

# **UCLA**

## **College Access**

### **Title**

Building on Success: Educational Diversity and Equity in Kentucky Higher Education

### **Permalink**

<https://escholarship.org/uc/item/4b27j1gg>

### **Author**

The Civil Rights Project/ Proyecto Derechos Civiles

### **Publication Date**

2008-09-29



# **Building on Success**

Educational Diversity and Equity  
in Kentucky Higher Education

**CHOICES BEFORE THE COMMONWEALTH**

The Civil Rights Project

September 2008

# **Building on Success**

Educational Diversity and Equity  
in Kentucky Higher Education

**CHOICES BEFORE THE COMMONWEALTH**

The Civil Rights Project  
September 2008

**Final Report**

## ACKNOWLEDGEMENTS

This report would have been impossible without the courage of Kentucky officials in commissioning an independent report of a very sensitive and important set of issues. We greatly appreciate the opportunity to prepare what we believe is the first independent assessment of the progress to date and the priority issues in racial integration and diversity for the future of an entire state system of higher education. We expected this project to be complex but it was far more challenging than we had imagined. Many people who worked with the Harvard Civil Rights project in Cambridge were involved in various ways and stages as well as those who have participated intensively after the project moved to California. The researchers who worked with us on this report played many essential roles:

Angelo Ancheta, University of Santa Clara Law School  
Maria Ledesma, Univ. of California at Berkeley  
William Trent, University of Illinois, Urbana  
Michal Kurlaender, Univ. of California, Davis  
John Yun, Univ. of California, Santa Barbara  
Chungmei Lee, Civil Rights Project, Cambridge  
Genevieve Siegel-Hawley, Civil Rights Project, Los Angeles  
Anne Driscoll, Univ. of California, Davis  
Gary Orfield, Civil Rights Project, Cambridge and Los Angeles

The administrative complexities were ably managed by :

Jennifer Blatz and Laurie Russman, coordinators, Civil Rights Project  
Judy Myoshi, UCLA and Keith Collar, Harvard Graduate School of Education  
Patricia Marin, University of California, Santa Barbara

The body of this report was written by Gary Orfield and the legal analysis appendix by Angelo Ancheta.

This project could not, of course, have been carried out without the cooperation and openness of educational leaders across Kentucky and access to the data system of the entire state higher education system. We were deeply impressed by many of those we encountered in the course of this study. The state is fortunate to have many thoughtful and capable educational leaders and administrators. No one was more important in making possible the complex relationships necessary to undertake this study than Sherron Jackson, who has ably managed an extremely challenging job for years in administering oversight of the state's diversity plan under the direction of the Committee on Equal Opportunities of the Kentucky Council on Postsecondary Education. He has a rare combination of passion for justice, respect for process, listening skills, understanding of the complicated terrain of his state and its institutions, and genuine desire to face real problems and solve them. We did not

always agree, but those of us who worked with him had the deepest respect for him. We appreciate the decision of the presidents of the campuses to fund this study and funds from our Ford foundation higher education project that helped us when the work expanded beyond what we had imagined.

Sometimes there is a tendency for people from the largest states with the most powerful institutions to think they are better than smaller states. We have often commented to each other, however, in the course of this study, that California and Massachusetts would do well to emulate Kentucky in the seriousness of its pursuit of equity in higher education.

## **CONTENTS**

<b>EXECUTIVE SUMMARY</b>	<b>6</b>
<b>INTRODUCTION: THE CHALLENGE AND THE GOALS OF THE STUDY</b>	<b>10</b>
<b>SECTION I: THE COMPELLING REASONS FOR CAMPUS DIVERSITY AND THE LESSONS OF RESEARCH</b>	
<b>The Value of a Diverse College Education: What the Evidence Shows</b>	<b>14</b>
<b>What Can Research Tell Us About Achieving Successful Diversity?</b>	<b>20</b>
<b>Progress and Challenges in Realizing the Educational Potential of Diverse Campuses</b>	<b>27</b>
<b>Alternatives for Admissions in a Diversity Context</b>	<b>28</b>
<b>The State and its People: Why Meeting the State’s Economic Goals Requires Racial Progress in Higher Education</b>	<b>35</b>
<b>SECTION II: BACKGROUND: HISTORY, CIVIL RIGHTS, AND THE DEVELOPMENT OF KENTUCKY’S REMEDY</b>	
<b>The Legacy of Mandated Segregation and the Desegregation Mandate</b>	<b>39</b>
<b>The Civil Rights Act and the Kentucky Plan</b>	<b>43</b>
<b>The State’s Civil Rights Policy</b>	<b>52</b>
<b>SECTION III: THE ENFORCEMENT PROCESS AND KENTUCKY’S UNIVERSITIES</b>	
<b>The Council and the Committee on Equal Opportunities</b>	<b>54</b>
<b>Kentucky’s Universities and Plan Enforcement</b>	<b>59</b>
<b>SECTION IV: CHALLENGES KENTUCKY FACES</b>	
<b>The Leaking Pipeline and Graduation Trends and Inequality</b>	<b>69</b>

<b>State Funding and College Costs</b>	<b>73</b>
<b>Kentucky’s Plan to Increase College Attainment</b>	<b>74</b>
<b>Student Success and Student Loss: What Happens After Enrollment?</b>	<b>78</b>
<b>Community Colleges and their Contribution: Developing a Critical Resource</b>	<b>85</b>
<b>A Viable Future for Kentucky State University</b>	<b>93</b>
<b>CONCLUSIONS AND RECOMMENDATIONS: FRAMEWORK FOR THE FUTURE</b>	<b>100</b>
<b>APPENDIX: LEGAL PRINCIPLES FOR A DIVERSITY PLAN</b>	<b>116</b>

## **EXECUTIVE SUMMARY**

After a third of a century of work to remedy the historic segregation of education in Kentucky's institutions of higher education, the state has, we believe, created a serious plan for educational opportunity and made major progress in overcoming its history of discrimination. The attainment of these goals has been aided through important reforms implemented in Kentucky's public schools and higher education system under state laws and by school desegregation, especially in Jefferson County. The state has provided substantial increases in funding for higher education. We find that the enforcement efforts by the Council on Postsecondary Education have been diligent and highly beneficial to the state. We see encouraging trends in the retention and graduation of African American students and in the production of a potentially more diverse future faculty. Most encouragingly, we find that the leaders of the state's institutions of higher education express strong agreement with the goal of increasing the diversity of their student and faculty communities, and working on creating academic communities where all are welcome and all students have the opportunity to learn from each other in positive and supportive settings. The state has made solid progress and some institutions have produced remarkable change.

In spite of the solid progress, however, the effort is far from finished. The leaders of Kentucky's higher education systems freely admit that there is much yet to do, particularly in terms of improving acceptance and success for minority students on campus and for recruiting and welcoming nonwhite faculty. One of the fundamental goals of the succession of plans has been to change the image and raise the status of the state's only historically black college, Kentucky State University. We believe that the remedy cannot be complete until the questions of a viable role and workable plan for KSU are successfully resolved. We conclude that after three decades of work on implementing a new mission, another major effort is needed to assure KSU a viable future.

Kentucky's goals of doubling the number of its college graduates to secure its economic future, and the goal of the Kentucky plan to produce equal enrollment and graduation levels for black students, are overlapping and interdependent. What civil rights policy requires in terms of social justice, and what the state policy demands in terms of economic competitiveness, require more successful integration of previously excluded groups of students into the higher education system. As we look at the educational pipeline in the state, there are four central problems in reaching the state's goals. The first is not a matter of higher education policy but shows the urgent need for a K-16 policy, since a state that loses a very large share of its students as high school dropouts cannot have a very high college graduation rate. Policies to rapidly increase the high school graduation level are urgently needed. Second, the state's campuses are dealing with a very high proportion of students needing remediation before they can take regular college courses. Since college costs are rising and college financial aid typically does not cover extra noncredit course time, this threatens the



future completion of students. Thirty years of national experience shows that this cannot be accomplished simply by raising high school requirements. Figuring out how to increase the level of preparation and to speed up needed remediation before the fall of the freshman year are urgently important goals. Third, though there has been a dramatic increase in community college enrollment, there is a very low level of successful transfer for and graduation of community college students from the four-year campuses. Without a pipeline that works between these institutions many students who work hard at a local community college will never realize their dreams and the state will not meet its goals. Fourth, there is a high level of attrition before graduation for university students and a long time between initial enrollment and graduation for those who finish. There are very serious problems in the educational pipeline and solving them will greatly assist in reaching civil rights goals. When pipelines leak there is a disproportionate impact on nonwhite students. Repairing them will help all students but especially those on the margins.

It is very understandable that after decades of effort the state should want independence from federal regulation and the campuses more autonomy from the Council on Postsecondary Education and its CEO committee. Eventually, the Office for Civil Rights will find the state to have fulfilled its mandates, and the future will be up to Kentucky state policy makers and educational leaders. We conclude that the state will need a new voluntary affirmative action policy and that it should be administered by the Council, but that relations could be improved significantly between the Council and the campuses. We suggest creating more of a partnership situation in which there would be more focus on learning from models of success around the state and engaging the researchers on campus to find out how to solve still outstanding problems. There should be incentives and rewards from the state as well as sanctions. Campus leaders freely admit that there is more work to be done, that monitoring has been important, and that the Council's role has made a difference. We conclude that the Council's role is essential to future progress.

The Council and all state institutions need to develop new affirmative diversity policies to replace the existing Kentucky Plan. There is increasingly compelling research evidence from many parts of the country showing that the education of all students is enriched, and their preparation for adult life deepened, by exposure to and understanding of students from other groups and cultures. Those new policies should be more extensive in terms of the groups they include but should be more limited in the way they use race in their implementation. For the future, the Kentucky Plan will need to expand to address a rapidly growing Latino population, which at the Plan's genesis was small in number. Latinos have their own legitimate civil rights claims, which were recognized by the Supreme Court in the 1973 *Keyes* decision, and typically tend to have college completion rates even lower than African Americans. We also recommend that the standards include American Indian students, though there are very few now in Kentucky, and that the state consider including poor students, including whites, in the state's areas of most intense and isolated poverty. We also recommend that once the goal of the policy shifts from repairing the historic

discrimination against Kentucky blacks to one of educational diversity, that Universities and colleges be given credit for including black, Latino and Indian students from outside Kentucky, since those students clearly add to the educational diversity on campus. These recommendations do not mean that the problems of educational equity for African Americans in Kentucky have been resolved, or that policy makers should ever lose sight of the fact that the African Americans have been the primary victims of the history of discrimination in the state, or that the completion of the drive for educational equity for African Americans that has been central to the Kentucky Plan is not a fundamental imperative.

