

CHAPTER 3

STAND YOUR GROUND: LEGAL AND POLICY JUSTIFICATIONS FOR RACE-CONSCIOUS PROGRAMMING



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A study of legal challenges to race-conscious programs in higher education reveals that institutions appear to be responding to negative publicity and the threat of litigation without fully considering how current social science research and case law support their efforts. Indeed, the threat of litigation is based on arguments that contradict official policy and misinterpret U.S. Supreme Court holdings. Institutions that seek to increase diversity in their student body should continue to defend their efforts, and additional research can be conducted to assist them.

For many students in the K-16 “pipeline,” the transition to postsecondary education is more like a sieve than a pipeline. Although African American, Latino, and Native American students have made significant gains in college enrollment in the past two decades,² significant gaps remain.³ Unequal college-going rates are particularly pronounced when all young adults between the ages of 18-to-24 are compared, not just those who graduate from high school. According to a 2005 Civil Rights Project report, one-third of all students and 50 percent of African American, Chicano/Latino, and Native American students will not graduate from high school this year.⁴ Due to these low high school graduation rates, the higher education gap between white students and underrepresented students of color is widening.⁵ Low-income student participation rates also lag behind middle and upper income students; this gap grows wider as tuition assistance does not keep up with tuition increases.⁶ Structural barriers—policies or social structures that influence opportunity or access to higher education—impact low-income, first generation, and students of color disproportionately. Limited resources, poorly prepared teachers, tracking, and lack of pre-college curriculum in low-income, urban, and increasingly resegregated schools all combine to keep the doors to higher education closed to African American, Latino and Native American students.⁷

Postsecondary institutions have tried to increase access for low income, first generation, and underrepresented students of color through a variety of pre-college and retention programs. Examples of pre-college programs include: in-school tutorials and advising, out of school mentor programs, cultural awareness seminars, and summer bridge programs (intensive academic and

² AMERICAN COUNCIL ON EDUCATION (ACE), *MINORITIES IN HIGHER EDUCATION TWENTY-FIRST ANNUAL STATUS REPORT* (2003-2004). According to ACE, college enrollment of students of color rose by nearly 1.5 million students (52 percent) to more than 4.3 million from the 1980s to the present.

³ EDWARD P. ST. JOHN, *THE ACCESS CHALLENGE: RETHINKING THE CAUSES OF THE NEW INEQUALITY 3* (Indiana Ed. Policy Ctr., Policy Issue Report, 2002-01, 2002). Low-income high school graduates also had lower participation rates in higher education than their upper-income peers.

⁴ CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, *CONFRONTING THE GRADUATION RATE CRISIS IN CALIFORNIA* (2005) at <http://www.civilrightsproject.harvard.edu/research>.

⁵ *Id.* See also, SAMUEL M. KIPP, III, DEREK V. PRICE & JILL K. WOHLFORD, *UNEQUAL OPPORTUNITY: DISPARITIES IN COLLEGE ACCESS AMONG THE 50 STATES* (Lumina Foundation New Agenda Series, Vol. 4, No. 3, 2002). For example, in 1998 40.6% of whites between the age of 18 and 24 were enrolled in postsecondary education as compared to 29.8% of blacks and 20.4% of Hispanics.

⁶ SANDRA S. RUPPERT, EDUCATION COMMISSION OF THE STATES (ECS), *CLOSING THE COLLEGE PARTICIPATION GAP: A NATIONAL SUMMARY 3-4* (2003).

⁷ For further discussion of the link between segregation, concentrated poverty, and unequal education see, GARY ORFIELD & CHUNGMEI LEE, *BROWN AT 50: KING’S DREAM OR PLESSY’S NIGHTMARE* (Civil Rights Project, Harvard University, 2004) at <http://www.civilrightsproject.harvard.edu/research>. For a discussion of the disconnect between secondary and postsecondary institutions, see, ANDREA VENEZIA, MICHEAL W. KIRST, & ANTHONY L. ANTONIO, *BETRAYING THE COLLEGE DREAM: HOW DISCONNECTED K-12 AND POSTSECONDARY EDUCATION SYSTEMS UNDERMINE STUDENT ASPIRATIONS*. (Final Policy Report from Stanford University’s Bridge Project, 2004.)

advising programs where students typically reside on campus for a number of weeks). Pre-college programs primarily involve high-school students, although, increasingly, tutorials, mentor, and bridge activities enroll junior high and elementary students. Programs for parents increase opportunities for students who traditionally have lacked access to four-year institutions. These programs are often in conjunction with pre-college programs and provide information on financial aid. Scholarships for underrepresented students of color are also used to diminish the major structural barrier to attending four-year institutions: cost. Postsecondary institutions also utilize a number of programs to retain student diversity, including programs committed to increasing the number of underrepresented students of color in the sciences and engineering.

Several conservative organizations, in particular the American Civil Rights Institute (ACRI) and the Center for Equal Opportunity (CEO), argue that pre-college outreach and recruitment programs targeted to students of color are illegal.⁸ Initially the groups based their arguments on Title VI of the Civil Rights Act of 1964,⁹ which prohibits racial discrimination by any institution that receives federal funds. After the Supreme Court decided the Michigan affirmative action cases, the groups added the constitutional argument that individualized review is required when race is a criterion for participation in an outreach or recruitment program.¹⁰ Admissions officers contend that these outreach and pre-college programs are legal because recruited students still must apply for college admission and are not guaranteed entry. Rather than risk litigation, however, many schools are altering or canceling programs. The CEO claims that of the 100 schools it contacted, roughly 70 have either ended the programs or amended language to make their programs more racially inclusive.¹¹

Part One of this chapter will review current legal challenges to race-conscious programs and the effects of press coverage on such programs.¹² It analyzes documents obtained from a Freedom of Information Act (FOIA) request to the U.S. Department of Education Office for Civil Rights, along with results from a web and telephone survey. Part Two will provide suggested research questions to assist in the legal defense of programs designed to “fix the pipeline.”¹³

⁸ Peter Schmidt, *Not Just for Minority Students Anymore*. CHRONICLE OF HIGHER Education, March 19, 2004, at 17.

⁹ Peter Schmidt, *Iowa State Changes Minority Program*. CHRONICLE OF HIGHER EDUCATION, March 28, 2003, at 24; CEO and ACRI letters obtained from FOIA request on file with author.

¹⁰ Schmidt, *supra* note 8, at 17; CEO and ACRI letters obtained from FOIA request on file with author.

¹¹ *Id.*

¹² For the purposes of this chapter, the term race-conscious encompasses all race-based affirmative action programs, including race-exclusive (only one race or ethnic group eligible for the program), race-targeted (only underrepresented racial and ethnic minorities served), and race-plus (race and ethnicity one of many diversity factors considered for eligibility in the program). When only one type of race-conscious program is the subject of a challenge or legal argument, then the text will specify the type of race-based affirmative action program. Otherwise, the term race-conscious will be used to include all three types of race-based affirmative action eligibility criterion.

