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Comments of the National Bar Association

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BEFORE THE UNITED STATES DEPARTMENT OF EDUCATION

Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964; Proposed Policy Guidance :

To: Office for Civil Rights

COMMENTS OF
THE NATIONAL BAR ASSOCIATION

The National Bar Association[1] ("NBA") by its attorneys, hereby submits these comments in response to the Notice of Proposed Policy Guidance issued by the U.S. Department of Education and published in the Federal Register on December 1, 1991. See Notice of Proposed Policy Guidance, 56 Fed. Reg. 64548 (December 10, 1991) ("Notice") . By its Notice, the U.S. Department of Education requests public comment on the circumstances under which "colleges may offer such race exclusive scholarships, or other scholarships designed to create diversity, without violating federal law, specifically, Title VI of the Civil Rights Act of 1964...." Id. By the Notice, The Department of Education outlines five principles by which "all complaints of discrimination concerning race-exclusive

[1] The National Bar Association ("NBA") was founded in 1925, and is an organization comprised of approximately 20,000 Black lawyers, many of whom are graduates of historically Black colleges and universities across the United States. Since its founding, NBA has been involved in promoting civil rights activities to improve the educational, societal, and economic welfare of Black and other disadvantaged Americans. NBA, for almost seventy years, has actively participated in the formation of this nation's legislative and judicial policy affecting the educational advancement and opportunities of minority and disadvantaged youth and young adults of the nation.

financial aid" will be evaluated. The following are comments on the principles contained in the proposed policy guidance and the underlying premise supporting minority scholarships.

INTRODUCTION

> The Henry Harrison Sprague Scholarship at Harvard College is for those "in whole or in large part of New England Colonial descent." The Reuben Baker Scholarship is for "a resident of Latrobe, Pennsylvania, or, there being no such resident, a resident of the western part of Pennsylvania." The Helen E. Millington Memorial Scholarship is for "students whose fathers are deceased and whose mothers have not remarried." This list goes on for 250 pages. . . . The point is not that it still sometimes helps to be white (Harvard, in practice, guarantees financial aid to all comers.) The point is that fate spews out all sorts of arbitrary advantages. Yet some people in government seem obsessed with one tiny category: the occasional advantage that comes from being black.[2]

These comments from a nationally-known conservative columnist echo what many civil rights advocates fear about the real motives behind the Department of Education's review of the constitutionality of minority scholarships. The Department of Education's Notice presupposes that race based scholarships are per se unconstitutional. No court, however, has agreed with the proposition advanced by the Department of Education, not even Podberesky v. Kirwan, 764 F. Supp. 364 (D.Md. 1991), rev'd on other grounds, No. 91-2577 (4th Cir. Jan. 31, 1992), the only case to address the constitutional validity of minority scholarships.[3] In

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[2] Michael Kinsley, No Civil Rights Program Can Be Truly Color-Blind, Los Angeles Daily Journal, Jan. 28, 1991, at 6, col. 7.

[3] Podberesky v. Kirwan involves a challenge by an Hispanic student of a scholarship program created by the University of Maryland as a method for remedying the effects of the State of Maryland's past discriminatory conduct against Black students. In an effort to achieve Title VI compliance, the University of Maryland created the "Banneker Scholarship Program." Under the

Podberesky v. Kirwan, No. 91-2577 (4th Cir. Jan. 31, 1992), the Fourth Circuit stated that "[t]he Supreme Court has declared that in some situations the State may enact a race exclusionary remedy in an attempt to eliminate the effects of past discrimination."[4] The Fourth Circuit's decision in Podberesky was narrowly drawn, based on a present record which is insufficient to show any present day effects of discrimination. Podberesky v. Kirwan, No. 91-2577 (4th Cir. Jan. 31, 1992) at 5. (district court, although recognizing the need to identify some present effects of past discrimination, failed to make specific findings of such present effects; affirmative redress requires some present effect of past discrimination). The NBA, and hopefully the Department of Education, is mindful of the fact that previous Supreme Court decisions which hold that voluntary race conscious affirmative action programs are lawful when they serve "a compelling governmental interest" and are "narrowly tailored to the achievement of that goal." Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) (opinion of Powell, J.); see also Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990) (opinion of

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Banneker proram, the University of Maryland provides full financial support to approximately 25 Black students each year.

