



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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WASHINGTON, DC 20202-1475

REGION XI
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May 25, 2012

Lloyd Cohen, Ph.D., J.D.
Professor of Law
George Mason University School of Law
3301 Fairfax Drive
Arlington, Virginia 2201-4426

Re: OCR Complaint No. 11-04-1020
Letter of Findings

Dear Dr. Cohen:

This letter is to advise you of our decision regarding the above-referenced complaint, which you filed on November 12, 2003, with the Office for Civil Rights (OCR), U.S. Department of Education, against Fairfax County Public Schools (the Division). We apologize for the substantial delay in providing you with this decision.

In your complaint, you alleged that the Division discriminated on the basis of race (in favor of blacks and against whites) in admissions to Thomas Jefferson High School for Science and Technology (the School). We note that, during a January 19, 2004, telephone conversation with OCR staff, you confirmed that this was your sole allegation. Your allegation was based on statistical information only, and did not identify any particular individuals that may have been treated differently on the basis of their race.

OCR enforces Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, as implemented by regulations at 34 C.F.R. Part 100, which bars public schools, as well as private institutions that receive federal financial assistance, from discriminating on the basis of race, color, or national origin. Racial discrimination by school districts that violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution also violates Title VI. Accordingly, OCR here considers not only case law interpreting

federal statutory law, but also case law interpreting the Equal Protection Clause, particularly the Supreme Court's decision in *Parents Involved in Community Schools v. Seattle School District No. 1*.¹

Pursuant to these standards, OCR thoroughly investigated your complaint, beginning with a data request letter. OCR conducted statistical analyses of the data submitted by the Division and OCR conducted on-site interviews of Division staff involved in the admissions process. OCR also reviewed admissions files at the School's admissions office.

We note here, at the outset, that Title VI does not require a school district to rely solely on objective measures, such as grades and test scores, to admit applicants. A school may, consistent with Title VI, elect to consider a range of other, difficult to quantify factors, such as motivation, leadership, personal achievements and teacher recommendations, in admitting students to a school.

Further, the use of race as a factor in admissions, in and of itself, is not a violation of federal law. The U.S. Department of Education and the U.S. Department of Justice have recognized, as has a majority of Justices on the U.S. Supreme Court, the compelling interests that K-12 schools have in obtaining the benefits that flow from achieving a diverse student body and avoiding racial isolation. As the Supreme Court has explained, and as the Departments stated in their guidance on the use of race, released in December 2011, elementary and secondary schools are

“pivotal to sustaining our political and cultural heritage;” they teach “that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all.” Racially diverse schools provide incalculable educational and civic benefits by promoting cross-racial understanding, breaking down racial and other stereotypes, and eliminating bias and prejudice. Our “nation’s future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples.”
[Citations and footnotes omitted.]²

¹ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

² “Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools,” available at: <http://www.ed.gov/ocr/docs/guidance-ese-201111.pdf>.

School districts may permissibly use race as a factor in admissions, if they do so in a manner consistent with the law. Districts should identify their compelling interest(s) and then determine if they can meet their compelling interest(s) by using race-neutral approaches. School districts are required to use race-neutral approaches only if they are workable. School districts are not required to implement such approaches if, in their judgment, the approaches would not be workable. When race-neutral approaches would be unworkable to achieve their compelling interests, school districts may employ generalized race-based approaches. Generalized race-based approaches employ expressly racial criteria, such as the overall racial composition of neighborhoods, but do not involve decision-making on the basis of any individual student's race. When schools adopt approaches that consider the race of individual students, they should do so in a narrowly tailored manner that closely fits their goal of achieving diversity or avoiding racial isolation and includes race no more than necessary to meet those ends.³

Nonetheless, in response to OCR's inquiries, the Division has maintained that it was not considering the race of applicants in its admissions decisions to the School during 2002, the year at issue in your complaint. The Division's statements are supported by OCR's investigation, which did not find sufficient evidence that race was a factor in admissions to the School during this period. OCR is therefore closing its investigation into your complaint. OCR's investigation is discussed below.

