs, community partnerships and federal financial aid.

Starting today, CSU will begin to adjust to the new federal directives. We will shift some employee job duties and human resources policies and processes, and we will make some changes to CSU's websites to reflect the institution's compliance with federal guidelines.

The path forward may challenge our campus in different ways. For some members of our community, these changes will be disruptive and concerning, and I understand that many individuals feel uncertain. I

ask that we extend grace, dignity and respect to each of our fellow Rams. If you need assistance or someone to talk to, please take advantage of the many <u>support programs</u> offered to students, faculty and staff. CSU leaders will continue to work directly with impacted individuals and groups across campus to provide support and guidance.

The situation remains fluid, and we want to keep you informed. On Feb. 8, we launched a <u>Federal</u> <u>Updates website</u> to serve as a reliable source of information for the campus community. Questions related to impacts on <u>federally funded grants</u>, <u>agreements and contracts</u> may be directed to the Office of the Vice President for Research at <u>VPR_Support@colostate.edu</u>. Additional questions about federal changes and impacts may be directed to <u>CSU_FederalQuestions@colostate.edu</u>.

As a CSU alum and longtime employee, I have been part of the university community for most of my life. We have seen CSU grow into one of the nation's leading land-grant universities. We have always worked together when facing change and uncertainty and have emerged with strength. The actions we must take now are aimed at positioning CSU for continued success and a bright future. By continuing to put students first and focusing on our land-grant mission, we will see our way through the changing federal landscape with resilience.

The heart of what it means to be a Ram – a commitment to unlocking the doors of opportunity for all – will remain strong. We will continue to provide timely and relevant information to the CSU community.

Sincerely,

Amy Parsons, President

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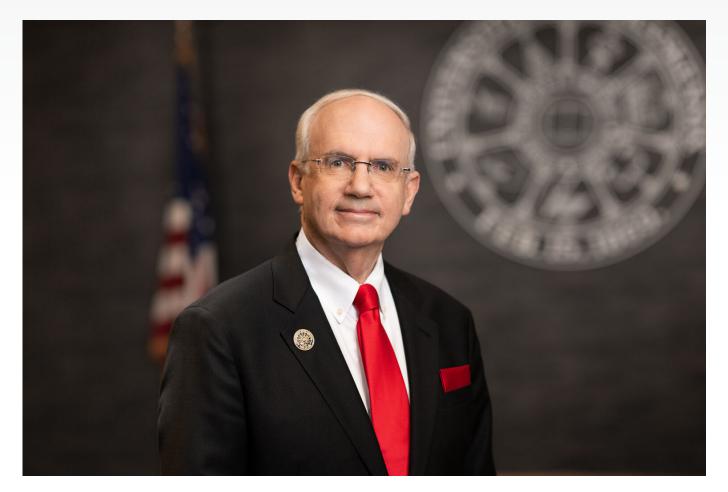


♠ - Newsroom - 'A message from President Gold on OCR's 'Dear Colleague' letter'

'A message from President Gold on OCR's 'Dear Colleague' letter'

WRITTEN BY University of Nebraska System

PUBLISHED Feb 21, 2025



University of Nebraska System President Jeffrey P. Gold, MD

University of Nebraska System President Jeffrey P. Gold, MD, sent the following message to university faculty, staff and students on Thursday, Feb. 20.

Dear Faculty, Staff, and Students,

I am reaching out regarding the U.S. Department of Education Office for Civil Rights' (OCR) "Dear Colleague" letter that was released last week.

The letter references "discriminatory practices" that OCR asserts have been conducted "under the banner of diversity, equity and inclusion" and outlines federal requirements to restrict such initiatives at institutions receiving federal financial support.

The letter also reiterates existing legal requirements under Title VI of the Civil Rights Act of 1964 and signals that the Department of Education will apply a broad interpretation of the 2023 Supreme Court decision in Students for Fair Admissions v. Harvard, which found race-conscious admissions programs to be unlawful.

According to the OCR, the prohibition on race-based considerations extends beyond admissions to decisions related to hiring, promotion, compensation, financial aid, scholarships, awards, administrative support, discipline, housing, graduation ceremonies, and all other aspects of student, academic, and campus life. The letter notes that OCR will begin assessing compliance by February 28.

The letter also outlines consequences for direct and non-direct noncompliance – most notably the entire university system becoming ineligible for all federal funding, which could have a significant impact on our university.

In response to this letter, our university has initiated an immediate, chancellor-led comprehensive review of potentially relevant activities on each campus. This process allows each campus to evaluate its current programs, positions and policies and take appropriate measures to align with the Department's directives with the information we have thus far. The letter also states that more information and legal guidance will be forthcoming. As soon as we receive these updates, we will share them with you.

We recognize that these changes may raise significant questions and uncertainties. Please know that we remain committed to keeping you informed as we navigate this evolving landscape together. Thank you for your continued dedication to our university community.

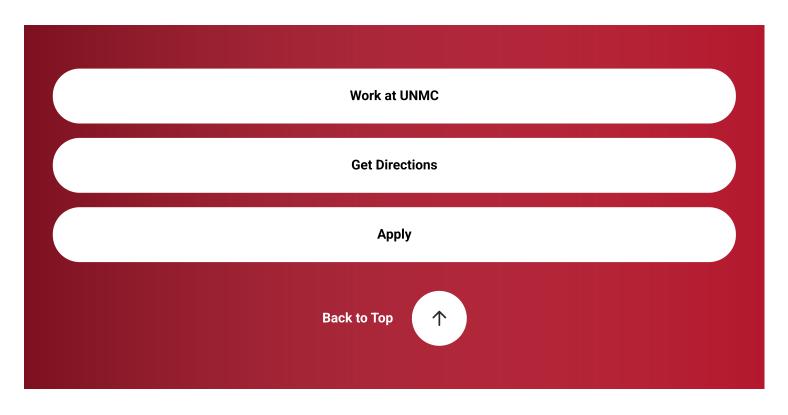
Sincerely,

Jeffrey P. Gold, MD President, University of Nebraska System



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GRAND RAPIDS

Muskegon Community College suspends DEI programs amid Trump mandates

Updated: Mar. 07, 2025, 4:06 p.m. | Published: Mar. 06, 2025, 1:32 p.m.



withhold federal funding from schools that don't end initiatives. Alison Zywicki | azywicki Alison Zywicki | azywicki









By Danielle James | djames@mlive.com

MUSKEGON, MI - Muskegon Community College has suspended Diversity, Equity and Inclusion (DEI) programming, following the Trump administration's threat to withhold federal funding from schools that don't end initiatives.

Muskegon Community College (MCC) President John Selmon said pending litigation is challenging the administration's positions and legal interpretations, "and we are monitoring those proceedings.



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"However, during this period of uncertainty, in consultation with legal counsel, MCC has paused programming and work in the areas of diversity, equity and inclusion to minimize the risk of any interruption of critical federal financial assistance relied upon by our students."

The college has also modified its mission and vision statements in response as of Feb. 28, 2025.

On the decision, Selmon said, "As always, our biggest responsibility is to do everything we can to help all students succeed."

He said the college's decision to pause its work in the DEI space was made as a direct result of recent federal communications.

In a Feb. 14 "Dear Colleague" letter, the U.S. Department of Education Office of Civil Rights gave K-12 schools, colleges and universities 14 days to eliminate diversity initiatives, including "race-based decision-making," or risk losing federal funding.

The letter, signed by Acting Assistant Secretary for Civil Rights Craig Trainor, said programs like DEI promote discrimination in "less direct, but equally insidious, ways."

The letter follows executive orders signed by President Trump that seek to end DEI programs, both in schools and in the federal workforce.

Selmon said the college reviewed the letter with its legal counsel.

That review, "the uncertain legal landscape regarding enforcement, and implementation by the Education Department of that interpretation," led the college to conclude that continuing to offer DEI programming "could place absolutely necessary federal financial assistance at risk."

RELATED. As Trump orders and to DEI, WMU says its diversity practices are constitutional

David Takitaki, a professor at Ferris State University and part-time MCC professor in the college's political science department, said in a Facebook post that approximately 29% of MCC's revenue comes from federal contracts, while 33% comes from tuition and fees.

"Since a significant portion of those tuition dollars come through Federal Student Aid, you're looking at likely half of all revenues that would be cut off," he said.

In addition, community colleges can receive supplemental federal grant dollars to advance their programming.

In April 2024, MCC <u>received</u> a \$1.1 million grant to bolster its computer information systems and manufacturing programs. The college was designated as a sub-recipient of the Strengthening Community College Training Grant from the U.S. Department of Labor, getting part of \$5.5 million that was received by Grand Rapids Community College through a grant application.

Takitaki said Selmon sent out several letters to faculty and staff in response to Trump administration action, first telling staff the college was waiting on official guidance from the Department of Education and later informing of the Dear Colleague letter.

In the days since receiving the letter, MCC has disabled a webpage with DEI resources and information.

The college had been a partner with the Community Foundation for Muskegon County in a two-month <u>skills</u> <u>training series</u> relating to diversity, equity, inclusion and belonging in February and March.

The final two of four session dates are scheduled for March 11 and 25.

Selmon said MCC is now "not pursuing any DEIB trainings in connection with its educational programs for enrolled students."

The school's vision statement, which was previously "an educated, inclusive community," has been changed to "an educated, thriving community."

The mission statement was previously "Muskegon Community College, dedicated to equity and excellence, prepares students, builds communities and improves lives."

It is now, "Muskegon Community College, dedicated to excellence, prepares students, builds communities and improves lives."

The college also concluded that continuing to employ DEI personnel could jeopardize funding, Selmon said.

The letter sent by the college confirmed that two employees previously assigned to DEI-related positions have been shifted to other areas.

"I have great sympathy for the MCC administration and board of trustees who were put in an impossible situation," Takitaki said in his Facebook post. "They bear no blame for these changes, as this was the only choice anyone could make if your priority was on the students attending your institution."

"I expect more colleges and universities to make similar concessions, and I expect some will go further and attempt to modify curriculum in order to avoid the wrath of those who would erase history and ignore reality," he added. "I do not blame those educators and administrators who, with a metaphorical gun to their heads, do their best to preserve vital educational access and opportunities for students."

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PRESS RELEASE

U.S. Department of Education Cancels Additional \$350 Million in Woke Spending

Contracts and grants terminated at several Regional Educational Laboratories and Equity Assistance Centers

FEBRUARY 13, 2025

Today, the U.S. Department of Education cancelled over \$350 million in contracts and grants to several Regional Educational Laboratories and Equity Assistance Centers.

The Department terminated 10 contracts totaling \$336 million with the Regional Educational Laboratories, the purpose of which are supposed to support applied research, development, and technical assistance activities; however, review of the contracts uncovered wasteful and ideologically driven spending not in the interest of students and taxpayers. For example, the Regional Educational Laboratory Midwest has been advising schools in Ohio to undertake "equity audits" and equity conversations. The Department plans to enter into new contracts that will satisfy the statutory requirements, improve student learning, and better serve school districts, State Departments of Education, and other education stakeholders.

The Department also terminated grants to four Equity Assistance Centers totaling \$33 million, which supported divisive training in DEI, Critical Race Theory, and gender identity for state and local education agencies as well as school boards.

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PRESS RELEASE

U.S. Department of Education Cuts Over \$600 Million in Divisive Teacher Training Grants

U.S. Department of Education Cuts \$600 Million in Grants Used to Train Teachers and Education Agencies on Divisive Ideologies

FEBRUARY 17, 2025

The U.S. Department of Education today announced it has terminated over \$600 million in grants to institutions and nonprofits that were using taxpayer funds to train teachers and education agencies on divisive ideologies. Training materials included inappropriate and unnecessary topics such as Critical Race Theory; Diversity, Equity, and Inclusion (DEI); social justice activism; "anti-racism"; and instruction on white privilege and white supremacy. Additionally, many of these grants included teacher and staff recruiting strategies implicitly and explicitly based on race.

The grants are awarded to teacher preparation programs that train future classroom teachers. Examples from the grant applications included:

- Requiring practitioners to take personal and institutional responsibility for systemic inequities (e.g., racism) and critically reassess their own practices;
- Receiving professional development workshops and equity training on topics such as "Building Cultural Competence," "Dismantling Racial Bias" and "Centering Equity in the Classroom";
- Acknowledging and responding to systemic forms of oppression and inequity, including racism, ableism, "gender-based" discrimination, homophobia, and ageism;
- Building historical and sociopolitical understandings of race and racism to interrupt racial marginalization and oppression of students in planning instruction relationship building discipline and assessment;
- Providing "targeted practices in culturally relevant and responsive teaching abolitionist pedagogies and issues of diversity in classroom management"; and
- · Providing spaces for critical reflection to help educators confront biases and have transformative conversations about equity.

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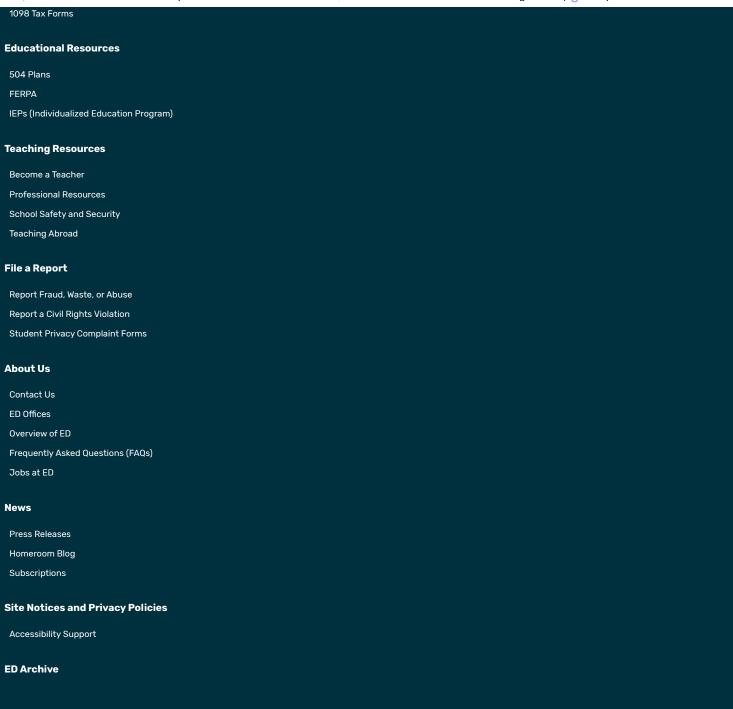
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EXHIBIT AJ

PROPUBLICA

Trump Administration

Education Department "Lifting the Pause" on Some Civil Rights Probes, but Not for Race or Gender Cases

A memo to the department's Office for Civil Rights reveals that the agency will allow "only disability-based discrimination" cases to proceed. Thousands of outstanding complaints will continue to sit idle.



Photo illustration by ProPublica. Source images by Saul Loeb/AFP/Getty Images, Wikimedia, DOF

by Jennifer Smith Richards and Jodi S. Cohen

Feb. 20, 2025, 8:35 p.m. EST

ProPublica is a nonprofit newsroom that investigates abuses of power. Sign up to receive our biggest stories as soon as they're published.

The U.S. Department of Education on Thursday told employees that it would lift its monthlong freeze on investigating discrimination complaints at schools and colleges across the country — but only to allow disability investigations to proceed.

That means that thousands of outstanding complaints filed with the department's Office for Civil Rights related to race and gender discrimination — most of which are submitted by students and families — will continue to sit idle. That includes cases alleging unfair discipline or race-based harassment, for example.

"I am lifting the pause on the processing of complaints alleging discrimination on the basis of disability. Effective immediately, please process complaints that allege only disability-based discrimination," Craig Trainor, the office's acting director, wrote in an internal memo obtained by ProPublica. It was sent to employees in the enforcement arm of the office, most of whom are attorneys.

A spokesperson for the department did not immediately respond to a request for comment.

ProPublica reported last week that the Department of Education had <u>halted ongoing civil rights</u> investigations, an unusual move even during a presidential transition. Department employees said they had been told not to communicate with students, families and schools involved in cases that were launched in previous administrations, describing the edict as a "gag order" and saying they had "been essentially muzzled."

The office has opened only a handful of new cases since the inauguration of President Donald Trump, and nearly all of them reflect his priorities. The investigations target a school district's gender-neutral bathroom and institutions that have allowed transgender athletes to participate in women's sports. Other prioritized investigations involve allegations of discrimination against white students or of anti-semitism.

As of last week, the OCR had opened about 20 new investigations in all, a low number compared with similar periods in prior years. More than 250 new cases were opened in the same time period last year, for example.

The OCR has had a backlog of cases for years — there were about 12,000 pending investigations when Trump took office. Some had been open for more than a decade, which civil rights advocates said failed to bring relief to students when they needed it.

About half of the pending investigations are related to students with disabilities who feel they've been mistreated or unfairly denied help at school, according to a ProPublica analysis of department data.

Investigators were pursuing about 3,200 active complaints of racial discrimination, including unfair discipline and racial harassment. An additional roughly 1,000 complaints were specific to sexual harassment or sexual violence, the analysis found. The remainder

concern a range of discrimination claims.

Ignoring or attacking disability rights "would be politically unpopular," said Harold Jordan of the American Civil Liberties Union, who works on education equity issues across the country. "They don't want to be seen as shutting down all the disability claims," he said.

But complaints typically investigated by the OCR, many related to discrimination against students of color, do not align with Trump's priorities on racial bias, which so far have related to prejudice against white students.

"They will pick up race cases once people file, essentially, reverse discrimination complaints," Jordan said.

The OCR, in fact, decided this month that it would investigate a complaint filed in August by the Equal Protection Project, a conservative nonprofit, that alleges the Ithaca City School District in New York excluded white students by hosting an event called the Students of Color Summit. The Biden administration had not acted on the complaint, but new Education Department leaders decided within days that the agency would proceed with an investigation.

Thursday's memo also included a "revised" case manual, which details how the office will investigate and resolve complaints that allege violations of civil rights law. During the previous administration, investigators had the authority to open "systemic" inquiries when there was evidence of widespread civil rights issues or multiple complaints of the same type of discrimination at a school district or college. That ability to launch wider investigations appears to have been stripped under Trump; there is no mention of systemic investigations in the new manual.

The manual also no longer includes gender-neutral references; people alleging violations of "their" rights have been replaced by "his or her" in Trump's updated version. That aligns with his recent anti-transgender policies and his view that there are only two genders.

The shifts at the OCR come as Trump has called the Education Department a "con job" and is expected to issue an executive order that it be dismantled. Last week, <u>Trainor told schools and colleges</u> that they have two weeks to eliminate race as a factor in admissions, financial aid, hiring and training or risk losing federal funding.

"Under any banner, discrimination on the basis of race, color, or national origin is, has been, and will continue to be illegal," Trainor wrote.

During the past two weeks, the Trump administration has terminated contracts totaling hundreds of millions of dollars that mostly focused on education research and data on learning and the country's schools. The cuts were made at the behest of Elon Musk's cost-cutting crew, known as the Department of Government Efficiency, which said it also ended dozens of training grants for educators that it deemed wasteful.

But recent contract terminations touted by Musk's team as ridding the department of "waste" and ending "diversity" programs also <u>abruptly ended services</u> for some students with disabilities.

What We're Watching

During Donald Trump's second presidency,
ProPublica will focus on the areas most in need of
scrutiny. Here are some of the issues our reporters
will be watching — and how to get in touch with
them securely.



Learn more about our reporting team. We will continue to share our areas of interest as the news develops.

Andy Kroll

I cover justice and the rule of law, with a focus on the Justice
Department, the U.S. Attorney's
Office for the District of Columbia and the federal courts.

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Robert Faturechi

I have been reporting on Trump
Media, the parent company of
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I'm an engagement reporter interested in immigration, labor and the federal workforce.



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I'm interested in Trump's and his allies' promises to dismantle the federal bureaucracy and laws that protect the environment.



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We're trying something new. Was it helpful?

Jennifer Smith Richards 😾 6 in

I pursue stories about abuses of power — often focusing on schools and education — and stories about private businesses throughout the Midwest.

MORE STORIES NEED TO GET IN TOUCH?

Tips about government and business, particularly in the Midwest, are welcome. I'm also eager to hear from educators and government officials. I want to connect with parents and students experiencing the administration's policy changes.

Jodi S. Cohen X



Jodi S. Cohen is a senior editor for ProPublica.

MORE STORIES NEED TO GET IN TOUCH?



EXHIBIT AK

PROPUBLICA

Trump Administration

Massive Layoffs at the Department of Education Erode Its Civil Rights Division

Only five of the agency's civil rights offices remain nationwide. Those who are still with the department say it will now be "virtually impossible" to resolve discrimination complaints.



People protest President Donald Trump's plans to dismantle the Department of Education outside the agency in Washington on Tuesday. Eric Lee/The New York Times/Redux

by Jodi S. Cohen and Jennifer Smith Richards

March 12, 2025, 10:30 a.m. EDT

ProPublica is a nonprofit newsroom that investigates abuses of power. Sign up to receive our biggest stories as soon as they're published.

With a mass email sharing what it called "difficult news," the U.S. Department of Education has eroded one of its own key duties, abolishing more than half of the offices that investigate civil rights complaints from students and their families.

Civil rights complaints in schools and colleges largely have been investigated through a dozen regional outposts across the country. Now there will be five.

The Office for Civil Rights' locations in Boston, Chicago, Cleveland, Dallas, New York, Philadelphia and San Francisco are being shuttered, ProPublica has learned. Offices will remain in Atlanta, Denver, Kansas City, Seattle and Washington, D.C.

The OCR is one of the federal government's largest enforcers of the Civil Rights Act of 1964, investigating thousands of allegations of discrimination each year. That includes discrimination based on disability, race and gender.

"This is devastating for American education and our students. This will strip students of equitable education, place our most vulnerable at great risk and set back educational success that for many will last their lifetimes," said Katie Dullum, an OCR deputy director who resigned last Friday. "The impact will be felt well beyond this transitional period."

The Education Department has not responded to ProPublica's requests for comment.

In all, about 1,300 of the Education Department's approximately 4,000 employees were told Tuesday through the mass emails that they would be laid off and placed on administrative leave starting March 21, with their final day of employment on June 9.

The civil rights division had about 550 employees and was among the most heavily affected by Tuesday's layoffs, which with other departures will leave the Education Department at roughly half its size.

At least 243 union-represented employees of the OCR were laid off. The Federal Student Aid division, which administers grants and loans to college students, had 326 union-represented employees laid off, the most of any division.

On average, each OCR attorney who investigates complaints is assigned about 60 cases at a time. Complaints, which have been backlogged for years, piled up even more after President Donald Trump took office in January and <u>implemented a monthlong freeze on the agency's civil rights work</u>.

Catherine Lhamon, who oversaw the OCR under former Presidents Barack Obama and Joe Biden said: "What you've got left is a shell that can't function."

Civil rights investigators who remain said it now will be "virtually impossible" to resolve discrimination complaints.

"Part of OCR's work is to physically go to places. As part of the investigation, we go to schools, we look at the playground, we see if it's accessible," said a senior attorney for OCR, who spoke on the condition of anonymity because he was not laid off and fears retaliation. "We show up and look at softball and baseball fields. We measure the bathroom to make sure it's accessible. We interview student groups. It requires inperson work. That is part of the basis of having regional offices. Now, California has no regional office."

The OCR was investigating about 12,000 complaints when Trump took office. The largest share of pending complaints — about 6,000 — were related to students with disabilities who feel they've been mistreated or unfairly denied help at school, according to a ProPublica analysis of department data.

Since Trump took office, the focus has shifted. The office has opened an unusually high number of "directed investigations," based on Trump's priorities, that it began without receiving complaints. These relate to curbing antisemitism, ending participation of transgender athletes in women's sports and combating alleged discrimination against white students.

Traditionally, students and families turn to the OCR after they feel their concerns have not been addressed by their school districts. The process is free, which means families that can't afford a lawyer to pursue a lawsuit may still be able to seek help.

When the OCR finds evidence of discrimination, it can force a school district or college to change its policies or require that they provide services to a student, such as access to disabilities services or increased safety at school. Sometimes, the office monitors institutions to make sure they comply.

"OCR simply will not be investigating violations any more. It is not going to happen. They will not have the staff for it," said another attorney for the Department of Education, who also asked not to be named because he is still working there. "It was extremely time and labor intensive."

The department said in a press release that all divisions at the department were affected. The National Center for Education Statistics, which collects data about the health of the nation's schools, was all but wiped away.

Education Secretary Linda McMahon called the layoffs "a significant step toward restoring the greatness of the United States education system." In addition to the 1,300 let go on Tuesday, 600 employees already had accepted voluntary resignations or had retired in the past seven weeks, according to the department.

Trump and his conservative allies have long wanted to shut the department, with Trump calling it a "big con job." But the president hasn't previously tried to do so, and officially closing the department would require congressional approval.

Instead, Trump is significantly weakening the agency. The same day Congress confirmed McMahon as education secretary, she sent department staff an email describing a "final mission" — to participate in "our opportunity to perform one final, unforgettable public service" by eliminating what she called "bloat" at the department "quickly and responsibly."

Education Department employees received an email on Tuesday afternoon saying all agency offices across the country would close at 6 p.m. for "security reasons" and would remain closed Wednesday. That led many workers to speculate that layoffs were coming.

Then, after the workday had ended, employees who were being laid off began receiving emails that acknowledged "the difficult workforce restructuring."

Emails also went to entire divisions: "This email serves as notice that your organizational unit is being abolished along with all positions within the unit — including yours."

What We're Watching

During Donald Trump's second presidency, ProPublica will focus on the areas most in need of scrutiny. Here are some of the issues our reporters will be watching — and how to get in touch with them securely.



Learn more about our reporting team. We will continue to share our areas of interest as the news develops.

Sharon Lerner

I cover health and the environment and the agencies that govern them, including the Environmental Protection Agency.





Robert Faturechi

I have been reporting on Trump
Media, the parent company of
Truth Social. I'm also reporting on
the Trump administration's trade policies,
including tariffs.



Andy Kroll

I cover justice and the rule of law, with a focus on the Justice
Department, the U.S. Attorney's
Office for the District of Columbia and the federal courts.



Jesse Coburn

I'm tracking how the Trump administration reshapes policy at the Department of Housing and Urban Development and the Department of Transportation.





If you don't have a specific tip or story in mind, we could still use your help. Sign up to be a member of our <u>federal worker source</u> <u>network</u> to stay in touch.

We're trying something new. Was it helpful?

Jodi S. Cohen X

Jodi S. Cohen is a senior editor for ProPublica.

MORE STORIES NEED TO GET IN TOUCH?

F

Jennifer Smith Richards 😾 🔞 in

I pursue stories about abuses of power — often focusing on schools and education — and stories about private businesses throughout the Midwest.

MORE STORIES NEED TO GET IN TOUCH?

Tips about government and business, particularly in the Midwest, are welcome. I'm also eager to hear from educators and government officials. I want to connect with parents and students experiencing the administration's policy changes.

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'End DEI' portal is 'culmination' of her efforts, says M4L co-founder Justice

For Moms for Liberty (https://www.momsforliberty.org/) co-founder Tiffany Justice, the U.S. Department of Education's (https://www.ed.gov/) creation of an "End DEI" public portal, where users can submit "reports of discrimination based on race of sex in public schools," is the "culmination" of her efforts to advance conservative parental values in the classroom.

Opponents of the online effort, called a "snitch line" by some, say it was created by conservatives to stamp out diversity, inclusion and equity efforts.

"Every child — no matter their state, neighborhood or background — deserves access to a world-class public education that inspires, empowers and prepares them for success," said Andrew Spar, president of Florida Education Association, the Sunshine State's largest association of professional employees, in a statement sent to FLORIDA TODAY.

"This means fully supporting our teachers and education staff professionals with fair pay, affordable healthcare and a secure path to retirement — enabling them to do what they love without political interference. It also means providing students with an honest education that reflects their experiences and history."

Justice, however, says the portal, which launched Feb. 27, is a way for the Department of Education to see the "breadth of the indoctrination" taking place in public schools.

"It's a betrayal what's been happening in the schools," Justice said. "This DOE portal is going to really give the department an opportunity to see, again, the landscape, what's really happening on the ground. They're going to be able to see fact patterns, and they're going to be able to do what they call directed investigations."

Justice, who helped on the project, said the "seed that was planted with Moms for Liberty has grown awareness all over the country" regarding issues Moms for Liberty and other conservative parents have pushed back on. But ultimately, she credits President Donald Trump and former wrestling executive Linda McMahon, who was confirmed Monday as secretary of education, with the creation of the portal.

READ THE FULL STORY HERE (https://www.floridatoday.com/story/news/2025/03/05/moms-for-libertys-justice-played-role-in-dept-of-eds-end-dei-portal/81167730007/)

Print (/news/print-view/end-dei-portal-is-culmination-of-her-efforts-says-m4l-cofounder-justice/)

Group(s): Moms for Liberty

Source: Florida Today (/news/?q=source:Florida Today)

Released: March 05th, 2025 12:02 AM

Author: Finch Walker

Website: https://www.floridatoday.com/story/news/2025/03/05/moms-for-libertys-justice-played-role-in-dept-of-eds-end-dei-portal/81167730007/ (https://www.floridatoday.com/story/news/2025/03/05/moms-for-libertys-justice-played-role-in-dept-of-eds-end-dei-portal/81167730007/)

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Moms for Liberty is dedicated to fighting for the survival of America by unifying, educating and empowering parents to defend their parental rights at all levels of government.

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EXHIBIT AM







Moms for Liberty's Post



Moms for Liberty February 15 · 🕙





A letter has been sent to the departments of education in all 50 states, informing them that they have 14 days to eliminate all Diversity, Equity, and Inclusion (DEI) programs in their public schools. Institutions that do not comply may risk losing federal funding.

- NO MORE Tax Payer Dollars will be spent on DEI!
- Academic Achievement over woke ideologies!
- Getting Back to the Basics!



UNITED STATES DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS

THE ACTING ASSISTANT SECRETARY

February 14, 2025

Dear Colleague:

Discrimination on the basis of race, color, or national origin is illegal and morally reprehensible. Accordingly, I write to clarify and reaffirm the nondiscrimination obligations of schools and other entities that receive federal financial assistance from the United States Department of Education (Department).1 This letter explains and reiterates existing legal requirements under Title VI of the Civil Rights Act of 1964,2 the Equal Protection Clause of the United States Constitution, and other relevant authorities.3

In recent years, American educational institutions have discriminated against students on the basis of race, including white and Asian students, many of whom come from disadvantaged backgrounds and low-income families. These institutions' embrace of pervasive and repugnant race-based preferences and other forms of racial discrimination have emanated throughout every facet of academia. For example, colleges, universities, and K-12 schools have routinely used race as a factor in admissions, financial aid, hiring, training, and other institutional programming. In a shameful echo of a darker period in this country's history, many American schools and universities even encourage segregation by race at graduation ceremonies and in dormitories and other facilities.

Educational institutions have toxically indectrinated students with the false premit that the United States is built upon "systemic and structural raciem" and advanciationizations policies and practices. Proponents of these discriminatory portions are discriminatory portions are strongly the statement of surface to further justify them—particularly during the last four years—under thannes of "diversity, equity, and inclusion" (PEIT), surgiging racial sterestypes an explicit race-consciousness into everyday training, programming, and discipline.

But under any banner, discrimination on the basis of race, color, or national origin is has been, and will continue to be illegal.

has been, and will continue to be lilegal.

The Supreme Court's 2023 decision in Students for Fair Admissions v. Harvard* (SFFA), which clarified that the use of racial preferences in cellege admissions is unlawful, sets often far framework for evaluating the use of race by state actors and entities covered by Title VI. The Court explained that "[e]lassifying and assigning students based on their race" is lawful only if it satisfies "strict senting", which means that any use of race must be narrowly tailored—that is, "necessary"—to achieve a compelling interest.* To date to he supreme Court has recognized only two interests as compelling in the context of race based sets. (I) "remediating specific, signified instances of past discrimination to thuman safety in prisons, such as a race rist." Nebulous conepst like racial balancing and diversity are not compelling interests. As the Court explained in SFFA, and individuals "are any never be used against him" and "may not operate as a sterestype" in governmental decision-making."

Relying on non-racial information as a proxy for race, and making decisions based on that information, violates the law. That is true whether the proxies are used to grant preferences on a individual basis or aytematic one. It would, for instance, be unlawful for an educational institution to eliminate standardized testing to achieve a desired racial balance or to increase racial diversity.

Other programs discriminate in less direct, but equally insidious, ways. DEI programs, for example, frequently preference certain racial groups and teach students that certain racial groups and one. Such programs stigmatize racial groups based on crude one stigmatize students who belong to particular racial groups based on crude racial stereotypes. Consequently, they down students the ability to participate fully in the life of a school.³³

The Department will no longer tolerate the overt and covert racial discrimination that has become widespread in this Nation's educational institutions. The law is clear treating students differently on the basis of race to achieve nebulous goals such as diversity, racial balancing, social justice, or equity is illegal under controlling Supreme Court precedent.

The Department intends to take appropriate measures to assess compliance with applicable statutes and regulations based on the understanding embodied in this la beginning no later than 14 days from today's date, including antidiscrimina requirements that are a condition of receiving federal funding.

All educational institutions are advised to: (1) ensure that their policies and actions comply with existing civil rights law; (2) cease all efforts to circumvent prohibitions on the use of race by relying on proxies or other indirect means to accomplish such ends;

Institutions that fail to comply with federal civil rights law may, consistent with applicable law, face potential loss of federal funding.

Anyone who believes that a covered entity has unlawfully discriminated may file a complaint with OCR. Information about filing a complaint with OCR, including a link to the online complaint form, is available here.



¹ Throughout this letter, "school" is used generally to refer to preschool, elementary, secondary, and postsecondary educational institutions that receive federal financial assistance from the

² Title VI provides that: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d, et seq.; 34 C.F.R. § 100, et seq.

This document provides significant guidance under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007). This guidance does not have the force and effect of law and does not bind the public or create new legal standards. This document is designed to provide clarity to the public regarding existing

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DEI tug-of-war in Wake County Schools stirs tensions among board, parents

Amid new Trump-era policies abandoning Diversity, Equity, and Inclusion (DEI) initiatives, the Wake County Public School System (WCPSS) has chosen not to dismantle its own Office of Equity Affairs, prompting some North Carolinians to warn of potential funding cuts that could impact the district.

Tuesday night's WCPSS board meeting revealed deepening divisions over DEI policies, with heated exchanges between supporters and critics. Seven of the nine board members are Democrats who have allowed the district's DEI policies to remain intact. Proponents point to protections for marginalized students, while opponents point to the division and harm created by the policies.

Board member Lynn Edmonds argued that Trump's rapid series of executive orders aim to destroy democracy while making people feel hopeless. She questioned who is so threatened by DEI policies while disputing public assertions that DEI threatens students and federal funding.

"Who exactly is so threatened by the pillars and value of DEI, or so threatened by pronouns, that they would deny special needs students with the funding they need and deny children school meals?" Edmonds asked. "Own it. Own that short-sightedness and own that cruelty."



Video clips of board members advocating for DEI went viral online, with Elon Musk reacting to comments made by board member Sam Hershey last week. He stated that "mediocre white men" have been hired based on their skin color for the last 250 years.



Shephard, a former Title 1 school teacher and veteran, spoke to the board during this week's meeting, pointing out plummeting public confidence in public schools.

Hershey apologized for coming across in a demeaning way.

"I want Eric Shephard to know that I took his words to heart, and I want to personally apologize to him," Hershey said on Tuesday. "I could have made the same points two weeks ago by being more nuanced and without coming across as demeaning to anyone. Mr. Shephard and to those who feel I demeaned their own life, I am sorry."

While some suggest DEI implies inclusivity for disabled individuals and others in need of accommodations, board member Cheryl Caulfield voiced concerns over the ideological implications of DEI. She said a second-grade class was assigned to act out a play where the students held roles that pushed "they/them" pronouns on students in what is socially influencing students.

"And at the end of the play, the actor is relieved that they finally chose their words of the day: 'They/then.' That is social influence," said Caulfield. "Let me repeat that this is second grade. Not learning the basics of 123s and ABCs and how to write and read words."

Keung Hui · Feb 18

@nckhui · Follow

Wake County school board
member Cheryl Caulfield asks
board to comply w/ Feb. 28
federal order to end DEI
programming. She says Sam

Some parents also expressed concerns that DEI lowers academic standards and prioritizes race over merit. They called for the dismantling of the WCPSS Office of Equity Affairs, arguing that DEI is divisive and undermines the achievements of individuals from all backgrounds.

Jessica Lewis, vice chair of Moms for Liberty, attended President Trump's executive order signing of the "No Males in Female Sports" policy. She questioned why WCPSS has not yet implemented Title IX changes following the order.

"This means the Office of Equity Affairs needs to be dismantled along with any DEI programs," said Lewis. "February 28 is the deadline to say goodbye to DEI. It will be in the best interest of this school district to comply. If compliance is not met, Moms for Liberty is prepared to escalate this issue, potentially leading to the loss of federal funding for the school district."

READ THE FULL STORY HERE (https://www.carolinajournal.com/dei-tug-of-war-in-wake-county-schools-stirs-tensions-among-board-parents/)

Group(s): Moms for Liberty 🖶 Print (/news/print-view/dei-tugofwar-in-wake-county-schools-stirs-tensions-among-board-parents/)

Source: The Carolina Journal (/news/?q=source:The Carolina Journal)

Released: February 20th, 2025 12:01 AM

Author: Brianna Kramer

 $\textbf{Website:} \ https://www.carolinajournal.com/dei-tug-of-war-in-wake-county-schools-stirs-tensions-among-board-parents/alicenses. The street of the street$

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EXHIBIT AO



← Post



Moms for Liberty Hillsborough Co, NH
@Moms4LibertyNH



We've got \$500 for the person that first successfully catches a public school teacher breaking this law.

Students, parents, teachers, school staff... We want to know! We will pledge anonymity if you want.



Public school teachers that teach critical race theory in New Hampshire will now lose their jobs and licenses.

N.H Education Department launches system for parents to lodge discrimination complaints against teachers

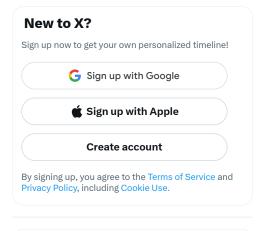
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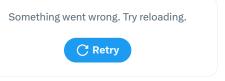
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PRESS RELEASE

DOJ, HHS, ED, and GSA Announce Initial Cancelation of Grants and Contracts to Columbia University Worth \$400 Million

Members of the Joint Task Force to Combat Anti-Semitism take swift action to protect Jewish students in response to inaction by Columbia University

MARCH 7, 2025

WASHINGTON – Today, the Department of Justice (DOJ), Department of Health and Human Services (HHS), Department of Education (ED), and the U.S. General Services Administration (GSA) announced the immediate cancelation of approximately \$400 million in federal grants and contracts to Columbia University due to the school's continued inaction in the face of persistent harassment of Jewish students. These cancelations represent the first round of action and additional cancelations are expected to follow. The Task Force is continuing to review and coordinate across federal agencies to identify additional cancelations that could be made swiftly. DOJ, HHS, ED, and GSA are taking this action as members of the Joint Task Force to Combat Anti-Semitism. Columbia University currently holds more than \$5 billion in federal grant commitments.

On March 3, the Task Force <u>notified</u> the Acting President of Columbia University that it would conduct a comprehensive review of the university's federal contracts and grants in light of ongoing investigations under Title VI of the Civil Rights Act. Chaos and anti-Semitic harassment have continued on and near campus in the days since. Columbia has not responded to the Task Force.

"Since October 7, Jewish students have faced relentless violence, intimidation, and anti-Semitic harassment on their campuses – only to be ignored by those who are supposed to protect them," said **Secretary of Education Linda McMahon.** "Universities must comply with all federal antidiscrimination laws if they are going to receive federal funding. For too long, Columbia has abandoned that obligation to Jewish students studying on its campus. Today, we demonstrate to Columbia and other universities that we will not tolerate their appalling inaction any longer."

President Trump has been clear that any college or university that allows illegal protests and repeatedly fails to protect students from anti-Semitic harassment on campus will be subject to the loss of federal funding.

"Freezing the funds is one of the tools we are using to respond to this spike in anti-Semitism. This is only the beginning," said **Leo Terrell, Senior Counsel to the Assistant Attorney General for Civil Rights and head of the DOJ Task Force to Combat Anti-Semitism**. "Canceling these taxpayer funds is our strongest signal yet that the Federal Government is not going to be party to an educational institution like Columbia that does not protect Jewish students and staff."

The decisive action by the DOJ, HHS, ED, and GSA to cancel Columbia's grants and contracts serves as a notice to every school and university that receives federal dollars that this Administration will use all the tools at its disposal

to protect Jewish students and end anti-Semitism on college campuses.

"Anti-Semitism is clearly inconsistent with the fundamental values that should inform liberal education," said **Sean Keveney, HHS Acting General Counsel and Task Force member**. "Columbia University's complacency is unacceptable."

GSA will assist HHS and ED in issuing stop-work orders on grants and contracts that Columbia holds with those agencies. These stop-work orders will immediately freeze the university's access to these funds. Additionally, GSA will be assisting all agencies in issuing stop work orders and terminations for contracts held by Columbia University.

"Doing business with the Federal Government is a privilege," said **Josh Gruenbaum, FAS Commissioner and Task Force member**. "Columbia University, through their continued and shameful inaction to stop radical protestors from taking over buildings on campus and lack of response to the safety issues for Jewish students, and for that matter - all students - are not upholding the ideals of this Administration or the American people. Columbia cannot expect to retain the privilege of receiving federal taxpayer dollars if they will not fulfill their civil rights responsibilities to protect Jewish students from harassment and anti-Semitism."

For more information, read the HHS, ED, and GSA joint press release from Monday, March 3.

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Office of Communications and Outreach (OCO)

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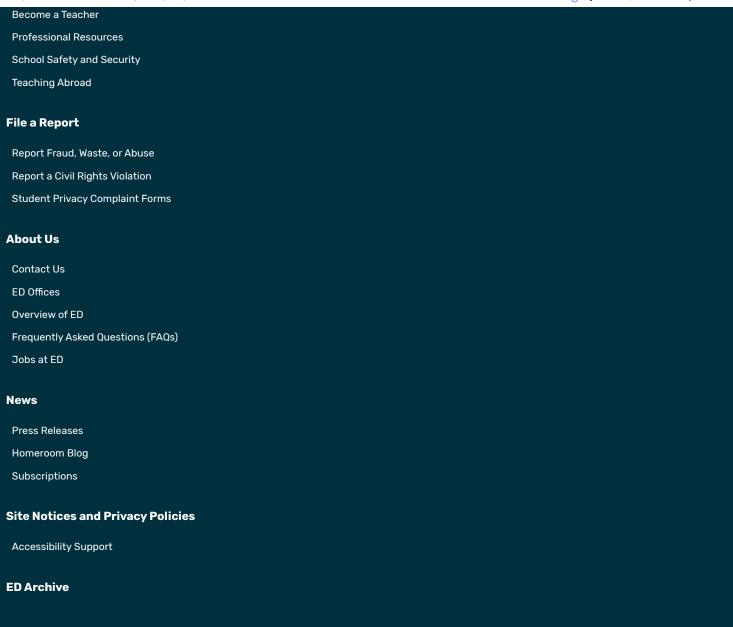
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March 13, 2025

Dr. Katrina Armstrong Interim President Columbia University Office of the President 202 Low Library 535 W. 116 St., MC 4309 New York, NY 10027

David Greenwald Claire Shipman Co-Chairs Columbia Board of Trustees 202 Low Library 535 W. 116 St. MC 4309 New York, NY 10027

Dear Dr. Armstrong:

Please consider this a formal response to the current situation on the campus of Columbia University and a follow up to our letter of March 7, 2025, informing you that the United States Government would be pausing or terminating federal funding. Since that date your counsel has asked to discuss "next steps."

U.S. taxpayers invest enormously in U.S. colleges and universities, including Columbia University, and it is the responsibility of the federal government to ensure that all recipients are responsible stewards of federal funds. Columbia University, however, has fundamentally failed to protect American students and faculty from antisemitic violence and harassment in addition to other alleged violations of Title VI and Title VII of the Civil Rights Act of 1964. Pursuant to your request, this letter outlines immediate next steps that we regard as a precondition for formal negotiations regarding Columbia University's continued financial relationship with the United States government. Please ensure and document compliance with the following no later than the close of business on Wednesday, March 20, 2025:

- Enforce existing disciplinary policies. The University must complete disciplinary proceedings for Hamilton Hall and encampments. Meaningful discipline means expulsion or multi-year suspension.
- **Primacy of the president in disciplinary matters.** Abolish the University Judicial Board (UJB) and centralize all disciplinary processes under the Office of the President. And

empower the Office of the President to suspend or expel students with an appeal process through the Office of the President.

- Time, place, and manner rules. Implement permanent, comprehensive time, place, and manner rules to prevent disruption of teaching, research, and campus life.
- Mask ban. Ban masks that are intended to conceal identity or intimidate others, with exceptions for religious and health reasons. Any masked individual must wear their Columbia ID on the outside of their clothing (this is already the policy at Columbia's Irving Medical Center).
- Deliver plan to hold all student groups accountable. Recognized student groups and individuals operating as constituent members of, or providing support for, unrecognized groups engaged in violations of University policy must be held accountable through formal investigations, disciplinary proceedings, and expulsion as appropriate.
- Formalize, adopt, and promulgate a definition of antisemitism. President Trump's Executive Order 13899 uses the IHRA definition. Anti-"Zionist" discrimination against Jews in areas unrelated to Israel or Middle East must be addressed.
- **Empower internal law enforcement.** The University must ensure that Columbia security has full law enforcement authority, including arrest and removal of agitators who foster an unsafe or hostile work or study environment, or otherwise interfere with classroom instruction or the functioning of the university.
- MESAAS Department Academic Receivership. Begin the process of placing the Middle East, South Asian, and African Studies department under academic receivership for a minimum of five years. The University must provide a full plan, with date certain deliverables, by the March 20, 2025, deadline.
- Deliver a plan for comprehensive admissions reform. The plan must include a strategy to reform undergraduate admissions, international recruiting, and graduate admissions practices to conform with federal law and policy.

Acting General Counsel

U.S. Dep't Health & Human Servs.

We expect your immediate compliance with these critical next steps, after which we hope to open a conversation about immediate and long-term structural reforms that will return Columbia to its original mission of innovative research and academic excellence.

Sincerely,

Josh Gruenbaum

Comm'r of the Fed. Acquisition Serv.

General Services Administration

Phomas E. Wheeler

Acting General Counsel

U.S. Dept. of Education

EXHIBIT AR



THE SECRETARY OF EDUCATION WASHINGTON, D.C. 20202

January 19, 2001

Dear Colleague:

I am writing to call your attention to a serious issue that goes to the heart of our shared mission to ensure equal educational opportunity and to promote educational excellence throughout our nation – the problem of continuing disparities in access to educational resources.

Over the last several years, our nation has embraced the goal of promoting high educational standards for all students and of increasing accountability in public education. Standards-based reform efforts have the potential of greatly improving educational outcomes for all children and of closing achievement gaps between minority and nonminority students. There is also evidence that the adoption of state standards and measures to hold schools accountable against those standards is generating public support for increased spending on our schools.

However, the movement toward standards and accountability will only succeed if we ensure that all children have full and equal access to the educational resources necessary to achieve high standards. Indeed, raising standards without closing resource gaps may have the perverse effect of exacerbating achievement gaps and of setting up many children for failure.

In particular, I am concerned about long-standing racial and ethnic disparities in the distribution of educational resources, including gaps in access to experienced and qualified teachers, adequate facilities, and instructional programs and support, including technology, as well as gaps in the funding necessary to secure these resources. Despite important progress, evidence shows that disparities in access to these educational resources remain -- with too many minority children isolated in schools and school districts with far too little opportunity.

These persistent disparities raise serious educational concerns, limiting the ability of children, and our nation, to reach their full potential. In some cases, these disparities may also raise legal concerns under our nation's civil rights laws. Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race or national origin in the provision of educational benefits by recipients of federal financial assistance. Several recent court decisions have held, and it has long been the position of the United States, that where a state acts to provide or regulate the provision of educational resources, the state is responsible under Title VI to act in a nondiscriminatory manner.

[OCR-00023]

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I know that, as a state leader in education, you share my concerns regarding continuing resource gaps in education. This letter is intended to provide you with some important information regarding racial and ethnic disparities in access to educational resources and to help you more closely examine these issues within your state. I have enclosed a summary of some of the research and preliminary data on current disparities in resources and funding. I have also enclosed a summary of the Title VI standards and of some recent private lawsuits in several states challenging their provision of educational resources.

Evidence Shows that Resource Disparities Exist in Education

A review of some of the existing research and preliminary data indicates that there are substantial disparities between minority and nonminority students, as well as districts with substantial concentrations of minority students and other districts, in terms of their access to key educational resources.

First and foremost, with regard to teachers, students in school districts with a greater percentage of minority students are less likely to have experienced, certified teachers who are teaching in their fields of expertise. For example, in 1998, schools with the highest concentrations of minority students had more than twice the inexperienced teachers of schools with the lowest concentrations of minority students. In addition, schools with high percentages of minority students were four times as likely as schools with low percentages of minority students to hire teachers who were unlicensed in their primary teaching field.

Furthermore, school facilities in districts with higher minority enrollment are generally in worse condition than school facilities in districts with lower minority enrollment. For example, one national study found that schools with greater than 50 percent minority enrollment were significantly more likely than schools with low minority enrollment to have less adequate environmental conditions across seven measures, including lighting, heating, ventilation, air quality, noise control, energy efficiency, and physical security.

In addition, with regard to instructional programs and instructional support, minority students are less likely to have access to key resources, such as computers and quality educational materials. For example, despite some important progress in closing the "Digital Divide," white students have been 20 percent more likely than African American students and about 24 percent more likely than Hispanic students to have access to computers in their schools.

Finally, these disparities in educational resources are reflected in disparities in school funding. For example, preliminary data on the revenue school districts received in 1996-97 indicate that -- when revenue is adjusted to reflect variations in buying power based on the cost of teacher salaries -- in 25 of the 40 states that have school districts with greater than 50 percent minority enrollment, those high-minority districts received less

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total average revenue per pupil from state and local sources than districts with less than 50 percent minority enrollment. Even without adjustments to reflect differences in buying power, high-minority districts received less total average revenue per pupil than low-minority districts in 17 of the 40 states. And higher spending districts typically have greater access to key educational resources.

These resource gaps are likely to be particularly acute in high-poverty schools, including urban schools, where many students of color are isolated and where the effect of the resource gaps may be cumulative. In other words, students who need the most may often receive the least, and these students are often students of color.

Research also indicates that these disparities in resources can affect educational outcomes. For example, studies show students learn more from qualified, experienced teachers. Simply put, these differences matter and may be hindering the learning experience of many minority students.

Title VI Prohibits Discrimination in the Provision of Educational Resources

Title VI prohibits discrimination on the basis of race or national origin by recipients of federal funds, including discrimination in the provision of educational resources. Title VI requires that when a recipient acts it must do so in a nondiscriminatory manner. Thus, to the extent that a state acts to provide educational resources to students, the state is covered by Title VI and must provide such resources in a nondiscriminatory manner.

Significantly, our nation's civil rights laws reinforce sound educational practices. Under Title VI, the central concern is whether all children are being provided an equal opportunity to succeed regardless of race or national origin. Thus, Title VI and its implementing regulations prohibit the different treatment of students based on race and national origin and prohibit policies or practices that have a discriminatory disparate impact by race or national origin. Disparity alone does not constitute discrimination; rather, the existence of a significant disparity triggers further inquiry to ensure that the given policy is educationally justified and that there are no alternative policies that would equally serve the recipient's goal with less disparity.

Several recent private lawsuits are pending against several states alleging, in part, that various state actions in the provision of educational resources violate Title VI or its implementing regulations. The United States has participated in several of these cases as amicus curiae, taking the position that Title VI is applicable to these claims, though not reaching the merits of any case. Moreover, several court decisions have affirmed that Title VI applies. These lawsuits challenge various types of state action as being carried out in a discriminatory manner, including the state's direct provision of resources or funding to school districts, the state's establishment of state and local funding formulas, and the state's enforcement, or lack thereof, of state mandates regarding educational resources. Furthermore, these private lawsuits often reference the state's movement

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toward the use of tests for student promotion or graduation. Several cases establish that where a state uses tests for these high-stakes purposes, the state must ensure that all students have an equal opportunity to learn the material being tested.

This is an emerging area of the law, and most cases are still in the early stages. Nonetheless, to help you understand the types of state action that have generated litigation, I am enclosing a brief summary of some recent cases.

States Should Examine Their Provision of Educational Resources

In sum, persistent disparities by race and ethnicity in access to educational resources raise important educational concerns and may also raise legal concerns. Given the importance of these issues to children and our nation, I strongly encourage all states to examine their provision of educational resources. That inquiry can help identify inequities, help promote educational achievement, and help the state and its school districts achieve the state's performance standards. Taking the initiative to address these issues may also help avoid costly and lengthy litigation. The challenge of resource disparities in education is one in which all levels of government have a stake, and this Department can help in addressing this vital issue. Nonetheless, in our federal system, state government – in carrying out its education leadership, oversight, and funding roles – has a special responsibility and opportunity to address the challenge.

Thank you for your attention to these issues that are so important to our nation's efforts to ensure that all students have an equal opportunity to achieve high standards. We encourage you to share this information with other decision-makers on education policy in your state so that you can examine together how your state can best promote the educational excellence of all students.

Yours sincerely,

Richard W. Riley

Enclosures

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EXHIBIT AS



UNITED STATES DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

October 1, 2014

Dear Colleague:

Sixty years ago the Supreme Court famously declared in *Brown v. Board of Education* that education "is a right which must be made available to all on equal terms." Today, I write to call your attention to disparities that persist in access to educational resources, and to help you address those disparities and comply with the legal obligation to provide students with equal access to these resources without regard to race, color, or national origin.* This letter builds on the prior work shared by the U.S. Department of Education on this critical topic.²

Across the country, teachers, administrators, and local and State[†] officials are working tirelessly to improve our schools through exciting innovations in teacher recruitment, hiring, assignment, evaluation, support, development, and retention. They are also upgrading school facilities, expanding access to advanced courses, increasing the availability of technology in the classroom, and employing more well-prepared staff to support the work of excellent teachers. The Department applauds these efforts and will make every effort to support them while ensuring that the provision and allocation of educational resources afford equal educational opportunity for all students.³

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[OCR-00075]

^{*} This letter addresses legal obligations under Title VI of the Civil Rights Act of 1964 (Title VI), which prohibits discrimination on the basis of race, color, or national origin, in programs and activities receiving Federal financial assistance. 42 U.S.C. § 2000d, *et seq. See also* 34 C.F.R. Part 100 (implementing regulations). The Office for Civil Rights (OCR) also enforces statutes that prohibit discrimination on the basis of sex and disability, and under which recipients of Federal financial assistance have similar responsibilities regarding the obligation to provide comparable educational resources to all students without regard to their sex or disability. 20 U.S.C. § 1681 *et seq.* (sex), 34 C.F.R. Part 106 (implementing regulations); 29 U.S.C. § 794 (disability), 34 C.F.R. Part 104 (implementing regulations).

[†] Although this letter focuses on the resource equity obligations of school districts, States and individual schools that receive Federal funds must likewise comply with Title VI's nondiscrimination requirements, including nondiscrimination in their provision and allocation of educational resources. Accordingly, OCR strongly encourages State education officials and school administrators to closely review this letter and to take proactive steps to ensure that the educational resources they provide are distributed in a manner that does not discriminate against students on the basis of race, color, or national origin. In particular, State education officials should examine policies and practices for resource allocation among districts to ensure that differences among districts do not have the unjustified effect of discriminating on the basis of race.

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I. The Problem of Unequal Access to Educational Resources

Many States, school districts, and schools across the Nation have faced shrinking budgets that have made it increasingly difficult to provide the resources necessary to ensure a quality education for every student. Chronic and widespread racial disparities in access to rigorous courses, academic programs, and extracurricular activities; stable workforces of effective teachers, leaders, and support staff; safe and appropriate school buildings and facilities; and modern technology and high-quality instructional materials further hinder the education of students of color today.* Below I highlight the negative effects these inequalities can have on student learning and encourage school officials to assess regularly disparities in educational resources in order to identify potential — and where it exists to end — unlawful discrimination, particularly in districts with schools where the racial compositions vary widely.[†]

Research confirms what we know intuitively — high-quality schools can make a dramatic difference in children's lives, closing achievement gaps and providing students with the opportunity to succeed in college and their chosen careers. The allocation of school resources, however, too often exacerbates rather than remedies achievement and opportunity gaps.

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^{*}This letter uses the term "students of color" rather than the term "minority students" to refer to students who identify as black, Latino, Asian, Native Hawaiian/Pacific Islander, American Indian/Alaska Native, and students of two or more races. Using "students of color" to refer to these students reflects the fact that in many school districts white students are in the minority. This letter also typically uses "Latino" to refer to people who identify as Hispanic or Latino and uses "black" to refer to people who identify as African-American or black. In addition, the terms "race" or "racial" includes race, color, and national origin; "policy" or "policies" includes policies, practices, and procedures; and "school" or "schools" includes an elementary or secondary school as well as a charter or "alternative" school that is a recipient of Federal financial assistance.

[†] This letter cites to leading scholarship in the field of education in the endnotes to demonstrate the importance of the resources discussed to the quality of education that students receive and to document the disparities in access to these resources across the Nation. These citations, however, are intended to illustrate the problems we face rather than to provide an exhaustive account of the state of the research. OCR weighed information gleaned from research alongside the experience of decades of OCR enforcement of civil rights protections in our schools to determine which resources to prioritize in this letter. As with all investigations, OCR retains discretion to investigate complaints of discrimination in access to resources not discussed in this letter and will consider the fact-specific contexts of all complaints in evaluating allegations of discrimination, including evidence that in a particular school or district, the relationship between resources, the quality of education, and student outcomes may not follow typical patterns.

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Many school districts offer academic and co-curricular* programs that are differentiated based on academic rigor (*e.g.*, gifted and talented or college preparatory programs) or content (*e.g.*, business, health care, music, art, or career and technical education programs). These programs can improve student achievement and build specialized skills that help students move along a variety of pathways toward college- and career-readiness.⁵ For example, participation in high-quality arts programs, including music and visual arts, is valuable to all students.⁶ Students in more advanced courses tend to put in significantly more effort, and student effort is in turn correlated with higher achievement, regardless of the student's entering level of achievement and regardless of which courses the student takes.⁷ Additionally, extracurricular opportunities such as academic clubs, athletics, and other organizations continue to build students' academic and social skills outside of class. These extracurricular programs have benefits such as increasing physical fitness and building skills in disciplines like music, technology, and debate. And researchers have found that participation in organized, school-based, extracurricular activities is strongly related to improved student achievement.⁸

But schools serving more students of color are less likely to offer advanced courses and gifted and talented programs than schools serving mostly white populations, and students of color are less likely than their white peers to be enrolled in those courses and programs within schools that have those offerings. 9 For example, almost one in five black high school students attend a high school that does not offer Advanced Placement (AP) courses, a higher proportion than any other racial group. 10 Students with limited English proficiency (English language learners) are also underrepresented in AP courses according to data from the 2011-12 school year. In that year, English language learners represented five percent of high school students, but only two percent of the students enrolled in an AP course. 11 Similarly, of the high schools serving the most black and Latino students in the 2011-12 school year, only 74 percent offered Algebra II and only 66 percent offered chemistry. Comparable high-level opportunities were provided much more often in schools serving the fewest black and Latino students, where 83 percent offered Algebra II courses and 78 percent offered chemistry. Moreover, the percentages of black and Latino students enrolled in calculus courses did not closely match the percentages of black and Latino students enrolled in high schools. While black and Latino students represented 16 percent and 21 percent, respectively, of high school enrollment in 2011-12, they were only 8 percent and 12 percent, respectively, of the students enrolled in calculus. 12 Black and Latino students were also

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^{*} Co-curricular refers to programs that have components occurring during classroom time as well as outside-of-class requirements such as music courses with required concerts that happen outside of the normal school day. This term is meant to distinguish those out-of-class requirements from extracurricular activities that are not typically tied to a specific course. Many researchers include co-curricular activities in their investigations of the effects of extracurricular involvement on student achievement because the activities happen outside of normal classroom time. However, because these programs are fundamentally part of a student's school day, OCR considers co-curricular programs alongside other academic programs in evaluating the comparable provision of programs across the schools in a school district.

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underrepresented in gifted and talented programs during the 2011-12 school year. In particular, schools offering such programs had an aggregate enrollment that was 15 percent black and 25 percent Latino, but their gifted and talented enrollment was only 9 percent black and 17 percent Latino. ¹³ Further, the percentage of non-English language learners participating in gifted and talented programs was three-and-a-half times greater than the percentage of English language learners participating in these programs. ¹⁴

The teachers, leaders, and support staff in a school are foundational to student learning and development. But disparities in the opportunity for students to benefit from strong teachers, leaders, and support staff — ones who, generally speaking, are qualified, experienced and accomplished — exist among and within districts, as well as among classes in the same school. Schools serving the most black and Latino students are 1.5 times more likely to employ teachers who are newest to the profession (who are on average less effective than their more experienced colleagues 16) as compared to schools serving the fewest of those students. The unequal provision of strong teachers and stable teacher workforces too often disadvantages the schools with the most at-risk students as well as schools with the highest enrollments of students of color. Students of color.

The physical spaces where our children are educated are also important resources that influence the learning and development of all students, yet many of our Nation's schools have fallen into disrepair. Too often, school districts with higher enrollments of students of color invest thousands of dollars less per student in their facilities than those districts with predominantly white enrollments. While conditions have improved in some districts, older buildings with inadequate or poorly maintained heating, ventilation, and air conditioning (HVAC) systems still are more likely to house schools attended mostly by students of color, who in many instances are also low-income students. Schools with the most students of color are more likely to have temporary, portable buildings and permanent buildings with poorer building conditions, including poorly maintained exterior features such as lighting and walls. Students of color must not be consigned to dilapidated, overcrowded school buildings that lack essential educational facilities, such as science laboratories, auditoriums, and athletic fields, and that may not be able to support the increasing infrastructure demands of rapidly expanding educational technologies while providing better facilities for other students.

In addition to facilities, access to instructional materials and technology for students and teachers can impact the quality of education as well as students' ability to engage with digital resources outside the classroom. ²² Technology and other instructional tools and materials support teachers in properly delivering, enhancing and personalizing the curriculum. Access to these important instructional resources varies between high-poverty schools that are heavily populated with students of color and more affluent schools serving fewer students of color. ²³ While gaps by race and income in student access to technology are narrowing at a national level, disparities persist regarding the number and quality of computers or mobile devices in the classroom, speed of internet access, and the extent to which teachers and staff are adequately prepared to teach

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students using these technologies.²⁴ High-quality instructional materials for students and teachers, including digital learning materials, textbooks, library resources, and other materials, promote rigorous engagement with the curriculum, and so when school districts provide these resources they must ensure that students have comparable access to them without regard to race, color, or national origin.

Adequate funding is necessary to provide the programmatic, human, and physical resources described above. ²⁵ Allocation of funding should be designed to ensure the availability of equal educational opportunities for students, which may require more or less funding depending upon the needs at a particular school. Intradistrict and interdistrict funding disparities often mirror differences in the racial and socioeconomic demographics of schools, particularly when adjusted to take into consideration regional wage variations and extra costs often associated with educating low-income children, English language learners, and students with disabilities. These disparities are often a result of funding systems that allocate less State and local funds to high-poverty schools that frequently have more students of color, ²⁶ which can often be traced to a reliance on property tax revenue for school funding. Federal funds provided through Title I of the Elementary and Secondary Education Act of 1965, as amended (ESEA), are designed to provide additional resources on top of state and local funds. ²⁷ As a result, OCR typically will not consider Title I funds in a resource equity analysis. OCR also notes that even counting Title I funds, many districts still allocate resources among schools inequitably. ²⁸

Such disparities may be indicative of broader discriminatory policies or practices that, even if facially neutral, disadvantage students of color.²⁹ For example, teachers in high schools serving the highest percentage of black and Latino students during the 2011-12 school year were paid on average \$1,913 less per year than their colleagues in other schools within the same district that serve the lowest percentage of black and Latino students.³⁰

As discussed above, challenging and creative courses, programs, and extracurricular activities; effective and qualified teachers, leaders, and support staff; adequate facilities; updated technology; quality education materials; and sufficient funding — are critical to the success of students. Yet, disparities in the level of access to these resources often reflect the racial demographics of schools, with schools serving the most students of color having lower quality or fewer resources than schools serving largely white populations even within the same district. This letter, therefore, highlights the importance of protecting students from discrimination in the allocation of any of these educational resources. This letter also serves to support and inform education officials by clarifying their legal obligations, and by identifying resources that can guide proactive district and State efforts to assess relevant data and to examine policies and practices on resource allocation to ensure compliance with Title VI.

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II. Legal Framework for Office for Civil Rights Enforcement Efforts

The Department's Office for Civil Rights (OCR) enforces Title VI of the Civil Rights Act of 1964, 32 which prohibits discrimination on the basis of race, color, or national origin, in programs and activities receiving Federal financial assistance. School districts that receive Federal funds must not intentionally discriminate on the basis of race, color, or national origin, and must not implement facially neutral policies that have the unjustified effect of discriminating against students on the basis of race, color, or national origin. In assessing the allocation of educational resources, OCR will investigate and analyze the evidence found under both theories of discrimination — intentional discrimination and disparate impact — to ensure that students are not subjected to unlawful discrimination. Each theory is summarized in turn below.

A. Intentional Discrimination

Under Title VI, intentional discrimination in allocating educational resources on the basis of race, color, or national origin is unlawful. Such discrimination can include acting on a racially discriminatory motive, providing educational resources only to members of select races, adopting facially neutral policies with an invidious intent to target students of certain races, or applying a facially neutral policy in a discriminatory manner. Evidence of discriminatory intent can be proven through direct evidence or circumstantial evidence. For example, such evidence may include the existence of racial disparities that could not otherwise be explained, a history of discriminatory conduct towards members of a certain race, or the inconsistent application of resource allocation policies to schools with different racial demographics.³⁵

OCR applies the following analysis to determine whether a school district intentionally discriminated in the allocation of resources:

1) Did the school district treat a student, or group of students, differently with respect to providing access to educational resources as compared to another similarly situated student, or group of students, of a different race, color, or national origin (a *prima facie* case of discrimination)?

* This letter focuses on the comparable allocation and provision of educational resources regardless of students' race, color, or national origin, but school districts should also be mindful of their obligation to take "affirmative steps" to help English language learners (ELLs) overcome language barriers so they can meaningfully participate in their schools' educational programs. *See Lau v. Nichols*, 414 U.S. 563, 566 (1974). The obligation to take such affirmative steps does not diminish a district's obligation to otherwise ensure equitable access to comparable educational resources for ELL students. OCR's policies governing the treatment of English-language learners are available at www.ed.gov/ocr/ellresources.html.

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- 2) Can the school district articulate a legitimate, nondiscriminatory, educational reason for the different treatment? If not, OCR could find that the district has intentionally discriminated on the basis of race. If yes, then
- 3) Is the allegedly nondiscriminatory reason a pretext for discrimination?³⁶ If so, OCR would find the district has intentionally discriminated on the basis of race.

In the context of a resource comparability investigation, this analysis for intentional discrimination may in practice take the following form, particularly in cases where there is no direct evidence of invidious purpose.

First, OCR would examine evidence regarding the quality, quantity, and availability of critical educational resources (as discussed in more detail below) to determine whether there are disparities among schools serving similarly situated students or among similarly situated students within the same school. Similarity of schools would be primarily judged by the size and grade level of the schools, whereas differences of student needs, programs, and other like factors would be relevant to the second prong of this analysis. Students would typically be considered similar if they are in the same grade and have generally comparable educational or academic needs. A *prima facie* case of intentional discrimination is demonstrated when the school district treats schools that are otherwise similar, but that have demonstrably different student populations with regard to race, color, or national origin, differently in terms of resource allocation, or when the school district gives similarly situated groups of students of different races within schools demonstrably different access to critical resources.

Second, school districts would then be given an opportunity to explain the different treatment, and OCR would assess whether there existed any legitimate, nondiscriminatory, educational explanation from the school district. OCR anticipates that in some school-level resource equity investigations, school districts may be able to explain differing resource allocations as arising from educational strategies such as the operation of themed programs at particular schools that may justify, for example, specialized training, courses, or technology supports at one school versus another. As another example, different resource allocations may also arise from appropriate targeting of capital improvement expenditures at the most dilapidated buildings in a district. A district might also explain that an alleged disparity among schools with regard to the allocation of a particular resource (such as laptops in the classroom) is part of a plan for allocating a broader category of resources (such as classroom-based technology) and present evidence that the broader plan leads to an equitable allocation overall.

However, if the school district cannot articulate a legitimate, nondiscriminatory, educational reason for different treatment, OCR could find that the district has intentionally discriminated based on race. If the school district provides an explanation, OCR would then assess whether the explanation is a pretext for unlawful discrimination — in other words, not the true reason for the different treatment but rather a mere cover for racial discrimination. Evidence that an explanation

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is pretextual may include, but is not limited to, that the explanation does not conform to overall district or State policies regarding the provision of resources or that witnesses or documents credibly offer evidence that contradicts the explanation offered. For example, the actual purpose or explanation for the different treatment could be a stereotype about a particular race not opting for or valuing advanced coursework. If OCR finds that the reason for the different treatment is pretextual, then the recipient would be found in violation of Title VI.

B. Disparate Impact

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.³⁷ 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?³⁸ 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?³⁹ 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.

Applying this disparate impact framework, OCR would not find unlawful discrimination based solely upon the existence of a quantitative or qualitative racial disparity resulting from a facially neutral policy. Nevertheless, OCR will investigate and ascertain whether such disparities are the result of unlawful discrimination under Title VI.

The first prong of this analysis requires OCR to identify a policy or practice that creates racial disparities in access to educational resources that are important to the quality of education a student receives, such that the disparity has an adverse impact on a racially defined group of students. Relying in part on research, OCR generally considers each of the educational resources

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discussed in this letter to provide a benefit and that its inequitable allocation tends to be adverse to students who are under-resourced. Additionally, OCR would also consider the school district's decision to provide a particular resource to students, such as technology or a gifted and talented program, as evidence that the district believes the resource is important. OCR would expect these resources to be equitably provided without regard to students' race, color, or national origin. Furthermore, OCR may consider indicia of the quality of education when determining adverse impact including, but not limited to, student achievement outcomes, graduation and retention-ingrade rates, and student and parent surveys. Finally, OCR would consider evidence offered by the school district that, in the specific factual context of its schools, a difference in certain resources does not adversely impact the quality of education.

If OCR identifies a policy or practice that creates adverse racial disparities, OCR looks to the school district for a substantial, legitimate, educational justification for the policy or practice. A district may offer a justification such as a policy of offering a diverse range of educational programs, of targeting resources to underperforming schools, or of piloting programs in one school before expanding them to more schools. As another example, school-based budgeting may allow for different choices at the school level regarding budgeting for resources such as instructional materials and staff positions, so that different combinations of resources at different schools would not necessarily represent resource inequity among those schools; in such a situation, OCR would investigate, among other things, whether the district's overall system for allocating funds to schools was equitable. OCR will assess the explanation identified, giving some deference to the expertise of the educators making those decisions. If OCR accepts the justification, OCR will work with the school district to identify whether the district could implement a workable alternative with a less racially disparate impact.

III. Office for Civil Rights Investigations

Again, Title VI prohibits discrimination in the allocation and provision of educational resources. 40 Therefore, OCR investigates complaints and conducts proactive investigations to determine whether school districts are discriminating against students based on race, color, or national origin in their allocation of educational resources. Such investigations may include, but are not limited to, analyses of any or all of the resources discussed in this letter, depending on the fact-specific context in a particular case. Sound educational judgments made by State and local education officials, as well as budgetary constraints, may lead school districts to prioritize certain resources or the needs of certain schools, but such decisions cannot reflect unlawful race discrimination, in purpose or effect. OCR's legal determinations will necessarily be context-specific and will require a holistic analysis of both quantitative and qualitative factual findings, including an evaluation of evidence presented that the quality of education students receive in a particular school or district is equitable despite apparent resource inequities in some areas. OCR's investigations recognize that States, districts, and schools have a significant amount of flexibility and variation in how they operate and that compliance with Title VI does not require a specific approach to ensuring equitable access to comparable resources.

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In its investigations, OCR focuses on the scope and severity of resource disparities, and on a district's processes for allocating resources to determine the extent to which the district is exacerbating or eliminating such disparities. OCR may compare a school's resources against district averages and against district schools serving the most and the fewest students of a particular race or national origin to assess whether alleged resource disparities are, in fact, correlated with the race, color, or national origin of students. OCR also recognizes that resources may appropriately be allocated differently to meet schools' differing needs. For example, an engineering-themed magnet school may invest more in computers than an arts-themed magnet school that invests more in musical instruments. Accordingly, OCR investigations are more likely to find school districts in violation of Title VI when it uncovers significant racial disparities in access to a particular education resource or patterns of racial inequality across a range of different types of resources.

Finally, OCR encourages districts to proactively identify and address racial disparities in resource allocation. School districts that take proactive, concrete, and effective steps to address the root causes of such disparities and to ensure that students are equitably served are more likely to be in compliance with Title VI. Further, the effectiveness of such efforts may reflect favorably on districts and inform any remedies OCR requires so that the district can build upon its efforts.

Note on School Funding

Although comparative funding levels are pertinent to the issue of educational resource comparability, they may not be conclusive evidence of compliance or non-compliance. The comparison of resources, including funds, allocated among schools is ultimately designed to measure the relative allocation of equal educational *opportunities* for students. The provision of equal opportunities may require more or less funding depending on the location of the school, the condition of existing facilities, and the particular needs of students such as English language learners and students with disabilities.* For example, older facilities generally require more money for annual maintenance than do newer facilities. Similarly, greater annual per-pupil library expenditures for one school may reflect an effort to correct years of underfunding of a library collection. Funding disparities that benefit students of a particular race, color, or national origin may also permissibly occur when districts are attempting to remedy past discrimination.

Much of the Federal funding provided to districts and schools comes from sources specified for a particular use such as special education, alternative language, or gifted programs. OCR may exclude these categorical resources from data used to determine comparability of regular education programs if those resources distort the comparisons for such programs.

^{*} For example, students in special education may be served by more teachers and support staff than other students, and therefore districts may spend more on those students, but that does not mean that those students are inequitably receiving a disproportionate share of resources.

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Lack of funds does not preclude the duty to act under Title VI. OCR may consider how States, districts, and schools distribute whatever funds and resources are available, as well as how they act to provide additional or sufficient funds, to ensure equal educational opportunities.

OCR generally focuses on funding via its impact on the other categories of educational resources discussed below. Simplistic comparisons of per-pupil expenditure levels are often a poor measure of resource comparability, and there are many factual circumstances that can create varying funding needs that justify differential spending patterns among schools. The ultimate issue is whether funding is provided to each school in the district so as to provide equal educational opportunities for all students.

A. Courses, Academic Programs, and Extracurricular Activities

Equal educational opportunity requires that all students, regardless of race, color, or national origin, have comparable access to the diverse range of courses, programs, and extracurricular activities offered in our Nation's schools. Students who have access to, and enroll in, rigorous courses are more likely to go on to complete postsecondary education. ⁴¹ Further, completing college or other postsecondary education such as a technical certification is increasingly necessary for students to enter careers that will enable them to join the middle class.⁴² Therefore, OCR assesses the types, quantity, and quality of programs available to students across a school district to determine whether students of all races have equal access to comparable programs both among schools and among students within the same school. OCR generally considers a range of specialized programs, such as early childhood programs including preschool and Head Start, Advanced Placement and International Baccalaureate courses, gifted and talented programs, career and technical education programs, language immersion programs, online and distance learning opportunities, performing and visual arts, athletics, and extracurricular activities such as college-preparatory programs, clubs, and honor societies. These programs help students distinguish themselves and develop skills that will help them in college and in their careers.

OCR also examines the relative availability of the full panoply of high school courses that prepare students to graduate ready for college and careers, including the range of science, technology, engineering, and mathematics (STEM) courses, as well as middle and elementary school courses that prepare students for college- and career-preparatory high school courses. Further, OCR may consider the overall quality and adequacy of special education programs at the school level, including identification, evaluation, and placement procedures as well as the quality and appropriateness of services and supports provided to students with disabilities to determine whether schools serving more students of color have comparable supports and services in place for students with disabilities.

While differentiation among schools in a district may serve important educational goals, OCR evaluates whether students of different races in a district are able to equally access and

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participate in a comparable variety of specialized programs — whether curricular, co-curricular, or extracurricular.* The selection of schools to offer particular programs and the resources made available for the success of those programs may not disproportionately deny access to students of a particular race or national origin. Also, the policies for recruitment and admission to particular schools or programs, both within and across schools, should not deny students equal access on the basis of their race.⁴³

Extracurricular activities, especially those that have been shown to support college and career readiness and high academic rigor, must be offered on a nondiscriminatory basis. OCR considers whether students of different races have equal access to extracurricular programs of similar quality across the district, including activities sponsored by the district but provided by outside organizations since school districts continue to have an obligation to provide equal educational opportunities for their students when working with third parties. OCR considers quantitative and qualitative factors including the number of extracurricular activities as well as their intensity and content; the types and relative quality of academic and co-curricular programs; the expertise of the teachers, coaches, and advisors who are implementing the programs; and the availability of the necessary materials such as books, uniforms, technology, and spaces. Where relevant, OCR also inquires into the district's policies and procedures for allowing students to gain access to programs offered at another school in the district.

B. Strong Teaching, Leadership, and Support

OCR examines a broad range of information sources when assessing whether a district discriminates based on race in providing access to strong teaching and instruction to its students including a variety of data related to the teachers, leaders, and staff in a district's schools. These sources can include data on teacher and leader effectiveness produced by teacher and leader evaluations and data on the relative stability of the teacher workforce across a district, including teacher turnover, absenteeism, use of substitutes, and vacancies. These sources can also include data on the following characteristics and qualifications of teachers: teachers' licensure and certification status, whether teachers have completed appropriate training and professional development, whether teachers are inexperienced, whether they are teaching out of their field, and other indicators of disparities in access to strong teachers. Finally, strong school leadership and support staff play a critical role in recruiting and retaining teachers, as well as in ensuring that teachers are able to be effective in the classroom. These criteria are discussed in more detail below. A particular OCR investigation may focus on a small subset of these criteria where

* OCR recognizes that student or parent demand for specific programs and courses may differ among the schools in a district, so participation rates will reasonably differ. However, OCR considers whether students have been given reasonable notice of the availability of programs and whether districts accommodate interested students in low-demand schools.

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appropriate, such as when the complainant's allegations are quite specific or where the adverse impact of the disparity in a particular area is clearly identifiable. But other investigations will rely upon a holistic analysis of these criteria to better gauge the totality of teacher and staff characteristics and the quality of instruction that students receive.