Civil rights policies are vital but are only part of the solution to the problem of educational inequality. Admitting a poorly prepared student is not enough if the student doesn't feel welcomed on campus, if he or she does not have enough funds to persist, and if there are not the academic and counseling supports necessary to enable her to catch up and successfully adapt to the campuses' demands. The collaboration between public schools, colleges, and universities has to deepen since there are too many losses of students at transition points, and students are often neither prepared nor connected well between one level and the next. Both the Council and the CEO Committee have very appropriately targeted the goals of increasing persistence and timely degree attainment. Both of these goals need more work. Kentucky is a state where tuition is high relative to family income, creating huge obstacles for many families. Some of these are obstacles of not understanding the financial aid systems and how to access them, and some are sheer problems of affordability. There is a need for greater collaborative efforts between state policy makers, institutions, and supportive organizations, including donors, so that families have early access to financial aid information, including resources and opportunities. Priority should be given to policies that ensure that no student is excluded from pursuing higher education because of poverty.

As Kentucky prepares to move beyond its present plan, it must come into compliance with the Supreme Court's prohibition of admitting students solely on the grounds of race and develop more sophisticated ways of admitting students and, in some cases, of awarding financial aid and other benefits. Test scores, for example, tend to be very strongly related to family income, parent education, and school quality and to predict only a small fraction of a student's performance in college; relying simply on scores would tend to exclude disadvantaged students with strong potential. Educational leaders in Kentucky believe that race needs to be taken into account if gains are not to be lost and we agree. This must, however, be done in a more complex way, thinking about more aspects of students' potential and contributions to campus academic diversity. Under the Supreme Court's decision in *Grutter v. Bollinger* (2003), this requires an individualized and multifaceted review of student applications in situations where affirmative action is practiced. There has been some significant progress along these dimensions within the state and it is important that the state and institutions work together and share information about the most cost effective and educationally sound ways to meet these needs.

As the work moves forward it offers the opportunity for the state to build on its considerable achievements, and to adapt quickly and effectively to a substantial coming change in its population. Kentucky should be proud of its accomplishments. State leaders of higher education should now produce the blueprint for the next generation, while asking other parts of state and local governments and civic organizations to join more closely in plans that must reach well beyond the universities and colleges. These collaborations are necessary if the state is to reach its goal of rising higher education attainment and truly equal opportunity for all Kentuckians. A strong diversity plan and policies to strengthen the educational pipeline are vital parts of the state's excellent effort to rapidly increase its level of higher education and to develop all of its talent.

## INTRODUCTION: THE CHALLENGE AND THE GOALS OF THE STUDY

The state of Kentucky has a history of educational inequality, has had strong leadership in recent years for improving equity and achievement in its colleges and universities, and faces a future in which state leaders must deal with changing legal requirements within a backdrop of a changing population and economy. Though Kentucky has traditionally lagged behind in higher education, the state has attracted national attention for its sweeping reforms in the 1990s in both K-12 and higher education policy. In good measure because of leadership of citizens and officials in Jefferson County, Kentucky has also been a leader in the desegregation of its schools. The role of the state's Council on Postsecondary Education in the desegregation of the higher education system has been a very important development in Kentucky's effort to provide equal education access.

Kentucky is justifiably famous for both its 1990 Kentucky Education Reform Act (KERA), and the 1997 Postsecondary Education Improvement Act. The KERA law has been widely pointed to as an exemplar of strong state school reform. In *Education Week* newspaper's *Technology Counts 2008* report, Kentucky was identified as one of the national leaders in integrating technology into its schools.<sup>1</sup> State officials reported major gains in achievement scores, though those claims have been challenged by some.<sup>2</sup> At the very least, it is clear that the state attracted national attention and substantially increased school funding, at least at the outset of the reform. The 1997 higher education reform was described in one major report as "one of the foremost examples of postsecondary education reform in the country" which had had an "extraordinary impact" in its first years, a record which "convinced many who were skeptics in the past that they can make a difference in improving the lives of Kentuckians; and that Kentucky *is* a leading state in the nation on education reform" if it could continue the progress.<sup>3</sup> A number of the state's institutions of higher education have worked hard, in collaboration with the Council on Postsecondary Education, trying to fulfill the commitments of Kentucky's partnership agreement with the federal Office for Civil Rights to bring the state into full compliance with federal civil rights law. Clearly, for a state that was traditionally well behind, it has experienced a period of unusual leadership on a range of important educational initiatives.

---

<sup>1</sup> Education Week, *Technology Counts 2008*, March 27, 2008, pp. 40-41.

<sup>2</sup> Kentucky Department of Education, "Kentucky's NAEP Scores Show Gains Since 2000," Oct. 19, 2005; Daniel Koretz and Sheila Barron, *The Validity of Gains in Schools on the Kentucky Instructional Results Information System*, Santa Monica, RAND Corp., 1998. U.S. Department of Education, "Mapping Kentucky's Educational Progress 2008."

<sup>3</sup> Aims C. McGuinness, Jr., *An Assessment of Postsecondary Education Reform in Kentucky*, Submitted to The Prichard Committee for Academic Excellence, October 15, 2002.

As one of the 17 states with a long history of *de jure* segregation<sup>4</sup>, Kentucky educators have been challenged for a half century by the national struggle to overcome the legacy of separate and unequal schooling. Thanks to the long-term school desegregation of its major center of black population, Louisville-Jefferson County, Kentucky has become the least segregated state in the nation for African American students among states with significant black enrollments. The state has been actively working on desegregation of its higher education system for a quarter century. After showing real leadership in desegregation, it is characteristic of Kentucky educators that they would commission a totally independent outside evaluation of their progress in the desegregation of higher education, while seeking guidance on the issues the state will face should it be found to be in compliance with the Civil Rights Act of 1964. Kentucky may soon need to devise a new plan, building on its success to date, that would continue progress and comply with the standards set down by the Supreme Court for voluntary affirmative action. So far as we know, no other state has taken the step of opening itself and its records to independent analysis.

This report is an effort to assess what has been accomplished in successfully diversifying and desegregating historically segregated and unequal higher educational institutions across Kentucky, and how this was done. The report discusses the changing legal setting for these initiatives, analyzes the educational achievements and challenges, and suggests how the progress can be continued and expanded in changing circumstances. Much has been accomplished, but educational inequality continues in some important ways. There are still massive gaps in the educational pipeline that threaten realization of the state's goals. Changing circumstances, both in law and in the state's demography, require new approaches that deal both with major vestiges of the historic discrimination against African Americans as well as equity for Latinos, whose numbers are now growing fast.

We were honored to be chosen by the Kentucky Council on Postsecondary Education to carry out this assessment, and we assembled a team of experienced experts to conduct the study. We have learned a great deal from the information that the state and the higher education institutions have made available. State officials have provided the data we requested, and leaders of the institutions have spoken to us candidly. We are deeply impressed by the quality of the state's leaders and the seriousness with which they take the task of providing higher education opportunities to groups that have been historically excluded.

The Civil Rights Act of 1964 required the desegregation of historically segregated higher education systems. Its enforcement triggered the development of a historic collaboration between state and university officials and federal civil rights authorities

---

<sup>4</sup> The eleven states of the old confederacy, and the six "border states" from Oklahoma to Delaware which had slavery but remained in the Union, all had legally mandated educational segregation at the time of the Supreme Court's 1954 *Brown* decision. In addition there are two other states which did not have legally mandated segregation but created public colleges for blacks, Ohio and Pennsylvania, which were also subject to federal civil rights requirements.

in the implementation of the Kentucky Plan. The state has been waiting for years for a federal decision on its status under the partnership agreement. Whether or not it is released from federal supervision, state educational leaders report that they are eager to build on existing gains and move forward to a better and more comprehensive approach. This report tallies what has been accomplished and what is yet to do, and suggests a path forward for the state and its educational institutions.

The report deals with diversity on Kentucky's campuses and examines the record in moving all students from enrollment to graduation. It considers the achievements on campuses and the attitudes of their leaders, as well as the role of the Council on Postsecondary Education in monitoring and enforcing the state plan. It offers an updated assessment of changes in the law, outlines the legal standards that will prevail after the Office for Civil Rights process ends, and concludes with an assessment of the choices before the state and its institutions.

Our basic conclusion is that the state and the institutions of higher education have made major progress under the Kentucky Plan but still confront some large challenges, and that a continued strong focus on issues of access, equity, and diversity at both the state and campus levels will continue to be essential for some time to come. Leading educators across the state share this view. We find a broad consensus among the leaders of higher education that successful diversity is a central responsibility and goal of their institutions and has very important educational value.

We believe that the goal should be the greatest feasible representation of all parts of the state's population in its institutions of higher education, as provided in the federal standards promulgated in 1978<sup>5</sup> and modified in 1992 by the Supreme Court's *Fordice* decision. There is still so much inequality in the society and in educational experiences that change cannot happen without a strong and sustained determination. The role of state leadership, particularly by the Council on Postsecondary Education, has been critical in creating a strong focus on these issues, and there has been remarkable leadership on some campuses, and in some schools and programs. We find, however, that there are elements of the Kentucky Plan that have not yet been achieved, and that there are ways in which the state oversight could be improved. When the federal government releases Kentucky from the requirements of a remedial plan, a future state plan must, of course, comply with the requirements of the Supreme Court in its 2003 decisions governing voluntary affirmative action in higher education.<sup>6</sup> We believe that that change could be carried out successfully in the state, preserving much of what has been learned in the past decades, and expanding the goals to deal with changes in the state's present and future population. The ultimate aim of civil rights policy is to remove the external compulsion as institutions transform and incorporate the goals of equity and diversity into the heart of their

---

<sup>5</sup> "Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education," published in the *Federal Register* on February 12, 1978, (43 Fed. Reg. 6658). 59 Fed. Reg. 4272.