¹³ See *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1* and *Meredith v. Jefferson County Bd. of Educ.*, 2007 WL 1836531 (June 28, 2007) (plurality). Five Justices agreed the student assignment plans were not narrowly tailored to achieve the compelling goal of diversity. In a concurring opinion that joined parts of the plurality opinion to make a five-member majority, Justice Kennedy outlined examples of when public schools may permissibly consider race without necessarily triggering strict scrutiny. 2007 WL 1836531, at 46. Because of the timing of this publication, this chapter does not consider arguments based on the Court’s analysis, in particular Justice Kennedy’s controlling opinion, supporting the constitutionality of race-conscious outreach and retention programs in the context of higher education. The opinion, however, unequivocally supports the use of race-based affirmative action in higher education designed to ensure a diverse student body.

Part I. Current Legal Challenges

For the past thirty years, university sponsored programs have been creating opportunities and access for underrepresented students of color to postsecondary education. A variety of approaches have been used, including programs that work with students while they are still in junior high and high school, summer bridge programs on university campuses, university and private scholarships, and retention programs for students admitted to college. All of these approaches have several goals in common, including: targeting underrepresented students of color to promote access to college, diversifying college campuses, and narrowing the attendance gap.

A. Press Coverage of Recent Changes in Race-Conscious Programs

In February 2003, the *Chronicle of Higher Education* began running a number of articles regarding challenges to race-conscious programs designed to ameliorate the college-going gap.¹⁴ According to the *Chronicle*, the Office for Civil Rights in the U.S. Department of Education issued a statement in February of 2003 (five months prior to the U.S. Supreme Court opinions in the Michigan affirmative action cases). The OCR prepared statement claimed, “generally, programs that use race or national origin as sole eligibility criteria are extremely difficult to defend.”¹⁵ By 2004, the Center for Equal Opportunity (CEO) and *Chronicle* reports interpreted the same statement to include not just “minority scholarships and fellowships—but also recruitment, orientation, and academic-enrichment programs.”¹⁶

The *Chronicle of Higher Education* reported in 2005 that the American Civil Rights Institute and the Center for Equal Opportunity claimed they had contacted roughly 100 institutions of higher education asking about race-conscious programs. According to Roger Clegg, general counsel of the CEO, the majority of colleges contacted have opened up racially exclusive programs to all students, regardless of race.¹⁷ According to reports, programs began acquiescing after receiving letters from the CEO, agreeing to stop race-conscious programs even though formal complaints had not been filed. The Massachusetts Institute of Technology (MIT) and Princeton University

¹⁴ See, Peter Schmidt & Jeffrey R. Young, *MIT and Princeton Open 2 Summer Programs to Students of All Races*. THE CHRONICLE OF HIGHER EDUCATION, February 21, 2003, at 31; Peter Schmidt, *Iowa State Changes Minority Program*. CHRONICLE OF HIGHER EDUCATION, March 28, 2003, at 24; Peter Schmidt, *Not Just for Minority Students Anymore*. CHRONICLE OF HIGHER EDUCATION, March 19, 2004, at 17; Peter Schmidt, *From 'Minority' to 'Diversity': The Transformation of Formerly Race-Exclusive Programs May be Leaving Some Students Out in the Cold*, THE CHRONICLE OF HIGHER EDUCATION, February 3, 2006, at A24.

¹⁵ See, Peter Schmidt & Jeffrey R. Young, *MIT and Princeton Open 2 Summer Programs to Students of All Races*. THE CHRONICLE OF HIGHER EDUCATION, February 21, 2003, at 31; Peter Schmidt, *Iowa State Changes Minority Program*. CHRONICLE OF HIGHER EDUCATION, March 28, 2003, at 24. Although the OCR statement is quoted in the *Chronicle* articles and in the CEO letters (on file with author), the agency would not provide a copy of the prepared statement to the author.

¹⁶ Peter Schmidt, *Not Just for Minority Students Anymore*. CHRONICLE OF HIGHER EDUCATION, March 19, 2004, at 17.

¹⁷ Roger Clegg, *Time Has Not Favored Racial Preferences*. CHRONICLE OF HIGHER EDUCATION, January 14, 2005, at 10. He specifically lists the following institutions: Carnegie Mellon University, Harvard University, Indiana University, the Massachusetts Institute of Technology (MIT), Northwestern University, Princeton University, the University of Illinois at Urbana-Champaign, Williams College, and Yale University.

were the first two institutions mentioned in the *Chronicle of Higher Education*.¹⁸ The *Chronicle* reported that MIT officials originally refused to comply with the CEO's request, but decided in January of 2003 to change the eligibility criteria of a summer program to include applicants of all racial and ethnic backgrounds in response to a discrimination complaint being investigated by the Education Department's Office for Civil Rights.¹⁹ Next, the *Chronicle* reported that Iowa State University agreed in 2003 to open the Iowa State College of Agriculture's Summer Research Internship Program to white applicants in response to pressure from conservative advocacy groups.²⁰

A closer look reveals that, while Iowa State no longer considers race when admitting students, the challenged MIT summer programs continue to take the race and ethnicity of applicants into account, in keeping with their mission of bringing more African American, Latino and Native American students into the fields of science and engineering. But the programs have been expanded to look at factors related to "disadvantage." For example, MIT now also considers whether an applicant is part of the first generation in his or her family to attend college, or comes from a high school that does not send a large percentage of its students to four-year colleges.

The National Institutes for Health (NIH) also recently changed some of its programs for research fellows.²¹ The *Chronicle* reported in March of 2005 that the NIH decided to include a "disadvantaged" category, along with considerations of racial and ethnic minorities. Included in the new category are researchers who are low-income, as well as those who come from rural or urban communities that have "inhibited their efforts to obtain the knowledge, skills, and abilities necessary to develop and participate in a research career."²²

The Center for Equal Opportunity and the American Civil Rights Institute rely heavily on the February 2003 OCR statement in their letters to institutions claiming that race-conscious programs are illegal.²³ In addition, Roger Clegg, general counsel for the CEO, argues that the fact many institutions have stopped race-conscious programs makes it more difficult for other institutions to claim a necessity to consider race in their programs.²⁴

¹⁸ Peter Schmidt & Jeffrey R. Young, *MIT and Princeton Open 2 Summer Programs to Students of All Races*, THE CHRONICLE OF HIGHER EDUCATION, February 21, 2003, at 31.

¹⁹ *Id.* The two programs are Project Interphase, which helps incoming freshmen adjust to college life, and Minority Introduction to Engineering, Entrepreneurship, and Science, which enrolls high-school students, mainly between their junior and senior years. Both were previously open only to African American, Latino, or Native American applicants.

²⁰ Peter Schmidt, *Iowa State Changes Minority Program*, THE CHRONICLE OF HIGHER EDUCATION, March 28, 2003, at 24.

²¹ Peter Schmidt, *NIH Opening Minority Programs to Other Groups*, THE CHRONICLE OF HIGHER EDUCATION, March 11, 2005, at 26.