1. Teacher Effectiveness Data

Many States and school districts are in the process of developing evaluation systems that use multiple measures, including student growth, to provide important information about the effectiveness of teachers and principals. The Department considers these systems essential for a number of reasons, such as informing professional development and improving instructional practices, and has made development of these systems a key part of its equity-focused policies, including the principles for granting waivers from provisions of the Elementary and Secondary Education Act (ESEA), also known as ESEA flexibility. While there are many possible sources of information about student access to effective teaching, OCR may consider whether States and districts are developing high-quality evaluation systems. The data from these systems can enable States and districts to proactively help ensure that students of color are not being taught by ineffective teachers at higher rates than other students. For this reason, OCR recognizes that progress in the development and use of these systems may help demonstrate a commitment to the equitable allocation of resources. For example, evidence that States are including data on the allocation of effective teachers and strategies to address any inequitable allocation in their educator equity plans under Title I of the ESEA, 45 or evidence that school districts are implementing those strategies, would reflect favorably on a State or district in an OCR investigation.

2. Stability of Teacher Workforce

OCR may investigate a range of factors to determine whether students of color are more or less likely to attend schools with a stable teacher workforce. OCR may assess relative rates of teacher absenteeism⁴⁶ and the number and duration of teacher vacancies as part of investigating discrimination in student access to quality teaching. Because instruction by substitute teachers can disrupt the continuity of the classroom, OCR's Title VI nondiscrimination analysis includes comparisons of the number of school days, classes, and students taught by substitutes as well as assessments of whether schools make use of long-term substitutes where possible for planned teacher absences.*

* OCR investigations will of course consider a school district's explanations about causes of unusually high teacher absenteeism: for example, whether high teacher absenteeism rates at a school can be explained by a small number of teachers being absent for long periods of time because of pregnancy or long-term illness.

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OCR may also consider teacher turnover rates when investigating discrimination in access to strong teaching.* While some forms of turnover may be desirable, such as incentivizing and encouraging highly effective teachers to move to struggling schools or to become school leaders, the instability for students caused by teachers leaving year after year, particularly when teachers leave mid-year, disrupts student learning and destabilizes school environments. In addition, schools with high turnover rates must repeatedly expend scarce resources for recruitment and professional support for new teachers. Excessive turnover at a specific school may also lead to the overrepresentation of inexperienced teachers, and it may suggest a lack of district oversight of deeper problems with the school environment (*e.g.*, lack of necessary teacher support and development, poor school leadership, school safety issues) that may impair the effectiveness of teachers. OCR also considers whether there are disparities among schools in the speed with which vacancies are filled in assessing student access to a stable teacher workforce.

3. Teacher Qualifications and Experience

The qualifications and credentials of teachers, amount of teacher experience, and frequency of teachers teaching in their area of expertise and certification may, upon further investigation, relate to equitable access to strong teachers.⁴⁷ Typically new teachers gain skill and effectiveness each year in their early careers until they become proficient educators. OCR recognizes that teacher experience is neither a direct measure of nor a perfect proxy for teacher effectiveness, and OCR acknowledges that some inexperienced teachers may be more effective than those who have more experience. Furthermore, developing high-quality pipelines of new teachers in high-need and rural schools can be an effective strategy for districts or schools seeking to improve outcomes, and OCR will take that into consideration as part of its investigations. In general, however, inexperienced teachers perform less well on average than their more experienced colleagues.⁴⁸ Therefore, OCR may consider the distribution of inexperienced teachers across a district as part of its overall evaluation of potential discrimination in access to strong teaching.

Other relevant qualifications that OCR may consider in investigations include whether teachers with emergency licenses or advanced certifications such as National Board Certification are more or less likely to teach in schools with more students of color. OCR considers whether, in a particular district, disparities in types of teacher certifications augment and reinforce patterns found in the totality of evidence that students are experiencing discrimination in access to strong teaching. Additionally, OCR considers whether teachers are teaching in or outside of their subject matter expertise, particularly in math, science, and foreign languages at the high-school

^{*} OCR considers all relevant contextual factors in analyzing teacher turnover rates, including whether turnover in a particular year or specific position is an anomaly, and all investigations would consider any nondiscriminatory, educational justifications presented by a district for factual circumstances which, if unexplained, might constitute unlawful discrimination.

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level.* Similarly, OCR examines whether teachers of English language learners, or of students who receive special education and related services, have the appropriate training to be effective in delivering language assistance or special education and related services, respectively.

OCR may also examine whether a district provides equitable resources to improve teacher quality and retention. Factors that OCR may evaluate include teacher orientation, mentoring, peer support, opportunities and time for professional collaboration, and professional-development programs, including participation in teacher learning communities, teacher retention programs including incentives for teachers in high-need schools, and any good faith efforts to use student performance data, teacher observation data, or other appropriate assessment data to improve instruction.

4. School Leadership

OCR recognizes the critical role school principals and other school leaders play in recruiting and retaining teachers and in fostering teacher effectiveness and overall school success. A growing body of research, including surveys of teachers, shows that principals and other school leaders play an important role in attracting strong teachers to a school, helping teachers become more effective, and retaining effective teachers. Effective school leaders can create climates of high expectations and a sense of community.

OCR will consider whether there are racial disparities in student access to effective, well-prepared, and stable school leadership, and this will include both leaders in schools and district-level leaders who support groups of schools. As mentioned previously, OCR will take favorable notice of States and districts that have reliable leader evaluation systems and are implementing strategic plans to improve the allocation of effective leaders. OCR may also consider the stability of principals and other school leaders in schools across a district, including data about turnover, absenteeism, use of substitutes, and vacancies. OCR may also consider the following characteristics and qualifications of principals and other school leaders: their levels of experience, their credentials and certification, whether they have completed appropriate training and professional development, and other relevant characteristics.

5. Support Staff

In conjunction with its assessment of access to strong teachers and leaders, OCR may analyze access to high-quality non-instructional and other support staff in schools. These support staff strengthen teaching and learning by providing services to students and implementing

* To assess whether teachers are teaching in or outside of their subject matter expertise, OCR will determine whether the teacher has a major or minor in the subject, has demonstrated subject matter mastery by passing a valid test, or has satisfied an applicable State standard. At the elementary level, OCR would also consider whether teachers have certification, training, and/or education in elementary education.

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individualized programs based on students' needs. OCR considers the staff-to-student ratios, training, certification, and years of experience of the support staff to determine whether these critical personnel are supporting students across a district on a nondiscriminatory basis.

For example, paraprofessionals* support teachers and students. When prepared, deployed, and supervised appropriately, paraprofessionals help teachers to implement effective instructional practices such as smaller group and individualized instruction. Paraprofessionals may also help lessen teachers' administrative burdens, giving teachers more time to plan and to directly educate students. These critical staff may also provide services and supports as part of IEPs for students with disabilities such as serving as readers, aides, or transportation personnel. OCR considers the ratio of pupils to paraprofessionals and the qualifications of those paraprofessionals (*e.g.*, high school or college diploma, paraprofessional certification). OCR also evaluates the amount of training, professional development, and supervision given to paraprofessionals and the roles that they play in the classroom. OCR's investigations then holistically evaluate whether a school district is providing equitable access to comparably qualified paraprofessionals to all students without regard to race.

Other non-instructional employees whom OCR may consider include school guidance counselors, school psychologists, librarians, specialized therapy providers for students with disabilities (*e.g.*, speech, physical, and occupational therapists), and social workers. The services these employees provide in academic development, social and emotional skill development, and college and career planning contribute to positive student outcomes.⁵¹ Yet low-income students and students of color are less likely to have access to counselors, and in turn to the information and tools necessary to make decisions about pursuing college or a career.⁵² OCR evaluates staff-to-student ratios for these positions and their training and professional qualifications. In addition, OCR looks at other staff members who help students enter the classroom ready to learn, such as social workers or other health professionals, and those who otherwise support the school environment.

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^{*} Paraprofessionals include a variety of instructional support positions that do not require a teaching credential or license. Their titles may vary and could include teacher's aide, assistant teacher, classroom aide, classroom assistant, instructional aide, etc.

[†] In a district-wide, comprehensive resource comparability investigation, OCR would take into account paraprofessionals and other non-instructional staff used for the support of special student populations, such as students with disabilities, English language learners, or gifted students. These investigations certainly consider relevant contextual factors that may affect quantitative comparisons such as higher salaries because of additional certification requirements or smaller staff-to-student ratios that may be required, for example, to implement individualized education programs (IEPs) of particular students with disabilities under the Individuals with Disabilities Education Act (IDEA). However, in some instances, OCR assessments will consider regular education staff separately from these specialized staff, in order to properly analyze potential discrimination in the provision of non-specialized, regular education programs.

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C. School Facilities

OCR's investigations may examine those aspects of facilities that affect student achievement and educational outcomes to determine whether the distribution of facilities resources has the purpose or effect of discriminating on the basis of race, color, or national origin.

1. Physical Environment

Research has shown that the quality and condition of the physical spaces of a school are tied to student achievement and teacher retention. Structurally sound and well-maintained schools can help students feel supported and valued. Students are generally better able to learn and remain engaged in instruction, and teachers are better able to do their jobs, in well-maintained classrooms that are well-lit, clean, spacious, and heated and air-conditioned as needed. In contrast, when classrooms are too hot, too cold, overcrowded, dust-filled, or poorly ventilated, students and teachers suffer. For example, asthma and other chronic health problems, which a facility's poor condition or surrounding environment may exacerbate, have been tied to increased absenteeism among students and teachers. The overall physical condition of the school, including features such as paint, maintenance of carpet and lockers, and the absence of vandalism, has also been linked to improved student achievement.

When investigating whether all students have equal access to comparable facilities, OCR therefore evaluates the overall physical condition of a district's facilities and the availability of sufficient maintenance staff. OCR also considers the location and surrounding environment of school buildings and facilities, as well as the availability and quality of transportation services provided to students.* OCR generally investigates a range of indicators regarding the general upkeep and quality of buildings to judge whether students of color are disproportionately attending schools that are in inferior physical condition or that are physically inaccessible to students with disabilities. OCR would also investigate whether language acquisition programs for English language learners are disproportionately placed or provided in lesser quality facilities.

2. Types and Design of Facilities

The relative quantity and quality of specialized spaces such as laboratories, auditoriums, and athletic facilities are also key considerations in investigating the equitable provision of facilities.⁵⁷ Students need proper laboratory facilities — with sufficient equipment, space, and ventilation — for safe and effective instruction in critical classes such as chemistry and biology.

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^{*} Even where transportation is provided to all students, comparable transportation services are not being provided if, for example, students of color, disproportionately, are burdened by unnecessarily longer rides or must ride in older buses that more frequently break down.

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Performing-arts programs require practice and performing spaces. Athletic programs, including physical education courses, require proper facilities for practice and competition.

OCR does not mandate that schools have specific types of facilities or that every school in a district have exactly the same type and array of facilities. Instead, OCR investigates whether districts are providing equal access to comparable facilities. Different schools will have different programs and different facility needs, but the diverse needs of a district cannot justify distributing facilities resources in a way that has the purpose or effect of discriminating on the basis of race, color, or national origin.

D. Technology and Instructional Materials

When investigating resource comparability, OCR may evaluate the availability of digital and other instructional materials that enhance instruction, including library resources, computer programs, mobile applications, and textbooks. As discussed below, OCR considers how instructional materials vary between schools in number, quality, and accessibility and whether they are equally available to students without regard to race, color, or national origin.

1. Technology

Technology, when aligned with the curriculum and used appropriately, contributes to improved educational outcomes⁵⁸ and promotes technological literacy. OCR evaluates whether all students, regardless of race, have comparable access to the technological tools given to teachers and students, along with how those tools are supported and implemented.⁵⁹ OCR generally considers the number, type, and age of educational technology devices available in a school, such as laptops, tablets, and audio-visual equipment, among other resources. This assessment includes the availability and speed of internet access.

Additional important factors when considering comparable access to technology include its use to support the school's curriculum, its availability for teachers and students, the use of appropriate technology to support the accessibility of instruction for students with disabilities, and the provision of professional development for teachers on how to use technology to increase student engagement and achievement. OCR may consider the amount and type of professional development available to teachers, in addition to other services for teachers such as technical support. Key considerations in evaluating whether districts provide comparable access to technology include whether the technology is located within the classroom and how many hours a week students have access to the technology during and after school. For those districts or schools where access to the internet or to other technology outside of school hours is a necessary or presumed aspect of what is expected from students, OCR also examines the extent to which students have access to necessary technology outside of school and how school districts support

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students who do not have internet access at home, such as through providing wireless access via a Wi-Fi hotspot at school that is available outside of school hours.*

2. Other Instructional Materials

OCR may also evaluate whether students have comparable access to other materials schools use to instruct students. For example, adequately resourced school libraries (or library media centers) provide teachers and students with up-to-date resource collections and tools to access and navigate those resources. OCR considers the size, content, and age of a school's library collection, including print, video, and digital resources. Student learning from library resources is maximized when the content of the collection is aligned with the curriculum. The availability of information through online databases and internet access is also important in modern school libraries. OCR also considers how often students and teachers have the opportunity to use a library.

A range of other materials can support instruction, such as textbooks, graphing calculators, digital materials and simulations, and hands-on science and math materials. Diverse instructional materials are necessary to deliver certain curricula and can help teachers reach students with different learning needs. OCR may consider the quantity of learning materials available per pupil, the quality of those materials in terms of their age and alignment with the curriculum, and the availability of those materials during and outside of the school day.

IV. Steps to Prevent and Remedy Discrimination in the Provision of Educational Resources

A. Self-Assessment and Monitoring of Title VI Compliance

OCR strongly recommends that school districts proactively assess their policies and practices to ensure that students are receiving educational resources without regard to their race, color, or national origin, including the resources discussed in this letter, as Title VI requires. Periodic self-evaluation enables districts to identify barriers to equal educational opportunity and avoid unnecessary delay in taking corrective action. An effective assessment should incorporate the principles that are outlined in this letter. OCR's Civil Rights Data Collection (CRDC) can help

* Disparities in such support, or inattention to the disparities in internet access at home, may be cause for concern if students need internet access outside of school hours to be successful in the classroom.

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inform a district's self-assessment of resource comparability. * In addition, a district's self-assessment of resource comparability may also be informed by any data and analysis considered or strategies undertaken by a State or district in connection with the statutory obligations under the ESEA to ensure that "poor and minority children are not taught at higher rates than other children by inexperienced, unqualified, or out-of-field teachers." 62

Self-assessment may include notice to the school community of rights and responsibilities under Title VI and the procedure by which students, parents, and employees may report concerns. Ideally, the district would designate one or more employees to coordinate the district's compliance with Title VI, including self-assessments of resource comparability. Designating one person responsible for overseeing compliance may aid in identifying and addressing any patterns or systemic problems that arise during the assessment and review of any complaints of discrimination. The self-evaluation and monitoring process provides a good opportunity to assess compliance with other aspects of Title VI as well as obligations under other civil rights laws.

School districts that choose to conduct a comprehensive resource equity self-assessment should use reliable methods. (A list of some available materials that school districts may wish to consult in conjunction with such an assessment is available on OCR's website at www.ed.gov/ocr/resourcecomparability.html.) Districts need to ensure that their methods accurately measure and compare the relevant populations' access to and benefit from educational resources. For example, when examining teacher equity, districts should examine the full range of teacher characteristics using multiple measures. They should also consider barriers to students receiving effective teaching, efforts to improve the quality of teachers, and use and quality of teacher retention programs.

Also, districts conducting such a self-assessment should review the policies that govern how resources are distributed to schools and within schools. As one specific example, many districts have policies for determining when and where to build or renovate facilities. Such policies must be nondiscriminatory, and may also be used to remedy inequalities in existing facilities. One policy that may help districts reach comparability is prioritizing the improvement of resources for the schools that need it most rather than simply ensuring that funding and other resources are equally distributed moving forward. Finally, school districts should look at Title VI compliance

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^{*} The CRDC is available at http://ocrdata.ed.gov. A sample of nearly 7,000 districts was part of the 2009-10 CRDC, and the 2011-12 collection is a universal collection from all school districts and charter schools. The 2013-14 CRDC will also be a universal collection. Of particular interest with respect to resource comparability, it contains data at the district and school levels on student demographics, enrollment in selected academic programs and courses, the number of teachers in their first and second years of teaching, the number of teachers with State certification, teacher absenteeism, teacher salaries, and both personnel and non-personnel expenditures per student. While thus capturing critical data points, the CRDC is limited in scope by OCR's recognition of the cumulative burden of a recurring, universal data collection, and thus the CRDC cannot purport to cover the full range of information that would potentially be relevant to a district's self-assessment of resource comparability.

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not only across schools, but also within schools to ensure that students have comparable access regardless of race to the educational resources available in the school such as rigorous academic programs and innovative technology.

The measures described in this letter should be used to compare how educational benefits and burdens are allotted based on the race, color, or national origin of students. If a district's self-assessment identifies significant inequities, districts should take steps calculated to eliminate the inequities and remedy their effects in accordance with the remedial principles discussed below. Such proactive efforts may help a school district avoid a Title VI violation or give the district an opportunity to remedy a violation on its own.

B. Principles Guiding OCR Enforcement and Remedies

If OCR finds that a school district's allocation of educational resources violates Title VI, OCR, as it does in all of its cases, will work with the school district to attempt to resolve the matter in a cooperative fashion. A range of remedies may resolve non-compliance, depending on the facts of each case. In attempting to reach such resolutions, OCR is guided by the following principles:

- Remedies must effectively end the discrimination and eliminate its effects.
- Remedies must be implemented in a timeframe that is prompt and appropriate given the nature and difficulty of the corrective actions at issue.
- OCR encourages school districts to work cooperatively with leaders, teachers, and support staff (and their unions and associations).

C. Courses, Academic Programs, and Extracurricular Activities

When a school district is not providing comparable access to high-quality programs to all students, a variety of approaches can be used to remedy the discrimination. Those remedies could include:

- Developing additional programs for schools where those programs were previously lacking.
- Providing additional training for teachers so they can teach or lead missing courses or programs, allowing the district to expand offerings without having to hire new staff.
- Locating specialized academic programs so they are centrally located or equitably available.
- Ensuring that financial resources are available to support the success of established programs.

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- Simplifying requirements for participation in programs at schools other than the school where a student is primarily enrolled and providing assistance with transportation and scheduling.
- Enhancing, through training, the capacity of school personnel and the school community (*e.g.*, principals or PTAs) to raise funds and other resources from outside sources and ensuring that differences in outside source funding do not result in inequitable allocation of opportunities.
- Pairing or grouping schools for the purpose of raising and distributing outside resources.
- Encouraging all students with strong academic performance, assessed through multiple measures, to enroll in advanced coursework and programs, for example, through a policy change from opt-in to opt-out placement into advanced courses.
- Forming partnerships with universities, community-based organizations, and businesses on behalf of schools with limited access to outside resources.

Also, to prevent discrimination from recurring, a district may need to revise its policies and procedures regarding how new programs are developed and located in order to ensure continued equal access for all students to comparable programs.

D. Strong Teaching, Leadership, and Support

If the violation relates to ineffective teachers, leaders, or support staff, remedies that help develop, attract, and retain strong teachers, leaders, and support staff may include:

- School districts can increase effective teaching at particular schools by focusing on supporting the teachers already assigned to that school and preventing excessive turnover. Such efforts can include augmenting existing orientation, mentoring, peer support, or professional-development efforts. For example, a school district could develop a special mentoring program that assigns senior teachers from the same school or master teachers from across the school district to assist promising teachers at struggling schools. The school district could also provide teachers at those schools with more preparation time or afford those teachers greater participation in teacher learning communities.
- Assigning a principal or other school leader proven to be effective to a school that has
 fewer effective teachers can lift the performance of the teachers at that school. Strong
 leadership increases teacher effectiveness through the direct supervision, training, and
 mentoring of teachers. In addition, the tone and expectations that principals and other
 school leaders set for the school, and for the teachers who work there, can have a
 significant impact on teacher morale and performance. An effective principal or other

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school leader may attract effective teachers not only from other schools within the district, but also from teaching training programs and from schools outside of the district.

- Improving the entire system of human capital management for a school district can help to ensure the district and all of its schools have valid and reliable data about teacher and principal effectiveness to help them recruit, develop, and retain the educators they need in all schools.
- School environments, physical and cultural, sometimes contribute to a discriminatory allocation of effective teachers. Thus improving working conditions and school climate can be part of remedying inequitable allocations of effective teachers.
- Districts can provide incentives for effective teachers, including those with more
 experience or quality training, to choose to teach in hard-to-staff schools, such as
 additional planning time, monetary incentives, or other benefits. Making such incentives
 available to effective teachers already in these schools as well as those choosing to
 transfer to such schools could help stabilize their teacher workforce and attract more
 experienced and effective teachers.
- OCR will work with school districts to identify remedies that do not conflict with staffing policies or vested teacher rights. When a district's adherence to collective bargaining agreements or State law has caused or contributed to discrimination against students on the basis of race, color, or national origin, Federal civil rights obligations may require a school district to renegotiate agreements, revise its personnel policies, or take other steps to remedy the discrimination. OCR will work with school districts to think creatively in remedying discrimination in effective teaching and to develop solutions that increase effective teaching district- and school-wide, rather than merely shifting resources among the schools in the district.
- School districts' and statewide hiring policies that contribute to or fail to address discrimination in the allocation of effective teachers and support staff should be revised. For example, hiring early (*e.g.*, in the spring rather than the summer or fall) for a new school year, even if this in some cases requires hiring before specific school vacancies have been identified, can lead to higher quality personnel.

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• Even seemingly minor procedural rules that help hard-to-staff schools and districts fill vacancies earlier can significantly influence the relative allocation of quality staff, and therefore changes in such rules may be required to remedy discrimination.*

E. Technology, Instructional Materials, and School Facilities

Ensuring the nondiscriminatory allocation of and access to physical resources such as technology, instructional materials, and, particularly, facilities across school districts may require significant financial investment from the district, which may not always be readily available. As a result, OCR generally focuses on forward-looking remedies that target financial resources to the schools, and therefore the students, harmed by discrimination. Where construction or other significant capital expenditures would be required, OCR understands that gaps in resource comparability cannot be remedied immediately. At the same time, lack of funding is not a defense for noncompliance with Federal civil rights obligations. Therefore, if a violation is found, a district will be expected to put in place a clear plan for remedying the inequality in a timely fashion. For example:

- School districts may need to purchase additional textbooks, computers, or other materials for schools that have fallen behind in the quality or quantity of these resources.
- School districts may need to ensure that all schools are properly maintained, which would necessitate employing sufficient custodial staff to adequately care for the facilities.
- Schools that have been neglected or are otherwise in worse condition than other schools may need to allocate additional maintenance dollars to restore a basic level of cleanliness and usability.

In some cases, remedies might include finding ways for schools to share facilities such as athletic fields or auditoriums if that can be done without placing additional burdens in areas such as scheduling and transportation disproportionately on the same students who were being denied the facilities in the first place. Generally, OCR would accept sharing of facilities and other physical resources only as a last resort or as a temporary measure while the district and local officials raised the capital funds to provide additional facilities. However, in some cases, such as disparities existing between two schools already co-located within one larger building, sharing of facilities and other physical resources may be both a necessary and an acceptable solution so

^{*} For example, prioritizing and streamlining the administrative processes for filling a vacancy at hard-to-staff schools may help overcome some of the staffing challenges they face by allowing vacancies to be posted earlier, leading to longer available selection periods and larger and more qualified applicant pools.

[†] OCR may consider, in designing short-term portions of remedies, that some physical resources are not permanent fixtures — computers, books, tables, chairs, etc. Therefore, remedies could include shifting some resources to other locations if it is truly not financially possible to reach comparability through additional investment.

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long as it does not perpetuate, or inhibit the expeditious remediation of, the disparities that gave rise to the Title VI violation.

V. Conclusion

We appreciate your attention to ensuring that students of all races and national origin backgrounds have equal access to effective teaching, adequate facilities, and quality instructional programs and support, and thus have an equal opportunity to attain the academic success upon which our future depends. We encourage you to share this information with other decision-makers so you can examine together how to best promote the educational excellence of all students.

If you have questions or need technical assistance, please contact the OCR regional office serving your State or territory by visiting www.ed.gov/ocr or call OCR's Customer Service Team at 1-800-421-3481; TDD: 800-877-8339, or for a list of additional sources of technical assistance visit www.ed.gov/ocr/resourcecomparability.html. We look forward to continuing our work together to ensure equal access to education for all of America's students.

Yours sincerely,

/s/

Catherine E. Lhamon Assistant Secretary for Civil Rights

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Endnotes

Our education system, legally desegregated more than a half century ago, is ever more segregated by wealth and income, and often again by race. Ten million students in America's poorest communities—and millions more African American, Latino, Asian American, Pacific Islander, American Indian and Alaska Native students who are not poor—are having their lives unjustly and irredeemably blighted by a system that consigns them to the lowest-performing teachers, the most run-down facilities, and academic expectations and opportunities considerably lower than what we expect of other students. These vestiges of segregation, discrimination and inequality are unfinished business for our Nation.

Admittedly, many of these disadvantaged students enter school far behind their more advantaged peers. But instead of getting deadly serious about remedying that fact—by making sure such students are in high-quality early childhood and pre-K programs, attend schools staffed with teachers and leaders who have the skills and knowledge to help each student reach high standards, get after-school counseling or tutorial assistance or the eyeglasses they need to see the smart board—the current American system exacerbates the problem by giving these children less of everything that makes a difference in education.

¹ Brown v. Bd. of Educ. of Topeka (No. 1.), 347 U.S. 483, 493 (1954).

² See generally Dear Colleague Letter from Secretary Riley on Resource Equity (January 19, 2001) (citing evidence that students in school districts with higher percentages of students of color have access to fewer and lower-quality resources than students in districts with fewer students of color and summarizing the obligation under Title VI to allocate resources in a nondiscriminatory manner), available at www.ed.gov/about/offices/list/ocr/letters/colleague-200101-title-vi.pdf; U.S. Department of Education, For Each and Every Child — A Strategy for Education Equity and Excellence, Washington, D.C. (2013) [hereinafter Equity Commission Report] available at http://www2.ed.gov/about/bdscomm/list/eec/equity-excellence-commission-report.pdf. The Equity and Excellence Commission was a congressionally mandated convening of 27 leading education experts, researchers, and policymakers representing a wide array of perspectives on education reform. The Equity Commission Report, offered by the Equity and Excellence Commission to the Secretary of Education, details the problems of education inequality and offers unanimous policy recommendations at the local, State, and Federal levels addressing these problems.

³ The Department has determined that this Dear Colleague Letter is a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), available at www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507 good guidance.pdf. This and other policy guidance is issued to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that we enforce. The Department's legal authority is based on those laws. This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how the Department evaluates whether covered entities are complying with their legal obligations. If you are interested in commenting on this guidance, please send an e-mail with your comments to OCR@ed.gov, or write to the following address: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, D.C. 20202.

⁴ See Will Dobbie & Roland G. Fryer, Are High-Quality Schools Enough to Increase Achievement Among the Poor? Evidence from the Harlem Children's Zone, AM. ECON. J. APPLIED ECON. (July 2011) at 158-87 (showing that the effect of the quality of the school is distinguishable from the effects of neighborhood poverty and the existence of wrap-around services in explaining the increase in student achievement seen in the Harlem Children's Zone). See also Equity Commission Report, supra note 2, at 14:

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⁵ See William C. Symonds, Robert B. Schwartz, and Ronald Ferguson (2011), "Pathways to Prosperity: Meeting the Challenge of Preparing Young Americans for the 21st Century" Report issued by the Pathways to Prosperity Project, Harvard Graduate School of Education; C. Adelman, *The Toolbox Revisited: Paths to Degree Completion From High School Through College*, (2006), Washington, D.C.: U.S. Department of Education; Wayne Camera, *College Persistence*, *Graduation*, and *Remediation*, (Mar. 2003), http://research.collegeboard.org/sites/default/files/publications/2012/7/researchnote-2003-19-college-persistence-graduation-remediation.pdf; David K. Cohen et al., *Resources, Instruction, and Research*, 25 EDUC. EVALUATION & POL'Y ANALYSIS 119 (2003).

Ninety-two percent of the States reported having higher graduation rates for career and technical education students, as compared to the overall State graduation rate of all students in their respective States for program years 2008-09 and 2009-10. See Carl D. Perkins Career and Technical Education Act of 2006, Report to Congress on State Performance, Program Year 2008–09, Washington, D.C., 2012, at http://cte.ed.gov/docs/Rpt_to_Congress/Perkins_RTC_2008-09.pdf, pp. 37–40; Carl D. Perkins Career and Technical Education Act of 2006, Report to Congress on State Performance, Program Year 2009–10, Washington, D.C., 2013, at http://cte.ed.gov/docs/Rpt_to_Congress/Perkins_RTC_2009-10.pdf, p. 34 and pp. 36–39.

The importance of equitable access to comparable educational offerings in both curricular and extracurricular programs is well established in a long line of U.S. Supreme Court decisions in the context of desegregation at the elementary and secondary education level, as well as in higher-education desegregation. See, e.g., Green v. County School Bd. of New Kent County, Va., 391 U.S. 430 (1968) (extracurricular programs identified as one of six factors to evaluate in determining whether a school district has fully eliminated the vestiges of de jure segregation); United States v. Fordice, 505 U.S. 717 (1992) (reaffirming the legal standards regarding the affirmative duty to dismantle de jure segregation at the higher education level, including whether unnecessary duplication of educational programs at formerly segregated postsecondary institutions and failure to provide comparable, though differentiated, specialized programs is a vestige of that discrimination that contributes to any continual racial identifiability of those institutions).

⁶ See Christopher M. Johnson & Jenny E. Memmott, Examination of Relationships between Participation in School Music Programs of Differing Quality and Standardized Tests Results, 54 J. RES. MUSIC EDUC. 293 (2006); Daryl W. Kinney, Selected Demographic Variables, School Music Participation, and Achievement Test Scores of Urban Middle School Students, 56 J. RES. MUSIC EDUC. 145 (2008); Allan G. Richards, Arts and Academic Achievement in Reading: Functions and Implications, ART EDUC., Nov. 2003, at 19-23; but see Ellen Winner & Monica Cooper, Mute Those Claims: No Evidence (Yet) for a Causal Link between Arts Study and Academic Achievement, J. AESTHETIC EDUC., Autumn – Winter 2000, at 11-75 (finding research support for a positive correlation between arts study and academic achievement in correlational studies, although not in experimental design studies to date).

⁷ William Carbonaro, Tracking, Students' Effort, and Academic Achievement, 78 Soc. Educ. 27 (2005).

⁸ See Equity Commission Report, supra note 2, at 32 ("After-school, extended-day, summer and other extendedlearning experiences can both stem learning loss and accelerate student achievement."); Jaime L. Del Razo & Michelle Renée, Expanding Equity through More and Better Learning Time, The Next Four Years: Recommendations for Federal Educ. Pol'y, Winter/Spring 2013, at 29 ("Schools using evidence-based [extended learning time] practices and supporting programs have improved student achievement across several student subgroups") (citing Susan J. Bodilly & Megan K. Beckett, Making Out-of-School-Time Matter Evidence for an Action Agenda, (2005), www.rand.org/pubs/monographs/MG242.html; Ann Duffett et al., All Work and No Play? Listening to What Kids and Parents Really Want from Out-of-School Time (2004), www.wallacefoundation.org/knowledge-center/after-school/key-research/Documents/All-Work-and-No-Play.pdf; American Youth Policy Forum. (2006). Helping Youth Succeed Through Out of School Time Programs. Washington, DC: American Youth Policy Forum) available at http://vue.annenberginstitute.org/sites/default/files/issuePDF/VUE36.pdf; Beckett A. Broh, Linking Extracurricular Programming to Academic Achievement: Who Benefits and Why?, 75 Soc. EDUC. 69 (2002); Amy F. Feldman & Jennifer L. Matjasko, The Role of School Based Extracurricular Activities in Adolescent Development: A Comprehensive Review and Future Directions, 75 REV. EDUC. RES. 159 (2005); James B. Schreiber & Elisha A. Chambers, After School Pursuits, Ethnicity, and Achievement for 8th- and 10th- Grade Students, 96 J. EDUC. RES.

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90 (2002); Simone Travis O'Bryan et al., *Bringing Parents Back In: African American Parental Involvement, Extracurricular Participation, and Educational Policy*, 75 J. NEGRO EDUC. 401 (2006); Endya B. Stewart, *Individual and School Stuctural Effects on African American High School Students' Academic Achievement*, HIGH SCH. J., Dec. 2007 – Jan. 2008, at 16-34.

- ⁹ Adelman, *supra* note 5; Grace Kao & Jennifer S. Thompson, *Racial and Ethnic Stratification in Educational Achievement and Attainment*, 29 ANN. REV. Soc. 417 (2003); C. Adelman, *Answers in the Tool Box: Academic Intensity, Attendance Patterns, and Bachelor's Degree Attainment*, (1999), Washington, DC: U.S. Department of Education.
- ¹⁰ Philip Handwerk et al., *Access to Success: Patterns of Advanced Placement Participation in U.S. High Schools*, (July 2008), www.ets.org/Media/Research/pdf/PIC-ACCESS.pdf (finding six percent of Asian students, 12 percent of Latino students, and 14 percent of white students attend high schools without any Advanced Placement courses).
- ¹¹ U.S. Department of Education, Office for Civil Rights, *Civil Rights Data Collection: 2011-12: Data Snapshot: College and Career Readiness*, (Mar. 21, 2014), www.ed.gov/ocr/docs/crdc-college-and-career-readiness-snapshot.pdf.
- ¹² *Id.* Schools with the highest and lowest combined black and Latino enrollment are in the top and bottom quintiles, respectively, within the district in terms of combined black and Latino enrollment.
- ¹³ *Id*.
- ¹⁴ *Id*.

¹⁵ Donald Boyd et al., The Narrowing Gap in New York City Teacher Qualification and Its Implications for Student Achievement in High Poverty Schools, 27 J. POL'Y ANALYSIS & MGMT. 793, 794 (2008) ("A growing literature finds that teachers 'sort' very unequally across schools, with the least-experienced teachers and those with the poorest academic records often found in schools with the highest concentrations of low-income, low-performing, and minority students."); Charles T. Clotfelter et al., Teacher Credentials and Student Achievement in High School: A Cross Subject Analysis with Student Fixed Effects, 45 J. HUM. RESOURCES 655, 656-57 (2010) ("[T]he uneven distribution of teacher credentials by race and socio-economic status of high school students...means that minority students and those with less well-educated parents do not have equal access to a high quality education at the high school level."); Eric Isenberg et al. (2013), Access to Effective Teaching for Disadvantaged Students (NCEE 2014-4001), 41, National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Department of Education, available at http://ies.ed.gov/ncee/pubs/20144001/pdf/20144001.pdf (study of 29 geographically diverse districts found significant disparities in access to effective teachers for students receiving free- and reduced-price lunch (FRL). The study estimated that by providing all students with equal access to effective teachers, "[t]he difference in student achievement between FRL and non-FRL students would decrease from 28 percentile points to 26 percentile points in ELA and from 26 percentile points to 24 percentile points in math." Similar disparities based on race and national origin were found in the 15 study districts in which at least 15 percent of the students were white and 15 percent of the students identify as the same non-white race or national origin.); Corey Koedel & Julian R. Betts, Re Examining the Role of Teacher Quality in the Educational Production Function (Apr. 2007), http://economics.missouri.edu/working-papers/2007/wp0708_koedel.pdf (concluding that in one district 80% of the variation in teacher quality was within elementary schools rather than between schools); Daniel Aaronson et al., Teachers and Student Achievement in the Chicago Public High Schools, 25 J. LAB. ECON. 95 (2007) (another district-level study finding more variation in teacher quality between schools than within schools); Charles T. Clotfelter et al., Who Teaches Whom? Race and the Distribution of Novice Teachers, 24 ECON. EDU. REV. 377, 391 (2005) ("Within districts, novice teachers are disproportionately assigned to schools and to the classrooms within schools that disproportionately serve black students."); Steven G. Rivkin et al., Teachers, Schools, and Academic Achievement, 73 ECONOMETRICA 417, 421 (2005) ("[M]uch of the variation in teacher quality exists within rather than between schools."). Since research is mixed on whether within-school or betweenschool comparisons are more likely to find disparities in teacher quality, OCR retains discretion to focus on either or both comparisons depending on relevant contextual factors including, but not limited to, the specific allegations of discrimination in a complaint.

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- ¹⁷ U.S. Department of Education, Office for Civil Rights, *Civil Rights Data Collection: 2011-12: Data Snapshot: Teacher Equity*, (Mar. 21, 2014), www.ed.gov/ocr/docs/crdc-teacher-equity-snapshot.pdf. This analysis compares the percentage of teachers in their first or second years of teaching in schools with the highest and lowest combined black and Latino enrollment in the 2011-12 CRDC. Schools with the highest and lowest combined black and Latino enrollment are in the top and bottom quintiles, respectively, within the district in terms of combined black and Latino enrollment. Specifically, six percent of teachers in the top quintile of schools, ranked by percentage of black and Latino enrollment, are in their first or second year of teaching, compared to four percent of teachers in the lowest quintile.
- ¹⁸ Frank Adamson & Linda Darling-Hammond, Funding Disparities and the Inequitable Distribution of Teachers: Evaluating Sources and Solutions, EDUC. POL'Y ANALYSIS ARCHIVES, Nov. 19, 2012, at 30-32, available at http://epaa.asu.edu/ojs/article/view/1053 (documenting inequalities in the allocation of high-quality teachers and in teacher salaries, as well as finding that teacher qualifications are related to student achievement, even when controlling for demographic variables known to impact student achievement); Charles T. Clotfelter et al., Teacher Credentials and Student Achievement: Longitudinal Analysis with Student Fixed Effects, 26 ECON. EDU. REV. 673, 673 (2007) ("Taken together the various teacher credentials exhibit quite large effects on math achievement, whether compared to the effects of changes in class size or to the socio-economic characteristics of students."); Rivkin supra note 15, at 419 ("The results reveal large differences among teachers in their impacts on achievement and show that high quality instruction throughout primary school could substantially offset disadvantages associated with low socioeconomic background."); see also Erik A. Hanushek, The Economic Value of Higher Teacher Quality, 30 ECON. EDU. REV. 466, 467 (2011) ("Some teachers year after year produce bigger gains in student learning than other teachers. The magnitude of the differences is truly large, with some teachers producing 1½ years of gain in achievement in an academic year while others with equivalent students produce only ½ year of gain."); Daniel Aaronson et al., Teachers and Student Achievement in the Chicago Public High Schools, 25 J. LAB, ECON. 95 (2007) (finding that the difference between teachers in the 90th and 10th percentile in quality is nine-tenths of a year of gain in achievement while the difference between teachers in the 75th and 25th percentile is four-tenths of a year).
- ¹⁹ Mary W. Filardo, *Growth and Disparity: A Decade of U.S. Public School Construction*, (Oct. 2006), www.ncef.org/pubs/GrowthandDisparity.pdf.
- ²⁰ U.S. Department of Education, National Center for Education Statistics, Issue Brief, *How Old are America's Public Schools?*, (January 1999), http://nces.ed.gov/pubs99/199048.pdf (finding that older schools enroll more low-income students and are concentrated in the urban fringe); U.S. Department of Education, National Center for Education Statistics, *Condition of America's Public School Facilities: 1999*, NCES 2000-032, by Laurie Lewis et al. (June 2000), http://nces.ed.gov/pubs2000/2000032.pdf ("GAO reported that in 1994, the largest proportion of schools reporting deficient school conditions was in central cities serving more than 50 percent minority students or 70 percent or more poor students.") (citing United States General Accounting Office, *School Facilities: Condition of America's Schools*, (Feb. 1995), Report to Congressional Requesters, www.gao.gov/assets/230/220864.pdf).

A recent update to the 2000 study from the National Center for Education Statistics show that racial disparities in access to comparable facilities still exist, though with some disparities actually favoring students of color; the clearest disparities were found between schools that are over 50 percent students of color and schools with 21 to 49 percent students of color. Debbie Alexander & Laurie Lewis (2014). *Condition of America's Public School Facilities:* 2012–13, NCES 2014-022, U.S. Department of Education, National Center for Education Statistics, http://nces.ed.gov/pubs2014/2014022.pdf.

¹⁶ Clotfelter (2005), *supra* note 15, at 379 ("It seems reasonable to conclude from this previous research that teachers with no prior experience are undoubtedly on average less effective than other teachers."). *See* more discussion in text accompanying note 48, *infra*.

²¹ Forty-five percent of schools with over 50 percent students of color have temporary, portable buildings compared with only 13 percent of schools with less than 6 percent students of color and 32 percent of schools with 21 to 49 percent students of color. Twenty percent of schools with over 50 percent of students of color have exterior walls and finishes in fair or poor condition, compared with only 15 percent for schools with 21 to 49 percent students of

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color. Similarly, 31 percent of schools with a majority of students of color have fair or poor quality exterior lighting, compared to 26 percent of schools with 21 to 49 percent students of color. See Alexander & Lewis, supra note 20.

- ²² See, e.g., Larissa Campuzano et al., Effectiveness of Reading and Mathematics Software Products: Findings From Two Student Cohorts, (NCEE 2009-4041). National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Department of Education (Feb. 2009), http://ies.ed.gov/ncee/pubs/20094041/pdf/20094041.pdf (an experimental design study with mixed results on the benefits to student achievement tied to specific technology interventions finding statistically significant and positive effects on student achievement from a Grade 4 reading intervention, but no statistically significant effects on student achievement from Grade 1 reading, Grade 6 math, and Algebra 1 software interventions). The research in this area is still developing. There are, however, independent benefits to technological literacy as a skill beyond potential benefits to reading and math outcomes. OCR has concluded that equitable access to technology in the classroom is an educational benefit that school districts should provide to students regardless of their race, color, or national origin.
- ²³ Linda Darling-Hammond, *The Color Line in American Education: Race, Resources, and Student Achievement*, 1 DUBOIS REV. SOC. SCI. RES. ON RACE 213 (2004); Louis Harris, Report on the Status of Public Education in California, (May 2004), http://idea.gseis.ucla.edu/publications/files/Harris.pdf; Jeannie Oakes & Marisa Saunders, *Education's Most Basic Tools: Access to Textbooks and Instructional Materials in California's Public Schools*, 106 TEACHERS C. REC. 1967 (2004).
- ²⁴ Lucinda Gray et al., *Educational Technology in U.S. Public Schools: Fall 2008*, (Apr. 2010), (NCES 2010–034), U.S. Department of Education, National Center for Education Statistics. http://nces.ed.gov/pubs2010/2010034.pdf; John Wells & Laurie Lewis, *Internet Access in U.S. Public Schools and Classrooms: 1994-2005*, (November 2006), U.S. Department of Education, National Center for Education Statistics, http://nces.ed.gov/pubs2007/2007020.pdf; Michael Eskenazi et al., *The Dynamics of Resources, Demographics, and Behavior in the New York City Public Schools*, (October 2003), http://stage.web.fordham.edu/images/ncsc/equityorexclusion.pdf.
- ²⁵ Dennis J. Condron & Vincent J. Roscigno, Disparities Within: Unequal Spending and Achievement in an Urban School District, 76 Soc. EDUC. 18, 30 (2003) ("[S]chools that spend more exhibit higher levels of academic achievement.... A \$1,000 increase in local instructional spending per student leads to from about 6 percent to about 10 percent more students passing the proficiency tests.... [W]e found that higher spending promotes achievement through particular school resources. Instructional spending from local sources and operations/maintenance spending both promote achievement through the school's physical condition and the degree of order/consistency in the learning environment."); Spyros Konstantopoulos & Vicki Chun, What Are the Long-Term Effects of Small Classes on the Achievement Gap? Evidence from the Lasting Benefits Study, 116 Am. J. EDUC. 125 (2009) (evaluating class size reduction as a resource allocation strategy by "examin[ing] the long-term effects of small classes on the achievement gap in mathematics, reading, and science scores" and finding that "longer exposure to small classes in early grades increases student achievement in later grades for all students and for low achievers in particular"); Latika Chadhaury, Education Inputs, Student Performance and School Finance Reform in Michigan, 28 ECON. EDUC. REV. 98, 98 (2009) ("The findings of this paper suggest that there is a causal relationship between spending and test performance... [A]lthough the results on the beneficial effects of class size are inconclusive, higher teacher salary does appear to positively impact test performance. Overall, the findings suggest that school finance reforms, which increase expenditures, might be more effective if spending increases are targeted toward increasing teacher salaries that are perhaps a crude proxy for teacher quality."); David N. Figlio, Can Public Schools Buy Better-Qualified Teachers?, 55 INDUS. & LAB. RELATIONS REV. 686, 697 (2002) (finding a "positive, statistically significant relationship between changes in a [non-union] school district's teacher salaries and its likelihood of recruiting higher-qualified teachers, measured in terms of college selectivity as well as subject matter expertise."); Susanna Loeb & Marianne Page, Examining the Link Between Teacher Wages and Student Outcomes: The Importance of Alternative Labor Market Opportunities and Non-Pecuniary Variation, 82 REV. ECON. & STAT. 393, 393 (2000) ("[O]nce we adjust for labor market factors, we estimate that raising teacher wages by 10% reduces high school dropout rates by 3% to 4%. Our findings suggest that previous studies have failed to produce robust estimates because they lack adequate controls for non-wage aspects of teaching and market differences in alternative occupational opportunities."); Marta Elliott, School Finance and Opportunities to Learn: Does Money Well Spent Enhance Students' Achievement?, 71 Soc. EDUC. 223, 239 (1998) ("The findings of this study ... provide firm

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support for the position that money does, in fact, affect students' achievement. Both the math and science analyses confirm that money matters and that teaching practices and classroom resources matter. ... In the case of science, the results ... provid[e] strong evidence that how money is spent affects what takes place in the classroom, which, in turn, affects students' learning. In addition to hiring more educated teachers, money can be used to train teachers to emphasize inquiry skills and to purchase an adequate amount of science equipment in relatively good condition."); Deborah A. Verstegen & Richard A. King, *The Relationship Between School Spending and Student Achievement: A Review and Analysis of 35 Years of Production Function Research*, 24 J. EDUC. FIN. 243, 262 (1998) ("[T]here are clear relationships between funding and achievement emerging from the recent body of production function research. These studies provide further evidence that money matters in producing educational outcomes.").

- ²⁶ Bruce D. Baker, David G. Sciarra, & Danielle Farrie, *Is School Funding Fair?: A National Report Card*, 3d Ed., Education Law Center, January 2014. *available at* www.schoolfundingfairness.org; Robert Bifulco, *District-Level Black-White Funding Disparities in the United States*, 1987, 31 J. EDUC. FIN. 172, 192 (2005) ("The estimates of black-white funding disparities presented here indicate that the average black student's district has between 3% and 16% less funding than it needs to provide its students an equal expectation of achieving the same standards as students in the average white student's district."); Condron & Roscigno, *supra* note 25, at 32 ("[I]nequality in spending appears to correspond to the racial and class composition of schools. Schools with the highest proportions of poor students are particularly disadvantaged, while race is somewhat less salient. This inequality appears to be a result of an allocation dynamic through which fewer *local* dollars land in high-poverty schools, weakening the intended compensatory effect of federal Title I funds."); Bruce D. Baker & Preston C. Green III, *Tricks of the Trade: State Legislative Actions in School Finance Policy That Perpetuate Racial Disparities in the Post-Brown Era*, 111 Am. J. Educ. 372, 406 (2005) ("We have found that racially neutral state aid policies in two formerly de jure segregated states, Alabama and Kansas, have caused racial funding disparities.").
- ²⁷ See 20 U.S.C. § 6321(c). Title I funds must supplement, not supplant, the funds provided from non-Federal sources for the education of Title I participants, and school districts are obligated to support schools equitably in the provision of non-Federal funds.
- ²⁸ Condron & Roscigno, *supra* note 25, at 29 ("Given the unequal distribution of local resources, however, the Federal funds are not able to bring the disadvantaged schools up to the level of total per-student spending found in disproportionately white and higher-SES schools. Title I money, in other words, does not make up for existing local inequality in the allocation of resources.").
- ²⁹ But see Joydeep Roy, Impact of School Finance Reform on Resource Equalization and Academic Performance: Evidence from Michigan, 6 EDUC. FIN. POL'Y 137, 163, 165 (2011) (finding Michigan's school finance reform reduced inter-district spending inequalities and was associated with "significant positive improvement in performance in the lowest-spending districts," but there was "suggestive evidence that the constraints imposed...on discretionary increases in spending had a negative effect on student performance in the highest-spending districts.") (suggesting that remedies focusing only on funding systems may not be sufficient to improve educational outcomes because of unintended adverse consequences).
- ³⁰ Data Snapshot: Teacher Equity, supra note 17 (This analysis compares the average teacher salaries at schools with the highest and lowest combined black and Latino enrollment. Schools with the highest and lowest combined black and Latino enrollment are in the top and bottom quintiles, respectively, within the district in terms of combined black and Latino enrollment.)

Similarly, a 2011 U.S. Department of Education study found that many high-poverty schools do not receive an equitable share of State and local funds from their school districts, based on school-level expenditure data for 2007-08 that States and districts reported in response to a requirement under the *American Recovery and Reinvestment Act*. The study found that more than 40 percent of schools that received Federal Title I funding to serve disadvantaged students spent less State and local funding on teachers and other personnel than non-Title I schools at the same grade level in the same school district, leaving students in these high-poverty Title I schools with a resource disadvantage. Title I of the ESEA includes a "Comparability of Services" provision that requires districts to provide services in Title I schools from State and local funds that are at least comparable to those provided in non-Title I schools. *See* P.L. 107-110 Section 1120A(c). Federal Title I funds are designed to provide extra funding for the education of disadvantaged children, on top of an equitable State and local funding base.

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However, the current Title I comparability provision has loopholes that allow districts to mask spending disparities between schools. For a description of the resulting within-district disparities, *see* U.S. Department of Education, Office of Planning, Evaluation and Policy Development, Policy and Program Studies Service, *Comparability of State and Local Expenditures Among Schools Within Districts: A Report From the Study of School-Level Expenditures*, by Ruth Heuer & Stephanie Stullich, (Nov. 2011), http://www2.ed.gov/rschstat/eval/title-i/school-level-expenditures.pdf.

³¹ See generally, Equity Commission Report, supra note 2.

³² 42 U.S.C. § 2000d et seq. See also 34 C.F.R. Part 100 (implementing regulations).

³³ 34 C.F.R. § 100.3(a), (b). Under the regulations implementing Title VI, districts are prohibited from unjustifiably "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." 34 C.F.R. § 100.3(b)(2). *See also* Memorandum from Ralph F. Boyd, Jr., Assistant Attorney General, to Heads of Departments and Agencies, General Counsels and Civil Rights Directors (Oct. 26, 2001)), at 2, *available at* www.justice.gov/crt/about/cor/lep/Oct26memorandum.pdf. Although the Supreme Court in *Alexander v*. *Sandoval* held that private individuals have no right to sue to enforce the disparate-impact provision of the Title VI regulations, it did not undermine the validity of the regulations or otherwise limit the government's authority and responsibility to enforce Title VI regulations. *See* 532 U.S. 275 (2001).

³⁴ Note that Title VI not only prohibits direct violations by recipients of Federal funds, but also violations "through contractual or other arrangements." 34 C.F.R. § 100.3(b). Thus, school districts cannot avoid their nondiscrimination obligations by delegating responsibility to third parties.

³⁵ See, e.g., Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265-68 (1977) (identifying a non-exhaustive list of factors that may serve as indicia of discriminatory intent). For further discussion of this topic, see Dear Colleague Letter from Assistant Secretary for Civil Rights Catherine E. Lhamon and Acting Assistant Attorney General for Civil Rights Jocelyn Samuels on Nondiscriminatory Administration of School Discipline (Discipline DCL) (Jan. 8, 2014), at 7-10, available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf.

³⁶ See generally Elston v. Talladega County Bd. of Educ., 997 F.2d 1394 (11th Cir. 1993); U.S. Department of Justice, Title VI Legal Manual, (Jan. 11, 2001), www.justice.gov/crt/about/cor/coord/vimanual.php; U.S. Department of Education, Racial Incidents and Harassment against Students at Educational Institutions, 59 Fed. Reg. 11,448 (Mar. 10, 1994). See also McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (an employment discrimination case setting forth a three-part test that also applies in the context of discrimination in education under Title VI and Title IV of the Civil Rights Act of 1964 in court and administrative litigation to determine whether an institution has engaged in prohibited discrimination). See also Discipline DCL, supra note 35, at 8-10.

³⁷ See Discipline DCL, supra note 35, at 11-13.

³⁸ See Elston, 997 F.2d at 1411-12 (explaining that courts have required schools to demonstrate an "educational necessity" for the challenged program, practice, or procedure). In analyzing discrimination under the disparate impact framework, OCR uses "substantial, legitimate educational justification", "necessary to meet an important educational goal", and "educational necessity" to convey the same standard regarding the justification for a disparate impact by a recipient that will be acceptable to OCR.

³⁹ See Elston, 997 F.2d at 1413.

⁴⁰ Cases interpreting the U.S. Constitution's Equal Protection Clause and Title VI support the importance of resource allocation among schools within a district in assessing whether the district is in compliance with its Federal civil rights obligations. *See, e.g., Green v. County School Bd. of New Kent County, Va.*, 391 U.S. 430 (1968) (setting forth six factors for evaluating whether districts have achieved "unitary status" by eliminating the vestiges of *de jure* segregation: student assignment, faculty, staff, facilities, extracurricular activities, and transportation); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (articulating guidelines for courts to help school districts convert racially separate school systems into constitutionally acceptable systems, particularly with respect to new

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school construction, faculty assignment, and transportation); *Freeman v. Pitts*, 503 U.S. 467 (1992) (adding relative quality of education to the six *Green* factors used in assessing unitary status); *Bd. of Educ. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237 (1991) (directing district court to consider student assignments and "every facet of school operations — faculty, staff, transportation, extra-curricular activities and facilities" in considering whether the vestiges of school system's *de jure* segregation had been eliminated).

Numerous State courts have also deemed inequitable access to these educational resources unlawful under their State constitutions. See, e.g., Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 198 (Ky. 1989) (teacher pay, student-teacher ratios, school facilities, instructional materials); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 393 (Tex. 1989) (teacher and school leadership experience, teacher aides, student-teacher ratios, class sizes, school facilities, libraries, broader curriculum, advanced courses, technology, counseling and support services, educational programs, extracurricular activities); Tenn. Small Sch. Sys. v. McWherter, 851 S.W. 2d 139, 143-46 (Tenn. 1993) (teacher training and experience, school facilities, equipment and supplies, science labs, libraries, textbooks, AP courses, educational programs, athletic and extracurricular activities); McDuffy v. Sec'y of Executive Office of Educ., 615 N.E.2d 516, 617 (Mass. 1993) (class sizes, teacher quality, retention, and training, quantity of staff and guidance counselors, library quality, updated curriculum, academic programs, student services); Campbell County Sch. Dist. v. State, 907 P.2d 1238, 1279 (Wyo. 1995) (class size, school size, student-teacher ratios, textbooks, computers, programs for at-risk and talented students, educational standards); DeRolph v. State, 677 N.E.2d 733, 742-45 (Ohio 1997) (teachers, student-teacher ratios, school facilities, computers, software, and technology training instructional materials, AP and honors courses); Abbott ex rel. Abbott v. Burke, 710 A.2d 450 (N.J. 1998) (full-day kindergarten, high-quality preschool, school facilities, specialized instructional rooms for art and music, technology, after-school and summer-school programs); Abbott ex rel. Abbott v. Burke, 748 A.2d 82, 88-93 (N.J. 2000) (educational standards, qualified and certified teachers, class size, student-teacher ratios, preschool programs); Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 332-40 (N.Y. 2003) (teaching quality and training, facilities, instrumentalities of learning); Hoke County Bd. of Educ. v. State, 599 S.E.2d 365, 390 (N.C. 2004) (teachers, principals, instructional resources, support programs); Columbia Falls Elementary Sch. Dist. No. 6 v. State, 109 P.3d 257, 263 (Mont. 2005) (teacher salaries and retention, programs, staff, school facilities).

⁴¹ See Adelman, supra note 5, at 26-41 (concluding that among students who attend any postsecondary education, those whose high school curriculum was more academically intense were more likely to complete a bachelor's degree).

⁴² See Symonds et al., supra note 5, at 1-3 ("In 2008, median earnings of workers with bachelor's degrees were 65 percent higher than those of high school graduates (\$55,700 vs. \$33,800). Similarly, workers with associate's degrees earned 73 percent more than those who had not completed high school (\$42,000 vs. \$24,300).") (citing Sandy Baum, Jennifer Ma, and Kathleen Payea, Education Pays 2010: The Benefits of Higher Education for Individuals and Society, 2010, College Board Advocacy & Policy Center, available at http://trends.collegeboard.org/sites/default/files/education-pays-2010-full-report.pdf).

⁴³ See OCR's Dear Colleague Letter from Assistant Secretary Stephanie J. Monroe regarding Title VI and access to rigorous courses including Advanced Placement (May 22, 2008), available at www.ed.gov/ocr/letters/colleague-20080522.html. OCR has extensive enforcement experience in assessing access to advanced coursework, including gifted and talented courses, STEM courses, and AP and IB courses. Recent resolutions from some of those investigations may be found on OCR's website at www.ed.gov/ocr.

⁴⁴ Federal courts have repeatedly required equitable allocation of resources such as teacher experience and teacher training in order to achieve equal educational opportunities for students under the Fourteenth Amendment. *See, e.g., Pitts v. Freeman,* 887 F.2d 1438, 1450 (11th Cir. 1989); *United States v. Lawrence County Sch. Dist.,* 799 F.2d 1031, 1041 (5th Cir. 1986); *Morgan v. Kerrigan,* 509 F.2d 599, 600-01 (1st Cir. 1975); *United States v. Board of Sch. Comm'rs,* 332 F. Supp. 655, 680 (S.D. Ind. 1971), *affirmed by* 474 F.2d 81 (7th Cir. 1973); *Hobson v. Hansen,* 327 F. Supp. 844, 855 (D.D.C. 1971); *Spangler v. Pasadena City Board of Educ.,* 311 F. Supp. 501, 524 (C.D. Cal. 1970); *Kelley v. Altheimer, Arkansas Pub. Sch. Dist.,* 378 F.2d 483, 499 (8th Cir. 1967); *Lee v. Macon County Bd. of Educ.,* 267 F. Supp. 458, 489 (M.D. Ala. 1967), *affirmed sub nom Wallace v. United States,* 389 U.S. 215 (1967). Congress has likewise focused on these factors, providing, as part of ESEA, that school districts are required to "ensure, through incentives for voluntary transfers, the provision of professional development, recruitment

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programs, or other effective strategies, that low-income students and minority students are not taught at higher rates than other students by unqualified, out-of-field, or inexperienced teachers." 20 U.S.C. § 1112(c)(1)(L).

- ⁴⁵ On July 7, 2014, Secretary Arne Duncan announced the Excellent Educators for All Initiative, and one key component is the revised comprehensive educator equity plans to be developed by State educational agencies to comply with Title I of ESEA. *See* Letter from Secretary Duncan to Chief State School Officers at http://www2.ed.gov/policy/elsec/guid/secletter/140707.html and announcement of initiative at http://www.ed.gov/news/press-releases/new-initiative-provide-all-students-access-great-educators.
- ⁴⁶ See Nithya Joseph, et al. Roll Call: The Importance of Teacher Attendance, The National Council on Teacher Quality, (June 2014), www.nctq.org/dmsView/RollCall TeacherAttendance (using data from 50 largest school districts on teacher absences, this study found that on average teachers miss 11 school days, which is troubling since prior research regarding the impact of teacher absenteeism on student achievement showed a significant impact on students when teachers were absent for more than 10 days) (citing Reagan T. Miller, et al., Do Teacher Absences Impact Student Achievement? Longitudinal Evidence from One Urban School District (2008), EDUC. EVAL. & POL'Y ANAL. 30, 181, available at http://epa.sagepub.com/content/30/2/181.full.pdf).
- ⁴⁷ OCR recognizes that the current state of the empirical research has demonstrated only weak support for the importance of teacher qualifications (such as route of certification, experience, subject matter expertise, and other training) to teachers' effectiveness in the classroom, if the sole criterion taken into account is a student growth, "value added" metric. However, some studies previously highlighted in this letter have shown a relationship between such teacher characteristics and the quality of education students are receiving. *See supra* section I on pages 2-5 and accompanying notes. OCR considers these teacher characteristics in assessing equitable access to effective teaching.
- ⁴⁸ Gary T. Henry et al., *Portal Report: Teacher Preparation and Student Test Scores in North Carolina*, 9, (June 2010),

http://publicpolicy.unc.edu/Research/teacher Portals Teacher Preparation and Student Test Scores in North Carolina 2.pdf. ("Teachers in their first year of experience produced student test score gains that were significantly worse than those produced by teachers with five or more years of experience."); Douglas O. Staiger & John E. Rockoff, Searching for Effective Teachers with Imperfect Information, 24 J. ECON. PERSP. 97, 102-103 (2010) ("In both Los Angeles and New York, teacher effects on student achievement appear to rise rapidly during the first several years on the job and then flatten out. This finding has been replicated in a number of states and districts."); Clotfelter (2007), supra note 18, at 666 ("Thus we conclude that teachers with some experience are more effective than novice teachers."); Rivkin, supra note 15, at 449 ("There appear to be important gains in teaching quality in the first year of experience and smaller gains over the next few career years. However, there is little evidence that improvements continue after the first three years."). OCR recognizes that some inexperienced teachers may provide relatively more effective teaching than other inexperienced teachers. See, e.g., Melissa A. Clark, Hanley S. Chiang, Tim Silva, Sheena McConnell, Kathy Sonnenfeld, Anastasia Erbe, and Michael Puma, The Effectiveness of Secondary Math Teachers from Teach For America and the Teaching Fellows Programs (NCEE 2013-4015) (2013), National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Department of Education, available at http://ies.ed.gov/ncee/pubs/20134015/pdf/20134015.pdf; Clotfelter et al. (2010), supra note 15; Linda Cavaluzzo, Is National Board Certification an Effective Signal of Teacher Quality? The CNA Corporation (2004) available at

www.nbpts.org/sites/default/files/documents/research/Cavalluzzo_IsNBCAnEffectiveSignalofTeachingQuality.pdf (finding robust evidence that National Board Certification is a reliable indicator of teacher quality). But see Jill Constantine, et al., An Evaluation of Teachers Trained Through Different Routes to Certification, Final Report (NCEE 2009-4043) (2009) National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Department of Education, available at

http://ies.ed.gov/ncee/pubs/20094043/pdf/20094043.pdf (report based on a random assignment study found no difference in the performance of traditionally certified teachers and teachers who were alternatively certified with very low coursework requirements).

⁴⁹ See, e.g., Jason A. Grissom, Can Good Principals Keep Teachers in Disadvantaged Schools? Linking Principal Effectiveness to Teacher Satisfaction and Turnover in Hard to Staff Environments, 113 TCHRS. C. REC. 2552, 2552-

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2585 (2011) ("Regression results show that principal effectiveness is associated with greater teacher satisfaction and a lower probability that the teacher leaves the school within a year. Moreover the positive impacts of principal effectiveness on these teacher outcomes are even greater in disadvantaged schools."); Anthony T. Milanowski, et al., *Recruiting New Teachers to Urban School Districts: What Incentives Will Work?*, INT'L J.EDUC. POL'Y & L., 2009 at 1-13 (Survey data showed that "many working conditions factors, especially principal support, had more influence on simulated job choice than pay level..."); Gregory F. Branch, et al., Estimating the Effect of Leaders on Public Sector Productivity: The Case of School Principals (Feb. 2012) (CALDER Working Paper 66) (on file at The American Institutes for Research, Washington, D.C.); Damon Cark, et al., School Principals and School Performance (Dec. 2009) (CALDER Working Paper 38) (on file at The Urban Institute. Washington, D.C.)

- ⁵⁰ Samuel D. Miller, Partners-in-Reading: Using Classroom Assistants to Provide Tutorial Assistance to Struggling First-Grade Readers, JOURNAL OF EDUCATION FOR STUDENTS PLACED AT RISK (JESPAR), 8:3, 333-349 (2003); Daniel K. Lapsley, et al., Teacher Aids, Class Size and Academic Achievement: A Preliminary Evaluation of Indiana's Prime Time (2002) (unpublished paper presented at American Educational Research Association Annual Meeting); Marie C. Keel, et al., Using Paraprofessionals to Deliver Direct Instruction Reading Programs, 18 EFFECTIVE SCH. PRAC. 16, 16-22 (1999).
- Susan C. Whiston & Robert F. Quinby, Review of School Counseling Outcome Research, 46 PSYCHOL. IN SCH. 267, 267-272 (2009); Gregg Brigman & Chari Campbell, Helping Students Improve Academic Achievement and School Behavior, 7 PROF. SCH. COUNSELING 91, 91-98 (2003); C.A. Sink & H.R. Stroh, Raising Achievement Test Scores of Early Elementary School Students Through Comprehensive School Counseling Programs, 6 PROF. SCH. COUNSELING 350, 350-364 (2003); R.T. Lapan, et al., Preparing Rural Adolescents for Post-High School Transitions, 81 J. COUNSELING & DEV.329, 329-342 (2003); Greg Goodman & Phillip Young, The Value of Extracurricular Support in Increased Student Achievement: An Assessment of a Pupil Personnel Model Including School Counselors and School Psychologists Concerning Student Achievement as Measured by an Academic Performance Index, Educational Research Quarterly, Sept. 2006, at 3-13; Barnett Berry et al., Teacher Effectiveness: The Conditions that Matter Most and a Look to the Future, Center for Teaching Quality, Mar. 2012, at 11-12, http://files.eric.ed.gov/fulltext/ED509720.pdf ("Many students from high-needs communities come to school with an array of family and personal problems (e.g., abuse, neighborhood violence, food insecurity or actual hunger, lack of proper clothes to wear). These are not excuses for not learning, but they are realities, and teachers need support in connecting the teaching of academic content to the socio-emotional and physical needs of students.").

By engaging students with a range of high-quality resources, librarians contribute to student achievement. See, e.g., Briana Hovendick Francis, et al., School Librarians Continue to Help Students Achieve Standards: The Third Colorado Study (Closer Look Report), Colorado State Library, Library Research Service (2010), available at www.lrs.org/documents/closer_look/CO3_2010_Closer_Look_Report.pdf; Ester G. Smith, Texas School Libraries: Standards, Resources, Services, and Students' Performance, EGS Research & Consulting (April 2001), available at www.tsl.texas.gov/sites/default/files/public/tslac/ld/pubs/schlibsurvey/survey.pdf; Keith Lance, et al., The Impact of School Library Media Centers on Academic Achievement (Hi Willow Research and Publishing) (1993).

Patricia M. McDonough, Counseling and College Counseling in America's High Schools, National Association for College Admissions Counseling (October 17, 2013), http://inpathways.net/McDonough%20Report.pdf, ("[R]epeated studies have found that improving counseling would have a significant impact on college access for low income, rural, and urban students as well as students of color. Specifically, if counselors begin actively supporting students and their families in middle school in preparing for college, as opposed to simply disseminating information, this will increase students' chances of enrolling in a four-year college.") (citations omitted); John Brittain & Callie Kozlak, Racial Disparities in Educational Opportunities in the United States, 6 SEATTLE J. Soc. JUST. 605, 605-608 (2008) ("[S]chools with a high concentration of poor and minority students lack access to guidance counselors who are important to assisting students and parents in making informed decisions about important curricular choices. Therefore, low-income and minority students often find themselves ill-prepared or ineligible for postsecondary education.") Valerie E. Lee & Ruth B. Ekstrom, Student Access to Guidance Counseling in High School, 24 AM. EDUC. RES. J. 287, 287-310 (1987).

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⁵³ Lawrence O. Picus, et al., Understanding the Relationship Between Student Achievement and the Quality of Educational Facilities: Evidence from Wyoming, 80 PEABODY J. EDUC. 71, 71-95 (2005); Mary W. Filardo, et al., Growth and Disparity: A Decade of U.S. Public School Construction, Building Educational Success Together (BEST) (February 24, 2012) www.ncef.org/pubs/GrowthandDisparity.pdf; Grayce Cheng, et al., Facilities: Fairness & Effects, Evidence and Recommendations Concerning the Impact of School Facilities on Civil Rights and Student Achievement, Submission to the U.S. Department of Education Excellence & Equity Commission (Feb. 24, 2012). www.21csf.org/csf-home/publications/ImpactSchoolFacilitiesCivilRightsAug2011.pdf; American Federation of Teachers, Building Minds, Minding Buildings: Turning Crumbling Schools into Environments for Learning, (Jan. 20, 2014), www.aft.org/pdfs/psrp/bmmbcrumbling1106.pdf; Carol Cash & Travis Twiford, Improving Student Achievement and School Facilities in a Time of Limited Funding, (Feb. 24, 2012), http://cnx.org/content/m23100; U.S. Department of Education, Policy and Program Studies Service, 2004-06, A Summary of Scientific Findings on Adverse Effects of Indoor Environments on Students' Health, Academic Performance and Attendance, (2004); Mark Schneider., Do School Facilities Affect Academic Outcomes? National Clearinghouse for Educational Facilities, (Feb. 24, 2012), www.ncef.org/pubs/outcomes.pdf; Glen I. Earthman, School Facility Conditions and Student Academic Achievement, wws-RR008-1002 UCLA Inst. For Democracy, Educ., & Access (2002); Sean O'Sullivan, A Study of the Relationship Between Building Conditions and Student Academic Achievement in Pennsylvania's High Schools (Aug. 28, 2006) (unpublished Ph.D. in Educational Leadership and Policy Studies dissertation, Virginia Polytechnic Institute & State University) (on file with Virginia Tech library).

⁵⁴ Cynthia Uline & Megan Tschannen-Moran, *The Walls Speak: The Interplay of Quality Facilities, School Climate, and Student Achievement*, 46 J. OF EDUC. ADMIN. 55, 55-73 (2008).

⁵⁵ Glen I. Earthman, *Prioritization of 31 Criteria for School Building Adequacy*, American Civil Liberties Union Foundation of Maryland (Feb. 25, 2012), www.schoolfunding.info/policy/facilities/ACLUfacilities report1-04.pdf (expert report prepared based on review of extensive bibliography, own research, and years of experience in the field) (concluding that studies have shown that properly functioning HVAC systems that enable classrooms to be air-conditioned are correlated with improved student achievement); A. N. Myhrvold, et al., *Indoor Environment in Schools — Pupils Health and Performance in Regard to CO2 Concentrations*, The 7th Int'l Conf. on Indoor Air Quality & Climate, at 369, 369-371.

⁵⁶ Glen I. Earthman, Education Oversight Committee for South Carolina, The Relationship of School Facilities Conditions to Selected Student Academic Outcomes: A Study of South Carolina Public Schools, http://dc.statelibrary.sc.gov/bitstream/handle/10827/5176/EOC Relationship of School Facilities 2001.pdf?seque nce=1 (2001); Glen I. Earthman, The Effect of the Condition of School Facilities on Student Academic Achievement, Expert Report prepared for Williams v. California (May 23, 2012), www.decentschools.org/expert reports/earthman report.pdf.

⁵⁷ See, e.g., C. Kenneth Tanner, The Influence of School Architecture on Academic Achievement, 38 J. OF EDUC. ADMIN. 309, 309-330 (2000); C. Kenneth Tanner, Explaining Relationships Among Student Outcomes and the School's Physical Environment, 19 J. OF ADVANCED ACAD. 444, 444-471 (2008).

⁵⁸ Qing Li & Xin Ma, *A Meta-Analysis of the Effects of Computer Technology on School Students' Mathematics Learning*, 22 EDUC. PSYCHOL. REV. 215, 215-244 (2010); James Cengiz Gulek & Hakan Demirtas, *Learning with Technology: The Impact of Laptop Use on Student Achievement*, THE J. OF TECH., LEARNING & ASSESSMENT, January 2005, at 5; James A. Kulik, Effects of Using Instructional Technology in Elementary and Secondary Schools: What Controlled Evaluation Studies Say, SRI International (2003), http://citeseerx.ist.psu.edu/viewdoc/download?rep=rep1&type=pdf&doi=10.1.1.207.3105.

⁵⁹ Although this letter is not intended to address Section 504 of the Rehabilitation Act of 1973 or Title II of the Americans with Disabilities Act, school districts must ensure that students with disabilities have equal access to the benefits of educational technologies in the classroom. *See* OCR's Dear Colleague Letter and Frequently Asked Questions from Assistant Secretary Russlynn Ali on the June 2010 DCL (May 16, 2011), available at www.ed.gov/ocr/letters/colleague-201105-ese.html and www.ed.gov/ocr/docs/dcl-ebook-faq-201105.html.

⁶⁰ See Pamela Cantrell, et al., The Effects of Differentiated Technology Integration on Student Achievement in Middle School Science Classrooms, INT'L. J. TECH. IN TEACHING & LEARNING, 36, 36-54 (2007); Gerald Knezek &

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Rhoda Christensen, *Effect of Technology-Based Programs on First- and Second-Grade Reading Achievement*, COMPUTERS IN SCH., 23, 23-41 (2007); Lowther, et al., Freedom to Learn Program: Michigan 2005-2006 Evaluation Report, Center for Research in Education Policy (2007), www.memphis.edu/crep/pdfs/Michighan Freedom to Learn Laptop Program.pdf.

⁶¹ Keith Curry Lance, et al., *How Students, Teachers & Principals Benefit from Strong School Libraries: The Indiana Study*, RSL Research Group (2007), www.ilfonline.org/resource/resmgr/aisle/infinalreportnextsteps.pdf; Robert Burgin & Pauletta Brown Bracy, *An Essential Connection: How Quality School Library Media Programs Improve Student Achievement in North Carolina*, R.B. Software & Consulting (2003), www.rburgin.com/ncschools2003/NCSchoolStudy.pdf; Keith Lance, et al., *The Impact of School Library Media Centers on Academic Achievement* (Hi Willow Research and Publishing) (1993).

⁶² See 20 U.S.C. §§ 6311(b)(8)(C), 6312(c)(1)(L).

⁶³ Note that "contractual or other arrangements" cannot justify a school practice that results in denial of educational benefits on the basis of race, color, or national origin. 34 C.F.R. § 100.3(b).

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Test Optional Defined

Test-optional admissions describes the process by which many colleges and universities consider for admissions all or most applicants without requiring an ACT or SAT test score to be submitted. Fair Test has been defining, tracking, and promoting such policies since the organization was founded in 1985.

The most common terms associated with these polcies are:

Test optional: This is both a blanket term for schools which do not require applicants to submit test scores before admissions decisions are made, including test-free institutions, and a more specific label for the more than 1,700 bachelor-degree granting schools that currently give students the power to choose whether ACT/SAT scores will be considered in the admissions process.

Test-free: This refers to institutions that will not consider ACT or SAT results in the admissions process even if scores are submitted. As of September, 2023, about 86 campuses, including the University of California and the California State University, the nation's largest public higher education system, are test-free. Test-free is sometimes referred to as "test blind".

Given that that the U.S. has a large and varied higher educational system, each university with test optional admissions practices might administer these policies slightly differently.

Notes in the "exceptions" column of the FairTest Test Optional List explain variations in these policies. FairTest tries to research and report accurate information, but it is not possible to keep up perfectly with 2,300 different admissions policies. Applicants and their advocates should always refer to individual school's websites to verify current policies.

Test Optional Colleges

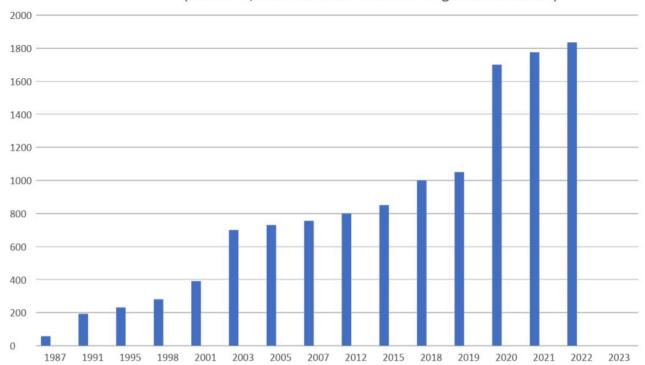
A Brief History

Since 1968, colleges and universities have been limiting their use of the SAT and ACT in the admissions process. FairTest's test optional list provides a constantly updated resource to track the rapidly growing number of U.S. bachelor degree-granting institutions that admit most or all of their students without requiring either the SAT or ACT.

https://fairtest.org/test-optional/

ACT/SAT-Optional and Test Blind/Score-Free **Schools Growth Chronology**

(out of ~2,330 accredited bachelor-degree institutions)



Milestones

1969: Bowdoin College announced that applicants would have the choice of whether to submit the tests or not making it the first test optional college.

1994: Dickenson College becomes test optional

2000: Muhlenberg College is among the 280 colleges that are part of the test optional surge at the end of the 90s.

2001: Richard Atkinson, president of the University of California, recommended that colleges stop using the SAT and switch to tests tied more closely to the high school curriculum

2005: Bates College is among the 730 test optional colleges and universities.

2009: Agnes Scott College College joins the test optional movement bringing the number of test optional colleges to about 800.

2015: Bennington College becomes test optional.

2017: Emerson College and University of the Ozarks announce test optional policies bringing the count to 950 colleges.

2019: Prior to the pandemic public colleges in Oregon jointly announce adoption of test optional admission, which brings the total test optional schools to more than 1050.

2021: University of California and Californual State University become test free.



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Untested Admissions: Examining Changes in Application Behaviors and Student Demographics **Under Test-Optional Policies**

Christopher T. Bennett Vanderbilt University

This study examines a diverse set of nearly 100 private institutions that adopted test-optional undergraduate admissions policies between 2005-2006 and 2015-2016. Using comparative interrupted time series analysis and difference-in-differences with matching, I find that test-optional policies were associated with a 3% to 4% increase in Pell Grant recipients, a 10% to 12% increase in first-time students from underrepresented racial/ethnic backgrounds, and a 6% to 8% increase in first-time enrollment of women. Overall, I do not detect clear evidence of changes in application volume or yield rate. Subgroup analyses suggest that these patterns were generally similar for both the more selective and the less selective institutions examined. These findings provide evidence regarding the potential—and the limitations—of using test-optional policies to improve equity in admissions.

KEYWORDS: higher education, test-optional, college admissions, standardized tests

Introduction

Throughout the 20th century, selective 4-year colleges and universities in the United States widely adopted standardized tests as admissions requirements (Syverson, 2007). Despite early aspirations that such tests could serve as a "census of human abilities" capable of reliably identifying talented individuals from a variety of backgrounds (Carmichael & Mead, 1951, p. 196), there remain strong correlations between college admissions test scores and race, gender, and socioeconomic status (e.g., Bowen et al., 2009). Alon and Tienda (2007)

Christopher T. Bennett is a PhD candidate in the Department of Leadership, Policy, and Organizations at Vanderbilt University, 230 Appleton Place, PMB #414, Nashville, TN 37203, USA; e-mail: chris.bennett@vanderbilt.edu. His research focuses on topics related to college access, graduate/professional education, and labor market outcomes for students.