<sup>6</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Gratz v. Bollinger*, 539 U.S. 244 (2003).

normal operations, and move beyond the issues of admission to issues of building truly integrated academic communities. Our recommendations address ways to achieve this transition. We see great potential for success in Kentucky.

## **SECTION I: THE COMPELLING REASONS FOR CAMPUS DIVERSITY AND THE LESSONS OF RESEARCH**

### **The Value of a Diverse College Education: What the Evidence Shows**

The first stage of desegregation policy is remedial and mandated. Institutions must implement changes because they have violated the rights of racial or ethnic groups over long periods of history. As much as possible they must provide remedies that make up for the violations. That is the basic story of the long first phase of desegregation policy in the states that mandated racial segregation for many generations. The remedial goals have yet to be accomplished in a number of states. Those requirements triggered the creation of the Kentucky Plan a generation ago. The constitutional imperative rests on the Supreme Court's conclusion in *Brown v. Board of Education* 54 years ago that legally mandated segregation is inherently unequal and does irreversible harm to students excluded from educational opportunities available to whites.

Repairing violations has not been the rationale, however, of the many institutions that practice some form of affirmative action in states which never mandated segregation and in the hundreds of private institutions. The vast majority of America's selective colleges have pursued voluntary affirmative action for more than four decades. Their central goals are to contribute to successful racial and community relations and, in educational terms, to produce the educational benefits of diversity for all students, including white students. The policies rest on a deepened understanding by educators and researchers that racial separation, whether or not resulting from state segregation policies, limits and harms all groups of students and weakens the educational possibilities of universities wishing to prepare students to live and work successfully in a multiracial society. When voluntary affirmative action in college was first challenged in the Supreme Court in the 1978 *Bakke* case<sup>7</sup>, the Court upheld the legitimacy of considering race as one of the factors in admissions because it found that diversity was a compelling educational interest to universities, something that enriches and deepens the educational experience of all students. In the *Bakke* decision the Court relied heavily on the findings of a Harvard faculty committee report which noted that Harvard College had actively pursued student diversity on many dimensions for generations, believing that it created the most powerful educational experience. Harvard faculty were convinced both that racial diversity was critical in a society where race is a fundamental cleavage, and that given the systematically unequal preparation of students it would not be achieved without affirmative action.

---

<sup>7</sup> *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).



Since *Bakke*, researchers in several disciplines have done extensive research that shows that the Court was correct in its finding 30 years ago. This research was relied upon by the Supreme Court in its 2003 decision, *Grutter v. Bollinger*, upholding the University of Michigan law school's affirmative action plan.<sup>8</sup> In that decision the Court cited several books and reports summarizing a wide body of evidence showing that students of all races reported positive experiences, which changed their understanding of important subjects. Research following cohorts of students through the nation's most competitive colleges showed that the black students who were admitted although they did not have the highest scores did very well in extremely competitive colleges and made large, sometimes disproportionately large, contributions to their professions and communities.<sup>9</sup> Some of the research conducted by University of Michigan scholars followed students over a multi-year period and showed that students with diverse classes actually made long-term gains in the complexity of their thinking.<sup>10</sup> Other research showed that minority students who found their way into elite schools tended to have a good deal of earlier interracial experience, but many of the white students came from more segregated backgrounds and thus, in an important way, had the most to gain in learning to understand and function across racial lines. The research also showed that faculty of color tended to deal with different subjects, and teaching methods, than white faculty, thereby enriching the educational experience and the research work of universities along several dimensions.<sup>11</sup>

The research does not, of course, show that diversity ends all gaps, or solves all racial problems, only that diverse educational experiences are far superior to segregated ones. It shows that affirmative action is not a situation where expanding opportunity for new groups takes opportunities from whites, but one where all groups gain, intellectually and in preparation for life in a diverse society. There is now massive research on the value of diversity that educators and policy makers in Kentucky should examine as they consider long-term policy. Kentucky educators and policy makers thinking about the future of the state policy should read the powerful evidence two former college presidents and great scholars, William Bowen and Derek Bok, reported in their study of the lifetime successes and contributions made by black students admitted to the nation's most elite colleges under affirmative action. They should also study Professor Patricia's Gurin's research on the long-term learning

---

<sup>8</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>9</sup> William Bowen and Derek Bok, *The Shape of the River*, Princeton: Princeton University Press, 2001.

<sup>10</sup> Patricia Gurin, Jeffrey S. Lehman, and Earl Lewis, with Eric L. Dey, Gerald Gurin, and Sylvia Hurtado, *Defending Diversity Affirmative Action at the University of Michigan*, Ann Arbor: Univ. of Michigan Press, 2004.

<sup>11</sup> Research cited by the Supreme Court included Bowen and Bok, *The Shape of the River*, Princeton: Princeton University Press, 2001; Orfield and Kurlaender, *Diversity Challenged*, Cambridge: Harvard Education Press, 2001; and M. Change, D. Witt, J. Jones, and K. Hakuta, *Compelling Interest: Examining the Evidence on Racial Dynamics in Colleges and Universities*, Palo Alto: Stanford University Press; as well as a brief citing data from many studies by the American Educational Research Association. (*Grutter v. Bollinger*, 539 U.S. 306, at 330.)

effects of diverse learning opportunities for all groups of students. They should read the surveys of the high school juniors in Jefferson County schools about the impact of integrated schooling on their confidence about their ability to live and work successfully in the diverse society of the future. They should examine the hundreds of studies from across the world analyzed by Professor Thomas Pettigrew, about the conditions of successful interracial opportunities. And they should examine the lessons from a half century of educational integration research summarized in a statement submitted to the U.S. Supreme Court in 2006 by 553 scholars from 201 universities and research centers, as well as the analysis of that research by the independent National Academy of Education, a group of 100 leading education researchers in the U.S. We believe that a review of that research will show educators and leaders in the state the significance of diversity efforts and accomplishments, as well as highlight the importance of work that continues to perfect these efforts. Although Kentucky still has a much smaller proportion of nonwhites than the nation as a whole, its population trends show that the skills and understanding acquired in diverse settings will become continually more important.

In our discussions with educational leaders in Kentucky, and in reading the mission statements and strategic plans of the various universities, we have found widespread agreement on the compelling importance of diversity for an education that can effectively prepare a student for living and working in contemporary American society. Their experiences have convinced them that positive efforts to achieve racial equity provide solid benefits to their institutions. It is clear that this has become a widely shared way of thinking about affirmative action issues in Kentucky's colleges. Once the goals of the Kentucky Plan are fulfilled, affirmative action issues will be decided by Kentucky officials and educators, and the educational consequences of diversity will undoubtedly play a central role in those discussions and decisions. This report both evaluates the progress in reaching the remedial goals of the Kentucky Plan and examines the legal issues, the policy questions, and the educational importance of the next stage of policy making in the state.

### **Research on Compelling Interest and Continuous Monitoring of Programs**

Once Kentucky is no longer under OCR supervision, it will be subject to the very different legal situation of voluntary affirmative action. In the remedial setting of an OCR plan the goal is to overcome the segregation and inequality produced by a history of racially separate and unequal higher education. The remedy must be directed, of course, to assist the group that suffered the historic injustice. In voluntary plans, the basic justification changes to one of the educational value of diverse learning and teaching in a university community, to the role of the universities in training leaders for major institutions in a diverse society, and to fostering the success of democratic processes in communities facing racial and ethnic division and inequality. To justify voluntary race conscious policies, institutions and the state must affirm diversity as a basic part of their mission. In justifying that compelling interest institutions can rely on an extensive body of research across the U.S., some of it explicitly recognized by the U.S. Supreme Court, but their case will be even stronger

if they show how diversity contributes to enriched learning opportunities, leadership development, and positive community relations at the state and institutional levels.

Locally based research could look at many dimensions of the value of diversity to the university and its students. Survey research showing the assessments of the learning experience by students and faculty could be part of this work. Studies of campus climate can show relationships between and treatment of different groups of students. Conducting these studies over time can show the trends of improvement and identify areas needing further work. All of Kentucky's universities have produced some data on these issues, and some have conducted in-depth campus surveys. High quality institution-based social research that can stand up to professional scrutiny and documents educational outcomes over time for all groups of students would be especially powerful.

Some of the best compilations of national research on the impacts of diversity on educational experience and on the other fundamental values recognized by the Supreme Court are reflected in the books and briefs of educational experts cited by the Supreme Court in 2003. In a very unusual part of the decision, the Supreme Court directly cited a number of social science studies to support its conclusion that research has proved that diverse educational experiences strongly benefit students and provide a compelling justification for colleges to make limited use of race-conscious. A related source is the statement of 553 scholars on the educational value of integration cited in the Louisville public school case and provides much of the basis for Louisville's efforts to pursue integration through other routes.

The best example, by far, of any university fully documenting the compelling educational values of diversity was the effort of the University of Michigan in mobilizing research about its campus. Both the University as a whole and the Law school in particular supported and/or welcomed research showing the specific local context and results. The most important part of that effort was led by Patricia Gurin who followed groups of students over time to observe the effects of diverse experiences on the complexity of thinking of students several years after their experience in classes that were or were not diverse. Professor Gurin documented broad long-term educational impacts of great importance to education.<sup>12</sup>

The Michigan Law School carefully documented its strategy for selecting students using multiple dimensions of review but actively seeking a critical mass of nonwhite students to avoid the token integration that leaves individual nonwhite students isolated in classes and expected to speak for their entire race when conversations turn to race-related issues. Very limited diversity levels of course also limit the possibility of white students experiencing contact with other groups of students, their ideas and their experiences.

---

<sup>12</sup> Patricia Gurin, Expert Report of Patricia Gurin prepared for her testimony in *Gratz v. Bollinger* and *Grutter v. Bollinger*, 1999. Patricia Gurin, Jeffrey S. Lehman, and Earl Lewis, with Eric L. Dey, Gerald Gurin, and Sylvia Hurtado, *Defending Diversity: Affirmative Action at the University of Michigan*, Ann Arbor: University of Michigan Press, 2004.