²² *Id.* Prior to the change in policy at the NIH, when Indiana University's Cancer Center was challenged over an NIH financed summer-research program for underrepresented students of color, the agency responded by giving Indiana and other grantees the option of applying the term "underrepresented minority" to subsets of the nation's white and Asian-American population that produce relatively few cancer researchers, such as those who are from low-income backgrounds or whose parents did not complete college.

²³ CEO and ACRI letters on file with author.

²⁴ Clegg, *Time Has Not Favored Racial Preferences*, *supra* note 17.

B. Freedom of Information Act (FOIA) Request

To learn more about the American Civil Rights Institute, Center for Equal Opportunity, and the OCR strategy to require colleges and universities to use so-called “race neutral” approaches, I made a request for documents to the OCR in the U.S. Department of Education pursuant to the Freedom of Information Act (FOIA). (The FOIA request, dated April 27, 2005, is attached as Appendix A). I requested a variety of documents pertaining to the use of race in pre-college, summer bridge, scholarship, and retention programs. I received 290 pages of documents from the OCR in September 2005. As of January 1, 2005, only ten institutions of higher education had formal letters filed against them with the OCR.²⁵ In addition to complaint letters filed against colleges and universities, the FOIA documents also included the 2001 complaint filed against the Wisconsin Department of Public Instruction “Pre-College Minority Scholarship Program.” Financial aid/scholarship programs were the subject of all but one of the complaints.

(1) Challenges to Race-Conscious Scholarship Programs

The Center for Equal Opportunity, American Civil Rights Institute, and the Center for Individual Rights are challenging race-conscious scholarships (the Center for Individual Rights is the conservative organization that challenged Michigan’s use of race-based affirmative action in admissions). Race-specific scholarships and scholarships designed to recruit more underrepresented students of color have been subject to a number of legal challenges, both prior and subsequent to the Michigan affirmative action cases. Most recently, in November 2004, after a complaint was filed with the Office for Civil Rights, the State of Wisconsin agreed to no longer limit a scholarship program to African American, Latino, and Native American students.

An analysis of the OCR correspondence obtained in the FOIA request revealed that the Department of Education is currently violating its own regulations and policy guidelines regarding race-conscious scholarships. Some background on Title VI of the Civil Rights Act of 1964 regulations, as well as the OCR’s interpretation of Title VI’s application to scholarship programs, will help to illustrate how the Department of Education is not following its own official policy.

The Title VI regulations permit a college or university to take voluntary affirmative action, even in the absence of past discrimination, in response to conditions that have limited the participation of students of a particular race or national origin.²⁶ In 1994, the U.S. Department of Education

²⁵ The ten institutions are: Carnegie Mellon; MIT; Pepperdine University; Portland Community College; Portland State; St. Louis University; University of Cincinnati School of Law; University of Wisconsin, Platteville; Virginia Tech; and Washington University at St. Louis. The ACRI and CEO wrote the majority of the complaint letters: Carnegie Mellon, MIT, St. Louis University, Virginia Tech, and Washington University at St. Louis were all cited by the ACRI and CEO in complaint letters written to the OCR.

²⁶ 34 C.F.R. §100.3(b)(6).

34 C.F.R. 100.3 (b)(6)(i)

[i]n administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

issued policy guidelines setting forth the circumstances under which race-conscious financial aid is permissible.²⁷ According to the 1994 OCR guidelines:

The Secretary of Education encourages continued use of financial aid as a means to provide equal educational opportunity and to provide a diverse educational environment for all students. The Secretary also encourages the use by postsecondary institutions of other efforts to recruit and retain minority students, which are not affected by this policy guidance.²⁸

In addition to race-neutral policies, and race-based affirmative action to overcome past intentional discrimination, the guidelines also recognize diversity as a legitimate basis for the use of race-conscious policies to administer financial aid.²⁹ The 1994 guidelines clarify that race-based affirmative action is permissible to ensure a diverse student body. The guidelines acknowledge three ways in which scholarships can be used to diversify the student body:

First a college may, of course, use its financial aid program to promote diversity by considering factors other than race or national origin, such as geographic origin, diverse experiences, or socioeconomic background.³⁰ Second, a college may consider race or national origin with other factors in awarding financial aid if the aid is necessary to further the college's interest in diversity.³¹ Third, a college may use race or national origin as a condition of eligibility in awarding financial aid³² if this use is narrowly tailored, or, in other words, if it is necessary to further its interest in diversity and does

34 CFR § 100.5 Illustrative application.

(h)(i) Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service.

²⁷ See 59 Fed. Reg. 8756 (Feb. 23, 1994).

²⁸ *Id.* Supplementary information. Although the guidelines specifically refer to scholarships and financial aid, the Secretary encouraged other types of race-conscious recruitment, outreach, and retention programs.

²⁹ 59 Fed. Reg. 8756 (Feb. 23, 1994):

Principle 4: Financial Aid To Create Diversity

America is unique because it has forged one Nation from many people of a remarkable number of different backgrounds. Many colleges seek to create on campus an intellectual environment that reflects that diversity. A college should have substantial discretion to weigh many factors—including race and national origin—in its efforts to attract and retain a student population of many different experiences, opinions, backgrounds, and cultures—provided that the use of race or national origin is consistent with the constitutional standards reflected in Title VI, *i.e.*, that it is a narrowly tailored means to achieve the goal of a diverse student body.

³⁰ According to the 1994 guidelines, *race-neutral* is defined as not based, in whole or in part, on race or national origin.

³¹ The guidelines thus allow the use of race as one of several diversity factors in awarding financial aid and scholarships (this also includes programs that consider race as a plus factor).

³² The 1994 guidelines define *race-targeted*, *race-based*, and *awarded on the basis of race or national origin* to mean limited to individuals of a particular race or races or national origin or origins.

not unduly restrict access to financial aid for students who do not meet the race-based eligibility criteria.³³

The 1994 guidelines provide direction to colleges and universities on how to determine if a race-conscious scholarship is “narrowly tailored.” Whether an institution’s use of race-conscious financial aid is narrowly tailored to meet the compelling interest of student body diversity involves a case-by-case determination based on the particular circumstances involved. Among the questions that an institution should consider are:

- (1) Whether race-neutral means of achieving that goal have been or would be ineffective;³⁴
- (2) Whether a less extensive or intrusive use of race or national origin in awarding financial aid as a means of achieving that goal has been or would be ineffective;³⁵
- (3) Whether the use of race or national origin is of limited extent and duration and is applied in a flexible manner;³⁶
- (4) Whether the institution regularly reexamines its use of race or national origin in awarding financial aid to determine whether it is still necessary to achieve its goal;³⁷ and
- (5) Whether the effect of the use of race or national origin on students who are not beneficiaries of that use is sufficiently small and diffuse so as not to create an undue burden on their opportunity to receive financial aid.³⁸

³³ 59 *Fed. Reg.* 8756 (Feb. 23, 1994).