Untested Admissions

have argued that the "apparent tension between merit and diversity exists only when merit is narrowly defined by test scores" (p. 487). Amid such concerns, over 10% of selective institutions shifted to test-optional admissions policies between 1987 and 2015 (Furuta, 2017). Still more institutions have adopted test-optional policies, at least temporarily, following large-scale testing cancellations in the wake of the coronavirus outbreak in 2020 (Anderson, 2020).

Given the increasingly widespread adoption of test-optional admissions strategies and the significant benefits that accrue to individuals who attend selective institutions (e.g., Bowen & Bok, 1998), the impact of such test-optional policies warrants further attention. Previous work on test-optional policies has largely focused on selective liberal arts colleges, which accounted for nearly all of the earliest adopters (Belasco et al., 2015). Considerably less attention has been devoted to the implications of the test-optional movement as it continued to expand beyond selective liberal arts colleges. The present study offers insights into this much wider pool of test-optional institutions, encompassing a range of selectivity levels and institution types. In doing so, this study takes extensive steps to identify suitable comparison groups, relies on policy enactment dates corroborated from multiple sources, and follows outcome measures for more years postenactment than other studies, on average.

To provide greater understanding of the implications of test-optional policies, the primary analysis for this study compares nearly 100 private institutions that implemented test-optional policies between 2005-2006 and 2015-2016 (a treated group of earlier-adopters) to more than 100 others that subsequently enacted or announced test-optional policies by December 2019 (a comparison group of later-adopters). In addition, due to the variety of institutions that adopted test-optional policies within this timeframe, I use three matching methods to identify institutions that closely resemble one another on key observable dimensions. This approach enables me to emphasize results that are consistent across multiple comparison groups, suggesting they are not contingent on the exact matching approach used.

Using comparative interrupted time series (CITS) and difference-indifferences (DD) analytic strategies, I assess the effects of test-optional policy enactment on measures related to undergraduate admissions and the composition of the student body. Relying on the variation in policy adoption timing for more test-optional institutions than any prior published study, I find that the enrollment of Pell Grant recipients, underrepresented racially/ethnically minoritized (URM) students, and women increased following test-optional policy enactment, relative to trends at matched peer institutions. I do not find clear overall evidence of an increase in applications, though there may have been a short-term rise during the first few years of the policy. The study detects no consistent relationships between test-optional policies and an institution's yield rate, although it is not possible to entirely rule out modest effects. These findings are robust to a variety of alternative specifications that produce qualitatively similar estimates. Subgroup analyses suggest that

Bennett

more selective and less selective institutions alike experienced the increases in Pell Grant recipients, URM students, and women.

Background

To contextualize this study, it is worthwhile to consider the role of standardized tests in college admissions and previous research on test-optional policies. I conclude this section with an overview of the conceptual framework for the study, including a discussion of the roles that students and institutions play in shaping admissions and enrollment outcomes.

Test-Optional Policy Adoption

Prior to the advent of standardized testing in the early 20th century, American universities typically admitted students through institution-specific examinations or guaranteed admission for graduates of preapproved high schools (Wechsler, 1977). Descended from IQ tests and Army Alpha tests used to assess military recruits, the SAT emerged in 1926 as an alternative mechanism for assessing applicants (Zwick, 2004). Among the earliest uses of the SAT was as a selection criterion for a national scholarship program at Harvard University, an initiative through which Harvard president James Bryant Conant sought to expand access to students from a wider array of socioeconomic backgrounds (Karabel, 2006). In part through Conant's advocacy for the SAT, other selective institutions began adopting the SAT in their admissions practices, laying the groundwork for a long-standing link between standardized testing and selective college admissions (Zwick, 2019). With an expanding pool of college applicants as a result of the G.I. Bill, institutions increasingly turned to the SAT to distinguish between candidates (Lemann, 1999). By 1959, a large-scale competitor, the ACT, had emerged, as well.

As the pool of college students has expanded in subsequent decades, so too have debates about the role these standardized test scores play in the admissions process. One primary set of concerns centers on persistent disparities in standardized test scores across various groups. In particular, average SAT and ACT scores vary by a student's socioeconomic status and racial/ethnic group (Dixon-Román et al., 2013). For example, among high school seniors in 2010, Asian students averaged a combined 1,110 points on the Critical Reading and Mathematics sections, compared to 857 for Black students, 906 to 921 for subgroups of Hispanic students, 977 for Native American students, and 1,064 for White students (College Board, 2010). Furthermore, on average, women underperform on the SAT relative to men, especially when considering performance in high school courses (Leonard & Jiang, 1999). For college-bound seniors who took the SAT in 2010, for instance, men averaged 34 points higher on the Mathematics section and 5 points higher on the Critical Reading section (College Board, 2010).

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These differences do not originate with college admissions tests but are instead reflective of long-standing, systemic variation in educational resources and opportunities that also manifest themselves in achievement disparities on standardized tests at the K-12 level (Duncan & Magnuson, 2005; Reardon et al., 2019). In addition to such underlying forces, differential access to test preparation services may partially account for such score gaps, particularly for students from low-income backgrounds (Buchmann et al., 2010). Other proposed explanatory factors include stereotype threat, in which negative stereotypes lead members of the stereotyped group to underperform (Walton & Spencer, 2009), and content that advantages members of certain groups (Rosner, 2012). Regardless of the origin, the strong correlations between background characteristics and test scores could lead applicants to believe that standardized tests reinforce rather than displace barriers to social mobility.

A second group of concerns regarding standardized testing involves the predictive validity of scores. Much of the predictive validity literature has found that standardized test scores offer incremental improvements in predicting college grades and graduation rates, relative to high school grades alone (e.g., Westrick, et al., 2015). However, other work has conveyed the importance of considering heterogeneity in the predictive validity for the SAT and ACT. For instance, using data from 2006 test-takers, Mattern et al. (2008) found variation in the relationship between SAT scores and first-year college grade point average (FYGPA) by gender, race/ethnicity, and a student's best language. They determined that SAT scores overpredicted FYGPA for men by 0.15 standard deviations while underpredicting women's FYGPA by 0.13 standard deviations. Across racial/ethnic groups, the relationship between SAT scores and FYGPA ranged from an overprediction of 0.22 standard deviations (for Native American students) to an underprediction of 0.03 standard deviations (for White students). Meanwhile, for students who reported speaking another language better than English, the SAT underpredicted FYGPA by 0.33 standard deviations. More recent evidence has also highlighted the importance of considering high school context when evaluating the relationship between ACT scores and college graduation rates, with Allensworth and Clark (2020) finding that "the signal provided by ACT scores is much smaller than the noise introduced by school effects" (p. 209). In light of such variation, test scores' utility varies depending on the purpose for which they are used, and the decision of how much weight to assign to test scores is consequential (Bowen et al., 2018).

At least partly in response to such concerns, a growing number of institutions have chosen to adopt test-optional admission policies (Furuta, 2017). These policies permit applicants to decide whether to submit standardized test scores in their application. Admissions professionals at test-optional institutions then use the available evidence to determine which applicants to admit. Test-optional institutions state that they do not penalize applicants who choose to omit test scores (Syverson et al., 2018). For students who do not submit test scores, institutions must rely more heavily on other factors when making an

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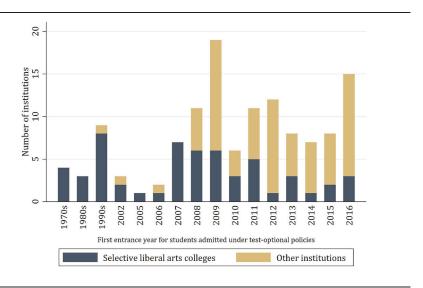


Figure 1. Number of institutions enacting test-optional admissions over time, by institution type.

Note. Prior to 2001–2002, policy enactment is listed by decade.

admission decision (e.g., grades, extracurriculars), although the precise balance is unknown. In some cases, test-optional institutions require additional application materials (e.g., supplementary essays) in place of test scores, or they may require test scores for placement purposes once a student enrolls.

While Bowdoin College and a handful of other institutions have maintained test-optional policies for about half a century, the preponderance of test-optional policy adoption has taken place within the past two decades (Furuta, 2017). Early on, test-optional policies were overwhelmingly concentrated in selective liberal arts colleges. By the 2010s, however, the test-optional movement expanded to reach a variety of other sectors. In fact, Figure 1 illustrates that selective liberal arts colleges account for the minority of institutions adopting test-optional policies in more recent years. For instance, of private institutions that first enacted test-optional policies for students entering between 2008–2009 and 2015–2016, only one quarter were liberal arts colleges. Despite such diversification in terms of the Carnegie classifications, test-optional adoption in this period was overwhelmingly limited to private institutions, which are therefore the focus of this study.

Impacts of Test-Optional Policy Adoption

Before COVID-19 dramatically constrained the availability of standardized testing, institutions espoused two primary rationales for adopting test-

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optional policies. First, institutions frequently invoked the notion that a person is "more than just a number," arguing a test-optional policy is consistent with a holistic admissions approach and the university's values more broadly (e.g., Hanover College, 2019). Second, they commonly explained that they expected test-optional policies to increase student body diversity along several dimensions. For instance, the dean of admissions at Bowdoin College suggested their use of the policy increased "geographic, socioeconomic, racial, [and] ethnic" diversity (Goldfine, 2017). Other case studies have similarly reported that student body diversity increased after test-optional policy adoption, though they do not claim their findings represent average effects for all test-optional adopters (e.g., Syverson et al., 2018). Early data simulations also suggested that improved socioeconomic and racial/ethnic diversity would be likely outcomes of the policies (Espenshade & Chung, 2010).

A limited body of research has sought to identify the causal effects of testoptional policies. Focusing on 32 test-optional selective liberal arts colleges, Belasco et al. (2015) used a DD analytic strategy and determined that the policies were more effective at achieving latent, rather than the manifest, aims. Specifically, they found that the policies had no significant impact on the proportion of URM students or Pell Grant recipients enrolled, although testoptional selective liberal arts colleges experienced increased application volumes and higher reported SAT scores after implementing the policy. Such findings suggest that the implementation of test-optional policies at a small group of early adopters may have enhanced the perceived selectivity of the institution without meaningfully improving the socioeconomic and racial diversity on those campuses. Analyzing the same set of institutions with a DD approach combined with propensity score matching (PSM), Sweitzer et al. (2018) obtained generally similar results, finding that test-optional policies resulted in increased SAT scores but had no statistically significant effects on applicant volume, acceptance rates, or the number of URM students. Subsequent work from Rosinger and Ford (2019) analyzing a similar group of test-optional liberal arts colleges found no significant evidence of changes in enrollment by family income quintile.

Looking beyond selective liberal arts colleges, Saboe and Terrizzi (2019) used a DD approach to examine effects of test-optional policies at 4-year institutions of all types, finding few effects apart from a short-term initial increase in applications. There are several caveats to the analysis in that article, however. For instance, Saboe and Terrizzi compared test-optional institutions to all 4-year test-requiring institutions, regardless of other institutional characteristics such as selectivity. Since many 4-year institutions are actually or effectively open-access, their admissions strategies and goals are likely to differ from the selective institutions that adopt test-optional policies. Additionally, Saboe and Terrizzi's measure of racial diversity was a count of all non-White students, rather than focusing on historically underrepresented students in particular. Finally, the data analyzed were confined to the period

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between 2009 and 2014, a range of years immediately following the Great Recession that does not include dozens of test-optional adopters outside that time period.

Overall, then, prior literature finds few effects of test-optional policies, apart from occasional evidence of increases in applications and reported standardized test scores. However, as outlined above, that prior literature either focused exclusively on selective liberal arts colleges or compared test-optional adopters to a counterfactual set that likely differed from the test-optional adopters in meaningful ways. In addition, the analytic time period in prior studies did not allow the majority of institutions to be followed for 4 years after test-optional policy adoption. Such a comparatively limited observation window makes it difficult to interpret estimates from prior research regarding outcomes such as Pell Grant recipient enrollment, which takes 4 years to be fully evident.

Building on previous literature, this study identifies suggestive evidence for the effects of test-optional policy adoption at a broad array of private institutions. To do so, I examine a larger group of test-optional institutions than prior studies, allowing me to evaluate the policy at the diverse coalition of institutions that the test-optional movement has come to encompass. I also follow outcomes for more years postadoption, on average, facilitating analysis of long-term outcomes. As a result, this study provides some of the most recent, largest scale evidence on the effects of test-optional policies for enrollment management metrics and student body diversity at private institutions in the United States.

Conceptual Framework

The underlying process that connects test-optional policy implementation and student behavior is primarily student decision-making regarding whether and where to enroll in higher education. To better understand how students make these decisions, I draw on Perna's (2006) model of college choice. At the same time that students undertake the college choice process, of course, institutions themselves are engaged in an effort to identify and attract applicants who are well-suited for the institution's aims. Therefore, while this conceptual framework emphasizes the student's role in choosing where to apply and ultimately matriculate, it also addresses some institutional actions that can facilitate or constrain student decision-making.

Seeking to explain differential college choice processes across a variety of groups, Perna (2006) introduced a conceptual model of college choice that integrated considerations from economic and sociological traditions. Perna's model identified college choice in part as a human capital investment decision, with students evaluating the expected costs and benefits of their college choice in light of their own academic background and family resources. In Perna's conceptualization, this human capital decision is nested within four layers of context. The first

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layer involves the interrelationship between a student's demographic characteristics (e.g., race/ethnicity, gender), cultural capital, and social capital. Together, these attributes help form a student's *habitus*, an internalized set of dispositions and preferences that undergirds an individual's behaviors and decision-making (Bourdieu, 1977). The second layer covers a student's high school and community context, including the resources available to facilitate or inhibit college choice activities. A third layer of context addresses the role of institutions of higher education, including their recruitment efforts, geographic proximity, and other attributes. The fourth and final layer extends to the larger social, economic, and political context in which a student is engaging in the college choice process. Thus, under Perna's model, the college choice process is ultimately a human capital investment decision, though students' assessments differ based on several layers of context within which they are embedded.

In what ways do these models, in combination with prior research, suggest test-optional admissions practices could alter the college choice process? To answer this question, I outline a theory of change that uses Perna's (2006) college choice model to identify several potential channels by which adoption of test-optional policies could affect students' application decisions. I focus on four potential channels: increased publicity, removal of application barriers, shifts in students' perceptions of academic fit, and alignment between students' ideals and institutions' professed values. From there, I discuss the ways that test-optional policy adoption could affect admissions professionals' and students' decisions (to admit and to enroll, respectively), jointly resulting in student body composition shifts.

First, the policy change may increase a student's awareness of a testoptional institution, a necessary precursor to becoming part of a student's choice set. Since most selective colleges and universities required test scores during the analytic time period, newly test-optional institutions regularly received media attention. Such media exposure can prove valuable in the competitive market for private colleges and universities, many of which have comparatively small student bodies and are unable to rely on the same name recognition as public flagships, for example. This increased publicity could be relevant for students with various levels of prior access to social capital. For instance, information on admissions policy changes may accrue to students who can rely on the expertise of college-educated parents in the college search process (Engle & Tinto, 2008), students embedded in high school contexts with greater college-going cultures (K. J. Robinson & Roksa, 2016), and wealthier students with greater access to college and private counselors (McDonough et al., 1997; Plank & Jordan, 2001). Conversely, increased publicity may be most salient for students with less prior access to information about the universe of college options.

Second, by permitting students to apply without standardized test scores, test-optional policies may reduce impediments to applying (e.g., structural barriers in the community context, such as limited transportation to testing

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sites), thereby making such institutions more attractive. In light of differential SAT- and ACT-taking rates across student groups (e.g., Klasik, 2012), individuals for whom test-taking represents an application barrier appear disproportionately likely to be URM students and students from low-income backgrounds. These differences in test-taking rates may originate from a number of factors. For instance, prior research has shown shifts in college entrance exam completion based on the availability of test-taking sites, particularly for students at schools with high proportions of minoritized and low-income students (Bulman, 2015). Seeking to reduce such gaps in test-taking, a growing number of states have begun initiatives to promote universal participation in college entrance examinations (e.g., Goodman, 2016; Hyman, 2017). Even for students who take the SAT or ACT, however, research from Pallais (2015) suggested that other seemingly small financial and behavioral hurdles, such as the default number of free score reports available, can affect the types of colleges where low-income students apply and enroll. From this perspective, then, the availability of test-optional admissions policies could prove attractive to URM students and students from low-income backgrounds.

Third, test-optional policies could shift students' perceptions of their academic fit for an institution. Given that students consider likely admissions outcomes when identifying institutions of interest (Manski & Wise, 1983), some individuals may be deterred from applying to selective institutions because of a (potentially inaccurate) expectation that their standardized test scores would not make them competitive candidates. Based on average standardized test scores, such concerns might be especially pronounced among (but by no means unique to) students from low-income backgrounds, URM students, and women—particularly if they are embedded in school and community contexts in which few students apply to selective private institutions. By adopting a test-optional admissions policy, selective private institutions may prompt students to reevaluate their likelihood of acceptance, especially if a student's class rank and GPA are more typical of admitted students than their standardized test scores. Such reevaluations may be common among women, who are more likely than men to take themselves out of the running for jobs due to concerns that they do not meet necessary qualifications (Mohr, 2014). If test-optional policies shift women's perceptions of necessary qualifications for admission to ones that prioritize GPAs, on which they outperform men (Niederle & Vesterlund, 2010), they may result in increased applications from women.

Also supporting the potential role of this third channel, literature on academic "undermatching" suggests low-income students do not apply to or matriculate at selective institutions at the same rates as higher income peers, even when they possess academic credentials typical of admitted students (e.g., Dillon & Smith, 2017; Hoxby & Avery, 2012). A substantial number of high-ability students also underestimate their academic competitiveness to such an extent that they fail to take standardized tests altogether

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(Goodman, 2016), foreclosing any possibility of enrolling at a selective testrequiring institution. Evidence from Texas's Top Ten Percent Plan demonstrates that substantial shares of students (especially those who are Black or Hispanic) "undermatch" despite having guaranteed admission to selective institutions based on class rank (Black et al., 2015). Consequently, it is clear there are constraints on the extent to which applicants shift their application behaviors even when perfectly informed about the likelihood of acceptance.

A fourth channel by which test-optional policies might shift students' application behaviors is by changing the perceived alignment between the values of the student and the institution. For instance, some students may interpret test-optional policies as signals that an institution values individuality and considers a student's unique needs and contributions. Empirical support for such a relationship comes from Furuta (2017), who found increased odds of test-optional policy adoption among institutions with expanded notions of "student personhood" (e.g., availability of self-designed majors), even after for controlling for a variety of factors. This channel may operate through either the higher education layer of context or the broader social, economic, and policy context. Within the higher education context, institutions themselves may strategically deploy their test-optional status to assist in recruitment efforts. Alternatively, students' evaluations of institutions with test-optional policies could shift based on broader societal narratives regarding the appropriate levels of standardized testing (e.g., Zernike, 2015) and evolving conceptions of what constitutes equitable notions of merit (Warikoo, 2016).

Ultimately, the extent to which shifts in application behaviors lead to differences in enrollment depends on the decisions of both admissions officers and admitted students. Test-optional institutions typically claim to evaluate students on equal footing regardless of whether they submit test scores, although there is little existing literature on the exact processes by which admissions officers evaluate candidates that differ by test score availability (for a case study, see M. Robinson & Monks, 2005). Even assuming that admissions officers do not penalize score nonsubmitters, one possibility is that testoptional policies primarily increase applications from students whom admissions officers are unlikely to admit. Such a scenario could result in improvements in selectivity metrics (e.g., application volume, reported standardized test scores) without meaningfully changing the student body composition, similar to earlier findings from Belasco et al. (2015). Alternatively, the testoptional policy could shift the higher education context level of Perna's (2006) college choice model and provide institutions with greater latitude to admit students who present compelling cases for admission but whose standardized test scores (or lack thereof) would have previously served as a barrier to admission. In the latter case, accepted students may exhibit greater

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diversity along several dimensions, while the institution is able to maintain or increase its reported standardized test scores.

The test-optional policy introduction could also have implications for the matriculation decisions of admitted students, thereby affecting the yield rate (i.e., share of admitted students who enroll). Consider the case of a student with a compelling application, apart from a low SAT score. At a highly selective institution with test-optional admissions, they might have received strong consideration as a test score nonsubmitter. In contrast, highly selective institutions that required test scores may have been less likely to admit the student. In such cases, the test-optional institution may have represented the most selective institution to which a student received admission, which would have factored into their human capital decision. If the test-optional policy facilitated a sufficiently large number of matches to students for whom they represented the preferred choice, an increase in the yield rate would be evident. A higher yield rate may also be apparent if students believed testoptional institutions were more aligned with their values, as suggested in the fourth proposed channel discussed above. In an era when the number of college applications per student increased substantially (Clinedinst & Koranteng, 2017), increases in yield rate can help reduce uncertainty for institutions in the admissions process, with meaningful implications for university budgeting and planning.

To explore the extent to which test-optional policies affect subsequent application and enrollment behaviors, I therefore address two primary research questions.

Research Question 1: Following enactment of test-optional admissions, do institutions experience significant changes in key measures of application behavior (i.e., number of applications and yield rate) and student demographics (i.e., Pell Grant recipients, URM students, women)?

Research Question 2: How do the effects of test-optional policies on application behaviors and student demographics vary based on an institution selectivity and institution type?

Data and Measures

To address the research questions, I assembled data from multiple sources, resulting in an institution-level data set of private 4-year institutions covering the academic years 2001–2002 through 2015–2016. Using a multistep process to verify the adoption period at each institution, I identified 99 private institutions that enacted test-optional admissions policies for students entering between 2005–2006 and 2015–2016 ("earlier-adopters"). As a comparison group, I also identified an additional 118 institutions that had enacted or announced test-optional policies for academic years 2016–2017 or later, as

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of December 2019 ("later-adopters"). I excluded institutions that did not have selective admissions according to the 2003 Barron's competitiveness index (i.e., not at least "less competitive"), as well as institutions that did not award bachelor's degrees or were ineligible for federal Title IV aid. Additionally, I excluded institutions designated as "specialized institutions" in the Carnegie classifications, which include art schools and other programs for which standardized test scores may play a more limited role in admissions. The methodology for identifying test-optional institutions is detailed below in the section titled "Classifying Treatment Institutions." See Supplemental Appendix Tables 1 and 2 for the full lists of earlier- and later adopting institutions (available in the online version of the journal).

Outcome Measures

Aligned with the conceptual framework, the outcome measures include overall applications, overall yield rate, and enrollment among certain groups of students. The primary source for institution-level variables was the Integrated Postsecondary Education Data System (IPEDS). Outcome variables from IPEDS included the number of first-year applications, yield rate (i.e., entering students divided by accepted students), first-time full-time (FTFT) URM students, and FTFT women. (For consistency, I linked application data based on entry year rather than application year.) While some prior research on test-optional policies also explored standardized test scores as an outcome measure, approximately two fifths of test-optional institutions no longer reported standardized test scores to IPEDS by 2016. Thus, out of concern about the extent of data missingness for standardized test scores and the likely bias in reported scores, this study does not focus on standardized test scores as an outcome.

Data on the total number of Pell Grant recipients were available through the Office of Postsecondary Education (U.S. Department of Education, 2018). Although Pell Grant status is an imperfect proxy for students from lower income backgrounds (Rosinger & Ford, 2019; Tebbs & Turner, 2005), its ubiquity provides incentives for institutions to increase enrollment of Pell-eligible students in particular if they are indeed expanding access (Hoxby & Turner, 2019).

Control Measures

Additional institutional attributes from IPEDS that measure key sources of differentiation between the treatment and comparison groups include institutional Carnegie classification and geographic region, which prior research identified as associated with test-optional policy adoption (Furuta, 2017). Through the Delta Cost Project, I acquired four more control variables, which were standardized IPEDS variables (Hurlburt et al., 2017). One such measure was the full-time equivalent (FTE) number of students, which represents a rough indication of the overall size and complexity of the organization. Instructional expenditures per FTE serve as a proxy for resources that affect

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undergraduate academic experiences. I also included student services expenditures per FTE to help account for differences in institutional outlays for items such as student activities, admissions, and recruitment, which may help shape prospective applicants' perceptions of campus life. Last, based on student responsiveness to the sticker price of college (e.g., Hoxby & Turner, 2015), I also controlled for listed tuition and fees.

Since the second research question focused on variation in effects by an institution's selectivity level, I also incorporated the Barron's competitiveness index as a measure of institutional selectivity. I used the 2003 Barron's competitiveness index for all institutions, which considers acceptance rate, class rank of admitted students, and test scores of admitted students in its calculation (Barron's Educational Series, 2002). Conceptually, prior research has used a variety of approaches to grouping the categories of the Barron's competitiveness index, so there is no clear standard for grouping (e.g., Braxton, 1993; Light & Strayer, 2000). In the current study, I categorized those institutions designated as "most competitive" or "very competitive" as "more selective," and remaining institutions as "less selective."

Finally, I also included an indicator of whether an institution had a "noloan" or "loan cap" policy in effect in a particular year. These policies assure some or all students that they will either receive no student loans in their financial aid package or receive no loans above a specified amount. Prior research has shown that such policies can result in slight increases in the enrollment of students from low-income backgrounds at private institutions (Bennett et al., 2020; Hillman, 2013), although such findings are not universal (Rosinger et al., 2018). Since there is overlap in the time periods during which institutions adopted test-optional policies and the establishment of "no-loan" and "loan cap" policies, it is valuable to control for adoption of such initiatives. The listing of "no-loan" and "loan cap" institutions and their enactment year comes from Bennett et al. (2020).

Classifying Treatment Institutions

To identify the treatment group, I proceeded through a series of steps. First, I consulted the list of test-optional selective liberal arts colleges identified in Belasco et al. (2015), which covered policies announced at selective liberal arts colleges through 2009–2010. I then reviewed the lists of test-optional institutions maintained at FairTest.org (http://www.fairtest.org). I examined announcements listed on FairTest.org through December 2019 and added any institutions not previously identified, as long as the institution was at least "less competitive" according to Barron's. I considered an institution as test-optional if it allowed all U.S.-based, nonhomeschooled students the choice of whether to submit test scores for consideration in the admission process, or extended the option based on requirements (e.g., GPA, class rank, intended major) that a substantial share of applicants would have met.² I

excluded institutions with test-flexible policies, which offer applicants some choice in which standardized test scores to submit (e.g., two SAT II tests rather than an SAT or ACT) but nevertheless require all students to submit some test scores for consideration during the application process.

After identifying the list of test-optional institutions that are at least somewhat selective, I determined the academic year in which the policy took effect. In addition to information gathered from reports on FairTest.org (http://www fairtest.org), I consulted a list from Derousie (2014) and conducted searches in two higher education media outlets (Inside Higher Ed and the Chronicle of Higher Education) to obtain details on the policy enactment time period. I also searched regional newspapers, university websites, and school newspapers, often doing so using the Internet Archive's Wayback Machine to access archived versions of the websites. For each institution, I sought to have at least two sources to confirm the year the policy took effect (e.g., a policy first available to the class of 2018 would be linked to students entering in the 2014-2015 academic year). In 18 cases where this search process yielded only one source for the policy's timing, I contacted the institution and received clarification from an official in the admissions office (or, in one instance, library). This extensive process resulted in the list of test-optional institutions and enactment years presented in Supplemental Appendix Tables 1 and 2, available in the online version of the journal. As a result of this detailed investigation into adoption time frames, I identified several institutions where the enactment year differed from prior published research.

Empirical Strategy

The conversion to test-optional admissions is a voluntary process, with institutions adopting the policy at various points in time. Simply comparing outcome measures at test-optional institutions before and after the policy's implementation is insufficient to obtain credible estimates for the effects of test-optional policies, since unmeasured factors beyond the introduction of test-optional policies could account for part or all of the observed changes in outcomes. Several quasi-experimental methods offer approaches for addressing this challenge by assessing not just within-institution variation over time but also variation between institutions.

This study primarily relies on an econometric technique known as CITS analysis. A CITS design estimates effects by comparing average outcomes before and after an event of interest (e.g., test-optional policy enactment) for both treatment and comparison groups. Prior education research employing a CITS design has examined topics such as No Child Left Behind (e.g., Dee & Jacob, 2011; Markowitz, 2018) and school improvement grants (Hallberg et al., 2018). The CITS design can explicitly model pretreatment trends (i.e., baseline mean and baseline slope) for both treatment and comparison groups and then compare the extent to which each group varies from those

pretreatment trends following policy implementation. To model pretreatment trends, the CITS approach requires at least four time periods of data prior to policy implementation. Since the first available year of data in this study is the 2001-2002 academic year, pretreatment years extend through 2004-2005 and this analysis excludes institutions that adopted test-optional policies prior to 2005–2006.³

By explicitly modeling baseline trends, CITS differs from the more common DD design, which requires constant differences between comparison groups in the pretreatment period (as evidence of hypothetical parallel trends posttreatment in the absence of treatment). When these models are properly specified, CITS can account for even modest differences in baseline trajectories between comparison groups. In effect, one can think of the DD design as representing a special case of CITS in which the treatment and comparison group have precisely the same baseline trends. Somers et al. (2013, p. 3) have argued that the "CITS design is a more rigorous design in theory, because it implicitly controls for differences between the treatment and comparison group with respect to their baseline outcome levels and growth."

The following model describes the main CITS design used in this study to estimate the relationship between test-optional policy implementation and outcomes:

$$Y_{it} = \beta_1(Optional_i * Post_{it}) + \beta_2Optional_i * Time_{it} + \alpha_t + \gamma_i + \lambda X_{it} + \varepsilon_{it}.$$
 (1)

In Equation 1, Y_{it} represents an outcome for institution i in year t, where the outcomes of interest include the number of applications, yield rate, number of Pell Grant recipients, number of FTFT URM students, and number of FTFT women enrolling. Optionali indicates whether an institution ever adopted a test-optional admissions policy during 2005–2006 to 2015–2016; Post_{it} represents whether the institution was test-optional in a given year; Time_{it} is centered at the year prior to test-optional policy adoption and increases one unit per year; α_t represents a year fixed effect, which is intended to account for secular trends; and γ_i indicates an institution fixed effect to represent time-invariant differences between institutions. The vector \mathbf{X}_{it} includes a group of time-varying institutional characteristics with potential relationships to the adoption of testoptional policies as well as the outcome variables themselves. The final component of the model is the heteroskedastic-robust error term ε_{it} , clustered at the institution level. Based on this setup, the interaction Optional_i * Time_{it} allows for different baseline linear time trends (i.e., slopes) at the earlier-adopters of test-optional policies. β_1 represents the primary coefficient of interest in this CITS model, and can be interpreted as the intercept shift between test-optional and test-requiring institutions in the years posttreatment.

Rather than solely relying on the CITS model, I also provide main estimates based on a DD design. Given the staggered timing of test-optional policy adoption, this study employs the following generalized DD model:

$$Y_{it} = \beta_1(Optional_i * Post_t) + \lambda X_{it} + \alpha_t + \gamma_t + \varepsilon_{it}.$$
 (2)

The terms from Equation 2 largely correspond to those described in Equation 1, except that Equation 2 does not contain the centered time variable. β_1 is the primary effect estimate of interest in the DD model.

For the DD approach to yield unbiased effects, the changes in outcomes over time for the comparison group must represent what the treatment group would have experienced in the absence of the treatment. This strong presumption of equivalent changes in the absence of treatment is known as the parallel trends assumption (Angrist & Pischke, 2008). It is not possible to definitively prove or disprove that the parallel trends assumption is upheld. One method for identifying potential support for this assumption, however, is to examine outcomes in the pretreatment period, for which data are available. As shown in Supplemental Appendix Figure 1 (available in the online version of the journal), earlier- and later-adopters of test-optional policies experience broadly similar trajectories in the 4 years immediately preceding test-optional policy enactment, providing some evidence to support the parallel trends assumption. Out of caution that the parallel trends assumption may not strictly be upheld, though, and due to the largely similar results between the CITS and DD approaches, I emphasize the CITS results as my primary model.

Though the CITS and DD designs can have several distinctive elements, both fundamentally rely on timing in their estimation. Due to these methods' emphasis on policy timing, it is essential to precisely isolate the year that institutions enacted test-optional policies. One contribution of this study is its corroboration of policy enactment timing based on multiple sources, including admissions offices themselves. Even when policy timing is perfectly captured, though, it is not possible to entirely rule out effects of other changes that were coterminous with the policy of interest. For instance, institutions likely made changes to their marketing and recruitment practices in concert with testoptional policy implementation, which are therefore embedded within the estimated effects. It is also possible that test-optional policy enactment coincided with other major events, such as the introduction of a new admissions director, though the emphasis on the policy enactment year rather than policy announcement year (typically 1 or 2 years earlier) suggests a limited role for such corresponding events. Therefore, to be precise, the estimates in this study represent changes in outcomes that coincided with test-optional policy enactment, and may not necessarily isolate the causal effects solely due to testoptional policies.

Comparison Groups

Ultimately, the credibility of estimates from a CITS or DD design depends on the suitability of the comparison group used. Prior studies of test-optional policies have focused on selective liberal arts colleges (e.g., Belasco et al., 2015), which comprised the vast majority of the earliest adopters, and therefore used test-requiring selective liberal arts colleges as a comparison group. In contrast, however, this study examines a period when a much broader pool of institutions enacted test-optional policies. For such a diverse set of institutions, no single group of institutions constitutes an obviously superior comparison group. At the same time, it is clear that the set of institutions that have voluntarily adopted test-optional policies varies from non-adopting 4year institutions on a number of dimensions. For instance, prior research has shown that test-optional policy adoption is associated with factors such as liberal arts college status, geographic location, yield rate, and institutional selectivity (Furuta, 2017).

As one method for improving the suitability of the comparisons, the main analyses restrict the sample to a treatment group that enacted test-optional policies between 2005-2006 and 2015-2016 ("earlier-adopters") and a comparison group that announced additional test-optional policies by December 2019 ("later-adopters"). By constraining the sample to institutions that adopted testoptional policies within this time frame, the aim is to identify a comparison group that is similar to treated institutions not just on observable dimensions but also potentially on less apparent dimensions such as institutional perceptions of merit and receptivity to change (though this can never be definitively achieved). While this restriction may aid in identifying earlier- and later adopting institutions that are highly comparable to one another, it also limits the generalizability of the findings to institutions that announced test-optional policies by December 2019, as outlined in greater detail in the Conclusion section.

In addition, this study relies on three matching procedures to identify comparison groups while accounting for factors associated with test-optional policy adoption. For the primary specification, I used a PSM procedure to identify comparison group institutions similar to the treatment group institutions on key measures available prior to policy implementation. The propensity score is a single value corresponding to the probability of an institution adopting a test-optional policy, conditional on the set of observable pretreatment covariates (Rosenbaum & Rubin, 1985). For the PSM, I used a radius matching approach, in which a treated institution's matches include all untreated institutions with propensity scores that fall within a specified value, known as a caliper, of the treated institution's propensity score. 4 I used a caliper equivalent to one quarter of a standard deviation of the propensity score, as recommended in Rosenbaum and Rubin (1985). In addition to the PSM approach, I also used two other matching strategies, coarsened exact matching and Mahalanobis distance matching (Mahalanobis, 1936). For additional details on PSM and an overview of the two alternative matching methods, see the Matching Procedures section of the supplemental appendix, available in the online version of the journal.

There were five separate propensity score calculations. The first applied to all institutions in the analytic sample and matched institutions based on the

FTE number of undergraduates, tuition and fees, selectivity level, Carnegie classification, region, applications, acceptance rate, yield rate, Pell Grant recipients, FTFT URM students, and FTFT women. In addition, there were four propensity score calculations for subgroups focused on creating matches by selectivity level (less and more selective institutions) and institution type (baccalaureate college vs. master's/doctoral university). For propensity scores among the subgroups, matching variables included all the covariates used for the main PSM match, apart from selectivity, region, and Carnegie classification.

Results

This section begins with a description of the attributes of earlier- and lateradopting institutions. Afterward, I proceed with an overview of the main CITS and DD results, year-by-year (nonparametric) estimates, and robustness checks that reinforce the main findings. I conclude with several subpopulation analyses, one focused on women and the others exploring the potential for differential outcomes by selectivity level and institution type. (For reference, Tables 1-5 provide PSM-based results, while comparable estimates from coarsened exact matching and Mahalanobis distance matching approaches are available in Supplemental Appendix Tables 4-9, available in the online version of the journal.)

Descriptive Statistics

As outlined in Table 1, the set of institutions in the analytic sample that adopted test-optional policies by 2015-2016 were broadly similar to their later-adopting counterparts, although they differed on a number of observable dimensions prior to matching. Among the most conspicuous discrepancies between the two sets of institutions is the share of institutions that had a Carnegie classification as a baccalaureate liberal arts college, with 42% of the earlier test-optional institutions holding such a designation, compared to just 26% of later-adopting institutions. The matching procedure identified later-adopting institutions that more closely resembled earlier adopting institutions in terms of liberal arts designation, with a difference of 6 percentage points following PSM. Similarly, while a substantially different share of earlier and later test-optional institutions had Barron's classifications of "most competitive" or "highly competitive" in the unmatched sample (25% vs. 10%, respectively), the matched sample differed by 4 percentage points. Among the outcome measures, earlier and later test-optional institutions had notable differences in the unmatched sample on application volume (29% difference) and the acceptance rate (6 percentage points). On both measures, the matching process identified later-adopting institutions that were substantively more similar to those that implemented test-optional policies during the analytic time period. In addition to the evidence of comparison improvements due to matching shown in Table 1, Supplemental Appendix Figures 2 to 4

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	Unmatched	ched	Matched: PSM	d: PSM
Value	Earlier-Adopters	Later-Adopters	Earlier-Adopters	Later-Adopters
Carnegie: Baccalaureate/liberal arts	0.424 (0.497)	0.263 (0.442)	0.402 (0.493)	0.458 (0.501)
Total price (2016\$)	39,044 (5,848)	35,202 (6,160)	38,813 (5,866)	38,204 (6,496)
Barron's: most/highly competitive	0.253 (0.437)	0.102 (0.304)	0.230 (0.423)	0.189 (0.393)
Full-time equivalent undergraduates	2,389 (2,069)	2,127 (1,857)	2,370 (2,059)	2,383 (1,821)
Applications received	2,836 (2,383)	2,199 (2,519)	2,804 (2,387)	3,061 (2,849)
Acceptance rate	0.681 (0.139)	0.742 (0.144)	0.691 (0.128)	0.705 (0.143)
Yield rate	0.331 (0.100)	0.379 (0.145)	0.328 (0.101)	0.319 (0.085)
Proportion of students receiving Pell Grants	0.231 (0.128)	0.273 (0.115)	0.230 (0.123)	0.233 (0.098)
Proportion of FTFT students identified as URM	0.102 (0.121)	0.135 (0.133)	0.097 (0.115)	0.099 (0.104)
Proportion of FTFT students identified as women	0.621 (0.149)	0.627 (0.151)	0.626 (0.149)	0.622 (0.139)
Institutions (N)	66	118	06	112

Note. Earlier-adopters enacted test-optional policies between 2005–2006 and 2015–2016, while later-adopters had test-optional policies that took effect in 2016–2017 or later (and were announced by December 2019). Standard deviations are in parentheses. PSM = propensity score matching, FTFT = first-time full-time; URM = underrepresented, racially/ethnically minoritized.

Filed 03/21/25

Table 2 Regression Estimates for Test-Optional Policies, Relative to PSM Comparison Group

Outcome Measure	Comparative Interrupted Time Series	Difference-in-Differences
Applications (log)	0.040 (0.023) [.075]	0.031 (0.018) [.088]
Yield rate	-0.001 (0.006) [.893]	0.000 (0.005) [.971]
Pell Grant recipients (log)	0.042 (0.014) [.002]	0.031 (0.011) [.003]
FTFT URM students (log)	0.103 (0.032) [.001]	0.119 (0.026) [<.001]
FTFT women (log)	0.080 (0.014) [<.001]	0.060 (0.012) [<.001]
Institutions (N)	202	202

Note. Cells represent coefficient estimates from separate comparative interrupted time series and difference-in-differences models. Control variables include full-time equivalent (FTE) undergraduates (log), instructional expenditures per FTE, student services expenditures per FTE, total price, and an indicator of whether the institution had a loan-reduction initiative in effect. Standard errors in parentheses; p values in brackets. PSM = propensity score matching; FTFT = first-time full-time; URM = underrepresented racially/ethnically minoritized

Table 3 Robustness Check Results for Test-Optional Policies, Relative to PSM Comparison Group

Outcome Measure	Falsification Test	Covariate Balance
Applications (log)	0.006 (0.029) [.850]	_
Yield rate	-0.006 (0.010) [.585]	_
Pell Grant recipients (log)	-0.003 (0.013) [.841]	_
FTFT URM students (log)	-0.031 (0.056) [.582]	_
FTFT women (log)	-0.003 (0.021) [.900]	_
FTE undergraduates (log)	_	0.028 (0.012) [.020]
Total price, 2016\$ (log)	_	-0.003 (0.004) [.534]
Instructional expenditures per FTE, 2016\$ (log)	_	0.017 (0.015) [.276]
Student services expenditures per FTE, 2016\$ (log)	_	0.029 (0.017) [.086]

Note. Cells represent coefficient estimates from separate comparative interrupted time series models. Standard errors in parentheses; p values in brackets. For the falsification test, a false test-optional adoption year is assigned. PSM = propensity score matching; FTFT = first-time full-time; URM = underrepresented racially/ethnically minoritized.

(available in the online version of the journal) illustrate that the matched sample closely aligns with the distribution of the earlier-adopters in terms of their propensity score.

Table 4

Comparative Interrupted Time Series Regression Estimates of Relationship Between Test-Optional Policies and Gender Composition, Relative to PSM Comparison Group

Outcome Measure	Comparative Interrupted Time Series
Women as a share of applicants	0.013 (0.004) [.001]
Women as a share of accepted students	0.019 (0.004) [<.001]
Women as a share of enrolling students	0.027 (0.005) [<.001]

Note. Cells represent coefficient estimates from separate comparative interrupted time series models. Standard errors in parentheses; *p*-values in brackets. PSM = propensity score matching; FTFT = first-time full-time.

Main Results

Having employed the matching procedures to identify observationally similar sets of institutions for the comparison groups, I used the CITS and DD analytic approaches to assess whether earlier-adopters of test-optional policies experienced significantly different changes in outcomes following policy enactment. Table 2 provides the resulting CITS and DD estimates for the PSM-matched institutions in the analytic sample. The first column of estimates represents results from the CITS model, with point estimates corresponding to β_1 in Equation 1. The second column provides comparable estimates from the DD model, represented by β_1 from Equation 2. As a result, the results in the first column refer to intercept shifts for earlier-adopters of test-optional policies on a particular outcome during the period when the policy was in effect, relative to later adopting institutions.

The first outcomes assessed in Table 2 are the two admissions metrics, application volume and yield rate. After controlling for time-varying characteristics and institution and year fixed effects, both the CITS and DD analyses identify modest increases of 3.1% to 4.0% in applications that are slightly above conventional levels of significance (p = .075 for CITS, p = .088 for DD). For yield rate, however, the CITS and DD models do not find evidence of a shift following test-optional policy enactment, with point estimates that are nearly zero (p = .893 for CITS, p = .971 for DD).

The second set of outcomes in Table 2 focuses on the composition of the undergraduate student body. I find indications that test-optional policy enactment is associated with increases in the enrollment of Pell Grant recipients. The detected increases for the postenactment period are relatively modest, however, amounting to 4.2% in the CITS model (p = .002) and 3.1% in the DD model (p = .003). The results in Table 2 also provide evidence that test-optional policies increased enrollment levels for URM students. These results suggest that there was a positive shift in URM enrollment following institutions' implementation of test-optional policies of 10.3% to 11.9% (p = .001

Comparative Interrupted Time Series Regression Results for Test-Optional Policies by Selectivity Level and Institution Type, Relative to PSM Comparison Group Table 5

	Sele	Selectivity	Inst	Institution Type
Outcome Measure	More Selective	Less Selective	Bachelor's-Granting	Master's- or Doctorate-Granting
Applications (log)	0.030 (0.024) [.219]	0.014 (0.044) [.757]	0.058 (0.030) [.057]	-0.019 (0.030) [.526]
ield rate	0.002 (0.007) [.821]	-0.002(0.012)[.849]	-0.009 (0.009) [.345]	0.010 (0.006) [.142]
Pell Grant recipients (log)	0.032 (0.016) [.039]	0.036 (0.022) [.106]	0.006 (0.018) [.742]	0.074 (0.017) [<.001]
FTFT URM students (log)	0.077 (0.035) [.031]	0.125 (0.061) [.040]	0.154 (0.045) [.001]	0.010 (0.041) [.810]
FTFT women (log)	0.046 (0.015) [.002]	0.071 (0.027) [.009]	0.081 (0.020) [<.001]	0.053 (0.018) [.003]

NOTE: "More selective" refers to institutions listed as at least "highly competitive" according to the 2003 Barron's competitiveness index, while "less selective" refers to institutions listed as "very competitive, "competitive," or "less competitive." Cells represent coefficient estimates from separate comparative interrupted time series models. Standard errors in parentheses; p values in brackets. Control variables include full-time equivalent (FTE) undergraduates (log), instructional expenditures per FTE, student services expenditures per FTE, total price, and an indicator of whether the institution had a loan-reduction initiative in effect. PSM = propensity score matching; FTFT = first-time full-time; URM = underrepresented racially/ethnically minoritized.

for CITS, p < .001 for DD).⁵ For the final compositional measure, estimates suggest that test-optional policies increased FTFT enrollment of women by 6.0% to 8.0% (p < .001 for both CITS and DD).

In addition to the relative changes for individual student groups, it is also worth considering the implications for the student body composition as a whole. As shown in Table 1, the proportion of Pell Grant recipients and URM students at matched institutions during the pretreatment period is comparatively low. As a result, the estimated increases in Pell Grant recipients and URM students amount to relatively modest gains as an absolute share of the student body. Specifically, these estimates correspond to an increase of roughly 1 percentage point in terms of both the share of students receiving a Pell Grant and the share of students from URM backgrounds. With women accounting for the majority of students at private institutions, their enrollment shift following test-optional policies represents a larger absolute increase—amounting to approximately 4 percentage points as a proportion of all FTFT students. Because the results from the CITS and DD models are quite similar, I focus on the CITS estimates from this point forward.

CITS Results by Time Since Enactment

In addition to overall estimates, I also explored potential temporal variation in the effects of test-optional policy adoption. To do so, I replaced the single $Post_t$ variable from Equation 1 with a vector of binary indicators for whether a time period was the first, second, third, fourth, or fifth or higher year of the test-optional policy (Bloom & Riccio, 2005). Figure 2 depicts the CITS results of such an estimation strategy, which focuses on the amount of time since policy enactment. While the main estimates for application volume are not measurably different from zero at conventional levels, the results in Figure 2 suggest the possibility of a short-term boost in applications that fades within a few years. For yield rate, the results appear stable and close to zero at all time points. In contrast, the point estimates for Pell Grant recipient enrollment increase over time, consistent with the fact that the measure is not restricted to first-time students. The coefficients for Pell Grant recipient enrollment are significant and positive at conventional levels beginning in the fourth year of the policy. Meanwhile, the estimates for URM enrollment are fairly consistent at each time point, although there are relatively large standard errors. The estimated effects on enrollment for women are also relatively stable, with positive point estimates across all five time periods (significant at conventional levels for three of the five).

Robustness Checks

To assess the relevance of comparison groups and the sensitivity of the estimates to different specifications, I conducted a series of robustness checks. The first two checks are provided in Table 3. If the CITS model isolates effects



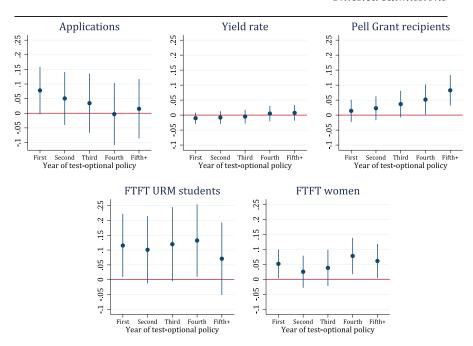


Figure 2. Year-by-year CITS estimates of relationship between test-optional adoption and key outcomes.

Note. Figures depict year-by-year CITS estimates relative to the MDM-identified comparison group. CITS = comparative interrupted time series analysis; MDM = Mahalanobis distance matching; FTFT = first-time full-time; URM = underrepresented, racially/ethnically minoritized.

specifically attributable to test-optional policy enactment and accompanying practices in areas such as recruitment and admissions, significant effects would be discernable only after policy implementation. Effects detected in nontreatment years would suggest that any significant results identified may simply be the result of chance variation. Therefore, in the falsification test presented in the left column of Table 3, I reestimate the same CITS model but used artificial adoption years. For this falsification test, I removed data from the period of actual test-optional implementation, when it would be possible to detect actual effects. This approach does not identify any relationships based on a placebo enactment year that are significant at conventional levels. Results from the falsification test thus provide some reassurance that detected effects are unlikely to be artifacts of a spurious correlation.

As a second robustness check, the right column of Table 3 reports on covariate balance. By treating covariates as outcome measures in the CITS model, the covariate balance check indicates whether there were significant

trends in covariates that coincided with policy adoption and that therefore may be related to the main findings. Results from the covariate balance check do not suggest a clear relationship between test-optional policy enactment and the total price, instructional expenditures per FTE, or student services expenditures per FTE. There is, however, some evidence of a positive relationship between test-optional policy adoption and the FTE number of undergraduates (p = .020). The CITS analysis models include these measures as covariates to help account for such variation, though it is worthwhile to remain mindful of the relationship between test-optional policy adoption and this covariate.

Two additional sets of robustness checks are available and described in greater detail in the supplemental appendix, available in the online version of the journal. First, based on increasing attention to the weighted nature of DD estimates when there is variation in treatment timing (Goodman-Bacon, 2019), Supplemental Appendix Table 3 (available in the online version of the journal) displays estimates from an Oaxaca-Blinder-Kitagawa decomposition using the bacondecomp Stata package (Goodman-Bacon et al., 2019). This decomposition confirms that comparisons specifically between earlierand later-adopters (i.e., the "never v. timing" group in the decomposition) account for the vast majority of the weight for the DD estimate, and that the corresponding coefficients substantially align with the main DD estimates. A second set of checks, presented in Supplemental Appendix Table 4 (available in the online version of the journal), focuses on the sensitivity of the main findings to the comparison group and CITS specification used. Across four alternative specifications in Supplemental Appendix 4 (available in the online version of the journal), I find substantially similar results to those obtained from the main CITS model.

Subpopulation Analyses

Gender

As noted earlier, rhetoric surrounding test-optional policy adoption often alludes to institutional efforts to increase representation of students from historically underrepresented backgrounds, such as Pell Grant recipients and URM students. Evidence also suggests that test-optional policy adoption may assist liberal arts colleges in improving on measures of institutional selectivity and prestige (Belasco et al., 2015), including application volume. Yet neither explanation accounts for the enrollment increases I find for women following test-optional policy adoption. Therefore, to better understand of the increase in women, I examined data on the gender composition of applicants, admitted students, and matriculants.⁶

The resulting Table 4 provides an overview of the possible steps at which test-optional policies could lead to increases in the enrollment of women. First, test-optional policies may prompt a shift in the gender composition of

the applicant pool. This change could occur if, for instance, socialization processes for women lead them to be less inclined to apply when their test scores are not in or above an institution's reported range. As shown in Table 4, there does appear to be a 1.3 percentage point increase in the share of women among all applicants following test-optional policy adoption (p = .001). Another possibility is that applications from women receive more favorable evaluations, on average, once test-optional policies are in effect. If, for instance, women were differentially more likely to submit applications without test scores and also had higher GPAs than men who apply, test-optional policies may contribute to higher acceptance rates for women. Consistent with this rationale, the estimates indicate that women increased an additional 0.6 percentage points at this step, resulting in a net rise of 1.9 percentage points as a share of admitted students after policy enactment (p < .001). Finally, women admitted under test-optional policies might enroll at different rates than men. Such differential yield rates could occur if, for instance, women were more responsive to test-optional policies as indicators of institutions' commitments to personalization. The results in Table 4 also suggest an additional gain of 0.8 percentage points for women at the enrollment stage, resulting in a cumulative increase of 2.7 percentage points as a share of enrolling students following test-optional adoption (p < .001). Thus, at each stage from application to acceptance to enrollment, the share of women rose, with increases in applications from women accounting for roughly half of the overall gain. These results imply the increased share of women is a net result of both factors largely under students' control (i.e., application/matriculation decisions) as well as admissions decisions.

Selectivity Level

Beyond these overall effects, it is also worthwhile to consider whether effects of test-optional policies vary by attributes of the adopting institution. In particular, since this study is among the first to include institutions from a variety of selectivity levels, it offers an opportunity to explore potential variation by institutional selectivity. Toward this end, the first two columns of Table 5 present a subgroup analysis that distinguishes between estimates for "more selective" and "less selective institutions." Here, "more selective" institutions represent the two most competitive Barron's categories, while "less selective" institutions fall within the third through fifth Barron's categories.⁷

The results of Table 5 point suggest a high degree of similarity in outcomes regardless of selectivity level. For instance, there were no consistent patterns of changes in application volume or yield rate for either group at conventional levels. In contrast, the subgroup analyses find evidence of positive intercept shifts for Pell Grant recipient enrollment following test-optional policies for both groups. These increases amount to 3.2% for the more selective group (p = .039) and 3.6% for the less selective group (p = .106), with the latter

finding more tentative. Clearer evidence emerges for enrollment of URM students and women among the more selective and less selective groups. At more selective institutions, URM student enrollment increased 7.7% followed test-optional policy enactment (p = .031), while less selective institutions experienced increases of 12.5% for their URM student enrollment (p = .040). These results suggest that changes in URM enrollment patterns extended to both groups following test-optional policy enactment, with gains of a generally similar magnitude. Likewise, both more selective and less selective institutions experienced increases in women after implementing test-optional policies, with a 4.6% increase at more selective institutions (p = .002) and a 7.1% increase at less selective institutions (p = .009).

Institution Type

One of the contributions of this study is that it includes not just liberal arts colleges but also the master's and doctoral universities that adopted testoptional policies later on. Building off of this distinction, the two rightmost columns of Table 5 offer an exploration of changes by institution type, aggregated as either baccalaureate colleges or master's/doctoral universities. For baccalaureate institutions, test-optional enactment during this period was linked to increases in URM students and women, with suggestive evidence of a rise in applications. Notably, whereas prior studies did not detect gains in URM at selective liberal arts colleges using data through 2010, this more recent analysis instead finds that test-optional adoption was linked to a 15.4% increase in URM enrollment at baccalaureate institutions (p = .001). As in prior work, however, I find no measurable increase in Pell Grant recipients among baccalaureate institutions. Turning to the master's/doctoral universities, the subgroup analysis suggests that test-optional policies were linked to a 7.4% increase in Pell Grant recipients (p < .001) and a 5.3% increase in women (p = .003). Thus, the findings by institution type point to gains in either Pell Grant recipients or URM students, though neither baccalaureate nor master's/doctoral institutions experienced gains on both the socioeconomic and racial/ethnic diversity indicators.

Discussion

Relying on the policy adoption timing for more test-optional institutions than any prior published research, this study offers evidence on the effects of test-optional policies across the wide variety of institutions that had come to comprise the test-optional movement as of 2016. In contrast to earlier work, I find an increase of 10.3% to 11.9% in the number of URM students who matriculated following test-optional policy implementation during this era. At the same time, according to additional analyses (available upon request), there were no detectable changes in the enrollment of White and Asian students

after test-optional policies went into effect. The finding that test-optional policies increased enrollment for URM students at private institutions contributes to a broader literature on efforts to increase racial/ethnic diversity among undergraduates at selective institutions. While these increases were fairly substantial in relative terms, such effects correspond to a modest 1 percentage point increase in absolute terms in the share of URM students among the entering class. This finding suggests that test-optional policies alone may be insufficient to achieve a more transformative change in the representation of URM students at selective institutions. Such implications align with prior work showing that factors related to the higher education context, such as the proportion of same-race students at a college and the distance between home and college, are particularly salient in the college choice process for URM students (e.g., Black et al., 2020).

This study also offers some evidence supporting proponents' expectations that test-optional policies can increase socioeconomic diversity (e.g., Henson, 2014). With only a 3.1% to 4.2% increase in Pell Grant recipients, though, the effects detected are comparatively limited. Considering the baseline underrepresentation of Pell Grant recipients at the institutions examined, this shift amounts to a gain of just 1 percentage point as a proportion of all students. Given that students from low-income backgrounds are among those whose standardized test scores are systematically lower than other measures of academic performance, on average, they would appear to be some of the prime candidates to benefit from test-optional policies. Several possibilities may account for the modest change in enrollment of students from lowincome backgrounds. For instance, students from low-income backgrounds may not be taking advantage of test-optional opportunities to the extent that would be beneficial, either because they are unaware of the option or because they are disposed not to use it. Such a finding would align with the conceptual framework and prior research on the college choice process of students from lower-income backgrounds, who have less access to college counseling and may have different taken-for-granted behaviors as an applicant than their higher income peers (e.g., McDonough et al., 1997). Alternatively, students from low-income backgrounds may be taking advantage of test-optional policies, but their peers strategically use test-optional policies in a manner that offsets the benefit to students from low-income backgrounds. Prior research on test score submission under test-optional policies implies the latter may be at work (Hiss & Franks, 2014), though each of these possibilities is worthy of additional investigation.

I also find that test-optional policies increased the enrollment of women, relative to matched comparison institutions. Such findings are consistent with the third channel of the proposed theory of change, with women potentially perceiving themselves as better qualified for admission under test-optional policies (even if, in fact, they were equally qualified under either policy). Notably, due to the share of women at the private institutions examined,

the absolute effects on enrollment trends for women—an increase of 4 percentage points—exceed the shifts for both Pell Grant recipients and URM students. This result sheds light on an underexamined aspect of test-optional policies, implying that test-optional policies may also prove attractive to institutions seeking to enroll larger numbers of women. Indeed, Worcester Polytechnic Institute specifically cited increasing the enrollment of women as part of its objective in launching a test-optional policy (Worcester Polytechnic Institute, 2007). With women accounting for the majority of students at adopting institutions (see Table 1), however, increases in the enrollment of women could represent an unintended consequence of the policy.

I also do not find a strong overall relationship between test-optional policy enactment and either overall application volume or yield rate. In the case of application volume, though, there is some tentative evidence of slight overall gains. These findings may reflect early gains in applications that quickly subside, as suggested in the year-by-year estimates shown in Figure 2. With dramatic escalations in the number of institutions adopting test-optional policies, however, it remains to be seen whether applicants will remain as responsive to test-optional policies in their application decisions.

Conclusion

In recent decades, a growing number and variety of institutions have turned to test-optional admissions policies. By the 2010s, what originated as a niche practice among liberal arts colleges had expanded to an increasingly mainstream approach to admissions at institutions that varied substantially on an array of attributes. These policies attracted even more extensive attention following the announcement of a test-optional policy at the University of Chicago (Anderson, 2018), one of the nation's most selective research universities, and revelations about fraudulent standardized test scores from the Operation Varsity Blues admissions scandal (Medina et al., 2019). With large-scale test cancellations tied to the coronavirus outbreak in 2020, the shift to test-optional admissions became a practical necessity for hundreds of additional institutions (Anderson, 2020). The growing interest in and experience with test-optional admissions have made it all the more valuable to ascertain the effects of these policies.

When reflecting on the implications of this study, there are several broad points worthy of additional consideration. First, these findings depict the experiences of private institutions that enacted test-optional policies between 2005–2006 and 2015–2016, relative to others that announced policies by December 2019. Such institutions operated in an environment where students were able to decide whether to withhold their standardized test scores (with the majority still choosing to submit scores), and all of these institutions had a clear predisposition to voluntarily adopt test-optional policies. The results are unable to speak directly to the experiences of institutions that announced test-optional policies outside the period observed, the limited number of

selective public institutions that were test-optional prior to 2020, or institutions that remain test-requiring. The likely effects of test-optional policies are especially difficult to anticipate for institutions that went test-optional during the coronavirus outbreak, due in part to substantially diminished number of standardized tests completed and a rise in pass/fail grading. With dramatic reductions in test scores submitted—due to either constrained testing availability or shifting student preferences—admissions decisions place increased reliance on extracurriculars and subjective factors such as letters of recommendation. Prior research has found increased weight on such elements to be adversely related to Pell Grant recipient enrollment (Rosinger et al., 2021). Accordingly, there remains value in considering the equity implications of the admission criteria still in place at test-optional institutions and potentially expanding those criteria to include additional factors (e.g., Melguizo, 2010).

Second, the success of achieving any particular aim with a test-optional policy ultimately depends on the manner of enactment. The treatment discussed in this study is not merely the creation of a test-optional policy but also the suite of contemporaneous shifts in recruitment and admissions practices that coincided with test-optional policies. Future work on the implementation strategies at test-optional institutions may shed additional light on the mechanisms that led to the observed effects. Detailed investigation of the practices that contribute to a "successful" test-optional admissions policy may be particularly valuable for institutions that abruptly shifted to pilot test-optional policies following the coronavirus outbreak, a decision they will revisit in the years to come.

Third, modifications to standardized admissions tests may change the salience of test-optional policies. For instance, the College Board's (2019) introduction of Landscape, which provides admissions officials with neighborhood and high school context for a student's SAT scores, is based on an approach that has shown the potential to increase the probability of admission for students from low-socioeconomic status backgrounds (Bastedo & Bowman, 2017).

These findings suggest several avenues for future research. For example, it may be worthwhile to compare the cost and implementation burden of testoptional policies to other strategies designed to improve diversity among the student body, such as targeted outreach and recruiting or informational interventions. Institutions considering a test-optional policy (or deciding whether to retain a temporary policy) may also be interested in better understanding the mechanisms by which such increases occur. For instance, are there distinctive communication strategies at test-optional institutions that convey values that appeal to a greater number of students? Similarly, what are the specific changes in the practices of admissions officers that may help account for the observed increases in enrollment among women, URM students, and students from lower income backgrounds? Important questions also remain

about the implications of test-optional policies for outcomes beyond matriculation. For instance, if removing standardized tests from the admissions process reduces bias but adds imprecision and variability, test-optional institutions may encounter a wide variety of student needs in any particular admitted class. Therefore, a natural point of inquiry might be whether test-optional institutions are able to ensure that all admitted students have the academic supports needed to succeed. Future qualitative research would be helpful in unpacking this point. More broadly, one might consider examining whether test-optional institutions make adequate investments to develop supportive, inclusive climates for the students the policies help attract.

Overall, this study provides suggestive evidence that adopting testoptional policies can increase the enrollment of Pell Grant recipients, URM students, and women at selective private institutions, with more tenuous evidence of increases for applications. To the extent that such policies increase access for Pell Grant recipients and URM students, they help fulfill selective institutions' stated ambitions of better reflecting the socioeconomic and racial/ethnic diversity of the nation. Yet these findings also suggest that the scale of changes in demographic composition following test-optional policy adoption has been comparatively modest. For institutions seeking dramatic shifts in the student populations they serve, test-optional policies would likely need to represent one facet of a more comprehensive plan.

ORCID iD

Christopher T. Bennett (D) https://orcid.org/0000-0002-8910-8098

Notes

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¹Yield rate was first available in IPEDS for 2006–2007, though I derived its value for prior years based on other available variables; I find no apparent discontinuity in yield rate values between the derived and institution-provided versions of the yield rate variable.

²I did not restrict test-optional policies to those available to all students for two reasons. First, many (perhaps most) test-optional institutions require standardized test scores for at least some applicants, such as homeschooled or international students. Second, while some test-optional institutions extend the policy only to students who meet a GPA or class rank threshold (e.g., 3.0 GPA), applicants frequently meet those requirements. Excluding institutions with GPA or class rank restrictions would overlook an important method by which institutions choose to make the test-optional policy available to applicants. The Robustness section includes a sensitivity check that excludes institutions with GPA/class rank thresholds and produces qualitatively similar estimates.

³Supplemental Appendix Table 1 (available in the online version of the journal) provides the full list of institutions excluded based on test-optional policy adoption prior to 2005–2006. The CITS requirement for 4 years of pretreatment data resulted in the exclusion of six private colleges that enacted test-optional policies between 2001–2002 and 2004–2005: Dowling, Mount Holyoke, Pitzer, Sarah Lawrence, Ursinus, and Utica.

⁴Specifically, I implemented the radius matching procedures using the psmatch2 command in Stata Version 14.0 (Leuven & Sianesi, 2003).

⁵In additional analyses (available upon request), I also separately assess enrollment trends for individual racial/ethnic groups. Point estimates suggest increases in enrollment for Black students, Hispanic students, and Native American students alike, though large standard errors make such estimates relatively imprecise.

⁶Comparable admissions data by Pell Grant status and race/ethnicity would also be quite informative, but they are not available for the duration of the analytic time period.

The results of the exploratory subgroup analysis are sensitive to the precise Barron's categories included in the "more selective" and "less selective" groups. The analyses presented limit the "more selective" group to institutions in the two most competitive Barron's categories, thereby focusing on a relatively small set of institutions traditionally regarded as having the most stringent admissions standards. For reference, these two categories included just 157 colleges and universities in the 2003 Barron's competitiveness index.

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EXHIBIT AV

ELIZABETH J. ALLAN is an assistant professor of Higher Educational Leadership at the University of Maine in Orono. Her current research and teaching interests center around campus climates in postsecondary education, as well as student development, classroom teaching practices, and college student experiences outside the classroom. She is the author of "Hazing in High School and College" in Encyclopedia of Men and Masculinities (edited by M. Kimmel and A. Aronson, forthcoming), and "Gender and Hazing: Analyzing the Obvious" in *Hazing* (edited by H. Nuwer, 2002).

Roy O. Freedle is a former senior research psychologist; he retired in 1998 from the Educational Testing Service in Princeton, New Jersey. His primary professional focus is the application of discourse theory to the study of reading comprehension, essay writing, and the effects of culture on language evaluation. He is editor-in-chief of a 65-volume book series, Advances in Discourse Processes (1978-present). His other books include Language Comprehension and the Acquisition of Knowledge (with John B. Carroll, 1992) and Artificial Intelligence and the Future of Testing (1990).

JOSIANE HUDICOURT-BARNES is a research and development specialist at the Chèche Konnen Center of TERC, a not-for-profit education research and development organization based in Cambridge, Massachusetts. She is interested in bilingual education, science education, and cognitive development. She is coauthor of "Rethinking Diversity in Learning Science: The Logic of Everyday Languages," with B. Warren, C. Ballenger, M. Ogonowski, and A. Rosebery, in the Journal of Research in Science Teaching (2001), and "The Sound of Drums," with F. Conant, A. Rosebery, and B. Warren, in Classroom Diversity: Connecting Curriculum to Students' Lives (edited by E. McIntyre, 2001).

Correcting the SAT's Ethnic and Social-Class Bias: A Method for Reestimating SAT Scores

ROY O. FREEDLE

The SAT has been shown to be both culturally and statistically biased against African Americans, Hispanic Americans, and Asian Americans. In this article, Roy Freedle argues for a corrective scoring method, the Revised-SAT (R-SAT), to address the nonrandom ethnic test bias patterns found in the SAT. The R-SAT, which scores only the "hard" items on the test, is shown to reduce the mean-score difference between African American and White SAT test-takers by one-third. Further, the R-SAT shows an increase in SAT verbal scores by as much as 200 to 300 points for individual minority test-takers. Freedle also argues that low-income White examinees benefit from the revised score as well. He develops several cognitive and cultural hypotheses to explain the ethnic regularities in responses to various test items. Freedle concludes by offering some predictions as to how ethnic populations are likely to be affected by the new designs currently being proposed for the SAT, and describes the implications of the R-SAT for increasing minority admission to select colleges.1

Statement of Problem

In theory, the educational movement that initiated standardized testing for purposes of college admission originally held the promise of identifying students of merit from diverse social-class and ethnic backgrounds who otherwise would not have been considered for admission into the nation's select colleges (Lemann, 1999). But, in practice, this early promise has not been fulfilled, especially for minority groups whose mean test performance has departed significantly from White mainstream test-takers. Over the past several decades, the search for a more equitable ethnic representation in our nation's select colleges led to the adoption of affirmative action, a policy that is increasingly under attack (Lemann, 1999). The recent erosion of affirma-

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tive action increases the need for other means of identifying promising minority students for admission into our system of higher education. This article suggests one avenue for solving this problem.

The chief purpose of this article is to present a new method of scoring the SAT (called the Revised-SAT, or R-SAT) that will greatly increase the number of high-scoring minority individuals. This new scoring method corrects for two types of potential test bias: cultural and statistical. It has the potential to justify the acceptance of many more minority individuals into select colleges based on their test performance, along with other important factors such as high school grade point average.

Stephen Jay Gould (1995) reminds us that a test can be biased in at least two ways, culturally or statistically. Gould's distinction crystallizes several ideas regarding test bias. He explains that a standardized test may be culturally biased when one group (typically a minority population) performs *consistently* lower than some reference population — typically, the White population. He adds that a test is considered statistically biased if two individuals (e.g., one African American, one White) who get the same test score nevertheless perform differently on some criterion external to the test, such as school grades.

One can extend Gould's argument to say that a test is culturally biased if individuals from different ethnic groups interpret critical terms in many of the test items differently. The consequence of this interpretive difference would be the observed mean differences in test performance. Building as well on Gould's statistical bias definition, there is at least one other sense in which a test can be biased. For example, if two individuals get the same verbal test score, it is reasonable to assume that they should perform approximately equally well on all aspects of the verbal test itself. However, if two individuals with the same overall score — or, more generally, two ethnic groups matched on some total test score — should differ substantially on different subparts of a test, we would say that the test is also statistically biased.

Based on the results presented below, I assert that the SAT, as currently administered and analyzed, is both *culturally* and *statistically* biased in the ways described above. I also show how both cultural and statistical bias can be partially ameliorated by scoring one half of the SAT, the *hard* part. The *hard* items are those that are often dependent on rare vocabulary, whereas the *easy* items are dependent on terms that are typically more common. (I explain this in more detail below.)

After developing a rationale for this new scoring, I argue that this method for reestimating at least the verbal SAT score can have significant implications for increasing minority admission into select colleges that often prefer very high verbal SAT scores.² I also show that this new method carries positive import for many White individuals from disadvantaged backgrounds (e.g., low-income individuals and/or individuals whose preferred language is

Correcting the SAT's Ethnic and Social-Class Bias
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not English).³ Therefore, a revised SAT score (R-SAT) could benefit individuals from various ethnic groups.

Background Studies of Cultural and Statistical Bias in the SAT

Cognitive psychologists Freedle and Kostin (1987, 1988, 1990, 1997) use a measure called the standardized Differential Item Functioning (DIF) statistic to study ethnic bias in any standardized test. Briefly, DIF is a statistical procedure (Dorans & Kulick, 1983, 1986) that examines minority and White responses to each test item (both verbal and quantitative). The first step in conducting the DIF procedure is to look at performance on the first test item for all examinees who scored 200 on the verbal SAT. The respective proportions of White and African Americans who correctly answered that first item are computed, and then the difference in proportions is determined. This difference is then weighted by the number of African Americans scoring 200. Notice that both Black and White students are said to be of matched ability here because both groups received the same score of 200.

Next, for the same item, the same weighted computation is performed for all White and African American candidates who scored a 210. This continues for all score levels, through 800. These steps (from 200 to 800) together yield sixty-one weighted computations, all applying to the first item. One sums these sixty-one computations and determines their average value. This average is called the DIF score for the first item. All subsequent verbal items are then examined by the same procedure, and a DIF score is assigned to each of them. A positive DIF score for an item indicates that the African American population performs differentially better than their matched-ability White peers. A negative DIF score for an item indicates that the African American population performs differentially less well than their matched-ability White counterparts.^{5,6}

Freedle and Kostin (1988) show that there is evidence of an unintended but persistent cultural and statistical bias in the verbal section of the SAT that adversely affects African Americans.⁷ Specifically, using the DIF method, these studies show that Whites tend to score better on *easy* items and African Americans on *hard* items.⁸ It should be noted from the outset that virtually all these DIF item effects are typically small. For example, White students may get 84 percent correct on some *easy* items, while African Americans get a slightly lower number, say 82 percent, correct for that same item. Conversely, for some particular *hard* items, White students might get 30 percent correct whereas African Americans might get a slightly higher score, say 31 percent correct. What is unusual about these effects is their highly patterned nature; that is, many *easy* items show a small but persistent effect of African Americans' underperformance, while many *hard* items show their overperformance.

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Later I will make it clear that these small single-item bias effects become magnified, partly because the traditional scoring of a paper-and-pencil SAT gives equal weight to every item. In other words, a correct *easy* item carries the same weight as a *hard* item. I examine this assumption of equal weight below in terms of its effects on ethnic bias.

The Lexical Ambiguity and Cultural Familiarity Hypothesis

The largest positive and negative DIF values occurred among analogies and antonyms, the verbal item types with the least verbal context. In contrast, the smallest DIF values tended to occur for the reading comprehension items, which had the maximum verbal context. Freedle and Kostin (1990) observed two major effects: 1) DIF item values, both positive and negative, increase as the amount of verbal context decreases; and 2) within each item type (except for the reading items) the *easy* items typically receive negative DIF values, while the *hard* items typically receive positive DIF values. In short, test bias against minorities occurs primarily for *easy* analogy and *easy* antonym items.

Two alternative ways to report on the relationship between item difficulty and DIF are displayed in Table 1. First, we sometimes resort to a shorthand way of reporting the contrast between *hard* and *easy* items by presenting just two values: one for the grouped *easy* items (in this case –.027) and a second for the grouped *hard* items (in this case +.012). These two values typically establish the pattern that most of the *easy* items yield a negative DIF (favoring the Whites), while the *hard* items yield a positive DIF (favoring the African American examinees).

Second, a shorthand way to report the relationship between item difficulty and DIF is to compute a single correlation between item difficulty (the values that range from 4.0 through 18.9 in Table 1) and DIF. As shown in Table 1, the correlation for analogies is equal to .52 for all 217 analogies. In this case, the fact that the correlation is positive indicates that *hard* items are associated with positive DIF values, while *easy* items are associated with negative DIF values.

Replication of the Ethnic Bias Pattern: A Brief Review

Freedle and Kostin (1997) reviewed other background studies that replicated and extended the general pattern of DIF that they reported earlier. Kulick and Hu (1989) later reported positive DIF scores favoring African Americans, Hispanic Americans, and Asian Americans on *hard* item performance, not only for verbal SAT items, but also for the quantitative SAT-M items. ^{10,11,12} Kulick and Hu also replicated an overall positive DIF result for the *hard* verbal items. They also found, like Freedle and Kostin, that analogies and antonyms yielded the largest DIF scores for each ethnic group, and reading items yielded the least bias. Schmitt, Dorans, Crone, and Maneck-

TABLE 1 Average DIF Values for Different Levels of Item Difficulty for Three SAT Verbal Item Types and the Correlation between DIF and Item Difficulty

ltem Difficulty	Analogies	Antonyms	Sentence Completions	Reading Comprehension
(Easiest)++				
4.0-4.9	016 (1)+	016 (4)	.0 (0)	.0 (0)
5.0-5.9	033 (9)	026 (10)	015 (8)	.0 (0)
6.0-6.9	035 (8)	018 (17)	044 (10)	018 (5)
7.0-7.9	040 (16)	011 (23)	014 (17)	.003 (11)
3.0–8.9		017 (17)	.003 (20)	001 (19)
9.0-9.9	024 (17)	024 (26)	.003 (17)	.008 (23)
10.0-10.9	010 (21)	.023 (21)	015 (12)	.008 (46)
Average for <i>Easy</i>				
4.0 – 10.9	027 (98)	011 (118)	010 (84)	.005 (104)
(Hardest)				
11.0–11.9	.004 (13)	.012 (15)	.003 (7)	.009 (47)
12.0-12.9	006 (16)	.018 (17)	.010 (11)	.004 (48)
13.0-13.9	.018 (27)	.017 (32)	.014 (16)	.008 (33)
14.0-14.9	.013 (40)	.016 (43)	.010 (20)	.005 (20)
15.0-15.9	.017 (12)	.023 (32)	.015 (19)	.012 (19)
16.0-18.9	.019 (11)	.026 (14)	.012 (5)	.014 (4)
Average for <i>Hard</i>				
11.0–18.9	.012 (119)	.018 (153)	.012 (78)	.007 (171)
Correlation between DIF and all Difficulty Levels:	.52 ***	.41***	.48***	.08 ns

^{***} Significant, p < .001 (2-tailed); ns = not significant (p > .05)

⁺ The number of items used to compute each average DIF value is in parentheses.

^{**} Item Difficulty values are actually Equated Delta values. These later values reflect a statistical procedure that standardizes the item difficulties across individual test forms in such a way that difficulty is expressed on a common scale, thereby allowing for items to be meaningfully pooled across different test forms (for further details, see Kulick & Hu, 1989, p. 3).

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shana (1991) also reported similar verbal DIF findings for all three ethnic groups. Finally, Freedle and Kostin (1997) reanalyzed data reported by Raju, Drasgow, and Slinde (1993) regarding a 45-item vocabulary test for grades ten and twelve. Participants included 245 African American and 436 White students. Again, they found significant effects favoring the African American students for the *hard* vocabulary items and disfavoring the African Americans for the *easy* items.

It is clear then that other researchers have replicated this ethnically based response pattern, with *easy* items generally being better performed on by the White majority and *hard* items generally being better performed on by each of the minority groups. What is needed now is a more explicit cognitive interpretation that helps to explain this highly replicable test bias pattern.

The Cultural Unfamiliarity Hypothesis

A culturally based interpretation helps explain why African American examinees (and other minorities) often do better on many hard verbal items but do worse than matched-ability Whites on many easy items. To begin with, easy analogy items tend to contain high-frequency vocabulary words while hard analogy items tend to contain low-frequency vocabulary words (Freedle & Kostin, 1997). For example, words such as "horse," "snake," "canoe," and "golf" have appeared in several easy analogy items. These are words used frequently in everyday conversations. By contrast, words such as "vehemence," "anathema," "sycophant," and "intractable" are words that have appeared in hard analogy items, and do not appear in everyday conversation (Berger, 1977). However, they are likely to occur in school-related contexts or in textbooks. In fact, these rare words do occur in a large sample of college textbooks analyzed by Breland and Jenkins (1997).