The Civil Rights Project carried out a survey of the law students at the University of Michigan Law School and Harvard Law School with a grant from the Mellon Foundation that permitted us to use the services of the Gallup Poll staff to obtain the high response rate needed to give our findings statistical significance. The excellent response rate obtained by Gallup from Michigan and Harvard gave us confidence that we had a valid sample and that the questions were professionally administered. The findings of those surveys showed that all groups of students reported substantial and positive impacts of diverse learning experiences and that many students believed it was critical to an effective legal education. The survey showed that, on a number of important substantive legal issues and questions about legal careers, the students reported that their views had been affected and changed by the interaction that took place in class and outside of class among students of different groups. This position was the conclusion not only of the minority students, who may have personally been aided by affirmative action, but also of substantial majorities of white and Asian students, the groups whose interests had presumably been harmed according to the claims of affirmative action critics. One of the findings of the study was that few black or Latino students got to these law schools without considerable experience in diverse racial settings, but that white students had more isolated development. In other words it was the white students who especially benefited from the preparation the law school offered them about living and working in racially diverse settings.<sup>13</sup> The book in which this study, “Diversity and Legal Education,” appeared was cited by the U.S. Supreme Court as one of the bases for its conclusion about the compelling interest colleges have in creating diverse learning opportunities.<sup>14</sup> Universities could well carry out studies and surveys of this sort on specific kinds of learning, on the development of deeper understanding of multiple viewpoints, and on the quality of the general college experience.

The Civil Rights Project also worked directly with Kentucky’s largest school district in developing and interpreting surveys of black and white students in high school to assess the impacts of their experiences in diverse schools, particularly on their attitudes and feeling of preparation to live and work successfully in racially diverse settings. The findings were highly positive and very similar from both blacks and whites in the district’s high schools.<sup>15</sup> That survey, which was submitted in evidence in the case that ultimately went to the Supreme Court was part of the record that led the Court majority to conclude that integration was, indeed, a compelling educational goal, even while overturning some of the methods used in Jefferson County. Similar issues could readily be explored in a college context and could help provide evidence of a compelling interest in all three of the major justifications upheld by the Supreme

---

<sup>13</sup> Gary Orfield and Dean Whitla, “Diversity and Legal Education: Student Experiences in Leading Law Schools,” in Orfield and Kurlaender, *Diversity Challenged: Evidence on the Impact of Affirmative Action*, Cambridge: Harvard Educational Publishing Group, 2001, chapter 6. (Our earlier web surveys at ten leading law schools produced similar results but inadequate response rates).

<sup>14</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>15</sup> Michal Kurlaender and John Yun, “Is Diversity a Compelling Interest? Evidence from Louisville,” in Orfield and Kurlaender, *Diversity Challenged*, chapter 5.

Court in the *Grutter* case. The Civil Rights Project would be happy to share the Diversity Assessment Questionnaire used in those surveys and similar surveys in a number of other major districts across the U.S.

Sylvia Hurtado at UCLA and a number of colleagues from other universities have done important studies of the impact of campus climate. This work suggests strong relationships between the way students experience the racial climate on campus and academic and social outcomes.<sup>16</sup> Some Kentucky campuses have carried out such studies, and it would be valuable for all campuses to implement sample surveys from time to time to show progress and/or problems in these important dimensions. Kentucky institutions use the NESSE survey of student engagement. We have found several of the items included on the survey to provide valuable comparable data on some important issues of racial climate. Careful attention to these survey items over time and in-depth follow up with focus groups as well as exit surveys for graduating students could yield very useful information for improving campus climate.

There has been far less research on the impacts of faculty diversity on the educational experiences on campus but every reason to think that it is substantial. There is evidence that minority faculty members both contribute new subjects and materials to the educational process and tend to use different methods of instruction. Obviously, they play a role in making nonwhite students feel welcome on campus. Faculty focus groups and surveys would be invaluable in documenting such impacts on subjects covered, courses offered, kinds of research undertaken, mentoring of nonwhite students, kinds of outreach and community service provided, and other outcomes.

A diversity plan also needs to consider when such an effort would no longer be necessary to respond to the Supreme Court's concern that race-conscious policies should not be continued when the underlying inequalities have been solved. A plan could specify what would trigger ending of student or faculty affirmative action for a particular group—for example, full proportionate access of a previously excluded group for a number of years and evidence of equal treatment on campus and successful overcoming the continuing effects of a history of discrimination and marginalization on campus. Success should be reflected in issues of persistence and in student attitudes and experience. We recommend that the Council promise to review its goals and the record of attainment every five or ten years and announce when the conditions have been met for a particular group to no longer be included in accountability goals for an institution. The goal of civil rights and affirmative action policies is not to create a permanent focus on issues of race but to create conditions of successful institutional change to the point where such policies will no longer be necessary.

---

<sup>16</sup> See, for example, Sylvia Hurtado, Alma R Clayton-Pedersen, Walter Recharde Allen and Jeffrey Fmitem. "Enhancing Campus Climates for Racial/Ethnic Diversity: Educational Policy and Practice," *The Review of Higher Education* 21, no. 3, Spring 1998: 279-302; Sylvia Hurtado, "Latino Educational Outcomes and the Campus Climate," *Journal of Hispanic Higher Education*, 4, no. 3: 235-251 (2005).

### **Issues in Devising a New Plan**

Kentucky officials and educators are planning for the next phase of affirmative action in which a legal mandate growing out of the desegregation of historically segregated colleges gives way to voluntary action by the state in pursuit of the educational and community benefits of educational diversity. Part of this journey will be guided by the Supreme Court's definition of permissible pathways, discussed at great length in the legal appendix, but much of it must be guided by a diagnosis of the problems the state and its institutions face in achieving full equity in higher education and the key points at which interventions will be needed. Much of this report is about those issues. Part will also be guided by research on what will actually work under what conditions both for getting diverse student bodies and producing more effective diverse campuses with more equitable outcomes for minority as well as white students. This report considers what is known about achieving successful diversity. It recalls the historical context, which is essential in thinking about some aspects of the future plan. It discusses the changing nature of Kentucky's population and how those changes interact with the state's educational goals—something that is essential to the framing of future plans. This report also deals with the issues the state has yet to fully accomplish that were incorporated in the original state plan 26 years ago. A great deal has been accomplished, but the issues of equalization of the state's HBCU and of creating equal education across racial lines have not been fully achieved. Whether under a diversity plan, or still under OCR supervision on some issues, those issues demand attention. In any complex process of regulation on sensitive social issues, the quality of the relationships between state officials and the institutions are very important, and we examine both the strengths of those relationships and the ways in which they could be improved.

### **What Can Research Tell Us About Achieving Successful Diversity?**

Part of the assignment of our team was to discuss the implications of research for future planning. We have been deeply involved in research in this area for the last 12 years, producing five books and a variety of reports. The entire structure of this report derives from our understanding of what are the most critical issues and challenges higher education institutions and state governments confront in reaching the goals Kentucky has chosen. Although there has been extensive research in a few areas, some of which have limited applicability to Kentucky, most of the work focuses on very highly selective universities, so well grounded knowledge that can be immediately used by most Kentucky institutions is limited.

Campuses across Kentucky and across the country have developed hundreds of programs and initiatives to help attainment of all groups of students and positive relationships on campus. Many of these policies and programs doubtless have some positive consequences and contribute to outcomes, such as the generally positive findings from the NEESE surveys. It would be very useful to have a research-based set of recommendations that would tell campuses nationwide what would work.

Unfortunately serious scholarly work on these programs is very limited. In terms of on-campus development programs, an exhaustive five-year study by experts for the American Policy Forum concluded in 2001:

Despite the intensive search for evaluations of postsecondary programs that serve minority students, few studies were found and most them were not evaluations, but descriptive reports. At the beginning of the search, we contacted a large number of organizations that provide college scholarships for minority youth. None had evaluations. We received suggestions and indications about “great studies” being done in one state or another, only to find that these studies would not meet the acceptance criteria for rigorous evaluations disaggregated by race or ethnicity. The landscape of evaluations of postsecondary interventions for minority students is as arid as the programs are numerous.<sup>17</sup>

The basic problem is that many of the interventions are weakly funded and there has been no priority by either the federal government or private philanthropy to finance serious scientific evaluations. Given the enormous diversity of program and campus contexts the task would be overwhelming and the results very complex. Many of the people who run these programs are so busy working with students, often helping them meet very difficult challenges at the individual level, that they have neither time nor resources or the expertise to conduct evaluations that would meet professional standards. That does not mean that a number of these programs may not be effective, but it does mean that they seldom have the kind of evidence that would persuade a skeptic. Obviously, credible evaluation data can support the appropriateness of university programs not only in meeting any possible legal challenges but also in terms of gaining support and understanding of such programs both on campus and in the policy process.

Many of the issues that colleges face in creating more effective diversity are similar or the same as those they face in creating more effective educational opportunities for all of their students. We cannot lay out a plan for comprehensive reshaping of all of the universities but we do suggest, on the basis of what we see as the best available research, issues that must be addressed if there is going to be a reasonable likelihood of success as well as methods for the state’s institutions to create new knowledge and exchange experiences in ways that allow them to assess and improve their own outcomes.

### **Moving Toward Integration: Student Persistence and Success**

One of the most impressive facts about research on interracial institutions is that a theory developed more than a half century ago about the conditions for building positive relationships has not only held up but has been demonstrated to hold in many

---

<sup>17</sup> Donna Walker James, Sonia Jurich, and Steve Estes, *Raising Minority Academic Achievement: A Compendium of Education Programs and Practices*, Washington: American Youth Policy Forum, 2001.

settings across the world in more than 500 studies.<sup>18</sup> The theory is the theory of equal status interaction developed by Gordon Allport in his classic 1954 book, *The Nature of Prejudice*.<sup>19</sup> The theory is based on a simple proposition. In order to deal with prejudice, to change the attitudes of those who have attitudes about racial inferiority, and to effectively incorporate minorities into historically racially or ethnically exclusive institutions, the institutions must create a situation in which people actually interact together in conditions of equal status and respect. The theory specifies the conditions under which this is likely to take place. One of them is strong visible support of institutional leaders who create and support rules and policies of fairness, respect and equal treatment. At the classroom level this can mean bringing together students in a positive setting on projects where they must work together across these normal lines of division to achieve academic objectives. Extensive research by Robert Slavin of Johns Hopkins, by Elizabeth Cohen, of Stanford University, Walter Stefan, now at the University of Hawaii, and others have developed techniques that realize these objectives. Slavin's Student Team Learning method has been extensively tested and shows positive gains both in learning and race relations.<sup>20</sup> Most of this work was developed for public schools, not for colleges, but many of the principles are directly transferable. We recommend that administrative teams and faculty groups review this research and that plans be developed to train faculty members, teaching assistants, and student service workers in techniques applying this research. The basic goal of this approach is to move from what many researchers call "desegregation," or the physical bringing together of students from different backgrounds, to "integration," a transformative kind of change in which institutions become genuinely multicultural and create conditions for realizing the true educational gains that can come from genuine understanding of each others' experiences and world views.