³⁴ According to the guidelines,

[f]irst, it is necessary to determine the efficacy of alternative approaches. *United States v. Paradise*, 480 U.S. at 171. Thus, it is important that consideration has been given to the use of alternative approaches that are less intrusive (e.g., the use of race or national origin as a “plus” factor rather than as a condition of eligibility). *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. at 583; *Richmond v. J.A. Croson*, 488 U.S. at 507. Financial aid that is restricted to students of a particular race or national origin should be used only if a college determines that these alternative approaches have not or will not be effective.

³⁵ According to the guidelines:

[t]he extent of the use of the classification should be no greater than is necessary to carry out its purpose. *Richmond v. J.A. Croson*, 488 U.S. at 507. That is, the amount of financial aid that is awarded based on race or national origin should be no greater than is necessary to achieve a diverse student body.

³⁶ The guidelines explain:

[t]he duration of the use of a racial classification should be no longer than is necessary to its purpose, and the classification should be periodically reexamined to determine whether there is a continued need for its use. *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. at 594. Thus, the use of race-targeted financial aid should continue only while it is necessary to achieve a diverse student body, and an assessment as to whether that continues to be the case should be made on a regular basis.

³⁷ In addition, the guidelines clarify:

the use of the classification should be sufficiently flexible that exceptions can be made if appropriate. For example, the Supreme Court in *United States v. Paradise* found that a race-conscious promotion requirement was flexible in operation because it could be waived if no qualified candidates were available. 480 U.S. at 177. Similarly, racial restrictions on the award of financial aid could be waived if there were no qualified applicants.

³⁸ The 1994 guidelines provide information on how institutions should consider whether there is sufficient harm to non-minority students.

A use of race or national origin may impose such a severe burden on particular individuals—for example, eliminating scholarships currently received by non-minority students in order to start a scholarship program for minority students—that it is too intrusive to be considered narrowly tailored. *See Wygant v. Jackson Board of Education*, 476 U.S. at 283 (use of race in imposing layoffs involves severe disruption to lives of identifiable individuals). Generally, the less severe and more diffuse the impact on non-minority students,

The OCR guidelines recognize significant differences between admissions and financial aid. Unlike admission policies, financial aid does not exclude a student from attending college on the basis of race. The amount of financial aid is not fixed, unlike the number of seats in the freshman class. Thus, according to the OCR official policy, the harm to non-minority students is likely less than a race-conscious admission policy. If the use of race or national origin in awarding financial aid is justified under Principle 4 in the OCR guidelines (financial aid to increase diversity), the college may use funds from any source. **The 1994 guidelines remain official policy as they have never been amended or rescinded by the U.S. Department of Education.**

I analyzed the FOIA documents and determined that the OCR initially applied the Title VI regulations and 1994 guidelines to complaints regarding race-conscious scholarship programs.³⁹ In 1997, for example, the OCR investigated a complaint of discrimination from a white student based on a scholarship program at Florida Atlantic University.⁴⁰ The complaint argued that the Martin Luther King (MLK) Scholarship Programs were only available to African American students and thus violated Title VI of the Civil Rights Act. The OCR investigated the complaint and determined that the race-exclusive MLK Programs were legal and did not violate the Constitution or Title VI of the Civil Rights Act. Florida Atlantic and the OCR agreed, however, for the MLK Programs to begin to use race only as a plus factor. According to the OCR Letter of Resolution:

The MLK scholarship programs . . . were legally supportable as narrowly tailored means to pursue the University's interest in seeking a diverse student body. However, during the course of the investigation, OCR advised the University that using race as a plus factor, rather than an eligibility criterion, could—if it is successful in meeting the University's diversity interest—strengthen the legal support for these programs.

In the Florida Atlantic case, it is clear that the OCR official position mirrored the 1994 guidelines on the use of race to recruit and retain a diverse student body.⁴¹

the more likely a classification based on race or national origin will address this factor satisfactorily.

However, it is not necessary to show that no student's opportunity to receive financial aid has been in any way diminished by the use of the race-targeted aid. Rather, the use of race-targeted financial aid must not place an undue burden on students who are not eligible for that aid.

³⁹ For example, in 1997, the OCR determined that a "minority scholarship" at a community college in Virginia was not legal because there was no demonstration that the scholarships were needed for recruitment and retention of underrepresented students of color. Complaint Against Northern Virginia Community College, OCR Docket No: 03962088 (1997) (on file with author).

⁴⁰ OCR Letter of Resolution to Florida Atlantic University dated Feb. 21, 1997 (on file with author).

⁴¹ For an excellent discussion on the legal and policy considerations surrounding race-targeted and race-conscious scholarships, see ARTHUR L. COLEMAN, SCOTT R. PALMER, & FEMI S. RICHARDS, *FEDERAL LAW AND FINANCIAL AID: A FRAMEWORK FOR EVALUATING DIVERSITY PROGRAMS*. (The College Board, 2005). The federal courts have not ruled whether race-exclusive and race-targeted scholarship programs designed to diversify the student body are constitutional. There is, however a Fourth Circuit Court of Appeals decision on the use of a race-exclusive scholarship to remedy the current effects of past discrimination. In *Podberesky v. Kirwan*, 38 F.3d 147, 154 (4th Cir. 1994), the Fourth Circuit ruled that a scholarship for African American students violated Title VI and the Equal Protection Clause. In the case, a Latino student had challenged the University of Maryland at College Park African American Scholarship Program. The University argued that the program was needed to remedy the present day effects of previous intentional discrimination. (The campus did not admit African Americans until the 1960s.) The Fourth Circuit ruled that the program was not narrowly tailored and concluded the scholarship was unconstitutional.

Although the Title VI regulations and 1994 guidelines have not been changed, recent agency actions demonstrate that the OCR is not following its official policy. Several letters from the OCR obtained via the FOIA request illustrate the change in agency administration and enforcement. According to an OCR letter dated November 18, 2004, the Department of Education is taking the position that “narrow tailoring” requires adopting race-neutral alternatives. The letter to the Wisconsin Department of Public Instruction states:

A recipient of federal financial assistance from the U.S. Department of Education may not use race and national origin as eligibility criteria for the provision of aids, benefits, or services unless, consistent with Title VI strict scrutiny standards, such use is narrowly tailored to achieve a compelling interest. *Under Title VI, narrow tailoring standards include the central requirement that a recipient adopt alternatives to the use of race or national origin when they are workable and effective in achieving the recipient’s educational objectives.* (emphasis added)

The subject of the OCR investigation was a Wisconsin pre-college scholarship program for African American, Latino, Asian American, and Native American students. The goal of the program was to open up access to higher education for racial and ethnic groups in Wisconsin who were disproportionately impacted by lack of access to financial aid. Although, the Wisconsin “Pre-College Minority Scholarship Fund” had proven to be effective in increasing access for underrepresented students of color, the OCR settlement agreement required that Wisconsin rename the program and only consider the income of applicants in awarding scholarship funds in the future. The program is no longer race-targeted, nor is it race-conscious.