Let's consider some possible psychological dimensions associated with word frequency. It is well known that common words often have many more semantic (dictionary) senses than rare words. For example, Freedle and Kostin (1990) report that fifteen high-frequency analogy words (such as "horse" and "snake") had an average of 5.2 dictionary entries, whereas rare analogy words (such as "vehemence" and "anathema") had an average of only 2.0 dictionary entries. Various researchers have hypothesized that each cultural group assigns its own meanings to such common words to encapsulate everyday experience in its respective cultures (Schwanenflugel, Blount, & Lin, 1991; Scarr, 1994). Thus, individuals from various cultures may well differ in their definitions of common words. Communities that are purportedly speaking the "same" language may use the same words to mean different things. 13

The extensive work of Diaz-Guerrero and Szalay (1991) illustrates the different implications of common vocabulary use. They report on the different associations of African Americans, Whites, Mexicans, Puerto Ricans, Colombians, mainland Chinese, and Hong Kong Chinese for a wide array of com-

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monly used words, such as "friend," "love," "sex," "religion," "education," and "money," as well as an array of less commonly used words, such as "communism" and "capitalism." They present graphics and various similarity measures that reveal the degree to which ethnic groups differ in their associations for particular words. For example, the African American and White groups disagreed strongly in their responses to frequently used words such as "goals," "desires," "valuable," "justice," "progress," "society," and "class." On the other hand, African Americans and Whites agreed strongly on other terms, which happened to be words with low frequency of occurrence, such as "capitalism" and "communism." One should not conclude that these groups agree only when rarer words are presented as stimuli. In fact, African Americans and Whites were found to agree strongly on such commonly used words as "school," "father," and "mother." Nevertheless, Diaz-Guerrero and Szalay (1991) present provocative ethnic contrasts that provide a useful explanation of why any two cultural groups might differ in their responses to high-frequency words that often appear as easy analogy and antonym items on standardized tests, such as the SAT.14

It will be useful to encapsulate the above comments in a two-part hypothesis: (a) Performance on many easy verbal items is hypothesized to be highly dependent on the semantic sense of common words that are used in everyday conversation within a given community. Many easy verbal items tap into a more culturally specific content and therefore are hypothesized to be perceived differently, depending on one's particular cultural and socioeconomic background. Thus, the cultural and lexical ambiguity that African Americans are hypothesized to experience when responding to many easy verbal items offers one promising explanation for why they and other minorities do differentially worse on at least the easy analogy and easy antonym items; (b) Hard verbal items often involve rarely used words that are hypothesized to have fewer potential differences in interpretation across ethnic communities. Such precise meanings for rare words are probably most often encountered in classroom lectures and in textbooks; hard items are hypothesized to be oriented toward curriculum or achievement. Therefore, the pattern observed for hard analogy and antonym items among matched-ability African American and White peer groups is most likely a consequence of two forces: 1) hard items tend to embody less ambiguous vocabulary, and 2) the statistical fact that if a minority person gets a fixed score of 500 on the verbal SAT and has performed less well on the easy items than the White candidates, this mathematically implies that the minority individual must have performed better on the remaining hard items. 15

The Rationale for Focusing on Hard-Item Test Performance

The purpose of the R-SAT score as presented in this article is to minimize cultural bias associated with *easy* verbal items. As such, our analysis eliminates the *easy* items and focuses instead on *hard*-item performance. Can one justify

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focusing only on hard-item performance? I argue yes, because it already is a central assumption underlying computer-adaptive testing. Specifically, computer-adaptive testing assumes that the best estimate of a candidate's proficiency can be determined from the highest level of item difficulty at which an examinee can reliably perform (Urry, 1977). Computer-adaptive testing focuses on difficult items. Our proposed R-SAT score invokes basically the same assumption: the ability of an examinee to perform well on the hard verbal items is a better indicator of true competence than is his/her performance on the easy items. Furthermore, I hypothesize that if there is a difference between an SAT score that combines performance on both easy and hard items and a revised R-SAT score that examines performance on just the hard half of the test, then the more accurate assessment of true proficiency lies with whichever score is greater. While this hypothesis is intended to benefit primarily the minority populations, we shall see evidence below that all students can potentially benefit to varying degrees.

Schaeffer et al. (1998) conducted a study comparing student performance on both a traditional paper-and-pencil (P&P) test and a computer-adaptive test (CAT), which selected items from a large pool of possible items. The items administered were different on the two tests. Students were randomly assigned to the study's two main conditions. Schaeffer et al. show that White examinees gain very little (from 505 to 507) on the verbal section when scores on the P&P and the CAT are compared. However, African Americans who take the CAT do significantly better than African Americans who take the P&P version. In fact, their verbal test score improves on average by about twenty points, from 371 to 390. Furthermore, African Americans' mean performance on their CAT quantitative scores improves by twenty-three points over their P&P scores.

A similar improvement on the verbal section of the CAT occurs, but to a lesser degree, for Hispanic Americans (7-point gain) and Asian Americans (12-point gain). For the quantitative sections, Hispanic Americans improve a substantial thirty points, while the Asian Americans improve by about forty points (Shaeffer et al., 1998, Table 5, p. 17).

Why do the verbal scores improve for minorities but very little for Whites? My explanation is straightforward. The CAT measures student proficiency by focusing on the hardest level at which the student can reliably perform; however, the paper-and-pencil version focuses on a scoring method that gives easy and hard items equal weight. One possibility to consider for reducing ethnic bias in the SAT could be to pursue use of the CAT for the SAT. However, there are technical and financial difficulties in pursuing the CAT. First, there are not enough computer terminals to handle the large volume of examinees that currently take the SAT, and second, there are financial problems in generating a very large item pool for which a testing organization can maintain security. For this reason, we focus our attention on revising the paper-and-pencil SAT.

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Calculating the Revised-SAT

My recommendation regarding the SAT is to focus on *hard*-item performance, using the R-SAT score as an alternate estimate of a student's true verbal proficiency. Here I illustrate how to calculate the R-SAT scores for groups of African American individuals. Table 2 helps guide the explanation.

The first row in Table 2 presents all examinees (White and African American) who originally scored 200 on their SAT (the lowest possible score). All the White examinees are further examined for how well they responded to only the forty hardest items, and a percentage correct score is entered in the table; we see that 11.9 percent of the forty hardest items were correct. In other words, of the forty hard items, 11.9 percent is the average percentage correct across all Whites who scored 200. A similar calculation was done for all African Americans whose original score was 200; we see that 13 percent of the forty hardest items were correct. One notes that African Americans got more hard items correct than their "matched" cohorts among the White examinees. Since I assert that hard-item performance is a better indicator of true ability, it is reasonable to ask a further question: since the African Americans got more hard items correct, how far down in the ability scale would one have to go in order to find a similar hard-item performance level among the White examinees? One can see that Whites who got an original SAT score of 210 got 12.9 percent of the hard items correct; this 210 is the White entry that most closely approximates the African American hard-item performance at 200. So, one assigns a "gain" score of 10 points to the African American's original score of 200, and enters the R-SAT score of 210 (200+10 = 210) in the right-hand column. The next entry for 210 shows again that African American examinees outperform matched-ability Whites on the hard items, 14.6 percent versus 12.9 percent.

How far down the White column must one go in order to find a *hard*-item performance level that most closely approximates the African American performance of 14.6 percent? One must go down four steps, to 250, where the White performance exactly equals the African American *hard*-item performance. Hence, African American examinees who originally earned 210 on the SAT can now be assigned a 40-point gain, which is added to their original SAT score of 210 to yield an R-SAT score of 250, which is entered in the right-hand column. In general, one can see that African Americans do better on *hard*-item performance than Whites with the same total SAT scores.

Another pattern that emerges from Table 2 is that the maximum increases for African Americans occur early in the table. As shown, the maximum gain score for African Americans is 60 points, which occurs at the SAT levels of 230 and 240. As one moves down the table — as the original SAT score gets larger — the gain scores begin to trail off to about 10 points. And as one approaches even higher scores (not shown in the table), the results typically oscillate around zero. The reason that the gain scores are larger at low SAT lev-

TABLE 2 Percentage of Correct Responses to the 40 Hardest Verbal Items Used in an Early SAT Test*

Original SAT Score for 85 Verbal Items**	White Examinees % Correct (40 hardest)	Black Examinees % Correct (40 hardest)	Gain Score for Black	Average Reestimated R-SAT Score for Black	BI-Wh % Diff.***
200	11.9%	13.0%	10 pts	200+10 = 210	1.1%
210	12.9%	14.6%	40 pts	210+40 = 250	1.7%
220	13.2%	15.6%	60 pts	220+40 = 260	2.4%
230	14.2%	16.1%	60 pts	230+60 = 290	1.9%
240	14.5%	16.5%	50 pts	240+50 = 290	2.0%
250	14.6%	17.2%	50 pts	250+50 = 300	2.6%
260	15.1%	17.6%	40 pts	260+40 = 300	2.5%
270	15.2%	18.2%	40 pts	270+40 = 310	3.0%
280	15.9%	18.4%	30 pts	280+30 = 310	2.5%
290	16.1%	19.0%	40 pts	290+40 = 330	2.9%
300	17.4%	19.2%	30 pts	300+30 = 330	1.8%
310	18.3%	20.5%	40 pts	310+40 = 350	2.2%
320	18.1%	21.1%	40 pts	320+40 = 360	3.0%
470	33.9%	35.3%	10 pts	470+10 = 480	1.4%
480	35.6%	36.4%	10 pts	480+10 = 490	0.8%
490	36.5%	37.7%	10 pts	490+10 = 500	1.2%
640	68.0%	69.2%	10 pts	640+10 = 650	1.2%
800	100%	100%	0 pts	800+00 = 800	0.0%

^{*} This test is designated by the symbol OB023 (or 3CSA2) in the ETS file system.

^{**} The values entered for this form use the R+W formula, which is the formula recommended by Kulick and Hu (1989); however, see Appendix B for further comments.

^{***} This column subtracts the White percentage correct from the African American percentage correct.

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els is that the percentage difference between the two ethnic groups in *hard*item performance is greater at these low SAT levels. It seems likely that the greater gains that occur at these lowest SAT levels are due to the possible increased representation of lower socioeconomic status (SES) at these levels, but a separate analysis of this possibility has not been conducted. Table 2 shows the percentage difference between the White and African American examinees for each SAT score level — it begins with a 1.1 percent difference for the 200 SAT level, increases to about 3.0 percent difference around 270, and then begins to trail off to about 1.2 percent or less for higher SAT levels. For the particular calculations entered in Table 2, the average gain score for African Americans equals 30.08 points. This average group gain by itself does not seem particularly substantial; however, when individual R-SAT scores are calculated, the gains can be considerable.

Estimating Individual R-SAT Scores: An Initial Illustration

Returning to Table 2, one can see that the maximum gain shown is sixty points for the group of African Americans who originally scored 220 and 230. However, if the group has gained sixty extra points, this implies that there should be many individuals who have gained even more (i.e., all those individuals above the group mean). Since we are interested primarily in those individuals who score even higher on the *hard* items (because of the college admission implications), it will be useful to attach a separate R-SAT for each individual examinee.

For purposes of illustration, the logic of the procedure for individual gain scores will be identical to the way we assigned gain scores for groups of individuals; however, later in this report, a more robust technique will provide the final recommended procedure for facilitating R-SAT assignment. For example, if we know an African American examinee originally got a score of 220 but got 18.1 percent of the *hard* items correct, then, as Table 2 shows, this person can be assigned an R-SAT score of 320, a gain of 100 points. Similarly, for any other White or African American examinee, once the White group's percentage of correct responses to the *hard* items has been calculated for each original SAT level, as in Table 2, the data entered provide all the information needed to reassign individual R-SAT scores.¹⁷ The following section will present a more in-depth estimation of individual R-SAT scores.

The Revised-SAT for High-Scoring Individuals

I will begin by focusing on individuals at each SAT score level who have yielded the highest performance on the forty hardest verbal items. ¹⁸ Table 3 presents the gains in R-SAT scores for these students. These top-scoring individuals are selected to illustrate that individual R-SAT scores can show very large gains for individuals whose original SAT scores are often quite low.

Many of these exceptional individuals, I maintain, might have been considered for admission into colleges that had high SAT cut-off scores among other criteria for acceptance.

The first part of Table 3 presents the highest scoring individuals at each original SAT level from 200 through 390. Notice that there is an African American student who scores at R-SAT = 600, even though his/her original SAT score was only 290. This student's gain score is 310 points — an astonishingly large reassessment of his/her scholastic skills.¹⁹

In general, the top-scoring African American student at each original SAT score level gains using the R-SAT method of scoring his/her verbal skills. This is borne out by examining the average scores (see row labeled "Average 200–290" in Table 3). The average top-scoring African American student's R-SAT score is 543, while the top-scoring White student in the same row averages an R-SAT score of 514, which is still impressive but not as high as the African American student's score.²⁰

What does the R-SAT score mean? What does it mean for individuals and the test itself? Since the R-SAT is defined here for only the *hard* half of the verbal test — which is basically consistent with CAT assumptions — would it have made a difference if we also had assigned a second R-SAT score using just the *easy* half of the verbal test? Consistent with my two-part hypothesis concerning cultural bias presented earlier, I generally interpret the difference between an individual's R-SAT score and his/her regular SAT score (i.e., R-SAT minus SAT) for the *hard* half as a measure of the degree to which this individual's cultural background diverges from White, middle-class culture.

Because a general symmetry (except at the extreme low end of the SAT scale) can be expected between how well any disadvantaged student of low socioeconomic status or minority status overperforms on the *hard* half (vis-àvis his/her regular SAT score) and how poorly the same student underperforms on the *easy* half, it should be clear that a separate measure of performance on only the *easy* items in most cases would amount to a measure of the same underlying concept: departure from White, middle-class culture.²¹

Social Class, Language Background, and Test Bias

White students comprised 78 percent of the test-taking population in the 1980s.²² Of this group, 54 percent come from families whose income is \$50,000 or greater; only 12 percent come from families earning \$20,000 or less. The question is whether family income differences among Whites (and associated differences in education level) lead to a sufficiently different set of cultural values and expectations so that one might expect to find a significant SAT test-bias effect emerging from analyses that contrast subgroups of Whites with different income and/or education levels. If so, then one can ex-

TABLE 3 The Best Scoring Individual at Each SAT Score Level with His/Her R-SAT Score

Original SAT Score	Form OB023 White Gain	Form OB023 White R-SAT	Form OB023 Black Gain	Form OB023 Black R-SAT	BI-Wh**
200	220	420	250	450	30
210	230	440	290	500	60
220	240	460	300	520	60
230	270	500	270	500	0
240	300	540	300	540	0
250	280	530	310	560	30
260	300	560	330	590	30
270	290	560	310	580	20
280	290	570	310	590	20
290	270	560	310	600*	40
Average 200–290	269	514	298	543	29
300	310	610*	310	610*	0
310	300	610*	290	600*	-10
320	290	610*	340	660*	50
330	290	620*	330	660*	40
340	290	630*	310	650*	20
350	300	650*	340	690*	40
360	280	640*	320	680*	40
370	280	650*	290	660*	10
380	260	640*	290	670*	30
390	270	660*	300	690*	30
Average 300–390	287	632*	312	657*	25
Average 400–490	233	681*	255	700*	19
Average 500–590	189	734*	219	764*	28

^{*} The asterisk indicates a student whose original SAT score is below 600 but whose R-SAT score is 600 or higher. All SAT scores (as well as R-SAT scores) are uncentered.

^{**} The column labeled "BI-Wh" indicates that the White Gain score is subtracted from the African American Gain Score. The data represent the most conservative R+W+O+NR scoring formula (see Appendix A).

pect not only Blacks but also some White students to benefit from application of an R-SAT score.

A brief survey of the research literature provides evidence that, among Whites, there is often a cultural difference associated with education and/or income level. For example, Hall and Freedle (1975) reported several significant differences in language use associated with social-class differences for Whites and Black students. In addition, Cook-Gumperz (1973) summarizes significant White differences in language use and childrearing practices in Great Britain as a function of social class.

I have taken a recent form of the SAT (QSA01) to provide empirical evidence favoring the R-SAT score. From Form QSA01, I selected 263 Whites from the highest income (\$70,000 or more) and parental education levels (college degree or higher). Their responses to the analogy items were contrasted with 370 lower-income Whites (earning \$20,000 or less) whose parents had less education (a high school diploma or less). The six easiest analogies yielded a DIF score of -.031, which indicates that the lower-income Whites performed less well than the higher-income Whites. For the hardest analogies the DIF score was +.016, indicating that the lower-income Whites performed slightly better than the high-income Whites. This yields the familiar bias pattern — as observed with African Americans — indicating, in this case, socioeconomic bias against the White students from low-SES backgrounds. ²³

While it is somewhat flawed in its design, a second example provides a similar result. I took another recent SAT form (QSA09) and defined two additional White subgroups based on slightly higher SAT scores. Both groups scored between 300 and 390 on the traditional SAT. One group of 516 Whites was from poorer income levels (\$30,000 or less) and English was not the sole preferred language. This group was compared to White students from all income levels (but with a predominance of higher incomes, inasmuch as 88% exceed the incomes of the disadvantaged group) and for whom English was the preferred language (N = 56,672). The easiest five analogies yielded a DIF value of –.028, which indicates that the disadvantaged Whites performed less well on these easiest analogies. The five hardest analogies yielded a +.014, indicating that the disadvantaged Whites performed slightly better on the hardest analogies. Again, we observe a familiar bias pattern. The existence of this bias pattern further justifies the calculation of an R-SAT score for Whites, as well as for any of the ethnic groups.

The Implications of an R-SAT Score for High-Scoring Individuals

Below I hypothesize that receiving a revised verbal score of at least 600 (actually, 670 on the recentered scale) would be sufficiently meritorious to interest many colleges in an applicant who received such a score. My choice of a score of 600 is not totally arbitrary. One can see by examining data on the College Board website that students whose high school grade point average

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is between 97 percent and 100 percent receive an average SAT verbal score of 610 (recentered). Colleges undoubtedly differ in the weight they attach to SAT scores. ²⁴ A score of 600 also reflects a level of test performance that only about 5 percent of the test-taking population receives, using the normal SAT scoring procedures.

Table 4 is crucial for understanding the implications of this article for college admissions. Even at the lowest scores of 200–290, there are a few students who, by virtue of the R-SAT estimation procedure, will likely increase their chance of admission to a select college. This is primarily true for several of the low-scoring African American students. For example, for Form 4I, in the original SAT 200–290 range, nine African Americans out of 3,605 earned 600 or more points on their revised R-SAT score. ²⁵

One can see the frequency of probable increases in select college admission for African Americans and Whites as one moves up the original SAT scale, so that, by the time we consider students originally getting 500–590 on their SAT, about 21 to 23 percent of the African Americans and Whites are now assigned very high R-SAT scores. For Form 4I, without the R-SAT scores added (this is the row designated 600–800), one sees that only 0.72 percent of the original African American sample will likely go to a select college; however, after adding in the R-SAT scores, this percentage of probable select college admissions increases to 2.46 percent. On Form 4I, for the original SAT scores (600–800), only 5.19 percent of Whites are likely to go to a select college, but after adding in their R-SAT scores this percentage increases to 10.20 percent. These results are basically the same for the other form (OB023).

By calculating the percentage increase in the scores of high-scoring African American and White students, we can see that African Americans can benefit proportionately more than Whites from the new way of scoring. For Form 4I, we said that 0.72 percent of African American students will potentially gain admission to select colleges using the original SAT scores (600–800); by adding in the R-SAT, this percentage increases to 2.46 percent. The ratio of 2.46/0.72 x 100 represents an increase of 342 percent. For Whites, the increase from 5.19 percent to 10.20 percent represents an increase of 196 percent.

A similar dramatic increase in potential African American enrollments occurs for the other test form (OB023) presented in Table 4. For this second form, the increase goes from 0.64 percent of African Americans being admitted (because they get scores of 600–800) to a grand total of 2.14 percent (obtained after adding in the African American R-SAT scores of 600 or greater), which represents an increase of potential African American enrollments of 334 percent (2.14/0.64 x 100 = 334). For Whites, the comparable increase is from 6.56 percent to 12.41 percent, an increase of 189 percent. These figures agree closely with what was found for Form 4I. The implication of these results is that more African Americans and disadvantaged Whites will likely qualify for admittance into select colleges. ²⁶

Original	Form 4I Freq.* Black	Form 4I Freq.* Whites	Form OB023 Freq. Black	Form OB023 Freq. Whites
SAT Score	with R-SAT of 600+	with R-SAT of 600+	with R-SAT of 600+	with R-SAT of 600+
200–290	9 (3605; 0.25%)	0 (2401; 0.00%)	1 (3595; 0.00%)	0 (2920; 0.0%)
300-390	12 (3687; 0.33%)	13 (9996; 0.13%)	10 (2761; 0.36%)	10 (12564; 0.08%)
400-490	57 (1779; 3.20%)	328 (11645; 2.82%)	35 (1071; 3.27%)	358 (14215; 2.52%)
500–590	88 (419; 21.00%)	1236 (5809; 21.28%)	71 (336; 21.13%)	2037 (8767; 23.23%)
Subtotal	166 (9490; 1.75%)	1577 (29851; 5.28%)	117 (7763; 1.51%)	2405 (38466; 6.25%)
	Form 4I	Form 4I	Form OB023	Form OB023
	Freq. Black	Freq. Whites	Freq. Black	Freq. Whites
	with Regular	with Regular	with Regular	with Regular
	SAT of 600+	SAT of 600+	SAT of 600+	SAT of 600+
600–800	69 (69; 100%)	1635 (1635; 100%)	50 (50; 100%)	2702 (2702; 100%)
Subtotal	69 (9559; 0.72%)	1635 (31486; 5.19%)	50 (7813; 0.64%)	2702 (41168; 6.56%)
	Form 4I	Form 4I	Form OB023	Form OB023
	R-SAT + SAT	R-SAT + SAT	R-SAT + SAT	R-SAT + SAT
	(600 & higher)	(600 & higher)	(600 & higher)	(600 & higher)
Grand Total	235 (9559; 2.46%)	3212 (31486; 10.20%)	167 (7813; 2.14%)	5107(41168; 12.41%

^{*}These frequencies also include those few maximum scoring African Americans and Whites (i.e., the best-performing individuals at each score level with respect to the forty most difficult verbal items). Within parentheses, I list the number of examinees within a designated SAT range followed by the percentage of examinees whose R-SAT score equals or exceeds 600. All these calculations for African Americans and Whites used the conservative R+W+O+NR formula (see Appendix A).

Bias in the Current SAT Format

The newest version of the SAT that has been used over the last several years is different from the older versions of the test that I employ in most of my analyses. The current SAT may have been modified to include different numbers of each verbal item type, but there is continued empirical evidence that ethnic bias is present. I offer this evidence in Table 5.

In Table 5, we see that there are significant correlations between 116 new analogy items and the DIF for the current SAT format. The correlations for African American and Hispanic Americans, .496 and .555, respectively, are

TABLE 5 Correlations between DIF and Item Difficulty for 116 New Analogies Items and 90 New Sentence Completion Items for Three Ethnic Groups

Ethnic Group	Analogy Correlation (n = 116)	Sentence Completions Correlation (n = 90)
African American	.496 *** +	.275 **
Hispanic American	.555 ***	.263 *
Asian American	.296 **	.495 ***

^{*} Significant, p < .05 (2-tailed)

quite large. The correlation for Asian Americans, .296, is smaller, but significant.

In general, a positive correlation means that each minority group is responding better to the *hard* verbal items and worse to the *easy* analogy items than matched-ability White examinees. This is exactly the pattern reported by Freedle and Kostin (1990). Similarly, on ninety new sentence-completion items the correlations for the three minority groups are significant, but generally not as large as those produced for the analogies (the Asian Americans are an exception).²⁷

Quantitative SAT Items

Kulick and Hu (1989) found that ethnic bias was present for a sample of 540 quantitative SAT items administered from 1986 to 1987. The familiar bias pattern is found: hard items are differentially responded to better by the minority groups in comparison with their matched-ability White peers. The easy quantitative items show the converse effect, reporting a correlation of .35 for African Americans between math item difficulty and DIF magnitude, .33 for Hispanic Americans, and .22 for Asian Americans. Their results did not distinguish between students who report English as their best language and those who report equal competence in English and another language. In addition, Kulick and Hu did not include students whose preferred language is not English. Nevertheless, I find that their reported bias regarding math items can be replicated with more recent SAT data, as illustrated in Table 6.

In Table 6, we present new results for forty-eight quantitative items from one recent SAT test form (QSA09). One can see a similar pattern of bias; for

^{**} Significant, p < .01 (2-tailed)

^{***} Significant, p < .001 (2-tailed)

⁺ A positive correlation between DIF and item difficulty implies that the *easy* items are differentially responded to more poorly by the given ethnic group while, at the same time, the *hard* items are differentially responded to better than matched White examinees.

TABLE 6 Differential Ethnic Effects for 48 SAT Quantitative Items from a Recent Test Form (QSA09) for Examinees with SAT-M Scores between 200–290

Ethnic Group	Average DIF for 24 Easy Quantitative Items	9
African American		
(English best language) (N = 3,903)	-2.04	+1.08
African American		
(English not best)* (N = 362)	-2.38	+1.38
Hispanic American		
(English best language) (N = 746)	-1.46	+0.54
Hispanic American		
(English not best)* (N = 1,047)	-1.83	+1.71
Asian American		
(English best language) (N = 261)	-1.38	+1.08
Asian American		
(English not best)* (N = 335)	-0.79	+1.17
AngloAmerican		
(English not best)* (N = 278)	-1.58	+1.33

^{*} Two categories of respondents were included here, those who checked "other language" as their best language and those who checked "English and another language about equal."

example, the African American group (N = 3,903) performs on average about two percentage points below (-2.04) matched-ability Whites (N = 5,147) on the twenty-four easiest math items, and on average about one percentage point above (+1.08) the same matched-ability Whites on the twenty-four hardest math items. For African Americans whose sole preferred language is not English (N = 362), the DIF bias pattern increases, yielding a DIF score of -2.38, or more than two percentage points below matched-ability Whites on the *easy* math items, and +1.38, or more than one percentage point above matched-ability Whites on the *hard* items.²⁸

One can observe a similar bias pattern for Hispanic Americans. The DIF bias increases when the sample is comprised only of those students for whom English is not their sole preferred language. Asian Americans show the same

^{**} Two middle-difficulty items were dropped out of a total of fifty quantitative items in defining the easy half versus the hard half. The White comparison sample for all six ethnic group comparisons consisted of 5,147 White students whose primary language was solely English and who themselves scored in the 200–290 range on their SAT-M score.

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bias patterns with one exception; they fail to show an increase in their negative DIF on the *easy* items when English is not their sole preferred language.

Of further interest is the White sample (N = 278) for whom English is not the sole preferred language; these individuals were contrasted with the White sample used in all the previous DIF comparisons (N = 5,147): those Whites for whom English is the sole preferred language. This special sample of Whites produces a fairly substantial average negative DIF of -1.58 on the twenty-four *easy* math items, and a comparatively strong average positive DIF of +1.33 on the *hard* items.

This result for contrasting two White samples shows that it is not ethnicity per se that is producing these DIF patterns; the source is, rather, any index that identifies a group as sharing a persistent environment that differs from the White majority English speakers. A linguistic difference in that sense can be thought of as a type of cultural difference; membership in any such group creates some degree of cultural mismatch that reveals itself in the typical DIF pattern of *easy* items and *hard* items that produce quite divergent results.

Carlton and Harris (1992) described the types of quantitative items that yield better African American performance (positive DIF) vis-à-vis their White peers. They showed that quantitative items that were rated as more "textbook like" or more "abstract" yielded positive DIF scores for African American examinees; this generalization also applied to the Hispanic American and Asian American groups.²⁹ To help explain why the quantitative items produce some of the DIF bias patterns, we can apply the cultural familiarity hypothesis, as described earlier for the verbal DIF findings. The hard math items are more likely to contain both rarer and more abstract concepts learned strictly in the classroom, and therefore should be less sensitive to cultural background. In contrast, the easy items are likely to contain more common vocabulary terms whose exact meaning is sensitive to cultural background. If further empirical work confirms this hypothesis, it should be possible to extend the same two-part hypotheses to the quantitative items that I used to explain our earlier ethnic differences for the verbal items.

Whatever final cognitive reasons explain the differential ethnic responses, the practical solution for mitigating math bias from the SAT should be clear. The Educational Testing Service (ETS) and the College Board should compute a revised quantitative SAT score to supplement the regular quantitative SAT score. Further, ETS and the College Board should study the reliability and predictive validity of the SAT by doing a detailed study of the correlation with freshman grades.

Bias in Two Advanced Placement Tests: Implications for the SAT II

This section focuses on DIF results for the multiple-choice section of two Advanced Placement (AP) Tests: U.S. history and biology.^{30,31} I argue that the bias shown for the multiple-choice sections of these two AP tests might occur

for the SAT II Achievement Tests, inasmuch as the structure and content of the multiple-choice items are similar.³²

In Table 7, I present the DIF results for these two AP tests. In 1994, the multiple-choice part of the AP biology test consisted of 120 questions that ranged from very easy (90% of students respond correctly) to very hard (10% of students respond correctly). Table 7 reveals that there are highly significant DIF correlations for each of the three minority groups. The largest ethnic DIF correlation (.331) is for Asian Americans; this correlation indicates that these students (as well as the other two minority groups) generally do worse on the easy items and better on the hard than do matched-ability White students.

The results for the U.S. History Advanced Placement Test (administered in 1999) also yield highly significant ethnic differences, with the largest DIF entry (-.342) for African Americans.³³ There are a total of eighty history questions for this AP test. As with other tests, African Americans respond differentially better to *hard* items than to *easy* items when compared to matchedability White students. Hispanic Americans and Asian Americans show the same bias pattern as African Americans.

What is most surprising about these data is that these test questions represent material selected from a preestablished reading list. All students knew beforehand what material was to be tested. Yet, minority students still responded differentially worse to easy items and differentially better to hard items. Such results suggest that there is something about the structure and content (e.g., the semantic and linguistic features) of the items that are contributing to these systematic effects. Easy items probably use cues that introduce sufficient ambiguity of interpretation to cause all minority groups to perform differentially more poorly; exactly the converse occurs on the hard items. Whether the hypothesized ambiguity is traceable to common vocabulary terms has not yet been analyzed; it is therefore unclear to what degree the hypothesis presented to explain the verbal SAT results necessarily extends to explaining the findings for these tests. Suffice it to say, minority students lose enough points on the easy items so that it is very difficult, in fact impossible, for them to regain sufficient ground when responding to the hard items to show their true ability. The way around this problem, as before, is to calculate a revised score following the logic employed in the earlier sections of this article.

The SAT II Achievement Tests (the subject-area tests) are similar in content and form to the multiple-choice sections of the AP tests; therefore, I fully expect the same ethnic bias patterns to emerge once the SAT II is subjected to DIF analyses. These patterns are important, given that the University of California system is currently considering substituting the SAT II tests for the SAT I. Because scores are crucial in the college selection process, ensuring that the SAT II tests are unbiased is critical.

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TABLE 7 Ethnic Bias on Two Advanced Placement Tests, U.S. History and Biology: Correlation between DIF and Item Difficulty

Ethnic Group	Advanced Placement Test** U.S. History (1999)	Advanced Placement Test** Biology (1994)
African American	342** (.401**), N = 80	.272** (.339**), N = 120
Hispanic American	315** (.399**), N = 80	.282** (.358**), N = 120
Asian American	266* (.292**), N = 80	.331** (.509**), N = 120
Male/Female	003ns (.027ns), N = 80	.004ns (.001ns), N = 120

^{*} Significant, p < .05 (2-tailed)

The Final Operational Method for Estimating Revised-SAT Scores

Up to this point I have used a method of estimation that relies on comparing African American and White examinees (and other groups) who have been matched on their SAT performance. This, of course, is the essence of the DIF technique. There are many insights to be gained from this approach, but it also has several limitations. Most important, it assumes that students will always identify their respective ethnic group membership on their SAT background information sheet. In every test administration, a small number of examinees invariably fail to identify themselves. Therefore, it is impossible to calculate an R-SAT score (for math and/or verbal) for all individuals.

Fortunately, there is another new and more direct way to estimate the R-SAT score — one that ignores aspects of race, gender, and class. It is as follows: 1) one simply scores only the *hard* half of the SAT test for every individual; 2) from these individual scores one forms a single distribution of scores; 3) the raw scores (correct, incorrect, omissions, number not completed) are then optionally corrected for guessing;³⁴ and 4) a new scaled score from 200 to 800 is defined. All individuals who do well on only the *hard* items, regardless of who they are and what their background is, will get a high score, and those who do poorly will get a low score.

The above approach is ideal. Since I no longer have access to the ETS data tapes, I will use an indirect approach to estimate what the total distribution of these R-SAT scores might look like. I will again have to resort to the data at

^{**} Significant, p < .01 (2-tailed)

ns = not significant, p > .05 (2-tailed)

^{**} The U.S. History test involved equated delta as the measure of item difficulty; the Biology test used Percentage Correct as the measure of item difficulty — hence the reversal of algebraic sign. The correlation enclosed within parentheses represents a slightly more sensitive test of ethnic bias called the Mantel-Haenszel, which is now used at Educational Testing Service as a replacement for the Standardized DIF statistic (see Holland & Thayer, 1988).

hand (the SAT data analyzed by Freedle & Kostin, 1988, 1990). This data is admittedly flawed in the sense that not all African Americans and not all Whites have responded to the background questionnaire, but it should provide a close approximation. For that reason, it will suit my purpose of showing the likely impact of the R-SAT score on the distribution of African American and White performance, respectively. If I combine all White and African American students into a single distribution, this typically represents the great majority of people (87%) who take the SAT.³⁵ Therefore, the combined distribution of White and African American students' performance on just the *hard* half of the test will, for the purposes of this section, be my best approximation to the total population of test-takers. To see how well African Americans and Whites will do within this new distribution of scores for the *hard* items, I focus on just one test form (4I) for this demonstration, as displayed in Table 8.

Table 8 presents the overall mean and standard deviation for (a) self-identified Whites, (b) self-identified African Americans, and (c) the total African American and White population, as based on the conservative R+W+O+NR formula for R-SAT score estimates (see Appendix A). To contrast African American and White performance with this test, I use a statistic called "sigma" that expresses the difference between the two ethnic populations in terms of a standardized difference calculation.

A small sigma indicates that the test performance of two ethnic groups is very similar; a large sigma indicates that the two groups are dissimilar. Previous research has reported that Whites and African Americans differ by about one standard deviation on the SAT as currently scored; that is, sigma typically equals about 1.00 (e.g., Jensen, 1980; Herrnstein & Murray, 1994), a value that has been considered to be quite large. I believe the sigma can be significantly reduced.³⁶

Table 8 shows that the traditional SAT results for all the verbal items yield a sigma of .90, which is very close to the typical value of 1.00 reported in the literature. The second row shows that when only *hard* verbal items are examined, the two ethnic groups move much closer together so that the sigma now equals .62; this represents a reduction of nearly one-third of a standard deviation.³⁷ It is clear that the perspective taken by this report seriously calls into question the empirical basis for the racist conclusions drawn by such well-known authors as Jensen (1969, 1980) and Herrnstein and Murray (1994). Issues of further relevance to this matter are taken up below.

Although I no longer have access to the raw data, it is evident that the sigma difference between Whites and African Americans for all eighty-five test items is approximately 1.00 (i.e., one standard deviation difference). If the sigma for only the forty hardest items is reduced to about .60, this implies that had a separate sigma been calculated for only the easiest items, the value would almost certainly be greatly in excess of 1.00. Such a result would clearly have shown that African Americans and Whites differ more dramati-

TABLE 8 A Comparison of White and African American Mean Performance (Using the Traditional SAT and the R-SAT for Test Form 4I)

Type of Items Analyzed	Mean White Performance	Mean Black Performance	Standard Deviation of Whites plus Blacks	Sigma*
Easy and Hard Verl	bal Items**			
(85 items)	428.89	336.71	102.14	.90
(R+W+O+NR)				
Hard Verbal Items*	÷**			
(40 items)	30.95%	21.98%	14.45	.62
(R+W+O+NR)				

^{*}Sigma is calculated as follows: The African American mean is subtracted from the White mean and the result is divided by the standard deviation of the combined African American and White sample—for example, for 85 items, [(428 - 336.71)/102.14] = [92.18/102.14] = 90. This calculation indicates that, for the typical SAT method of scoring, the African American population is almost one standard deviation below the White mean.

cally on the *easy* items while at the same time are more similar on the *hard* items. Such a finding would be consistent with Flaugher and Schraeder's (1978) findings. These two findings imply a large cultural difference for the *easy* items and a much smaller cultural difference for the *hard* items.

Thus, if we regard *hard*-item performance as a more accurate indicator of true underlying ability, then the measured difference between White and African American SAT examinees is shown to be substantially reduced. Had we been able to control for the additional negative effects of family income, quality of education, and prior practice (see Powers & Rock, 1999), it is predicted that the calculated sigma would be even further reduced, perhaps approaching zero — a result that would not surprise many biologists (Gould, 1995), anthropologists (Gumperz, 1982), and linguists (Labov, 1975) who have critically commented on the testing literature regarding ethnic differences. In short, the methodology introduced in this article may provide yet another approach, given sufficient future interest, toward affirming the essential intellectual equality of all races.³⁸

^{**}The sigma for the hard and easy items (N = 85) reflects the correction for guessing that is normally applied to SAT scores. Score values range from 200 to 800.

^{***}The sigma for expressing the difference between the mean performance of the African American and White examinees for only the *hard* items (N = 40) uses the percentage pass score. It is not expressed on the 200 to 800 scale. Also, these values do not apply the correction for guessing. A separate analysis of similar data for only the *hard* items indicated that the correction for guessing does not strongly affect the size of the sigma. In this data set the sigma varied from .68 without the correction and was .66 after the correction. I conclude that sigma for only the *hard* items indicates that the African American and White examinees are much closer in comparison with the standard calculation that includes both *easy* and *hard* verbal items.

Critiquing Old and New SAT Designs in Terms of Ethnic Bias

In this section I critique the old SAT format, provide a critique of the current SAT format, suggest additional strategies for analyzing reliability and validity in both formats, and briefly survey a few other formats, including the one most likely to be implemented by the College Board.³⁹ Each format shows a different degree of racial bias. For each design, I consider how an R-SAT or a variant of the R-SAT might ameliorate any bias that is found.

Reliability and Validity of Computing the R-SAT Score Using the Old SAT Format

We already have seen ample evidence that the old SAT is ethnically biased in both its verbal and quantitative sections (Freedle & Kostin, 1990, 1997; Kulick & Hu, 1989). The most troublesome verbal items in the old format are the *easy* analogies and the *easy* antonyms. To a lesser degree, the *easy* sentence completions are also troublesome. I have shown above how to generate at least one R-SAT score by focusing on the forty hardest items. I have argued above that the R-SAT is a measure (actually, the individual's R-SAT score minus the individual's SAT score) of the degree to which each individual deviates from his or her matched-ability White peers, and thus by extension from White, middle-class culture.

A cruder way of describing the R-SAT score is merely to say that it is what remains after eliminating the forty-five easiest items. An early study by Flaugher and Schraeder (1978; also see Angoff & Ford, 1973) actually showed that if only the twelve easiest verbal and fifteen easiest math items were discarded, the difference in mean SAT scores would diminish between African American and White students. They also noticed that removing these easy items had little effect on test reliability. This early work is therefore encouraging with respect to our R-SAT score — the real question is whether test reliability for the verbal would be greatly diminished if all forty-five of the easiest verbal items were discarded.⁴⁰

How strongly does a student's R-SAT score correlate with his/her freshman college grade average? It is not possible to conduct a rigorously accurate estimate of validity, since many people who did not attend select colleges might have matriculated at such schools if their R-SAT scores had been used in the admissions process. Nevertheless, an attempt should be made to study these old data and compute a validity correlation. Is the validity coefficient (the correlation) higher between R-SAT and grades than the validity coefficient between regular SAT and grades?

Before I leave this aspect of the validity of the R-SAT score for the old SAT, I need to deal with the issue concerning different degrees of predictive validity for minority versus White populations. The reader will remember that Gould (1995) called attention to the fact that there are two general types of test bias: cultural and statistical. By statistical bias he indicated that a test

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would be biased if two students who get the same final score on a standardized test nevertheless perform differently in some other setting, such as freshman college grades. Actually, Ramist, Lewis, and McCamley-Ienkins (1994) show that the SAT overpredicts the freshman college grades of African Americans when compared with those of White students. If we accept this premise, it would be reasonable to ask whether the R-SAT would still overpredict their freshman grades, just as the regular SAT does? Not necessarily. While many African Americans who get very high SAT scores will necessarily get high R-SAT scores, we have seen in Tables 3 and 4 that many lowscoring SAT individuals (African American and White) turn out to have quite high R-SAT scores. In other words, the distribution of individuals who might qualify for college admission under the traditional SAT will be substantially different from the population of individuals who qualify using their R-SAT scores. (Remember, the number of African Americans who get a high score of 600 or more increases by almost 400 percent over the number of African Americans who get 600 or higher using the traditional SAT score.) Therefore, it is an open question whether the predictive validity studies as reported by Jensen (1980) for the traditional SAT score necessarily apply to the R-SAT scores. The empirical work has yet to be done.

Reliability and Validity of the Current SAT Format

A logical new format to help reduce ethnic bias — as suggested by the empirical findings of Flaugher and Schraeder (1978), Angoff and Ford (1973), and Freedle and Kostin (1987, 1990) — would have been to increase the number of hard antonyms, hard analogies, and hard sentence completion items (and perhaps to reduce the number of reading items), since the earlier work all showed that the mean performance of African American and White examinees is more similar on the hard items (excluding reading items). Instead, based in part on the recommendations of an ETS research committee, the new format basically dropped all antonyms and added more reading items. Is this current format conducive to less ethnic bias and hence more minority enrollments? The significant DIF results reported above showing persistent ethnic bias for quantitative and verbal items (excluding reading) in the current SAT suggests that the answer is "probably not."

An R-SAT score calculated for the new format will be less reliable simply because there are now even fewer total *hard* items wherein the minority populations can demonstrate their true verbal competence (i.e., only several *hard* analogies and *hard* sentence completions are present in the current SAT). An attempt to increase reliability of the R-SAT by simply adding the *hard* reading-item performance to the computation would be misleading. Separate evidence (using the older SAT forms) shows a sharp increase in the gain score for African Americans when the mean R-SAT is recomputed after eliminating all the *hard* reading items, thereby leaving just the *hard* analogies and *hard* antonyms. Thus the R-SAT verbal construct seems strongly depend-

ent on measuring especially the *hard* analogy and antonym performance; boosting R-SAT reliability by simply adding in the *hard* reading items is therefore a questionable tactic.

As with the old SAT, predictive validity for the R-SAT (the correlation between freshman grades and R-SAT) is compromised for the current SAT simply because the R-SAT for the current test has never been calculated or reported to college admission officers for purposes of student admission. Therefore, if an R-SAT score is ever calculated for individuals (an unlikely prospect, given that the SAT is to be revised yet again), a retrospective validity study for the current SAT is likely to be tentative simply because those students who might have qualified for admission based on their unreported R-SAT score will at best have been admitted to less selective schools. Nevertheless, even with this admitted limitation, an interesting hypothesis can be advanced.

If R-SAT is calculated for the current SAT, there are two groups of disadvantaged students that should be distinguished; let us call them Group I and Group II. Both Groups are assumed to be admitted into less selective colleges. Group I consists of those disadvantaged students whose R-SAT verbal scores are much higher than their regular SAT verbal scores (for simplicity, I am considering just the verbal R-SAT here). In contrast, Group II consists of those disadvantaged students whose R-SAT scores are less divergent from their regular SAT scores. If we contrast the grades earned by students in Group I and Group II, it seems reasonable to predict that those in Group I whose R-SAT scores are much higher than their regular SAT scores should do significantly better in many of their college courses than students in Group II. If this prediction is borne out through empirical research, R-SAT scores do have predictive validity and should be reported (along with the regular SAT scores) to college admission officers in all future test reporting with this format.

It is ironic that if the College Board has altered the current test to reduce ethnic differences — a praiseworthy goal in itself — it may have inadvertently muted the possibility of showing really large R-SAT gain scores and hence less test bias for the minorities (by dropping all antonyms). Nevertheless, it is quite possible that large R-SAT scores might still be forthcoming with the current SAT format.

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How will the newly proposed changes in the SAT affect minority performance? Will something akin to an R-SAT score have any likely significance, given this newly proposed design?

The new SAT will probably consist of a quantitative section with several new items dealing with more advanced algebra content. Also, the few items dealing with so-called quantitative comparisons will be eliminated.⁴² There will be a Critical Reading Test, essentially consisting of more reading items

with presumably shorter reading passages (i.e., each short passage will probably have just one or two items associated with it). There will be a Writing Section consisting of two parts: a written essay (perhaps the student will be allowed to select one topic from a list of possible topics) and a multiple-choice grammar test. Analogies will be eliminated (and, of course, there will be no antonyms, since these have already been dropped from even the most current SAT version).

Regarding the quantitative section, I predict that a separate R-SAT score for the math section will still be relevant; the more advanced algebra items (assuming these items are among the more difficult math items) are likely, given our earlier results, to favor the minority population, once the White and African American populations have been equated for their total SAT math scores. This assumes, of course, that the African American students will have been properly instructed in this more advanced subject matter in their high schools.

The issue concerning the elimination of the so-called quantitative comparison items should pose no problem for the math R-SAT score, since Kulick and Hu (1989) have already shown that the math items (with the quantitative comparison items deleted) yield the familiar DIF bias pattern, with African Americans and other minorities performing differentially better on the *hard* items.

Regarding the requirement for a written essay, data from a new study shows (Freedle, 2003) that African American, Hispanic American, and Asian American students perform significantly better on harder topics in comparison with their performance on easier topics. ⁴³ That is, minority essay scores were more similar to those of White examinees for the hardest topics than for the easiest topics. Such a finding is similar to what Flaugher and Schraeder (1978) already reported for the old SAT. African Americans and Whites (without benefit of the DIF statistic) are more similar on *hard* SAT items than on *easy* items. The results for the written essay topics are part of a larger study that examines what factors influence topic difficulty for students taking the AP biology test over a ten-year period. Obviously, I must make the critical assumption here that the results found for the biology topics also will apply to essays written on more generally assigned topics; that is, topics that do not assume any specialized knowledge of a particular subject matter.

If I am correct in this assumption, then there should be interest in examining topic difficulty in order to select SAT essay topics in such a way that the several ethnic groups will be more similar in mean performance. There is less chance for ethnic bias to appear in the essay section of the SAT if hard essay topics are selected and if students are freely allowed to structure their essays with few restriction on what content to include.

Regarding the other changes that probably will be adopted for the new SAT — dropping the analogies, adding a grammar section, and including more reading items via shorter reading passages — I predict, based primarily

on Freedle and Kostin (1990), that these changes will not contribute in any significant way to the biased pattern I have described. Nevertheless, the new grammar section should still be empirically evaluated using the DIF statistic, as described earlier.⁴⁴

In summary, regarding the newly proposed SAT, at least for the math sections and the essay requirement, it seems highly likely that something akin to an R-SAT score would be beneficial to minority students taking the new SAT. The bias that existed in earlier versions of the SAT is not necessarily decreased or eliminated in newer (and proposed) versions. Thus, R-SAT scores should still be calculated, even on the newer SAT.

Conclusion

Large-scale standardized testing may be at a crossroads in U.S. education (Gose & Selingo, 2001). The recent decision of several large state systems (California, Texas, and Florida) to consider dropping the SAT as a requirement for college application sounds a possible warning. Although some state and college officials say that race is not the basis for questioning the regular SAT as a requirement, other observers suggest that the unintended existence of ethnic bias in the SAT underlies their efforts to minimize the importance of the test in college admissions. 45 With this in mind, I offered some concrete suggestions for how to reinvigorate the traditional SAT using the R-SAT so as to remove a large part of its cultural and statistical bias; I call the new technique the revised SAT score, or R-SAT. I believe this new score reduces ethnic bias and therefore has the potential to increase dramatically the number of minority individuals who might qualify for admission into our nation's select colleges and universities. I further show that disadvantaged White examinees can also benefit from application of this revised score. The often dramatic increases in an examinee's score as revealed by his/her R-SAT score results from focusing attention on how the student performs on the hard half of the SAT test, be it the verbal or the quantitative parts of the test.

The present research and earlier studies (e.g., Flaugher & Schraeder, 1978) shows that African Americans, Hispanics, Asian Americans, and disadvantaged Whites perform differentially better on hard verbal and quantitative items. Indeed, except for reading items, this pattern of results seems to represent a widespread phenomenon for multiple-choice tests; I have found evidence for this bias pattern across a wide span of tests and age groups. The existence of this problem of bias (and its concomitant solution via the R-SAT score) has appeared in such diverse contexts as a vocabulary test for high-schoolers (Raju et al., 1993), the paper-and-pencil version of the Graduate Record Examination (Freedle & Kostin, 1997), the SAT (both verbal and quantitative), several Advanced Placement tests, and even in some unpublished reanalysis I did of the responses of African American and White third graders to a multiple-choice test. In all these examples it appears likely that

cultural familiarity and semantic ambiguity play an important role in determining the relatively poor performance of minority groups on essentially the easiest test items.

A great deal of empirical work still needs to be completed. The necessary reliability and validity studies for the R-SAT score must be addressed. Although it is not optimal, at the very least one should study the R-SAT score using the current SAT format by restricting computation of the R-SAT score to just the *hard* analogies and *hard* sentence completions, because that is all there is left in the current test format from which to construct this promising new score.

Results show that the amount of verbal context plays an important role in the degree of cultural bias that occurs, at least in the verbal section: the greater the verbal context, the less the cultural bias. As noted earlier, Freedle and Kostin (1990, 1997) have hypothesized that cultural bias appears to be closely associated with differences in how common vocabulary words are perceived across minority and majority cultures so that *easy* verbal items (especially analogy and antonym items) show the most extensive cultural bias. *Hard* vocabulary appears to be less culturally sensitive (tends to have unique dictionary entries and to reflect concepts learned primarily from textbooks); numerous analyses show that minorities perform differentially better on these *hard* items. *Hard* items (not *easy*) therefore have a more curricular and achievement orientation.

Having said this, a general disclaimer is in order. For many years, before each new test is compiled, a strong and in many ways admirable effort has been made by ETS and the College Board to help identify individual items that produce very large ethnic differences. Psychometric techniques are applied, and these errant items are regularly discarded. In addition, special committees are convened to examine individual item content for obvious ethnic differences; such items are also discarded. Why then do the tests still show small, persistent, and highly patterned ethnic differences that cumulatively can have such an impact on estimated ability, such as those reported by Freedle and Kostin (1990, 1997)? Again, my answer is that one cannot fully erase the pervasive influence of cultural linguistic background when examinees are asked to process "common" words that occur on the test without ample context to help separate the various semantic senses of these common words. The various shades of meaning of common words are shaped by the cultures that make frequent use of these words. Cultural communities have variable needs, which are reflected in these vocabularies (Gumperz, 1982; Gumperz & Levinson, 1996; Hall & Freedle, 1975; Hall, Nagy, & Linn, 1984; Heath, 1983; Scarr, 1994; Schwanenflugel, Blount, & Lin, 1991).

Because obviously flawed items have been eliminated, the DIF magnitudes for individual items that remain in the test are not large — a difference usually at most of about four percentage points for an *easy* item (e.g., 80% correct for African Americans versus 84% for Whites). However, it should be

stressed that the accumulation of these small differences across a span of forty items can have a dramatic effect on an examinee's estimated true ability. I have argued that the solution is not to get rid of all such residual DIF or, more radically, to throw out the entire test; the solution is to recognize that this is a pervasive phenomena that can be easily remedied by reporting two scores, the usual SAT and the R-SAT. For outsiders to continue to blame the test industry as the cause of the ethnic score differences is unfair and simplistic. However, having said that, I certainly hope that the testing industry can be persuaded to carry out the crucial predictive validity studies suggested herein. Should the validity studies find this new scoring system meritorious, I would hope that the testing industry would implement the reporting of this additional Revised-SAT.

Indeed, it seems to me that the College Board and ETS are strongly obligated to investigate these several recommended revised scores in the next two years, before the new SAT is implemented, in order to conduct the relevant reliability and predictive validity studies of the R-SAT. The expense is truly minimal, the moral obligation maximal.

Notes

- 1. Most of the work in this article was completed while the author was a senior research psychologist at the Educational Testing Service, Princeton, New Jersey. He is now retired. None of the ideas expressed in this paper should be interpreted as representing any official position of either the Educational Testing Service or the College Board. They are strictly the viewpoints of the author.
- 2. To keep matters manageable, the first part of this report focuses on possible increases in the verbal SAT scores for primarily African American students. Of course it is true that having higher math scores (e.g., SAT-M scores) as well should be considered in studying possible increases in minority admissions into the select colleges. But for simplicity's sake, the SAT-M will be examined in a later section of this article.
- 3. The background questionnaire for the SAT inquires about a student's language strengths in the following way: "What language do you know best? A) English; B) English and another language about the same; C) Another language." I refer to students who select option "A" as those for whom English is their sole preferred language or for whom English is their best language (of course, it is possible that these students may either be monolingual or they may have limited competence in another language or languages). Those students who select "B" or "C" are clearly bilingual.
- 4. It is important to note that, unless otherwise indicated, all the DIF analyses reported below selected only examinees that listed English as their best language.
- 5. See Freedle and Kostin (1990), for the computational DIF formula.
- 6. "Differentially" implies that, while the scores of African American and White students may increase under the new estimation technique, the change in score is greater for African Americans than Whites.
- 7. Freedle and Kostin's (1988) work was replicated for African Americans by Kulick and Hu (1989). They also extended the earlier DIF findings to Hispanic Americans and Asian Americans and found identical bias patterns.
- 8. *Hard* and *easy* items are defined as follows: for a given test, if one rank orders the items by the percentage of all students that pass each item, then the items can be divided into

two halves, with 50 percent of the items yielding the largest percentage passing (the *easy* half) and the remainder representing the lowest percent passing (the *hard* half).

- 9. Grouping the analogies so that we get the average DIF value for all analogies from item difficulties ranging from 4.0 to 10.9, the single average value for these easier analogies equals –.027. If we group all the harder analogies from item difficulties ranging from 11.0 to 18.9 together, we get an average DIF value of +.012 (these grouped averaged values are also shown in Table 1).
- 10. Some readers may find it counterintuitive that, if Asian Americans score very well on SAT verbal and math items vis-à-vis the White majority, how can they be showing further positive gains on the *hard* verbal and *hard* math items? The quantitative details necessary for answering this question are presented later in this article when we examine the existence of the same bias pattern at *each and every* SAT score level. It then becomes evident that it is *not* the mean performance of each ethnic group that influences the emergence of a bias pattern, but rather whether there is a cultural mismatch between the White majority and any given ethnic minority.
- 11. I will use SAT-M to refer to quantitative items of the SAT.
- 12. Carlton and Harris (1992) reported additional replications of Kulick and Hu's SAT quantitative bias pattern (wherein minority groups differentially respond better to *hard* math items).
- 13. Some potentially relevant work in this regard is covered by Hall, Nagy, and Linn (1984), who contrasted African American and White children's language in a variety of settings (e.g., school versus home). Hall et al. compiled a separate dictionary of words used by each ethnic group; however, though this work is quite valuable in itself, the dictionary does not distinguish the different semantic senses with which each word is used within and across racial groups and so cannot directly help us solve the problem at hand.
- 14. Regarding lexical disambiguation, see Miller, Heise, and Lichten (1951) and Miller (1999).
- 15. The two halves together must in most cases mathematically balance out to yield the fixed score of 500 (for further comments on cognitive aspects of *hard* item performance see Freedle, Kostin, & Schwartz, 1987).
- 16. Briefly, for our purposes, computer-adaptive tests (CATs) differ from paper-and-pencil (P&P) tests in several respects. To evaluate a student's ability using a P&P test, the student is presented with a fixed set of items, and every correct item receives one point, regardless of the difficulty of the item (for convenience I'm ignoring omitted items and items not reached). In contrast, no fixed set of items is presented for a CAT. By following a complex algorithm, a student's ability is estimated sequentially, such that if a student responds correctly to an item of known difficulty, he/she is then presented with an even harder item from a large pool of available items. But, if the student misses the item, an easier item is next presented from the item pool, and so on. Gradually, the program is able to narrow down a score assignment by locating the hardest items within which a student can successfully respond, given some statistically desirable degree of confidence. For CAT, there is no simple relationship between the total number of items correctly responded to over the whole procedure and the final score assignment.
- 17. White test-takers are used as the normative group for two reason. First, they constitute the largest single ethnic group taking the SAT (e.g., in the 1980s they represented about 78% of the test-takers, while Blacks represented 9%). Second, ethnic comparison statistics (such as DIF) as computed at ETS typically use White test-takers as the reference group.
- 18. To carry out these analyses, I will use the formula that gives the most conservative results. Appendix A explains the relative merits of three computational formulas.

- 19. For this same form, the highest-scoring White student scores at 600 or better on his/her R-SAT, starting with an original SAT score of 300.
- 20. The reader should note that had I used the recentered scale, all these revised scores would be even higher; for example, 600 would be 670 and so on. To keep matters simple, I am using the earlier unrecentered values since these data come from earlier test forms
- 21. Just to be sure there are no unwelcome surprises, it probably would be useful (for a few test forms) to calculate two separate R-SAT scores for each examinee — one for the easy half and one for the hard half. Very high SAT performers necessarily must do well on the easy and hard halves; but if they do slightly better than expected on the hard half (given their total SAT score), they must have done ever so slightly worse somewhere on the easy items; some medium SAT performers (say, scores of 300-600) are also expected to show a mathematical symmetry — perhaps performing noticeably better on the hard (than expected from their total SAT score); hence, they should in turn be performing noticeably worse on the easy. The lowest SAT performers, however, can actually earn a total score that yields large negative numbers due primarily to overcorrection for guessing and/or a complex pattern of item omissions or items not reached (at the end of sections); such individuals collectively get a score of 200. It's possible that such individuals may occasionally show a distinct nonsymmetry in their R-SAT for the easy as opposed to the hard half of the test. In such cases college admission officers may want to see a separate breakdown of easy-versus hard-item performance, especially for those rare individuals who happen to score extremely well on just the hard half.
- 22. See the information posted on the College Board website at www.collegeboard.com.
- 23. See Table 1 for the general bias pattern.
- 24. Although the SAT may be losing its preeminence as a factor in college admissions decisions (see Gose & Selingo, 2001), I maintain the assumption here of its continued importance. I assert that correcting the SAT score (via the R-SAT score) will likely lead to more minority admissions into select colleges. I am fully aware that this may be true in a general sense that having higher SAT (or R-SAT) scores certainly cannot hurt minority admissions, but that many other factors might figure in the decision process. This assumption is not without merit; Gose and Selingo suggest that the SAT's importance may persist because SAT scores figure prominently in annual college ranking guidebooks that presumably strongly influence college applicants. As such, select colleges may feel the necessity to require the SAT (and the R-SAT, hopefully), simply to help maintain their high rankings in these guidebooks.
- 25. Readers interested in seeing the details behind the calculation for estimating the number of African Americans whose R-SAT score equals or exceeds 600 at each of the SAT original score levels starting at 200 and moving up through 590 are referred to Appendix B.
- 26. These analyses of Forms OB023 and 4I were based on small samples taken from a large examinee pool. The actual frequency of African Americans who qualify for admissions would be correspondingly larger. Today, African Americans represent 11 percent of the SAT test-taking population. A total of 1,260,278 students took the SAT in 2000 (www.collegeboard.com), including about 139,000 African Americans. Of these, 0.72 percent, or 1,001 African Americans, were "qualified" for admission to a select college based on my hypothesis that a regular SAT score of at least 600 would qualify a student as a serious candidate. As shown in Table 4, when using combined R-SAT and SAT figures, 2.46 percent of African Americans score at or above 600. If we apply this percentage to the total figures for African American examinees cited above, it results in 3,419 African American students scoring at the 600 or above range, an increase of over 2,400 students potentially available for admission. These results hold considerable promise, I believe, for addressing the currently low admission rates of African Americans into se-

- lect colleges. Of course, it is also true that additional White students will be competing for admission to these same elect colleges due to the beneficial application of R-SAT scores for all White examinees. How admission officers will choose to balance these new possibilities remains to be seem.
- 27. Without another sample to replicate the pattern of these correlations, it is difficult to explain why the Asian Americans produced such a large significant correlation for the ninety sentence-completion items reported in Table 5. What is more important at this point is that the correlations all show the same persistent ethnic bias pattern *easy* items are still differentially more difficult for each ethnic group, while *hard* items are differentially easier.
- 28. The matched Whites for all these cross-ethnic comparisons is always the same group of 5,147 Whites for whom English is their sole preferred language.
- 29. This latter finding is consistent with Freedle and Kostin's (1997) study that reported that abstractness (i.e., nonconcreteness) was one of the factors producing positive DIF for African Americans in responding to *hard* analogy items. Unfortunately, Carlton and Harris (1992) did not explicitly link their DIF findings to item difficulty per se, as Freedle and Kostin (1988, 1990, 1997) have done.
- 30. The Advanced Placement (AP) tests are generally taken by very able high school students. In 1997, for example, 68 percent of the AP test-takers had a grade point average of A– or better. In addition, 39 percent of all AP test-takers planned to get a doctoral degree (see www.collegeboard.com). Fifty-five percent were female, 71 percent White, 5 percent African American, 3 percent Hispanic or Latino, and 12 percent Asian, Asian American, or Pacific Islanders.
- 31. A DIF analysis of the several subject-area tests of the SAT II (i.e., the achievement tests) would have been desirable. However, these data are not available to the author.
- 32. In 2001, 252,504 students took one or more of the twenty-two listed subject area tests for the SAT II; of these, fully 225,724 took the English writing test. Of the total SAT II test-takers, 157,548 took the math level IC subject-area test. It is clear that these two subject-area tests are the ones most requested by various colleges to which these students have applied. It is my understanding that colleges that request these additional SAT II tests tend to be the more select colleges. We see, therefore, that approximately 20 percent of SAT I takers also take one or more of the SAT II tests. It is noteworthy that the mean verbal SAT I scores of students who take various SAT II tests are often considerably higher than the mean verbal scores for the student body who take the regular SAT I. For example, those taking the English writing test, the most popular subject-area test, earn a mean verbal SAT I of 599 SAT II, which is about 100 points above the total SAT I average; these same students' mean SAT I math score is also about 100 points above the mean of all SAT I takers math score. The students who take the SAT II tests are therefore a more select student population (see News & Information, www. collegeboard.com).
- 33. The reason the correlation is negative is that here, item difficulty is indexed by the so-called Equated Delta values for each item rather than percentage correct. Equated Delta is a statistic used by ETS in order to facilitate comparison across different test forms Equated Delta adjusts the percentage corrects upward or downward for a given test form, depending upon the relative ability of the population taking the test at various times of the year; the results of these adjustments are placed on a new scale called the Equated Delta scale (see Kulick & Hu, 1989). In practice, the choice of which measure to base the correlation on (either the percentage correct or Equated Delta) does not seem to make that much difference; however, one can see that the use of the statistic called the Mantel-Haenszel for the two AP tests appears to magnify all the correlational effects this statistic is much more sensitive to the "tails" of the distribution of proportions.

- 34. Traditionally, the raw test scores are corrected for "guessing" by use of the formula R W/4, where R = number of correct items and W = number of wrong items. Suppose there are one hundred items and all items are randomly guessed; for a five-option item format, on average, one would expect twenty of these items to be correct by chance alone. Eighty items would then be wrong and this eighty is divided by four, equaling twenty. Applying the formula, the twenty correct minus the 80/4 fraction equals zero. By assumption, since the whole test was randomly responded to, the final score, corrected for chance, would be zero. I argue that this correction-for-guessing formula artificially penalizes minority test-takers. The key reason is that minorities get many easy items wrong because of a cultural ambiguity in interpreting many common vocabulary terms. These culturally induced wrong item responses get added to their other wrong answers (which are wrong, presumably, due to a true lack of information) and then, after dividing by four, are subtracted from their correct scores. It should be clear, then, that a bigger fraction is unfairly being subtracted from their correct scores due to the cultural mismatch that occurs primarily on the easy items. For this reason I recommend abandoning the correction for guessing formula before the final scaled scores are determined.
- 35. In 1987, White (non-Hispanic) students represented 78 percent of test-takers, while African Americans represented 9 percent; together they comprised 87 percent of the test-takers. By 1997, these percentages had changed so that White (non-Hispanic) students now represented 68 percent compared to 11 percent African Americans (a total of 79 percent) (see www.collegeboard.com).
- 36. Sigma is calculated by first determining the mean performance of each of two ethnic groups (here, the mean for African American performance and the mean for White performance). Then the two means are subtracted and the result is divided by the standard deviation for the combined group. This yields the final sigma value.
- 37. The reader may be puzzled as to why the African American mean for the *hard* items is not higher than the White mean; after all, many of our tables have shown that when equated for original SAT score, the African Americans almost invariably perform better on the *hard* items in comparison with their matched-ability White peers. The reason the African American *group* mean performance is lower than the White *group* mean is due to the number of examinees that occur at each scoring level; the number of African American examinees tends to be larger at the lower SAT levels while the number of White examinees tends to be larger for the higher SAT levels. These differential frequencies of occurrence result in an overall lower African American mean performance on the forty *hard* items in spite of their superior performance at each particular score level. The reader is referred to footnote 38, which describes a set of social variables that artificially lower the overall mean performance of African Americans. Once all these factors are controlled for, one might very well see the disappearance of any significant mean differences in ethnic SAT comparisons. Unfortunately, the author no longer has the raw data with which to evaluate this supposition.
- 38. It is important that the reader be informed about a few variables that unfairly affect mean test performance of disadvantaged groups. When population statistics are reported for contrasting, say, African American and White responses to verbal and/or quantitative items, there is little care given to the fact that these populations differ in a number of factors that contribute unfairly when mean performance levels are being considered. Some of the factors that have a negative impact on mean performance are family income level, amount of prior SAT practice, whether some language other than English is the primary means of expression, and the quality of education one has received. For African American examinees the presence of each of these factors artificially depresses their mean SAT performance with respect to White mean performance. For example, in my analyses of recent SAT forms, the biographical responses

show the following: 1) 9 percent of the African American population reports that a language other than English is their sole preferred language, while only 5 percent of the White population reports similar language preferences; 2) 36 percent of the African American examinees come from families earning \$25,000 or less, while only 10 percent of African American applicants come from families earning \$70,000 or more; on the other hand, only 12 percent of White examinees come from families earning \$25,000 or less while almost 30 percent of the White examinees come from families earning \$70,000 or more; 3) regarding prior practice on the SAT, Powers and Rock (1999) show that African Americans have less prior practice, which artificially lowers their mean performance; 4) African American examinees are generally acknowledged to receive a relatively poor education (Lemann, 1999). Each of these factors has a negative impact on mean SAT score level for African Americans, yet these many factors are seldom if ever partialled out or otherwise controlled for when official reports are issued that are intended to indicate overall mean ethnic performance of African Americans and other minorities. This is obviously unfair, inasmuch as the total impact of these several uncontrolled factors is, in my opinion, undoubtedly quite large. Studies typically will control just one of these factors at a time (e.g., Jensen, 1980) and will be comfortable demonstrating that large ethnic population differences in performance still remain; but virtually no study (including this one) has, to my knowledge, controlled for all these factors. College admissions officers are, of course, aware of the negative impact of these several factors on traditional SAT scores and has adopted various measures to try to ameliorate their effects on the admissions process. It is my expectation that the virtue of incorporating R-SAT scores into the decision process might provide a more objective way to bypass the negative impact of many of these uncontrolled fac-

- 39. For details, see www.collegeboard.com.
- 40. Generally speaking, the more items comprised in a test score, the more reliable that test is. Any such R-SAT score that is calculated using the old SAT data will have to be statistically increased via a "correction for attenuation" due to the fewer test items used in its calculation.
- This section describes potential SAT changes discussed on the College Board website (www.collegeboard.org). These changes are expected to be implemented in 2004 and 2005.
- 42. These special items were not separately discussed above because they show the same DIF pattern as all the math items considered as a whole. They are mentioned here only because the College Board and ETS have specifically targeted them for elimination.
- 43. Freedle (2003) uncovered several significant factors that influence essay difficulty. The forty essay topics that were studied differed in a number of structural ways; for example (a) they varied in the amount of verbal background material that was presented in written form to students before the students wrote their essays; (b) the topics varied as to whether the background material was supplemented by graphs or tabular information or neither; and (c) the topics differed in how many specific subtasks were required of the student in order to successfully complete the essay assignment, and so on. Of eight factors examined, the three factors just mentioned contributed significantly to essay difficulty. The results showed that 1) the greater the amount of background information provided to students, the easier the essay; 2) if the background information was supplemented by tables or graphs, the essay topic was easier; and 3) the greater the number of specific subtasks requested to successfully complete the essay, the easier the essay. Put another way, hard essays had fewer guidelines in how to construct an acceptable essay — they provided less background information and provided fewer specific subtasks to cue the writer as to what a successful essay would consist of. Students writing the hard essays were more on their own in selecting relevant facts and in determining

how they would organize the information. As I have already indicated, minority students performed more similarly to White candidates on the hardest essays; that is, while Whites did in fact earn higher mean essay scores across the difficulty spectrum, the difference in mean performance between Whites and each minority group was smallest for the *hard* essays. If we assume that the results for the forty biology essays can indeed be generalized to essay writing across a variety of subject matters, then Freedle's (2003) results suggest that special caution will have to be exercised to ensure that the essay topics assigned to SAT examinees are sufficiently difficult so as to minimize mean score differences among all ethnic groups — that is, to minimize ethnic bias whenever possible

- 44. Pragmatically speaking, the optimal way to design verbal, math, and essay items is to study how every item correlates with every grade obtained across a wide variety of college courses; if one selects the item types that yield the largest correlations, this necessarily increases the predictive validity of any test consisting of such items. For example, certain types of general math items are likely to correlate strongly with physics, chemistry, and math course grades; and certain types of general verbal (or essay) items might correlate strongly with particular literature or history courses. By increasing these special item types in the verbal and quantitative sections of any new SAT test, one can gradually improve the predictive validity of the SAT for each ethnic group. Such a selective process of gradual improvement in predictive power was actually used by Alfred Binet (1909) when he was developing the first standardized tests in France nearly a century ago. I believe there is wisdom in returning to his original method of test construction.
- 45. See Atkinson (in press).

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Appendix A:

The Effect of Three Formulas for Calculating DIF Scores

There is a technical issue that concerns the choice of three possible formulas for calculating how well a student has performed on a multiple-choice test (be it just for *hard* items or for the full set of test items). The issue arises of which formula is most appropriate for DIF studies because a few of the terms that occur in the several formulas can show a different rate of occurrence when comparing across the various minority groups. The question naturally arises as to whether these different rates seriously affect the conclusions one might draw regarding DIF comparisons.

Each of the three formulas involves calculating a percentage correct score using the number of correct responses (designated "R" for number right) in the numerator, but differing in what is placed in the denominator. There are three possible selections for a denominator: R+W, R+W+O, or R+W+O+NR, where R = number of correct answers, W = number of wrong answers, O = numbernumber of omitted items (these typically are blank items that occur among the correct and incorrect answers), and NR = number of items not reached (as might occur at the end of a test section). Let us focus on just the forty hardest items in calculating a score. For example, if R = 20, W = 10, O = 5, and NR = 5, the three formulas would yield the following 3 percent correct responses for the very same individual: 20/(20+10) = 20/30 = 67 percent for the R+W formula. For the R+W+O formula, the percentage of correct responses would be 20/(20+10+5) = 20/35 = 57 percent. And for the R+W+O+NR formula, the percentage of correct responses would be 20/(20+10+5+5) = 20/40= 50 percent. So there are three different ways to think about how well a particular individual has performed on the hardest forty items. How should one go about selecting a formula?

The earlier work of Freedle and Kostin (1988, 1990) used the R+W+O formula because that was the one traditionally used by ETS in many of its DIF analyses to identify highly divergent items during pretesting. However, Kulick and Hu (1989) suggest that, since Whites actually have a higher item omission rate than African Americans do on the SAT, this fact would artificially depress the performance of Whites on the *hard* items relative to African Americans. In fact, they suggest that if Freedle and Kostin had used just the R+W formula they would not have found any systematic bias effects. Because of this contention of Kulick and Hu, I have chosen to present the data in Table 2 (see main text) using just the R+W formula; yet this table clearly reveals the superiority of African American examinees on the hardest forty items at every calculated score level shown. Hence, Kulick and Hu, based on this evidence alone, are mistaken that the R+W formula will fail to show any systematic ethnic differences. Later, Schmitt et al. (1991) also showed that the Freedle and Kostin (1988) bias effect will persist no matter which of the

three formulas is used. Therefore, in several sections of the main article I have used the more conservative score R+W+O+NR when I have determined that it is preferable to present conservative estimates, especially when it comes to estimating the percentage of African Americans who might qualify for admission to select colleges.

To further settle this issue, I present several new findings. Immediately below I present the average gain scores for three SAT tests using each of the three formulas. The mean African American gain scores for Form OB023 were 38.76, 30.08, and 30.09 for the three formulas R+W+O, R+W, and R+W+O+NR, respectively. For Form 4I, the comparable African American mean gain values were 30.26, 20.75, and 24.06. And for Form 4W the comparable values were 21.93, 17.88, and 16.09. (The number of African Americans for Forms OB023, 4I, and 4W were 7468, 9559, and 6225, respectively. For White students the corresponding numbers for these three test forms were 40102, 31487, and 37639.)

These results clearly show that large average positive gain scores occur for African American examinees for all three test forms and for each of the three formulas. Therefore, I conclude that omission rates, while undoubtedly differentially represented in the African American and White examinee populations, are not themselves the basic source of difference between the populations.

Appendix B:

Calculating the Number of African American Examinees
Whose R-SAT Equals or Exceeds 600

Table B-I lists the mean percentage (out of 40 items) that the White examinees and the African American examinees got right for each SAT score level (actually, for convenience, the score levels start at 470). Then it lists the standard deviation (S.D.) for all the White students at a given score level, and the S.D. for all the African American students at the same SAT level. Then it lists the best-scoring White and African American student (the student who got the highest percentage of the forty items correct for a given ethnic group). And, finally, at a given score level, it lists how many White and African American students obtained that original SAT score. I use the R+W+O+NR formula here because it gives the most conservative estimates.

Now I will show how to estimate the number of minority students who get a revised R-SAT score of 600 or better using these entries. First of all, note what the target is: we know from Table 6 that Whites who got an original SAT score of 600 also got 52.9 percent of the forty hard items correct. We want to determine how many African American students who originally got an SAT score of less than 600 are found to have actually achieved as good a performance on the hard half of the test as the White students did; ultimately, by applying our method to every score level we want to find how many African Americans at each score level between 200 and 590 achieved 52.9 percent (or more) of the hard items correct.

As a convenience and merely for the purposes of exposition, in what follows below I assume a normal distribution of scores around the mean percentage correct for African American and White students (remember, the final operational procedure for R-score assignment is outlined on pages 9-11). To begin with, note that at a score level of 470 there are sixty-four African American students represented. Half of these students (64/2 = 32) exceed the African American mean of 28.1 percent in their performance on the forty hard items. We already know that at least one student (the maximum scorer with 74.6%) exceeds the target of 52.9 percent, so we are certain that this maximum performing student will definitely get an R-SAT score of 600 or better (actually, this student's R-SAT score is 690). But how many other African American students who scored above the mean of 28.1 percent reached the target value or exceeded it? To find out, we use the S.D. of the African American students at 470, which is 16.1. We want to find a "z score" in standard deviation units that equals the target of 52.9 percent. The following calculation will estimate this for us.

$$28.1 + 16.1z = 52.9$$

 $z = 1.54$

TABLE B-1 Mean, Standard Deviation, and Maximum for Students' Percentage Performance on 40 Hardest Verbal Items

Original SAT Score*	Type of Statistic	Whites	African Americans
470	Mean	27.7%	28.1%
	S.D.	15.1	16.1
	Maximum Examinee	74.1%	74.6%
	Freq. Examinees	949	63
480	Mean	28.1%	29.8%
	S.D.	15.6	17.3
	Maximum Examinee	75.0%	81.7%
	Freq. Examinees	1630	93
490	Mean	30.3%	31.6%
	S.D.	16.0	18.7
	Maximum Examinee	78.9%	83.0%
	Freq. Examinees	885	47
600	Mean	52.9%	(Not applicable)

^{*} This table uses SAT Form OB023 and the formula R+W+O+NR for scoring (see Appendix A).

The first entry (28.1) is the average African American performance on the *hard* items for all African Americans who originally got an SAT score of 470. The next entry 16.1 is the S.D. for all the African Americans at SAT = 470. The "z" value, when solved for, gives us the number of S.D. "units" that are needed to help us reach the target performance of 52.9 (which is the White performance on the 40 hardest items whose original SAT score is 600).

A z score of 1.54 is the solution. Mosteller, Rourke, and Thomas' (1961, Table 3, p. 368) table tells us that a z score of 1.54 includes 43.82 percent (out of a maximum of 50%) who are above the mean. We subtract 43.82 from 50.00 = 6.18 percent. We then multiply 6.18 times 64 (the total number of African Americans at original SAT level of 470) to find out how many African American students get a score of 600 or higher. The solution is 4.0 (since 6.18% x 64 = 4.0). So, we estimate that a total of 4.0 African American examinees who originally scored 470 on the SAT actually have earned a score of 600 or higher for their R-SAT score (this estimate includes the maximum African American student with an R-SAT score of 690 mentioned above).

A similar calculation is made for the White students; we want to see how many White students at each score level starting with 200 up through 590 have earned an R-SAT score of 600 or better on just the forty hardest verbal items. The critical level is again 52.9 percent. Any White student who equals or exceeds that level will get an R-SAT score of 600 or higher. (To show exactly what score level is achieved by each examinee would require a different computer program than the one currently available to me; that is why I have employed the current shortcut procedure for estimating R-SAT.)

EXHIBIT AW



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How the SAT Creates Built-in-Headwinds: An Educational and Legal Analysis of Disparate Impact

William C. Kidder

Jay Rosner

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HOW THE SAT CREATES "BUILT-IN HEADWINDS": AN EDUCATIONAL AND LEGAL ANALYSIS OF DISPARATE IMPACT

William C. Kidder* & Jay Rosner**

With the end of affirmative action, it is more apparent than ever that the old-time preferences for folks who are privileged by race and class have never died.

—Charles R. Lawrence III¹

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^{*} Researcher, Testing for the Public, Berkeley, California. J.D., Boalt Hall School of Law, University of California, Berkeley; B.A., University of California, Berkeley. Mr. Kidder served as a consultant for the student intervenors defending affirmative action in Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001), rev'd en banc 288 F.3d 732 (6th Cir. 2002). He also conducted research on affirmative action for the Society of American Law Teachers (SALT), and subsequent to the acceptance of this article took a position as Law Clerk to the Honorable Edward M. Chen, Northern District of California. The authors wish to thank the following scholars for their helpful reviews: Vikram Amar, Angelo Ancheta, Richard Delgado, Lani Guinier, William Henderson, Bradford Mank, David Oppenheimer, Peter Sacks, Gerry Spann, Sam Spital, and David M. White. We also appreciate the assistance of Martin Shapiro in transforming our SAT data into a useable form. Mr. Kidder also thanks Gale Drake Jones for her support and patience with this project.