One of the positive aspects about emphasizing creation of conditions of equal status interaction is that it offers faculty members an opportunity to improve both learning outcomes and relationships and intellectual exchanges within classes with relatively simple techniques that do not require uncomfortable discussion of personal racial attitudes and stereotypes.

A major College Board report, *Priming the Pump: Strategies for Increasing the Achievement of Underrepresented Minority Undergraduates*, reported severe limitations on the quality of available research in their search for programs that seemed to work to produce high achievement. Authors Gándara and Maxwell-Jolly write:

We began by conducting literature searches, using several databases to identify programs about which something had been written and published. This yielded some programs, but not many ... few programs have formal

---

<sup>18</sup> Thomas F. Pettigrew and Linda Tropp, "A Meta-Analytic Test of Intergroup Contact Theory" *Journal of Personality and Social Psychology*, 2006, Vol. 90, No. 5, 751–783.

<sup>19</sup> Gordon Allport, *The Nature of Prejudice*, Reading MA: Addison-Wesley, 1954.

<sup>20</sup> Robert E. Slavin, *Using Student Team Learning*, 4<sup>th</sup> ed., Baltimore: Johns Hopkins Univ., 1994.



evaluations or other written documentation ... we came to the realization that virtually *every* campus had at least one program; and most campuses had more than one ...<sup>21</sup>

They found that most of the programs with some reasonable data were involved in preparing students for the sciences, that there were few resources for serious evaluation in the great bulk of other programs, and, to make evaluation more complicated still, they found that there were often multiple strategies being used simultaneously on a campus with the concerned administrators using any university, governmental, or private resources they could identify to help the students succeed.<sup>22</sup> This “kitchen sink” approach may be a sensible administrative response, given limited knowledge and resources, but it makes it almost impossible to assess the impact of any component.

Since educational research shows that most educational programs have limited effects, it is very important to know where to focus efforts and how to evaluate your own campus program.

In examining 20 programs and approaches, the College Board study found five broad fields of effort: mentoring, financial aid, academic support, internships and professional opportunities, and “psychosocial support.”<sup>23</sup> They found mentoring to be very popular but a vague concept with many meanings and little research evidence. On financial aid there was more evidence of the impact of costs and the value of ample assured funding in producing continuity and completion, but relatively little serious study of campus decisions and very little evaluation of aid efforts campuses were making.<sup>24</sup> Across the U.S., there has, for example, been a move from focusing financial aid on need to “merit” aid programs that give students funding on the basis of test scores or other measures, whether or not they need it. Research on these programs has shown that such policy changes typically move to an increasingly white and relatively affluent group of students.

There is clear evidence that tuition and aid policies tend to have disproportionate impacts on minority students who are more influenced by the “sticker” price of college and whose families have much more limited resources and readiness to incur debt.<sup>25</sup>

There was a strong focus by campuses on academic support including bridge programs, study centers, tutoring, study groups and special courses or programs of study. The researchers found the strong evidence for certain kinds of study groups,

---

<sup>21</sup> Patricia Gándara and Julie Maxwell-Jolly, *Priming the Pump: Strategies for Increasing the Achievement of Underrepresented Minority Undergraduates*, New York: The College Board 1999, 23-4.

<sup>22</sup> *Ibid.*, 25-29.

<sup>23</sup> *Ibid.*, 29.

<sup>24</sup> *Ibid.*, 33-34.

<sup>25</sup> Donald Heller and Patricia Marin, *Who Should We Help? The Negative Social Consequences of Merit Aid Scholarships*, Cambridge: Civil Rights Project, 2002.

such as those developed by Uri Triesman, then at Berkeley, and for efforts to foster a sense of community and network for the minority students in the programs.<sup>26</sup> The researchers reported that most of the effective intervention programs they found had remarkable leaders, “visionary individuals who had a *passion* for finding a remedy.... They are also charismatic individuals who easily attract followers .... As is typical of highly successful people, all could be described as ‘workaholics’ who have devoted major portions of their lives to these endeavors.”<sup>27</sup>

Ernest T. Pascarella and Patrick T. Terenzini’s comprehensive review of research in their 2005 book, *How College Affects Students, Vol. 2: A Third Decade of Research*, attempts to describe a vast literature of hundreds of studies, most of which do not meet high standards of scientific research, but which tend to consistently identify some important elements of the steps that can increase student persistence and success in college. The seventy pages of chapter 8, “Educational Attainment and Persistence,” offer their interpretation of the entire body of research. They report evidence that starting in a four year campus is an advantage, stopping out harms eventual completion, and that there is some evidence that smaller campuses are more beneficial, everything else being equal, perhaps because of greater social integration with the college community.<sup>28</sup> Controlling for other factors, they report that attending an HBCU tends to modestly increase the academic success of African American students, probably because of the a more positive, supportive and smaller environment compared to greater isolation and more negative attitudes in white institutions.<sup>29</sup>

Student persistence and completion are powerfully affected by a student’s academic success, particularly in the first year of college, suggesting the great value of anything that increases that initial success and cuts failure. They cite evidence on the value of freshman seminars, special support for less-prepared students enrolled in the “killer courses” that tend to sort out students in majors and in pre-professional programs, and developmental education in increasing student persistence. They also find convincing evidence for the benefit of special counseling efforts and comprehensive programs such as the Student Support Services program of the federal TRIO programs.<sup>30</sup> Their review of research on financial aid finds that adequate aid, particularly grant aid, improve persistence and attainment, particularly for students from low-income families and particularly at the beginning of college.<sup>31</sup> Working more than 15 to 20 hours a week and increases in tuition have negative impacts on student persistence,

---

<sup>26</sup> Gándara and Maxwell-Jolie, 36-38.

<sup>27</sup> *Ibid.*, 45.

<sup>28</sup> Ernest T. Pascarella and Patrick T. Terenzini, *How College Affects Students, Vol. 2: A Third Decade of Research*, San Francisco: Jossey-Bass, 2005: 376-386.

<sup>29</sup> *Ibid.*, 393-94.

<sup>30</sup> *Ibid.*, 396-406.

<sup>31</sup> *Ibid.*, 407-410; for an earlier review of the earlier research reaching similar conclusions: see Gary Orfield, “Money, Equity, and College Access,” *Harvard Educational Review*, 62, no. 3 (Fall 1992): 337-372.

full-time enrollment and success.<sup>32</sup> There is also evidence, some of it from Indiana, about the value of plans and policies which provide a guarantee of funding for college for disadvantaged students who meet certain levels of educational success.<sup>33</sup>

Pascarella and Terenzini cite a substantial body of research showing that negative racial climates on campuses harm the academic performance and lower the persistence of African American, Latino and American Indian students and that positive efforts on campus can diminish this harmful impact. “Factors in student persistence appear to include friendly and courteous administrators ...; effective communication of institutional rules and expectations, fair enforcement of rules, and involvement of students in decision making ...; support and encouragement from administrators ...; supportive residence advisers and academic counselors ...; and administrators who define a hospitable racial climate ...”<sup>34</sup>

What the research suggests is that there are a wide variety of things that college leaders, staff and faculty can do that can positively impact the likely persistence, success and positive experiences of minority students. The most important objectives should be to devise a plan within each institution to address the various gaps and limits that prevent minority enrollment, academic success in the first year, feeling of belonging and welcome in the academic and social community of the university or college, help in getting the financial aid for which a student is eligible, and advising as he or she confronts obstacles or needs to make important decisions as the college experience unfolds. The research is consistent showing that there is no magic bullet, there are a number of potentially valuable positive steps, and leadership can make a difference. Obviously where there is hostility or lack of welcome or sense of unfairness or disrespect on campus, that is a critical threat to the goals of successful diversity and strong leadership is imperative in setting a strong sense of institutional values. Beyond that, however, there are many things at many levels in the institution that can make a difference. It is important that they are evaluated in that light, that positive steps are encouraged and supported, that the campus find leaders and faculty members who contribute positively to these efforts, and that no one assumes that simply admitting diverse students completes the job; it is only the first step of a multidimensional transformation that has the potential to enrich the education and future of all students if properly handled. Much of the evidence can be directly linked to Allport’s theory of equal status interaction. Obviously, however, serious and independent ongoing evaluation are necessary parts of this process to make certain that resources are not continually committed to efforts that show no demonstrable effects, and that those producing positive outcomes are sustained and expanded.

---

<sup>32</sup> Pascarella and Terenzini, 414-416.

<sup>33</sup> Edward P. St. John, Glenda D. Musoba, Ada B. Simmons, “Keeping the Promise: The Impact of Indiana’s Twenty-first Century Scholars Program,” *The Review of Higher Education*, 27, no. 1, Fall 2003: 103-123.

<sup>34</sup> Pascarella and Terenzini, 420.

We know of no institution in Kentucky or elsewhere that has done all these things perfectly and believe that almost all have efforts to address some parts of these challenges. We believe that the Kentucky accountability system focusing on

admissions, retention, success, and faculty integration progress is a very appropriate example of state leadership which sets the framework for positive plans on campuses to achieve those goals. Good leaders acknowledge that it is an ongoing challenge and try to keep it in focus as a basic institutional mission.

Although universities have faculties with many members who were trained in the conduct of research, there is very little research on campus programs. There are countless efforts across the country to intervene at one or another point of loss of students and to facilitate transitions. Most of them are either not evaluated at all or evaluated in ways that produce no usable knowledge. It is also highly probable that best approaches depend on local circumstances and challenges. A program that might work very well for bringing Chicanos from a barrio in East Los Angeles into a state university campus would probably not work well for a student from an isolated impoverished rural area in East Kentucky. We believe that universities could use their own on-campus faculty to conduct research that would be of great value to their own campuses and, at the same time, aid the careers of professors and produce important research opportunities for some students. We also believe that such research could have a great deal of credibility with the administrators, faculty and staff whose efforts are essential to the creation of successfully diverse campuses.