Another example involves an agreement between Washington University at St. Louis and the OCR. Washington University at St. Louis received a letter from the Center for Equal Opportunity challenging the John B. Ervin Scholars Program. The Ervin Scholars Program was exclusively for African American students and included a scholarship as well as orientation, academic support, and internship and research opportunities for the recipients. After the OCR began investigating the CEO complaint, the University agreed to no longer consider race or national origin as an eligibility factor. Rather, to meet its compelling interest of a diverse student body, the University agreed to the following selection criteria: academic achievement, leadership, service, and a demonstrated commitment to bringing diverse people together, and/or demonstrated achievement and determination in the face of personal challenges. The resolution agreement with Washington University is the most recent case obtained through the FOIA request. According to the OCR letter dated May 13, 2005:

If the University proposes to introduce race or national origin as an eligibility factor for the Ervin program, the University will provide OCR a written legal and factual demonstration that the proposed use of race or national origin will fully satisfy Title VI strict scrutiny standards, *particularly including a legal and factual explanation why the Revised Ervin Selection Criteria have not been workable in achieving the compelling interests identified by the University.* (emphasis added)⁴²

⁴² Letter on file with author.

Requiring Washington University to provide legal and factual proof that the new race-neutral criteria are “not workable” appears to go well beyond the U.S. Supreme Court’s decision in *Grutter v. Bollinger*.⁴³ In the *Grutter* case, the Court determined that the U.S. Constitution does not require a college or university to exhaust every conceivable race-neutral alternative.⁴⁴ As long as an institution considers alternatives in good faith, there is no need to exhaust alternatives prior to utilizing race-conscious programs to meet the institution’s goals.⁴⁵ Applying the Court’s reasoning in *Grutter*, institutions that utilize race in pre-college programs and retention strategies should not be required to exhaust all race-neutral options. They must seriously consider the alternatives but should not be required to prove that alternatives are “not workable.”⁴⁶

(2) Challenges to Outreach, Recruitment, Summer Bridge, and Retention Programs

Other types of programs were also mentioned in the complaint letters, including: summer bridge programs that are either exclusively for underrepresented students of color or consider race and ethnicity as one factor for admission, and culturally conscious retention programs and programs with the goal of increasing underrepresented students of color and women in the sciences, engineering and health care fields. Often, in addition to receiving a scholarship, students also receive mentoring, tutoring, or the opportunity to attend a summer bridge program. Thus, when the CEO and ACRI letters challenge a scholarship program, the outreach, recruitment or retention program that accompanies the financial aid is also the subject of the investigation. It should be noted, however, that when the OCR investigates the CEO and ACRI complaint letters, the focus is only on the race-conscious programs that a particular institution has developed. The dozens and often hundreds of other scholarship, recruitment, outreach, and retention programs that are available to majority students are never considered. Thus, the context of race-conscious policies is never considered. Universities have developed race-conscious programs over the past 30 years, not in a vacuum, but within the context of the myriad other programs available on campuses.⁴⁷ This context is ignored by conservative advocacy groups and the OCR.

In addition to the CEO and ACRI complaint letters and the OCR settlement agreements, the FOIA request also included a copy of the Department of Education’s most recent publication dealing with race-neutral alternatives. The publication, “Achieving Diversity: Race-Neutral Alternatives in American Education,” offers no legal advice, but is intended as a “toolbox” containing an array of race-neutral alternatives to foster “innovative thinking” about alternative ways to achieve diversity.⁴⁸ Interestingly, the publication lists “recruitment and outreach” as

⁴³ 539 U.S. 306.

⁴⁴ *Id.* at 339.

⁴⁵ *Id.*

⁴⁶ In addition to misinterpreting the *Grutter* decision, requiring an institution to prove that race-neutral policies are not workable also appears to violate Department of Education regulations and policy guidelines. See footnotes 28-40 and accompanying text for a discussion of the Title VI regulations and 1994 guidelines on the use of race-neutral and race-conscious scholarships and financial aid.

⁴⁷ The U.S. Supreme Court recognized the importance of context in the *Grutter v. Bollinger* decision. 539 U.S. 306 (2003). Most recently, the U.S. Supreme Court reiterated that in the higher education context, the use of race in admissions plans to ensure a diverse student body is constitutional. *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 2007 WL 1836531 (June 28, 2007) (plurality).

⁴⁸ In 2004, the Department of Education released the second of two publications dealing with race-neutral alternatives. The publication, “Achieving Diversity: Race-Neutral Alternatives in American Education,” does not

“developmental approaches” designed to diversify student enrollments in a “race-neutral manner” by enriching the pipeline of applicants equipped to meet achievement standards. Even though the publication is a “toolbox,” a review of the OCR settlement letters demonstrates that race-conscious recruitment and outreach programs designed to diversify the student body were required to become race-neutral.

(3) Indications of a Close Relationship between the OCR and Conservative Organizations

The FOIA documents also demonstrated a close working relationship between the OCR and the Center for Equal Opportunity (CEO). The documents included a letter from the CEO and ACRI complaining about race-conscious programs at Virginia Tech University. The letter, dated April 16, 2003, enclosed two letters from the state Attorney General’s office in Virginia.⁴⁹ A subsequent June 10, 2003, letter from the CEO to the Office for Civil Rights, District of Columbia Office, states, “[a]s your letter indicated, OCR has agreed to investigate the following programs”⁵⁰ Included in the list are retention programs, scholarship programs, outreach, and summer bridge programs. The letter from the CEO further notes that the OCR declined to investigate a particular program but, “per our conference call, however, we request that OCR confirm that this program was in fact permanently suspended and not merely temporarily suspended or operating under another name.”

The CEO letter also states, “[y]ou requested that we inform you of any additional programs using race or ethnic preferences. . . attached is a list which highlights VT’s diversity programs.” On the list provided to the OCR are a number of weekend enrichment programs, scholarships, mentoring programs, pre-college initiatives, and campus visit programs for students and parents. Most of the programs on the list are for “underrepresented undergraduate or graduate students” and are not race-exclusive programs. The correspondence, referenced conference call, and requests from the OCR to the CEO to provide lists of programs for the OCR to investigate all show a close working relationship between the agency and the conservative advocacy group.⁵¹

offer legal or policy advice, but instead lists a number of alternative ways to achieve diversity. The report lists targeted outreach, recruitment, and summer bridge programs as ways to achieve diversity in college admissions. U.S. DEPARTMENT OF EDUCATION, *ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION* (2004). The report is available on-line at: <http://www.ed.gov/about/offices/list/ocr/raceneutral.html>.

⁴⁹ One of the letters, dated April 3, 2003, is marked “CONFIDENTIAL—ATTORNEY-CLIENT COMMUNICATION” and is from the Office of the Attorney General to the Rector and Board of Visitors at Virginia Tech. The author received the letter from the OCR as part of the FOIA documents. The author is not publishing the content of the letter as it is marked confidential. How the CEO obtained the confidential document and why the OCR included it as a public document remain unclear.