^{**} Executive Director, The Princeton Review Foundation. J.D., Widener University; B.A., University of Pennsylvania. Member of the New York, New Jersey, Pennsylvania. and Oregon Bars. Mr. Rosner recently testified as an expert witness on standardized testing for pro-affirmative action student interveners in Grutter v. Bollinger. Mr. Rosner's expert report is reprinted in 12 LA RAZA L.J. 377 (2001).

^{1.} Charles R. Lawrence III, Two Views of the River: A Critique of the Liberal Defense of Affirmative Action, 101 COLUM. L. REV. 928, 943 (2001).

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I. INTRODUCTION

In Griggs v. Duke Power Co.,¹ the Supreme Court declared that Title VII of the 1964 Civil Rights Act extends to acts of unintentional discrimination.² The Court held that Duke Power's reliance on graduation requirements and standardized test scores as hiring and transfer criteria violated Title VII because these requirements invidiously discriminated against African Americans and yet were unrelated to actual job performance.³ Griggs was the case of first impression in which the Court established a framework for assessing "disparate impact" discrimination, criticizing the unwarranted reliance on standardized tests that operate as "built-in headwinds" against minority groups.⁴

This article analyzes the SAT's disparate impact, and demonstrates how "built-in headwinds" are designed into the actual process of selecting and developing SAT questions. Although this process may appear facially-neutral and non-discriminatory, the SAT unfairly exacerbates the test's already significant disparate impact on African Americans and Chicano test-takers. Part I provides an

- 1. Griggs v. Duke Power Co., 401 U.S. 424 (1971).
- 2. See id. We note that the Court was generous in characterizing the employer's policy as "unintentional discrimination." Prior to 1965, the Duke Power Company's Dan River plant in North Carolina explicitly discriminated against African Americans; it was no coincidence that the new diploma/test score hiring criteria were first imposed on July 2, 1965, the very day that the Civil Rights Act took effect. See id. at 426-27.
 - 3. See id. at 431-36.
 - 4. See id. at 432.
 - 5. See discussion infra Parts II and III.
- 6. A few points about race and ethnicity. First, throughout the text we capitalize "White" and "Black" intentionally to designate these as specific groups deserving of proper noun status because these categories have deep political and social meanings. While there is some disagreement among scholars, this capitalization is consistent with many critical race theorists. See, e.g., IAN HANEY LOPEZ, WHITE BY LAW xiv (1996); Cheryl I. Harris, Whiteness as Property, 106 HARV. L. REV. 1707, 1710 n.3 (1993).

Second, in the interest of accuracy, this article uses both the terms Chicano and Latino. The data on 1998 SAT questions in Part II refers to Chicanos (Mexican Americans) because the data we obtained from ETS reported Chicanos separately. However, most of Parts III and IV refer to Latinos because the authors of the studies we discuss report data on Latinos (which includes Chicanos, as well as those with national origins in Central America, Cuba, Puerto Rico, and South America). Since Latino is a broad ethnic category referring to all people of Hispanic origin (which can include people who self-identify their race as either White or Black), when we refer to White we mean non-Hispanic White, and when we refer to Black we mean non-Hispanic Black. All of these categories are the subject of enduring debate, and more recently the literature is divided on whether to use Chicano or Chicana/o and Latino or Latina/o. See, e.g., Margaret E. Montoya, A Brief History of Chicana/o School Segregation: One Rationale for Affirmative Action, 12 LA RAZA L.J. 159 (2001); Ian F. Haney Lopez, Protest, Repression, and Race: Legal Violence and the Chicano Movement, 150 U. P.A. L. REV. 205, 208 (2001); Rachel F. Moran, What if Latinos Really Mattered in the Public Policy Debate?, 85 CAL. L. REV. 1315 (1997); Francisco Valdes, Poised at the

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overview of standardized tests in relation to recent affirmative action litigation and admissions policy changes. This article challenges the conventional wisdom that the SAT accurately measures merit and fairly reflects group differences in educational attainment.

Parts II and III provide evidence of the existence of racial and ethnic bias on the current SAT. Part II analyzes previously undisclosed data about SAT questions and demonstrates that a substantially higher proportion of White test-takers correctly answer virtually all questions on the scored sections of the SAT. Contributing to the larger educational debate about test bias, reliability, and construct validity in Part III, our findings indicate that the test development process unintentionally, but consistently and predictably increases the disparate impact of the SAT. Moreover, traditional methods of rooting out biased questions are ineffective and are based on a dubious premise. A more effective method to lessen disparate impact can be achieved by means of Golden Rule-style techniques for selecting test questions. This part also addresses criticisms of our proposed bias reduction method and some practical difficulties in implementation of this method.

Part IV provides a detailed analysis of the law governing standardized tests, university admissions, and Title VI disparate impact claims. The prospect of enforcing U.S. Department of Education disparate impact regulations through section 1983 is still a viable option, notwithstanding many difficulties. Another possible but not as

Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self-Empowerment, 2 HARV. LATINO L. REV. 1, 2 n.1 (1997).

Third, we limited our study to African Americans and Chicanos for a combination of policy and empirical reasons. These groups have been hardest hit by the end of affirmative action in higher education. We were not able to analyze the disparate impact of SAT items on American Indians because of the small absolute number of American Indians For background on American Indians, affirmative action, and who take the SAT. educational access, see Carole Goldberg, American Indians and "Preferential" Treatment, 49 UCLA L. REV. 943 (2002); Faith Smith, Expert Report in Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (no. 97-75928), reprinted as Building Native American Representation in the Law: The Need for Affirmative Action, in 12 LA RAZA L.J. 397 (2001); Gloria Valencia-Weber, Law School Training of American Indians as Legal-Warriors, 20 AM. INDIAN L. REV. 5 (1995-96). With our database from ETS it was also not possible to separately analyze Asian Pacific American subgroups, nor were we able to combine Chicanos with other Latinos. Thus, we were unable to look at Asian Pacific American groups that tend to be under-represented in higher education, including Filipinos and Southeast Asians. However, in Part III.D. we comment on how the application of impact reduction techniques for African Americans and Latinos might effect women and Asian Pacific Americans overall.

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favorable alternative is to file a complaint with the Office for Civil Rights. While the evidence in Parts II and III focuses on racial/ethnic bias in the SAT test construction process, independent of this evidence it remains the case that many universities are vulnerable to disparate impact challenges over their use of the SAT for reasons discussed in Part IV. Many universities may not be able to meet their "educational necessity" burden because they knowingly use the SAT in ways that have not been validated, as is the case with rigid cut-off scores. Even more institutions may have difficulty establishing educational necessity because the SAT only incrementally improves the prediction of college grades, and is even less helpful in forecasting graduation rates or contributing to colleges' institutional goals. Even when educational necessity is established, a plaintiff in cases challenging use of the SAT may still prevail by demonstrating that percentage plans or SAToptional admissions are less discriminatory alternatives that are equally effective in meeting the educational goals of a university.

Part V discusses the consequences of ending affirmative action at public universities in California, Georgia, and Texas. While it remains unclear whether the Supreme Court will ultimately uphold higher education affirmative action programs, either way there are steps that can be taken in the test construction process to lessen the SAT's disparate impact on African Americans and Chicanos without compromising the test's validity. Since test producers have been extremely resistant to the kinds of test development changes advocated in this article, we conclude that ending reliance on the SAT, or making the test optional, may be the most pragmatic strategies for fostering equity and fairness in university admissions. This article's purpose is to document the ways in which the current SAT development process amounts to covert racial gerrymandering in favor of Whites, thereby exacerbating disparate impact against students of color.

The SAT and Affirmative Action A.

The SAT has long been the gatekeeper of higher education.⁷ Among the 2.85 million American high school graduates in 2001, 1.3 million took the SAT, and over half of those took the test two or more

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^{7.} Former College Board President George Hanford states that "the SAT served as the most widely used and possibly the most important single talent search device the country had." GEORGE H. HANFORD, LIFE WITH THE SAT: ASSESSING OUR YOUNG PEOPLE AND OUR TIMES 90 (1991).

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times.⁸ In addition, 1.1 million high school students, predominantly in the Midwest and the South, took the ACT, the only alternative college admissions test to the SAT. In the last two decades, the proportion of high school graduates taking the SAT grew from 33% to 45%. 10 The College Board, as owner of the SAT, and the Educational Testing Service (ETS), as administrator and designer of the test, last year combined to take in \$900 million in gross revenue. 11

In 2001, over one-third of all SAT test-takers were students of color, an all-time record. 12 Yet at the same time, opponents of affirmative action mounted a spirited, multi-faceted, and often successful attack on race-conscious college admissions. universities public consequence. discontinued race-conscious admissions in Texas, 13 California, 14 Florida, 15 Washington, 16 Georgia, 17

In addition, the University of California (UC) Regents approved the SP-1 Resolution in July 1995. SP-1 ended race-conscious admissions at the graduate and professional level beginning on January 1, 1997, a year before Proposition 209 took effect. See Kit Lively, University of California Ends Race-Based Hirings, Admissions, CHRON. HIGHER EDUC., July 28, 1995, at A27; William C. Kidder, Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts About Thernstrom's Rhetorical Acts, 7 ASIAN L.J. 29, 34-35 n.25 (2000). The UC Regents recently voted to overturn SP-1, though Proposition 209 remains in effect. See Tanya Schevitz, Affirmative-Action Ban Revoked by UC Regents, S.F. CHRON., May 17, 2001, at A1; Rebecca Trounson & Jill Leovy, UC Regents Vote to Rescind Ban on Affirmative Action, L.A. TIMES, May 17, 2001, at A11.

^{8.} See Press Release, College Board, 2001 College Bound Seniors Are the Largest. Most Diverse Group in History (2001) [hereinafter College Board Press release]; Ben Gose & Jeffrey Selingo, The SAT's Greatest Test, CHRON. HIGHER EDUC., Oct. 26, 2001, at A10.

^{9.} See Ben Gose, ACT Sees Openings for Expansion in Debate Over the SAT, CHRON. HIGHER EDUC., Oct. 26, 2001, at A13. Note that a small proportion of students take both the SAT and the ACT.

^{10.} See Gose & Selingo, supra note 8, at A10.

^{11.} See id.

^{12.} See College Board Press Release, supra note 9.

^{13.} See Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (ruling that the affirmative action program at the University of Texas (UT) Law School was unconstitutional because taking account of race to improve the quality of learning was not a compelling governmental interest, and because the program was not narrowly tailored to remedy the UT Law School's own prior discrimination against minority students); Hopwood v. Texas, 236 F.3d 256 (5th Cir. 2000); Chris Vaughn, Order Lifted in College Entry Case, Court Maintains Ban on Race-based Admissions, FORT WORTH STAR-TELEGRAM, Dec. 22, 2000, at 1.

Proposition 209, now CAL. CONST. art. I, § 31, was passed by a 54% majority of California's voters in November 1996. It states: "The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." CAL. CONST. art. I, § 31. For a description of the political fight over Proposition 209, see LYDIA CHAVEZ, THE COLOR BIND: CALIFORNIA'S BATTLE TO END Civil rights organizations mounted an unsuccessful AFFIRMATIVE ACTION (1998). challenge to the constitutionality of Prop. 209. See also Coalition for Economic Equity v. Wilson, 110 F.3d 1431 (9th Cir. 1997).

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Massachusetts, ¹⁸ and Virginia. ¹⁹ In May 2002, the Sixth Circuit, acting en banc, decided Grutter v. Bollinger, in which the court upheld the affirmative action program at the University of Michigan Law School.²⁰ The Supreme Court granted certiorari in *Grutter*, and will revisit higher education affirmative action for the first time since its landmark Bakke decision.²¹ In addition, the Court will also review

- 15. Florida Governor Jeb Bush's November 1999 executive order replaced affirmative action in the Florida university system with the "One Florida" plan. See Why the "One Florida" Plan Would Remove Blacks from the Best Campuses of the University of Florida, 27 J. BLACKS HIGHER EDUC. 29, 30 (2000); Jeffrey Selingo, What States Aren't Saying About the 'X-Percent Solution,' CHRON. HIGHER EDUC., June 2, 2000, at 31. Governor Bush's executive order was partly a preemptive strike against an anti-affirmative action ballot initiative that Bush feared would harm his brother's presidential chances by prompting high minority voter turn-out in the November 2000 Bush-Gore election. See Selingo, id. at 32-33.
- 16. The voters of Washington passed Initiative 200 (1-200), a ballot initiative identical to Proposition 209, in November 1998 with a 58% majority. See D. Frank Vinik et al., Affirmative Action in College Admissions: Practical Advice to Public and Private Institutions for Dealing with the Changing Landscape, 26 J.C. & U.L. 395, 413-15 (2000). In a case involving the University of Washington Law School's affirmative action program, the Ninth Circuit recently held that racial diversity can be a compelling governmental interest that passes muster under strict scrutiny review. See Smith v. Univ. of Washington Law Sch., 233 F.3d 1188 (9th Cir. 2000); Sara Hebel, U.S. Appeals Court Upholds Use of Affirmative Action in Admissions, CHRON. HIGHER EDUC., Dec. 15, 2000, at A40; Kenneth J. Cooper, U.S. Courts Differ on Preference; Affirmative Action Gets Mixed Verdict, WASH. Post, Dec. 7, 2000, at A10. However, for now this is a moot point in the state of Washington because 1-200 still precludes affirmative action at the University of Washington and other public institutions.
- 17. See Johnson v. Bd. of Regents of the Univ. Sys. of Georgia, 263 F.3d 1234 (11th Cir. 2001). See also Edward Walsh, Court Strikes Down Georgia Admissions Policy, WASH. POST, Aug. 28, 2001, at A5; Bill Rankin & Rebecca McCarthy, Court Rejects UGA Effort to Enroll More Minorities, ATLANTA J. & CONST., Aug. 28, 2001, at A1; Sara Hebel, U. of Georgia Settles Affirmative-Action Suit, CHRON. HIGHER EDUC., Feb. 16, 2001, at A30.
- 18. See UMass Retreats From Race-Based Affirmative Action, 27 J. BLACKS HIGHER EDUC. 12, 12 (2000); Mary Carey, Policy or Practice?, DAILY HAMPSHIRE GAZETTE, Mar. 26, 1999, at A1, available at 1999 WL 11723625; Mark Mueller, UMass to Change Race-Based Policies, BOSTON HERALD, Feb. 20, 1999, at 5, available at 1999 WL 3390642.
- 19. See Peter Schmidt, U. of Virginia Halts Use of Scoring System That Helped Black Applicants, CHRON. HIGHER EDUC., Oct. 22, 1999, at A42.
- 20. See Grutter v. Bollinger, 137 F. Supp. 2d 821, 825 (E.D. Mich. 2001), rev'd en banc 288 F.3d 732 (6th Cir. 2002). See also Peter Schmidt, Appeals Court's Decision Upholding Affirmative Action in Michigan Law School Case Doesn't End Debate, CHRON. HIGHER EDUC., May 15, 2002; Jacques Steinberg, Court Says Law School May Consider Race in Admissions, N.Y. TIMES, May 15, 2002, at A1.
- 21. See Grutter v. Bollinger, cert. granted, -- S.Ct.-- (Dec. 2, 2002), available at 2002 WL 1967853; see also Peter Schmidt, U.S. Supreme Court Agrees to Hear 2 Affirmative Action Cases from Michigan, CHRON. HIGHER EDUC., Dec. 2, 2002.

In Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978), the Court struck down the affirmative action program at the UC Davis Medical School, although it upheld the use of race as a plus factor in admission decisions. For background on the Bakke

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Gratz v. Bollinger, a challenge to the undergraduate affirmative action program at the University of Michigan, that had yet to be decided by the Sixth Circuit.²²

The struggle over the future of affirmative action is closely linked to the debate about how to define fairness in the meritocracy.²³ with its current emphasis on standardized tests. The Gratz and Grutter cases highlight how divergent views of standardized testing inform the opposing efforts to dismantle or defend affirmative action. In Gratz and Grutter, the principal evidence of "reverse discrimination" presented by the Center for Individual Rights (CIR) on behalf of White plaintiffs consisted of comparisons, by racial/ethnic group, of the different admission odds for applicants with similar test scores and grade point averages.²⁴ Thus, CIR litigation theory assumes that scores on the SAT and LSAT are a fair and adequate basis for determining who should be entitled to admission at selective colleges and universities. Given the centrality of test scores to the evidence proffered by CIR in Gratz and Grutter, and other efforts by conservative think tanks to posit SAT score differences as "incontrovertible evidence of racial preferences,"25 affirmative action opponents are treating standardized test scores as dispositive criteria

case, see JOEL DREYFUSS & CHARLES LAWRENCE III, THE BAKKE CASE: THE POLITICS OF INEQUALITY (1979).

^{22.} See Gratz v. Bollinger, cert. granted, --S.Ct.-- (Dec. 2, 2002), available at 2002 WL 31246645.

^{23.} The term "meritocracy" is an invention of British Labour Party policy analyst Michael Young. Young first used this term derisively in his wicked dystopian satire. See MICHAEL YOUNG, THE RISE OF THE MERITOCRACY: 1870-1933: AN ESSAY ON EDUCATION AND EQUALITY (1958). For background on Young and meritocracy, see NICHOLAS LEMANN, THE BIG TEST 115-19 (1999); Nicholas Lemann, The SAT Meritocracy: Is It Based on Real Merit?, WASH. MONTHLY, Sept. 1997, at 32.

^{24.} See William C. Kidder, Affirmative Action in Higher Education: Recent Developments in Litigation, Admissions and Diversity Research, 12 LA RAZA L.J. 173, 177 (2001) (summarizing the standard testing evidence presented at trial by CIR in Grutter v. Bollinger); Expert Report of Dr. Kinley Larntz, Grutter v. Bollinger, 188 F.3d 394 (6th Cir. 1999), reprinted in 5 MICH J. RACE & L. 463 (1999). See also Jodi S. Cohen, Witness: Odds Lean to U-M Minorities, DETROIT NEWS, Jan. 18, 2001 (summarizing Larntz's trial testimony). In Grutter, Larntz's testimony was found by District Court Judge Friedman to be "mathematically irrefutable proof that race is indeed an enormously important factor." Grutter v. Bollinger, 137 F. Supp. 2d 821, 841 (E.D. Mich. 2001).

^{25.} We are referring to a series of reports on college admissions sponsored by the Center for Equal Opportunity, which is headed by Linda Chavez. See, e.g., ROBERT LERNER & ANTHEA K. NAGAI, CENTER FOR EQUAL OPPORTUNITY, PERVASIVE PREFERENCES: RACIAL AND ETHNIC DISCRIMINATION IN UNDERGRADUATE ADMISSIONS ACROSS THE NATION (2001); Peter Schmidt, Most Colleges Use Racial Preferences in Admissions, Foe of Affirmative Action Finds, CHRON. HIGHER EDUC., Mar. 2, 2001, at A22; Douglas Lederman, Study Documents Gaps Between White and Minority Students at Colorado Colleges, CHRON. HIGHER EDUC., Nov. 7, 1997, at A37.

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for assessing claims under the Equal Protection Clause.

In contrast, the student intervenors in *Grutter*²⁶ directly challenged CIR's presumption that affirmative action necessarily amounts to a preference for "lesser qualified" students of color by presenting evidence that standardized tests are racially biased.²⁷ The intervenors argued that affirmative action is justified in part to counterbalance the ways that tests like the LSAT and SAT taint the admissions process with racial unfairness.²⁸ In Grutter, four Sixth Circuit judges concurred that the LSAT and SAT are not race-neutral criteria for Judge Clay, joined by Judges Moore, Cole, and Daughtrey, opined that the LSAT and SAT are not race-neutral criteria for admissions and that criticism of standardized testing supports the University of Michigan Law School's consideration of race and ethnicity.²⁹

Faced with the possible prohibition of using race-conscious admissions process, several states adopted "Percent Plans" that admit students based upon high school rank, without reference to SAT scores.³⁰ Among these are the "Ten Percent Plan" in Texas.³¹ the "One

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^{26.} The intervenors in both Gratz and Grutter appealed separate District Court rulings prohibiting them from intervening as defendants. See Grutter v. Bollinger, 188 F.3d 394 (6th Cir. 1999) (consolidated cases). The Sixth Circuit overruled the two lower court rulings because it was persuaded by the intervenors' argument that the "University is unlikely to present evidence of past discrimination by the University itself or of the disparate impact of some current admissions criteria, and that these may be important and relevant factors in determining the legality of a race-conscious admissions policy." Id. at 401.

^{27.} The intervenors' expert witnesses on the issue of the racial/ethnic bias on the LSAT and SAT included Martin Shapiro, Jay Rosner, David M. White, and Eugene Garcia. These four expert reports are reprinted in 12 LA RAZA L.J. 373, 377, 387, 399 (2001). See also Jodi S. Cohen, Testimony Claims Law Testing Bias: Executive for Test Firm Says Questions Favor Wealthy White Males, DETROIT NEWS, Jan. 25, 2001.

^{28.} See Miranda Massie, A Student Voice and a Student Struggle: The Intervention in the University of Michigan Law School Case, 12 LA RAZA L.J. 231, 233 (2001) (Massie, the lead counsel for the Grutter intervenors argues, "[w]e engaged in a systematic critique of the manner in which racism and unearned white privilege continue to structure every aspect of educational experience in the US-and in particular, unavoidably mar the use of allegedly meritocratic criteria like LSAT scores and grades."); Defendant-Intervenors Final Reply Brief in Grutter v. Bollinger, Case No. 01-1516 (6th Cir.) July 26, 2001, at 22-26; Jodi S. Cohen, Minorities Set to Testify at U-M Trial, Students Say Criteria Used for Law School Entry Discriminate, DETROIT NEWS, Dec. 24, 2000, available at 2000 WL 30259961.

^{29.} See Grutter, 288 F.3d at 769-71.

^{30.} For analysis of percentage plans, see generally Michelle Adams, Isn't it Ironic? The Central Paradox at the Heart of "Percentage Plans," 62 OHIO ST. L.J. 1729 (2001) (criticizing percentage plans because they can only succeed in preserving racial diversity in higher education if K-12 education remains racially segregated); U.S. COMM'N ON CIVIL RIGHTS, BEYOND PERCENTAGE PLANS: THE CHALLENGE OF EQUAL OPPORTUNITY IN HIGHER EDUCATION (Draft Report November 2002), available at http://www.usccr.gov/ (go to recent briefings and papers); U.S. COMM'N ON CIVIL RIGHTS, TOWARD AN

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Florida Plan,"32 and the "Four Percent Plan,"33 and "12.5 Percent Provisional Admission Plan" at the University of California (UC).³⁴ UC President Richard Atkinson recently recommended discontinuing the use of the SAT I in favor of some other test more closely related to high school curriculum.³⁵ In addition, the UC Latino Eligibility Taskforce previously recommended abandoning the SAT.³⁶ Seen by many as an effort to dissuade the UC system, its largest customer, from abandoning the SAT, ETS recently announced a new Writing section

UNDERSTANDING OF PERCENTAGE PLANS IN HIGHER EDUCATION: ARE THEY EFFECTIVE SUBSTITUTES FOR AFFIRMATIVE ACTION? (April 2000), available at http://www.usccr.gov/ (go to publications; commission reports); Mary Francis Berry, How Percentage Plans Keep Minority Students Out of College, CHRON. HIGHER EDUC., Aug. 4, 2000, at A48; Jeffrey Selingo, What States Aren't Saying About the 'X-Percent Solution,' CHRON. HIGHER EDUC., June 3, 2000, at 31.

- 31. The Texas Legislature approved the "Ten Percent Plan" soon after the 1996 Hopwood ruling. This plan allows applicants in the top ten percent of their class to be admitted to any of the public universities in the Texas system, including selective institutions like UT-Austin and Texas A&M. For background see Danielle Holley & Delia Spencer, Note, The Texas Ten Percent Plan, 34 HARV. C.R.-C.L. L. REV. 245 (1999); William E. Forbath & Gerald Torres, Merit and Diversity after Hopwood, 10 STAN. L. & POL'Y REV. (1999); Susanna Finnell, The Hopwood Chill: How the Court Derailed Diversity Efforts at Texas A&M, in CHILLING ADMISSIONS 71 (Gary Orfield & Edward Miller eds., 1998); David Orenlicher, Affirmative Action and Texas' Ten Percent Solution: Improving Diversity and Quality, 74 NOTRE DAME L. REV. 181 (1998). We analyze the Texas Ten Percent Plan in the context of disparate impact litigation infra Part IV.D.iii.
- 32. See generally Why the 'One Florida' Plan Would Remove Blacks from the Best Campuses of the University of Florida, supra note 16.
- 33. The UC Regents approved the "Four Percent Plan" in March 1999. background see Pamela Burdman, UC Regents Rethinking Use of SAT-Newly Approved 4% Admissions Policy May Still Need Tweaking, S.F. CHRON., Mar. 20, 1999, at A22; V. Dion Haynes, U of California Alters Its Policy on Admissions—Change Aims to Increase Number of Minority Students, CHICAGO TRIB., Mar. 20, 1999, available at 1999 WL 2855179. Likewise, in November 2001, the UC Regents approved a system-wide admissions policy that places more emphasis on special talents, overcoming adversity, and extra-curricular activities. See Tanya Schevitz, UC Regents Set to Alter Admissions, S.F. CHRON., Nov. 15, 2001, at A1.
- 34. In July of 2001, the UC Regents approved a type of 12.5% provisional admission plan. Under this plan, students in the top 12.5% of their high school who were not initially admitted to a UC campus can still be admitted as junior transfers (without having to reapply) if they completed two years of community college and met a certain GPA requirement specified by the UC campus. See Tanya Schevitz, UC Widens Chance of Gaining Admission, S.F. CHRON., July 20, 2001, at A1. There is no assurance that applicants under this plan can secure a spot at Berkeley and UCLA, the most selective UC campuses. See id.
- 35. See, e.g., Diana Jean Schemo, Head of U. of California Seeks to End SAT Use in Admissions, N.Y. TIMES, Feb. 17, 2001, at A1; Kenneth R. Weiss, SAT May Be Dropped as UC Entrance Exam, L.A. TIMES, Feb. 17, 2001, at A1; John Cloud, Should SATs Matter?, TIME, Mar. 4, 2001, at 41; see also Selingo, supra note 16, at A21.
- 36. See Univ. of Cal. Latino Eligibility Taskforce, Latino Student ELIGIBILITY AND PARTICIPATION IN THE UNIVERSITY OF CALIFORNIA: YA BASTA!, REPORT No. 5, at 19 (1997); Z. Byron Wolf, Task Force Urges Regents to Drop SAT Requirement, DAILY CALIFORNIAN, Sept. 19, 1997, at 1.

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and revised the Verbal section to place greater emphasis on reading comprehension and sentence completion.³⁷ As we will argue, however, these attempts do not mitigate the problem of disparate impact.³⁸

Does the SAT Accentuate or Reflect Racial and Ethnic B. Differences?

A core issue underlying both "Percent Plans" and the Grutter and Gratz cases is whether standardized tests are a neutral reflection of racial and ethnic differences in educational attainment. The positions taken by many scholars and policymakers in response to this question do not correspond with their stances generally in the affirmative action debate. Rather, as will be demonstrated, a powerful conventional wisdom bridges ideological fault lines, and it is precisely this accepted wisdom that we wish to critically investigate in this empirical study.

Several "non-profit" corporations develop and market the major university undergraduate, graduate, and professional admissions tests used in American higher education, including ETS (for the SAT, GRE, and GMAT), the College Board (for the SAT), the Law School Admission Council (for the LSAT), and the American Association of Medical Colleges (for the MCAT). These organizations generally adopt liberal positions on major educational policy issues, including support for race-conscious affirmative action in higher education admissions 39

Former president of the College Board Donald Stewart vigorously argued against the UC Latino Eligibility Taskforce recommendation to

^{37.} See Tamar Lewin, College Board Announces an Overhaul for the SAT, N.Y. TIMES, June 28, 2002 (detailing the planned changes for 2005); Tanya Schetitz, UC's Criticisms Spur Proposal to Revise SAT Tests, S.F. CHRON., June 18, 2002, at A4; Elizabeth Farrell, College Board Considers Major Changes to SAT, CHRON. HIGHER EDUC., Mar. 25, 2002 (quoting Harvard Professor Howard Gardner about UC); Eric Hoover, SAT is Set for an Overhaul, But Questions Linger About the Test, CHRON. HIGHER EDUC., May 31, 2002, at A35 (quoting Bob Schaeffer of FairTest about UC); Jeffrey Selingo, U. of California Faculty Wants to Drop SAT by 2006, CHRON. HIGHER EDUC., April 5, 2002, at A20 (reporting that the UC Regents would likely vote in July 2002 on a recommendation to drop the SAT in favor of subject exams and a writing test).

^{38.} See discussion infra Parts III and IV.

^{39.} See, e.g., Brief of Amicus Curiae, Law School Admission Council, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), reprinted in ALLAN BAKKE VERSUS REGENTS OF THE UNIVERSITY OF CALIFORNIA: THE SUPREME COURT OF THE UNITED STATES, VOLUME IV 143 (Alfred A. Slocum ed., 1978); LAW SCHOOL ADMISSION COUNCIL, PRESERVING ACCESS AND DIVERSITY IN LAW SCHOOL ADMISSIONS - AN UPDATE (1998).

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eliminate the SAT:

It is unfortunate, as the new millennium approaches, that race, ethnic background, or family income can still limit students' educational future. Getting rid of the SAT or any other standard is not going to change that fundamental fact. Instead of smashing the thermometer, why not address the conditions that are causing the fever?40

Similarly, UC Santa Barbara Professor Rebecca Zwick, who spent many years as a researcher at ETS, argued that racial and ethnic gaps on the SAT are substantially equivalent to gaps in high school grades:

Because the pattern of ethnic group differences in average high school GPA is usually similar to the pattern of average admissions test scores, an admissions policy that excludes tests but continues to include high school grades is unlikely to produce dramatic change. . . . The indisputable fact is that both high school grades and scores on admissions tests are reflections of the same education system, with all its flaws and inequities.⁴¹

As with testing industry insiders, a range of conservative scholars defend the SAT and other standardized tests as neutral measures of differences in educational achievement. For example, Jennifer Braceras, recently appointed by President Bush to the U.S. Commission on Civil Rights and author of a recent article defending standardized testing, concludes:

[T]he achievement gap between black and Latino students, on the one hand, and their white peers, on the other hand, has been fount to be present across tests and across assessment devices. Thus, data from the national Assessment of Educational Progress (NAEP), the National Educational Longitudinal Survey (NELS), and the SAT all

^{40.} Donald M. Stewart, Why Hispanic Students Need to Take the SAT, CHRON. HIGHER EDUC., Jan. 30, 1998, at A48. See also June Kronholz, As States End Racial Preferences, Pressure Rises To Drop SAT to Maintain Minority Enrollment, WALL St. J., Feb. 12, 1998. at A24 (noting that the College Board rebuts the UC Latino Eligibility recommendation by arguing that eliminating the SAT would cause the White and Asian eligible pools to increase even more).

^{41.} Rebecca Zwick, Eliminating Standardized Tests in College Admissions: The New Affirmative Action?, 81 PHI DELTA KAPPAN 320, 323 (1999). See also id. at 324 ("[B]oth test scores and high school grades are reflections of the very same disparities in educational opportunity. Eliminating standardized tests and relying more heavily on high school achievement in admissions decisions simply cannot result in a dramatic change in the ethnic diversity of the student body.").

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confirm the results of state educational assessments: African-American and Latino students lag behind their peers from other ethnic groups at every educational level. And it is not just standardized test scores that reveal this learning deficit. Grade point averages, graduation rates, and class rankings of students across the country are, regrettably, also consistent with this pattern. indicating that claims of bias are, at best, exaggerated. 42

Similarly, Stephan and Abigail Thernstrom, influential opponents of affirmative action, reviewed evidence on class rank, grade point averages, and course selection, and concluded that the SAT gap is no larger than the gap on other measures of achievement.⁴³ Even more illustrative of the fact that the aforementioned conventional wisdom makes for strange bedfellows, Arthur Jensen⁴⁴ and Linda Gottfredson,⁴⁵

When they heap scorn on "mere tests," defenders of affirmative action pick an easy target, and deflect attention away from a wealth of evidence demonstrating that the racial gap in other measures of academic achievement and preparation is just as large as the gap in SAT scores. . . . So far, at least, critics of tests have been unable to demonstrate that any other measure of academic preparation and achievement yields a significantly different result.

Id. at 402-03. For a critique of the conclusions the Thernstroms draw from this SAT data, see Stephen R. Shalom, Dubious Data: The Thernstroms on Race in America, 1 RACE & Soc'y 125, 132-33 (1998).

^{42.} Jennifer C. Braceras, Killing the Messenger: The Misuse of Disparate Impact Theory to Challenge High-Stakes Educational Tests, 55 VAND. L. REV. 1111, 1174-76 (2002).

^{43.} See, e.g., STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE (1997). The Thernstroms argue:

^{44.} See Arthur R. Jensen, Testing: The Dilemma of Group Differences, 6 PSYCHOL., PUB. POL'Y, & L. 121, 123 (2000) ("Nevertheless, because GPA and test scores are substantially correlated, the sole use of GPA for selection usually results in a highly similar ranking of applicants, and strict top-down selection still has almost as much adverse impact as test scores or even test scores and GPA combined."). Jensen is best known for his infamous article arguing against headstart and other social programs on the ground that IQ is largely hereditary. See, e.g., Arthur R. Jensen, How Much Can We Boost I.Q. and Scholastic Achievement?, 38 HARV. EDUC. REV. 1 (1969); ARTHUR R. JENSEN, BIAS IN MENTAL TESTING (1980). For discussion and critique of Jensen's claims about race and IQ, see Marcus W. Feldman, Expert Reports on Behalf of Student Intervenors: The Meaning of Race: Genes, Environments, and Affirmative Action (expert report submitted on behalf of intervening defendants (student intervenors), Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001)(No. 97-75928)), reprinted in 12 LA RAZA L.J. 365 (2001); ARTHUR JENSEN: CONSENSUS AND CONTROVERSY (Sohan Modgil & Celia Modgil eds., 1987); WILLIAM H. TUCKER, THE SCIENCE AND POLITICS OF RACIAL RESEARCH (1994); Richard Delgado et al., Can Science Be Inopportune? Constitutional Validity of Governmental Restrictions on Race-IQ Research, 31 UCLA L. REV. 128, 136-41 (1983); Anne L. Hafner & David M. White, Bias in Mental Research, 51 HARV. EDUC. REV. 577 (1981).

^{45.} See Linda S. Gottfredson, Skills Gaps, Not Tests, Make Racial Proportionality Impossible, 6 PSYCHOL., PUB. POL'Y, & L. 129, 141 (2000) (arguing that the test score gap is a neutral reflection of differences in job performance skills and concluding that "[t]ests are not the problem; banishing them is no solution. Skills gaps are the major remaining barrier to racial equality in education and employment, and therein lies the only enduring

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both unabashed eugenics scholars, make arguments about the neutrality of testing that are nearly identical to those of Zwick and Stewart, respectively.

The position that the SAT, like other indicators, fairly and accurately reflects group differences in educational attainment is inconsistent with the available evidence. For example, in the last few years it was about equally as difficult for White college-bound seniors to obtain either a 600+ Verbal or 600+ Math score on the SAT as it was for them to rank in the top 10% of their high school class.⁴⁶ In contrast, it was considerably more difficult for Black and Chicano seniors to score over 600 on a section of the SAT than to rank in the top 10% of their high school class. Based on current national performance levels, even if there were equal numbers of African Americans and Whites applying to college, there still would be 4.2 times as many White as Black applicants with 600+ on the Verbal section and 5.4 times as many on the Math section.⁴⁷ The ratio is slightly lower for Chicano applicants: 3.1 White students to each Chicano student scoring 600+ on the SAT Verbal, and 3.0 Whites for every Chicano on the Math section.48

Yet, if we make the same kind of comparisons using high school grades, the results do not favor Whites so dramatically. Supposing there were equal numbers of Whites, Blacks, and Chicanos, the ratio of Whites to Blacks with grades in the top tenth of the class would be 1.9, and there would be "only" 1.4 times as many Whites as Chicanos among such "talented tenth" students. 49 Therefore, for Blacks and

solution.").

^{46.} See generally College Board, 2001 Verbal and Math Percentile Ranks by Gender available Groups, http://www.collegeboard.org/prod downloads/about/news info/cbsenior/yr2002/pdf/threeC. pdf (last visited Nov. 7, 2002) (reporting that among White SAT test-takers 25% had 600+ Verbal scores and 28% had 600+ Math scores) [hereinafter College Board]; Wayne J. Camara & Amy Elizabeth Schmidt, Group Differences in Standardized Testing and Social Stratification (1999), COLLEGE BOARD REPORT NO. 99-5, at 5 tbl.5 (reporting high school grades for 1997 college bound seniors).

^{47.} See College Board, supra note 47.

^{48.} See id.

^{49.} See Camara & Schmidt, supra note 47. Unfortunately, Camara and Schmidt report aggregated results for all Latino (Hispanic) students combined, and do not separately report high school grades for Chicanos. In contrast, the College Board table of SAT percentile ranks separately reports various Latino subgroups, but does not report aggregate results for all Latinos combined. While this reporting difference introduces a bit of imprecision to our comparisons, it is not likely to be substantial, since SAT data suggest that other Latinos, including those from Puerto Rico, South America, and Central America, perform similar to

Chicanos applying to college, the disparate impact of requiring a 600+ on a section of the SAT is roughly twice as severe as the adverse impact of requiring graduation in the top 10% of the class. Likewise, while an equivalent proportion of White college-bound seniors obtained either an "A" average in high school or a 550+ SAT section score, for Blacks and Chicanos aspiring to go to college, a 550+ on either the SAT Verbal or Math section had almost double the impact of an "A" average. 50 This analysis is consistent with earlier representative studies documenting the adverse impact of the SAT vis-à-vis high school grades.51

Commissioner Braceras' argument—that standardized tests are not biased because gaps in achievement are also present in other measures⁵²—is artfully imprecise and it misses the point. Few would argue that there are no disparities in educational measures, for what else could be expected given America's history of unequal educational opportunities? However, it hardly follows that merely because racial/ethnic educational gaps exist in grades and class rank that standardized tests are not biased. Rather, the crucial questions raised in this article are, given the consistent finding that the magnitude of racial/ethnic disparities in SAT scores surpasses that of other measures, why might this occur, and what are the legal and social policy implications?

METHODOLOGY AND RESULTS

A. Data Samples of SAT Questions

Representatives of the College Board and ETS often proclaim that the SAT is the single most studied test in the world. Although they are purportedly willing to provide outside researchers information about

Chicanos on the SAT. See id.

^{50.} See Camara & Schmidt, supra note 47, at 5 tbl.5; College Board, supra note 47.

^{51.} See, e.g., JAMES CROUSE & DALE TRUSHEIM, THE CASE AGAINST THE SAT 92, 94 (1988) (reporting national SAT and high school rank data for the 1984 cohort of collegebound seniors); Shalom, supra note 44, at 132 (reporting on the SAT's greater adverse impact compared to high school grades and other measures for the 1995 cohort of collegebound seniors); William T. Dickens & Thomas J. Kane, Racial Test Score Differences as Evidence of Reverse Discrimination: Less than Meets the Eye, 38 INDUS. REL. 331, 338 (1999) (reporting that Black-White SAT differences are 0.30 SDs (standard deviations) greater than high school grades using a nationally representative 1982 sample from the High School and Beyond database).

^{52.} Braceras, *supra* note 43, at 1174-76.

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the SAT.⁵³ much of the relevant data is difficult to access. This article analyzes hard-to-access data in a fresh, original way. 54

Our database was generated by ETS, and consists of a nationally representative sample of 100,000 test-takers who took the October 1998 SAT. The SAT currently consists of 138 test questions in its six scored sections: sixty math items and seventy-eight verbal items. Out of 138 items, 128 are multiple-choice. The remaining ten math items are called "grid-ins," and require the student to generate an answer rather than choose one from a set of four or five provided in the test booklet. After the student generates an answer, the student must then "grid-in," or bubble in his or her answer on a scantron sheet.

In addition, each SAT test-taker also answers questions from one of the many unscored experimental sections, which may include math or verbal items. The experimental section pretests new questions, and generates statistical data used to determine whether the questions should later appear as items on scored sections of future SATs. For proprietary reasons, the College Board and ETS have resisted requests for performance data on these experimental sections, even when they are more than a few years old. Consequently, our database does not permit a detailed analysis of experimental questions. However, this article does make reference to a few experimental questions that are publicly available.

To address whether the October 1998 SAT was typical with respect to racial/ethnic group performance on Math and Verbal items, we also analyzed a database with 580 questions taken from four SATs administered during 1988 and 1989. This second supplemental database includes approximately 209,000 test-takers from New York State. 55 While New York is not representative of the country's overall demographics, for our purposes it was sufficient that it included substantial proportions of African Americans (8.8%) and Latinos

^{53.} See EDUCATIONAL TESTING SERVICE, ETS STANDARDS FOR QUALITY AND FAIRNESS 25 (2000) (ETS Standard 5.7 states: "Give non-ETS researchers reasonable access to ETS-controlled, nonproprietary information, if the privacy of individuals and organizations, and ETS's contractual obligations, can be met.").

^{54.} We were initially told by several researchers and testing critics that such data was not available. Finally, Wayne Camara of the College Board put us in touch personnel at ETS, and after a series of correspondences we were able to arrange to obtain our 1998 data set for a \$500 fee.

^{55.} We thank Professor Martin Shapiro for sharing this data with us (spreadsheets on file with the authors) [hereinafter New York SAT Data].

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(5.7%) in the data set.⁵⁶ Because the 1988-1989 database is older than our current sample and makes for a less representative population, this data sample was used to confirm broad conclusions about disparate impact. New York's unique "Truth in Testing" law compelled ETS to disclose these data 57

Our inquiry is quite straightforward: for each of the 138 items in the scored sections of the October 1998 SAT, what were the percentages of White, African American, and Chicano test-takers answering the question correctly? The impact of each question is defined as the difference between the correct responses by Whites and these racial minorities. For example, if 50% of Whites, 35% of Chicanos, and 30% of African Americans correctly answer a particular SAT Verbal question, that item has a Black-White impact of 20% and a Chicano-White impact of 15%. Part III of this article will establish that this definition of item impact is widely used by both ETS researchers and testing critics. Item impact is often associated with the Golden Rule procedures that emerged from a settlement between ETS and plaintiffs who sued over discrimination in the test construction process on one of ETS's standardized licensing exams.⁵⁸

In adopting this definition of impact, it is not necessary to (and we do not) assume that all racial and ethnic differences in performance on SAT items are entirely a product of cultural bias on top of already existing disparities in preparation for higher education. Rather, our central empirical and policy question is one of degree: how much of the Black-White and Chicano-White SAT score gap can be reduced by the use of impact reduction techniques in the test development process, while still maintaining reasonable psychometric standards?

Charts 1-4 display our findings regarding the magnitude of Black-White and Chicano-White impact on the seventy-eight Verbal and sixty Math items on the October 1998 SAT. In the last few years, African Americans trailed Whites on the SAT by an average of about ninety-

^{56.} Another significant difference is that the 1988-1989 New York data bunches all Latinos into a single category, whereas in our 1998 database we were able to separately assess Chicanos.

^{57.} For a history and legal analysis of New York's Truth in Testing law, see Leslie G. Espinoza, The LSAT: Narratives and Bias, 1 Am. U. J. GENDER & L. 121, 123-25, 138-57 (1993).

^{58.} See infra Part III.A-C.

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five points on the Verbal section and 105 on the Math section, whereas Chicanos trailed Whites by approximately seventy-five and seventy points respectively.⁵⁹ Both the Math and Verbal sections are scored on a 200-800 scale, with a standard deviation of about 110 points.⁶⁰

Given that a Black-White SAT average gap of approximately one standard deviation, and a Chicano-White SAT gap of about two-thirds of a standard deviation, it is hardly surprising that the percentage of Whites correctly answering each question would exceed that of African Americans and Chicanos on a substantial majority of SAT items. The consistency of the pattern, however, may be surprising: African Americans or Chicanos did not outperform Whites on any of the seventy-eight Verbal and sixty Math questions.⁶¹ Overall, on the seventy-eight Verbal items. Whites correctly answered at an average of 59.8% and African Americans correctly answered an average of 46.4% of the items. This results in an average impact of 13.4%. Chart 1, which follows below, indicates that zero Verbal questions displayed greater African American correct response rates than White rates, and less than a tenth (7/78) of the items had differences of 5% or less. Over one-third (29/78) of the Verbal questions had Black-White differences of 15% or more, and one-sixth of the items (13/78) had gaps of 20% or more.

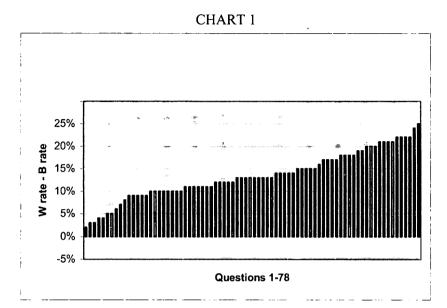
^{59.} See College Board Press Release, supra note 9, at tbl.9. See Camara & Schmidt, supra note 45, at tbl.1.

^{60.} See Camara & Schmidt, supra note 47, at tbl. 1 n.2.

^{61.} However, later we argue this pattern is not unavoidable. See infra Part III.

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The pattern of disparate impact for Chicanos in Chart 2 is similar to that for Blacks, although the disparity is smaller. The overall average Chicano correct response rate was 48.7%, meaning that average Chicano-White disparate impact of the seventy-eight items was 11.1%. Out of seventy-eight items, only one question had no adverse impact on Chicanos, and just over a tenth (9/78) of the items had a disparity of 5% or less. Nearly one-fifth of the items (15/78) had gaps of 15% or greater, and three items had gaps of 20% or greater.

CHART 2

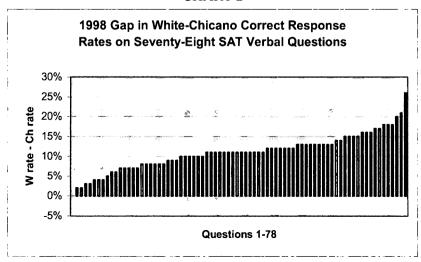
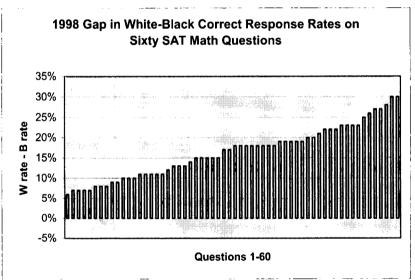


Chart 3 indicates that the Black-White disparities were somewhat larger on the Math section than on the Verbal section. Overall, the average White correct response rate was 58.4% on the sixty Math items, and the African American average correct response rate was 42.0%, for an average impact of 16.4%. One sixth (10/60) of the items had a disparate impact under 10%. Nearly three out of ten items (17/60) had a disparity of 20% or more, and two items had an impact of 30%.

CHART 3



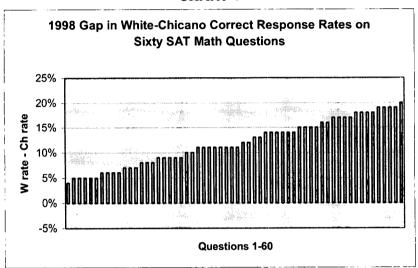
As indicated by Chart 4, the disparities for Chicanos were greater on the Math section than on the Verbal section. Overall, the average Chicano correct response rate was 46.5%, for an average disparity of 11.9% as compared to White test-takers. Interestingly however, results were not as varied (at both the low and high ends) in the Math section as on the Verbal section. This pattern may be partly attributable to bilingualism. Chicanos tend to perform relatively better on Verbal questions with vocabulary words that contain Latin root words, and they tend to perform relatively worse on Verbal items with root words that are "false cognates," which are words that appear to have Latin root words but in fact do not. 62 Only one Math item had a disparity

^{62.} See Maria Pennock-Roman, The Status of Research on the Scholastic Aptitude Test (SAT) and Hispanic Students in Postsecondary Education 40-41 (1988), ETS RESEARCH REPORT No. 88-36 ("For Hispanic students, bilingualism is sometimes an asset and sometimes a handicap. Items that contain English words that are true cognates of Spanish

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under 5%. Nearly one-third of the items (19/60) had a disparate impact of 15% or more, and the item with the greatest disparity had a 20% gap.

CHART 4



The disparate impact of the items on the October 1998 SAT was slightly greater than that found in the 1988-89 New York SAT database. Of the 580 questions in the New York dataset, the Black-White average disparate impact was 13.2%. Specifically, for these 580 questions, Whites were more likely to answer 574 of them correctly, five items had no Black-White differences, and Blacks scored higher than Whites on one question. On the 1998 October SAT, the average

words in the stem and answer choices are easier, and those with false cognates are more difficult."); REBECCA ZWICK, FAIR GAME? THE USE OF STANDARDIZED ADMISSIONS TESTS IN HIGHER EDUCATION 38, 129 (2002) ("There is some evidence that Hispanic test-takers are disadvantaged by false cognates—similar words that have different meanings in the two languages."). Here is an example of an antonym problem containing a cognate in Spanish where Latinos were more likely than Whites to answer correctly. This item, presumably from the mid-to-late 1990s, was removed from the SAT by ETS at the experimental stage:

infidelity:

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approval creativity exorbitance loyalty (correct answer) flightiness

Pamela Burdman, Worth of SAT Exam Questioned, S.F. CHRON., Nov. 11, 1997, at A1. Women also performed better than men on the same item. See id.

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disparate impact was 14.7% for the 138 items. Moreover, Whites outperformed Blacks on all of the 138 items.

To better understand the disparate impact of each SAT item, it is helpful to examine actual SAT questions. Compare two 1998 SAT Verbal sentence completion items with similar themes: the item correctly answered by more Blacks than Whites was discarded by ETS, whereas the item that has a higher disparate impact against Blacks became part of the actual SAT. On one of the items, which was of medium difficulty, 62% of Whites and 38% of African Americans answered correctly, resulting in a large impact of 24%. The other item was pretested on the experimental section of the SAT in 1998, but it was deemed psychometrically flawed and was removed from the test. On this second item, 8% more African Americans than Whites answered correctly and 9% more women than men answered correctly.

Which Item Appeared on the SAT and Which Item was Rejected? Is Either Item (or both) Noticeably Biased?

The actor's bearing on stage seemed; her movements were natural and her technique

- The dance company rejects preferring to present only dances in a manner that underscores their traditional appeal.
- unremitting...blasé
- fluid...tentative b.
- unstudied...uncontrived
- d. eclectic...uniform
- grandiose...controlled
- invention...emergent
- b. fidelity...long-maligned
- ceremony...ritualistic c.
- innovation...time-honored
- custom...ancient e.

The item on the left (with C as the correct answer) is the one that 8% more African Americans than Whites answered correctly. This item was omitted from the actual SAT.⁶³ In contrast, the item on the right (with D as the correct answer) was answered correctly by 24% more Whites than African Americans, and was included on the actual

^{63.} This item is reported in Amy Dockser Marcus, To Spot Bias in SAT Questions, Test Maker Tests the Test, WALL ST. J., Aug. 4, 1999.

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After presenting this question at several academic conferences, we found that most people cannot readily identify which item favors Whites as opposed to Blacks. As we argue at length in Part III, the facially-neutral SAT test construction will have a strong tendency to eliminate items (such as the one on the left side above) on which African Americans and Chicanos outperform Whites.

Consider another SAT Verbal item and its disparate impact. Below are two sentence completion items that are included in our data displayed in Chart 1. Whites correctly answered 59% of both items, whereas African Americans answered one of the items correctly 49% of the time, and the other 37% of the time. Can you tell which item will have a lower disparate impact of 10% and which will have a higher impact of 22%?

Which Item Will Have a Greater Black-White Disparate Impact?

The singer now performs a more repertoire of songs than in the past, when he sang only traditional ballads.

Ann Wickham's marriage seemingly
her art because, a few years
after her wedding, she began to write
prolifically.

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- a. sentimental
- b. experimental
- c. mellow
- d. customary
- e. wary

- a. quelled
- b. construed
- c. consumed
- d. invigorated
- e. sated

The item on the left (with B as the correct answer) had a Black-White disparate impact of 22%.⁶⁵ The item on the right (with D as the correct answer) had a disparity of 10%,⁶⁶ even though White test-takers found each item to be equally difficult. This article argues that a meaningful number of lower impact items can be substituted for higher impact problems without significantly compromising the psychometric

^{64.} For verification purposes, this item is labeled VC 204 in our data set.

^{65.} This item is labeled VC 103 in our data set.

^{66.} This item is labeled VC 108 in our data set.

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properties of the SAT.⁶⁷

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With respect to the SAT Math section, especially with items that do not include too many words or applied situations (i.e., word problems), it is difficult for many people to conceptualize how such items could be either biased against or in favor of a particular group. We argue that this difficulty is actually the point. The lack of a patently observable bias falsely implies a neutrality that does not exist. Given that educationally sound items testing similar mathematical concepts can have varying levels of disparate impact on African Americans and Chicanos, does sufficient a priori justification exist for preferring items that display relatively larger racial/ethnic disparities? We argue that the legitimacy of such a policy is sorely lacking, yet this is precisely what ends up happening on the real SAT and other standardized tests required for higher education admissions.

For example, in the two items below, one of the questions is from a scored SAT and was answered correctly by 11% more Whites than African Americans.⁶⁸ The other item was on the experimental SAT Math section in 1998, but was not included in a scored section of the SAT.⁶⁹ This experimental item was answered correctly by 7% more African Americans than Whites. Is it easy to distinguish the item with a disparate impact of 11% favoring Whites from the item with an impact favoring African Americans by 7%?

^{67.} In addition, sentence completion problems such as those above will become a bigger part of the SAT starting in 2005. *See* College Board, *supra* note 47.

^{68.} See New York SAT Data, supra note 56.

^{69.} See id.

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Which Item Appeared on the SAT and Which Item was Rejected? Is Either Item (or both) Noticeably Biased?

If the area of a square is $4x^2$, what is the length of a side?	If $\sqrt{2x}$ is an integer, which one of the following must also be an integer?
a. x b. 2x c. 4x d. x ² e. 2x ²	a. \sqrt{x} b. x c. 4x d. x^2 e. $2x^2$

The item on the right side (with C as the correct answer) was answered correctly by a greater percentage of African American testtakers than Whites. The item on the left side (with B as the correct answer) was answered correctly by a higher percentage of Whites.⁷¹ Would it shortchange America's high school seniors if items like that on the right appeared on the scored SAT in addition to or instead of items like that on the left?⁷² While the content of both items is ostensibly neutral, can it be said that the SAT is truly unbiased if, time and time again, the test construction process tends to prefer (for statistical reasons) items like the one on the left (that favors Whites), and rejects items like the one on the right (that favors African Americans)?

III. EDUCATIONAL ANALYSIS

The Devilish Details of Disparate Impact

At the outset, we wish to make clear that neither our results nor other evidence suggests that ETS intends to construct the SAT and

^{70.} See Marcus, supra note 64.

^{71.} This item is from our New York SAT data. It was item number 14 on the second Math section of the November 1988 SAT. See New York SAT Data, supra note 56.

^{72.} For clarification, we do not suggest that these two items specifically, which test different concepts yet have similar answer options, should be swapped. Here we remind readers that the unavailability of data on experimental questions constrains our ability to present ideally matched comparison items.

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other standardized tests to ensure African Americans and Chicanos score lower than Whites. Indeed, it appears that a large majority of ETS staffers believe strongly in increased educational access for students of color and support affirmative action. We do not doubt that those involved in the development of the SAT strive for scrupulous fairness; nor do we contest that blatantly culturally biased questions (such as those rewarding familiarity with regattas, pirouettes, etc.)⁷³ are by far the exception and not the rule. Good intentions aside, facially neutral test construction has, for purely statistical reasons independent of discriminatory animus, the ultimate effect of contributing to—even guaranteeing—the lower performance of African Americans and Chicanos on the SAT. Obviously, our counter-intuitive and rather startling claim requires explanation.

Before any item is included in a scored section of the SAT, it must first pass through a rigorous, multi-step test construction process. The psychometricians who develop norm-referenced standardized tests such as the SAT generally adhere to two primary requirements when selecting items for the final version of the test: (1) items must be reliable, meaning that each item is internally consistent with the other items on the same test; and (2) items must meet particular specifications for level of difficulty (some questions are relatively easy, others are hard) so that the final version of the test will differentiate between test-takers of different ability levels.⁷⁴

RUNNER: MARATHON

- (A) envoy:embassy
- (B) martyr:massacre
- (C) oarsman:regatta *the correct answer*
- (D) referee:tournament
- (E) horse:stable

On this question 53% of Whites but just 22% of African Americans chose answer (C). John Weiss, The Golden Rule Bias Reduction Principle: A Practical Reform, EDUC. MEASUREMENT ISSUES & PRACTICE, Summer 1987, at 23, 24. This question is frequently cited as an example of the SAT testing familiarity with White upper-middle class social norms rather than the ability to logically identify the appropriate relationship. See id.

74. See Robert L. Linn & Fritz Drasgow, Implications of the Golden Rule Settlement for Test Construction, EDUC. MEASUREMENT ISSUES & PRACTICE, Summer 1987, at 13 ("Classical item analysis techniques have traditionally emphasized two item characteristics: item difficulty (i.e., the proportion of test takers giving the correct answer to an item) and item discriminating power (i.e., the correlation between scores on a given item and total test scores).").

^{73.} One example is this SAT question from the early 1980s:

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While test reliability is operationalized by means of mathematical models with forbidding names like "item response theory" (IRT),75 the underlying concept is simple: a "reliable" item is one that people of "high ability" tend to answer correctly and people of "low ability" tend to answer incorrectly.⁷⁶ The requirements for reliability on the SAT, LSAT, GRE, and similar tests do not depend on an independent, external measure of ability.⁷⁷ Rather, item reliability is assessed by the correlation between performance on that item and performance on the test overall (or the entire portion of a test within a defined content domain). 78 If, after pre-testing, the correlation between an item and the larger test set drops below about 0.30, that item is typically flagged as a poor, unreliable question that can be excluded from the final version of the test (at least in its current form).⁷⁹

To show how a seemingly neutral, innocuous process of selecting test questions creates an unnecessary adverse impact for students of color, imagine a pool of 1,000 pre-tested SAT Verbal sentencecompletion questions in which White students, on average, score higher than Black and Chicano students. 80 Next, assume that among these 1,000 items, 100 items slightly favor Whites and 100 items slightly favor African Americans and Chicanos. As evidenced in the results section, 81 the direction (and the causes) of favoritism will seldom be readily apparent, even to expert sensitivity. After wellintentioned psychometricians calculate the correlations between each of the 1,000 items and total test scores, the key issue is which items will be accepted for an actual SAT and which items will be rejected?

Consistent with our empirical findings, we argue that in this

^{75.} See Martin M. Shapiro, Expert Reports on Behalf of Student Interventors: A Psychometric Model for Preserving Discrimination (expert report submitted on behalf of intervening defendants (student intervenors), Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001)(No. 97-75928)), reprinted in 12 LA RAZA L.J. 387 (2001) [hereinafter Expert Report of Martin M. Shapiro].

^{76.} See Jay Rosner, Discrimination Is Built into Standardized Aptitude Tests, LONG TERM VIEW, Sept.-Oct. 1993, at 14, 16.

^{77.} See Expert Report of Martin M. Shapiro, supra note 76.

^{78.} See Martin M. Shapiro et al., Minimizing Unnecessary Racial Differences in Occupational Testing, 23 VAL. U. L. REV. 213, 224-25 (1989); Linn & Drasgow, supra note 73, at 13.

^{79.} See Shapiro et al., supra note 79, at 224-25.

^{80.} This hypothetical is our adaptation of similar examples in Shapiro et al., see id. at 225-26; see also Expert Report of Martin M. Shapiro, supra note 70.

^{81.} See supra Part II.

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hypothetical, questions that are "biased" in favor of Whites have a fair chance of making their way onto a scored section of the SAT; ones that are "biased" against Whites have virtually no chance of appearing on a real SAT section. 82 Note that nothing is conspiratorial about our claim; it follows mathematically from the application of facially neutral tools of test construction. If Whites score higher overall on the set of 1,000 questions, then it must be true that "race-blind" item analysis will often detect robust and positive correlations for the items biased in favor of Whites, and weakly positive or even negative correlations for the items biased in favor of Blacks and Chicanos. In other words, item bias favoring Whites will tend to spuriously appear as reliable, whereas item bias favoring African Americans and Chicanos will, on balance, artificially appear as unreliable. The imposition of this White preference standard of test reliability necessarily follows, because the benchmark of reliability is simply the sum total of all biased and unbiased questions—meaning that there is a "tyranny of the majority" dilemma inherent in the way reliability is constructed.

While skeptics of our analysis may criticize it as too speculative, empirical evidence supports our claims. Rachelle Hackett and other ETS researchers studied the issue of disparate impact of test items by assembling two tests from a pool of experimental GRE items: the first was intended to minimize Black-White differences and the second was designed to maximize Black-White differences.⁸³ Hackett et al. found that the "maximum impact" test sections had item-test correlations that were just as high as the control group.⁸⁴ Equally troubling, the ETS researchers found that the maximum impact sections typically exhibited higher correlations with the operational (real) sections of the GRE than did the control sections. 85

It is even more disconcerting that the disparate impact attributable to SAT reliability requirements is self-perpetuating.⁸⁶ The process of

^{82.} See James W. Loewen, A Sociological View of Aptitude Tests, in U.S. COMM'N ON CIVIL RIGHTS, THE VALIDITY OF TESTING IN EDUCATION AND EMPLOYMENT 73, 85-86 (1993) (noting that point-biserial requirements are more likely to exclude items favoring women and minorities) (citing DAVID OWEN, NONE OF THE ABOVE: BEHIND THE MYTH OF SCHOLASTIC APTITUDE 124 (1985)).

^{83.} See Rachelle Kisst Hackett et al., Test Construction Manipulating Score Differences Between Black and White Examinees: Properties of the Resulting Tests 31 (1987), ETS RESEARCH REPORT NO. 87-30.

^{84.} See id. at 8 tbl.3.

^{85.} See id. at 18 fig. 10.

^{86.} See Shapiro et al., supra note 79, at 226; Expert Report of Martin M. Shapiro, supra note 76.

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developing new SAT questions is an ongoing feedback loop that includes writing, pre-testing, analyzing, and finally administering scored questions. Test writers, regardless of their background, are rewarded for maximizing the number of "reliable" items they construct. and minimizing the wasted time associated with developing items that will later be tossed away as "unreliable." Thus, this subtle White preference standard may become an imbedded social norm over the course of successive test administrations.⁸⁷ Such a bias tends to be obscured because Whites have historically scored higher on the SAT than African Americans and Chicanos. The entire score gap is usually attributed to differences in academic preparation, although a significant and unrecognized portion of the gap is an inevitable result of the flaw in the development process.⁸⁸

Our second, more concrete example also sheds light on the consequences of developing standardized test items around traditional notions of reliability. Over the years, one of us (Mr. Rosner) provided pro bono legal services to students in disputes with standardized test producers. One such student, Chris Laucks, took the LSAT in 1981 when it included math problems similar to those appearing on the SAT or GRE today. On a particular geometry problem, ETS mistakenly omitted a right angle marker. With the marker, one answer would have been mathematically correct, but in the absence of the marker, a different answer was mathematically correct. Unfortunately, Laucks picked the answer he knew to be mathematically correct instead of the answer he suspected ETS wanted.

After Mr. Laucks received his LSAT score with this geometry question marked incorrect, he wrote a complaint to the Law School Admission Council (LSAC) and attached a flawless mathematical proof of his answer. Oddly enough, LSAC confirmed that Laucks was correct, but it would not give him credit for his correct answer. Strict adherence to correlation requirements accounts for LSAC's peculiar stance. In its view this item was defective, because in pre-testing, "high ability" students picked the other, incorrect answer. Thus, to give Laucks points for this question (and to penalize those picking the

^{87.} Cf. Daria Roithmayr, Barriers to Entry: A Market Lock-in Model of Discrimination, 86 VA. L. REV. 727 (2000) (advancing an economic argument that institutional networks among law school professional organizations tend to construct merit criteria that pose significant barriers to entry for people of color, and that such discrimination becomes imbedded over time).

^{88.} See Shapiro et al., supra note 79, at 226.

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other answer) would violate a sacrosanct principle of test reliability. Accordingly, ETS wrote a letter to test-takers explaining why the item was pulled from scoring (rather than crediting Laucks and others who picked (D) as the correct answer), in which it stated:

As was noted above, the credited response to the question was (C). Statistical results from a trial administration of the question indicated that the question, with (C) as the answer, was functioning as intended. If the question had been keyed (D) in the trial administration, the statistics would have shown that it did not function properly, and it would not have been used in the LSAT.89

Chris Laucks learned the hard way that traditional psychometric methods will not allow the "right" people to get the answer wrong and the "wrong" people to get the answer right, even if this is what happened in fact. Critical race theorist Richard Delgado has criticized standardized tests for their "epistemological fascism" because of the ways such tests reward particular thinking styles and punish other styles. 90 Laucks' Alice in Wonderland experience with the LSAT—if the highest scorers pick "A" as their answer, and it is later proven that "B" is the correct answer, then the question, and not the answer key is deemed to be defective—is certainly consistent with Delgado's criticism.

While test producers vigorously defend item-test reliability as an essential tool of sound test construction, examples such as Laucks' raise the point that the overzealous pursuit of test reliability can actually undermine the construct validity⁹¹ of the SAT and similar

^{89.} Letter from ETS to LSAT Test-Takers, April 30, 1981, reprinted in DAVID M. WHITE. THE EFFECTS OF COACHING, DEFECTIVE QUESTIONS, AND CULTURAL BIAS ON THE VALIDITY OF THE LAW SCHOOL ADMISSION TEST Appendix A (1984).

^{90.} See Richard Delgado, Barrett Lecture on Constitutional Law at UC Davis Law School (Oct. 12, 2000). See also Richard Delgado, Official Elitism or Institutional Self-Interest? 10 Reasons Why UC Davis Should Abandon the LSAT (and Why Other Good Law Schools Should Follow Suit), 34 U.C. DAVIS L. REV. 593, 599 (2001) ("Standardized tests punish takers who deviate from the path the designer has in mind. This enforced orthodoxy is independent of particular items and terms that disadvantage minorities and the working class, such as regattas and tuxedos. It also punishes those who think outside the box."); Lani Guinier, Confirmative Action, 25 LAW & Soc. INQUIRY 565, 582 (2000) ("One can certainly begin to speculate, however, that multiple-choice, timed testing may train successful candidates not to question authority, not to look for innovative ways to solve problems, not to do sustained research or to engage in team efforts at brainstorming, but instead to try to answer questions quickly and in ways that anticipate the desires or predilections of those asking the questions.").

^{91.} For a discussion of construct validity see, e.g., U.S. DEPT OF EDUC. OFFICE FOR CIVIL RIGHTS, THE USE OF TESTS AS PART OF HIGH-STAKES DECISION-MAKING FOR

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standardized tests. For example, Professor Stuart Katz and his colleagues at the University of Georgia gave SAT Reading Comprehension questions and answers to students without the actual reading passages. Katz found that because of factors such as outside knowledge and test-wiseness, honors students correctly answered fortyseven of the 100 questions on average, and a broader mix of students answered thirty-eight questions correctly, whereas random guessing would result in about 20 correct responses. 92 However, SAT Reading Comprehension sections were altered in the 1990s to include fewer but longer passages with more questions, and Reading Comprehension increased from 29% of the Verbal score to 51%. Despite these revisions to the SAT, Katz found that students in introductory psychology courses could still answer 36% of the new Reading Comprehension items correctly without access to the reading passages.⁹⁴ We suggest, based partly on this line of research, that reliability requirements likely play a role in undermining the construct validity of SAT Reading Comprehension. If savvy test-taking is more helpful than actually understanding the reading passages, then the SAT's construct validity is suspect, and the hypertrophied virtue of item reliability may be contributing to the degradation of construct

STUDENTS 25 (Dec. 2000) ("Construct validity refers to the degree to which the scores of test takers accurately reflect the constructs a test is attempting to measure."); AM. EDUC. RESEARCH ASS'N ET AL., STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING 173 (1999) (defining a construct as "the concept or the characteristic that a test is designed to measure"); Samuel Messick, Foundations of Validity: Meaning and Consequences in Psychological Assessment, ETS RESEARCH REPORT NO. 1, at 9 (1993) (stating that construct validity "comprises the evidence and rationales supporting the trustworthiness of score interpretation in terms of explanatory concepts that account for both test performance and score relationships with other variables") Samuel Messick, Validity, in EDUCATIONAL MEASUREMENT, THIRD EDITION 13, 42 (Robert L. Linn ed., 1989) ("Indeed, the substantive component of construct validity entails a veritable confrontation between judged content relevance and representativeness, on the one hand, and empirical response consistency, on the other.").

^{92.} See Stuart Katz, Answering Reading Comprehension Items Without Passages on the SAT, 1 PSYCHOL. Sci. 122, 123, 125 (1991). See also Chris Raymond, Study Questions Validity of Reading-Comprehension in SAT, CHRON. HIGHER EDUC., April 25, 1990, at A5 (describing a Katz study and response by the College Board).

^{93.} See Stuart Katz, Answering Reading Comprehension Items Without Passages on the SAT-1, 85 PSYCHOL. REP. 1157, 1158 (1999).

^{94.} See id. at 1160. For further corroboration of this line of research see Stuart Katz et al., Answering Reading Comprehension Items Without Passages on the SAT When Items Are Quasi-Randomized, 51 EDUC. & PSYCHOL. MEASUREMENT 747 (1991); Stuart Katz & Gary J. Lautenschlager, Answering Reading Comprehension Questions Without Passages on the SAT-I, ACT and GRE, EDUC. ASSESSMENT 295 (1994); Stuart Katz & Gary J. Lautenschlager, The SAT Reading Task in Question: Reply to Freedel and Kostin, 6 PSYCHOL. SCI. 126 (1995); Stuart Katz et al., Answering Quasi-Randomized Reading Items Without the Passages on the SAT-I, 93 J. EDUC. PSYCHOL. 772 (2001).

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validity.

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B Does Differential Item Functioning Eliminate or Exacerbate Item Bias?

Our principal claim—that SAT reliability requirements can facilitate test item bias against Black and Chicano students-would be weakened if ETS and other test developers used methods that dependably rooted out biased items in the first place. Differential Item Functioning (DIF) is a statistical technique for identifying specific test items that are disproportionately more difficult for members of a race or gender group among test takers with equivalent overall test scores. 95 The Mantel-Haenszel statistic and "standardization" are two very similar methods, and are used by ETS, LSAC, and other test developers to measure DIF. 96

ETS promotional materials suggest that DIF is a sound method for flagging items that can unfairly penalize minorities. Sydell Carlton of ETS states:

Matching students according to their test scores and then examining how they did on individual test questions helps us to determine whether the test questions themselves may be creating problems for a particular group. . . . By using the DIF procedure, paired with the Test Sensitivity Review procedure, ETS helps ensure that its examinations provide a level playing field for all who take them. 97

^{95.} For an in-depth discussion of DIF techniques, see generally DIFFERENTIAL ITEM FUNCTIONING (Paul W. Holland & Howard Wainer eds., 1993).

^{96.} See W. Edward Curley & Alicia P. Schmitt, Revising SAT-Verbal Items to Eliminate Differential Item Functioning, COLLEGE BOARD REPORT NO. 93-2, at 3-4 (1993) (reviewing these two procedures and noting that they produce highly similar results); Loewen, supra note 83, at 84.

^{97.} Educational Testing Service, What's the DIF? Helping to Ensure Test Question Fairness, at http://www.ets.org/research/dif.html (last visited Dec. 31, 2001). This claim is not atypical of ETS and other test developers. See, e.g., Curley & Schmitt, supra note 91, at 3 ("Since DIF indices take into account overall differences in ability on the construct being measured by matching the groups before comparing their performance, DIF indices identify items that might have construct-irrelevant characteristics."); Jane Faggen, Golden Rule Revisited: Introduction, EDUC. MEASUREMENT ISSUES & PRACTICE, Summer 1987, at 5, 7 ("The Mantel-Haenszel statistic helps to identify differences in performance on an item-byitem basis that may reflect potentially irrelevant characteristics in certain test questions that may be unfair to certain groups."); Richard M. Jaeger, NCME Opposition to Proposed Golden Rule Legislation, EDUC. MEASUREMENT ISSUES & PRACTICE, Summer 1987, at 21, 22 (President of the National Council on Measurement in Education's (NCME) public letter to the New York legislature in opposition to a bill adopting item bias methods similar to those we advocate in this article: "Currently accepted measures of test item bias do not rest upon average performance differences between groups. Evidence of bias requires that an item be found to perform differently for individuals of equal ability.").

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As with claims about the SAT not having a disparate impact relative to other educational measures, ETS's public stance with respect to DIF does not withstand careful inspection. Put simply, DIF does not and cannot, as Carlton argues, "provide a level playing field." Continuing with this same metaphor, DIF techniques actually assume an overall level playing field, then proceed to look for an unusual pothole that might unfairly trip up one team or another, so to speak. If, for example, the playing field favors the home team by allowing them to run downhill to score a goal and forcing the away team to run uphill to score, this obvious bias would be undetected by DIF. The ETS "level playing field" argument is misleading and circular; by controlling for total test score before looking for potentially biased items, it is not possible for DIF to remove aggregate bias or lessen the overall racial and ethnic score gaps on the SAT. 98

ETS and other researchers even argue that since DIF does not decrease racial disparities, this is further corroboration that SAT items were unbiased all along.⁹⁹ Needless to say, we find this logic unconvincing. As James Loewen aptly put it, "DIF removes the adverse impact before looking for adverse impact!" A close look at the educational measurement literature reveals that several esteemed psychometricians, including many working for ETS and other test producers, acknowledge that DIF cannot identify and eliminate systematic item bias against a minority group because controlling for total test score means there is no external fairness standard. 101

^{98.} See Shapiro et al., supra note 79, at 226 ("[T]he available psychometric measures of item bias do not measure item bias per se but only item bias relative to overall test bias. These methodologies can only detect whether a particular item is significantly more biased or significantly less biased than the aggregate of all the test items as a whole."); Loewen, supra note 77, at 84 (noting that DIF does not impact group averages on a test).

^{99.} See Elizabeth Burton & Nancy W. Burton, The Effect of Item Screening on Test Scores and Test Characteristics, in DIFFERENTIAL ITEM FUNCTIONING, supra note 96, at 321; ZWICK, supra note 63, at 130. See also John E. Hunter & Frank L. Schmidt, Racial and Gender Bias in Ability and Achievement Tests: Resolving the Apparent Paradox, 6 PSYCHOL. PUB. POL'Y & L. 151 (2000).

^{100.} Loewen, supra note 83, at 85. Recall that our main point is that the test assembly procedures overall, rather than DIF specifically, worsens disparate impact.

^{101.} See, e.g., William H. Angoff, Perspectives on Differential Item Functioning Methodology, in DIFFERENTIAL ITEM FUNCTIONING, supra note 96, at 3, 17 ("For if the criterion is itself biased to some degree, then the application of a DIF analysis will certainly be flawed; further, if bias is pervasive in the criterion, then any attempt to identify bias in its component items will inevitably fail."); Lorrie Shepard et al., Comparison of Procedures for Detecting Test-Item Bias with Both Internal and External Ability Criteria, 6 J. EDUC. STAT. 317, 321 (1981) ("A major limitation of all of the bias detection approaches employed in the

Group test averages cannot be changed by DIF, which creates the foregone conclusion that questions biased "against" a group are counterbalanced by questions "in favor" of that group. 102 Some experts even argue that DIF can exacerbate rather than eliminate item bias against students of color because many questions favoring Whites would not stand out statistically after controlling for overall test score. 103

\mathbf{C} Can Golden Rule and Sound Test Development Procedures Coexist?

Our approach to reducing test item bias on the SAT bears some resemblance to the Golden Rule technique for ameliorating racial item bias, so this portion of Part III addresses common criticisms of the Golden Rule procedures. Golden Rule was a 1984 settlement of a lawsuit brought by the Golden Rule Insurance Company against the ETS over alleged racial bias on the Illinois Insurance Exam.¹⁰⁴ The core principle underlying this settlement was that when items are selected for the final version of the test, questions in each content area having smaller Black-White differences should be preferred over questions in the same content domain with larger racial disparities. 105 This principle was operationalized by classifying all questions as either Type I or Type II items after pre-testing. Type I items were those with Black-White correct answer rate differences of 15% or less and overall

research to date is that they are all based on a criterion internal to the test in question. They cannot escape the circularity inherent in using total score on the test or the average item to identify individuals of equal ability and hence specify the standard of unbiasedness."); Nancy S. Cole, Judging Test Use for Fairness, in U.S. COMM'N ON CIVIL RIGHTS, THE VALIDITY OF TESTING IN EDUCATION AND EMPLOYMENT 92, 102 (1993) (Cole, former ETS President, acknowledged that DIF cannot "guarantee that there is no gender bias in the questions."); Howard Wainer, Precision and Differential Item Functioning on a Testlet-Based Test: The 1991 Law School Admissions Test as an Example, 8 APPLIED MEASUREMENT IN EDUC. 157, 182 (1995) (conducting an ETS-sponsored study of LSAT DIF and noting, "Because performance on the test section itself determined the stratifying variable, the overall balance (zero overall DIF) is almost tautological. That the balancing works as well as it does at all levels of examinee proficiency is not mathematically determined.").

^{102.} See Gregory Camilli, The Case Against Item Bias Detection Techniques Based on Internal Criteria, in DIFFERENTIAL ITEM FUNCTIONING, supra note 96, at 397, 409 ("Holding ability constant, if one group of examinees tends to miss some items unexpectedly, it must unexpectedly answer other items correctly. In other words, items that disfavor the minority group are canceled by items that favor the minority group.").

^{103.} See Loewen, supra note 83, at 85-86.

^{104.} See Patrick Rooney, Golden Rule on Golden Rule, EDUC. MEASUREMENT ISSUES & PRACTICE, Summer 1987, at 9, 10-11 (discussing Golden Rule Ins. Co. v. Washburn, No. 419-76 (Ill. Cir. Ct. 7th Jud. Cir. Nov. 20, 1984) (consent decree)).