[4] The Fourth Circuit adopted this analysis of the trial court which would validate a race-based scholarship program if it survives "strict scrutiny" analysis. In other words, the Fourth Circuit stated that a race-based scholarship program must serve "a compelling goverment interest" and be "narrowly tailored to the achievement of [ ] goals." Podberesky v. Kirwan, No. 91-2577 (4th Cir. Jan. 31, 1992)(citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (Powell, J.).

Brennan, J.); Bakke v. University of California, 438 U.S. 265 (1978); Wygant v. Jackson Bd. of Educ., 476 U.S. at 286. (O'connor, J., concurring in part & concurring in the judgment) (court leaves open possibility that other objectives could justify affirmative action programs).

Turning attention to the specific principles advanced by the Notice, NBA strongly asserts that the Department of Education has not established a valid case, in law or fact, for discontinuing race exclusive scholarships. It believes, as do other groups, that the Notice should be withdrawn. However, NBA offers the following views to help shape the Notice should the Department proceed, we think unwisely, on this matter.

I. PROPOSED PRINCIPLE ONE

The First Principle permits colleges to make awards to "disadvantaged" students without regard to race "even if that means that such awards go disproportionately to minority students."[5] Notice at 64548. This principle, with the limitations and exceptions taken herein, could be acceptable since the proportion of Black students enrolled in college and graduate studies are generally fewer than that of their white counterparts. See e.g., Raspberry, "Graduate School Mystery", Washington Post, Jan. 6,

[5] The term "disadvantaged student" is defined as "one who, despite facing significant obstacles, has prepared himself or herself for a college education." In the Notice, significant obstacles may include a student coming from a low-income family, or students from school districts with high drop-out rates, or students from single-parent families, or families in which few or no members have attended college. Notice at 64548.

1992, at A19, col. 3. [6]

Since the mid-1970s there has been a steady decline in college entry among Black high school graduates. From the years 1976 to 1986, the percentage of Black high school graduates attending college decreased from 48% to approximately 36.5%. National Research Council, A COMMON DESTINY: Blacks and American Society (National Academy Press:1989) at 338-39 (A COMMON DESTINY). By comparison, during the same period college entry among white high school students rose continuously from 48% to 57%. Id. Among the many reasons to explain the difference in college enrollment among the two groups is "the changing structure of financial aid." Id. at 340, citing S. Arbeiter, "Minority Enrollment in Higher Education Institutions: A Chronological View" Research and Development Update New York: College Board (1986).[7] Specifically, there gradually has become less reliance among students on grants and other forms of "free money," to a shift in reliance upon "loans" or funds that must be repaid.[8] This shift

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[6] Raspberry, citing to a speech given by Frank L. Morris to the Council of Graduate Schools, reports that "between 1975 and 1990, the number of black males receiving doctoral degrees declined by 50%, from 650 to 320." Morris' speech reports that the decline in doctoral degrees granted to black males directly correlates with the decline in federal assistance to black males for expenses associated with the completion of graduate studies.

[7] Further, findings of Arbeiter show that the largest decline in total enrollment of Black students occurred at 4-year institutions, while there was an increase in Black enrollment at 2-year institutions. A COMMON DESTINY at 340.