Investigation

In response to your allegation, OCR investigated whether the School used race as a factor in admissions during 2002. OCR also expanded the inquiry to examine whether the School used race as a factor in admissions during the surrounding years of 2000-2004, in order to provide a broader picture of the school's activities. OCR conducted: (1) statistical analyses of School admit rates for black applicants versus white applicants for admissions decisions made during each Spring of the years 2000-2004 (each Spring's decisions were for the upcoming school year, e.g., the Spring 2002 decisions were for the 2002-2003 freshman class); (2) a review of Division admissions regulations, policies, and guidelines, and interviews with individuals who made School admissions decisions; and (3) a file review of applicants who were admitted to the School for the 2002-2003 academic year.

³ See *Grutter v. Bollinger*, 539 U.S. 306, 333-34 (2003) and "Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools," *Ibid*.

OCR found in its investigation that during the 2000-2004 academic years, the School used a bifurcated admissions process in which it winnowed all applicants into a semifinalist pool of the 800 or so applicants who had the highest combined admissions test scores and grade point averages (i.e., index scores). The School then made further selections based on a holistic review of the semifinalists, examining their applications for merit in three general areas: (1) aptitude for the successful study of science, mathematics, computer science, and related technological fields as measured by an admissions examination; (2) the record of prior academic achievement; and (3) interest and motivation in the study of science, mathematics, computer science and related technological fields.⁴

Statistical Analyses

OCR conducted statistical analyses of admissions decisions made from the semifinalist pool during each spring of the years 2000-2004. OCR sought to determine whether the admit rate for black students from the semifinalist pool was higher than that for white students from the semifinalist pool, and, if so, to determine whether this higher acceptance rate was statistically significant. To make these determinations, we used Fisher's Exact Test. This statistical test was developed for cases such as this one in which the sample size is small.

We first determined the admit rate, from the semifinalist pool, for black applicants and white applicants for each year during the relevant time period, 2000-2004. Then, using this test, we set out to determine whether there was a significant statistical disparity between the admit rate for black applicants and white applicants. Following standard practice, statistical significance was presumed in those cases where the probability of the admit rate for black students being attributable to chance was less than one in twenty, or less than .05.

Evidence submitted by the Division indicated that black applicants were admitted at a slightly higher rate than white applicants in four of the five years reviewed, but that there was a statistically significant disparity between the admit rate for black applicants versus white applicants in only one of these years – 2002. Upon further analysis, we concluded that the disparity in 2002 was, in statistical terms, a "fragile" one, that is, switching just one of the black students admitted to a black student being rejected

⁴ According to Division Regulation 3355.6.

would have resulted in there being no statistically significant disparity.⁵ Additional analysis also showed that the statistical disparity in 2002 could have occurred by chance, and that, in and of itself, it was not proof of the use of race.

Division Admissions Regulations, Policies and Guidelines

In addition to conducting the above statistical analysis, OCR interviewed 16 staff involved in admissions, including the School's Admissions Coordinator, 11 members of the selection committees and 4 members of the oversight committees. Although we asked a broad range of questions of each type of interviewee, the focus was on whether and, if so, to what extent, race was a factor in admissions decisions for the years in question.

All members of the selection committees stated that: (1) they were not aware of any comments from Division staff, including the Superintendent, about increasing diversity or the number or percentage of students of any particular race at the School; (2) they did not recall ever having received any guidance about taking race into account in admissions decisions; (3) applicant files were never segregated by race in the admissions process; and (4) they never took race into account in making admissions decisions. OCR found these witnesses to be credible in their testimony.

Other credible staff interviewed by OCR also stated that race was not a factor in the school's admissions process during the years in question. For example, all four members of the oversight committee told OCR that they were encouraged to look at applications as a whole rather than focusing on any single factor, and that race was not a factor at all. The School's Admissions Coordinator, who provided training to committee members, told OCR that she instructed committee members to ignore the race and ethnicity of applicants, that there was never a goal of admitting a racially diverse class of applicants, and that she had never discussed such a goal with committee members.

⁵ Further, OCR did additional statistical analysis, using the Pearson Chi-Square test of statistical significance, although this test is not designed for samples as small as those in this case. The findings of no statistically significant disparity were confirmed using the Pearson Chi-Square test. Additionally, our file review and the data submitted by the Division indicate that both black and white applicants with relatively high, average, and low index scores (i.e., combined admissions test scores and grade point averages) were admitted during the 2000-2004 period at issue here.

OCR also reviewed admissions regulations and policies and the materials provided to individuals who were involved in the School's admissions decisions. Neither the Division regulations (Regulations 3355.5, .6, and .7) nor policy (Policy 3355.1) applicable during Spring 2000-2004 provided for, or permitted, taking account of the race of applicants to the School in making admissions decisions.