^{105.} See Shapiro et al., supra note 79, at 250-52.

correct answer rates of 40% or higher. Type II referred to all other items, including those with large racial disparities. Four terms of the settlement covered these two categories: (1) Type I items were to be used as long as they were available in sufficient numbers; (2) among Type I items, those with the smallest Black-White disparities were to be used first; (3) Type II items could be used when Type I items were not sufficiently available; and (4) among Type II items, those with the smallest Black-White disparities were to be used first. After Golden Rule-type procedures were proposed in litigation over the National Teacher Exam in Alabama and then in college admission testing legislation in New York and California, ETS announced that the Golden Rule settlement was a "mistake." 108

The debate over the Golden Rule settlement is important for our psychometrician Lloyd Bond observed, psychometric profession is virtually unanimous in its condemnation of the Golden Rule as a bad precedent, even if unintended."109 criticism made by psychologists and lawyers for testing corporations is that the Golden Rule approach will jeopardize the "blueprint" of standardized tests, which has to do with the balancing of different forms of content on the exam. 110 For instance, education attorney Michael Rebell hypothesized that on a teacher exam, if minority teaching candidates do perform relatively worse on geometry problems, then the Golden Rule method will distort the test by unwisely steering the test away from an educationally optimal weighting of geometry problems. 111 However, Rebell's criticism is a straw man argument, insofar as the Golden Rule settlement carried out the classification of test item types separately within each subject Likewise, we advocate minimizing racial and ethnic area. 112 performance disparities within each of the SAT subsections and content areas.

^{106.} See Faggen, supra note 98, at 5, 6.

^{107.} See Linn & Drasgow, supra note 75, at 13, 14.

^{108.} See Faggen, supra note 98, at 6; Robert L. Linn, Bias in College Admissions Measures, in THE COLLEGE ADMISSIONS PROCESS: A COLLEGE BOARD COLLOQUIUM 80, 81 (1986); Gregory R. Anrig, ETS on "Golden Rule," EDUC. MEASUREMENT ISSUES & PRACTICE, Fall 1987, at 24.

^{109.} Lloyd Bond, *The Golden Rule Settlement: A Minority Perspective*, EDUC. MEASUREMENT ISSUES & PRACTICE, Summer 1987, at 18, 20.

^{110.} See Michael A. Rebell, Disparate Impact of Teacher Competency Testing on Minorities: Don't Blame the Test-Takers—or the Tests, 4 YALE L. & POL'Y REV. 375, 394 (1986); S.E. Phillips, The Golden Rule Remedy for Disparate Impact of Standardized Testing: Progress or Regress?, 63 ED. LAW REP. 383, 412-13 (1990).

^{111.} See Rebell, supra note 111, at 394.

^{112.} See Shapiro et al., supra note 79, at 250 n.164.

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The most common criticism of Golden Rule procedures is related to the "test blueprint" issue. Linn, Dragow, Rebell, and Jaeger argue that Golden Rule will disproportionately allow only easy items on the scored version of the test, because difficult items create the largest racial and ethnic gaps in performance. 113 This criticism lacks empirical support. In our database of 1998 SAT questions, we generally found that group differences are smaller on difficult and easy questions, and largest on questions of moderate difficulty. 114 For example, Robert Linn of the University of Colorado, one of the more outspoken critics of Golden Rule, states that "such an approach would have a negative effect on the reliability and validity of the resulting tests."115 To support his argument that Golden Rule "tortures validity." Linn claims that only a meager proportion of SAT items would qualify as Type I items under Golden Rule. 117 However, Linn's comparison between the SAT and the Illinois Insurance Exam is unpersuasive. Each question on the Insurance Exam only has four options, whereas SAT (and LSAT, GRE, GMAT, etc.) items have five options. Thus, Linn compares apples to oranges when he claims that Golden Rule's 40% minimum correct threshold will exacerbate rather than lessen group test score differences because it would tend to eliminate SAT items with the smallest disparities. 118 Moreover, such a critique is irrelevant to our results about the SAT, since we believe it would be unnecessary to impose a minimum cut-off for correct answer rates. In the context of the Illinois Insurance Exam, the 40% threshold was merely an attempt to ensure that selected items have a correct-rate above random guessing (25%, based on four multiple choice

^{113.} See Linn, supra note 109, at 81; Rebell, supra note 111, at 394; Linn & Drasgow, supra note 75, at 14-15; Richard M. Jaeger, supra note 98, at 21, 22.

^{114.} We note that this is partly a consequence of defining impact based on the difference in percentage correct rates. For example, a question answered correctly by 20% of Whites and 15% of Blacks appears small because 20% minus 15% equals 5%. In contrast, one could use another definition, such as the ratio of correct rates. From the latter perspective, African American performance would only be 75% of White performance, a seemingly larger discrepancy, and one that is not necessarily smaller than performance differences on typical moderate-difficulty questions. Nonetheless, we still argue that Linn, Drasgow, Rebell, and Jaeger are incorrect because these scholars reference the same definition of impact that we adopt in this article.

^{115.} Linn, supra note 109, at 81.

^{116.} *Id.*; Linn & Drasgow, *supra* note 75, at 17.

^{117.} Linn, supra note 109, at 81 (claiming only twenty-five of eighty-five SAT items would be classified as Type I). While Linn raises this point in order to condemn Golden Rule, a skeptic of standardized testing might interpret the same data as an admission that a high proportion of SAT items are indeed tinged with racial bias.

^{118.} See Linn, supra note 109, at 81; Linn & Drasgow, supra note 75, at 14-15.

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questions). 119 Moreover, for the SAT, the large population of 1.3 million test-takers eases concerns about inadequate item pools.

In their enthusiasm to condemn Golden Rule, Linn and Drasgow advance the curious position that Golden Rule will: (1) corrupt test validity because it will eliminate items with the largest group disparities, which they claim tend to be the most difficult items; and (2) worsen racial disparities because elimination of proportionately more difficult items will generally remove the items with smaller racial/ethnic differences. 120 As we demonstrate below, these claims are unsubstantiated and are contrary to subsequent empirical research, much of which was conducted by ETS.

In reality, the Golden Rule method in fact decreased Black-White differences on the Illinois Insurance Exam. 121 Additionally, when ETS researchers applied Golden Rule-inspired adverse impact reduction procedures to experimental sections of the GRE, they acknowledged that racial/ethnic disparities could be lessened without compromising test integrity:

First, such techniques can reduce impact . . . Second, the resulting tests can be made to look parallel in form and content to conventionally constructed tests and meet their specifications if the item pools are sufficiently large. Third, the average difficulty level of the resulting tests can be maintained without changing current test development procedures for adhering to average difficulty specifications. However, the distribution of item difficulties will change This may be a controllable phenomenon. 122

Unfortunately, in the fifteen years since this ETS study was published, ETS, the College Board, LSAC, GMAC, and AAMC still have not implemented impact reduction techniques on the SAT, LSAT, GRE, GMAT, or MCAT. Martha Stocking and other ETS researchers recently revisited the issue of item bias reduction techniques on populations of women, African Americans, and Latinos. 123

^{119.} See Shapiro et al., supra note 79, at 251 n.166.

^{120.} See Linn, supra note 109, at 81; Linn & Drasgow, supra note 75, at 14-15.

^{121.} See Shapiro et al., supra note 79, at 254-55; John Weiss, The Golden Rule Bias Reduction Principle: A Practical Reform, EDUC. MEASUREMENT ISSUES & PRACTICE, Summer 1987, at 23, 25. But see Phillips, supra note 111, at 404-05 (questioning claim of Shapiro et al. that the Golden Rule technique reduces racial disparities).

^{122.} Hackett et al., supra note 84, at 31.

^{123.} See generally Martha Stocking et al., An Empirical Investigation of Impact

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findings, consistent with our findings and earlier research, were that accounting for group differences when assembling SAT test forms can lessen the adverse impact of the test without compromising construct validity and with only minor effects on test reliability. 124

D Practical Considerations

What Are the Consequences for Asian Pacific Americans and for Women?

SAT disparate impact reduction procedures raise thorny policy questions about race, ethnicity, gender, and other categories. Which groups should be included in efforts to reduce adverse impact on standardized test questions, and what are the consequences of excluding certain groups from Golden Rule-style adjustments?¹²⁵ We will briefly discuss two key considerations: (1) the impact on Asian Pacific American (APA) test-takers; 126 and (2) the feasibility of simultaneously reducing adverse impact for African Americans, Latinos, 127 and women.

Because of the role that education plays in America's opportunity structure, it is particularly important to attend to interracial conflicts that may arise from our approach to impact moderation on the SAT. 128

Moderation in Test Construction, ETS RESEARCH REPORT NO. 01-04 (2001). While the authors of this study did not disclose the particular Math and Verbal test they studied, the details of their study-including the racial, ethnic and gender gaps on the test, and the size of the populations taking each of the test forms and the size of the item pools-strongly suggest that this was a study of the SAT. Cf. id. at 7 tbl.1.

- 124. See id.
- 125. Cf. Paul Brest & Miranda Oshige, Affirmative Action for Whom?, 47 STAN. L. REV. 855 (1995) (analyzing similar questions in the context of education and employment affirmative action programs).
- 126. The term APA is extremely heterogenous. Unfortunately, the College Board appears not to publish annual data on the composition of APA students taking the SAT by subgroup. Data from UC Berkeley is informative on this point, but is probably not representative of national trends. See Mark Tanouye et al., Asian Pacific Americans at Berkeley: Visibility and Marginality 17 (2001) (unpublished report by the UC Berkeley Campus Advisory Committee for Asian American Affairs to UC Berkeley Chancellor Robert Berdahl) (In 2000, there were 9,110 APAs at Berkeley (40% of the undergraduate student body), and of this group 50% had national origins in China, 15% in Korea, 9% in India/Pakistan, 7.5% in Vietnam, 7.5% in the Philippines, 5% in Japan, and 1% in the Pacific Islands). See id.
- 127. While we looked at Chicanos specifically in our data set, the ETS research we cite to on this point covers Latinos rather than Chicanos specifically. See infra note 142 and accompanying text.
- 128. See, e.g., ERIC K. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHT AMERICA (1999) (analyzing interracial conflict in

Some readers may have legitimate concerns about whether using item bias reduction techniques in order to produce a "fairer" SAT for African Americans and Latinos might unintentionally cause harm to APAs taking the SAT. APAs comprised 8% of those taking the SAT in 1991, and this grew to 10% in 2001. 129 Over the last decade APAs have scored about thirty points lower on average than Whites on the Verbal section of the SAT and about thirty-five points higher than Whites on the Math section. 130

Stocking's most recent ETS study of impact moderation on the SAT indicates that attempts to reduce Black-White and Latino-White test score gaps will not adversely effect APAs. ¹³¹ In a sample of 5,863 APA test-takers, the four methods of moderating the Verbal section of the test resulted in an average increase in the gap favoring Whites by 0.015 standard difference units, and the six methods of moderating the Math section resulted in increasing APAs' advantage by 0.083 standard difference units. 132 In practical terms, this would translate to a net gain for APAs of approximately five points on the SAT. 133 In fact, the Verbal section which resulted in the best impact reduction for Blacks and Latinos also most effectively decreased APAs' disadvantage on the Verbal section, whereas the section that increased disparate impact for Blacks and Latinos negatively affected APAs as well. 134 Likewise, the Math section which most effectively reduced impact for African Americans and Latinos also increased APAs' advantage on the Math section vis-à-vis Whites. 135 These findings suggest no inherent conflict between impact reduction techniques and APA performance on the

education and other settings); see also Kevin R. Johnson, Lawyering for Social Change: What's a Lawyer to Do?, 5 MICH. J. RACE & L. 201 (1999).

^{129.} See College Board Press Release, supra note 9, at 6.

^{130.} See id.; How Scores on the SAT Vary, CHRON. HIGHER EDUC., Sept. 17, 1999; Eric Hoover, Average Scores on the SAT and the ACT Hold Steady, CHRON. HIGHER EDUC., Sept. 7, 2001, at A52; Leo Reisberg, Disparities Grow in SAT Scores of Ethnic and Racial Groups, CHRON. HIGHER EDUC., Sept. 11, 1998, at A42.

^{131.} See Stocking et al., supra note 124, at 15 tbl.4; WARREN W. WILLINGHAM & NANCY S. COLE, GENDER AND FAIR ASSESSMENT 21-23 (1997).

^{132.} Standard difference (D) is a statistic used to make group comparisons across different tests and populations. See WILLINGHAM & COLE, supra note 132, at 21-23.

^{133.} This rough estimate is extrapolated from Willingham and Cole's chart listing D values on the SAT. See id. at 24 fig.2.2.

^{134.} Stocking et al., supra note 124, at 15 tbl.4. (showing that application of the "test construction" method to Verbal Section 2 decreased the gaps by 0.18 Ds for African Americans, 0.15 Ds for Latinos, and 0.10 Ds for APAs while application of the "test selection" method to Verbal section 1 increased the gaps by 0.04 Ds for African Americans, 0.09 Ds for Latinos, and 0.13 Ds for APAs).

^{135.} See id. (showing that application of the "test construction-small" method to Math Section 2 decreased the gaps by 0.12 Ds for African Americans, 0.07 Ds for Latinos, while it increased APA performance by 0.17 Ds).

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In summary, we are confident in concluding that Golden Rulestyle impact moderation techniques would not create a barrier to opportunity for APA college applicants. Other factors—such as legacy preferences at elite private universities, SAT Verbal cut-off scores, and covert enrollment ceilings-pose far more serious threats to equal educational opportunity for APAs in the contemporary admissions environment 136

Standardized tests usually have a modest disparate impact on women, as it is well documented that women perform slightly less well than men (both overall and within racial/ethnic groups) on the SAT, GRE, GMAT, MCAT, and LSAT. 137 This pattern occurs despite the fact that women consistently obtain better grades than men in high school, college, and most graduate school programs. 138 Consequently, higher education standardized tests are frequently criticized for being gender biased. 139

Fortunately, ETS research repeatedly demonstrates that it is

^{136.} See, e.g., DANA Y. TAKAGI, THE RETREAT FROM RACE: ASIAN-AMERICAN ADMISSIONS AND RACIAL POLITICS 34, 62-70, 96-98 (1992); see Grace W. Tsuang, Note, Assuring Equal Access of Asian Americans to Highly Selective Universities, 98 YALE L.J. 659, 670-74 (1989); see also Kidder, supra note 15, at 59-67; John D. Lamb, The Real Affirmative Action Babies: Legacy Preferences at Harvard and Yale, 26 COLUM. J.L. & SOC. PROBS. 491, 502-06 (1993).

^{137.} See WILLINGHAM & COLE, supra note 132, at 84 tbl.3.2; Richard J. Coley, Differences in the Gender Gap: Comparisons Across Racial/Ethnic Groups in Education and Work, ETS POLICY INFORMATION REPORT 18-25 (2001); Linda F. Wightman, Analysis of LSAT Performance and Patterns of Application for Male and Female Law School Applicants, LSAC RESEARCH REPORT NO. 94-02, at 25 tbl.8 (1994).

^{138.} See WILLINGHAM & COLE, supra note 132, at 128-38; Dana Keller et al., Relationships Among Gender Differences in Freshman Course Grades and Course Characteristics, 85 J. EDUC. PSYCHOL. 702 (1993).

^{139.} See, e.g., William C. Kidder, Portia Denied: Unmasking Gender Bias on the LSAT and Its Relationship to Racial Diversity in Legal Education, 12 YALE J.L. & FEMINISM 1 (2000); David K. Leonard & Jiming Jiang, Gender Bias and the College Predictions of the SAT: A Cry of Despair, 40 RESEARCH IN HIGHER EDUC. 375 (1999); Susan Sturm & Lani Guinier, The Future of Affirmative Action: Reclaiming the Innovative Ideal, 84 CAL. L. REV. 953, 992-97 (1996); Espinoza, supra note 54, at 127-38; Andrea L. Silverstein, Note, Standardized Tests: The Continuation of Gender Bias in Higher Education, 29 HOFSTRA L. REV. 669 (2000); Katherine Connor & Ellen J. Vargyas, The Legal Implications of Gender Bias in Standardized Testing, 7 BERKELEY WOMEN'S L.J. 13 (1992); Kary L. Moss, Standardized Tests as a Tool of Exclusion: Improper Use of the SAT in New York, 4 BERKELEY WOMEN'S L.J. 230 (1989); PHYLLIS ROSSER, THE SAT GENDER GAP: IDENTIFYING THE CAUSES (1989); James W. Loewen et al., Gender Bias in SAT Items (1988) (paper presented at the AERA Conference, available at U.S. Dept. of Education, ERIC document # ED 294 915).

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possible to simultaneously moderate racial/ethnic item bias and gender item bias. 140 This "win-win" scenario is, in part, a statistical byproduct of the fact that 59% of African American and 58% of Latino SAT testtakers are women (compared to 54% of Whites)—meaning that efforts to moderate gender impact will necessarily reduce racial/ethnic impact to some degree, and vice versa. 141

2. How Much Can the Golden Rule Approach Reduce the Test Score Gap?

In analyzing the GRE, Hackett et al. were able to decrease the Black-White test score gap by 18%-33% using item moderation techniques. 142 In a 1998 study, Martha Stocking and other ETS researchers studied impact moderation on the SAT Math section on over 600 items administered to 2.5 million test-takers. 143 Stocking et al. were able to reduce about 20% of the gender gap while also decreasing the Black-White gap by 9%. 144 According to Stocking et al.'s 2001 study of the SAT, the "test construction" method (which yielded more consistent results) reduced 3%-19% of the Black-White Verbal gap, 6%-11% of the Black-White Math gap, 7%-25% of the Latino-White Verbal gap, and 0%-12% of the Latino-White Math gap, at the same time that gender gaps were also lessened. 145

However, there is reason to view ETS "in house" experimental efforts at impact moderation with some skepticism. 146 For example, in Stocking et al.'s studies, the Verbal items were subject to sixty-four constraints on test content and statistical properties in addition to consideration of impact, and Math items were subjected to 196 such constraints. 147 Such statistical straitjacketing will lessen the

^{140.} See Stocking et al., supra note 124, at 15 tbl.4.; Martha L. Stocking et al., An Investigation of the Simultaneous Moderation of Average Gender and African-American Score Differences on a Test of Mathematical Reasoning, ETS RESEARCH REPORT NO. 98-46, at 36 (1998).

^{141.} See Stocking et al., supra note 124, at 30; see also Coley, supra note 138, at 20 (illustrating through graphs that American Indians, African Americans, Chicanos, Puerto Ricans, and other Latinos all have higher proportions of female SAT test-takers than Whites).

^{142.} See Hackett et al., supra note 84, at 27.

^{143.} See generally Martha L. Stocking et al., supra note 141.

^{144.} See id. at 36.

^{145.} See Stocking et al., supra note 124, at 15 tbl.4.

^{146.} See Shapiro et al., supra note 79, at 254 (noting the low priority given to impact reduction by ETS regarding the post-Golden Rule Illinois Insurance Exam).

^{147.} See Stocking et al., supra note 124, at 11.

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effectiveness of impact moderation, causing ETS estimates to be on the low side. Outside researchers have estimated, for example, that Golden Rule-style techniques could decrease the Black-White disparity on the SAT by about 33%-40%. ¹⁴⁸ Based on the findings by ETS researchers. as well as outside scholars, we conclude that reducing approximately one-quarter of the Black-White and Chicano-White SAT score gaps is a reasonable goal using item impact reduction techniques.

The meaning of a one-quarter reduction should not be underestimated. To place things in perspective, it is helpful to examine how much or little racial/ethnic disparities have decreased in the last two decades on several standardized tests. Since 1980, African American and Latino high school seniors made gains of about 0.2 standard deviations (relative to Whites) on the National Assessment of Educational Progress (NAEP) Math test, Blacks and Chicanos improved about 0.2 standard deviations on the ACT Math test, and on the SAT Math section Chicano scores remained unchanged and African American performance improved only 0.1 standard deviations. 149 Therefore, the magnitude of impact reduction using Golden Rule-style techniques could easily exceed the meager SAT gains made by students of color on the SAT over the past twenty years.

IV. LEGAL ANALYSIS

This section analyzes the law governing standardized tests and Title VI disparate impact claims, including the prospects of enforcing the U.S. Department of Education disparate impact regulations through section 1983 of the Civil Rights Act of 1871. This section also examines the possibility of lodging complaints with the Office for Civil Rights. Because ETS and similar test producers are not recipients of federal financial assistance and are not subject to these civil right statutes, suing colleges and universities on a disparate impact theory

^{148.} Loewen, supra note 83, at 86.

^{149.} See George Madaus & Marguerite Clarke, The Adverse Impact of High-Stakes Testing on Minority Students: Evidence from One Hundred Years of Test Data, in RAISING STANDARDS OR RAISING BARRIERS? INEQUALITY AND HIGH-STAKES TESTING IN PUBLIC EDUCATION 85, 89-92 (Gary Orfield & Mindy L. Kornhaber eds., 2001); see also David W. Grissmer, The Continuing Use and Misuse of SAT Scores, 6 PSYCHOL., PUB. POL'Y, & L. 223, 225 (2000). We included examples from several standardized tests because the pool of students taking the SAT is not representative of all high school students and the selfselectivity of this pool changes over time; these two facts make it difficult to draw firm conclusions about SAT group performance differences over time.

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over their use of the SAT in admissions is the only judicial remedy.¹⁵⁰

A. Discriminatory Intent: A Dead-end for Plaintiffs

In the absence of a history of de jure segregation at a particular educational institution, it is difficult for plaintiffs to prevail on an Equal Protection claim against a university for relying on the SAT. To demonstrate an Equal Protection violation on the basis of racial discrimination requires a showing that the state actor was motivated by a discriminatory purpose or intent.¹⁵¹ Racial discrimination in standardized testing based upon facially-neutral test development procedures does not rise to the level of discriminatory purpose. For example, in Personnel Administrator of Massachusetts. v. Feeney, 152 the Supreme Court stated: "Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of It implies that the decisionmaker... selected or consequences. reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." 153

In Village of Arlington Heights v. Metropolitan Housing Development, 154 the Court specified a non-exhaustive list of factors that can support a finding of discriminatory purpose: (1) the historical background of the policy, particularly if it reveals a series of official actions taken for invidious purposes; (2) the specific sequence of events leading up to the challenged policy; (3) departures from normal

^{150.} See Nat'l Collegiate Athletic Ass'n. v. Smith, 525 U.S. 459 (1999) (ruling that the mere fact that the NCAA received funds from schools that, in turn, received federal financial assistance, does not expose the NCAA to lawsuits pursuant to Title IX of the Education Amendments of 1972); Cureton v. Nat'l Collegiate Athletic Ass'n, 198 F.3d 107, 114-19 (3d Cir. 1999) (holding in part that Title VI disparate impact regulations are program specific, and finding that the NCAA could not be sued over the alleged disparate impact of its minimum SAT score eligibility requirement under the theory that the NCAA has "controlling authority" over colleges and is therefore an indirect recipient of federal assistance). Cf. Silverstein, supra note 134, at 690-91 ("To date there have been no cases which challenge the mere existence of the SAT, and no suits against a university for using the SAT as a decisive factor in its admissions decisions. . . . ETS may not be considered an educational program because it does not specifically receive federal financial assistance.").

^{151.} See Washington v. Davis, 426 U.S. 229, 242 (1976) (proof of Equal Protection Clause violations require evidence of discriminatory intent); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 (1977) (ruling that proof of discriminatory purpose or intent is a prerequisite for establishing a constitutional violation).

^{152. 442} U.S. 256 (1979).

^{153.} Id. at 258.

^{154. 429} U.S. 252 (1977).

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procedural sequences; (4) substantive departures, particularly if the factors usually considered important by the decision maker strongly favor a policy contrary to the one implementation; and (5) the legislative or administrative history, especially where there are contemporary statements by members of the decision making body. 155

As a practical matter, discriminatory purpose is an exceedingly difficult burden of proof in the higher education/standardized testing context. For example, in *United States v. Fordice*, 156 the Supreme Court held that Mississippi's use of ACT cut-off scores in admissions was constitutionally suspect because it was originally adopted just days after the court ordered the University to admit African American students. 157 Further, the standardized test requirement that was traceable to that decision continued to have segregative effect, and Mississippi failed to demonstrate that sole reliance on test scores was educationally necessary. 158

B. Title VI Disparate Impact Regulations

Another litigation option is Title VI of the Civil Rights Act of 1964. The Supreme Court ruled, in Regents of the University of California v. Bakke, that Title VI prohibited only the same forms of purposeful discrimination that are forbidden by the Equal Protection Clause. 159 Similarly, in Guardians Association v. Civil Service Commission of the City of New York, five justices (in four separate opinions) held that Bakke compelled, as a matter of stare decisis, that the terms of section 601 of Title VI required proof of discriminatory The Bakke/Guardians Title VI intentional discrimination intent. 160 requirement has not been overturned in subsequent cases. 161

^{155.} See Vill. of Arlington Heights, 429 U.S. at 267-68 (1977).

^{156. 505} U.S. 717 (1992).

^{157.} See id.; WILLIAM C. KIDDER, TESTING THE MERITOCRACY: STANDARDIZED TESTING AND THE RESEGREGATION OF LEGAL EDUCATION chap. 2 (book manuscript under submission with Stanford University Press) (noting that Mississippi colleges adopted the ACT requirement one week after Meredith v. Fair, 298 F.2d 696 (5th Cir. 1962)).

^{158.} See Fordice, 505 U.S. at 735-39; see also Groves v. Alabama State Bd. of Educ., 776 F. Supp. 1518, 1530-31 (M.D. Ala. 1991) (rejecting the use of the ACT as the sole criteria for admission to a teacher training program).

^{159.} See 438 U.S. 265, 287 (1978).

^{160.} See Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 610-11 (1983) (Powell, J., concurring); id. at 612, (O'Connor, J., concurring); id. at 641-42 (Stevens, Brennan, & Blackmun, JJ., dissenting).

^{161.} See Alexander v. Choate, 469 U.S. 287, 293 (1985) (stating, in dicta, "Title VI

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While the efficacy of Title VI itself is limited by the same discriminatory purpose requirement as the Equal Protection Clause, the U.S. Department of Education regulations interpreting Title VI¹⁶² prohibit both intentional discrimination and criteria or practices that have an unwarranted disparate impact on a protected class. 163 Equally majority in Guardians different notwithstanding the fact that Title VI requires proof of intentional discrimination, a party can bring a colorable disparate impact claim (at least for limited injunctive and declaratory relief) under Title VI regulations. 164 Thus, federal courts allow plaintiffs to enforce the Department of Education regulations by bringing Title VI claims alleging disparate impact discrimination. 165 The Supreme Court, in

itself directly reach[es] only instances of intentional discrimination."); United States v. Fordice, 505 U.S. 717, 732 n.7 (1992) (holding, in a suit brought under both the Equal Protection Clause and Title VI: "Our cases make clear, and the parties do not disagree, that the reach of Title VI's protection extends no further than the Fourteenth Amendment We thus treat the issues in these cases as they are implicated under the Constitution.").

162. 34 C.F.R. § 100.3(vii)(2) (Lexis 2002).

163. 34 C.F.R. § 100.3(vii)(2) provides:

A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

34 C.F.R. § 100.3(vii)(2) (emphasis added); see also Linda Hamilton Krieger, Civil Rights Perestroika: Intergroup Relations After Affirmative Action, 86 CAL. L. REV. 1251, 1299-1300 (1998) (discussing disparate impact and Department of Education's Title VI regulations).

164. See Guardians, 463 U.S. at 607 n.27.

165. See Krieger, supra note 164, at 1300 (citing Villanueva v. Carere, 85 F.3d 481, 486 (10th Cir. 1996); New York Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995); Chicago v. Lindley, 66 F.3d 819, 827 (7th Cir. 1995); Elston v. Talledega County Bd. of Educ., 997 F.2d 1394, 1406 (11th Cir. 1993); David K. v. Lane, 839 F.2d 1265, 1274 (7th Cir. 1988); Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030, 1044 (7th Cir. 1987); Latinos Unidos de Chelsea En Accion (LUCHA) v. Sec'y of Hous. and Urban Dev., 799 F.2d 774, 795 (1st Cir. 1986); United States v. LULAC, 793 F.2d 636, 648 (5th Cir. 1986); Larry P. v. Riles, 793 F.2d 969, 981, (9th Cir. 1986), as amended on denial of reh'g and reh'g en banc; Castaneda v. Pickard, 781 F.2d 456, 466 (5th Cir. 1986); Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1416 (11th Cir. 1985); Young v. Montgomery County Bd. of Educ., 922 F. Supp. 544 (M.D. Ala. 1996); Ass'n of Mexican-American Educators v. California, 836 F. Supp. 1534, 1545 (N.D. Cal. 1993); Grimes v. Sobol, 832 F. Supp. 704, 709 (S.D.N.Y. 1993); Groves v. Alabama State Bd. of Educ., 776 F. Supp. 1518, 1522 (M.D. Ala 1991); Theresa P. v. Berkeley Unified Sch. Dist., 724 F. Supp. 698, 716 (N.D. Cal. 1989)).

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Alexander v. Choate, noted in dicta that agency regulations designed to implement Title VI can be premised upon a disparate impact theory. 166

However, Title VI disparate impact regulations were recently dealt a severe blow. In Alexander v. Sandoval, the Supreme Court ruled that there is no private right of action to bring a disparate impact suit to enforce Title VI regulations. 167 This was a marked departure from what had been a settled body of jurisprudence, including the unanimous view of the nine circuit courts that addressed the issue.¹⁶⁸ In Sandoval, a class action suit challenging Alabama's English-only written driver's license examination policy, the majority found that section 601¹⁶⁹ of Title VI does not authorize a private right of action in disparate impact suits because, under Bakke and Guardians, section 601 only proscribes intentional discrimination. ¹⁷⁰ Next, the Sandoval Court found that the legislative intent behind section 602¹⁷¹ of Title VI was merely to authorize federal agencies to effectuate rights already created under section 601, 172 from which the Court concluded that there was no evidence of congressional intent to create a private right of action to enforce Title VI disparate impact regulations. 173

C. Enforcing Disparate Impact Regulations via Section 1983

Nonetheless, the Sandoval Court's ruling did not necessarily sound the death knell for all privately filed Title VI-inspired disparate impact claims. As Justice Stevens noted in dissent:

^{166.} See 469 U.S. 287, 293-95 (1985) (discussing Guardians Ass'n. v. Civil Serv. Comm'n, 463 U.S. 582 (1983)).

^{167. 532} U.S. 275 (2001); see Leading Cases, 115 HARV. L. REV. 497 (2001) (discussing Alexander v. Sandoval); see also Adele P. Kimmel et al., The Sandoval Decision and Its Implications for Future Civil Rights Enforcement, FLA. BAR J., Jan. 2002, at 24.

^{168.} See Sandoval, 532 U.S. at 295 n.1 (Stevens, Souter, Ginsburg, & Breyer, JJ., dissenting). (summarizing prior cases that expressly or impliedly allowed a private right of action for claims based upon disparate impact).

^{169.} See 42 U.S.C. § 2000d (2002) (providing that no person shall, "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity" covered by Title VI).

^{170.} See Sandoval, 532 U.S. at 280-85.

^{171. 42} U.S.C. § 2000d-1 (2002) (authorizing federal agencies "to effectuate the provisions of [section 601]... by issuing rules, regulations, or orders of general applicability.").

^{172.} See Sandoval, 532 U.S. at 288-89.

^{173.} See id. at 291.

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[T]o the extent that the majority denies relief to the respondents merely because they neglected to mention 42 U.S.C. § 1983 in framing their Title VI claim, this case is something of a sport. Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief. 174

In fact, two viable options will be assessed in this section: bringing section 1983 actions to enforce Department of Education regulations and filing administrative complaints directly with the Department of Education. A third option—congressional repudiation of Sandoval akin to the way that the 1991 Civil Rights Restoration Act¹⁷⁵ reined in the Court's decision in Wards Cove Packing Co., Inc. v. Antonio¹⁷⁶—may be equally or more promising. In the short term, however, Republicans control the House of Representatives and the executive branch, and will control the Senate in the upcoming term. which would make passage of such a bill unlikely. Since our expertise is not in politics, we leave it for others to assess legislative solutions in greater depth.

Section 1983 originated with the Civil Rights Act of 1871, a statute intended to enforce Fourteenth Amendment protections amidst efforts by the Ku Klux Klan and other southern White supremacists to deprive Blacks of their nascent rights after the Civil War. 177 Section 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.178

The crucial phrase "and laws" was added by the Committee on

^{174.} Id. at 299-300.

^{175.} Civil Rights Act of 1991, Pub. L. No. 102-166, § 1745, 105 Stat. 1071 (1991).

^{176. 490} U.S. 642 (1989). For further discussion of Wards Cove, see infra Part IV.D.2.

^{177.} See Todd E. Pettys, The Intended Relationship Between Administrative Regulations and Section 1983's "Laws," 67 GEO. WASH. L. REV. 51, 55-56 (1998); see Peggy Davis, Neglected Voices, at http://www.law.nyu.edu/davisp/neglectedvoices/KlanActSpeeches.html (last visited June 12, 2002) (posting the speeches of African American members of the Reconstruction Congress who supported the Civil Rights Act of 1871).

^{178. 42} U.S.C. § 1983 (1994).

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Revision of the Laws, an ambitious effort to consolidate federal statutes that was ratified in 1874.¹⁷⁹ Section 1983 lay dormant as a civil rights tool until the 1960s, when the Supreme Court held, in Monroe v. Pape, that section 1983 provides federal remedies against state officials who violate federal rights. 180 Two decades later, in the pivotal case of Maine v. Thiboutot, the Court applied a plain meaning test to the phrase "and laws," ruling that section 1983's reach extends to violations of rights protected under any federal law, not just equal protection laws. 181

Shortly after the Thiboutot decision, the Court laid down two limiting principles for courts to apply to section 1983 claims: (1) a plaintiff must establish that he or she is asserting an enforceable "right" which is encompassed by section 1983; and (2) that Congress did not intend to preempt enforcement of section 1983 remedies for a statute by virtue of other comprehensive enforcement mechanisms. 182

As to the issue of litigating a university's unwarranted reliance on the SAT, the key question is whether the Department of Education's Title VI disparate impact regulations 183 can be privately enforced via section 1983. This issue has yet to be squarely addressed by the Supreme Court, but the prospects of using section 1983 to enforce Title VI disparate impact regulations are dimming. In Sandoval, the Court assumed for purposes of deciding the Title VI private right of action issue that regulations promulgated pursuant to section 602 may prohibit disparate impact discrimination. 184 Yet, the Sandoval majority questioned in dicta whether it is sound to allow Title VI agency regulations to prohibit disparate impact when such conduct is not itself

^{179.} See Cass Sunstein, Section 1983 and the Private Enforcement of Federal Law, 49 U. CHI. L. REV. 394, 401-09 (1982); Pettys, supra note 178, at 57-60; Lisa E. Key, Private Enforcement of Federal Funding Conditions Under S 1983: The Supreme Court's Failure to Adhere to the Doctrine of Separation of Powers, 29 U.C. DAVIS L. REV. 283, 302-06 (1996).

^{180.} See 365 U.S. 167, 173-74 (1961).

^{181.} See 448 U.S. 1 (1980); see Key, supra note 180, at 308-13 (giving a defense of the plain meaning test as applied to § 1983).

^{182.} See Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498 (1990); see also Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1 (1981); Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n. 453 U.S. 1, 19 (1981); Wright v. City of Roanoke Redevelopment and Hous. Auth., 479 U.S. 418, 423-24 (1987).

^{183.} E.g., 34 C.F.R. § 100.3(vii)(2) (Lexis 2002).

^{184.} See Alexander v. Sandoval, 532 U.S. 275, 281, 286 (2001); see also Charles F. Abernathy, Title VI and the Constitution: A Regulatory Model for Defining "Discrimination," 70 GEO. L.J. 1 (1981) (arguing that Congress clearly established rights against disparate impact discrimination in section 602 by virtue of its delegation of the definition of discrimination to the administrative agencies responsible for implementing affected programs).

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outlawed by Title VI. 185 More writing on the wall appeared in Gonzaga University v. Doe, in which the Court held that the Family Educational Rights and Privacy Act (FERPA) could not be privately enforced through section 1983, and declared, "We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983."186 However, in Gonzaga University the Court distinguished FERPA from Title VI and Title IX, which create individual rights because the plain language of these statutes unmistakably focuses on the benefited classes. 187

In the absence of controlling Supreme Court precedent, it is instructive to compare and contrast the Third and Sixth Circuit approaches to the issue of section 1983 and disparate impact regulations. Until recently, civil rights groups could point to the Third Circuit's decision in Powell v. Ridge, in which the court held that there is a private right of action to enforce Title VI disparate impact regulations, and that section 1983 can be used to enforce these regulations. 188 While Sandoval unquestionably overruled Powell by limiting a private right of action in Title VI suits to intentional discrimination, 189 Powell's section 1983 holding was not disapproved by the Court. The Sandoval majority responded with silence to Justice Stevens' comment in the dissent that the availability of section 1983 remedies rendered Sandoval "something of a sport." 190

In Powell, the plaintiffs (a coalition of parents and educational organizations) brought a Title VI and section 1983 action against Pennsylvania state officials for declaratory and injunctive relief, alleging that the state's school funding practices had a racially

^{185.} See 532 U.S. at 286 n.6 (citing Guardians Ass'n. v. Civil Serv. Comm'n, 463 U.S. 582, 613 (1983)) ("We cannot help observing, however, how strange it is to say that disparate-impact regulations are 'inspired by, at the service of, and inseparably intertwined with' § 601 ... when § 601 permits the very behavior that the regulations forbid.") (O'Connor, J., concurring); id. ("If, as five members of the Court concluded in Bakke, the purpose of Title VI is to proscribe only purposeful discrimination . . . regulations that would proscribe conduct by the recipient having only a discriminatory effect . . . do not simply 'further' the purpose of Title VI; they go well beyond that purpose.").

^{186. 122} S.Ct. 2268, 2275 (2002).

^{187.} See id. at 2275-76.

^{188.} See 189 F.3d 387 (3d Cir. 1999); see Bradford C. Mank, Using § 1983 to Enforce Title VI's Section 602 Regulations, 49 KAN. L. REV. 321, 365-67 (2001) (commenting on the importance of the Powell v. Ridge section 1983 ruling).

^{189.} See Alexander v. Sandoval, 532 U.S. 275 (2001).

^{190.} Id. at 299-300.

disparate impact. 191 The Third Circuit, while not reaching the merits of plaintiffs' claims, reversed the lower court's dismissal of the complaint. 192 The court rejected defendant's contention that Title VI regulations were sufficiently comprehensive to preclude section 1983 remedies. 193 Rather, the court was satisfied that the Department of Education's Title VI regulations created a federal right. 194 Moreover. the Powell court ruled:

Neither Title VI nor the Department of Education regulation establishes "an elaborate procedural mechanism to protect the rights of [individual plaintiffs]"... Nor is it possible to describe the administrative remedies Title VI and the regulations establish as "unusually elaborate"... Indeed, the statutory scheme under Title VI does not specifically provide individual plaintiffs with any administrative remedy."195

In summary, the *Powell* Third Circuit panel found that section 1983 suits are not incompatible with Title VI enforcement regulations. 196

Yet the promise of *Powell* ebbed quickly. In December 2001, a different Third Circuit panel held, in South Camden Citizens in Action v. New Jersey Dept. of Environmental Protection, that because Title VI only prohibits intentional discrimination, plaintiffs do not have a right to enforce EPA Title VI disparate impact regulations via section The South Camden court essentially "Sandovalized" the inquiry into section 1983 as an enforcement mechanism for Title VI disparate impact regulations, ruling that because section 601 of Title VI proscribes only intentional discrimination, section 602 could not authorize agencies to promulgate disparate impact regulations pursuant to Title VI. 198 The South Camden majority strained to distinguish Powell in order to overrule it without candidly acknowledging that it was ignoring *Powell's* stare decisis value. The *South Camden* panel declared that Powell "should not be overread" and that Powell assumed rather than analyzed "the foundation issue that is central here, i.e., whether a regulation in itself can create a right enforceable under

^{191.} Powell, 189 F.3d. at 391-92.

^{192.} See id. at 405.

^{193.} See id. at 401-03.

^{194.} See id. at 401.

^{195.} Id. at 402 (citing Smith v. Robinson, 468 U.S. 992, 1010-11 (1984); Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 13 (1981)).

^{196.} See id. at 403.

^{197.} See 274 F.3d 771 (3d Cir. 2001).

^{198.} See id. at 786-90.

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section 1983."199

A dissenting judge in South Camden decried the majority's "analytical alchemy" for confusing the tests for an implied private right of action and for section 1983, as well as for disregarding the binding authority of Powell even after the majority acknowledged that the Powell court "held" that "a disparate impact discrimination claim could be maintained under section 1983 for a violation of a regulation promulgated pursuant to section 602."200 The South Camden court was incorrect to "Sandovalize" its analysis of section 1983 and Title VI disparate impact regulations; for the reasons we state below, the South Camden court applied the wrong standard when it required proof of specific congressional intent to authorize a private right of action to enforce disparate impact regulations via section 1983.²⁰¹ Unlike an implied private right of action, section 1983 expressly authorizes a private right of action.²⁰² Accordingly, the Court noted in Wilder v. Virginia Hosp. Ass'n that the question of whether section 1983 can serve as the basis for a suit involves a "different inquiry" than that underlying the question of whether the same statute allows a private right of action.²⁰³

The Wilder Court made this analytical distinction because section 1983 "provides an alternative source of express congressional authorization of private suits . . . these separation-of-powers concerns are not present in a section 1983 Case." In contrast to section 1983. whether or not there is an implied private right of action is a question that implicates separation of powers in two respects. First, Article III of the Constitution proscribes that lower federal courts may only review those matters that Congress has statutorily granted jurisdiction, meaning that courts risk encroaching upon a congressional function when they allow an implied private right of action to form the basis for jurisdiction.²⁰⁵ In addition to this danger of judicial lawmaking, private

^{199.} Id. at 784.

^{200.} Id. at 791-95 (McKee, J., dissenting).

^{201.} See Mank, supra note 189 at 353-59; Brief of Amici Curiae Law Professors Concerned About Environmental Justice, South Camden Citizens in Action v. New Jersey Dept. of Envtl. Prot., 274 F.3d 771 (3d Cir. 2001) (No. 01-224 & 01-2296).

^{202.} See supra note 179 and accompanying text (quoting 42 U.S.C. section 1983 (1994)).

^{203.} See 496 U.S. 498, 508 n.9 (1990).

^{205.} See Key, supra note 180, at 299; Mank, supra note 189, at 354; see Sunstein, supra note 180, at 415.

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rights of action also invoke separation of powers concerns because Congress alone has the power to interfere with states' lawmaking powers, as it is the only branch of the federal government in which states are represented.206

In light of the absence of such serious separation of powers implications, the Supreme Court, in Blessing v. Freestone, Wilder, and other cases, applied a less stringent three-part test to assess when a statute creates an enforceable right actionable under section 1983.²⁰⁷ In Blessing, a unanimous Court reiterated the three traditional factors: (1) the plaintiff must be an intended beneficiary of the statute; (2) the plaintiff's interests must not be so "vague and amorphous" that they extend beyond the judiciary's sphere of competence; and (3) a statute must clearly impose a binding obligation on the States, as evidenced by mandatory, not precatory terms. 208 Satisfaction of this test creates the rebutable presumption that there is a right enforceable under section 1983.²⁰⁹ The presumption of a right can be rebutted by either express language in the statute itself precluding section 1983, or by evidence that Congress impliedly forbid section 1983 because it created a comprehensive enforcement scheme that is incompatible with section 1983 individual remedies. Gonzaga University v. Doe²¹¹ did not change the three-part Blessing test, nor did it expressly overrule Wilder.

The Blessing test led to Loschiavo v. City of Dearborn, where the Sixth Circuit ruled that section 1983 can be a mechanism for enforcing rights created by federal regulations.²¹² In Loschiavo, the court held that Federal Communications Commission (FCC) regulations preempted local zoning ordinances, finding that the three-part test was satisfied and that since federal regulations carry the force of law, regulations may create enforceable rights.²¹³ The *Loschiavo* precedent

^{206.} See Key, supra note 180, at 299; Richard W. Creswell, The Separation of Powers Implications of Implied Rights of Action, 34 MERCER L. REV. 973, 991-92 (1983).

^{207.} See Blessing v. Freestone, 520 U.S. 329, 340-41 (1997); Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 509 (1990); Livada v. Bradshaw, 512 U.S. 107, 132-34 (1994); see also Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 107-08 (1989).

^{208.} See Blessing, 520 U.S. at 340-41.

^{209.} See id.

^{210.} See id. at 341.

^{211. 122} S.Ct. 2268 (2002); Cf. id. at 2285-86 (Stevens & Ginsburg, JJ., dissenting) (arguing that, despite assurances to the contrary, the majority eroded the principle that rights under section 1983 are presumptively enforceable).

^{212. 33} F.3d 548 (6th Cir. 1994).

^{213.} See id. at 551-53.

has led to two recent district court rulings within the Sixth Circuit allowing plaintiffs to bring section 1983 actions to enforce rights contained in Title VI disparate impact regulations.

The post-Sandoval case of White v. Engler is particularly relevant to our analysis of the SAT, as it involved a disparate impact challenge to the practice of awarding merit scholarships based upon the Michigan Education Assessment Program High School Test (MEAP Test).²¹⁴ In Engler, although the district court did not reach the merits of plaintiffs' challenge to the MEAP test, the court denied defendants' motion to dismiss because the Department of Education's disparate impact regulations unambiguously imposed a binding obligation on the states. The court found that the regulations were clearly intended to benefit the African Americans, Hispanics, and Native Americans who brought suit, and that the regulations were unquestionably within the province of judicial competence.²¹⁵

The other relevant post-Sandoval district court case in the Sixth Circuit is Lucero v. Detroit Public Schools, in which plaintiffs moved for a preliminary injunction to prevent a new Detroit elementary school (with an overwhelmingly African American and Latino student population) from opening on a site allegedly contaminated by industrial waste. While denying plaintiffs' motion on other grounds, the district court ruled that plaintiffs satisfied all three prongs of the Blessing/Wilder test and could enforce Title VI disparate impact regulations via section 1983. 217

D. The SAT: Proving the Elements of a Disparate Impact Claim

After overcoming the private enforcement hurdle through section 1983, the actual requirements for establishing a disparate impact case are relatively straightforward. In Title VI disparate impact analysis, the plaintiffs bear the initial burden of establishing that the challenged test or test use has a demonstrated disparate impact by race and ethnicity. After this prima facie showing has been made, it is defendant's burden of proof to establish that the challenged test or test use is educationally

^{214.} See White v. Engler, 188 F. Supp. 2d 730 (E.D. Mich. 2001).

^{215.} See id. at 744.

^{216.} See 160 F. Supp. 2d 767, 772-73 (E.D. Mich. 2001) (explaining the University of Michigan's environmental study of the site).

^{217.} See id. at 781-84.

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iustified. If the defendant meets this burden, plaintiffs may still prevail upon a disparate impact theory if plaintiffs can convince the court that there is an equally effective and less discriminatory alternative. ²¹⁸ This three-part burden-shifting framework mirrors the requirements for Title VII employment discrimination disparate impact cases.²¹⁹ confronting Title VI disparate impact challenges therefore often rely on Title VII cases, particularly since the case law is much more extensive in the employment context.²²⁰ There is a paucity of Title VI standardized testing cases challenging college and university admission practices.²²¹ This may be a reflection of the availability of affirmative action as a counterbalance to disparate impact, 222 and it may also reflect a recognition on the part of plaintiffs' attorneys that Title VI disparate impact cases are difficult to win and may have even less viability in the

^{218.} See U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, supra note 92, at 54-58 (2000) (summarizing Title VI disparate impact analysis).

^{219.} In a piece that came out while this article was at the final edit stage, Jennifer Braceras argues that the Title VII disparate impact framework should not be applied to Title VI standardized testing claims. Braceras, supra note 43, at 1177-1203. Rather than proving educational necessity, which she terms a "charade," Braceras urges reforms to eliminate unfair questions or confining the analysis of test bias to the "totality of circumstances" inquiry in an intentional discrimination claim. See id. at 1180. For the reasons discussed in Parts II and III, we conclude both that test developers have consistently resisted efforts to reduce item impact through Golden Rule-style procedures despite evidence that such techniques are workable, and that conventional methods of flagging biased items (DIF) are irrevocably flawed. We therefore conclude that Title VI disparate impact litigation is an important tool for addressing a serious problem that will not, in all likelihood, be rectified otherwise. Similarly, as indicated by our discussion of United States v. Fordice, 505 U.S. 717 (1992), infra Part IV(a), the prospects of bringing successful intentional discrimination claims under Title VI or the Equal Protection Clause over the use of educational standardized tests are exceptionally meager unless the offending institution has a diehard segregationist history. We therefore conclude that Bracera's recommendations have a "let them eat cake" quality; foreclosing the availability of disparate impact analysis would preclude legal remedies precisely where they are most needed.

^{220.} See infra Part IV.D.1-2.

^{221.} See Krieger, supra note 164, at 1300-01. Krieger reports:

Although various lower federal courts have followed Guardians [sic] and permitted Title VI plaintiffs to proceed under a disparate impact theory in actions to enforce the regulations, no reported case has ever challenged the use of either the SAT, the LSAT, the Graduate Record Exam (GRE), or the Medical College Admissions Test (MCAT). Indeed, as of the writing of this Article, I have been unable to find a single reported Title VI or Title IX case in which college or graduate school admissions criteria have been challenged. Thus, unlike employers, whose selection procedures have for years been subject to challenge under Title VII, institutions of higher education have been left to define and assess merit in admissions decision making in an atmosphere utterly devoid of legal contest.

Id. (internal citation omitted).

^{222.} See Miranda Massie, A Student Voice and a Student Struggle: The Intervention in the University of Michigan Law School Case, 12 LA RAZA L.J. 231, 233 (2001).

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1. Determining Disparate Impact

In the Title VII employment context, the Supreme Court declared that there is "no rigid mathematical threshold" to overcome a facially neutral practice as long as statistical disparities are sufficiently large to raise an inference that the challenged practice caused the disparate results. Courts have essentially adopted the same requirement for Title VI disparate impact claims. Plaintiffs' initial prima facie burden of establishing disparate impact is usually less onerous than contesting educational necessity or providing a workable less discriminatory alternative.

One recognized benchmark for assessing disparate impact is the Equal Employment Opportunity Commission's "Four-Fifths Rule," which allows a court to find an adverse impact when the passing rate for the minority group is less than 80% of the passing rate for the majority group (Whites). While results would vary depending on factors such as the particular test use involved, the appropriate applicant pools, and the level of selectivity, application of the Four-Fifths Rule would, in a majority of cases, allow plaintiffs to establish their initial disparate impact burden in a post-affirmative action environment where the SAT was an influential admissions factor. For example, the Black-White gap on the SAT is generally about one standard deviation. In the extreme example of a university that used the SAT as the sole criteria for admission, and with a one standard deviation gap (assuming a normal distribution and that applicants fairly represented the larger population), if 25% of Whites were admitted,

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^{223.} See Krieger, supra note 166, at 1301 ("The dearth of activity under Title VI may, among other things, reflect a lack of confidence in the viability of the Guardians rule.").

^{224.} See Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 994-95 (1988); see Wards Cove Packing Co., Inc. v. Antonio, 490 U.S. 642, 656-57 (1989).

^{225.} See, e.g., Groves v. Alabama State Bd. of Educ., 776 F. Supp. 1518, 1523-29 (M.D. Ala. 1991) (adopting Title VI disparate impact requirements in a challenge to the use of the ACT for a teacher training program); GI Forum v. Texas Educ. Agency, 87 F. Supp. 2d 667, 677-78 (W.D. Tex. 2000) (adopting Title VI disparate impact requirements in challenge to the Texas Assessment of Academic Skills, a standardized test required for high school graduation).

^{226.} See Watson, 487 U.S. at 994 (noting that establishing disparate impact is "relatively easy" when appropriate statistical proof is proffered).

^{227.} See 29 C.F.R. § 1607 (Lexis 2002). See also GI Forum, 87 F. Supp. 2d at 675-76, 678 (accepting the 80% rule as an appropriate measure in a Title VI standardized testing case); Groves, 776 F. Supp. at 1526.

^{228.} See supra Part II.

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only about 5% of African Americans would be admitted.²²⁹ Under this hypothetical worse-case scenario, plaintiffs could easily meet their prima facie burden since the Black acceptance rate is a mere 20% of the White acceptance rate. 230

A second recognized test for identifying statistical disparities for adverse impact purposes is the so-called "Shoben formula," or "zscore" statistic, which involves calculating the differences between independent proportions.²³¹ Whereas the Four-Fifths Rule is an intuitive guidepost, Professor Shoben's z-score statistic is a more reliable method of accounting for differences in sample size and the magnitude of differences in acceptance rates.²³² The z-score technique preconditions (independence, three randomness. sufficiently large sample size)²³³ and starts with the null hypothesis that there are no racial and ethnic differences in pass rates in the relevant population.²³⁴ The point of using z-scores or other tests of statistical

Null hypotheses are strawmen, established for the purpose of being refuted. In a statistical study, if a researcher suspects that some situation is true, he or she will state the opposite of that situation, run tests under the assumption that this opposite is true, and analyze the results. If the results are that this opposite is

^{229.} See Paul R. Sackett & Steffanie L. Wilk, Within-Group Norming and Other Forms of Score Adjustment in Preemployment Testing, 49 AM. PSYCHOL. 929, 942 (1994) (providing this example for the GATB test, which also has a one standard deviation gap).

^{230.} It should be noted that some limited data suggests that the SAT II achievements tests improve admission chances for Latinos and APAs compared to the SAT I because students can take a foreign language test like Spanish, Chinese, or Korean for one of their three SAT II tests. See Steven A. Holmes, SAT II Boosts Diversity, Threatens Controversy, N.Y. TIMES, July 22, 2001.

^{231.} See Groves v. Alabama State Bd. Of Educ., 776 F. Supp. 1518, 1527 (M.D. Ala. 1991); GI Forum, 87 F. Supp. 2d at 675-76, 678 (accepting the Shoben formula as an appropriate measure in a Title VI standardized testing case). See also Frazier v. Consolidated Rail Corp., 851 F.2d 1447, 1450 n.5 (D.C. Cir. 1988).

^{232.} See Elaine W. Shoben, Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII, 91 HARV. L. REV. 793, 812 (1978). See also Groves, 776 F. Supp. at 1527-28 (approvingly citing to Shoben's article and technique).

^{233.} See Shoben, supra note 233, at 801. Independence is compromised if students can take the test repeatedly or can cheat by passing on test information to subsequent test takers. Randomness is compromised if the self-selected population that applies for a college, takes a test, etc. differs substantially from the larger population. Sample size is adequate if there are at least ten passers and failers in each group when the population is very large. See id. at 801.

^{234.} See id. at 804. While conservative (and some other) critics might question this assumption as flying in the face of reality, it is important to point out that the assumption is merely an artifact of the Title VI and Title VII burden-shifting framework, and a plaintiff cannot win a case merely by establishing substantial racial/ethnic differences in test scores or admission rates.

For a definition of the null hypothesis, see Thomas J. Campbell, Regress on Analysis in Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet, 36 STAN. L. REV. 1299 (1984). Professor Campbell explains:

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significance is to determine whether there is ample evidence to reject the null hypothesis.²³⁵

A real example can assist readers in understanding how z-score statistics are utilized to establish disparate impact. UC Berkelev's entering class of 1998 was the first class admitted under California's Proposition 209 and the UC Regents SP-1 Resolution, which banned race-conscious affirmative action in public university admissions.²³⁶ In response, five civil rights organizations soon brought Rios v. Regents of the University of California²³⁷ (the lead plaintiff was later changed to Castañeda), a class action challenging UC Berkeley admission policies, including allegations that Berkeley placed an unjustified emphasis on SAT scores and unfairly awarded GPA bonus points for honors classes (which affluent White high schools were much more likely to offer than schools with large proportions of African Americans and Latinos).²³⁸ That year, UC Berkeley admitted 28.1% of all applicants (8,438/30,038), including 31.2% of Whites (2,778/8,892), 20.6% of Latinos (647/3139), and 19.3% of African Americans $(241/1249)^{239}$

How would the Shoben formula be applied to the 1998 Berkeley admissions cycle?²⁴⁰ The first step is to calculate the overall proportion of applicants who were admitted (0.281) and rejected (0.719). These two proportions are then multiplied, and we can label this product "PROD." Here, PROD equals 0.202 (0.281 x 0.719). PROD can then

untrue, and they are so extraordinary that the probability that they are a product of chance is only five percent or less, the researcher will infer that this assumed opposite situation is unlikely.

Id. at 304.

^{235.} See David H. Haye & David A. Freedman, Reference Guide on Statistics 332, 378-79, in FEDERAL JUDICIAL COUNCIL, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (2002), available at

http://air.fjc.gov/public/pdf.nsf/lookup/sciman00.pdf/\$file/sciman00.pdf.

^{236.} See supra note 14.

^{237.} Rios v. Regents of the Univ. of California, Compl. No. 99-0525 (filed in the U.S. District Court, N.D. Cal., Feb 2, 1999) [hereinafter Rios Complaint].

^{238.} See id. This action was filed by the Asian Pacific American Legal Center of Southern California, the ACLU, the Lawyers' Committee for Civil Rights of the San Francisco Bay Area, MALDEF, and the NAACP Legal Defense and Education Fund, Inc., on behalf of African American, Chicano/Latino, Native American, and Filipino American applicants. See also Lawrence, supra note 1, at 942-48; Evelyn Nieves, Civil Rights Groups Suing Berkeley Over Admission Policy, N.Y. TIMES, Feb. 3, 1999, at A11; Pamela Burdman, Lawsuit Against UC Berkeley Claims 'Colorblind' Admissions Policy Is Unjust, S.F. CHRON., Feb. 3, 1999, at A13.

^{239.} Rios Complaint, supra note 238, at 11-12.

^{240.} See Shoben, supra note 233, at 804.

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be used to calculate the Standard Error, which is a "measure of the variability of sample means in a sampling distribution." The Standard Error is equal to the square root of PROD/number of minority group in the sample plus PROD/number of Whites in the sample. 242

Standard Error = $\sqrt{PROD} / N(minority) + PROD/N(White)$

In the above example, the Standard Error equals 0.00933 for Latinos (compared to Whites) and 0.0136 for African Americans (compared to Whites). Lastly, the z-score statistic equals the sample pass rate difference divided by the standard error.²⁴³

Z = White Pass Rate – Minority Group Pass Rate Standard Error

For UC Berkeley's 1998 pool, Z equals 11.36 for Latinos and 8.75 for African Americans. A z-score of 1.96 or higher is needed to reject the null hypothesis with 95% confidence.²⁴⁴ Thus, in the above example plaintiffs would clearly be able to meet their prima facie disparate impact burden.

Note that in our example, the z-score is higher for Latinos than African Americans even though the Latino-White gap in acceptance rates is smaller than the Black-White gap. This illustrates a crucial distinction between the Shoben formula and the Four-Fifths Rule: with the Shoben statistic, a smaller disparity may still yield a higher z-score if the sample size is much larger, and vice versa (here we had 3,139 Latinos and 1,249 African Americans). The Four-Fifths Rule, which from the beginning was intended as a non-technical guidepost for employers, is less helpful than statistical analysis in that larger sample sizes allow for more precise conclusions about disparate impact, whereas smaller samples require larger disparities to reach statistical significance.²⁴⁵ Thus, in cases with very small samples, using the Four-Fifths Rule alone can incorrectly suggest a disparate impact; conversely, in cases with large samples, exclusive reliance on the Four-Fifths Rule can obscure the presence of a legally cognizable disparate

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^{241.} Id. at 802 n.39.

^{242.} See id. at 802, 804.

^{243.} See id. at 803, 805.

^{244.} See id. at 805.

^{245.} See id. at 806

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The courts sometimes consider issues of "practical significance" in addition to statistical significance.²⁴⁷ so both plaintiffs and defendants in Title VI disparate impact cases are better off retaining both technical/psychometric expert witnesses as well as expert witnesses who can place test score disparities in their proper educational, historical, and sociological context. For example, in Groves v. Alabama State Board of Education, a challenge to the use of the ACT cut-off for entrance to teacher training programs, the court evaluated both parties' statistical evidence and concluded:

Here, both the plaintiffs and the State Board have wrapped themselves in complex statistical data and terminology. However, this is one of those rare cases where if one stands back and applies reason and common sense the answer is apparent [T]he ACT requirement has resulted in substantial adverse racial impact. Indeed, to reach any other conclusion the court would have to close its eyes to the obvious.²⁴⁸

2. Determining Educational Necessity

After the plaintiff establishes a prima facie case of disparate impact, the defendant has the burden of justifying its use of a standardized test by proffering evidence of "educational necessity." This standard of "educational necessity is similar to "business necessity" in Title VII disparate impact litigation. 249 It is important to

^{246.} See Shoben, supra note 233, at 806-10. See also Groves v. Alabama State Bd. Of Educ., 776 F. Supp. 1518, 1527-28 (M.D. Ala. 1991) (reviewing problems courts have encountered when applying the Four-Fifths Rule); Joseph L. Gastwirth, Employment Discrimination: A Statistician's Look at Analysis of Disparate Impact Claims, 11 LAW & INEQUALITY 151, 155 (1992) (arguing that statistical testing is preferred to the Four-Fifths Rule).

^{247.} GI Forum v. Texas Educ. Agency, 87 F. Supp. 2d 667, 676 (W.D. Tex. 2000) ("In addition to evaluating the statistical impact of the examination, the Court has, as the behest of both parties, considered the 'practical consequences' or 'practical impact' of the high failure rates of minorities. That consideration involves careful examination of the immediate and long-term effects of the statistically disparate failure rates."); Groves, 776 F. Supp. at 1528-29 (discussing practical impact). There is a similar "practical impact" analysis in Title VII. See Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 995 n.3 (1988) (O'Connor, J.) (noting that "statistics 'come in infinite variety and their usefulness depends on all of the surrounding facts and circumstances"") (citing Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 340 (1977)).

^{248.} Groves, 776 F. Supp. at 1529.

^{249.} See Board of Educ. v. Harris, 444 U.S. 130, 151 (1979) (holding that defendant's evidence of educational necessity may rebut showing of disparate impact in case involving Emergency School Aid Act); Larry P. v. Riles, 793 F.2d 969, 982 (9th Cir. 1984) (ruling

note that in Watson v. Fort Worth Bank & Trust, a case involving alleged racial bias in subjective employment decision-making, four of the eight Supreme Court justices indicated a willingness to substitute "reasonableness" for "business necessity" as the employer's burden.²⁵⁰ A year later in Wards Cove Packing Co. v. Antonio, the majority adopted doctrinal changes suggested in Watson, but the ruling did not specify what exactly would be required of the employer in terms of formal validation of their selection procedures. 251 However, Watson and Wards Cove are no longer controlling regarding Title VII, because the 1991 Civil Rights Act expressly revived the "business necessity" defense in disparate impact cases.²⁵²

In Groves v. Alabama State Board of Education, 253 a disparate impact challenge to the use of ACT cut-off scores for admission to teacher training programs, the district court relied extensively on Wards Cove,²⁵⁴ and it borrowed Wards Cove's lower standard for educational justification.²⁵⁵ While the *Groves* decision was rendered before the 1991 Civil Rights Act, 256 a more troubling case is the recent district court decision in GI Forum, a disparate impact challenge to the Texas Assessment of Academic Skills (TAAS). Despite Wards

that the defendant carries the burden of establishing the educational necessity of its test use); Debra P. v. Turlington, 644 F.2d 397, 407 (5th Cir. 1981) (same holding).

^{250. 487} U.S. 977, 997-98 (1988). For further discussion of Watson, see Linda Hamilton Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 STAN. L. REV. 1161, 1229-31

^{251.} See 490 U.S. 642, 656-61 (1989).

^{252.} See Civil Rights Act of 1991, Pub. L. 102-166, § 105, 105 Stat. 1074 (codified at 42 U.S.C. § 2000e-2 (1991)). See also David Benjamin Oppenheimer, Negligent Discrimination, 141 U. PA. L. REV. 899, 925-30 (1993) (commenting on the 1991 Civil Rights Act and its impact on Watson, Wards Cove, and related cases); Preston C. Green, Can Title VI Prevent Law Schools from Adopting Admissions Practices that Discriminate Against African Americans?, 24 S.U. L. REV. 237, 249-50 (1997) (discussing Watson, Wards Cove, and the 1991 Civil Rights Act as they pertain to Title VI disparate impact litigation).

^{253.} Groves v. Alabama State Bd. of Educ., 776 F. Supp. 1518 (M.D. Ala. 1991).

^{254.} See id. at 1523 ("Although both Georgia State Conference and Quarles articulate the proof necessary to sustain a disparate-impact claim under Title VI's regulations, the Title VII law from which they borrow has since been redefined, particularly by the Supreme Court in Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989). Accordingly, the court relies principally on Wards Cove and other, subsequent Title VII decisions in evaluating plaintiffs' challenge to the ACT requirement in the following sections of this opinion.") (citations omitted).

^{255.} See Groves, 776 F. Supp. at 1529-30.

^{256.} See Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1412 (11th Cir. 1993) (reviewing educational necessity cases and cautioning that Groves came out after Wards Cove but before the 1991 Civil Rights Act).

^{257.} See GI Forum, 87 F. Supp. 667 (W.D. Texas 2000).

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Cove's questionable authority, the district court judge in GI Forum cited Wards Cove as authority for holding that the TAAS test serves the "legitimate educational goals" of the Texas Education Association. 258 While we believe that the district court's use of a less stringent "reasonableness/legitimate goal" standard in GI Forum amounted to improper judicial lawmaking in light of the Civil Rights Act of 1991, it remains the case that even a true "educational necessity" standard is not one that is tremendously difficult for defendant universities to satisfy. In reality, the courts have given considerable deference to the professional testing industry and to defendants such as state school boards. It is more accurate to say that the courts require "a substantial legitimate justification" for the practice in question. 259

In high stakes testing cases under Title VI/Title IX disparate impact, the courts have traditionally looked to the relevant body of evidence regarding the validity, reliability, and fairness of the test and test use.²⁶⁰ Thus, courts are far more likely to find educational necessity to be lacking where an institution is using a standardized test in a manner inconsistent with the established guidelines of the test producer and the educational measurement establishment.²⁶¹ A prime example is the case of Daniel Wurangian, a Latino and Asian high school student who dreamt of attending the U.S. Naval Academy to

^{258.} See id. at 679 ("Instead, an educational necessity exists where the challenged practice serves the legitimate educational goals of the institution. Wards Cove, 490 U.S. at 659, 109 S.Ct. 2115. In other words, the TEA must merely produce evidence that there is a manifest relationship between the TAAS test and a legitimate educational goal. Teal, 457 U.S. at 446. The Court finds that the TEA has met its burden.").

^{259.} See Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1412 (11th Cir. 1993) ("Under the Title VI disparate impact scheme, once plaintiffs have demonstrated a disparate impact, defendants bear the burden of demonstrating that their challenged practice is supported by a substantial legitimate justification."); Larry P. v. Riles, 793 F.2d 969, 982 n. 9 (9th Cir. 1984) (defining "educational necessity" as proof that a "given requirement has a manifest relationship to the education in question").

^{260.} See U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, supra note 92, at 57.

^{261.} See, e.g., Groves v. Alabama Bd. Of Educ., 776 F. Supp. 1518, 1531 (M.D. Ala. 1991) (concluding that Alabama State Board of Education's use of a rigid ACT cut-off score for entrance into teacher training programs "fall[s] far outside the bounds of even 'a good faith exercise of professional judgment."") (citing Richardson v. Lamar County Bd. of Educ., 729 F. Supp. 806, 823 (M.D. Ala. 1989)); Cureton v. Nat'l Collegiate Athletic Ass'n, 37 F. Supp. 2d 687, 707-09, rev'd on other grounds, 198 F.3d 107 (3d Cir. 1999) (rejecting the educational necessity of the NCAA's SAT eligibility cut-off score because the SAT has only been validated as a predictor of first-year GPA, not college graduation, and because the NCAA did not demonstrate an independent basis for choosing its cut-off); Sharif v. New York State Educ. Dep't, 709 F. Supp. 345, 362 (S.D.N.Y. 1989) (ruling in a Title IX disparate impact case, that defendants failed to establish a reasonable relationship between the use of the SAT to award scholarships and encouraging high school academic achievement because the "SAT was not designed to measure achievement in high school and was never validated for that purpose").

become a Navy pilot.²⁶² Wurangian, who served as the battalion commander for his Los Angeles high school in the Naval Junior Reserve graduated with a 3.64 GPA, took the SAT four times and managed to score just over 1000.²⁶³ In a surprisingly frank November 2001 letter from the Naval Academy's head of candidate guidance, Wurangian was informed that he did not score high enough on the SAT to meet the Academy's minimum cut-off, and he was therefore ineligible to receive an application:

We have carefully evaluated all of the information which you have submitted to date. At the present time, your College Board tests do not indicate sufficient academic achievement for you to be designated an official candidate and receive an application packet. Our pre-qualifying levels for the SAT-I are 530 verbal/570 math and for the ACT are 22 English/24 math. Either test is acceptable for admission. Keep in mind that test scores are the minimum levels needed to receive an application. 264

The head of the Naval Academy Admissions Office also recommended that Wurangian retake the SAT yet again to raise his scores.²⁶⁵ The use of such rigid, psychometrically unvalidated cut-off scores runs contrary to the positions of both the College Board and the National Association of College Admission Counseling, of which the Naval Academy is a member. 266 Another legally suspect use of cut-off scores is the state of Florida's requirement that winners of the top level of the Bright Futures scholarship program, which pays 100% of recipients' tuition at public universities, score at least 1270 on the SAT. 267 Whereas about 11% of White students received Bright Futures full scholarships between 1999 and 2001, only 4% of Latinos and 1%

^{262.} See Diana Jean Schemo, Spurned Student Challenges Naval Academy on Test Scores, N.Y. TIMES, July 28, 2002; Ariel Sabar, Pre-admissions Policy at Academy Challenged: Group Claims School Misuses Test Scores to Keep Some From Applying, BALTIMORE SUN, July 26, 2002, at 1B; Letter from Christina Perez of FairTest to Vice Admiral Richard Naughton of the Naval Academy (July 23, 2002), available at http://www.fairtest.org/pr/Naval Acc Letter.html (last visited July 29, 2002).

^{263.} Schemo, supra note 263.

^{264.} Letter from T.P. Tumelty, Head of Candidate Guidance at the Naval Academy to Daniel A. Wurangian (Nov. 27, 2001) (on file with author). I obtained a copy of this letter from Christina Perez of FairTest in Cambridge, Massachusetts.

^{265.} Id.

^{266.} See Letter from Christina Perez of FairTest, supra note 263.

^{267.} See Jeffrey Selingo, Civil-Rights Groups Blast Florida's Use of SAT Scores in Awarding Scholarships, CHRON. HIGHER EDUC., Dec. 21, 2001, at A18 (also reporting that African Americans comprise 14.4% of Florida SAT test-takers, but only 3% of Bright Futures level one scholarship recipients).

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of African Americans received these awards.²⁶⁸

A university defending its use of the SAT in admissions would undoubtedly rely upon the large body of studies produced by ETS and College Board researchers purporting to validate the SAT as a predictor of first year college grades. 269 This position hardly demonstrates educational necessity, however. Scholarly critics of the SAT, some of whom might be retained as expert witnesses by plaintiffs counsel in educational disparate impact litigation have for many years pointed out that combining the SAT with high school grades only incrementally improves the prediction of freshman grade point average compared to high school grades (HSGPA) alone.²⁷⁰ For example, researchers at the University of California Office of the President recently completed a study of 78,000 freshmen who entered seven UC campuses between 1996 and 1999.²⁷¹ The authors found that HSGPA explained 15.4% of the variance in freshman grades among enrolled students at UC campuses, HSGPA combined with SAT scores explained 20.8%. HSGPA combined with the SAT II subject-specific achievement tests explained 22.2%, and HSGPA, SAT, and SAT II combined explained 22.3%. 272 Based on these results, if UC were sued over the disparate impact of the SAT, it would be difficult to advance "a substantial legitimate justification" for the SAT when the test improves the percentage of variance explained by a statistically insignificant 0.1% above that explained by HSGPA and the SAT II, and when the SAT only adds 5.4% to the variance explained by HSGPA alone. At UC Berkeley, UCLA, and UC San Diego—the most selective campuses.

^{268.} See Press Release, MALDEF/FairTest, Florida State Scholarship Program Unfairly Discriminates, Say Civil Rights and Educational Groups (Aug. 26, 2002) (listing Academic Scholars Awards for 1999-2001).

^{269.} See, e.g., Brent Bridgeman et al., Predictions of Freshman Grade-Point Average from the Revised and Recentered SAT I: Reasoning Test (2000), COLLEGE BOARD RESEARCH REPORT NO. 2000-1; WARREN W. WILLINGHAM ET AL., PREDICTING COLLEGE GRADES: AN ANALYSIS OF INSTITUTIONAL TRENDS OVER TWO DECADES (1990); Rick Morgan, Predictive Validity Within Categorizations of College Students: 1978, 1981, and 1985 (1990), ETS RESEARCH REPORT NO. 90-14; Rick Morgan, Analyses of the Predictive Validity of the SAT and High School Grades From 1976 to 1985 (1989), COLLEGE BOARD RESEARCH REPORT NO. 89-7.

^{270.} See, e.g., CROUSE & TRUSHEIM, supra note 249, at 52; James Crouse, This Time the College Board Is Wrong, 55 HARV. EDUC. REV. 478, 479 (1985); Peter Sacks, Standardized Testing: Meritocracy's Crooked Yardstick, CHANGE, Mar./Apr. 1997, at 25-26; Warner V. Slack & Douglas Porter, The Scholastic Aptitude Test: A Critical Appraisal, 50 HARV. EDUC. REV. 154, 165 (1980).

^{271.} See, e.g., SAUL GEISER & ROGER STUDLEY, UC AND THE SAT: PREDICTIVE VALIDITY AND DIFFERENTIAL IMPACT OF THE SAT I AND SAT II AT THE UNIVERSITY OF CALIFORNIA (2001). UC Santa Cruz was excluded because in many courses that institution issued narrative evaluations rather than letter grades. See id.

^{272.} See id. at 3 tbl.1.

and the ones most likely to be named as defendants in a disparate impact lawsuit—the relative contribution of the SAT was even lower than it was for the UC system overall.²⁷³ To summarize, the SAT imposes a substantial adverse effect on underrepresented minority students, yet its contribution to the prediction of freshman grades is Moreover, the UC system's educational necessity auite modest. position was most likely undermined when UC President Richard Atkinson, who himself is a cognitive psychologist steeped in the testing literature, suggested that the UC system could discontinue using the SAT in favor of another test that it might develop.²⁷⁴

More importantly, the ability to predict freshman grades in college is hardly dispositive for a defendant university attempting to meet its educational necessity burden in a Title VI disparate impact claim. A strong argument can be made that college graduation is of greater ultimate importance than freshman GPA, and the educational necessity of the SAT is even more questionable considering available data on graduation patterns. U.S. Department of Education research analyst Clifford Adelman argues:

The justification for using SAT scores in admission decisions is that they are a decent predictor of first-year college grades. True, but so what? That criterion has nothing to do with the principal goal of students at four-year colleges and their families: completing a bachelor's degree. Nor do state legislatures give a hoot about grades when they judge the performance of public universities: Performance means graduation rates. 275

Using the U.S. Department of Education's comprehensive national database, Adelman found that, after controlling for major background characteristics of students, the quality and intensity of high school academic curriculum was a far better predictor of degree completion than SAT scores.²⁷⁶ Another major national study by

^{273.} See id. at 5-6. Note that the UC finding is not a byproduct of restriction of range. The range of student SAT scores would be expected to be more restricted at the most competitive UCs. However, restriction of range would not explain the predictive inferiority of the SAT I in comparison to the SAT II, since the variances of SAT I and SAT II score are quite similar within each school. For the same reason, restriction of range cannot explain why the inferiority of SAT I is greater at UCB, UCLA, and UCSD than other UCs. See id. at 4 n.8.

^{274.} See supra Part I.A.

^{275.} Clifford Adelman, Why Can't We Stop Talking About the SAT?, CHRON. HIGHER EDUC., Nov. 5, 1999, at B4.

^{276.} See Clifford Adelman, Answers in the Tool Box: Academic Intensity, Attendance Patterns, and Bachelor's Degee Attainment (1999), at http://www.ed.gov/pubs/Toolbox/

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UCLA Professor Alexander Astin looked at longitudinal data from the Cooperative Institutional Research Program (CIRP), and found that the SAT only correlated 0.27 with graduation rates, meaning that the SAT only explained 5% of the variance in graduation rates.²⁷⁷

Do SAT scores have a stronger association with graduation rates at highly selective universities, which are by and large the institutions at issue in the affirmative action debate? According to Abigail and Stephan Thernstrom, prominent critics of affirmative action, UC Berkeley graduation rates "correlated perfectly with SAT scores." 278

(last visited June 14, 2002); Clifford Adelman, The Rest of the River, UNIV. BUS., Jan.-Feb. 1999, at 42, 48.

277. See ALEXANDER W. ASTIN, WHAT MATTERS IN COLLEGE 193 (1993) (reporting for a sample of 38,000).

278. Abigail Thernstrom & Stephan Thernstrom, Letter to the Editor, N.Y. TIMES, June 1, 1998. This argument is laid out in greater detail in THERNSTROM & THERNSTROM, supra note 44, at 406-07. In particular, the Thernstroms argue that SAT-band data from Berkeley's 1988 entering class (reproduced in the left columns of the table below) establishes that the SAT correlates strongly with graduation rates. See id. at 407 tbl.8.

However, Gregg Thomson, Director of the Office of Student Research at UC Berkeley, offers what we believe is a persuasive rebuttal to the Thernstroms' claim. Gregg Thomson, Is the SAT a "Good Predictor" of Graduation Rates? The Failure of "Common Sense" and Conventional Expertise and a New Approach to the Question (1998) (unpublished paper presented at the California Association of Institutional Research annual meeting). Thomson argues that the Thernstroms' data presentation is misleading because the cells with far lower graduation rates (SATs in the 700s and 800s) only include 2% and 4% of the cohort, respectively. See id. at 4-5. As indicated in the far right column in the table below, after recalculating admission rate averages for nine equally sized intervals, the SAT-graduation rate association diminishes considerably. As indicated by the middle-right column below, even within the Thernstroms' reporting format, the SAT-graduation rate correlation decreases considerably after taking out students admitted by exception, which is a classification (distinct from affirmative action) for those who did not meet the basic UC eligibility requirements, which largely includes recruited athletes. See id. at 5. Finally, Thomson reports that there is "zero correlation" between SAT scores and eventual graduation rates for the African Americans within the same cohort of Berkeley students discussed by the Thernstroms. See id. at 6.

