

UNITED STATES COMMISSION ON CIVIL RIGHTS
WASHINGTON, D.C. 20425

OFFICE OF STAFF DIRECTOR

July 5, 2005

SENT VIA FACSIMILE AND U.S. MAIL

The Honorable Margaret Spellings
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Dear Secretary Spellings:

We write to you, as members of the U.S. Commission on Civil Rights, to commend you for your Department's commitment to protecting the civil rights of all students as we pass the second anniversary of the U.S. Supreme Court's decisions in *Gratz v. Bollinger* and *Grutter v. Bollinger*. The Department's excellent work in civil rights has recently received criticism from the NAACP Legal Defense and Educational Fund's report, "Closing the Gap: Moving from Rhetoric to Reality in Opening Doors to Higher Education for African-American Students." We strongly disagree with the Legal Defense Fund's report and would like to set the record straight.

The Michigan cases confirm, as the Department has previously maintained, that student body diversity is a compelling interest that will, under appropriate circumstances, justify the narrowly tailored consideration of race or national origin by colleges and universities in admissions decisions. They also clarify the limitations on the use of race in four important respects. The Legal Defense Fund report largely ignores these limitations, which are as important to the Court's holdings as its discussion of the compelling interest in diversity. Given widespread reports that many institutions continue to defy these constitutional limitations, we believe that it is important that they be clearly articulated and effectively enforced.

The limitations stated in the Court's opinions make clear that:

- Each applicant must be evaluated as an individual, not as a fungible member of a racial or ethnic group.
- A school's compelling interest in diversity must be rooted in the institution's broad educational mission. "Diversity" does not legitimately demand proportionate racial and ethnic representation. The goal allows colleges to strive for a mix of students from a variety of geographical regions, social class backgrounds, and religious faiths, as well as from different ethnic and racial backgrounds. Race and ethnicity, however, can only be considered a "plus" factor in an applicant's file.

- Serious consideration must be given to workable race-neutral alternatives before racial preferences may be employed. This does not mean that an institution must thoroughly analyze the applicability of all conceivable race-neutral approaches. It does, however, require that the institution consider, in a careful and professional manner, the utility of various alternatives that are applicable to institutions of its kind.

- Racial and ethnic preferences, if used, must have a logical termination point. Sunset provisions and periodic review will meet that demand. In the *Grutter* decision, the Court said it took the school at "at its word that it would `like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable."

We are aware that the Department applies a strict scrutiny standard in cases alleging inappropriate use of racial preferences, as the Court has demanded. It has also continued to give deference to the reasonable educational judgment of colleges and universities as to the necessity of pursuing diversity policies in order to fulfill their missions. This is appropriate in light of the Court's holding.

Thus, the LDF Report plainly misunderstands the Department's record, arguing that its investigation of various complaints provides inappropriate support to the non-profit advocacy groups that have filed them. The report concedes that OCR is required to investigate every complaint properly filed within its jurisdiction, and includes no credible evidence of bias at OCR. Moreover, we are not aware of any. We believe OCR has performed in exemplary fashion in its application of the Michigan decisions to cases arising at other universities and schools.

In criticizing OCR for its focus on race-neutral alternatives, the LDF fails to acknowledge that the Michigan cases require colleges and universities to seriously consider race-neutral alternatives before resorting to the use of racial preferences. In light of the Supreme Court's decision, OCR's annual reports on race-neutral alternatives have provided critically important guidance to American educational institutions. We strongly urge you to continue this important research with additional annual volumes in future years.

The public would greatly benefit from clearer guidance regarding the manner in which OCR is applying the principles announced in the Michigan cases. This should include revisions to the agency's Title VI guidance, in order to bring it up to date with recent legal developments. At a minimum, we would appreciate if you would inform us whether the Department is enforcing Title VI requirements in a manner consistent with the above summary of constitutional principles established by the U.S. Supreme Court in *Gratz* and *Grutter*.

The LDF has also cast various aspersions upon three not-for-profit advocacy organizations that have filed complaints with OCR or developed studies that have formed the basis for requested investigations. We find it ironic that the LDF would fail recognize the important role such groups

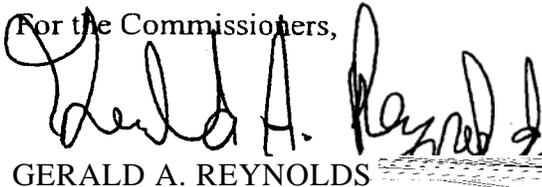
play in ensuring protection for the civil rights of all Americans. The Center for Equal Opportunity and the Center for Individual Rights have both contributed significantly to the pursuit of equal justice for all, and the National Association of Scholars has been an important voice for reasoned scholarship and academic freedom.

. In closing, we are pleased to see that the president has nominated a candidate for the position of assistant secretary of education for civil rights, and we wish her well in the confirmation process. We would also like to praise the commendable work that James Manning has done during the period in which he has been delegated the authority of assistant secretary for civil rights. He has brought credit to the department through his hard work and principled commitment to the civil rights of America's children.

This letter is sent on behalf of Vice Chairman Abigail Thernstrom, Commissioner Jennifer Braceras, Commissioner Peter Kirsanow, Commissioner Ashley Taylor, and myself. Commissioner Michael Yaki dissents from these remarks and may provide his views under separate cover.

Sincerely,

For the Commissioners,

A handwritten signature in black ink, appearing to read "Gerald A. Reynolds". The signature is written in a cursive style with a large initial "G".

GERALD A. REYNOLDS

Chairman