[8] The National Research Council reports that "[f]rom 1980-1981 to 1985-1986, the total federal and state college 'package' of financial aid declined 3% after controlling for changes in the consumer price index, but the real financial situation became worse

in reliance by students overall on loans to finance their education contributed greatly in "reduc[ing] Black [students'] college-going chances more than those of whites." A COMMON DESTINY at 343. Thirteen years ago it was postulated that of "the greatest deterrents to increased ranks of blacks as lawyers in the workforce may be the growing cost of tuition in state and private colleges, accompanied by fewer available loan and scholarship funds...." G. Segal, BLACKS IN THE LAW 9 (1983) (quoting J. Clay Smith, Jr., "The Future of the Black Lawyer in America" Paper before Old Dominion Bar Association, Lynchburg, Va., May 26, 1979).

With ever increasing reliance on student loans, the National Research Council analyzes the state of Black education as follows:

> At equal levels of current family income, Black youth are less economically secure than whites because Black families are more vulnerable than white families to unemployment and are less wealthy than whites. Consequently [citation omitted] [m]inority students are less likely to borrow than white students; fewer than one-third of low-income minority aid recipients secure a government loan, compared with more than two-fifths of low-income white aid recipients.

Id. (citation omitted). The skepticism among minority students to take on significant financial debt to meet academic expenses becomes more problemmatic with the dramatic rise in the cost of higher education. The National Research Council further explains the reasons for Black students having less willingness to borrow funds to finance their education as follows:

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than that because the costs of attending a state college or university rose faster than the general cost of living." A COMMON DESTINY at 343. During the 10-year period from 1975-76 to 1985-86, the percentage of grants awarded declined from 80% to 46%, and loans increased from 17% to 50% as a percentage of total financial aid awards.

> In a purely economic analysis, a student's willingness to borrow will be affected by the economic return to his or her investment. Given the history of economic discrimination against Blacks and the perception of fewer opportunities to enter good jobs, to be promoted, and to be retained in times of recession, a Black student will not expect the same economic rewards with the same degree of certainty as a white student who makes the same investment of time and money in college education. If the expected rewards are less, then the amount of money that a student will borrow to invest are also likely to be less. . . .[In addition,] there is a second psychological factor affecting willingness to borrow. Black students are overwhelming from very low income families. . . .[In 1985] the income distributions for families of Black and white students [were] almost mirror images: 35% above $40,000 for whites and below $10,000 for Blacks. A typical college debt is much larger to a Black student -- relative to his or her family income -- than to a white student.

Id. at 343-44.

Certainly, the state of Black education mandates that current efforts to provide post-secondary and graduate educational opportunities for minority students should remain a national priority.

NBA further submits that educational institutions should have broad discretion in defining what types of persons and/or situations qualify a student as "disadvantaged." For instance, if administrators at an educational institution in their wisdom, experience, and expertise expand the definition of "disadvantaged" to include persons requiring academic remedial assistance, this deterimination should be deferred to by the Department of Education.

II. PROPOSED PRINCIPLE TWO

The Second Principle permits an educational institution to consider race as one among several factors in awarding scholarships designed to create a more diverse student body. This principle is

a product of the Supreme Court's decision in Regents of the University of California v. Bakke, 438 U.S. 265 (opinion of Powell, J.). As amicus in Bakke before the Supreme Court thirteen years ago, NBA has long urged that racial and ethnic diversity in an academic setting is a bona fide institutional objective. See generally Bakke, 438 U.S. at 311-315.

Minority scholarships have been supported by local and federal governments, the private sector, and the academic academy. Governments have adopted the policy of minority scholarships "not as an end in itself, but rather as a means of achieving greater" diversity in institutions of higher learning. Such a goal carries its own natural limit. For example, when the population of Blacks in higher education reaches a reasonable and consistent level, the limit on these scholarships will become obvious, as the public policy goals behind the creation of the scholarships has been accomplished.

The impact of such scholarships on the rights of nonminorities is also de minimus. Lessons learned from Bakke and other cases teach us that, "as part of the nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of past discrimination." Metro Broadcasting v. FCC, 110 S.Ct. at 3026; see also Wygant v. Jackson Board of Education, 476 U.S. at 280-81 (opinion of Powell, J.); Steelworkers v. Weber, 443 U.S. 193, 208 (1979) (plan did not "unnecessarily trammel" interests of the white employees).