Most existing program evaluations, when there are any, involve a survey either at the end or at the beginning and end of a short intervention and the survey is limited to those who have participated in the program. Typically these surveys produce satisfyingly positive findings but prove nothing and may actually mislead those who want to devise successful solutions. Most of these surveys have leading questions and do not probe impacts with any depth or sophistication. Most students or faculty who have participated in a program or training effort tend to rate it favorably in the short term. What these surveys cannot answer are the following questions:

- 1) Do the reported results actually link to long-term outcomes?
- 2) Does the information and learning actually change behavior?
- 3) Would the changes have happened without the program?
- 4) Were the participants a non-representative group (selection bias)?
- 5) What were the elements that had lasting positive or negative effects?
- 6) Why did students not participate or leave the program before the end?
- 7) Was the instruction actually well designed?

Money spent on surveys that cannot answer any of these questions is wasted. It would be much better to have less research that met some or all of the following standards that would cure most of the deficiencies: The evaluations should sample the overall population, obtain a high response rate, have a control group or random assignment to

the treatment, include those who left the program, not be carried out by those operating the program, use questions carefully written to permit a full range of responses, checking negative as well as positive outcomes, follow the participants as long as possible, carefully protect the anonymity of the respondents, and study actions and beliefs long after the intervention ended to determine whether or not there were lasting impacts. Research that met these standards would not only be very useful for campus leaders and program operators and beneficial in terms of better outcomes, but would also be powerful evidence if programs were challenged.

## **Progress and Challenges in Realizing the Educational Potential of Diverse Campuses**

### **Student Surveys at the Universities**

Much can be learned from statistics about enrollment and graduation, the views of campus leaders, and the reports of the CEO visits, but it is, of course, very important to have information directly from the students. Kentucky's Universities explore the attitudes and engagement of their students through participation in a major national survey program, the National Survey of Student Engagement. This survey attempts to measure the quality of student experience on campus. The Kentucky officials provided us with access to the data set, which provides a way to compare systematically the experience of white and African American students on a number of dimensions critical to acceptance, comfort, and experience on campus. College is a complex experience for many students with both positive and negative dimensions. Going onto a campus, whether in a formal process such as the visits of the Committee on Educational Opportunity or informally, it is possible to find students of color who have had bad as well as good experiences with various aspects of college life.

It is also possible to find white students with widely varying perceptions of their own experiences. In terms of concern about racial equity the key question is not whether the campuses are perfect or fulfill all the desires of all students. Of course, they do not. The central civil rights question is whether or not there are systemic differences by race.

Even in the absence of discrimination, it would be reasonable to expect that students who are members of a small minority group, where they are often isolated in class and where there are few professors who share their racial background, would feel more uncomfortable and less welcome. When we decided to look at these surveys we expected to find at least modest differences of that sort. If there were serious racial problems, of course, the differences might be much more dramatic.

What the data from Kentucky shows is, in general, a clearly positive story. On a number of the issues we examined there were not substantial differences in the reported experiences of black and white students. When asked about their relationship with administrators and campus offices, for example, African American students were significantly more likely to rate them in the highest categories of being "helpful, considerate, flexible" and less likely so see the campus staff as "unhelpful,

inconsiderate, rigid.” 38% of blacks gave the highest two ratings and only 5% the lowest ratings. On the more important parallel question for faculty relationships, the rankings were virtually identical with 49% of whites and 51% of African Americans ranking faculty in the two highest categories and just 1% of blacks and 4% of whites giving the most negative ratings.

The same pattern held in students’ ratings of their relationships with other students. 60% of whites and 58% of African Americans chose the two highest categories of “friendly, supportive, sense of belonging” while only 3% of each group talked about fellow students being “unfriendly, unsupportive, sense of alienation.” Researchers often talk about the importance for students of achieving “social integration” with campus life. The University Presidents we interviewed were quite concerned about progress on this dimension and some of the campuses have experienced negative incidents of racism. Students, overall, however, show quite a positive pattern with few differences on these questions by race.

The educational value that makes diversity a compelling interest for universities is, of course, what students learn when they encounter people with different experiences, different social backgrounds and connections, and different attitudes. When asked whether the campus encouraged “contact among students from different economic, social, and racial or ethnic backgrounds” one-sixth of black and white students checked “very much” and 17% of whites and 23% of African Americans said “very little” with most students coming out somewhere in between.

These responses obviously suggested that more could be done but also that the experiences of whites and blacks tended to be parallel on this dimension. Students were less satisfied with the extent of including “diverse perspectives in discussions or writing assignments.” Only one student in twenty said that this happened “very often,” another third said “often,” and 30% of African Americans and 23% of whites checked “never.” Once again, the responses raised challenging questions for university leaders, but they were not questions that showed major racial differences in experiences. The responses to both of these questions suggested that significant groups of both African American and white students thought that the campuses could do more to take advantage of diversity. Overall, however, the similarity of responses across race to a variety of questions suggested that Kentucky’s collegians, their professors and university staff members were not highly polarized on the basis of race and that African American students saw their situation much as white students did. These were responses to encourage Kentucky educators and to challenge them to take the next steps as the state considers how to move from compliance with a civil rights plan toward true integration of its colleges and universities.

### **Alternatives for Admissions in a Diversity Context**

The Supreme Court requires not only that there be a compelling reason for perusing diversity on campus, but also that the plan be “narrowly tailored,” using race only where there is no good nonracial alternative to achieve their diversity goals. To the

extent that any public institution in Kentucky is admitting students solely on the basis of their race under the OCR remedy, that will become illegal under a voluntary diversity plan. Although it is less clear, the situation of scholarships awarded solely on the basis of race will also be at serious risk. Colleges will have to think about whether there are nonracial alternatives that would work and, if not, to develop processes in which race is only one of a number of factors considered in reaching decisions that are based on a holistic review of student applications. The Supreme Court made it clear that colleges do not have to try every conceivable alternative but that they should carefully examine plausible options. Of course, in the Kentucky institutions that generally admit all qualified students and have little or no affirmative action in admissions, these issues are irrelevant and they do not have to undergo any major review or change in admissions policies. Affirmative action is a major issue at only about one-fifth of American colleges since most campuses admit the vast majority of students meeting their minimum requirements. It is very important to note that the great bulk of the research on alternatives to affirmative action are about highly selective institutions, not about relatively open access regional campuses. What this research has to say is most relevant to the University of Kentucky which, we believe, has already made the necessary adjustments to its admissions process before they were legally required.

There are very few non-racial alternatives that have been seriously explored. Efforts to simply replace race with poverty have clearly shown that, in many circumstances, race and poverty are not equivalent and that it is quite possible to admit considerable numbers of students with low family incomes without achieving racial integration. At the University of California at Berkeley, for example, an experiment with preference for poverty was expected to help Latino and African American and poor white students enroll but it ended up producing a surge of Asian immigrant students, students from immigrant families with relatively high educational levels but the low current incomes that affect many first generation immigrants.<sup>35</sup> Poverty, especially when measured by current income does not tap many key dimensions of inequality—it does not deal with prejudice, it does not deal with the segregation of middle class black families into communities with poor schools because of housing discrimination. It does include children of privileged families and schools where there has been a recent divorce or sickness, regardless of their wealth, and there are many other dimensions of complexity. The reality is that poverty is a reasonable proxy for race only in two- race circumstances where there are vast differences between the races in terms of income.

The other major alternative, used in three states, has been the “percent plans” which grant automatic admission either to any campus, or to some public university, to all students in a state that achieve a certain standing in their high school class—top 10%

---

<sup>35</sup> Jerome Karabel, “No Alternative: The Effects of Color-Blind Admissions in California,” in G. Orfield and E. Miller, *Chilling Admissions: The Affirmative Action Crisis and the Search for Alternatives*, Cambridge: Harvard Education Publishing Group, 1998, chapter 3.

in Texas, 20% in Florida, and 4% in California. The 4% plan in California identifies few students who would not be eligible for admissions to the University of California system at any rate and its principal impact on the limited number of students it affects is from the outreach associated with the plan. It does not provide guaranteed access to the elite institutions in the system, only an assurance that the student will be admitted to one of the various campuses. Its principal effect is symbolic, and it has not offset the impact of losing affirmative action at the flagship campuses, where relative minority representation has fallen substantially in spite of the fact that there are now many more nonwhite students with high scores and academic averages.<sup>36</sup> The Florida Plan, known as the One Florida plan, also admits students only to the system, which includes some colleges vastly less selective than any in the University of California system. Very few students who meet its course taking and other requirements would not have been eligible for admission to some Florida public four-year institution without the plan. Since it does not provide access to the more competitive campus, especially the University of Florida, its impact is also largely symbolic, and the claims that have been made about it are simply inaccurate.<sup>37</sup>

The one case which has been widely cited as an example of the success of the percent plan approach is the University of Texas at Austin, a highly competitive flagship campus which has guaranteed access to the most desirable public university in the state to any student in the top ten percent of his high school class. This plan has permitted a significant, though partial, recovery to the losses from the outlawing of affirmative action in the 1996 *Hopwood* U.S. Court of Appeals decision, which was ultimately overturned by the Supreme Court's 2003 *Grutter* decision, and has increased the number of communities and schools sending students to this important campus. The Texas plan, however, is much more complex than it seems on the surface and the success it has had is largely dependent on the high levels of racial segregation in Texas high schools which makes it possible to practice affirmative action on the school rather than the individual level. The plan had little impact until several key elements were added. Perhaps the most important was the Longhorn Scholarship program, providing scholarships attached exclusively to particular high schools which were highly impoverished and had not sent students to the campus. Given the very high level of segregation in Texas and the relationship between poverty and racial segregation, especially in large urban districts, and in the overwhelmingly Latino area of the state in the Rio Grande Valley, it was relatively simple to identify schools where the students would be almost all from underrepresented minorities. Very high level recruitment at the school level was used, including personal appeals from the University's top leaders who traveled to

---

<sup>36</sup> Catherine Horn and Stella Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences*, Cambridge: Harvard Civil Rights Project, 2003.