All members of both the selection committee and the oversight committee also told OCR that they used the Division's "Guidelines for Selection Committees" (Guidelines) in making their decisions. The Guidelines contained guidance for evaluating applicants, including the order in which to read and review applications and suggestions on evaluating essays, activities and recommendations. OCR reviewed the Guidelines for the years 2002-2004 and other materials containing instructions and guidance for individuals involved in the School's admissions decision-making process and found no mention of racial preferences or, with one exception, any mention of race. The single exception, which appears at page 4 of the Guidelines for the committees for Spring 2002 and 2003, is as follows:

Standardized testing for minority students does not necessarily reflect their abilities. The scores may be depressed. If test scores are low, then determine judgments from other indicators of success (grades, teacher recommendations, writing, and activities).

This specific reference to test scores of minority students was deleted from the Guidelines for Spring 2004.

File Review of Black Students Admitted in 2002

As part of our comprehensive investigation, which included the statistical analyses and interviews noted above, OCR also reviewed the files for the 10 black students admitted to the School in decisions made in Spring 2002 (for the 2002-2003 class) to determine whether these decisions were consistent with the School's written admissions criteria. Our review of the files of black student applicants admitted to the School in decisions made in Spring 2002 did not reveal any deviations from the Division's admissions standards.

We also reviewed the files for the three black students admitted in Spring 2003 (for the 2003-2004 class) and the 11 admitted in Spring 2004 (for the 2004-2005 class) to determine whether there were any instances in which the Division appeared to have failed to follow its admissions standards. We determined that these students, as were the black students admitted in Spring 2002, appeared to be highly qualified, with the

highest or second highest ratings available in each of a wide range of categories, including the ability to think independently; motivation and leadership; and grades in high-level coursework. Further, these students had numerous achievements relating to science, mathematics, computer science and/or related technological fields and had enthusiastic recommendations. Their admittance was consistent with the Division's admissions standards.⁶

Conclusion

Based on the above discussion, there is insufficient evidence to find that the Division considered race as a factor in its admissions to the School in 2002. There also is insufficient evidence to find that the Division considered race as a factor in admissions to the School in the surrounding years, 2000-2004.

If you have any questions about the outcome of your complaint, please contact Peter Gelissen, the OCR attorney assigned to this case, at (202) 453-5912 or peter.gelissen@ed.gov. OCR is committed to a high-quality resolution of every case. Accordingly, OCR's appeal process provides you with an opportunity to bring information to OCR's attention that would change OCR's decision. An appeal should be as specific as possible and must explain why you believe the factual information was incomplete, the analysis of the facts was incorrect, and/or the appropriate legal standard was not applied, *as well as* how this would change OCR's determination in the case. Failure to do so may result in the denial of the appeal. Please note that we will not re-open a complaint because you are now providing facts that were known to you but not brought to our attention during the investigation or because you are merely expressing dissatisfaction with the resolution. You may submit an appeal within sixty days of the date of this letter to the following address: Deputy Assistant Secretary for Enforcement, Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, D.C. 20202-1100. Please note that you have only 60 days in which to file, and that speaking with Mr. Gelissen and/or other OCR staff will not extend this deadline.

⁶ We note that we were unable to review and compare the files of white students who were rejected in Spring 2002 – the only year for which we found there to be a statistically significant disparity between the admit rates for black students and white students – because the Division maintains the files of rejected applicants for only one year. We did review the files of white students who were admitted in Spring 2002, however, and found no significant discrepancies between admitted black applicants and admitted white applicants.

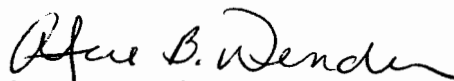
This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. You may have the right to file a private suit in federal court despite the fact that OCR has not found a violation.

We have reminded the Division that no person is permitted to intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the laws OCR enforces. If any individual is harassed or intimidated because of filing a complaint or participating in any aspect of OCR case resolution, the individual may file a complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent provided by law, information that, if released, could constitute an unwarranted invasion of personal privacy.

If you have any questions regarding this letter or your complaint, please contact Mr. Gelissen at the telephone number or email address provided above.

Sincerely,



Alice B. Wender, Director
District of Columbia Office