Moreover, in most instances, monies for race based

scholarships would probably be redirected to other means of recruiting and retaining Black students were the scholarships eliminated. Podberesky v. Kirwan, 764 F. Supp. at 376. In Podberesky v. Kirwan, there was no evidence that the monies used to fund the minority scholarships at the University of Maryland, which are designed to encourage Black student enrollment, would be used to fund additional scholarships for the general student population. Thus, as recognzed by the district court in that case, it would be unreasonable to assume that nonminorities, or even non-Black students, would be deprived of some benefit.

As a general proposition, scholarships directed at Black students do not necessarily impose impermissible burdens on nonminorities. Nonminority challengers, indeed some minority challengers, to these scholarships must concede that they have not suffered the loss of an already-awarded scholarship. See Podberesky v. Kirwan, 764 F.Supp. at 373 n 9. (the purpose underlying race based scholarships is certainly a desirable benefit, but the denial of such does not create a burden analogous to a lay-off, which violates a realiance interest in continued employment) (citations omitted).

III. PROPOSED PRINCIPLE THREE

The Third Principle permits educational institutions to award race-exclusive scholarships "when necessary to overcome past discrimination." Notice at 64549. Specifically, the Notice allows race-exclusive scholarships when there is a finding of past discrimination "by a court or by an administrative agency -- such

as the Department's Office for Civil Rights." Id. A finding of past discrimination may also be made by a state administrative agency or state legislature where there is a strong basis in evidence that identifies the discrimination that warrants remedial action, such as race exclusive scholarships. Id.

While the Third Principle finds that race exclusive scholarships are acceptable as a remedial measure to remedy a finding of past discrimination, NBA submits that a body competent to make a bona fide finding of discrimination includes not only the courts, state legislatures, and federal and administrative bodies, but public bodies such as educational institutions. NBA reads the Third Principle of the Notice to include public and private governing bodies of institutions of higher learning as competent administrative agencies, qualified to take measures to remedy its own, internal findings of discriminatory conduct directed toward racial and ethnic minority groups.

As suggested by the Supreme Court in Bakke, supra, a governing body of an institution of higher learning is as competent as any state legislature or other administrative agency to undertake the fact-finding and decisionmaking contemplated by the Notice. Bakke, 438 U.S. 265. The institution of higher learning may be in the best position to evaluate the facts that would provide insight on the institution's acts of historical discrimination. The institution of higher learning is also the threshold expert agency to ascertain and compare, subject to judicial review, the past and present racial and ethnic composition of the institution.

From an efficiency standpoint, it makes sense that an institution of higher learning do the fact-finding contemplated by the Notice. The reason -- because any investigation undertaken by the administrative agency or state legislature would inevitably rely almost exclusively on the background data, figures, and other relevant information provided by the institution of higher learning.

More importantly, permitting an institution of higher learning to do the fact-facting would, to the extent practicable, insulate factual findings from gamesman politics. The political dynamics of a state legislative body seldom produces a bi-partisan consensus necessary to undertake a fact-finding to show historical discrimination in its jurisidction. NBA fears that the winds of politics may dictate, to a large extent, the outcome of the fact-finding by delineating the scope and extent of the undertaking. Certainly, voluntary compliance is the cornerstone of Title VI. Thus, allowing institutions of higher learning to voluntarily undertake such fact-finding is in the spirit of Title VI and consistent with the desirable practice of self regulation.