<sup>37</sup> Patricia Marin and Edgar K. Lee, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida*, Cambridge: Harvard Civil Rights Project, 2003.



individual high schools promising scholarships that were available only to students in those schools. The University did not have to select the students on the basis of race since the very high segregation made it possible to select on the basis of community or other variables and get schools where the top 10 percent would surely be black or Latino. In addition the University set up a very strong special set of courses and experiences for the incoming students to ease their adjustment and increase their success on this vast campus. Even with all of this, the enrollment numbers fell far short of representing Texas' rapidly changing population.<sup>38</sup>

The Texas plan relied on segregation and basically substituted affirmative action for schools for affirmative action for students and radically reduced the role of university admissions officials and faculty in selecting the campus' student body. Over the past twelve years the percentage of "10 percent" students automatically admitted to the University has soared so that this system now accounts for the vast majority of new students. By 2007 the plan was accounting for about 70% of freshman admits and the University was fighting for changes.<sup>39</sup> Among other problems, the system forced the University to admit, for example, a student they considered much less prepared from a very weak high school over a very well prepared black or Latino student in the 75<sup>th</sup> percentile in one of the state's strongest schools, where almost all the students were operating at a competitive college level. As the plan was projected to grow to cover almost all freshman admits, the university would lose its power to holistically consider many aspects of a student's potential contribution to the campus. The inflexibility and unequal treatment of similar students who happened to be in very different kinds of high schools were among a variety of problems that led the University to prefer a return to more focus on traditional affirmative action.

A broader question is whether such a plan would work at all on many campuses without the reputation and the resources and commitment of UT Austin. The second most highly rated university in Texas, the highly competitive main campus of Texas A&M, tried a number of the same techniques used in Austin with much less success even though the percent plan was equally applicable there. Without the kind of leadership shown in Austin, the special Longhorn Scholarships, a history of being relatively welcoming to minority students in recent times, the prestige of being the state's dominant campus and the dedication of major resources, there was no assurance that the plan would work.

The larger problem in thinking about this possibility in Kentucky is that the state does not have the patterns of school segregation that make this approach possible in Texas. Texas is one of the nation's most segregated states, particularly for Latinos. Kentucky, in contrast, has long been one of the nation's most desegregated states for

---

<sup>38</sup> Horn and Flores, 2003.

<sup>39</sup> "10 Percent Plan Survives in Texas," *Inside Higher Education*, May 29, 2007.

black students because of the extensive desegregation achieved in the metropolitan Louisville region.<sup>40</sup>

We believe that the new plan of the Jefferson County school district will retain a high level of desegregation. This means that a percent plan in Kentucky would likely undermine rather than facilitate the diversity of higher education given the continuing racial achievement gaps in the state. If one tried to use another measure such as the percent of poor students in a school, in Kentucky such a plan would target white

Appalachian areas but miss many of the low-income African American students in desegregated urban schools. For many reasons, in other words, a percent plan is very unlikely to achieve high levels of racial diversity in Kentucky.

There are other policy changes and some techniques that might produce relative gains in minority admissions. Clearly using test scores and cut points for admissions is a negative approach for diversity since these scores are strongly related to social status, parent education, family income, race, and high school quality and students can gain advantages on tests if they have sufficient funds for test prep coaching programs and taking the tests multiple times in search of a higher score. In any case, as the testing industry and professionals have consistently said in their code of ethics no test is an adequate measure of students and none should be used as an exclusive bases for making major decisions about a student's life. After all tests only predict a modest fraction of the variation in college performance in the first years of college. Tests are not designed to and cannot predict performance in careers. Even if tests were ended, however, the impact may be relatively modest on admissions since grades are also highly unequal by race. A part of a good diversity plan should be a serious assessment of the racial consequences of admissions criteria, particularly test score cut points, and consideration of relevant alternatives. Many U.S. colleges have become test optional in admissions because of these problems. Tests provide useful but limited information and many colleges tend to treat test scores as a reliable and neutral measure of capability to succeed in and benefit from college. None of these tests are neutral measures of aptitude, which is why the name of the SAT was changed, and all of them strongly reflect the results of unequal opportunity. Any diversity plan should consider the best way to deal with these dilemmas.

Another possibility for pursuing diversity without considering race directly would be a fundamentally different way of assessing the potential of students in disadvantaged schools. A well-known example of this approach is the Posse Foundation which operates in New York and a number of other major cities and selects students from these cities' public schools through a method that emphasizes other talents such as creativity, leadership, and persistence and then sends groups (or "posses") of these students to a number of leading colleges in the U.S., including some institutions in Tennessee and Indiana. This program requires the receiving colleges to offer four-

---

<sup>40</sup> Gary Orfield & Chungmei Lee, *Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies*, Los Angeles Civil Rights Project/Proyecto Derechos Civiles, August 2007.

year scholarships and pay other costs for the entire group of students, regardless of their financial need, and it has reported excellent success in the persistence, graduation and campus leadership for students who might well not have been admitted under other procedures.<sup>41</sup> Although participation is not limited by race, the fact that the sending city's schools are overwhelmingly segregated minority institutions helps produce a substantial majority of students of color in each posse. This is a relatively modest and costly program typically sending only a small group each year to a campus. Since it is not established in a Kentucky city and the state's only big city has an integrated metropolitan school system, the process is not likely to work within Kentucky in its existing form. Nevertheless, there are doubtless lessons to be learned from Posse research about expanding the criteria that are considered in admitting students and thinking about creating groups of students who would come to campus together in ways that they would lend each other support.

The only real alternative likely to work in Kentucky's selective institutions is the development of the kind of holistic review including race as one of a number of factors considered in admissions authorized by the Supreme Court's decision. Comprehensive view of a student's record is the process long followed by the nation's selective private universities which review the full file of all plausibly qualified students and do not use either simple cut scores on tests or grades or race and ethnicity as sole factors in selecting their student bodies. Typically a file includes an application with responses to a number of questions about student experiences, a personal essay, recommendations, a transcript and test scores and the files are read by more than one reader. Many public universities said for many years that they could not do this but a number of the largest have now decided that they must and that they can, including UCLA, which receives more applications than any other U.S. campus, more than 50,000 a year. The University of Kentucky has developed processes to implement such multidimensional screening. We believe that the best way to initiate such full file review is for each campus practicing selective admissions and considering race to form a planning team to draft tentative plans and then to visit at least one other relatively similar institution which has implemented such a process to permit learning from the experiences and insights of counterparts about what worked and what problems to be prepared for in the implementation of a new process.<sup>42</sup> Obviously lessons about how to do this while keeping costs under control are very important.

---

<sup>41</sup> Deborah Bial and Alba Rodriguez, "Identifying a diverse student body: Selective college admissions and alternative approaches" *New Directions for Student Services, Volume 2007 Issue 118, (July 2007), 17 – 30.*

<sup>42</sup> The initial experience at one large Univ. of California campus is described in Susan Wilbur and Marguerite Bonous-Hammarth, "Testing a New Approach to Admissions: The Irvine Experience," in G. Orfield and E. Miller, *Chilling Admissions: The Affirmative Action Crisis and the Search for Alternatives*, Cambridge: Harvard Education Press, 1998, chapter 8.

### **Patching the Pipeline**

Transitions from one level of educational institution to the next are always complex. The transition from elementary to middle school is often a time of real difficulty and coming into high school can be much worse. Many students disappear before finishing high school. Choosing and gaining access to college and putting together the resources needed to go pose huge challenges for many students. Transfer levels are often poor for community college students no matter how much they plan to get a four-year degree when they start. Very well prepared students who come from educated families and strong schools and teachers with mastery of subject matter transferring with friends into an institution that welcomes them and where the culture is known and comfortable to the students face the best possible circumstances. Transitions are particularly difficult for students from segregated minority and low income backgrounds who often have few or none of these advantages.

The barriers are often multiple. The students come from families and live in neighborhoods which usually have much more limited resources for intellectual development and lack the peer groups that can be such important sources of knowledge, information and values for many students. Because of financial problems they often lack continuity in their education as their families move and live in a succession of troubled neighborhoods often served by schools lacking experienced teachers and classrooms operating at a competitive level as well as good pre-collegiate courses. Students facing these obstacles (and their parents) often have very limited knowledge of what is necessary to prepare for college or the implications of the choices they are making for courses and tracks in their schools. These students typically have little information about colleges and few contacts knowledgeable about them, something that gives extraordinary importance to the role of counseling. Finally, it is very clear that cost and perception of cost are major barriers and often lead to decisions that seriously diminish the possibility of success in college. The things that need to be done, in terms of broad categories, include:

- 1) Providing more students access to strong schools before college
- 2) Greatly strengthened counseling for students and parents in high school
- 3) More strong pre-collegiate courses and programs in weak high schools
- 4) More collaborative programs with colleges to give disadvantaged students experience with college and stronger precollegiate skills
- 5) Simplification of financial aid processes and forms and much stronger communication and help in obtaining financial aid for which students are eligible
- 6) Increased professional communication about students between levels of institutions
- 7) Welcoming and effective initiation to their participation in the campus community

- 8) Accountability systems that are fixed to prevent negative decisions about students and to reward institutional investment in and success with students needing extra help

## **The State and its People: Why Meeting the State's Economic Goals Requires Racial Progress in Higher Education**

As Kentucky moves from mandated civil rights enforcement to a voluntary plan for educational diversity it is very important to consider not only the state's history and obligations but also its new challenges and its future. Thinking about who Kentuckians are and how their society and economy is changing are vital parts of planning.

Kentucky is a state of 4.2 million people growing about one third slower than the rest of the U.S. Its population is spread out along a state that stretches from Virginia.

to Missouri, from Illinois to West Virginia. It borders seven states, and the two largest metropolitan areas are along the Ohio River on its Northern boundary. The Cincinnati-Northern Kentucky area was home to 2.1 million people in 2006, while the Louisville metro area has a population of 1.2 million. The only other substantial metro complex was Lexington with a metro population of .4 million. Bowling Green had .1 million. Much of the state has a low density rural and small town population.