Thernstroms' Data on 1988 Berkeley Freshmen Who Graduated Within Six Years (at 407 tbl.8)		Thomson's Data on 1988 Berkeley Freshmen Who Graduated Within Six Years (at 4-5)		
SAT BAND	Graduation Rate	Graduation Rates by SAT Band without "admissions by exception" (mostly recruited athletes)	Graduation Rates by SAT After Dividing Berkeley's Entering Class into Nine SAT intervals With Equal Numbers of Students	
700-799	58%	73%	77%	
800-899	62%	75%	80%	
900-999	72%	79%	86%	

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However, more reliable information is presented in The Shape of the River, in which William Bowen and Derek Bok, the former presidents of Princeton and Harvard, respectively, extensively studied the College and Beyond (C&B) database of twenty-eight (mostly private) elite colleges and universities.²⁷⁹ Bowen and Bok found that, after controlling for school selectivity, high school grades, socioeconomic status, and other characteristics, SAT scores bore little relationship to graduation rates (and no relationship above scores of 1000). Students with SAT scores under 1000 had graduation rates of 83%, students in the 1000s had rates of 86%, those in the 1100s had rates of 88%, those in the 1200s had rates of 86%, and those above 1300 graduated 87% of the time. 280 The SAT findings contrasted with school selectivity, which continued to be associated with graduation rates after controlling for other factors.²⁸¹ Bowen and Bok also report that at the most selective C&B schools African Americans with SAT scores under 1000 had graduation rates of 88%, whereas in the least selective C&B schools even African American students with SAT scores over 1300 had graduation rates of 75%. 282 In summary, the C&B data suggests that factors other than the SAT-those having to do with institutional resources (endowment size, class size, the availability of support programs, etc.)—are much more influential determinants of graduation rates.

The Bowen and Bok data should also remind researchers that

····			
1000-1099	78%	82%	88%
1100-1199	83%	86%	86%
1200-1299	86%	87%	89%
1300-1399	88%	91%	92%
1400-1499	84%	86%	88%
1500-1599	79%	82%	86%

We point out these differences in data presentation and interpretation because much of the public debate about affirmative action, merit, and the SAT involves UC Berkeley.

279. See WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER (1998). Seventy percent of C&B students attended private colleges and universities, while 30% attended four large public universities. See id. at xxxvii.

280. See id. at 66 fig.3.6.

281. See id. at 63. Bowen and Bok conclude:

The central finding is that the effect of school selectivity on graduation rates persists after controlling not only for differences in SAT scores, but for other factors as well. In other words, among students of the same gender with similar SAT scores, high school grades, and socioeconomic status, those who attended the most selective schools graduated at higher rates than did those who attended less selective schools.

Id.

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much of the SAT-graduation rate correlation reported in other largescale studies may be an artifact of combining data from different schools, while failing to acknowledge that the most well-endowed elite private schools simultaneously have greater institutional resources, as well as higher graduation rates and higher SAT scores. 283 For example, a recent study by Burton and Ramist of the College Board summarized eight studies of SAT and graduation rates, and reported a 0.33 correlation between these two measures.²⁸⁴ Yet, Burton and Ramist acknowledge that their estimate may be too high because they could not account for institutional effects. 285

To give a practical example, this means that it would be incorrect to combine data from Harvard and California State University at Hayward, and then draw conclusions about the SAT's ability to forecast graduation rates without first controlling for institutional and student background characteristics. First, graduation rates for Harvard will reflect the benefits of receiving an education at a place with enormous institutional resources (students receive individualized attention from faculty and administrators, stronger peer support networks, etc.). Second, Cal State Hayward students are far more likely to encounter socio-economic barriers that make uninterrupted graduation more difficult for reasons unrelated to academic preparation or ability. The SAT's correlation with income and other measures of socioeconomic status²⁸⁶ and institutional

^{283.} See ZWICK, supra note 63, at 93-94. In a review of the literature on standardized tests and graduation rates, Zwick cautions:

In a large study that includes many colleges, there will be a much larger range of test scores and graduation rates than in a single school. Multi-institution analyses of graduation are usually based on the combined data from all the schools (unlike multi-institution GPA prediction studies, which usually involve analyses that have been conducted within institutions and then averaged). To some extent, then, the apparent association between test scores and graduation will reflect the fact that some schools have both higher test scores and higher gradation rates than others.

Id.

^{284.} See Nancy W. Burton & Leonard Ramist, Predicting Success in College: SAT Studies of Classes Graduating Since 1980, at 16 tbl.9 (2001), COLLEGE BOARD RESEARCH REPORT No. 2001-2.

^{285.} See id. at 17 ("Most of the results in Table 9 are based on multi-institution studies, so the tendency of more selective institutions to have higher graduation rates will affect the correlations. Pending further research, one cannot be sure what part of a correlation in Table 9 is due to the institution-level relationship of selectivity to retention and what part is due to the predictability of individual students' graduation from their grades and SAT scores.").

^{286.} The relationship between SAT scores and income is indicated in the table below, which is based on test-takers' self-reported parental income for all high school seniors who took the SAT in 2001. See FairTest, University Testing: 2001 SAT Scores, at http://www.fairtest.org/univ/2001SAT%20Scores.html (last visited June 28, 2002).

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resources²⁸⁷ tends to artificially boost the correlation between graduation rates and SAT scores when combining Harvard and Hayward data. Consequently, when Warren Willingham of ETS studied SAT-graduation relationships within each of nine colleges, the correlation coefficient dropped to only 0.15.²⁸⁸

In analyzing whether "a substantial legitimate justification" exists for over-reliance on the SAT despite its disparate impact, a key consideration is that there must be a fit between a university's mission and its admission practices. In a recent report on standardized tests, the prestigious National Academy of Sciences recommended that "[a]dmissions policies and practices should be derived from and clearly linked to an institution's overarching intellectual and other goals" and that the "use of test scores in the admissions process should serve those institutional goals."289 While these recommendations may seem like common sense, universities espousing lofty institutional missions frequently fail to carefully consider whether or not their admission criteria are well-suited to serve important goals.²⁹⁰ For example, in its

Family Income	Combined SAT Scores	
Under \$10,000	864	
\$10,000 - \$20,000	898	
\$20,000 - \$30,000	942	
\$30,000 - \$40,000	976	
\$40,000 - \$50,000	1004	
\$50,000 - \$60,000	1011	
\$60,000 - \$70,000	1035	
\$70,000 - \$80,000	1049	
\$80,000 - \$100,000	1074	
\$100,000+	1126	

For further discussion of the relationship between SAT scores and income level, see Sturm & Guinier, supra note 140, at 970, Sacks, supra note 271, at 25-26. To be clear, we are not claiming that the correlation between SAT scores and income is entirely a reflection of bias in the SAT. The unfortunate fact is that since poor and affluent students have unequal educational opportunities, income-based differences in SAT scores are hardly surprising for reasons unrelated to test bias. We are making the more technical point that it is questionable logic to assume that the correlation between SAT scores and graduation rates is caused by SAT-related skill differences without first accounting for other factors (socioeconomic status, institutional effects, etc.) that correlate with SAT scores.

^{287.} See BOWEN & BOK, supra note 280.

^{288.} See Burton & Ramist, supra note 285, at 17 (citing WARREN W. WILLINGHAM, SUCCESS IN COLLEGE: THE ROLE OF PERSONAL QUALITIES AND ACADEMIC ABILITY

^{289.} Alexandra Beatty et al., Myths and Tradeoffs: The Role of Tests in Undergraduate Admissions (1999), at http://www.nap.edu/html/ myths tradeoffs/#Summary (last visited June 14, 2002).

^{290.} Lani Guinier, Confirmative Action, 25 LAW & SOC. INQUIRY 565, 578 (2000) ("Law schools, especially public institutions like the University of Michigan, could at least

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answer to the Rios/Castaneda complaint filed by civil rights organizations, defense counsel for UC Berkeley stated that Berkeley's institutional mission was to "admit students who, among other characteristics, demonstrate exceptional achievement and talent, who will contribute to the campus community, and will bring diversity of personal experience and background."291 The SAT's relationship to such criteria is far from self-evident. For example, a thirty-year retrospective study of three classes of Harvard University alumni found that low SAT scores and a blue-collar background correlated with measures of success such as community involvement, professional satisfaction, and high income.²⁹²

Evidence suggests that the SAT and other standardized tests are particularly weak predictors of potential contributions to community service and similar "public spirited" institutional goals. For example, Bowen and Bok found that within the C&B database, African American graduates, many of whom received affirmative action consideration, and who had average SAT scores over 200 points lower than Whites, were nonetheless significantly more likely than their White classmates to become the leaders of civic service organizations,

be more explicit and more open about their real mission, and express a willingness to abandon those rigid entry-level criteria that do not predict the kinds of behavior among their graduates that the school purports to value."); Thomas D. Russell, The Shape of the Michigan River as Viewed from the Land of Sweatt v. Painter and Hopwood, 25 LAW & SOC. INQUIRY 507, 511 (2000) ("As part of the defense of race-conscious affirmative action at state universities like Michigan and UT, the faculty and administrators, as well as their lawyers, ought to think hard about the aims of the universities in light of their character as state institutions."); Note, The Relationship Between Equality and Access in Law School Admissions, 113 HARV. L. REV. 1449 (2000). The author of this note observes:

[T]he institution must define merit in a way that enables the institution to create selection criteria that evaluate the skills necessary for participation within the institution. If the selection criteria identify and reward other attributes, access is granted arbitrarily because individuals are chosen based on something other than their capacity to engage in the activity at issue. Such a procedure not only prevents institutions from selecting the best candidates, but it can also have an unnecessary discriminatory effect on certain groups. Despite these potential problems, institutions rarely examine or reform their selection criteria to ensure that the criteria accurately identify individuals who will enable the institution to accomplish successfully its mission.

Id. at 1456.

291. Rios v. Regents of the University of California, Answer to First Amended Complaint at 9, April 9, 1999 (N.D. Cal., Case No. C 99-0525 SI).

292. Sturm & Guinier, supra note 140, at 976-77 (citing David K. Shipler, My Equal Opportunity, Your Free Lunch, N.Y. TIMES, Mar. 5 1995, section 4 at 1, 16). Admittedly, Harvard has one of the most competitive applicant pools in the country, so restriction of range effects caution against over-interpretation. On the other hand, there is reason to think that similar results might obtain at other elite universities and colleges.

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including those in law, medicine, business, and other professions.²⁹³ A study of alumni of the University of Michigan Law School graduating classes of 1970-1996 found similar results.²⁹⁴ Moreover, this is not simply a self-selection effect of admission policies at these institutions. as other research indicates that within nationally representative samples of applicants, standardized tests such as the LSAT, GRE, and MCAT negatively correlate with valuing social activism, leadership, and concern for others.²⁹⁵ Some institutions, such as Bates College, actually find that making the SAT optional allows them to better fulfill their institutional mission, and has the added bonus of broadening and deepening their applicant pool. 296

3. Evaluating Equally Effective but Less Discriminatory Alternatives

Plaintiffs may prevail in a Title VI disparate impact lawsuit even after the defendant provides sufficient evidence of educational necessity if plaintiffs can meet their burden, and demonstrate that an alternative practice results in smaller racial/ethnic disparities but is nonetheless equally effective in meeting the institution's educational goals.²⁹⁷ The courts can consider the administrative feasibility of suggested alternatives, including differences in cost and time. 298

^{293.} See BOWEN & BOK, supra note 280, at 29-31, 160-68.

^{294.} See Richard O. Lempert et al., Michigan's Minority Graduates in Practice: The River Runs Through Law School, 25 LAW & SOC. INQUIRY 395, 485-90 (2000).

^{295.} See Kidder, supra note 15, at 55-56. See also Astin, supra note 278, at 202-09, 213; Leonard L. Baird, Biographical and Educational Correlates of Graduate and Professional School Admission Test Scores, 36 EDUC. & PSYCHOL. MEASUREMENT 415, 418-19 (1976).

^{296.} See William C. Hiss, Optional SAT's at Bates: 17 Years and Not Counting, CHRON. HIGHER EDUC., Oct. 26, 2001, at B10 (also noting that the Bates students who do not submit their SAT scores have GPAs and graduation rates equal to students who do submit SAT scores).

^{297.} See U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, supra note 92, at 58,

^{298.} See id. at 59 n. 203. See also Sharif v. New York State Educ. Dep't, 709 F. Supp. 345, 363-64 (S.D.N.Y. 1989) (rejecting New York's argument that alternatives to sole reliance on the SAT in awarding scholarships were impractical in light of the fact that several other states employed alternative criteria which resulted in smaller gender disparities); GI Forum v. Texas Educ. Agency, 87 F. Supp. 2d 667, 682 (W.D. Tex. 2000) (ruling, in the context of a state standardized test required to graduate from high school, "[t]he Plaintiffs produced no alternative that adequately addressed the goal of systemic accountability"); Cureton v. Nat'l Collegiate Athletic Ass'n, 37 F. Supp. 2d 687, 714, rev'd on other grounds, 198 F.3d 107 (3d Cir. 1999) ("Plaintiffs have shown at least three alternative practices resulting in less racial disproportionality while still serving the NCAA's goal of raising student-athlete graduation rates . . . That is all the proof that Plaintiffs need to demonstrate under Title VI.").

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We wish to make clear at the outset that establishing the existence of equally effective but less discriminatory alternatives in a Title VI disparate impact case is quite distinct from the narrow tailoring prong of strict scrutiny review in Equal Protection challenges to university affirmative action programs.²⁹⁹ Thus, while we discuss percentage plans in this portion of the article, we warn readers not to mistakenly interpret our analysis to mean that race-conscious admission programs at institutions such as the University of Michigan³⁰⁰ and the University of Georgia³⁰¹ are not narrowly tailored to advance a compelling governmental interest. We also wish to avoid conveying the impression that pervasive inequalities in K-12 education are excused by virtue of percentage plans; it is only that K-12 equity issues are beyond the scope of this article. 302

One important source of data on equally effective but less discriminatory alternatives to the SAT is the Texas "Ten Percent Plan," which was enacted by the Texas legislature and signed by then-Governor George W. Bush in 1997, shortly after the Fifth Circuit's Hopwood v. Texas ruling banned affirmative action. 303 Percent Plan allows students graduating in the top tenth of their high school class to gain admission to the University of Texas-Austin (UT-Austin), Texas A&M University, and other campuses, without regard to performance on the SAT. In Table 1, we display UT-Austin freshman enrollment data by race/ethnicity for the five years since affirmative action was prohibited. The 1997 figures were after Hopwood banned race-sensitive admissions, but were before the Ten Percent Plan took effect. The pre-Ten Percent Plan numbers for the 1997 class therefore provide a useful baseline to compare with the subsequent four classes admitted under this plan. The data indicate that the proportion of African Americans and Latinos at UT-Austin have improved modestly (and slightly more for APAs) after the plan took African Americans were 2.7% of freshman enrollments in 1997, compared to an average of 3.6% during 1998-2001. Latinos made up 12.6% of UT-Austin freshman enrollments in 1997, compared

^{299.} For a summary of several recent educational affirmative action cases involving narrow tailoring, see Kidder, supra note 25, at 179, 193, 202-04. For in-depth discussion of the issue, see Ian Avres, Narrow Tailoring, 43 UCLA L. REV. 1781 (1996).

^{300.} See Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000).

^{301.} Johnson v. Bd. of Regents of the Univ. System of Georgia, 263 F.3d 1234 (11th Cir. 2001).

^{302.} See infra Part V.

^{303.} See Holley & Spencer, supra note 32, at 252-59.

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to an average of 13.5% during 1998-2001. While the parties would likely dispute causation, this kind of data should be sufficient to make a showing that percentage plans can be a less discriminatory alternative to post-affirmative action admissions in which the SAT is required. 304

TABLE 1: Post-Hopwood Freshman Enrollments at UT-Austin 1997-2001³⁰⁵

	1997	1998	1999	2000	2001
Black	190	199	286	296	242
	(2.7%)	(3.0%)	(4.1%)	(3.9%)	(3.3%)
Latino	892	891	976	1011	1024
	(12.6%)	(13.2%)	(13.9%)	(13.2%)	(14.0%)
APA	1130	1133	1221	1325	1413
	(15.9%)	(16.8%)	(17.3%)	(17.2%)	(19.2%)
White	4730	4399	4447	4801	4447
	(66.8%)	(65.2%)	(63.2%)	(62.5%)	(60.6%)

The remaining issue is whether a policy like the Texas Ten Percent Plan can be an equally effective alterative to reliance on the Again, data from the flagship UT-Austin campus are illuminating. Students in the top 10% of their high school class earned

^{304.} One study by David Montejano analyzed UT-Austin's feeder high schools, and found that the principal beneficiaries of the Ten Percent Plan were Black and Chicano students from inner-city high schools in San Antonio, Houston, and Dallas, as well as Whites from rural high schools in northern and eastern Texas. See David Montejano, Access to the University of Texas at Austin and the Ten Percent Plan: A Three-year Assessment (2001), at http://www.utexas.edu/student/research/reports/admissions/

Montejanopaper.htm (last visited June 14, 2002). See also David Montejano, Maintaining Diversity at the University of Texas, in RACE AND REPRESENTATION: AFFIRMATIVE ACTION 359 (Robert Post & Michael Rogin eds., 1998).

In a SAT disparate impact case, plaintiffs' and defendants' experts could be expected to dispute how much improvement in racial/ethnic composition is attributable to not considering the SAT, as opposed to shifting demographics of the applicant pool, increased recruiting efforts, changes in financial aid availability, etc.

^{305.} The information in Table 1 was generated from several different sources. See UT Austin Office of Institutional Studies' Enrollment Tables (2000); GARY M. LAVERGNE & BRUCE WALKER, IMPLEMENTATION AND RESULTS OF THE TEXAS AUTOMATIC ADMISSIONS LAW (HB 588) AT THE UNIVERSITY OF TEXAS AT AUSTIN REPORT NUMBER 4 (2001), available at http://www.utexas.edu/student/research/reports/admissions/HB588-Report4.pdf (last visited June 14, 2002); Holley & Spencer, supra note 32, at 252 tbl.1. We did not include American Indians in Table 1 because their numbers at UT-Austin, ranging from twenty-eight to thirty-seven annually, were too small to form the basis of conclusions vis-à-vis the Ten Percent Plan.

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significantly higher freshman grades than non-top 10% students—this finding was true overall for each racial and ethnic group, and within each field of study. 306 In fact, top 10% students with SAT scores in the 1200s had higher freshman GPAs than non-top 10% students with SATs in the 1400-1600 range, top 10% students with SAT scores in the 1000s had higher GPAs than non-top 10% students with SATs in the 1200s, and so forth. 307 Persistence and graduation rates were likewise higher at UT-Austin for top 10% students than those not in the top 10% 308

Some readers may reasonably find that the above performance data on the Texas Ten Percent plan is not an entirely satisfactory comparison, since many of the students in the top 10% of their high school class also had high SAT scores and would have been admitted to UT-Austin regardless of the Ten Percent Plan. Similarly, several scholars have criticized other major affirmative action studies for not separating students of color who would have been admitted anyway from those who would not have been admitted but for affirmative However, Bowen and Bok and other researchers have

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^{306.} See LAVERGNE & WALKER, supra note 306, at 7-13.

^{307.} See id. at 7 tbl.VI.

^{308.} See id. at 16-20. See also Montejano, Maintaining Diversity, supra note 305, at 2 (noting that top 10% students have outperformed non-top 10% students with SAT scores 200-300 points higher). Another study of public university students in Indiana likewise found that if students' SAT scores were subtracted from the mean SAT scores for their high schools (which is, in effect, similar to the Texas Ten Percent Plan) the "merit-aware" index scores were equally effective as predictors of student persistence compared to unadjusted SAT scores. See, e.g., Edward P. St. John, Aptitude vs. Merit: What Matters is Persistence, 24 REV. HIGHER EDUC. 131 (2001).

^{309.} Terrence Sandalow, Rejoinder, 97 MICH. L. REV. 1923 (1999). Sandalow criticizes Bowen and Bok:

In The Shape of the River, presidents Bowen and Bok pronounce the racesensitive admission policies adopted by selective undergraduate schools a resounding success. The evidence they adduce in support of that conclusion primarily concerns the performance of African-American students in and after college. But not all African-American students in those institutions were admitted in consequence of minority preference policies. Some, perhaps many, would have been admitted under race-neutral policies. I argued at several points in my review that since these students might be expected to be academically more successful than those admitted because of their race, the evidence on which Bowen and Bok rely provides a potentially distorted view of the latter's performance, almost certainly suggesting a greater level of success than those students actually achieved.

Id. at 1923. See also Terrance Sandalow, Minority Preferences Reconsidered, 97 MICH. L. REV. 1874 (1999). Richard Sander, The Tributaries to the River, 25 LAW & Soc. INQUIRY, 557, 559 n.2 (2000) (In criticizing Lempert, Chambers, and Adams study of the University of Michigan Law School, Sander argues: "It is worth pointing out that in all the paper's analyses, 'minority' is implicitly used as a proxy for 'affirmative action admit.' Given the extent of background information the authors had, I suspect they could have identified

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correctly noted that framing the debate in this manner is to chase an impossible goal, because it is surprisingly difficult to know as an empirical matter which students of color were and were not admitted under affirmative action.³¹⁰ Accordingly, we approached UT-Austin

which students were in fact probably admitted through affirmative action, and which students would have been admitted through a race-blind process. This would have made more convincing those analyses that purport to assess the effects of affirmative action."); Robert L. Nelson & Monique Payne, Minority Graduates from Michigan Law School: Differently Successful, 25 LAW & Soc. INQUIRY 521, 522 (2000) ("Minority status is then an imperfect indicator of whether an applicant was admitted preferentially on the basis of race. In an article primarily concerned with assessing the effects of affirmative action policies, blurring the distinction between minority and preferential admissions is problematic because it may obscure some fundamental differences within the group labeled minority. For example, perhaps those minorities who were admitted without preferential treatment were more likely to succeed than others granted admission.").

310. See William G. Bowen & Derek Bok, Response to Review by Terrance Sandalow, 97 MICH. L. REV. 1917 (1999). Bowen and Bok observe:

There is absolutely no way of knowing when race was and was not dispositive (or, to put the question another way, which African-American candidates would have been admitted had they been White). And, in fact, even framing the question this way is to chase a will o' the wisp. As one admissions dean put it in a recent conversation, people have to understand that we look at all the attributes of a candidate together; we view the race of a candidate in conjunction with so many other things—what school the student attended, where and how he or she grew up, leadership potential, 'drive,' and so on. Moreover, in deciding whether or not to admit a particular candidate, we also consider who else has already been admitted to the class. This admissions officer went on to say that, even with all the information he has (far more than would ever be available to any outside student of the process), he himself could not say which candidates were and were not admitted solely because of their race.

Id. at 1918-19. See also Richard O. Lempert et al., Michigan's Minority Graduates in Practice: Answers to Methodological Queries, 25 LAW & Soc. INQUIRY 585 (2000).

Responding to criticism of their study (cited in the previous footnote) Lempert, Chambers, and Adams argue:

Nelson and Payne and Sander would all like to know what our results would look like if we had excluded from our minority sample minority graduates who would have been admitted to Michigan without a boost from affirmative action. Their concern is that the success of these graduates explains why minority status and admissions credentials seem not to explain current income or career satisfaction. We understand why they are curious and concerned, but there is a good argument that the groups should not be separated. The success of minorities who would have been admitted to Michigan without affirmative action may be due in considerable measure to the existence of the program Moreover, if we turn from theory to practice, it is impossible to identify with certainty most of those minority students at Michigan who would have been admitted had the school not had an affirmative action program. Many minority students with admissions indexes in the range of White admittees nevertheless benefited at the admissions stage from Michigan's affirmative action program. This is because, like most of their white counterparts, most minority students with admissions indexes sufficient for admission to Michigan without affirmative action nonetheless do not have quantitative credentials so strong Michigan's concern for diversity meant that all these students presented very strong cases for admission, and we have no way of 2002]

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officials about obtaining more accurate data on this point, but they were unable to provide it for the same reason.³¹¹

E. The Viability of Filing Complaints with the Department of Education

The U.S. Department of Education regulations interpreting Title VI prohibit educational institutions that receive federal funding from using criteria (in admissions, scholarship allocation, etc.) that have an unwarranted disparate impact on students of color. 312 In addition to using section 1983 as a mechanism to privately enforce the Department of Education's disparate impact regulations, the costs and benefits of filing a complaint directly with Office for Civil Rights (OCR) should also be explored below. A recent example is the OCR complaint filed by MALDEF, FairTest, and other organizations over Florida's use of a 1270 SAT cutoff score for the state's \$164 million "Bright Futures" scholarship program.313

For many public interest organizations constrained by the cost of litigation, the lower cost of filing an OCR complaint may be more appealing, even though there are serious drawbacks. One glaring limitation is that a complainant does not possess a right to participate in an OCR investigation.³¹⁴

From the plaintiffs' perspective, the built-in level of passivity in an OCR investigation is substantial, which makes it difficult to use such a complaint as a lightening rod for the larger political movement for educational equity. Consequently, we conclude that an OCR complaint will usually fail what might be called the "social justice praxis test," although litigation often fails this test as well. instance, environmental law Professor Luke Cole advocates "practicing

distinguishing most of those students who would have made it had a concern for diversity not existed from those who would not have been admitted. Bowen & Bok, supra note 311, at 593-94.

^{311.} Specifically, we contacted Gary Lavergne, Director of Admissions Research at UT-Austin, and author of several reports on the Texas Ten Percent Plan. We also requested data from Professor Leicht at the University of Iowa, who heads a Ford Foundation study of the Texas Ten Percent Plan. Lavergne could not provide us with the data for reasons similar to those cited by Bowen and Bok, Lempert, and Chambers and Adams.

^{312.} See 34 C.F.R. § 100.3(vii)(2) (Lexis 2002).

^{313.} See Andrea Robinson, Coalition Alleging Bias in Fla. Scholarship Program, MIAMI HERALD, Aug. 27, 2002, at A1.

^{314.} See Mank, supra note 189, at 363 (noting that Title VI administrative investigations do not protect the individual rights of the complainant).

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law in a way that empowers people, that encourages the formation and strengthening of client groups, and that sees legal tactics in the context of broader [political] strategies."315 Civil rights scholar Eric Yamamoto espouses a similar notion of "critical race praxis," which involves using the courts as part of a larger communicative process "to help focus cultural issues, to illuminate institutional power arrangements, and to tell counter-stories in ways that assist in the reconstruction of intergroup relationships and aid larger social-political movements."316

In summary, we do not mean to disparage those who decide to file OCR complaints in order to enforce Title VI disparate impact regulations. Indeed, our analysis of the case law indicates that OCR complaints may be the only viable legal remedy in those jurisdictions that no longer recognize a private right of action to enforce Title VI disparate impact regulations. Rather, we emphasize the need to think strategically about how filing an OCR complaint (as well as filing a lawsuit) can contribute to a larger movement to advance educational equity issues.

V. CONCLUSION

According to the 2000 Census, nearly thirty-three million Latinos, including twenty-two million Chicanos, live in the United States. 317 More than half of U.S. Latinos reside in California and Texas, 318 where Proposition 209 and Hopwood currently prohibit the consideration of race in public university admissions. Consequently, while Latinos comprised 32.5% of Californians in the 2000 Census (and more than a third of California's public high school graduates in 2002),³¹⁹ Latinos comprised 12.7% of freshmen enrollments at all UC campuses in the

^{315.} Luke Cole, Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law, 19 ECOLOGY L.Q. 619, 648 (1992). See also GERALD P. LOPEZ, REBELLIOUS LAWYERING (1992).

^{316.} Eric K. Yamamoto, Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America, 95 MICH. L. REV. 821, 885-86 (1997). See also ERIC K. YAMAMOTO, INTERRACIAL JUSTICE (1999).

^{317.} See Melissa Therrien & Roberto R. Ramirez, The Hispanic Population in the United States: March 2000 (2001), in U.S. CENSUS BUREAU REPORT, available at http://www.census.gov/population/www/cen2000/briefs.html (last visited June 25, 2002).

^{318.} See Press Release, Census 2000, U.S. Census Bureau (May 2001), available at http://www.census.gov/press-release/www/2001/cb01-81.html (last visited June 25, 2002).

^{319.} See Bob Laird, Bending Admissions to Political Ends, CHRON. HIGHER EDUC., May 17, 2002, at B11 (UC Berkeley's former Director of Admissions, citing data from the California Department of Finance).

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first four years following the ban on affirmative action (1998-2001).³²⁰ Latino representation in 1998-2001 was even lower at UC Berkeley (9.6%), and at UC San Diego (8.9%), another highly selective campus where admission is driven by SAT scores and grades to an even greater extent than at Berkeley.³²¹ Likewise, while Latinos comprised 32% of Texas residents in the 2000 Census, they made up 13.4% of freshman enrollments at the University of Texas-Austin in the five years following the Hopwood decision (1997-2001). 322

Post-affirmative action university admission data are even more discouraging for African Americans, who comprised just under 3% of 1998-2001 freshmen enrollments in the UC system. 323 According to the 2000 Census, African Americans comprised 29.2% of Georgia residents.³²⁴ However, at the University of Georgia, under the quite modest 1999 affirmative action plan that was recently struck down by the Eleventh Circuit, 325 African Americans comprised less than 6% of freshmen enrollments.³²⁶ This reflected the reality that approximately 85% of freshmen at the University of Georgia (which had a 160-year history of de jure segregation) were admitted solely of the basis of SAT/GPA index scores, and that within the smaller pool of students receiving comprehensive review, the plus factor given to race was less

^{320.} See University of California Office of the President, Application, Admissions and Enrollment of California Resident Freshmen for Fall 1995 through 2001 [hereinaster California Resident Freshmen] at http://www.ucop.edu/news/factsheets/flowfrc9501.pdf (last visited June 25, 2002). For more extensive policy discussion of Latino's lack of access to higher education in California, see generally Richard Delgado & Jean Stefancic, California's Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education, 47 UCLA L. REV. 1521 (2000); Jorge H. del Pinal, Latinos and California's Future: Too Few at the School's Door, 10 LA RAZA L.J. 631 (1998); Aida Hurtado et al., Becoming the Mainstream: Merit, Changing Demographics, and Higher Education in California, 10 LA RAZA L.J. 645 (1998); Rachel F. Moran, Unrepresented, 55 REPRESENTATIONS 139 (1996).

^{321.} See California Resident Freshmen, supra note 321 (listing enrollments by campus and race/ethnicity); REBECCA ZWICK, supra note 63, at 38 (describing UC San Diego's 1999 admissions policy based upon information provided by the UCSD vice chancellor).

^{322.} See LAVERGNE & WALKER, supra note 306, at 4 tbl.II; Holley & Spencer, supra note 32, at 252 tbl.1.

^{323.} See California Resident Freshmen, supra note 321.

^{324.} See Jesse McKinnon, The Black Population: 2000 (2001), U.S. CENSUS BUREAU REPORT, available at http://www.census.gov/population/www/cen2000/briefs.html (last visited June 25, 2002).

^{325.} See Johnson v. Bd. of Regents of the Univ. System of Georgia, 263 F.3d 1234 (11th Cir. 2001).

^{326.} See Brief on Appeal of Intervenors Antoine Hester et al. at 17, Johnson v. Board of Regents of the Univ. System of Georgia, 263 F.3d 1234 (11th Cir. 2001) (reporting that African Americans were 243 of 4,272 freshmen in 1999 and 246 of 4,244 freshmen in 1997). The Intervenors in Johnson were represented by the NAACP Legal Defense and Educational Fund. See id.

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than 6% of the point total.³²⁷ When the University of Georgia discontinued its affirmative action plan in 2001 as it proceeded with its appeal, it still adhered tightly to this traditional SAT/GPA definition of merit for the vast majority of admissions decisions, and African American freshmen enrollments dropped by one quarter. 328

These stark statistical disparities in California, Texas, and Georgia bring us full circle to Professor Lawrence's observation at the beginning of this article that the end of affirmative action is a reminder, for those who need to be reminded, that racial privilege in America based upon Whiteness is alive and well.³²⁹ In this article, we attempted to identify and analyze one important expression of that privilege: racial bias on standardized tests like the SAT. While higher education inequities and standardized test score differences undoubtedly stem from a number of social forces—residential/educational segregation's contribution to inferior K-12 schooling for students of color is a salient example³³⁰—we argue that the SAT also creates "built-in headwinds" in its own right. We combined empirical evidence with a review of the

^{327.} See Johnson, 263 F.3d at 1240-41 (reporting that race was 0.5 points out of a maximum of 8.5 points for applicants given further consideration after the bulk of applicants were admitted or rejected automatically based on index scores); Press Release, University of Georgia, Nov. 9, 2001 (reporting that 80-90% of admissions in recent years were based grades and SAT/ACT scores), available http://www.usg.edu/news/2001/11.09.01.html (last visited June 25, 2002).

^{328.} See Janet L. Conley, Race Matters: Michigan Case Reopens Issue in Admissions, Enrollment of Black Freshmen at UGa Declined to Less than 5 Percent in 2001, FULTON CO. DAILY REPORT, May 23, 2002 (reporting a 24% drop, from 256 African Americans in 2000 to 207 in 2001); Joan Stroer, UGa's Black Enrollment Holds Steady, FLORIDA TIMES-UNION, Aug. 18, 2001, at B1 (reporting a one-year drop in African American freshmen enrollments from 249 to 201 based on preliminary data); Sara Hebel, U. of Georgia Eliminates Use of Race in Admission Decisions, CHRON. HIGHER EDUC. Dec. 14, 2001, at A26 (reporting that except for athletes and a few dozen students with special skills, admission decisions at the University of Georgia would be based upon high school GPA in core courses and standardized test scores).

^{329.} See supra note 1 and accompanying text.

^{330.} On segregation and related educational inequality issues, see, e.g., William D. Henderson, Demography and Desegregation in the Cleveland Public Schools: Toward a Comprehensive Theory of Educational Failure and Success, 26 N.Y.U. REV. L. & Soc. CHANGE 457 (2000-2001); Denise C. Morgan, The New School Finance Litigation: Acknowledging That Race Discrimination in Public Education is More than Just a Tort, 96 NW. L. REV. 99 (2001); LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA (2000); James E. Ryan, Schools, Race, and Money, 109 YALE L.J. 249, 257 (1999); Gary Orfield, Toward an Integrated Future: New Directions for Courts, Educators, Civil Rights Groups, Policymakers, and Scholars, in DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION 331-61 (Gary Orfield et al. eds., 1996); Wendy Parker, The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities, 50 HASTINGS L.J. 475 (1999); Sharon Elizabeth Rush, The Heart of Equal Protection: Education and Race, 23 N.Y.U. REV. L. & SOC. CHANGE 1 (1997).

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educational literature to argue that the SAT's test construction process unintentionally exacerbates the disparate impact of the test. problems we have identified will in no way be rectified by ETS's proposed changes to the SAT scheduled for 2005.³³¹ Moreover, test assembly/item construction is only one manifestation of racial bias in standardized testing that has not garnered sufficient attention, yet is alarming in creating disparate impact.³³²

If the SAT contains racial bias, the question remains where should American higher education go from here? Certainly affirmative action programs can help to counteract the negative impact of racial bias in standardized tests, as the interveners in Grutter argued in defending the program at the University of Michigan Law School. 333 In addition, we argued in this article that the SAT test construction process can be altered to decrease the disparate impact of the test on African Americans and Chicanos. While the majority of psychometricians would most likely disfavor our recommended changes, we should point out that our position is not entirely outside of the mainstream. For example, in the Standards for Educational and Psychological Testing, jointly produced by the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education, standard 7.11 states that it can be appropriate to take account of disparate impact: "[w]hen a construct can be measured in different ways that are approximately equal in their

^{331.} See Eric Hoover, College Board Approves Major Changes for the SAT, CHRON. HIGHER EDUC., June 28, 2002; Tanya Schevitz, SATs Gain an Essay, Lose the Analogies, S.F. CHRON., June 28, 2002, at A3.

^{332.} Other forms of test bias such as "stereotype threat" were not covered in this article. For an overview of the stereotype threat literature, see Clark D. Cunningham et al., Passing Strict Scrutiny: Using Social Science to Design Affirmative Action Programs, 90 GEO. L.J. 835, 839 (2002) (summarizing stereotype threat research and concluding, "[S]tereotype threat theory is now widely accepted within the field of psychology"); William C. Kidder, Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment? A Study of Equally Achieving "Elite" College Students, 89 CAL. L. REV. 1055, 1085-89 (2001) (summarizing several stereotype threat studies). For more detailed research, see, e.g., Jim Blascovich et al., African Americans and High Blood Pressure: The Role of Stereotype Threat, 12 PSYCHOL. SCI. 225 (2001); Claude M. Steele, Thin Ice: "Stereotype Threat" and Black College Students, ATLANTIC MONTHLY, Aug. 1999, at 44; Steven J. Spencer et al., Stereotype Threat and Women's Math Performance, 35 J. EXPERIMENTAL SOC. PSYCHOL. 4 (1999); Joshua Aronson et al., When White Men Can't Do Math: Necessary and Sufficient Factors in Stereotype Threat, 35 J. EXPERIMENTAL SOC. PSYCHOL. 29 (1999); Claude M. Steele, A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance, 52 AM. PSYCHOL. 613 (1997); Claude M. Steele & Joshua Aronson, Stereotype Threat and the Intellectual Test Performance of African Americans, 69 J. PERSONALITY & Soc. PSYCHOL, 797 (1995), reprinted in THE BLACK-WHITE TEST SCORE GAP 401 (Christopher Jencks & Meredith Philips eds., 1998).

^{333.} See supra Section I.A.

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degree of construct representation and freedom from constructirrelevant variance, evidence of mean scored differences across relevant subgroups of examinees should be considered in deciding which test to use.",334

We anticipate that opponents of our recommended SAT item bias reduction procedures will criticize us for advocating "race-norming" in the test assembly process.³³⁵ We conclude by reminding readers that, based on our empirical findings and review of the educational measurement literature, the process currently used to construct the SAT, LSAT, GRE, and similar tests unintentionally operates to select questions with larger racial and ethnic disparities (favoring Whites). Thus, the argument that lessening disparate impact in SAT test assembly amounts to unfair racial gerrymandering ignores the current manner in which standardized tests are developed—which incorporates significant behind-the-scenes racial gerrymandering. We believe that the costs of reifying this status quo standardized testing regime (a system that is far from "race-neutral") are too high for America's educational future, particularly for students of color.

Critics of our proposed changes on the SAT will likely argue that modifying the test assembly process to take cognizance of item impact will degrade the predictive validity of the SAT. Yet, for mathematical reasons having to do with the relationship between reliability and predictive validity, ETS researchers such as Stocking acknowledge that "substantial room" exists to lessen disparate impact without compromising the SAT's ability to predict college grades; indeed, by removing construct-irrelevant variance associated with race and ethnicity, the changes we advocate may even create the "win-win" situation of a less biased SAT that has higher predictive validity than the current form. 336

^{334.} AM. EDUC. RESEARCH ASS'N ET AL., STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING 83 (1999).

^{335.} Cf. Roger Clegg, The Right Score?: The Taint of Race-Norming is Just One Flaw in the Proposed 'Strivers' Rating for SAT-Takers, LEGAL TIMES, Sept. 20, 1999, at 19-20; Abigail Thernstrom, The End of Meritocracy: Should the SAT Account for Race? Opposing Opinions by Nathan Glazer and Abigail Thernstrom, NEW REPUBLIC, Sept. 27, 1999, at 26, available at http://www.tnr.com/archive/0999/092799/coverstory092799.html (last visited July 1, 2002); Shelby Steele, We Shall Overcome—But Only Through Merit, WALL ST. J., Sept. 16, 1999, at A30; Linda S. Gottfredson, Racially Gerrymandering the Content of the Police Tests to Satisfy the U.S. Justice Department: A Case Study, 2 PSYCHOL. PUB. POL'Y, & L. 418 (1996).

^{336.} See Stocking et al., supra note 124. In this study that attempted to simultaneously reduce race and gender impact, Stocking et al. conclude:

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Finally, as a pragmatic matter ETS and the College Board are very unlikely to adopt impact reduction techniques in connection with the SAT unless outside pressure is so substantial as to impact the SAT marketplace. ETS has known about the feasibility of Golden Rulestyle test assembly procedures for two decades, yet it has only sporadically conducted experimental research on the question—rather than putting something into place on a real SAT.³³⁷ The political difficulties involved are also apparent in the way that ETS quickly retreated from its "Strivers" research—which investigated the development of a scale adjusting SAT scores depending on the sociological obstacles students encountered—immediately after a story appeared in the Wall Street Journal and critical op-ed pieces started popping up nationwide.³³⁸ Thus, it may be practical to focus energy on urging colleges and universities either to not use the SAT or at least give applicants the choice of whether or not they want it to be considered in admissions decisions.³³⁹

The predictive validity of the SAT I Mathematical, when corrected both for restriction of range and the unreliability of the criterion of first-year grade point averages, is .53. The reliability of a test cannot be less the square of the predictive validity. (This is the inverse of the more familiar statement that predictive validity cannot be greater than the square-root of the reliability.) Thus the reliability of the SAT I Mathematical cannot be less than .28 (.53 * .53) without lowering the predictive validity. Because the current reliability of different editions of the SAT I Mathematical is typically above .90, there is substantial room for a reduction in reliability (.90 minus .28) before predictive validity is constrained by this mathematical relationship. Therefore, it is unlikely that reductions of reliability caused by the approach to test construction used in this paper will constrain predictive validity, and, as demonstrated above, predictive validity is most likely to be increased by this approach.

Id. at 44-45 (citations omitted).

We are confident that impact reduction will not meaningfully decrease the predictive validity of the SAT. However, Stocking et al.'s argument about improving the SAT's predictive validity is less certain, for it relies upon assumptions not only about the SAT but about the adequacy and fairness of the criterion variable (college freshman grades). If there is race-related construct irrelevant variance (bias) that is unfortunately common to both the predictor and the criterion, then its removal from the predictor alone would not boost predictive validity.

337. See supra Part III.C.

338. See Nicholas Lemann, Tinkering with the Test, N.Y. TIMES, Sept. 13, 1999, at A19; Ben Gose, More Points for 'Strivers': the New Affirmative Action?, CHRON. HIGHER EDUC., Sept. 17, 1999, at A55; Claire Barliant, Striving to Stay Alive, SALON.COM, Oct. 18, 1999, at http://www.salon.com/books/it/1999/10/18/strivers (last visited Dec. 28, 2001).

339. See supra Part IV.D.



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EXHIBIT AX



UNITED STATES DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS

1244 SPEER BLVD, SUITE 310 DENVER, CO 80204-3582 REGION VIII
ARIZONA
COLORADO
NEW MEXICO
UTAH
WYOMING

September 30, 2022

Dr. Jason Reynolds, Superintendent Peoria Unified School District 6330 West Thunderbird Road Glendale, Arizona 85306

via email only to [redacted content]

Re: Peoria Unified School District OCR Case 08-22-1273

Dear Superintendent Reynolds:

This letter is to notify you of the disposition of the above-referenced case stemming from a complaint filed with the U.S. Department of Justice (DOJ) on November 18, 2021. On March 9, 2022, DOJ referred the complaint to the U.S. Department of Education, Office for Civil Rights (OCR). On April 11, 2022, OCR opened an investigation into whether Peoria Unified School District (the District) failed to adequately respond to student and employee racial harassment of the Complainant's daughter, who is Black, (the Student) at [redacted content] (School).

OCR conducted this investigation under Title VI of the Civil Rights Act of 1964 (Title VI), and its implementing regulations, 34 Code of Federal Regulations (C.F.R.) Part 100, which prohibit discrimination based on race, color, or national origin in programs or activities receiving federal financial assistance. As a recipient of federal financial assistance from the Department of Education, the District is subject to Title VI and its regulations.

I. Summary of OCR's Findings

OCR found that racial harassment from student peers and District employees created a hostile environment for the Student in school years (SY) 2020-21 and 2021-22, and that the District had notice of the hostile environment and failed to respond adequately to redress it. Moreover, information from the Complainant and Student, and records in the District's first data response to OCR, suggested that other students in grades 5-8 at the School were also subjected to peer harassment based on race, color, and national origin during SY 2021-22. Based on OCR's review of District records and interviews with seven students, six parents, and thirteen employees at the School, OCR identified numerous incidents of peer harassment based on race, color, and national origin of over a dozen grade 5-8 students that involved racial and ethnic slurs, epithets, gestures, symbols, and jokes. Based on the documentary evidence and twenty-two interviews, OCR found by a preponderance of the evidence that in SY 2021-22 the District: (1) failed to adequately investigate reported peer harassment based on race, color, and national origin to determine if it created a hostile environment for the students who were the subject of those reports; (2) failed to offer any supports or remedies to students who were harassed; (3) repeatedly responded

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ineffectively, or not at all, to reported harassment, allowing it to continue on a consistent basis and to create a school-level hostile environment; and (4) failed to investigate the known hostile environment at the School to identify other students who may have been subjected to harassment and a hostile environment but did not report such harassment to the School given its repeated failures to respond promptly and effectively to reported harassment.

OCR's investigation also identified a compliance concern with the District's recordkeeping and compliance reporting under the Title VI regulations. Timely, accurate, and complete recordkeeping will be essential to ensuring the District effectively responds to notice of student-on-student and staff-on-student harassment based on race, color, and national origin in the future.

The District agreed to address OCR's noncompliance findings and compliance concern under Title VI through the enclosed Resolution Agreement.

II. Legal Standards

The regulation implementing Title VI, at 34 C.F.R. § 100.3, provides that no person shall, on the basis of race, color, or national origin, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program to which Title VI applies. The existence of a hostile environment based on race, color, or national origin that is created, encouraged, accepted, tolerated, or left uncorrected by a recipient constitutes discrimination on the basis of race, color, or national origin in violation of Title VI.

To establish a violation of Title VI under the hostile environment theory, OCR must find that: (1) a hostile environment based on race, color, or national origin existed; (2) the recipient had actual or constructive notice of the hostile environment; and (3) the recipient failed to respond adequately to redress the hostile environment.

Harassment creates a hostile environment when the conduct is sufficiently severe, persistent, or pervasive so as to interfere with or limit an individual's ability to participate in or benefit from a recipient's program. Harassing acts need not be targeted at the complainant in order to create a hostile environment; the acts may be directed at anyone. The harassment also need not be based on the complainant's or victim's race, color, or national origin so long as the harassment is motivated by race, color, or national origin. For example, the harassment might be based on the race, color, or national origin of a friend or associate of the victim. The harassment must, in most cases, consist of more than casual or isolated incidents to establish a Title VI violation. Whether harassing conduct creates a hostile environment must be determined from the totality of the circumstances. OCR will examine the context, nature, scope, frequency, duration, and location of the harassment, as well as the identity, number, age, and relationships of the persons involved. If OCR determines that the harassment was sufficiently severe that it would have adversely affected a reasonable person, of the same age and race, color, or national origin as the victim, under similar circumstances, from participating in or enjoying some aspect of the recipient's education program or activity, OCR will find that a hostile environment existed.

A recipient may be found to have violated Title VI if it has failed to correct a hostile environment based on harassment of which it has actual or constructive notice. A recipient is

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charged with constructive notice of a hostile environment if, upon reasonably diligent inquiry in the exercise of reasonable care, it should have known of the discrimination. In other words, if the recipient could have found out about the harassment had it made a proper inquiry, and if the recipient should have made such an inquiry, knowledge of the harassment will be imputed to the recipient.

Once a recipient has notice of a hostile environment, the recipient has a legal duty to take reasonable steps to eliminate it. OCR evaluates the appropriateness of the responsive action by assessing whether it was reasonable, timely, and effective. The appropriate response to a hostile environment based on race, color, or national origin must be tailored to redress fully the specific problems experienced as a result of the harassment.

Additionally, a recipient violates Title VI if one of its agents or employees, acting within the scope of their official duties (i.e., such that the individual has actual or apparent authority over the students involved), has treated a student differently on the basis of race, color, or national origin in the context of an educational program or activity without a legitimate, nondiscriminatory reason to interfere with or limit the ability of the student to participate in or benefit from the services or activities provided by the recipient. If the alleged harasser is an agent or employee of a recipient, acting within the scope of their official duties, then the individual will be considered to be acting in an agency capacity and the recipient will be deemed to have constructive notice of the harassment.

III. Background

The District is located in Peoria, Arizona, approximately 35 miles northwest of downtown Phoenix. The District has 34 schools, including the School. During SY 2021-22, the School served approximately 1,112 students from pre-school to eighth grade. The School's student population was 69.5% white, 18.8% Latino, 6.4% multi-racial, 2.9% African American, and 1.9% Asian.

OCR's investigation focused primarily on SY 2021-22. OCR requested and reviewed a variety of records from the District, including internal and external communications, student and parent complaints, investigation records, student discipline records, personnel records, the Student's education records, and District policies, procedures, forms, and handbooks. Additionally, OCR interviewed the District's Chief Personnel Officer, the School's principal (Principal) and assistant principals for grades 5-8 (AP 1) and K-4 (AP 2), nine teachers who worked at the School, the Complainant, the Student, six other students of color who attended the School and some of their parents, and the parent of another student of color who attended the School. OCR attempted to interview a former teacher at the School and six additional families, but they did not respond to OCR's voicemails and emails.

IV. Peer and Employee Harassment of the Student

The Complainant and Student told OCR that other students regularly used the n-word and made racist jokes in the Student's presence at the School in SY 2020-21 and SY 2021-22. The Student told OCR that students at the School asked her why her lips are big and commented on her skin color and hair. She also reported that some white students mocked the murder of George Floyd

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[redacted content] at the School in [redacted content] 2022. The Complainant reported to OCR that three white teachers made comments about the Student's hair and touched it between the spring of 2021 and the fall of 2021, and that this commentary and touching led other students to make similar comments and touch her hair. The Complainant and Student reported this harassment to the School and allege that the School failed to adequately respond.

As discussed below in the Section entitled, "Peer Harassment of the Student," OCR found that students at the School used racial slurs and made race-based jokes in the Student's presence, and that she was aware of other racial harassment at the School that included students drawing racially offensive symbols and performing racially offensive gestures. OCR also confirmed through interviews and record reviews that students repeatedly used the n-word, including calling the Student the n-word, and created a [redacted content] mocking the killing of George Floyd that was seen by the Student's friend who reported it to the Student and another Black student in [redacted content] 2022.

As detailed below in the Section entitled, "Employee Harassment of the Student," OCR found that three white teachers at the School commented on and touched the Student's hair and that other students began to make similar comments about, attempted to touch, and touched the Student's hair. District records and interviews confirmed that the Student and the Complainant reported the peer and teacher harassment to the School and revealed that School employees also reported the peer harassment. The District knew that these incidents caused the Student to feel sad, angry, and embarrassed. She requested to be moved out of the teachers' classes in 2021 and by [redacted content] 2022 asked to complete the school year remotely to avoid the harassment. The District allowed her to change her classes and to complete SY 2021-22 online.

A. Findings of Fact

OCR first summarizes its findings of fact regarding peer harassment of the Student in SY 2020-21 and SY 2021-22 and then the three teachers' harassment of the Student in the spring and fall of 2021.

1. Peer Harassment of the Student

The Student began attending the School in [redacted content] grade. During SY 2021-22, she was [redacted content] years old and in the [redacted content] grade at the School.

When the Complainant filed her complaint with the Justice Department in November 2021, she alleged that teachers and students had been racially harassing the Student for over one year, in other words throughout SY 2020-21 and into the fall of SY 2021-22. In interviews with OCR, the Complainant and the Student reported that during SY 2020-21, a white [redacted content] student (Student 1) repeatedly used the n-word during the Student's [redacted content] class and [redacted content] class. According to the Student, the [redacted content] teacher (Teacher 1) said that she would address the use of the word, and the [redacted content] teacher (Teacher 2) told Student 1 that the language was inappropriate. Other than these responses, the District took no action related to these incidents. Both teachers told OCR that they did not recall these incidents.

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In [redacted content] 2021, according to the Complainant and Student, the Student and [redacted content], a Black [redacted content] student (Student 2), informed their [redacted content] teacher (Teacher 3) that several students were using the n-word. Upon Teacher 3's request, the Student and Student 2 provided Teacher 3 with a list of students who use the n-word. According to Teacher 3, the list included two white [redacted content] students (Students 3 and 4), and one Hispanic [redacted content] student (Student 5). Teacher 3 told OCR that he determined that the allegations were credible and provided the list of students to AP 1. AP 1 told OCR that she asked Students 3 and 4 if they used the n-word, the students denied doing so, and the investigation ended. AP 1 informed OCR that District staff failed to follow up with the Student, Student 2, and Teacher 3 about the allegations and that Students 3 and 4 listed did not face any consequences because the allegations could not be proven. AP 1 subsequently discarded the list.

On [redacted content] 2021, the Complainant emailed the Principal about teachers, broadly, failing to address students' use of the n-word. The Complainant's e-mail stated that "[f]or years, teachers at [the School] have ignored children using [n-word] to antagonize African-American children" and that "vile phrases are met with indifference, a dismissive attitude, and passivity from teachers." The Complainant also wrote, "And each time my daughter has to internalize the verbal abuse because of inaction by teachers." The Complainant further stated that the Student was "not alone in her struggles regarding racism" and that "racial discrimination" at the School was widespread. In an interview with OCR, the Principal acknowledged that he did not investigate the Complainant's allegations of racial harassment directed at the Student or other students. The Principal further acknowledged to OCR that he failed to adhere to any District policies or procedures in responding to this complaint and, instead, followed his "instincts."

The following day, [redacted content] 2021, the Principal met with the Complainant to discuss the Student's allegation that a white [redacted content] student (Student 6) called the Student the n-word [redacted content] in spring 2021. The Principal told OCR that he spoke with Student 6's mother. Neither the incident nor the reported parent contact is reflected in Student 6's discipline records or parent contact log.

The Student alleged that, in [redacted content] 2022, during a class about European colonialism in Africa, a white [redacted content] student (Student 3) said to the Student, "That's why [n-words] pick cotton, [n-word]." According to the Student and Teacher 4, the Student informed Teacher 4 of the comment, and then Teacher 4 and Student 3 went to the hallway to discuss the Student's report. According to Teacher 3, when he saw Teacher 4 and Student 1 in the hallway, Teacher 3 told Teacher 4 that he had previously heard Student 3 use the n-word. Teacher 3 also told OCR that he was not surprised to hear that Student 3 was accused of using the n-word again. Teacher 4 sent Student 3 to the front office. AP 1 told OCR that Student 3 was given a lunch detention. In an email to the Principal, AP 1 wrote that another teacher also told her that Student 3 had used the n-word. The incident was not reflected in Student 3's discipline record.

During the last week of [redacted content] 2022, a white [redacted content] student [redacted content] created a [redacted content] to mock the death of George Floyd. [Redacted sentence]. Student [redacted content] sent this [redacted content] to another white [redacted content] student [redacted content]. Teacher 5 informed OCR that she noticed [redacted content] and told the two

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students that the [redacted content] was inappropriate. Teacher 5 also shared that she showed the [redacted content] to Teachers 4 and 8 and notified AP 1 of the incident.

According to AP 1, a white [redacted content] student (Student 7), [redacted content], saw the [content]. Student 7 informed the Student and another Black [redacted content] student (Student 2) about the [redacted content]. AP 1 emailed Teacher 3 to notify him that she disciplined the students by placing them in the main office during their homeroom and study hall. AP 1 also wrote, "[T]he racist behavior from [Student [redacted content]] is continuing and I plan to infuse some cultural sensitivity tasks during that time too." Teacher 3 informed OCR that Student [redacted content] had already been accused numerous times of using the n-word, and therefore, Teacher 3 believed the consequences for Student [redacted content] were inadequate. According to AP 1, she watched a video with Student [redacted content] and talked to him about racism. Additionally, Student [redacted content] emailed Student 2 an apology, which read, "[Redacted content]." During the same school day, the Student, Student 2, and Student 7 shared their concerns with AP 1 that Students [redacted content] did not receive a harsher consequence for the [redacted content]. AP 1 later wrote to Teacher 4 about the exchange, noting, "I expressed to [the Student, Student 2, and Student 7] that they need to be part of the solution through peer-to-peer education and raising awareness in partnership with us."

The Student told OCR about other alleged incidents that she did not report to School staff because they had already demonstrated an unwillingness to intervene in such matters and she did not believe they would respond. For instance, she shared that in [redacted content] 2022, various students, including a white [redacted content] student (Student 8), said during class, "[Another student] gave me the [n-word] pass; so, it's okay if I say it." The Student also reported that during [redacted content] 2022, a Hispanic [redacted content] student (Student 9) asked the Student, during class, if she would "give the [n-word] back to white people." Then, according to the Student, during homeroom [redacted content], a white [redacted] student (Student 10) put his hands up while another student pretended to shoot him and said, "Calm down. You can't kill me. I'm not Black." Finally, the Student told OCR that [redacted content], a white [redacted content] student (Student 11) screamed, "I can't breathe," while other students laughed.

The Complainant and Student informed OCR that the racial harassment made the Student feel upset and angry, want to avoid school, withdraw socially, and have lower self-esteem. The Complainant also told OCR that the Student had to have [redacted content] as a result of the harassment. At the end of SY 2021-22, the Complainant requested that the Student be able to attend class remotely to avoid attending the School. On [redacted content] 2022, the Principal responded that the School would work with the Student and Complainant if that was the direction they wanted to go. The family moved out of the District before the SY 2022-23 began due to the harassment at the School and the District's failure to respond.

2. Employee Harassment of the Student

The Complainant and Student told the School and OCR that three white teachers at the School made inappropriate comments about and touched the Student's hair. They also reported that other students began mimicking the teachers by making similar comments about, attempting to touch, and touching the Student's hair. Additionally, they alleged that these incidents caused the

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Student to feel sad, angry, and embarrassed, and to request to be moved out of the teachers' classes.

In interviews with the District and OCR, the three teachers admitted to touching the Student's hair. Two of the teachers – Teachers 3 and 4 – told OCR that they could not recall ever touching another student's hair. Teacher 8 recalled touching only one other student's hair – another Black, female [redacted content] student (Student 2). The Student and Student 2 confirmed for OCR that Teacher 8 touched Student's 3's hair. AP 1 told OCR that she believes that white teaches were "fascinated" with Black women's hair because it is "different," and that may be why the three white teachers touched the Student's hair. AP 2 shared with OCR that the teachers touching the Student's hair is "incomprehensible" and that they should have known never to touch a child in that manner.

a. [Redacted Content] 2021 Incident Involving Teacher 7

On [redacted content] 2021, during [redacted content] class, the [redacted content] teacher, Teacher 3, touched the Student's hair. According to the Student, Teacher 7 walked over to the Student and pulled the Student's hair, which was, according to Teacher 7, in a "pom-pom style." The Student told OCR that Teacher 7 said, "Your hair is really pretty," "Is it real or fake," and "How long did it take?" In response to her hair being touched, the Student told Teacher 7, "I don't like when people touch my hair." Prior to this incident, Teacher 7 had repeatedly asked the Student if she could touch her hair and the Student had said "no" each time.

In an interview with OCR, Teacher 7 stated that she "booped [the Student's] pom-pom hair." She told OCR that she was merely trying to give the Student a "compliment." Teacher 7 denied asking if the Student's hair was fake. Teacher 7 acknowledged that she did not ask for permission before touching the Student's hair, that she had touched the Student's hair on one other occasion, and that she previously asked the Student if she straightens her hair, how long it takes to straighten her hair, and the length of her hair when it is straightened.

That night, the Complainant emailed a complaint to the Principal and AP 2. The complaint alleged that Teacher 7 "feels this micro-aggressive behaviour [sic] is perfectly fine with African-American students, as she does not do this to others" The Principal and AP 2 showed Teacher 7 the Complainant's complaint.

On [redacted content] 2021, the Principal contacted the Complainant to schedule a meeting for the following day. During the meeting on [redacted content] 2021, according to the Complainant, the Principal told her that he was extremely embarrassed by Teacher 7's conduct and that Teacher 7 should know not to touch students. According to the Principal, the Complainant told him that Teacher 7 had touched the Student's hair twice and that the incident caused other students to ask to touch the Student's hair. The Principal wrote to OCR that, during his conversation with Teacher 7, he learned that "the Student had asked for [Teacher 7] to not [sic] touch her hair during a previous class and [Teacher 7] had forgotten the request when she touched it again." The Principal gave Teacher 7 [redacted content].

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On [redacted content] 2021, Teacher 7 left a voicemail for the Complainant and emailed her, in part, "I am so deeply sorry [redacted content]." The following day, according to the Principal, Teacher 7 apologized to the Student in front of the [redacted content] class.

On [redacted content] 2021, the District issued [redacted content] to Teacher 7 pursuant to Board Policy GBEBB. That policy read, in relevant part, "At all times teachers and other staff members will accord students the dignity and respect that they deserve, and avoid embarrassing any student unnecessarily." Teacher 7 was ordered to "[redacted content]" and "[redacted content]." The form read, "[Redacted content]."

According to the Student, after this incident, students started asking the Student whether her hair was "fake" and questioned why the Student wore her hair in certain styles, such as braids. The Principal granted the Complainant's request to move the Student out of the [redacted content] class. According to the Complainant and Student, the Student has since lost her love for [redacted content].

b. [Redacted Content] Incident Involving Teacher 8

According to the Complainant and Student, on or about [redacted content] 2021, when the Student was turning in an assignment, Teacher 8 placed her hand on the Student's hair and said, in front of other students, her hair was "so nice and pretty." According to Teacher 8, she said to the Student, "Did you have your hair done? It looks really pretty." Then, according to Teacher 8, she requested the Student come over to her and said, "I bet that took a long time. Must've taken a lot of patience," and the Student replied, "Thank you." Teacher 8 told OCR that she only brushed against the Student's hair and that she did not believe that she upset or offended the Student. Teacher 8 acknowledged that she did not ask to touch the Student's hair. The Principal wrote to OCR that the School's administrators received a report that Teacher 8 touched the Student's hair and that, in front of the class, Teacher 8 commented on whether the Student had hair "extensions."

During the same class period, according to the Student, Teacher 8 approached the other Black [redacted content] student in the class (Student 2) and pretended to pick lint out of her hair and throw it on the ground. According to Teacher 8, she walked up behind Student 2, who was sitting in her desk, and removed a piece of lint from Student 2's hair. Teacher 8 told OCR that she does not recall touching the hair of any other students besides these two Black students.

The Principal's notes from a [redacted content] 2021 meeting with the Complainant indicate that several students asked the Student about the hair extensions after the class in which Teacher 8 touched the Student and Student 2. In an email to AP 1, Teacher 8 confirmed that she asked the Student if she had hair extensions but denied that she asked in front of the class. In the same email, Teacher 8 acknowledged that she removed "a piece of white yarn" from Student 2's hair and referred to is as lint during class.

The Student and Complainant told OCR that the Student and Student 2 were both extremely upset. The Student told AP 1 about Teacher 8's conduct. AP 1 asked Teacher 8 to speak with both students before the end of the school day and noted that "hair is a very sensitive issue for

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both girls and something to stay clear of even if we are trying to be kind." Teacher 8 replied that she would speak with both students. According to Teacher 8, she apologized to the Student by saying to her, "[Redacted content]."

Shortly following the incident, Teacher 8 met with the Principal and AP 1. According to the Principal, during this meeting, the Principal and AP 1 informed Teacher 8 that her behavior was "unacceptable" and that she "could not touch a student's hair without permission." The Student was reassigned out of Teacher 8's class, at the request of the Complainant.

c. [Redacted Content] 2021 Incident Involving Teacher 6

On or about [redacted content] 2021, when the Student was sitting in class and working on an assignment, her [redacted content] teacher, Teacher 6, touched her hair. According to the Complainant and Student, Teacher 6 said at the time, "I like the feeling," and other students witnessed Teacher 6's conduct. The Student was very embarrassed and upset. According to Teacher 6, she touched the Student's hair because it was "pretty." Teacher 6 told OCR that she could not recall touching another student's hair in her "[redacted content] years of teaching."

The Student told AP 1 about Teacher 6's conduct. On [redacted content] 2021, the Complainant emailed the Principal and noted that this was the third teacher who had touched the Student's hair. The Complainant further stated that, after this incident, the Student felt more isolated as students repeatedly asked the Student about her hair using the "exact verbiage" of Teacher 6. The Complainant further wrote that the Student "has been singled out, put on display in front of her classmates, poked, prodded, and pulled on by teachers at [the School] and that Teachers 6, 7, and 8 "have assumed that it is appropriate to single out my African-American daughter for her hair. The Complainant further alleged that the "effort to disguise the racial harassment by praising my daughter as the 'the black girl with pretty hair' is transparent and insulting" and that teachers touching her hair is "a violation of [her] child's right to an education in a safe, non-threatening environment."

The following day, the Principal met with the Complainant. His notes reflect that Teacher 6 pulled and held onto the Student's braids and said, "I love what you've done with your hair." The Complainant requested that the Student be removed from Teacher 6's classroom and the School accommodated this request. According to the Principal, he met with Teacher 6 on the same day, and Teacher 6 acknowledged that she touched the Student's hair but "affirmed everything she did was meant as a compliment."

According to Teacher 6, she called the Complainant and Student and explained that she loved the Student and was merely being complimentary, and that her actions were driven by compassion, not malice. During the call, Teacher 6 told OCR, the Complainant explained the problem with people commenting on Black women's hair and that, as a white woman, Teacher 6 could not understand. According to the Student, Teacher 6 stated that the Student should be grateful that someone likes her hair. Neither the Complainant nor the Student believed Teacher 6 felt any remorse for her conduct.

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On [redacted content] 2021, the District's Chief Personnel Officer provided Teacher 6 with a "[redacted content]." The Notice included a scheduled meeting date.

On [redacted content] 2021, Teacher 6 submitted a written response to the Chief Personnel Officer. In her response, Teacher 6 described her relationship with the Student as "positive" and "warm," and said she was the Student's "favorite teacher." Teacher 6 wrote that she had "noticed [the Student] had gotten her hair done," "affectionately and warmly extended [her] arm around [the Student's] shoulder, "smiled," and said "how pretty." She also stated that District administrators failed to tell School staff about Teacher 8 touching the hair of the Student and Student 2, and how such conduct could be perceived as racist. Teacher 6 further wrote to the Principal, "[redacted content]" Teacher 6 concluded the response by requesting that she be [redacted content].

After his investigation into the above incident, the Principal issued [redacted content] for Teacher 6's conduct. The Principal and Chief Personnel Officer explained to OCR that Teacher 6 received a [redacted content] than Teacher 8 because Teacher 6 had previously received a [redacted content] for [redacted content]. Teacher 6 appealed the [redacted content], and the Principal worked in tandem with the Chief Personnel Officer to respond to her appeal. However, the Chief Personnel Officer missed the deadline to file a notice of decision; consequently, Teacher 6's [redacted content] was rescinded. According to the Chief Personnel Officer, her investigation did not uncover any malice or ill intent by Teacher 6 and she would have rescinded the [redacted content] even if she had not missed the filing deadline.

B. Legal Analysis and Conclusions

As explained below, OCR found that during SY 2020-21 and SY 2021-22, the Student was subjected to peer and teacher harassment based on race that created a hostile environment and that the District knew of this hostile environment but failed to take appropriate action to address it, in violation of Title VI.

1. Peer and Employee Harassment Created a Hostile Environment for the Student

Racial harassment must be severe, pervasive, or persistent to create a hostile environment under Title VI. Once a recipient has notice of a racially hostile environment, the recipient has a legal duty to take reasonable stapes to eliminate it. OCR evaluates the appropriateness of the responsive action by examining reasonableness, timeliness, and effectiveness. The appropriate response must be tailored to redress fully the specific problems experienced as a result of the harassment and must be reasonably calculated to prevent its recurrence.

The racial harassment the Student experienced was severe, pervasive, and persistent. The peer harassment involved multiple perpetrators, took place in multiple classes, and occurred over at least three consecutive semesters while the Student was in [redacted content] grade. OCR confirmed through interviews and review of records that during SY 2020-21, Student 1 used the n-word in classes with the Student and Student 6 called her the n-word. Additionally, during SY 2021-22, Student 3 made a joke about slavery to the Student, used the n-word in the Student's

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presence, and called the Student the n-word; and Students 9 and 8 used the n-word in front of her. Additionally, the Student heard about Student [redacted content]'s [redacted content] mocking the killing of George Floyd and reportedly witnessed Student 11 mocking George Floyd while other students laughed.

Moreover, OCR found that between [redacted content] and [redacted content] 2021 three white teachers touched the Student's hair without her consent. One of the teachers did so even after the Student had denied the teacher's repeated requests to touch her hair. The touching occurred three times in five months of school being in session, even though the Student and Complainant made clear after the first incident that they found the touching of and commenting on the hair offensive. The second and third instances of touching also occurred after School staff knew that the Student had been exposed to the widespread use of the n-word by other students (see Section V below). At least two of the three incidents occurred in front of other students, which reportedly led to some of the students commenting on and touching the Student's hair.

Two of the teachers told OCR that they had never touched a white student's hair during their teaching careers, and one teacher said that the only other student whose hair she has touched was that of a Black student, which happened in front of the Student. The teachers claimed that they were merely attempting to compliment the Student. AP 1 told OCR that she believed the teachers touched the Student's hair because, at least in part, they were fascinated with Black people's hair. The Principal and AP 2 told OCR that the teachers touching the Student's hair was inappropriate.

OCR found that students' racist slurs, jokes, comments, and other actions to or in front of the Student – combined with the unwelcome touching and commenting on the Student's hair by three of her teachers, who did not touch the hair of any white students – created a racially hostile educational environment for the Student. The harassment from peers and employees made the Student feel targeted, humiliated, and upset – so much so that she asked to be moved out of all three teachers' classes mid-semester and then to finish the school year online. She and the Complainant reported to School staff and OCR that the harassment caused her to become more socially withdrawn, have lower self-esteem, and want to avoid school. A reasonable [redacted content]-year-old Black student would have experienced various and repeated incidents of both peer and employee racial harassment as a racially hostile environment. Indeed, the touching adversely affected the Student's enjoyment of [redacted content], as she felt compelled to ask to be moved out of the [redacted content] class. She then felt compelled, after the two additional incidents of touching, to ask to have her schedule changed again mid-semester during SY 2021-22.

2. The District Had Actual Notice of the Hostile Environment for the Student

The District had actual notice of the racial harassment of the Student and the racially hostile environment she experienced at the School. In [redacted content] 2021, the Student gave Teacher 3 a list of students who were using the n-word. Teacher 3 determined that the list was credible and provided it to AP 1. Then, on [redacted content] 2021, the Complainant emailed a complaint about racial harassment of the Student to the Principal. The complaint mentioned that the Student was "internaliz[ing] the verbal abuse and struggling with the racism." The following day, the

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Complainant told the Principal that Student 6 called the Student the n-word in [redacted content] 2021. School staff were also aware of Student 3's joke about slavery and use of the n-word and Student [redacted content] mocking the death of George Floyd. Finally, staff were aware of widespread racial harassment of minority students by other students at the School (see Section V below). In addition, the Complainant informed the District immediately after each incident involving a teacher touching the Student's hair, beginning in [redacted content] 2021 and twice again in [redacted content] 2021.

AP 1 and the Principal knew not only of the Student being racially harassed by students and staff but also of the hostile environment it had created for the Student. The Complainant shared with the School's administrators – at least in meetings on [redacted content] and [redacted content], and in emails on [redacted content] and [redacted content] – the effects of the harassment on the Student. AP 1 told OCR that the Student's "anger about the School and feeling discriminated against [was] growing and growing." The Principal twice granted the Student's request to change out of the classes of teachers who touched her hair, and he knew by [redacted content] 2022 that the Student no longer felt comfortable attending school in person. The Principal agreed to the Complainant's request to let the Student finish the school year virtually so that she could avoid going to the School.

3. The District's Response to the Hostile Environment for the Student

Because the District had notice of the peer and employee racial harassment and resulting hostile environment for the Student, OCR next analyzed whether the District adequately responded to redress this environment. OCR found that the District did not adequately investigate all reported incidents of peer and employee racial harassment of the Student. For example, the Principal told OCR that he did not investigate the Complainant's allegations of peer racial harassment, including students' use of the n-word toward the Student and other students, in the Complainant's email of [redacted content]. With respect to the email's allegations regarding the teachers' touching the Student's hair, the Principal interviewed the teachers but failed to take steps to ensure that the Student's other teachers did not touch or comment on the Student's hair. School staff also did not follow up with the Complainant and Student when they reported racial harassment in spring 2021, which included the Student providing School staff with a list of students who were using the n-word, or after the Principal met with the Complainant on [redacted content]. In these ways and others, the School staff did not adequately respond to the reported harassment of the Student.

OCR further found that the District did not take effective steps to prevent recurring harassment, including use of the n-word in the School or subsequent incidents of white students making light of law enforcement killing Black people. The Student reported that use of the n-word and racist jokes continued at the School in [redacted content] 2022, and this was confirmed by other students and records, as discussed in Section V below. The Student also reported to OCR two subsequent incidents of white students making fun of law enforcement killing Black people in [redacted content] 2022 – after the [redacted content] in [redacted content] 2022 about which School staff were aware.

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The evidence indicates that the District rarely disciplined students for engaging in racial harassment, as discussed further in Section V. Though in some instances the School disciplined students involved in racial harassment incidents, the discipline was minor and inconsistent, and varied depending on the administrator who handled the matter and the student who engaged in harassment. For instance, according to staff interviewed by OCR, Student 6's consequence for calling the Student the n-word was parent contact, and Student 3 was given only a lunch detention for making a joke about slavery to the Student and calling her the n-word. AP 1 told OCR that Student 3 was given lesser consequences because [redacted content], yet these minor consequences failed to stop the harassment. Staff members and students told OCR that Student 3 regularly used the n-word and several people reported Student 3 for using the n-word, yet the District had no record in its student information system of his conduct, him receiving any discipline, or his parents being contacted.

OCR also analyzed the District's response to notice of Teacher 7's nonconsensual touching of the Student's hair, Teacher 7's comments about the Student's hair in front of other students, and how much both behaviors offended and upset the Student to determine whether the response was effective in stopping the unwelcome behavior. Though the District issued a "[redacted content]" to Teacher 7 and directed her to apologize, two more of the Student's teachers proceeded to engage in similar touching of and commenting on the Student's hair and the hostile environment continued, including some students' mimicking the teachers' offensive behavior. OCR recognizes that the Principal's warning and [redacted content] to Teacher 7 stopped her from continuing this behavior, but the District did not take effective action to prevent other teachers from touching or commenting on the Student's hair because Teacher 8 and Teacher 6 both did so. Even after receiving notice of the second incident involving Teacher 8, the District still failed to direct staff not to touch or comment on the Student's hair. Not long thereafter, Teacher 6 pulled on the Student's braids in class.

OCR further found that when the Complainant and the Student told the Principal that other students' were mimicking the teachers' behavior and making her feel targeted, humiliated, and upset, the District agreed to change her classes but it did not take action to ensure that her teachers stopped students from engaging in this behavior. The behavior continued and upset the Student, as did the peer racial harassment described above.

Despite knowing that the Student was in a racially hostile environment, the District never offered counseling or other support services to the Student. Additionally, the District did not take other measures to eliminate and prevent recurrence of a racially hostile environment, such as separating the student harassers from the Student; implementing social and emotional learning; offering mediation between the Student and her peers or teachers; providing counseling for the Student and students who were harassing her; providing training to the teachers who touched the Student's hair; or increasing supervision of the Student's interaction with peers who were engaging in racial harassment. District staff also did not follow up with the Complainant and Student to determine if racial harassment was continuing or if anyone had retaliated against the Student.

Based on the foregoing, OCR finds, by a preponderance of the evidence, that the District failed to adequately respond to notice of the racial harassment of the Student or to take reasonable steps

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eliminate the racially hostile environment for the Student, in violation of Title VI and its implementing regulations.

V. Harassment of Other Students at the School

Based on interviews with the Complainant, the Student, six other students, five other parents, and thirteen District employees, OCR found that at least a dozen other students of color in grades 5-8 at the School were harassed by at least sixteen peers based on race, color, or national origin. The harassed students were Black, Hispanic, Asian, Indian, Palestinian, and multi-racial. The interviews and District records revealed that the harassment continued throughout SY 2021-22, often several times a month, with little to no discipline of the harassing students.

A. Findings of Fact

1. Harassment of Other Students – Generally

The Complainant and the Student told OCR that other students have used slurs such as "ching chong," "monkey," and "coon." The Complainant and Student alleged that students have made mocking faces and noises targeting other students, such as pulling their eyes back to imitate an Asian student, as well as drawing racially offensive symbols such as Swastikas.

During interviews, several other students at the School told OCR that their peers engaged in harassment of students based on race, color, and national origin at the School. For example, a Black [redacted content] student (Student 12) told OCR that she had heard "many people" using the n-word, the n-word was used about once a week in classrooms and at recess, and Black students were called "monkey." An Asian [redacted content] student (Student 13) told OCR that students said racial and ethnic slurs "all the time" and that he heard the n-word every day. Student 13 also indicated that he has heard Hispanic students called "beaners;" white students talk negatively about "Black skin and tell Black students, "I hate Black people;" and students pretend to speak Chinese and repeatedly say "ching chong." Student 13 also shared that he has seen students pull back their eyes to mock Asian students. Another Asian [redacted content] student (Student 14) told OCR that she has have seen students draw Swastikas on notebooks, heard students say "monkey" "all the time," and heard a white [redacted content] student (Student 3) use the n-word. A [redacted content] student who is [redacted content] (Student 15) told OCR that students use racial slurs, including the n-word, and that a student asked an [redacted content] [redacted content] student (Student 16) if she was going to bomb the School.

OCR's interviews with School's administrators and teachers further confirmed that students engaged in peer harassment based on race, color, and national origin at the School in SY 2020-21 and SY 2021-22. For example, AP 1 told OCR that she received numerous reports from students and staff about students saying the n-word throughout the School, including in hallways, at recess, and in locker rooms, and that the School is not a welcoming place for racial and ethnic minorities due to ongoing harassment. AP 1 also stated that she told the Principal that the School has a systemic problem with racism and bullying. Like AP 1, AP 2 told OCR that she has heard students use the n-word at the School. AP 2 also told OCR that she has seen Swastikas on school property. Teacher 3 told OCR that students have told him about other students using the n-word

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and that there had been "talk" of students using the n-word "all year long." Teacher 4 told OCR that students referred to COVID as the "China Virus." Teacher 9 told OCR that she would not be surprised if students were being picked on or called a terrorist because of the color of their skin.

Multiple emails produced by the District to OCR also show that students at the School were engaging in peer harassment based on race, color, and national origin. For example, on [redacted content] Teacher 10 wrote to a parent, "... [T]he students in [redacted content] have been using racial slurs/jokes and [redacted content] meanness directed at many different students. I have never seen this amount of insensitive and unaccepting of others before at our school. It has been all over campus (location wise)...." Then, on [redacted content], Teacher 10 emailed the Principal, stating in part, "The 8th grade as a whole have been pushing boundaries hard ... N-words being dropped We would like STRONG admin support and aren't really feeling it." On [redacted content], the parent of a white [redacted content] student (Student 17) emailed the Principal expressing concern about "bullying and use of racial slurs that occur during recess." She reported that the n-word was being "used rampantly."