The Notice also mandates that the legislature possess a strong basis in evidence for identifying discrimination within its jurisdiction for which remedial action is required. Notice at 64549. NBA submits that this policy ought not dictate the probative facts to the legislature as to findings of discrimination, given the delicate principle of federalism. Further, the Notice proposes a standard, one of law, which may not

be able to be established as a matter of political will. In effect, the Notice standard encompassed in Principle Three places a virtually impossible burden on those who would attempt to establish invidious discrimination in the state. Cf. Podbersky v. Kirwan, 764 F.Supp. at 374 (justification of affirmative race-based remedy depends on whether there is a "strong basis in evidence" of past discrimination.)[9]

Reference in the proposed policy guidance to "state and local legislative bodies" implies that governing bodies of private institutions of higher learning are not competent to make findings of discrimination and subsequently establish race exclusive scholarship programs as a remedy. Title VI, though, draws no distinction between private and public institutions. Hence, the policy should be clarified to clearly state that the governing bodies of private institutions of higher learning, like Harvard, should not be precluded from doing under Title VI what the governing bodies of public institutions, like the University of Maryland, can do.

IV. PROPOSED PRINCIPLE FOUR

The Fourth Principle permits race based scholarships pursuant to an action by the U.S. Congress. As Congress enacted Title VI, which prohibits discrimination by institutions receiving federal financial assistance, this principle permits Congress to create

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[9] The court in Podberesky further noted that the final determination as to the existence of past discrimination will be made by the courts, and not by the Office of Civil Rights or other bodies like state legislatures. 764 F. Supp. at 374.

exceptions to Title VI by creating scholarship programs such as the Patricial Roberts Harris Fellowships, the Robert E. McNair Fellowships, and the Indian Education Fellowships. During the 1991-92 fiscal year, congressional and Executive sponsored programs will offer approximately $100 million in scholarship money for minority students. Nearly half of that amount is targeted to provide financial assistance to Native American students. See K. Cooper, "Race Based Student Aid: Practice and Policy" Washington Post, Dec. 26, 1991, at A21, citing U.S. Office of Management and Budget, "Catalog of Federal Domestic Assistance."

While the Notice states that it is targeting minority or race-based scholarship programs, there remain questions as to the precise reach of the Notice. See e.g., Comments of the United Negro College Fund, Inc., William H. Gray, III, President & CEO (Why is the attention all on race based scholarships? What about scholarships based on gender? Is there a concern about loosing the women's vote? What about national origin? If national origin is included, why the emphasis on race based scholarships? Perhaps we should consider cutting off scholarships based on religion. Or would this offend fundamentalists and other religious conservatives?). Answers to such questions should be provided by the Department of Education, unless the Notice is withdrawn as urged by several groups. Kenworthy & Weisskopf, University Groups Denounce Minority-Scholarship Policy, N.Y. Times, Mar. 5, 1992, at A19, Col. 6.

V. PROPOSED PRINCIPLE FIVE

The Fifth Principle permits funds for "race-exclusive" scholarship programs donated by a private individual or organization where (1) the funds do not limit financial assistance to other students outside the targeted class, and (2) the award by the private donor would further the legitimate objectives of the educational institution to provide funds on a need basis or to increase racial or ethnic diversity. The Notice states that institutions may not fund minority based scholarships, but that institutions may administer such scholarships funded by private, outside sources who have restricted eligibility to members of designated racial or ethnic groups. Notice at 64549.

NBA is puzzled by the private/institutional distinction drawn by the Department of Education because real dollars from private sources for such scholarships is minimal. Less than 10 percent of minority based scholarship programs are privately supported. The vast majority are funded through institutional resources, and federal and state education programs. See Exhibit "A".

Essentially, the terms of the Fifth Principle will require colleges and universities to "mix" privately-donated funds targeted to a racial or ethnic class, with other funds that may be used to further the educational objective of the institution. Under the rationale embraced by the Notice, a privately-funded race exclusive scholarship survives Title VI but institutionally-funded scholarships do not solely because of the origin of the funds. The basis for the public institution versus private institution

distinction might be on a more solid foundation if the public institution plays no role in the administration of the privately-funded scholarship.