⁵⁰ The letter from the OCR to the two conservative organizations was not included among the 209 pages of documents received from the OCR. The letter, however, should have been included because it clearly falls within the FOIA request. Numerous telephone calls and letters to the OCR have as yet not produced all of the requested documents.

⁵¹ The fax cover sheet included with the correspondence is dated April 16, 2003, and addressed to Dan Sutherland. On that date, Mr. Sutherland was working at the Office for Civil Rights within the U.S. Department of Education. On that same day President Bush appointed Daniel W. Sutherland to be the Officer for Civil Rights and Civil Liberties at the U.S. Department of Homeland Security.

Perhaps most instructive of the FOIA request was what was missing among the 209 pages. During the entire Bush Administration, there have been no “dear colleague letters” and no guidelines regarding the use of race in pre-college, summer bridge, recruitment, scholarship, or retention programs.⁵² Yet, when reviewing the settlement agreements the OCR has reached that were part of the FOIA documents, it appears that the Department of Education is no longer following the 1994 guidelines that allow the use of race-exclusive and race-conscious programs.⁵³ The OCR is also “quietly” disregarding the U.S. Supreme Court opinions in *Grutter v. Bollinger*⁵⁴ and *Gratz v. Bollinger*.⁵⁵ That is, contrary to the Court’s ruling, the OCR appears to require institutions to exhaust race-neutral alternatives. Furthermore, the OCR is not giving deference to the colleges’ and universities’ expertise in designing programs to deal with the achievement gap, nor their expertise in designing programs to recruit, admit, and retain a diverse group of students.⁵⁶

C. Survey Attempt and Follow-up Telephone Contacts

The CEO and ACRI contend that they have contacted 100 institutions and that in response, 70 institutions have “opened up” programs to students of all races. The FOIA request, however, yielded only ten letters to the OCR complaining about race-conscious programs. To learn more about what is actually happening in institutions of higher education I conducted a survey of program staff. (The survey is available on-line at: <http://app.gen.umn.edu/programs/asc/AHES.htm>.) The survey was designed to document the types of changes that have occurred due to the letters received from the CEO and ACRI, and complaints being filed with the OCR. In addition, I was interested in the staff’s assessment of whether the changes have reduced the effectiveness of the programs they administer.

In order to contact impacted programs, I reviewed the documents obtained in the FOIA request as well as news reports from the *Chronicle of Higher Education* and U Wire Service on Lexis/Nexis Academe. Many of the news reports did not list the specific programs that had been challenged. I utilized the search parameters listed on the CEO’s web site to search institutional web sites to discover the types of programs the CEO said it had contacted. Through this research, I was able to confirm that 53 institutions had been contacted by the CEO and ACRI. I was never

⁵² The only OCR publication referenced was the 2004 ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION, *supra* note 48.

⁵³ See 59 Fed. Reg. 8756 (Feb. 23, 1994).

⁵⁴ 539 U.S. 306 (2003).

⁵⁵ 539 U.S. 244 (2003). The NAACP Legal Defense Fund (LDF) issued a recent report coming to the same conclusion. See, NAACP LEGAL DEFENSE FUND, CLOSING THE GAP: MOVING FROM RHETORIC TO REALITY IN OPENING THE DOORS TO HIGHER EDUCATION FOR AFRICAN-AMERICAN STUDENTS (2005). Available on-line at: <http://www.naacpldf.org>. The LDF Report documents the OCR’s “singular pursuit” of race-neutral measures. According to the LDF, “to recognize that . . . the achievement gap is a national problem and to then intensify efforts to take race off the table and continue the onslaught against race-conscious strategies reflects a profound hostility towards the very goal of closing the gap.” *Id.* at 12.

⁵⁶ For a discussion of the importance of context and institutional deference in the *Grutter* case, see Leland Ware, *Strict Scrutiny, Affirmative Action, and Academic Freedom: The University of Michigan Cases*, 78 TULANE L.R. (6) 2097, 2108-2111 (2004) (noting outcome in *Grutter* heavily influenced by academic setting, deference to the institution’s expertise, and the Court’s reliance on academic freedom principles); *but cf.*, Richard H. Hiers, *Institutional Academic Freedom—A Constitutional Misconception: Did Grutter v. Bollinger Perpetuate the Confusion?* 30 J.C. & U.L. 531 (2004) (arguing that academic freedom is an individual right).

able to find the rest of the 100 institutions that the organizations claim they contacted, nor were they willing to provide the list.

My first challenge was getting staff to respond to the survey. Although most never responded to my request, those that did expressed nervousness about completing the survey. Past or on-going OCR investigations, negative publicity, fear of litigation, and fear of personal liability were the most common concerns. Such lack of access to institutions that have been affected is a critical concern. If education researchers do not have access, it becomes much more difficult to assess whether programs have become less effective when they no longer consider race to diversify the student body.

I was thus unable to rely on the survey to answer preliminary questions due to a low response rate. Therefore, I conducted extensive web research and placed follow-up telephone calls with pre-college, summer bridge, scholarship, and retention program staff. I was able to determine whether programs were in fact changed, when the changes occurred, why institutions changed the programs, and finally, how the programs were changed. Ultimately I was able to confirm that 71 programs at 53 institutions were changed or discontinued between 1995 to 2005.

For 47 of the race-conscious programs, I was able to confirm the exact dates each was changed. As Table 3-1 illustrates, the majority were changed in 2003. This is not surprising, considering 2003 was the year that the U.S. Supreme Court accepted the Michigan affirmative action cases on appeal and decided that the use of race in admissions was constitutional as long as it was narrowly tailored to meet the compelling interest of diversity. 2003 was also the year the *Chronicle of Higher Education* began reporting on the CEO and ACRI letter writing campaign. Of the 23 programs that changed eligibility requirements in 2003, 10 programs changed prior to the U.S. Supreme Court rulings on the Michigan affirmative action cases. These 10 programs changed after the *Chronicle* reported that the OCR asserted that race-conscious programs would be difficult to defend. There were only four programmatic changes made in 2005, but in the first 6 months of 2006, six race-conscious programs changed the eligibility criteria in some way. News reports in the *Chronicle* and *New York Times* may account for the modest increase in programs changing eligibility criteria in 2006.⁵⁷

⁵⁷ Peter Schmidt, *From 'Minority' to 'Diversity': The Transformation of Formerly Race-Exclusive Programs May be Leaving Some Students Out in the Cold*, THE CHRONICLE OF HIGHER EDUCATION, February 3, 2006, at A24; Jonathan Glater, *Colleges Open Minority Aid to All Comers*. NEW YORK TIMES, March 14, 2006, at A1.