On [redacted content], the mother of a multi-racial [redacted content] student (Student 18) emailed the Principal about a white student using racial slurs toward her son on multiple occasions in multiple classes, yelling "master please," and making jokes about slavery. The parent referenced two prior emails that she had sent to the Principal regarding another student who used racial slurs, and asserted that the Principal had not responded. On [redacted content], the mother of two students, emailed the Principal, stating in part, "... I also know that the N word is being said at the school and in the presence of teachers and no one, to my knowledge, has been disciplined for it." On [redacted content], a teacher wrote about a white [redacted content] student, Student 19, "We have had issues with him making racial comments and touching people."

During SY 2021-22, a white [redacted content] student (Student 7) created a document about a white [redacted content] student (Student 3) who was harassing other students. The Student wrote on the document that Student 3 "[s]ays n-word still." Student 7 wrote that Student 3 "[s]ays the n-word almost every day." Likewise, another student wrote that Student 3 "[s]ays the n-word." AP 1 received a copy of this document but failed to investigate the alleged conduct.

Finally, responses to District-administered surveys of students and parents describe harassment based on race, color, and national origin at the School. In a parent survey concerning SY 2020-21, the parent of a [redacted content] student at the School wrote, "Discuss the racism at the school! It gets worse every year." In a parent survey during SY 2021-22, a [redacted content] parent wrote, "racism and racial slurs get ignored." During the last two school years, the following statement was included in a survey of School students: "Please identify 2-3 things that your school should/could be doing to improve." Responses included: "the bullying, racism;" "there are also so many racist or homophobic comments going around all the time;" "racial discrimination;" "people respecting people of diverse opinions and backgrounds;" "disciplining the students better to stop any rude or racial comments that are used;" "racial coments [sic] or offensive words used twords [sic] students...;" "staff ... should stop the bad things that happen at school, including the racism, sexism etc.;" and "caring more about people be [sic] racist, homophobic, ect. [sic]." One student wrote, "This school is highly racist and it's very sad. ... If

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someone says the n-word the most that a teacher will say is 'that's not appropriate'. ... This school tolerates racism and it makes me question 'Do I even belong at this school?" The District did not investigate the issues reported in the parent and student surveys responses for SY 2020-21 or SY 2021-22.

2. Harassment of Other Students - Specific Incidents

OCR's interviews also identified specific incidents of peer harassment based on race, color, and national origin at the School throughout SY 2021-22. For example, AP 1 reported that students have made ethnically offensive remarks to a [redacted content] student, including calling his relatives "terrorists" and commenting on him not eating during Ramadan. AP 1 also recalled that a white [redacted content] student (Student 4) drew Swastikas in a School bathroom. Consistent with other reports to OCR about the use of the n-word, AP 1 also reported that a Black [redacted content] student alleged to her that a white [redacted content] student (Student 20) called him the n-word.

The District's records of reported harassment based on race, color, and national origin at the School produced to OCR also revealed the following chronology of instances of parents, students, and School employees reporting such harassment to School administrators, including AP 1 and the Principal throughout SY 2021-22. The District's discipline records regarding harassment revealed additional instances and minor discipline.

On [redacted content], the parent of a multi-racial [redacted content] student (Student 21) sent an email to the Principal stating that another student had called her son an n-word at School. There is no record of how the Principal responded in the documents that the District produced to OCR.

On [redacted content], a white [redacted content] student (Student 22) "displayed racist actions and comments to several Afro-American students," including calling one of them "a burnt piece of bacon," and said that Black people "do not deserve to live" and "should die." The discipline records indicate that the School gave Student 22 a one-day out-of-school suspension.

On [redacted content], Teacher 6 emailed AP 1 about a white [redacted content] student (Student 23) making racist remarks toward a Black [redacted content] student (Student 12). Student 12 had said that Student 23's behavior "is going on in other classes and for a while." Student 12 also yelled at Student 23 during class, "I'm tired of your racist comments that you've been making all year." Discipline records indicate that Student 23 received a one-day in-school suspension.

On or about [redacted content], according to a behavior log maintained by Teacher 6, a white [redacted content] student (Student 24) turned off the lights in a classroom and made a joke about not being able to see a Black [redacted content] student (Student 25) in the dark. AP 1 told OCR that Student 24 had "preyed on" Student 25. There is no record of how the School responded in the documents that the District produced to OCR.

On [redacted content], an [redacted content] [redacted content] student (Student 16) reported to AP 1 that a multi-racial [redacted content] student (Student 18) had "constantly" harassed her,

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including, according to AP 1, saying that Student 16 had a mustache and a hairy belly button. Records indicate that Student 18 received an in-school suspension.

On [redacted content], a [redacted content] teacher emailed a parent about her son, "He asked a girl if she was African American, she responded no and his reaction to that was saying the N word to her." The teacher stated in the email that she gave the student a lunch detention and would tell the Principal if something similar happened in the future.

On [redacted content], a white [redacted content] student (Student 3) told an Asian [redacted content] student (Student 14) to go back to her country and to eat dog because that is "what they do." Student 14's mother emailed AP 1 to report Student 3's comments. Her email read, in part, "Please address this egregious act of racism. I have been advised that there are other incidents regarding different cultures and racial ethnicity." The next day, Teacher 3 emailed AP 1, stating in part, "I have another student ... who asked they be moved away from [Student 3] for racial overtones." According to AP 1, she showed a "Words Matter" video to Student 3. Later, during class in [redacted content] 2022, according to the Student, a white [redacted content] student (Student 11) called Student 14 a "dog eater" and asked her if she used chopsticks. The teacher in that class (Teacher 3) told OCR that he was unaware of the incident.

On [redacted content], Teacher 11 emailed the School's administrators, stating, "Today after class [a multi-racial [redacted content] student (Student 26)], told me that she has overheard [a white [redacted content] student (Student 27)] using the 'N' word multiple times and it upsets her." There is no record of a response from the administrators in the documents that the District produced to OCR.

On [redacted content], according to discipline records, a white [redacted content] student (Student 28) repeatedly said the n-word in the cafeteria, including to two students of color. There is no record of how the Principal responded, and he could not recall if or how he responded.

On [redacted content], according to discipline records, a white [redacted content] student (Student 29) called a Black [redacted content] student (Student 30) "racial slurs." The students then got into a fight. The Principal gave both students four days of out-of-school suspension for fighting. On [redacted content], Student 29 threatened to "shoot up the School" and kill a specific student, and "said the n-word during this time about 10-15 times." There is no record of how the School responded in the documents the District produced to OCR.

On [redacted content], the mother of [redacted content] (Student 31) emailed a teacher to report that a student had called Student 31 a "black ni**er." The next days, Student 31's mother emailed the Principal about the incident and alleged that the School was discriminating against her child. There is no record of a response from the Principal. The District's Chief Personnel Officer spoke with the mother.

On [redacted content], the parent of a white [redacted content] student (Student 32) emailed the Principal, in part, "[Student 32] has complained that a new boy at school calls her the N word every day. She wanted for us to have a meeting because she doesn't feel heard when she has

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made complaints about students." The Principal could not recall if or how he responded, and records provided to OCR do not include this information.

On [redacted content], the mother of a Hispanic [redacted content] student (Student 33) emailed Teacher 11 that a student called her child a "monkey" and said that he would be a landscaper. The student admitted to School staff that he made these comments to Student 33. Teacher 11 rearranged the students' seats and wrote to the mother, in part, "These kids just aren't thinking about others when they make their 'joke' comments to each other and how it may impact their emotions."

On [redacted content], according to the Student and an Asian [redacted content] student (Student 13 two white [redacted content] students (Student 34 and Student 11) mocked Student 13 by using a made-up language, saying "ching chong," and pulling their eyes back during class. The teacher of that class (Teacher 4) told OCR that he was unaware of this alleged conducted.

On [redacted content], according to discipline records, a white [redacted content] student (Student 35) told a Hispanic [redacted content] student (Student 36) that her skin looked like burnt bread. According to AP 1, Student 36 was, as a result, very upset and insecure. Student 35 received a one-day in-school suspension.

Also on [redacted content], a Black [redacted content] student (Student 2) wrote to School staff about a Hispanic [redacted content] student (Student 37), "[He] was saying the n-word repeatedly and laughing and pretending like he was saying something else. The whole class heard and [the teacher] acted like she did not hear him say it. The whole class was telling him it was not funny and to stop. ... This has happened before. Ex. kids saying the n-word and teachers ignoring people saying it." The Principal told OCR that he did not interview other students because Student 37 admitted to the conduct and that Student 37's consequence was a one-day inschool suspension. The Principal also told OCR that he never talked to Student 37's parents about their son's behavior.

According to the District's discipline records, on [redacted content], a white [redacted content] student (Student 38) and a Black [redacted content] student (Student 25) got into a fight during class after Student 38 called Student 16 a "monkey." According to the Principal, he facilitated a conversation between Students 14 and 16, and called both of their parents. Records provided to OCR do not reflect the Principal's actions.

On or about [redacted content], there was an incident on a social media platform involving students from the School and students from schools in another district. According to AP 1, two white [redacted content] students at the School (Students 38 and 39) were part of the chat. A Black [redacted content] student (Student 25) and an [redacted content] [redacted content] student (Student 16), both of whom attend the School, were cyberbullied in the chat. On [redacted content], Student 25 emailed screenshots and videos from the chat to AP 1. In the chat, students repeatedly called Student 16 the n-word and wrote the n-word, "I love Hitler," and Swastikas on a photograph of her face. Photographs of Student 25's face had Swastikas and the n-word drawn on them, along with homophobic slurs. The Principal informed School staff that "inappropriate sexual and racial comments" were made in the chat and that the parents of the

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students involved were "working on things from their end." AP 1 interviewed Student 25 about the incident. AP 1's interview notes detail several racial slurs. District staff reported the situation to the local police department. During an interview with OCR, the Principal and AP 1 were unaware of what was happening since the District referred the incident to law enforcement; in other words, they had not followed up.

On [redacted content], Teacher 9 emailed AP 1 and another teacher to report that an [redacted content] student (Student 16) was being harassed by Student 39 and another student who asked Student 16 "what her favorite type of bomb is" and caused Student 16 to be "pretty upset." Teacher 9 requested that AP 1 speak with the students. There is no record of how AP 1 responded in the documents produced to OCR.

On [redacted content], as SY 2021-22 was coming to a close, three [redacted content] students did a "Heil Hitler" salute and said "Heil Hitler" during a school fieldtrip, according to Teacher 9 and emails produced by the District. One of the students continued the conduct, even after Teacher 9 told him to stop. As a consequence, the School marked an "infraction" on the Student's card.

3. The District's Response to the Reported Harassment of Other Students

The District's responses to numerous reports of student-on-student harassment based on race, color, or national origin at the School throughout SY 2021-22 were inconsistent and, at times, nonexistent. On several occasions, School staff failed to investigate adequately, or to investigate at all, student, parent, and employee reports of peer harassment based on race, color, or national origin. Moreover, School staff never conducted an analysis of whether the reported student-onstudent harassment based on race, color, and national origin had created a hostile environment for the targeted students at the School. Even when the School did respond to certain reported incidents of harassment, it failed to offer any supports or remedies to the harassed students and its responses were ineffective and did not prevent the harassment from recurring. As detailed below in this section, OCR found that the District responded as follows: School staff gave some students who engaged in harassment relatively minor disciplinary consequences; AP 1 emailed teachers in grades 5-8; AP 1 showed a "Words Matter" video that did not specifically address race; AP 1 organized a "Words Matter" assembly for students in grades 5-8; and AP 1 established a "Bully Box." These ineffective responses allowed the harassment to continue and to create a school-level hostile environment. The District then failed to investigate this known hostile environment at the School to identify other students who may have been subjected to harassment and a hostile environment but did not report such harassment given the School's repeated failures to respond effectively to reported harassment.

OCR recognizes that AP 1 took some school-wide steps to respond to the reports of peer harassment at the School, even though they proved inadequate to prevent harassment from recurring. AP 1 was the administrator primarily in charge of student conduct in grades 5-8. However, she was a Teacher on Special Assignment (TOSA) and had never previously been an administrator or worked in the District. According to AP 1 and Teacher 1, AP 1 was too busy to adequately handle all the student behavior incidents, including harassment. AP 1 told OCR that her duties included: facilitating all Section 504 and Individualized Education Program (IEP)

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team meetings for all students with disabilities in grades 5-8; managing arrival, lunch, recess, and dismissal duty every day; handling discipline for students in grades 5-8; providing classroom coverage for teachers due to a shortage of substitutes; handling matters for students in grades K-4 when AP 2 was away from the School or otherwise busy; and observing, evaluating, and supervising 19 teachers. AP 1 told OCR that she was "totally overwhelmed."

OCR found that the District's responses to students who harassed their peers were inadequate and ineffective. Even after conducting interviews with administrators, staff, and students and reviewing voluminous student records, OCR was unable to determine whether, for most reported incidents of harassment based on race, color, or national origin, students were disciplined, even though District Policy JICK-EB permitted suspension or expulsion for incidents related to bullying, harassment, or intimidation of others. In instances where OCR became aware of disciplinary action through interviews and reviewing emails, it was often difficult to ascertain the specific discipline that the School administered because the School did not adequately generate or maintain records and staff could not recall, with confidence, what, if any, consequences were given. When OCR could identify the discipline for a given incident of harassment based on race, color, or national origin, the consequences included watching a video, lunch detention, one day of in-school suspension, or one day of out-of-school suspension. AP 1 said that the School did not follow any specific policies or procedures when disciplining students; instead, discipline was left entirely to administrator discretion.

Staff acknowledged to OCR that students' parents influenced the decision-making process for determining discipline for student behavior, including harassment based on race, color, or national origin. Specifically, the Principal, AP 1, and Teacher 1 told OCR that students with more combative, aggressive, or vocal parents – even if those students were repeat harassers, like Student [redacted content] – were less likely to be disciplined. In March 2022, AP 1 told the Complainant that students who used racial slurs were "already on their radar," but that the District was reluctant to discipline the students because their parents would deny the allegations and push back against the District's administration.

In all specific instances of harassment described in this letter, the School failed to adhere to District policies and procedures governing the investigation of reported or observed harassment. For example, the School did not require employees to create detailed, written descriptions of incidents and the principal did not provide students who were allegedly harassed "a written copy of student rights, protections and support services available to the student," did not consistently "notify the student's parent(s)/guardian(s) of the suspected incident of harassment," and typically did not meet with the involved students to review the findings of investigations. All of these steps are required by District Policy JICK. School staff also did not follow required procedures for "student concerns, complaints, and grievances," as detailed in District Policy JII-R, such as having an investigator meet with the student to discuss the conclusions and actions taken as a result of the investigation or preparing a written report of findings.

In terms of school-level responses to widespread student-on-student harassment based on race, color, and national origin, the School took only three steps – all during about a six-week period in the first semester of SY 2021-22. Specifically, AP 1 sent an email to teachers, organized a "Words Matter" assembly, and created a "Bully Box." She also showed a video to a few students.

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On September 13, 2021, AP 1 sent an email to teachers in grades 5-8 with the subject line, "Sensitive Subject the n-word." The email stated in pertinent part, "There is a growing awareness that we have students in our school who would benefit from some cultural awareness (acceptance of other cultures and identities) training. I have several names of students who are throwing the word around without an apparent understanding of its degrading and dehumanizing impact on others." AP 1 told OCR that she did not provide the teachers with the names of the "several students" referenced in the email because staff were already aware of the students' names; however, teachers told OCR that they did not know the identities of the students. In the email, AP 1 informed the teachers that she would show the students who were using the n-word a "Words Matter" video during recess. AP 1 also requested that the teachers report any use of the n-word to her. No staff replied to AP 1's email.

AP 1 told OCR that she showed the "Words Matter" video to Student [redacted content], Student [redacted content], and one other student whose name she could not recall. Notably, AP 1 told OCR that the video does not discuss race.

On October 6, 2021, AP 1 informed staff, via email, that an assembly would take place "[d]ue to recent bullying, disrespect and discourse that does not represent our school well[.]" The Principal wrote to OCR that AP 1 "sought this assembly after hearing from different students that there was a growing concern of students in those grades making inappropriate and racist comments and jokes when out of earshot of adults." The Principal also informed OCR that teachers and students had been reporting that students were using "racial language," including the n-word.

The School held the "Words Matter" assembly for seventh and eighth graders on October 19, 2021, and for fifth and sixth graders on October 22, 2021. According to AP 1, the presentation included an overview of the School's Positive Behavioral Interventions and Supports (PBIS) framework, statistics about the prevalence of bullying, questions about bullying, strategies for bullying prevention, hypothetical bullying scenarios, and an announcement about a new "Bully Box." AP 1 stated that some School staff were not supportive during the assembly; rather than engaging in dialogue with students, those staff members stood in the back and did not participate. AP 1 also showed part of a video titled, "Let's Get Real." The description of the video on YouTube reads:

"Let's Get Real" examines issues that lead to taunting and bullying, including racial differences, perceived sexual orientation, learning disabilities, religious differences, sexual harassment and others. ...

Features youth speaking frankly about their varied and often painful experiences related to bullying at school, and helps open dialogue about the underlying prejudice- related to issues such as gender identity, race, national origin, class, religion, sexual orientation and more- that is fueling the bullying epidemic.

According to the Student, some students in the assembly laughed in response to a Black student in the video saying, "I have been called [n-word]."

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A Black [redacted content] student (Student 12) delivered prepared remarks during the assembly, stating that she had witnessed numerous racist comments by students at the School. According to AP 1, staff did not ask Student 12 to provide more details about the comments. Students left the assembly with a "Bully Box" card and reflection questions.

The "Bully Box" is a small, locked box located on a table, just inside the front door of the School and near the front of the main office. A pen is attached to the box. A slot on the side of the box holds copies of small cards that read "Bully Incident" at the top and "Submit to Bully Box by Lost & Found" at the bottom, with seven lines for text in between.

After the assembly, some parents complained to AP 1, the Principal, and the District about the lack of prior notice about the event, the video that was shown, and the "Bully Box." [Redacted content]. AP 1 told OCR that she was "slandered on Facebook as a liberal invader" after the assembly. AP 2 said that parents berated AP 1, claiming that she was trying to "bring woke culture to the School," and that the District "came down" on AP 1. The Principal acknowledged to OCR that the School might have taken further steps to address racial harassment if the staff had not received intense criticism from parents about the assembly. Teacher 3 shared with OCR that seventh-grade teachers have discussed how an outside professional or outside organization needs to provide training for students and staff at the School because the assembly was inadequate in addressing harassment at the School.

B. Legal Analysis and Conclusions

OCR found that at least a dozen students of color in grades 5-8 at the School, in addition to the Student, were harassed by peers based on race, color, or national origin. Those students were subjected to racist slurs, jokes, insults, symbols, and gestures. District staff had notice of this racial harassment because staff witnessed some of it, and parents and students reported it in person, via emails, and in survey responses. Some white students also reported to District staff that they were being negatively impacted by harassment aimed at students of color. Several staff told OCR that they were aware of peer harassment based on race, color, or national origin in the School. Nevertheless, the District never took steps to evaluate if this harassment created a hostile environment for the students at the School who were the subject of those reports or to offer supports or remedies for students who were harassed, even when discipline records confirmed the reported harassment.

The District's discipline of students who engaged in harassment was inconsistent, and, at times, nonexistent even though District policy prohibited harassment based on race and permitted suspension or expulsion for incidents related to bullying, harassment, or intimidation of others. Staff did not adequately investigate the harassment and did not follow District policies, such as conducting adequate investigations, preparing written reports of investigations, or notifying parents of incidents or the outcomes of investigations. The District took only three school-level steps in response to widespread harassment based on race, color, and national origin: sending an email to teachers in grades 5-8, holding an assembly for grades 5-8, and establishing a schoolwide "Bully Box." The District did nothing to redress the hostile environment at the School for students of color after October 2021, despite ongoing reported harassment. The District did not conduct follow-up interviews with victims of harassment; administer climate surveys or focus groups; initiate professional development for staff, social and emotional

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learning for students, or mediation or restorative practices; or remind students and parents about prohibitions on harassment or how to report harassment.

The District's minimal and ineffective responses to numerous reported instances of harassment based on race, color, and national origin failed to prevent its recurrence and allowed a hostile environment to fester and persist at the School in SY 2021-22. Given the pervasive, persistent, and at times severe racial harassment reported by students to School staff and OCR, OCR found that a hostile environment existed based on race, color, and national origin for other students at the School and that the District accepted, tolerated, and left it uncorrected. The District also failed to investigate the known hostile environment at the School to identify other students who may have been subjected to harassment and a hostile environment but did not report such harassment given the School's repeated failures to respond promptly and effectively to reported harassment.

VI. District Recordkeeping

The regulation implementing Title VI, at 34 C.F.R. § 100.6(b), requires recipients like the District to keep and submit "timely, complete, and accurate compliance reports at such times, and in such form and containing such information, as . . . [OCR] may determine to be necessary . . . to ascertain" the recipient's compliance with Title VI. In a Title VI investigation like this one, such records include complete and accurate records of harassment complaints, investigations, and school discipline that will enable OCR to ascertain whether the District's response to student harassment complies with the nondiscrimination requirements of Title VI.

OCR's investigation was impeded by the School's incomplete recordkeeping, particularly with respect to discipline records, investigation records, and records of communications with students and their parents concerning harassment. School staff often did not create or retain records related to specific incidents of harassment. For example, AP 1, who handled most behavior issues for grades 5-8, told OCR that she did not always document reported incidents and typically did not log parent contacts. This testimony was consistent with the documentary evidence. Though AP 1 and numerous other School employees told OCR that Student 3 used the n-word "constantly" and has a long discipline history, including numerous incidents of racial harassment, OCR could not find any discipline records for Student 3 in the District's electronic student information system.

While these gaps in the data were not so significant as to prevent OCR from making a determination about the District's compliance with Title VI based on the collective data and by relying on other sources of evidence like employee testimony, OCR has a compliance concern that the District's records regarding harassment complaints, investigations, and student discipline in SY 2020-21 and SY 2021-22 fell short of its recordkeeping obligations under Title VI. OCR found that some records concerning specific incidents of harassment often were not generated or retained, District staff did not consistently document reported incidents of harassment or contact with parents, and the District did not generate or maintain complete discipline records for students with documented incidents of harassment. The absence of discipline records for many reported incidents of harassment based on race, color, and national origin in both school years leaves the District unable to demonstrate to OCR that it took appropriate disciplinary action in response to

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confirmed incidents and that such action was effective in stopping the harassment. For these incidents, OCR is left to conclude that the District took no disciplinary action in response to numerous reports of racial harassment and that this explains, at least in part, why it continued unabated.

These record-keeping issues contribute to OCR finding that the District did not adequately respond to harassment of the Student and numerous other students at the School. Resolving these violations will require that the District creates and maintains timely, accurate, and complete records of complaints and reports of student harassment and the District's response to all such incidents of harassment.

VII. Conclusion

Upon being advised of the violation findings and compliance concerns, the District entered into a Resolution Agreement (Agreement) to resolve the matters. A signed copy of the Agreement is attached with this letter. When the Agreement is fully implemented, the issues will be resolved consistent with the requirements of Title VI and its implementing regulations. OCR will monitor implementation of this Agreement through periodic reports from the District about the status of the Agreement terms. When fully implemented, the Agreement will address OCR's identified violations. OCR will monitor the implementation of the Agreement until the District is in compliance with its terms and the statutory and regulatory obligations under Title VI that were at issue in the case.

This case is now in the monitoring phase. The monitoring of this case will be completed when OCR determines that the District has fulfilled all terms of the Agreement. When the monitoring phase of this case is complete, OCR will close this case and send a letter to the District stating that this case is closed.

This concludes OCR's investigation in this case and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determinations in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation. Please be advised that the District must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to protect, to the extent provided by law, personal information, which, if released, could constitute an unwarranted invasion of privacy.

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Thank you for the courtesy and cooperation extended to OCR during the investigation and resolution of this case. If you have any questions, please contact the attorneys assigned to this case: Jason Langberg [redacted content]; and Michael Athy [redacted content].

Sincerely,

/s/

Daniel Contreras Supervisory Team Leader

Attached: Resolution Agreement (signed)

cc: Megan Bennett, School Principal ([redacted content])
Dale Shough, Executive Director of Elementary Education ([redacted content])
Carter Davidson, Chief Student Services Officer ([redacted content])
Kathy Hoffman, Arizona Superintendent of Public Instruction ([redacted content])

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EXHIBIT AY

Resolution Agreement

East Side Union High School District Case No. 09-14-1242

The U.S. Department of Education, Office for Civil Rights (OCR) initiated the above referenced investigation pursuant to Title VI of the Civil Rights Act of 1964 (Title VI) and its implementing regulation at 34 C.F.R. Part 100. In order to resolve the compliance concerns identified by OCR, and without admitting to any violation of state or federal law, East Side Union High School District (District) agrees to implement this Resolution Agreement (Agreement).

Agreement Principles – Safe and Equitable Schools

The District's goal is to establish and sustain healthy and safe school cultures through relationship-centered practices to keep students engaged in their learning environment. The District is committed to nondiscrimination in discipline, and to treating all students fairly and equitably in the administration of discipline, without regard to race, color, or national origin. To the maximum extent possible, the District strives to adopt and implement student discipline policies and procedures that: 1) keep students in the classroom, learning; 2) ensure consistent and equitable implementation of research-based alternatives to exclusion; and 3) use exclusionary discipline only as a last resort, where it is necessary due to the student's presence causing an immediate danger to students or staff, or when it is the only means of stopping student misbehavior from substantially interfering with the delivery of educational instruction to others, and it is consistent with federal disability law. The District is committed to working with students who exhibit inappropriate behavior to ensure that students remain engaged in the District's educational program and are given every opportunity to reach their educational potential. The District will also ensure that students and parents/guardians¹ who are Limited English Proficient (LEP) will receive important education information, including discipline information, in a language they understand.

Agreement Provisions

I. School Climate Oversight, Expert Consultant(s), and Equity Committee

A. With the goal of developing a positive school climate of belonging and success for all students, as well as to address the issues specified in the agreement, the Associate Superintendent of Educational Services will oversee the implementation of the agreement in collaboration with the four directors and Coordinators of the Educational Services Division (Administrative Team). This oversight will focus on the development of positive school culture district wide, manage the actions of contracted professional development providers, ensure data analysis by staff and committees, and report to both the Board and the Office of Civil Rights.

The Director and Coordinator of Student Services will be directly responsible to ensure that district policies and the discipline matrix reduce the subjectivity of disciplinary

¹ The term "parents/guardians" as used herein also includes education rights holders.

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responses, facilitate the Advisory Committee meetings, and facilitate the monthly and semester meetings with administration with sites to review data and adapt actions, as well as to assist and direct trainings of administrators, advisors and site staff to reach determined outcomes.

The Director of Special Services and the Coordinator of Multiple Tiers of Student Supports will be directly responsible for building systems of analysis and instructional supports in order to direct responses to students who have a variety of learning needs and who do not meet benchmarked indices of positive progress toward a diploma and A-G eligibility, as well as, support students with social-emotional development and skills.

The Director of Data and Assessment will work to determine and implement the appropriate climate surveys and to provide the data necessary for intervention and reporting per the guidelines of the agreement.

The Director of Curriculum and Professional Development will work to assess, determine and implement the trainings necessary to develop positive school culture, a comprehensive programmatic approach to positive behavior interventions and supports, and a program of role specific trainings to address implicit bias, classroom management and disciplinary responses.

The Associate Superintendent will contract with providers to determine and implement appropriate cultural, instructional and systemic responses identified in the agreement. The Associate Superintendent, while overseeing the Uniform Complaint Policy of the district, will delegate investigations and ultimately oversee conclusions of law and corrective actions in order to address discriminatory actions consistent with board policy.

Reporting Requirements:

By <u>January 31, 2018</u>, the District will provide the names and contact information for each Administrative Team member described above. If any such positions are unfilled at that time, the District will describe for OCR who is responsible for the corresponding responsibilities until such position is filled. The District will ensure that all such positions are filled by March 31, 2018, and will provide OCR with the name and contact information of any such individual by <u>March 31, 2018</u>.

On <u>June 30, 2018</u>, and by the same date annually thereafter for the term of this Agreement, the District will provide OCR with a copy of all complaints of race, color, and national origin discrimination related to discipline for the prior school year, as well as a copy of the District's findings and resolutions of each such complaint (by email, if possible).

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B. Expert Consultant(s)²: The District will retain or designate, as needed throughout the implementation of this Agreement, one or more consultants with expertise in nondiscriminatory discipline practices³, data analysis, research-based discipline strategies, and implicit bias. The expert(s) will assist the District in implementing this Agreement (including developing and implementing the Corrective Action Plan), monitoring and evaluating practices, and stakeholder involvement. Any expert consultant(s) will be approved by OCR. The District, after retaining its expert consultant(s), shall provide the expert consultant(s) with all appropriate information the expert consultant(s) believes is necessary to engage in this process.

Reporting Requirements:

Within 15 days of deciding to use an expert consultant(s), the District will inform OCR of any expert consultant(s) selected and their qualifications for OCR review and approval, and will provide proposed contracts to provide the services required by this Agreement.

C. <u>Stakeholder Equity Committee:</u> The District will establish a Stakeholder Equity Committee (Committee) of community representatives within 90 days of execution of this Agreement. Such stakeholders should include site representatives, teachers, administrators, counselors, District administrators, special education staff or administrators, members of community organizations, as well as students and parents/guardians.

The Committee will meet twice a year at a minimum, by the following dates: March 31, 2018, and June 30, 2018, and by the same dates annually thereafter during the 2018-2019 and 2019-2020 school years, to review the District's student discipline data by race/national origin for the prior semester, as well as other relevant data and information to evaluate the District's progress in ensuring a positive school climate and nondiscrimination in discipline, as well as implementation of the corrective action plan described in Section II.A of this Agreement. The Committee will make recommendations to the District regarding the effectiveness of the District's discipline policies, practices, and procedures, and implementation of its Corrective Action Plan, described in Section II.A of this Agreement. The Administrative Team will coordinate Committee meetings and work.

The Committee will provide a written summary of findings and recommendations (report), and will submit its report to the District by <u>June 30, 2018</u>, and by the same dates

² The expert(s) with whom the District consults may be a District employee or employees or an outside consultant with sufficient expertise.

³ "Nondiscriminatory discipline practices" and "nondiscrimination in school discipline" is the administration of discipline in such a manner as to ensure that any racial disparities in disciplinary referrals and/or sanctions are not the result of discrimination prohibited by Title VI and its implementing regulations.

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for the 2018-2019 and 2019-2020 school years. The District Superintendent and Board will review the report and determine how to incorporate the Committee's recommendations into the Corrective Action Plan and for recommendations not incorporated, will provide a reason in writing to the Committee by <u>August 31, 2018</u>, and by the same dates for the 2018-2019 and 2019-2020 school years.

Reporting Requirements:

By March 31, 2018, and by the same date in the 2018-2019 and 2019-2020 school years, the District will provide documentation to OCR that the Committee required by this item has been established, the names, titles or position, as well as a calendar for the coming year's meetings and any other activities, and minutes from the previous meetings. By August 31, 2018, and by the same dates annually thereafter for the term of this Agreement, the District will provide OCR with copies of the Committee reports, any amendments to the District's Corrective Action Plan, and documentation showing the responsive steps taken.

II. Corrective Action Plan

A. <u>Identify Root Causes and Develop Corrective Action Plan:</u> The District will, in consultation with the Administrative Team, Committee, and expert consultants as needed, examine the root causes of the racial or national origin disparities in the discipline of students in the District, including for Latino, LEP, and African-American students. This will include discipline data review and analysis as described in Section III.G of this Agreement, reviewing relevant literature, research-based practices, implementation of positive behavior interventions and supports, securing any expert input, assessing implicit bias and cultural sensitivity, reviewing District policies and practices as described in Section III.A of this Agreement, reviewing employee training practices, and engaging students, staff, and community stakeholders in order to identify and take both immediate and long term corrective actions necessary to address such root causes, as part of the District's strategies for meeting its goals described in General Principles. Based on this examination, the District will develop a Corrective Action Plan describing the corrective actions it has identified to ensure nondiscrimination in school discipline.

Reporting Requirements:

By <u>August 1, 2018</u>, the District will provide OCR with a draft Corrective Action Plan (that will include the root cause analysis) as required by Section II.A of the Agreement, for review and approval. Within 30 days after OCR approval, the District will implement the Corrective Action Plan. The District will provide OCR with documentation of such implementation no later than <u>September 30, 2018</u>, and by the same date in the 2019-2020 school year. Documentation of implementation of the Corrective Action Plan will include all changes in discipline policies or practices and the reasons for such changes, as

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well as data analysis regarding student discipline rates disaggregated by race, national origin and LEP status consistent with Section III.G. Throughout the course of this Agreement, the District will submit for OCR review and approval of any changes to the Corrective Action Plan, including any changes to policies, practices or procedures or other actions it proposes to make, prior to implementation.

III. School Discipline

- A. <u>Policy and Procedures Review and Revisions:</u> The District will continue to review its student discipline policies and procedures, including those implementing positive behavior interventions and supports, and make revisions, as necessary, consistent with the goals of this Agreement and in consultation with any expert consultant (as defined in Section I.B) by <u>August 1, 2018</u>. In doing so, the District will also consider recommendations or suggestions made by the Committee described in Section I.C, as well as site specific practices and their relationship to discipline rates for students of different races/national origins and LEP students to identify internal best practices. The District will ensure that its student discipline policies and procedures, include the following:
 - 1. a requirement that School staff attempt and document a range of positive corrective measures that do not result in the removal of a student from class before referring a student for discipline, unless it can be documented that the behavior causes a danger to persons or substantial disruption to the education environment that can only be remedied by such removal from class, and it is permitted by law;
 - 2. a list of minor inappropriate behaviors for which suspension or expulsion should never be used, and a list of minor inappropriate behaviors that warrant interventions other than discipline;
 - 3. elimination, to the maximum extent permitted by and consistent with the law, of vague, subjective or redundant offense categories, including categories that allow for a high degree of subjectivity in enforcement (e.g., willful defiance or disruptive behavior);
 - 4. definitions of misconduct that are clearly defined, uniform, and objective to the maximum extent possible and that clearly distinguish between similar acts, (e.g., fighting and physical aggression);
 - 5. the range of appropriate consequences that may be imposed for each infraction, appropriate consequences that are proportionate to the type of inappropriate behavior, and uniform criteria for staff to use when selecting a particular discipline response within the range of possible appropriate consequences;
 - 6. a clear explanation of how any progressive disciplinary policies, practices and procedures will be implemented consistently at each school, including criteria or guidelines for appropriate discipline response for first offenders and repeat offenders;
 - 7. appropriate due process standards for all students disciplined under the District's student discipline policies, practices and procedures, including a description of the

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- key elements of the discipline process (appeals, alternative dispositions, timelines, provisions for hearings, etc.);
- 8. a process that seeks to successfully reintegrate students within the School community who have been suspended, expelled, transferred, or excluded, or who return from alternative disciplinary placements, including counseling, tutoring or other additional educational services to permit the student to make up lost classroom time;
- 9. a process to identify the predominant languages spoken by the District's Limited English Proficient (LEP) parents/guardians and English language learners (ELLs), for which translation of the District's discipline policies, practices and procedures, as well as discipline notices and other documents is appropriate, and the recently developed process that offers written translation and oral interpretation of these documents upon request for LEP parents/guardians and ELLs who speak other less common languages;
- 10. clear, objective criteria for the use of involuntary and administrative transfers that incorporates appropriate due process, and delineates the process, objective criteria, and timelines for transferred students to return to their home school;
- 11. clearly state that complaints by students, parents/guardians, or others alleging discrimination against students by school-based law enforcement may be filed through the District's Uniform Complaint Process and will be investigated through that process; and,
- 12. during negotiations, the District provided OCR with a Board approved memorandum of understanding (MOU) recently entered into with the San Jose Police Department, and the District commits to implementing the MOU and District-related policies and procedures to ensure that there are clear definitions and limits on law enforcement involvement in disciplinary or behavioral incidents occurring at District schools, including that school administrators, not law enforcement, are responsible for routine school discipline matters, and law enforcement on District campuses will focus on major threats to school safety or serious school-based criminal conduct that cannot be safely and appropriately handled by a school's internal disciplinary procedures.

Reporting Requirements:

By June 30, 2018, the District will submit its definitions and revisions, if any, to the student discipline policies and procedures to OCR for review and approval. Within 60 days of OCR's approval, the District will provide documentation to OCR of implementation and that it has disseminated the revised documents to all District staff, students, and parents, and posted them in a prominent location on the District's website and in the School. Throughout the course of this Agreement, the District will submit for OCR review and approval any changes to the policies and procedures prior to their implementation.

B. <u>Early Intervention for At-Risk Students & Student Support System:</u> Effective no later than <u>August 1, 2018</u>, the District will develop a plan that will be incorporated into its

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Corrective Action Plan at II.A to effectively tailor school-wide tiered supports and a range of interventions and supports that are supportive of the needs of students in order to decrease behavioral difficulties and to increase students' ability to benefit from the learning environment (School-Based Supports Plan). The School-Based Supports Plan will examine and describe the following:

- how the District will ensure that school-wide tiered supports and a range of positive interventions and supports are used prior to disciplinary referral, such as adult and/or peer in-school mentoring, mediation, counseling and restorative community building approaches, including how such measures will be documented and the extent to which implementation of positive behavior interventions and supports at some sites is effective;
- 2. the Instructional Support Team (IST) process for identifying students who are at-risk of or demonstrate behavioral difficulties due to trauma or other experiences in and outside of school;
- 3. the process for building interpersonal, social and emotional competencies for at-risk youth;
- 4. the process for involving parents/guardians in developing social emotional competencies and proactively addressing behavior problems;
- 5. support for school staff to help them meet the needs of at-risk students;
- 6. the process for ensuring referral for psychological evaluation or other educational services, where needed; and,
- 7. the schedule, if any, established by the District, by school, to hire guidance counselors, social workers, mental health workers and, as applicable, restorative practices and positive behavior intervention staff.

Reporting Requirements:

By May 1, 2018, the District will submit a copy of the School-Based Supports Plan described in this item for OCR review and approval.

Within 30 days of receiving OCR approval, the District will begin implementation. By <u>June 30, 2018</u>, and by the same date during the 2018-2019 and 2019-2020 school years, the District will provide to OCR documentation of the steps taken to implement the plan in the prior school year.

C. <u>Student and Parent/Guardian Information Sessions:</u> The District will provide informational sessions for parents/guardians of students and students at all District schools that will provide an accessible explanation of the District's disciplinary policies, what is expected of students under the policies, and the District's efforts in achieving nondiscriminatory discipline for all students. The District will offer the informational sessions to ensure maximum participation by students, parents and guardians. The

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District will provide oral interpretation at the sessions and translated materials for ELL students and LEP parents/guardians consistent with Title VI. The sessions will:

- 1. provide parents/guardians and students with the opportunity to raise concerns or suggestions regarding implementation of the District's disciplinary policies, including any issues in connection with fairness and nondiscrimination;
- 2. include participation by staff involved in the administration of discipline (e.g., administrators, teachers, counselors);
- 3. emphasize the District's commitment and goals as described in General Principles;
- 4. advise LEP parents/guardians of the right to receive translated or interpreted discipline information in a language they understand, consistent with Title VI;
- 5. include but not be limited to explanations of the discipline policy; the Committee and opportunities for participation in the Committee; the rights of students to due process; the range of non-exclusionary interventions, supports, and approaches to discipline to be documented and exhausted prior to exclusionary discipline; the definitions of offense categories; the specific manner in which progressive disciplinary consequences will be employed; the resources that are available to students to assist them in developing social emotional competencies; information about the staff to contact if there is a concern about discipline policy implementation or need assistance in addressing student behavioral problems; and the District's commitment to recognizing and reinforcing positive student behavior and to ensuring to the maximum extent possible that misbehavior is addressed in a manner that does not require removal from the educational program.

Reporting Requirements:

By September 30, 2018, and by the same date during the 2019-2020 school year, the District will provide OCR with documentation that the information sessions required by this item have been conducted, including materials distributed at the sessions, any recommendations, suggestions or reports provided by parents/guardians and students, at the sessions, and any revisions to the plans developed by the District or other steps taken in response to the input at these sessions.

- D. <u>Staff Discipline Training:</u> The District will provide annual discipline training to all District teachers, administrators, and school aides, school security officers, and any other District or site staff who supervise students, make discipline referrals, and/or impose discipline sanctions, by <u>August 30, 2018</u>, and by the same date during the 2018-2019 and 2019-2020 school years. The training will include an opportunity for employees to raise concerns or suggestions for improving the District's disciplinary policies, including any issues related to fairness and nondiscrimination on the basis of race, color, national origin (including LEP status). The training will include:
 - 1. the District's commitments and goals as described in General Principles;

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- 2. detailed explanations of the discipline policy; the interventions and supports to be documented and exhausted prior to exclusionary discipline; the specific manner in which progressive disciplinary consequences will be employed if applicable; and the documentation that must be developed and maintained by all staff who make disciplinary referrals or impose disciplinary sanctions;
- 3. the District's system for maintaining and analyzing data on student discipline as described in III.G-F., infra;
- 4. how to administer discipline fairly and equitably, including ensuring nondiscrimination in discipline by eliminating any bias (explicit or implicit) in discipline decision-making;
- 5. the value of recognizing and reinforcing positive student behavior, and the importance of addressing misbehavior in a manner that, to the maximum extent possible, does not remove students from the class and educational program; and,
- 6. policies and procedures for identifying students with LEP parents/guardians, and providing oral interpretation and written translation of discipline information.

Reporting Requirements:

By <u>June 30, 2018</u>, the District will provide the training materials, and the qualifications of the individuals providing the training for OCR review and approval. The District will provide documentation to OCR that it provided the first staff discipline training by <u>August 30, 2018</u>; and by the same date during the 2018-2019 and 2019-2020 school years.

E. <u>Publicly Available Discipline Data:</u> The District will convey to the community the data it collects on the use of discipline, disaggregated by race, color, national origin, LEP/ELL status, school, and reasons leading to exclusionary discipline. While protecting the privacy of individual student data, the aggregate data will include alternatives to exclusion, disciplinary referrals, suspensions, disciplinary transfers, expulsions, and referrals to law enforcement, citations, and arrest. This information will be shared at a School Board meeting open to community members at least annually, and published online on the District's website, and will include enrollment data and percentages by race and LEP/ELL status, for comparison.

Reporting Requirements:

By <u>January 31, 2018</u>, the District will provide, for OCR review and approval, a description of how it will publicly provide the data described above, and the data points to be provided. By <u>June 30, 2018</u>, and by the same date annually thereafter for the term of this Agreement, the District will provide documentation to OCR that it has made this data publicly for the prior school-year available and held a public meeting discussing the data.

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- F. <u>Discipline Data Collection</u>: The District will establish uniform standards for the content of student discipline files. The District will collect and report data regarding the range of interventions and supports to student discipline, disciplinary referrals, including those that do, and do not result in discipline sanctions, including warnings and non-exclusionary consequences, as well as any exclusionary consequences, including short-term removals from class to the office or other room, suspensions (in school and out), expulsions, disciplinary transfers, and referrals to law enforcement, citations, and arrests. By the end of the 2017-2018 year and thereafter, the District will ensure its discipline system includes collection of at least the following information at the School:
 - 1. the name/identification number, race, color, ethnicity, sex, age, disability, school, and grade level of each student referred for discipline; and for each referral;
 - 2. the name/identification number, race, ethnicity, sex, age, grade level, disability, as applicable, and grade level of all other students involved in the incident, whether or not they were referred for discipline themselves;
 - 3. a description of the alleged misconduct;
 - 4. a description of all the non-exclusionary interventions, supports, and approaches that were used and documented to address the behavior at issue prior to referral for discipline and prior to exclusionary discipline;
 - 5. the date and time of day of the referral;
 - 6. the specific discipline code violation for which the referral was made;
 - 7. the referring staff member (by staff identification/employee number);
 - 8. the location within the School and type of class from which the referral was made or other specific settings (e.g. bus referral, hallway referral, playground referral);
 - 9. whether there were any student and/or adult witnesses of the incident; names of witnesses;
 - 10. the prior disciplinary history of the student;
 - 11. the specific code violation for which the student was punished and the penalty/sanction imposed or, if no violation was charged or penalty/sanction imposed, the reason why, and if the sanction imposed was greater or less than the sanction listed in the policy, the reason why;
 - 12. for students with disabilities, the results of any manifestation determination meetings;
 - 13. the date the penalty/sanction was imposed;
 - 14. the length of the penalty/sanction (in number of days/periods);
 - 15. the staff member who assigned the penalty/sanction (by staff identification/employee number or other identifier);
 - 16. whether the student was transferred to an alternative school or another school site;
 - 17. whether the student was expelled, and if so, the length of and basis for the expulsion;
 - 18. whether school-based or local law enforcement were notified, and whether the student was searched, cited, arrested, or otherwise sanctioned by law enforcement;
 - 19. any other non-punitive interventions arising out of each referral incident, including, but not limited to, skill building, peer mentoring, counseling, restorative circle;
 - 20. whether, when, and how the parents were contacted in connection with each referral

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incident.

Reporting Requirements:

By <u>July 31, 2018</u>, the District will provide this data for 2017-2018 school year (to the extent the District collected it for 2017-2018) and by the same date after the 2018-2019 and 2019-2020 school years, the District will provide to OCR the data referenced in this item for the previous full academic school year. The District will also provide this data, for the 2016-2017 school year (to the extent the District collected it for 2016-2017) by March 1, 2018.

- G. Discipline Data Analysis & Site Team Meetings: Starting with the 2017-2018 school year, the District will evaluate on an ongoing basis but at least monthly basis, the data referenced herein, to assess whether the District is implementing its student discipline policies, practices and procedures in a nondiscriminatory manner. The Administrative Team and/or the designee will convene each site principal and discipline site team at the conclusion of each semester to discuss the data referenced herein, assist the site team with understanding, analyzing and using the data, and assess their school's progress relevant to the Corrective Action Plan. After the District meeting, and at the conclusion of each semester, the principal and discipline site team at each school in the District also will meet with the administrators, teachers, and other relevant staff at their school to discuss the data gathered and analyzed and the school's progress relevant to the Corrective Action Plan. The evaluation of the data may be conducted as part of the Committee, or separately, and will include the following review of data with respect to each or national origin group and ELL/LEP students, whether:
 - 1. students of a particular race or national origin, including Latino and ELL/LEP students, are more likely than students of other races or national origins to receive:
 - a. disciplinary referrals and sanctions;
 - b. exclusionary sanctions, such as suspensions, or harsher sanctions, such as longer suspensions, disciplinary transfers, expulsions, or referrals to law enforcement than students of other races/national origins;
 - c. certain types of offenses leading to discipline sanctions, or exclusionary discipline sanctions for referrals for certain types of offenses, such as subjective or objective offenses;
 - d. referrals for disciplinary transfers and expulsions; and,
 - e. referrals, citations, or arrest by school-based or local law enforcement;
 - 2. certain teachers and administrators refer students for discipline or impose harsher discipline sanctions (e.g. exclusionary sanctions) on students of a particular race or national origin, including Latino and ELL/LEP students, at a higher rate than students of other races or national origins;

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- 3. students of a particular race or national origin, including Latino and ELL/LEP students, are referred to, or searched, cited, or arrested by school-based or local law enforcement at higher rates than students of other races and national origins;
- 4. whether all students are consistently referred for similar misbehaviors without regard to race or national origin;
- 5. consequences imposed are consistent with the consequences specified in the District's discipline policies and procedures, and where exceptions are made, whether they are justified by legitimate, non-discriminatory reasons;
- 6. if the data reflects higher rates of discipline and/or law enforcement contacts for Latino or ELL/LEP students, the meetings discussed above will explore possible causes for the higher rates and consider and determine steps needed to ensure nondiscrimination in discipline and align any next steps with the Corrective Action Plan; and,
- 7. if the data shows a particular teacher, administrator or other staff member refers students at a higher rate than others, refers Latino or ELL/LEP students at higher rates, or administers harsher consequences to Latino and ELL/LEP, the principal, in consultation with the Administrative Team, will meet with that teacher to discuss the data and examine potential solutions. If the information suggests that the teacher is failing to adhere to the District's student discipline policies, practices and procedures or is engaging in discrimination, the principal will take appropriate action.

Reporting Requirements:

By <u>July 31, 2018</u> and <u>March 1, 2019</u>, and by the same dates during the 2018-2019 and 2019-2020 school years, the District will provide to OCR the data analysis and summary of findings discussed in this item, including any amendments that it proposes to make to its Corrective Action Plan, a description of the District meetings held regarding the data, and any District and site-based actions taken to address the findings.

H. Memorandum of Understanding (MOU) with Law Enforcement: The District has revised its MOU with the San Jose Police Department (Police Department) and commits to ensuring the MOU is implemented to meet the requirements of Sections III.A.12 and III.F.18, and will provide relevant training for Police Department officers who will respond to incidents at the District's schools or at District sponsored programs or activities. Such training will include the District's non-discrimination obligations under Title VI, the terms of the MOU, the District's revised student discipline policies, practices, and procedures, how to work with the District's students in a manner consistent with this Agreement including ELL/LEP students/parents/guardians, and the District's commitment to reinforcing positive student behavior and ensuring to the maximum extent possible that misbehavior is addressed in a manner that does not require exclusion from the educational program.

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Reporting Requirements: By August 31, 2018, the District will confer with OCR to review implementation of the November 15, 2017 MOU, to ensure it is being implemented consistently with Sections III.A.12 and III.F.18, above, and will propose revisions, if necessary, to achieve such consistency. If the Police Department proposes changes to the terms of the November 15, 2017, MOU the District will immediately notify OCR, which will review and approve proposed amendments and assist the District to resolve any differences and finalize the MOU within the 30 day period. The District will not enter into a revised MOU with the Police Department that is not approved by OCR during the term of this Agreement.

IV. School Climate Surveys

A. <u>Discipline Climate Survey:</u> Beginning in the 2017-2018 school year, and following approval by OCR of the survey instrument and survey administration methodology, the District will annually administer a comprehensive climate survey to students, teachers/staff, and parents of all District schools to measure their perceptions of the District's administration of school discipline. In particular, the survey will measure perceptions of school safety and fairness and equity in the administration of school discipline, as well as clarity of rules and behavioral expectations.

Reporting Requirements: By May 1, 2018, the District will provide OCR for its review and approval the climate surveys it proposes to use and the methods by which it will administer the surveys to maximize the response rate. By June 30, 2018, and by the same date in the 2019-2020 school year, the District will provide OCR for its review and approval a copy of the survey results and a description of actions it proposes to take the following school year based on the survey results, including any changes to the Corrective Action Plan. By June 30, 2019 and June 30, 2020, the District will document to OCR the steps it has taken during the prior year in response to the previous school year's survey results.

V. <u>Translation & Interpretation</u>

A. <u>Policies and Procedures:</u> The District will adopt Board Policies and Administrative Procedures (policies and procedures) to ensure the written translation and oral interpretation for LEP parents/guardians of important educational information that is provided in English, including student discipline information (suspension, involuntary transfer, and expulsion notices, school disciplinary rules/expectations, etc.). These policies and procedures will be consistent with the plan for written translation and oral interpretation that the District has developed pursuant to OCR case number 09-15-1253.

Reporting Requirements: By March 1, 2018, the District will provide, for OCR review and approval, draft policies and procedures regarding written translation and oral interpretation, as described above. Within 90 days of approval from OCR, the District

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will provide OCR with documentation that it has adopted the policies and procedures, and notified District and site staff of the policies and procedures.

B. Translation & Interpretation of Discipline Information: The District will provide OCR with a list of the students with LEP parents/guardians who were suspended (out-of-school), expelled, or involuntarily transferred. OCR will use the list to select a set of no more than 30 students (and a corresponding discipline incident for each such student) for whom the District will provide the following regarding each such student/incident: (1) a copy of the written translated discipline documents, or an explanation why no written translation was provided; and, (2) whether an oral interpreter was provided for any related discipline meetings, including the name and qualifications for each oral interpreter. If OCR determines that the LEP parents/guardians of any students reviewed through this process were unable to obtain equal access to the discipline process, the District will work with OCR to remedy the situation, including through translation or interpretation of information and, if appropriate, by providing compensatory education and/or assessing whether to rescind or amend the discipline determination.

Reporting Requirements: By March 30, 2018, and June 30, 2018, and by the same dates during the 2018-2019 and 2019-2020 school years, the District will provide the list of disciplined students with LEP parents/guardians from the prior semester to OCR. Within 30 days of OCR's selection of specific students/incidents from the list, the District will provide the documents described above for each student/incident.

VI. Individual Student Remedy

A. The District will reimburse the Student for educational and other related costs in the amount of \$1,250.

Reporting Requirements: By January 30, 2018, the District will provide OCR with documentation it has reimbursed the Student as described above.

B. The District will establish an Educational Fund for the Student in the amount of \$800.00 for community college, trade school, or other career or technical education costs, including but not limited to tuition and fees, and books and supplies. The Student may access the Educational Fund by submitting receipts or invoices for such costs, to the District for reimbursement or payment. The Educational Fund must be used by September 1, 2020.

<u>Reporting Requirements:</u> Within two weeks after the funds in the Educational Fund are exhausted or <u>September 1, 2020</u>, whichever comes first, the District will provide documentation to OCR that the Fund was exhausted by the Student or expired, including a copy of any receipts or invoices submitted, and proof of payment by the District.

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VII. Monitoring

The District understands that by signing this Agreement, it agrees to provide data and other information in a timely manner in accordance with the reporting requirements of this Agreement. Further, the District understands that during the monitoring of this Agreement, if necessary, OCR may visit the District, interview staff and students, and request such additional reports or data as are necessary for OCR to determine whether the District has fulfilled the terms of this Agreement and is in compliance with Title VI and its implementing regulation at 34 C.F.R. § 100.3, which was at issue in this case. Upon completion of the obligations under this Agreement, OCR shall close and dismiss the case.

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

/s/	12/13/2017
Superintendent or Designee	Date

EXHIBIT AZ



Presidential Documents

Executive Order 14190 of January 29, 2025

Ending Radical Indoctrination in K-12 Schooling

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered:

Section 1. Purpose and Policy. Parents trust America's schools to provide their children with a rigorous education and to instill a patriotic admiration for our incredible Nation and the values for which we stand.

In recent years, however, parents have witnessed schools indoctrinate their children in radical, anti-American ideologies while deliberately blocking parental oversight. Such an environment operates as an echo chamber, in which students are forced to accept these ideologies without question or critical examination. In many cases, innocent children are compelled to adopt identities as either victims or oppressors solely based on their skin color and other immutable characteristics. In other instances, young men and women are made to question whether they were born in the wrong body and whether to view their parents and their reality as enemies to be blamed. These practices not only erode critical thinking but also sow division, confusion, and distrust, which undermine the very foundations of personal identity and family unity.

Imprinting anti-American, subversive, harmful, and false ideologies on our Nation's children not only violates longstanding anti-discrimination civil rights law in many cases, but usurps basic parental authority. For example, steering students toward surgical and chemical mutilation without parental consent or involvement or allowing males access to private spaces designated for females may contravene Federal laws that protect parental rights, including the Family Educational Rights and Privacy Act (FERPA) and the Protection of Pupil Rights Amendment (PPRA), and sex-based equality and opportunity, including Title IX of the Education Amendments of 1972 (Title IX). Similarly, demanding acquiescence to "White Privilege" or "unconscious bias," actually promotes racial discrimination and undermines national unity.

My Administration will enforce the law to ensure that recipients of Federal funds providing K–12 education comply with all applicable laws prohibiting discrimination in various contexts and protecting parental rights, including Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. 2000d *et seq.;* Title IX, 20 U.S.C. 1681 *et seq.;* FERPA, 20 U.S.C. 1232g; and the PPRA, 20 U.S.C. 1232h.

Sec. 2. *Definitions*. As used herein:

- (a) The definitions in the Executive Order "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government" (January 20, 2025) shall apply to this order.
- (b) "Discriminatory equity ideology" means an ideology that treats individuals as members of preferred or disfavored groups, rather than as individuals, and minimizes agency, merit, and capability in favor of immoral generalizations, including that:
 - (i) Members of one race, color, sex, or national origin are morally or inherently superior to members of another race, color, sex, or national origin;
 - (ii) An individual, by virtue of the individual's race, color, sex, or national origin, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;

- (iii) An individual's moral character or status as privileged, oppressing, or oppressed is primarily determined by the individual's race, color, sex, or national origin;
- (iv) Members of one race, color, sex, or national origin cannot and should not attempt to treat others without respect to their race, color, sex, or national origin;
- (v) An individual, by virtue of the individual's race, color, sex, or national origin, bears responsibility for, should feel guilt, anguish, or other forms of psychological distress because of, should be discriminated against, blamed, or stereotyped for, or should receive adverse treatment because of actions committed in the past by other members of the same race, color, sex, or national origin, in which the individual played no part;
- (vi) An individual, by virtue of the individual's race, color, sex, or national origin, should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion;
- (vii) Virtues such as merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness are racist or sexist or were created by members of a particular race, color, sex, or national origin to oppress members of another race, color, sex, or national origin; or
- (viii) the United States is fundamentally racist, sexist, or otherwise discriminatory.
- (c) "Educational service agency" (ESA) has the meaning given in 20 U.S.C. 1401(5), and the terms "elementary school," "local educational agency" (LEA), "secondary school," and "state educational agency" (SEA) have the meanings given in 34 CFR 77.1(c).
- (d) "Patriotic education" means a presentation of the history of America grounded in:
 - (i) an accurate, honest, unifying, inspiring, and ennobling characterization of America's founding and foundational principles;
 - (ii) a clear examination of how the United States has admirably grown closer to its noble principles throughout its history;
 - (iii) the concept that commitment to America's aspirations is beneficial and justified; and
 - (iv) the concept that celebration of America's greatness and history is proper.
- (e) "Social transition" means the process of adopting a "gender identity" or "gender marker" that differs from a person's sex. This process can include psychological or psychiatric counseling or treatment by a school counselor or other provider; modifying a person's name (e.g., "Jane" to "James") or pronouns (e.g., "him" to "her"); calling a child "nonbinary"; use of intimate facilities and accommodations such as bathrooms or locker rooms specifically designated for persons of the opposite sex; and participating in school athletic competitions or other extracurricular activities specifically designated for persons of the opposite sex. "Social transition" does not include chemical or surgical mutilation.
- **Sec. 3**. Ending Indoctrination Strategy. (a) Within 90 days of the date of this order, to advise the President in formulating future policy, the Secretary of Education, the Secretary of Defense, and the Secretary of Health and Human Services, in consultation with the Attorney General, shall provide an Ending Indoctrination Strategy to the President, through the Assistant to the President for Domestic Policy, containing recommendations and a plan for:
 - (i) eliminating Federal funding or support for illegal and discriminatory treatment and indoctrination in K–12 schools, including based on gender ideology and discriminatory equity ideology; and
 - (ii) protecting parental rights, pursuant to FERPA, 20 U.S.C. 1232g, and the PPRA, 20 U.S.C. 1232h, with respect to any K–12 policies or conduct implicated by the purpose and policy of this order.

- (b) The Ending Indoctrination Strategy submitted under subsection (a) of this section shall contain a summary and analysis of the following:
 - (i) All Federal funding sources and streams, including grants or contracts, that directly or indirectly support or subsidize the instruction, advancement, or promotion of gender ideology or discriminatory equity ideology:
 - (A) in K–12 curriculum, instruction, programs, or activities; or
 - (B) in K-12 teacher education, certification, licensing, employment, or training;
 - (ii) Each agency's process to prevent or rescind Federal funds, to the maximum extent consistent with applicable law, from being used by an ESA, SEA, LEA, elementary school, or secondary school to directly or indirectly support or subsidize the instruction, advancement, or promotion of gender ideology or discriminatory equity ideology in:
 - (A) K–12 curriculum, instruction, programs, or activities; or
 - (B) K–12 teacher certification, licensing, employment, or training;
 - (iii) Each agency's process to prevent or rescind Federal funds, to the maximum extent consistent with applicable law, from being used by an ESA, SEA, LEA, elementary school, or secondary school to directly or indirectly support or subsidize the social transition of a minor student, including through school staff or teachers or through deliberately concealing the minor's social transition from the minor's parents.
 - (iv) Each agency's process to prevent or rescind Federal funds, to the maximum extent consistent with applicable law, from being used by an ESA, SEA, LEA, elementary school, or secondary school to directly or indirectly support or subsidize:
 - (A) interference with a parent's Federal statutory right to information regarding school curriculum, records, physical examinations, surveys, and other matters under the PPRA or FERPA; or
 - (B) a violation of Title VI or Title IX; and
 - (v) A summary and analysis of all relevant agency enforcement tools to advance the policies of this order.
- (c) The Attorney General shall coordinate with State attorneys general and local district attorneys in their efforts to enforce the law and file appropriate actions against K-12 teachers and school officials who violate the law by:
 - (i) sexually exploiting minors;
 - (ii) unlawfully practicing medicine by offering diagnoses and treatment without the requisite license; or
 - (iii) otherwise unlawfully facilitating the social transition of a minor student.
- (d) The Assistant to the President for Domestic Policy shall regularly convene the heads of the agencies tasked with submitting the Ending Indoctrination Strategy under subsection (a) of this section to confer regarding their findings, areas for additional investigation, the modification or implementation of their respective recommendations, and such other policy initiatives or matters as the President may direct.
- **Sec. 4.** Reestablishing the President's Advisory 1776 Commission and Promoting Patriotic Education. (a) The President's Advisory 1776 Commission ("1776 Commission"), which was created by Executive Order 13958 of November 2, 2020, to promote patriotic education, but was terminated by President Biden in Executive Order 13985 of January 20, 2021, is hereby reestablished. The purpose of the 1776 Commission is to promote patriotic education and advance the purposes stated in section 1 of Executive Order 13958, as well as to advise and promote the work of the White House Task Force on Celebrating America's 250th Birthday ("Task Force 250") and the United States Semiquincentennial Commission in their efforts to

- provide a grand celebration worthy of the momentous occasion of the 250th anniversary of American Independence on July 4, 2026.
- (b) Within 120 days of the date of this order, the Secretary of Education shall establish the 1776 Commission in the Department of Education.
- (c) The 1776 Commission shall be composed of not more than 20 members, who shall be appointed by the President for a term of 2 years. The 1776 Commission shall be made up of individuals from outside the Federal Government with relevant experience or subject-matter expertise.
- (d) The 1776 Commission shall have a Chair or Co-Chairs, at the President's discretion, and a Vice Chair, who shall be designated by the President from among the Commission's members. An Executive Director, designated by the Secretary of Education in consultation with the Assistant to the President for Domestic Policy, shall coordinate the work of the 1776 Commission. The Chair (or Co-Chairs) and Vice Chair shall work with the Executive Director to convene regular meetings of the 1776 Commission, determine its agenda, and direct its work, consistent with this order.
 - (e) The 1776 Commission shall:
 - (i) facilitate the development and implementation of a "Presidential 1776 Award" to recognize student knowledge of the American founding, including knowledge about the Founders, the Declaration of Independence, the Constitutional Convention, and the great soldiers and battles of the American Revolutionary War;
 - (ii) in coordination with the White House Office of Public Liaison, coordinate bi-weekly lectures regarding the 250th anniversary of American Independence that are grounded in patriotic education principles, which shall be broadcast to the Nation throughout calendar year 2026;
 - (iii) upon request, advise executive departments and agencies regarding their efforts to ensure patriotic education is appropriately provided to the public at national parks, battlefields, monuments, museums, installations, landmarks, cemeteries, and other places important to the American founding and American history, as appropriate and consistent with applicable law:
 - (iv) upon request, offer advice and recommendations to, and support the work of Task Force 250 and the United States Semiquincentennial Commission regarding their plans to celebrate the 250th anniversary of American Independence; and
 - (v) facilitate, advise upon, and promote private and civic activities nationwide to increase public knowledge of and support patriotic education surrounding the 250th anniversary of American Independence, as appropriate and consistent with applicable law.
- (f) The Department of Education shall provide funding and administrative support for the 1776 Commission, to the extent permitted by law and subject to the availability of appropriations.
- (g) Members of the 1776 Commission shall serve without compensation but, as approved by the Department of Education, shall be reimbursed for travel expenses, including per diem in lieu of subsistence, as authorized by law for persons serving intermittently in the Government service (5 U.S.C. 5701–5707).
- (h) Insofar as chapter 10 of title 5, United States Code (commonly known as the Federal Advisory Committee Act), may apply to the 1776 Commission, any functions of the President under that Act, except that of reporting to the Congress, shall be performed by the Secretary of Education, in accordance with the guidelines issued by the Administrator of General Services.
- (i) The 1776 Commission shall terminate 2 years from the date of this order, unless extended by the President.
- Sec. 5. Additional Patriotic Education Measures. (a) All relevant agencies shall monitor compliance with section 111(b) of title I of Division J of

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Public Law 108–447, which provides that "[e]ach educational institution that receives Federal funds for a fiscal year shall hold an educational program on the United States Constitution on September 17 of such year for the students served by the educational institution," including by verifying compliance with each educational institution that receives Federal funds. All relevant agencies shall take action, as appropriate, to enhance compliance with that law.

- (b) All relevant agencies shall prioritize Federal resources, consistent with applicable law, to promote patriotic education, including through the following programs:
 - (i) the Department of Education's American History and Civics Academies and American History and Civics Education-National Activities programs;
 - (ii) the Department of Defense's National Defense Education Program and Pilot Program on Enhanced Civics Education; and
 - (iii) the Department of State's Bureau of Educational and Cultural Affairs and Fulbright, U.S. Speaker, and International Visitor Leadership programs, as well as the American Spaces network.
- **Sec. 6**. *General Provisions*. (a) Nothing in this order shall be construed to impair or otherwise affect:
 - (i) the authority granted by law to an executive department or agency, or the head thereof; or
 - (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.
- (b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.
- (c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE, January 29, 2025.

EXHIBIT BA



Presidential Documents

Executive Order 14151 of January 20, 2025

Ending Radical and Wasteful Government DEI Programs and Preferencing

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered:

Section 1. Purpose and Policy. The Biden Administration forced illegal and immoral discrimination programs, going by the name "diversity, equity, and inclusion" (DEI), into virtually all aspects of the Federal Government, in areas ranging from airline safety to the military. This was a concerted effort stemming from President Biden's first day in office, when he issued Executive Order 13985, "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government."

Pursuant to Executive Order 13985 and follow-on orders, nearly every Federal agency and entity submitted "Equity Action Plans" to detail the ways that they have furthered DEIs infiltration of the Federal Government. The public release of these plans demonstrated immense public waste and shameful discrimination. That ends today. Americans deserve a government committed to serving every person with equal dignity and respect, and to expending precious taxpayer resources only on making America great.

- Sec. 2. Implementation. (a) The Director of the Office of Management and Budget (OMB), assisted by the Attorney General and the Director of the Office of Personnel Management (OPM), shall coordinate the termination of all discriminatory programs, including illegal DEI and "diversity, equity, inclusion, and accessibility" (DEIA) mandates, policies, programs, preferences, and activities in the Federal Government, under whatever name they appear. To carry out this directive, the Director of OPM, with the assistance of the Attorney General as requested, shall review and revise, as appropriate, all existing Federal employment practices, union contracts, and training policies or programs to comply with this order. Federal employment practices, including Federal employee performance reviews, shall reward individual initiative, skills, performance, and hard work and shall not under any circumstances consider DEI or DEIA factors, goals, policies, mandates, or requirements.
- (b) Each agency, department, or commission head, in consultation with the Attorney General, the Director of OMB, and the Director of OPM, as appropriate, shall take the following actions within sixty days of this order:
 - (i) terminate, to the maximum extent allowed by law, all DEIA, and "environmental justice" offices and positions (including but not limited to "Chief Diversity Officer" positions); all "equity action plans," "equity" actions, initiatives, or programs, "equity-related" grants or contracts; and all DEI or DEIA performance requirements for employees, contractors, or grantees.
 - (ii) provide the Director of the OMB with a list of all:
 - (A) agency or department DEI, DEIA, or "environmental justice" positions, committees, programs, services, activities, budgets, and expenditures in existence on November 4, 2024, and an assessment of whether these positions, committees, programs, services, activities, budgets, and expenditures have been misleadingly relabeled in an attempt to preserve their pre-November 4, 2024 function;

- (B) Federal contractors who have provided DEI training or DEI training materials to agency or department employees; and
- (C) Federal grantees who received Federal funding to provide or advance DEI, DEIA, or "environmental justice" programs, services, or activities since January 20, 2021.
- (iii) direct the deputy agency or department head to:
- (A) assess the operational impact (e.g., the number of new DEI hires) and cost of the prior administration's DEI, DEIA, and "environmental justice" programs and policies; and
- (B) recommend actions, such as Congressional notifications under 28 U.S.C. 530D, to align agency or department programs, activities, policies, regulations, guidance, employment practices, enforcement activities, contracts (including set-asides), grants, consent orders, and litigating positions with the policy of equal dignity and respect identified in section 1 of this order. The agency or department head and the Director of OMB shall jointly ensure that the deputy agency or department head has the authority and resources needed to carry out this directive.
- (c) To inform and advise the President, so that he may formulate appropriate and effective civil-rights policies for the Executive Branch, the Assistant to the President for Domestic Policy shall convene a monthly meeting attended by the Director of OMB, the Director of OPM, and each deputy agency or department head to:
 - (i) hear reports on the prevalence and the economic and social costs of DEI, DEIA, and "environmental justice" in agency or department programs, activities, policies, regulations, guidance, employment practices, enforcement activities, contracts (including set-asides), grants, consent orders, and litigating positions;
 - (ii) discuss any barriers to measures to comply with this order; and
 - (iii) monitor and track agency and department progress and identify potential areas for additional Presidential or legislative action to advance the policy of equal dignity and respect.
- **Sec. 3**. Severability. If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of its provisions to any other persons or circumstances shall not be affected.
- **Sec. 4**. *General Provisions*. (a) Nothing in this order shall be construed to impair or otherwise affect:
 - (i) the authority granted by law to an executive department or agency, or the head thereof; or
 - (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.
- (b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

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THE WHITE HOUSE, January 20, 2025.

[FR Doc. 2025–01953 Filed 1–28–25; 8:45 am] Billing code 3395–F4–P

EXHIBIT BB

Presidential Documents

Executive Order 14173 of January 21, 2025

Ending Illegal Discrimination and Restoring Merit-Based Opportunity

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered:

Section 1. Purpose. Longstanding Federal civil-rights laws protect individual Americans from discrimination based on race, color, religion, sex, or national origin. These civil-rights protections serve as a bedrock supporting equality of opportunity for all Americans. As President, I have a solemn duty to ensure that these laws are enforced for the benefit of all Americans.

Yet today, roughly 60 years after the passage of the Civil Rights Act of 1964, critical and influential institutions of American society, including the Federal Government, major corporations, financial institutions, the medical industry, large commercial airlines, law enforcement agencies, and institutions of higher education have adopted and actively use dangerous, demeaning, and immoral race- and sex-based preferences under the guise of so-called "diversity, equity, and inclusion" (DEI) or "diversity, equity, inclusion, and accessibility" (DEIA) that can violate the civil-rights laws of this Nation.

Illegal DEI and DEIA policies not only violate the text and spirit of our longstanding Federal civil-rights laws, they also undermine our national unity, as they deny, discredit, and undermine the traditional American values of hard work, excellence, and individual achievement in favor of an unlawful, corrosive, and pernicious identity-based spoils system. Hardworking Americans who deserve a shot at the American Dream should not be stigmatized, demeaned, or shut out of opportunities because of their race or sex.

These illegal DEI and DEIA policies also threaten the safety of American men, women, and children across the Nation by diminishing the importance of individual merit, aptitude, hard work, and determination when selecting people for jobs and services in key sectors of American society, including all levels of government, and the medical, aviation, and law-enforcement communities. Yet in case after tragic case, the American people have witnessed first-hand the disastrous consequences of illegal, pernicious discrimination that has prioritized how people were born instead of what they were capable of doing.

The Federal Government is charged with enforcing our civil-rights laws. The purpose of this order is to ensure that it does so by ending illegal preferences and discrimination.

Sec. 2. Policy. It is the policy of the United States to protect the civil rights of all Americans and to promote individual initiative, excellence, and hard work. I therefore order all executive departments and agencies (agencies) to terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements. I further order all agencies to enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities.

Sec. 3. Terminating Illegal Discrimination in the Federal Government. (a) The following executive actions are hereby revoked:

- (i) Executive Order 12898 of February 11, 1994 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations);
- (ii) Executive Order 13583 of August 18, 2011 (Establishing a Coordinated Government-wide Initiative to Promote Diversity and Inclusion in the Federal Workforce);
- (iii) Executive Order 13672 of July 21, 2014 (Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity); and
- (iv) The Presidential Memorandum of October 5, 2016 (Promoting Diversity and Inclusion in the National Security Workforce).
- (b) The Federal contracting process shall be streamlined to enhance speed and efficiency, reduce costs, and require Federal contractors and subcontractors to comply with our civil-rights laws. Accordingly:
 - (i) Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity), is hereby revoked. For 90 days from the date of this order, Federal contractors may continue to comply with the regulatory scheme in effect on January 20, 2025.
 - (ii) The Office of Federal Contract Compliance Programs within the Department of Labor shall immediately cease:
 - (A) Promoting "diversity";
 - (B) Holding Federal contractors and subcontractors responsible for taking "affirmative action": and
 - (C) Allowing or encouraging Federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin.
 - (iii) In accordance with Executive Order 13279 of December 12, 2002 (Equal Protection of the Laws for Faith-Based and Community Organizations), the employment, procurement, and contracting practices of Federal contractors and subcontractors shall not consider race, color, sex, sexual preference, religion, or national origin in ways that violate the Nation's civil rights laws.
 - (iv) The head of each agency shall include in every contract or grant award:
 - (A) A term requiring the contractual counterparty or grant recipient to agree that its compliance in all respects with all applicable Federal anti-discrimination laws is material to the government's payment decisions for purposes of section 3729(b)(4) of title 31, United States Code; and
 - (B) A term requiring such counterparty or recipient to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.
- (c) The Director of the Office of Management and Budget (OMB), with the assistance of the Attorney General as requested, shall:
 - (i) Review and revise, as appropriate, all Government-wide processes, directives, and guidance;
 - (ii) Excise references to DEI and DEIA principles, under whatever name they may appear, from Federal acquisition, contracting, grants, and financial assistance procedures to streamline those procedures, improve speed and efficiency, lower costs, and comply with civil-rights laws; and
 - (iii) Terminate all "diversity," "equity," "equitable decision-making," "equitable deployment of financial and technical assistance," "advancing equity," and like mandates, requirements, programs, or activities, as appropriate.
- Sec. 4. Encouraging the Private Sector to End Illegal DEI Discrimination and Preferences. (a) The heads of all agencies, with the assistance of the

Attorney General, shall take all appropriate action with respect to the operations of their agencies to advance in the private sector the policy of individual initiative, excellence, and hard work identified in section 2 of this order.

- (b) To further inform and advise me so that my Administration may formulate appropriate and effective civil-rights policy, the Attorney General, within 120 days of this order, in consultation with the heads of relevant agencies and in coordination with the Director of OMB, shall submit a report to the Assistant to the President for Domestic Policy containing recommendations for enforcing Federal civil-rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI. The report shall contain a proposed strategic enforcement plan identifying:
 - (i) Key sectors of concern within each agency's jurisdiction;
 - (ii) The most egregious and discriminatory DEI practitioners in each sector of concern;
 - (iii) A plan of specific steps or measures to deter DEI programs or principles (whether specifically denominated "DEI" or otherwise) that constitute illegal discrimination or preferences. As a part of this plan, each agency shall identify up to nine potential civil compliance investigations of publicly traded corporations, large non-profit corporations or associations, foundations with assets of 500 million dollars or more, State and local bar and medical associations, and institutions of higher education with endowments over 1 billion dollars;
 - (iv) Other strategies to encourage the private sector to end illegal DEI discrimination and preferences and comply with all Federal civil-rights laws:
 - (v) Litigation that would be potentially appropriate for Federal lawsuits, intervention, or statements of interest; and
 - (vi) Potential regulatory action and sub-regulatory guidance.
- **Sec. 5.** Other Actions. Within 120 days of this order, the Attorney General and the Secretary of Education shall jointly issue guidance to all State and local educational agencies that receive Federal funds, as well as all institutions of higher education that receive Federal grants or participate in the Federal student loan assistance program under Title IV of the Higher Education Act, 20 U.S.C. 1070 et seq., regarding the measures and practices required to comply with Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. 181 (2023).
- **Sec. 6.** Severability. If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of its provisions to any other persons or circumstances shall not be affected thereby.
- **Sec. 7.** Scope. (a) This order does not apply to lawful Federal or private-sector employment and contracting preferences for veterans of the U.S. armed forces or persons protected by the Randolph-Sheppard Act, 20 U.S.C. 107 et seq.
- (b) This order does not prevent State or local governments, Federal contractors, or Federally-funded State and local educational agencies or institutions of higher education from engaging in First Amendment-protected speech.
- (c) This order does not prohibit persons teaching at a Federally funded institution of higher education as part of a larger course of academic instruction from advocating for, endorsing, or promoting the unlawful employment or contracting practices prohibited by this order.
- **Sec. 8.** General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:
 - (i) the authority granted by law to an executive department, agency, or the head thereof; or

- (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.
- (b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.
- (c) This order is not intended to and does not create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

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THE WHITE HOUSE, January 21, 2025.

[FR Doc. 2025–02097 Filed 1–30–25; 8:45 am] Billing code 3395–F4–P Case 1:25-cv-00091-LM Document 34-57 Filed 03/21/25 Page 1 of 3

EXHIBIT BC

3/21/25, 1:27 PM



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DOGE Announces it's Slashing \$881M from Education Department Contracts

Feb 11, 2025 at 8:43 AM EST



By Hannah Parry
Live Blog Editor

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3/21/25. 12:01 PM

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Ion Musk's Department of Government Efficiency (DOGE) has announced it is terminating \$881 million worth of Education Department contracts.

DOGE announced, in a post on X, that it had cut 29 training grants for diversity, equity and inclusion, worth \$101 million.

It claimed that one such grant, aimed to train teachers to "help students understand / interrogate the complex histories involved in oppression, and help students recognize areas of privilege and power on an individual and collective basis."

The department has slashed another 89 Education Department contracts including a contractor hired to manage mail and clerical operations.

The cuts come as President Donald Trump is expected to issue an executive order closing down the department.

Newsweek's live blog is closed.

05:11 PM EST

Trump signing order for DOGE 'relating to shrinking federal workforce'

Trump and Musk are holding a joint press conference from the Oval Office, as the president signs an executive order related to DOGE.

The White House still has not confirmed what the order for DOGE is, but Semafor reports that it related to shrinking the federal workforce.

"The people voted for major government reform," Musk told reporters at the signing ceremony, adding that is what the people would get.

Trump added that DOGE had "found fraud and abuse" without giving any additional details.

04:45 PM EST

Federal Reserve chair gives update on US bank accounts amid Trump's orders