From a common sense standpoint, the implementation of the proposed policy guidance as it relates to the private versus public distinction will be problemmatic as drafted. The Notice states that institutions of higher learning are prohibited from seeking funding to support minority-based scholarships and prohibited from intimating to donors that restrictions be placed on donations to accommodate a minority-limited scholarship. Id. at 64549. The proposed policy guidance suggests that any restrictions on the donations be proposed by the donors. Id. This distinction is specious, at best. What real difference does it make as to how the donation for the minority-based scholarship comes to the institution so as long as it was donated voluntarily?

The Fifth Principle should eliminate or modify the restrictions it places on those schools seeking to move toward private funding of race exclusive scholarships before the expiration of the four-year "grace period" for existing scholarship procedures that is recommended in the Notice. Id. at 64549.

Further, the Fifth Principle states that schools can only administer the donations if the "aid does not limit the amount, type or terms of financial aid available to any student." Notice at 64549. By way of explanation, this policy states that private race exclusive scholarships can only be used to fund aid packages that have already been assembled on the basis of other criteria,

such as financial need. Id. In essence, the Notice suggests that private donors of minority scholarships funnel their donations into a general scholarship pool, whereby the funds would, hopefully, be allocated to a minority student who qualifies for the general pool.

CONCLUSION

For the foregoing reasons, the Notice of Proposed Policy Guidance should be withdrawn or, alternatively, modified pursuant to the recommendations contained herein.

Respectfully Submitted:

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EXHIBIT A

STATUS OF MINORITY-DESIGNATED SCHOLARSHIP PROGRAMS

A. SURVEY OF 117 HISTORICALLY AND PREDOMINANTLY BLACK COLLEGES AND UNIVERSITIES, WITH A 33% RESPONSE. (Survey, February 6, 1991)

1. 26 race-specific scholarship programs were identified, including scholarships to increase the number of minority teachers and scientists and to increase the number of other-race students at HBCUs.

2. 15 of the race-specific scholarships were for non-Blacks and were mostly at institutions located in Adams states which fund these scholarships as part of desegregation plans

3. Of the 15 programs for non-Blacks, 5 consider race as a single factor for selection.

4. Of the 11 programs for Blacks, 5 consider race as a single factor for selection.

5. 16 of the 26 programs identified, consider a combination of race, need, and merit for selection.

6. Sources of Funds: 6 programs funded from private funds; 14 funded from state funds, and 6 funded from federal funds.

7. The percentage of race-specific scholarships of the total pool of scholarships at each institution ranged from 5% to 35%

B. SURVEY CONDUCTED BY THE NATIONAL INSTITUTE OF INDEPENDENT COLLEGES AND UNIVERSITIES ("NIICU") AND BY THE AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES ("ASSCU") ON STATUS OF MINORITY-DESIGNATED SCHOLARSHIP PROGRAMS, WITH A 63% RESPONSE.

Programs	NIICU	ASSCU
Percentage of colleges and universities offering minority designated scholarship programs	89%	83%
Number of separate programs	3,700	1,447
Recipients		
Estimated number of awards	16,200	18,777
Recipients as a % of total enrollment	0.6%	0.7%
Recipients as a % of minority enrollment	3.2%	3.7%
Funds		
Total Dollars Available for Minority-designated Scholarships	$114 mil	$24.3 mill.
Percentage of all student aid	2.5%	2.3%
Percentage of all institutional aid that is used for minority-designated scholarships	3.5%	6.7%
Source of Funds		
Percentage of funds from:		
Institutional sources	79.3%	39.5%
Federal sources	7.0%	15.7%
State sources	3.8%	39.3%
Other	9.9%	5.5%
Programs by Type		
Number in which minority status is the sole criterion	500 (13.5%)	243 (16.8%)
Number in which minority status is one of several criteria	3,200 (86.5%)	1,204 (83.2%)
	3,700	1,447

Comments of American Council on Education, (July 15, 1991)

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