Table 3-1: Years Race-Conscious Programs Changed

Year	No. of Programs
Before 2000	5
2000-2001	1
2003	23
2004	8
2005	4
2006	6
Date Unknown	24
Total No. Changed	71

In all, I was able to document 71 race-conscious programs at 53 separate institutions that had been changed. More importantly, I was also able to ascertain why these institutions changed or discontinued race-conscious programs. Some programs reported more than one reason for changes, and Table 3-2 includes up to two reasons for changing programs. The most common reason given for changing a program was an investigation by the OCR, or a perceived threat that the OCR would investigate the program. Nineteen percent of the programs provided “Pressure from advocacy groups” as a reason. In addition to the threat of an OCR investigation and pressure from advocacy groups, staff reported an overall feeling that there was a hostile legal environment regarding race-conscious programs. Internal review of programs was also a common reason for changing or discontinuing a race-conscious program. Also of note is the “unknown” category. Many staff members did not know why the program had been changed, nor was it apparent that the staff had been consulted prior to changing the eligibility criteria. Fear of publicity—based on reading about other programs being challenged—was also mentioned.

Table 3-2: Why Programs Were Changed

Reason Changes Made	No. of Programs
Agency Investigation or Threat	29
Pressure from Advocacy Group	19
Institutional Review of Program	15
Complaint by Individual	7
Hostile Legal Atmosphere	4
No Funding	3
Unknown	16

In press releases, as well as the *Chronicle of Higher Education* stories, the CEO and ACRI claimed that, of the institutions contacted, over 70 had “opened up” the programs. To determine how in fact the programs had changed, if at all, I also conducted on-line research and telephone follow-up calls with the 53 institutions that had changed a program in the past 10 years. I was able to find 71 programs at those institutions that had changed in some way. Some programs changed in multiple ways. For example, in some cases both the name and eligibility criteria of a program changed. I documented all changes, but limited consideration to the top two for data

analysis purposes. As Table 3-3 illustrates, the most common change, by far, was to “open up” the program.

Table 3-3: How Programs Were Changed

Type of Change	No. of Programs
Opened to all	50
Renamed the Program	14
Discontinued the Program	11
Unknown	10

It became apparent during follow-up telephone calls that “opened to all” meant different things to different program staff. Table 3-4 provides more specific information on the 50 programs that reported eligibility criteria had been “opened to all.” The majority of these programs (32) no longer consider race in any way, but rather look for students who are “committed to a diverse campus.” Another 11 programs no longer consider race but consider socio-economic factors as a way to ensure a diverse student body. Of the 50 programs that “opened up the program,” only 7 continue to consider race as one factor in ensuring campus diversity.

Table 3-4: Breakdown of “Opened to All” Category

Type of Change	No. of Programs	Percentage of Opened	Percentage of All Programs Changed
Committed to diverse campus	32	64	45
Socio-economic factors used	11	22	15
Race as a plus factor	7	14	9

It appears from this preliminary study that institutions are modifying their programs more than may be legally required due to fear of an OCR investigation or pressure from advocacy groups. The 2003 *Grutter* case, the Title VI regulations, and the 1994 OCR guidelines do not require colleges to halt race-conscious programs. In addition, the U.S. Supreme Court’s most recent opinion in the voluntary school integration cases unequivocally reiterates that institutions of higher education may consider race to ensure the benefits of a diverse learning environment. Yet, many institutions, out of fear, have halted race-conscious programs. The study also illustrates the power of utilizing the press to create a perception that programs will be sued if they do not comply with advocacy groups’ demands. Clearly, colleges and universities, and civil rights advocacy organizations must do a better job of proactively countering negative press coverage of race-conscious programs. In addition, there are ways in which social science and institutional research can aid in shaping the policy debate and combating fear of OCR investigations. The next section briefly discusses research needed to provide evidence to support existing legal arguments for the use of race-conscious programs.

Part II. Future Research Questions and the Use of Race

Educational research has demonstrated the need for race-exclusive and race-targeted programs for underrepresented students of color.⁵⁸ Data also demonstrate that these programs work.⁵⁹ The *Grutter* and *Gratz* decisions, coupled with that research, provide a legal basis for minority programs in higher education that ultimately promote the compelling interests of access, admission, and retention of a diverse student body. Evidence also exists that race-neutral programs may not be as effective in promoting the compelling interests of diversity and access.⁶⁰ This is an area where additional research would be useful to support race-exclusive and race-targeted pre-college, summer bridge, and retention programs.

We need empirical data to support existing legal arguments, particularly to prove that the programs are narrowly tailored, that is, the program consideration of race ‘fits’ or promotes the compelling goal of diversity.⁶¹ This section lays out the gaps in the current research needs and provides specific questions for future research projects. As the preliminary study demonstrates, however, it may be difficult for researchers to gain access to institutional data. Many institutions are afraid of lawsuits, publicity, or are still being investigated by the OCR. This makes it imperative that researchers and funding agencies provide assistance to institutions and program staff to ensure that rigorous institutional research is conducted.

⁵⁸ See e.g., THE MAJORITY IN THE MINORITY: EXPANDING THE REPRESENTATION OF LATINA/O FACULTY, ADMINISTRATORS AND STUDENTS IN HIGHER EDUCATION (Jeanette Castellanos & Lee Jones eds., 2003); INSTITUTE FOR HIGHER EDUCATION POLICY, GETTING THROUGH COLLEGE: VOICES OF LOW-INCOME AND MINORITY STUDENTS IN NEW ENGLAND (2001) at 31-38; Laura Perna, *Pre-college Outreach Programs: Characteristics of Programs Serving Historically Underrepresented Groups of Students*, 43 J. OF COLLEGE STUDENT DEVELOPMENT 64 (2002); R. Simmons, *Pre-College Programs: A Contributing Factor to University Student Retention*, 17 J. OF DEVELOPMENTAL ED. 42 (1994).

⁵⁹ See e.g., Octavio Villalpando & Daniel Solorzano, *The Role of Culture in College Preparation Programs: A Review of the Research Literature In Preparing for College*, in PREPARING FOR COLLEGE: NINE ELEMENTS OF EFFECTIVE OUTREACH 13-28 (William Tierney, Zoe Corwin and Julia Colyar eds., 2005) (review of literature showing that transition to college for students of color is enhanced when they participate in pre-college outreach programs that include a focus on their culture).

⁶⁰ *Id.* See also, A. P. Jackson, et al., *Academic Persistence Among Native American College Students*, 44 J. OF COLLEGE STUDENT DEVELOPMENT 548, 553-554 (2003) (documents the importance of structural social support—including being involved in Native American clubs, multicultural offices, and other support groups for Native Americans); R. DENISE MEYERS, PATHWAYS TO COLLEGE NETWORK CLEARINGHOUSE, COLLEGE SUCCESS PROGRAMS 24-27 (2003) at <http://www.pathwaystocollege.net/pubs/index.html> (discussing race-conscious programs that exhibit best practices for recruiting and retaining a diverse student body); William G. Tierney & Alexander Jun, *A University Helps Prepare Low-Income Youth for College: Tracking School Success*, 72 J. OF HIGHER ED. 205 (2001) (analysis of a college preparation program that integrates the concept of cultural identity into the design to better serve urban youth).

⁶¹ *Grutter*, 539 U.S. at 333.

Most importantly, we need empirical data on the question of race-neutral alternatives.⁶² Opponents of race-exclusive, race-targeted, and race-conscious programs argue that race-neutral approaches can obtain similar results. Although there is research supporting the use of race-conscious programs, this is an area where more research is needed to shape the legal and policy debate. What, for example, is lost or gained when a college adopts race-neutral approaches in order to avoid OCR investigations? The following questions are designed to spark discussion among researchers and frame future research directions.

A. Is It Necessary to Use Race?

Institutional data, as well as rigorous social science research, is needed to assess whether race-conscious programs are necessary and effective. That is, do race-neutral programs achieve the same results? More research is needed to definitively answer this question. If the race-neutral approaches prove to be just as effective, it will be difficult to defend race-conscious programs. On the other hand, colleges and universities should not be required to exhaust all other alternatives if it is determined that the use of race is needed to meet the institution's goal of diversity. One way for institutions of higher education to demonstrate that they have seriously considered the alternatives is to evaluate existing programs. Another is to review research on race-neutral alternatives to see if they could be adopted and meet the educational goals of the institution. Thus, institutions and educational researchers should study programs that have recently changed their criteria due to pressure from conservative legal organizations to assess whether these alternatives are "viable."

B. Is Something Lost When a Race-Conscious Program Becomes Race-Neutral?

In addition to studying race-neutral programs, we also need to continue to assess the benefits of race-conscious programs. For example, are there unique benefits that would otherwise not be obtained in a program that is open to all students in a summer bridge program that allows underrepresented students of color to meet prior to classes starting at a predominantly white institution? The benefits of programs that stopped considering race should be evaluated in light of the benefits at the time that the program considered race. For example, an evaluation comparing the new race-neutral scholarship program in Wisconsin to the former targeted program is needed to inform other states and institutions of higher education before they change existing successful programs. The same is true for the STEM (science, technology, engineering, and math) programs that no longer consider race as part of their application process. Are they as effective in meeting institutional goals? These evaluations need to go beyond simple number counting to rigorous assessments of the new programs. The data also needs to be published so

⁶² Several comprehensive studies on pre-college, outreach, summer bridge and retention programs have called for more research. See, e.g., PATRICIA GÁNDARA, WITH JULIE MAXWELL-JOLLY, PRIMING THE PUMP: STRATEGIES FOR INCREASING THE ACHIEVEMENT OF UNDERREPRESENTED MINORITY UNDERGRADUATES (The College Board, 1999) (calling for more rigorous evaluations of programs, including research on the types of programs that impact underrepresented students of color); DENISE MEYERS, PATHWAYS TO COLLEGE NETWORK, *supra* note 60 (documenting the need for more rigorous evaluations); Laura Perna, *Pre-college Outreach Programs*, *supra* note 58 (noting that many programs do not publish evaluations and the need for more rigorous research on pre-college programs).

that it can inform other colleges and universities. Funding will need to be garnered to support these critical studies.

C. What Is Lost or Gained When a Formally Race-Exclusive Program Includes Other Racial and Ethnic Groups?

In the past five years, a number of scholarship and summer bridge programs nationwide have terminated race-exclusive policies. Empirical data is needed to determine if there is a unique need for race-exclusive programs. For example, does no longer having a race-specific scholarship program dilute the effectiveness of the program? In addition to quantitative data, what message does a university send when it renames and changes a program? How do such perceptions impact applications from underrepresented students of color? If there is a chilling effect, is this enough of a concern for a university to reject race-neutral alternatives? Ultimately, the most important question is: Are these “new” programs as effective in meeting institutional goals? If not, then other institutions across the country should not be required to “try” these unworkable alternatives.

In addition to the questions outlined above, researchers must also consider whether their answers change depending on the type of program being studied. That is, do the benefits of race-conscious policies change depending on whether the study is of a summer bridge program versus a scholarship program? Context matters and certain types of programs may require race-exclusive or race-targeted approaches to be effective, whereas others may not. The necessity to use race may also vary depending on the geographic location of the institution and whether the college or university is highly selective in its admission process. These are the types of questions that institutions of higher education need to consider.

Finally, researchers will have to carefully consider how to measure the “benefits” of pre-college, summer bridge, and retention programs. For example, the number of underrepresented students who major in a STEM field may be an appropriate variable for certain types of STEM programs, but certainly would be an inaccurate measure for an outreach program geared towards junior high students.

Conclusion

It is discouraging that programs designed to improve the education of all students and provide access to higher education are under attack. After watching the Michigan cases, it may be somewhat understandable that postsecondary institutions have been unwilling to engage in litigation to save race-conscious programs. Unfortunately, that caution has led to dismantling programs that may in fact be the best way to ensure that underrepresented students have access to higher education. Through research, educators will need to continue to document the benefits of outreach, recruitment, scholarship, and support programs and to hone in on the types of programs that enable first-generation, low-income and underrepresented students of color to attend and succeed in college. This task is made more difficult due to lack of access to institutional data. Legal advocates, policy makers and educational researchers must also work together to explore additional educational interests, beyond the diversity rationale, that will allow institutions to consider race when implementing programs and policies. Ultimately, a more proactive approach

is needed to combat the fear of litigation and publicity that has been fueled by press coverage of the CEO and ACRI letter campaign. Education researchers and policy makers must also utilize the press to document successful race-conscious programs, while continuing to bring public attention to the “pipeline” crisis.

APPENDIX A

Freedom of Information Act Request

Attn: FOIA Officer
U.S. Department of Education
Office of the Chief Information Officer
550 12th Street, SW, PCP, 9th Floor, Room 9148
Washington, DC 20202-4750

April 27, 2005

I respectfully request the following information:

- (a) Any complaints filed with the OCR in the past 5 years that allege that an institution of higher education is discriminating on the basis of race or sex in a pre-college, outreach, recruitment, summer bridge, retention, and/or scholarship program.
- (b) Any resolutions of the complaints referenced in (a).
- (c) Any voluntary compliance agreements of the complaints referenced in (a).
- (d) Any negotiated agreements for voluntary compliance of complaints referenced in (a).
- (e) Any violation letters issued within the past 10 years to institutions of higher education alleging race and/or sex discrimination in the way in which the institution conducted a pre-college, outreach, recruitment, retention, summer bridge, or scholarship program.
- (f) Any administrative complaints filed within the past 10 years against institutions of higher education alleging race and/or sex discrimination in the way in which the institution conducted a pre-college, outreach, recruitment, retention, summer bridge, or scholarship program.
- (g) Documents regarding any proactive initiatives OCR has conducted in the past 5 years regarding pre-college, outreach, recruitment, summer bridge, retention, and/or scholarship programs.
- (h) Any Policy guidelines, "Dear Colleague Letters," or position statements that OCR or the Department of Education have issued in the past 5 years regarding the use of race and/or sex in pre-college, outreach, recruitment, summer bridge, retention, and/or scholarship programs.
- (i) Any correspondence in the past 5 years to or from OCR requesting technical assistance regarding whether the use of race and/or sex in pre-college, outreach, recruitment, summer bridge, retention, and/or scholarship programs violates civil rights provisions.

Respectfully submitted,