Kentucky is a state that borders the South and the industrial North and stretches from the East far into the Midwest. It was settled early with the first crossing of the Appalachians by major migrations from the original 13 states, becoming the 15<sup>th</sup> state, in 1792, just three years after the Constitution was adopted. Kentucky is one of the "border states" between the old South and the Midwest. Its highest share of the national population came in 1830 when it had about an eighth of the national population, and almost a fourth of the residents were black. It was a slave state but never had the massive black population of the South and remained with the Union during the Civil War. Much of its land was unsuitable for plantation culture and was settled by small subsistence farmers. The state has experienced slow population gains, growing little more than a third from 1950 to 2000 and accounting for only 1.4% of the 2006 total U.S. population. Kentucky is much whiter than the U.S. total population and has many fewer immigrants and students speaking other languages. The U.S. Census Reported that in 2006 Kentucky had 4.2 million residents of whom 90.2% were white, 7.5% black, 2.0% Latino, 1.0% mixed race, and .2 percent Indian. (The black population had been 6.9% in 1950). The Eastern part of the state is part of Appalachia and is a center of severe poverty. The state's slow growth meant that the major immigration related changes in other parts of the country were coming much later in Kentucky. The state in 2000 had only 2% of residents born in other countries, and only 3.9% speaking a non-English language at home, but there were clear signs of change. It had only about one-seventh the national proportion of Latinos and one-fourth the national proportion of Asians. But the numbers are beginning to change

significantly so it has to look to the experience of other states further along in these demographic changes.

Kentucky is a state with relatively low levels of college completion with only 17.1% of adults 25 or over reporting that they had a BA degree or higher levels of education, and with average incomes significantly below the national average. The median household income was well below the national average.<sup>43</sup> These two facts are, of course, strongly related and are fundamental to the state's recent higher education reform goals.

Across the U.S., the nonwhite share of the population continually grows because nonwhite families are younger, have larger families, and immigration is now overwhelmingly Latino and Asian. These trends are beginning to be evident in Kentucky. The largest sector of Kentucky's small Asian population is from India, followed by smaller groups from several South and Southeast Asian nations and the Philippines. The largest of the American Indian communities still present in the state is from the Cherokee Nation, which inhabited the Appalachians when white settlement began.

Eastern Kentucky has large areas of isolated white poverty, and low education levels rarely found outside of Appalachia and some parts of the rural South. The 2007 report *Kentucky Kids Count*, shows that there are a number of counties in Eastern Kentucky that have few non-whites but have very high levels of child poverty, including a contiguous six-county area in Eastern Kentucky where more than 40% of the children live in poverty.<sup>44</sup> Most of those extremely impoverished counties have less than a dozen black children.<sup>45</sup> Kentucky has both a history of racial discrimination and areas of profound rural white poverty. The Kentucky Plan and other state initiatives are intended to cure the remaining racial inequalities and serve all the state's people.

Residential communities in Kentucky were relatively stable, in a country where frequent moves are the norm. In 2006, 83% of the people living in Kentucky were living in the same place they lived a year earlier; 10% had moved during the past year from another residence in the same county, 4% from another county in the same state, 3% from another state, and less than 0.5% from abroad.<sup>46</sup> Kentucky does not face the turbulent community change common in coastal and sunbelt states.

The state's public school enrollment in the 2006-2007 school year was 668,337 students. 84% of the students were white, compared with 56% of all U.S. students, while 10.6% of Kentucky students were black and 2.4% were Hispanic. Asians

---

<sup>43</sup> See table 1.

<sup>44</sup> Kentucky Youth Advocates, *Kentucky Kids Count, 2007 County Data Book*, p. 48.

<sup>45</sup> *Ibid.*, 17.

<sup>46</sup> Source: American Community Survey, 2006.

accounted for just one percent of students and American Indians slightly more than one student in a thousand. Only 4.4 percent of Kentucky teachers were nonwhite.<sup>47</sup>

**Table 1:**

<b>Census Bureau Data for Kentucky, 2006</b>		
	<b>Kentucky</b>	<b>USA</b>
Population, percent change, April 1, 2000 to July 1, 2006	4.1%	6.4%
Persons under 5 years old, percent, 2006	6.6%	6.8%
Persons under 18 years old, percent, 2006	23.8%	24.6%
Black persons, percent, 2006	7.5%	12.8%
American Indian and Alaska Native persons	0.2%	1.0%
Asian persons, percent, 2006	1.0%	4.4%
Persons of Hispanic or Latino origin, percent, 2006 (b)	2.0%	14.8%
White persons not Hispanic, percent, 2006	88.4%	66.4%
Foreign born persons, percent, 2000	2.0%	11.1%
Language other than English spoken at home, pct age 5+, 2000	3.9%	17.9%
Bachelor's degree or higher, pct of persons age 25+, 2000	17.1%	24.4%
Persons per household, 2000	2.47	2.59
Median household income, 2004	\$37,046	\$44,334
Per capita money income, 1999	\$18,093	\$21,587
Persons below poverty, percent, 2004	16.3%	12.7%

*Source: Census Bureau, America Community Survey*

Kentucky research shows, however, that things are about to change rapidly, and in ways that must be considered if the state is to reach its goals of increasing its number of college educated people. The state was facing a projection for slow growth overall, while experiencing a significant increase in Hispanic population. In the very recent past, Kentucky has been one of the ten most rapidly growing states in the number of Hispanic residents, though it started from a very low base. Within a decade, the Kentucky Long-Term Policy Research Center, which was established by the state government, projects that the proportion of white high school graduates will drop from 89% to 81%, and the percent of Hispanic grads will soar from 1% to 8% almost equaling the black share of 9%.<sup>48</sup> Since whites are the most likely to graduate from college, and Latinos have by far the lowest level of college graduation on a national level, this change presents Kentucky with a major challenge. However, this change is not reflected in the Kentucky plan and has not yet been a systematic part of the state’s planning for diversity in higher education.

Kentucky’s educational policy makers have been acutely aware of the need to drastically and rapidly increase the state’s education levels. The state’s plan to double the percentage of college graduates reflects the facts that workers without

<sup>47</sup> Kentucky State Department of Education website, “Kentucky Education Facts, updated Jan. 23, 2008; “Superintendent’s Annual Attendance Report,” updated Jan. 31, 2008.

<sup>48</sup> Kentucky Long-Term Policy Research Center, “Kentucky High School Graduates by Race and Ethnicity,” “Trends and Implications of Hispanic Immigration in Kentucky,” Nov. 14, 2006.

postsecondary education have experienced a substantial net decline in real per capita income in the past third of a century and that, in the fierce inter-state competition for business and jobs in a globalized economy, an educated workforce is essential to economic growth. The fact that the state's share of nonwhite high school graduates will nearly double in a decade, according to current trends, means that successfully reaching and educating those students is a matter of urgent economic and social necessity.



## **SECTION II: BACKGROUND: HISTORY, CIVIL RIGHTS, AND THE DEVELOPMENT OF KENTUCKY'S REMEDY**

### **The Legacy of Mandated Segregation and the Desegregation Mandate**

Civil rights policies like the Kentucky Plan are required because of a long history of state laws requiring segregation. Even as the state plans to move on to voluntary policies, the history that produced civil rights mandates must be kept in mind, and the state must carefully review whether or not it has fully achieved the goals set in its agreement with the U.S. Office for Civil Rights. The U.S. Constitution requires a remedy for a history of state-mandated segregation--a plan to correct the inequalities those violations created. The 1964 Civil Rights Act requires the federal government to enforce those rights in institutions receiving federal dollars. So before we examine the current realities in the campuses, we need to think briefly about why the problems were created, which groups of Kentucky citizens were denied their rights, and how policy and practices have evolved over recent decades. It is particularly important to keep in mind the continuing consequences of the state's decision more than 120 years ago to confine higher education for African Americans to a state institution that was supposed to provide an opportunity equal to that available for generations to whites in the University of Kentucky and the state's other white institutions.

Kentucky was settled early and slavery came with the westward movement of settlers from Virginia. Kentucky was one of the nineteen U.S. states to operate separate public colleges for blacks and whites, a group that included all the 17 former slave states which maintained segregation laws until the *Brown* decision, plus Pennsylvania and Ohio.

Kentucky created a separate college to educate blacks, who were forbidden to enroll in the white public campuses. Founded in 1886, two decades after the Civil War, the college then called the State Normal School for Colored Persons had a responsibility to train black teachers for the legally segregated black public schools. When the U.S. land grant college act was enacted in 1890<sup>49</sup>, the states with segregation laws were required to designate a black institution as the land grant college for blacks. The Land Grant College Act provided:

That no money shall be paid out under this act to any State or Territory for the support and maintenance of a college where a distinction of race or color is made in the admission of students, but the establishment and maintenance of such colleges separately for white and colored students shall be held to be a compliance [provided there was] ... a just and equitable division of the fund

---

49 Second Morrill Act of 1890 Act of August 30, 1890, ch. 841, 26 Stat. 417, 7 U.S.C. 322

to be received under this act between one college for white students and one institution for colored students ...<sup>50</sup>

In the early 1900s, when the Tuskegee model of industrial education rather than college for blacks was advocated by Booker T. Washington,<sup>51</sup> the name changed to the Normal and Industrial Institute for Colored Persons in 1902. A 1910 study classified the Institute as an industrial school, not a college, and reported that it had minimal admissions requirements.<sup>52</sup> The study contacted about a third of all African Americans in the U.S. who had ever graduated from college and identified only 27 of them who were born in Kentucky.<sup>53</sup> The Institute's name was changed to Kentucky State College for Negroes during the 1930s. It was renamed as a University following the civil rights era, in 1972. It has always been a small institution.

The white land grant college, of course, is the University of Kentucky. The state did not honor, for many years, the federal act's requirement of "a just and equitable division" of funds.

Kentucky had a long history of legally imposed segregation. In his 1997 book, *Fifty Years of Segregation, Black Higher Education in Kentucky, 1904-1954*. Professor John A. Hardin of Western Kentucky University recounted the history from the enactment of the Day Law of 1904, which prohibited even private colleges from educating blacks and whites together. As in many Southern states, before the Supreme Court decision in the *Sweatt v. Painter* case in 1950,<sup>54</sup> black graduate and professional students were forced to leave the state to be educated in professions not taught in the state's only black college until Lyman Johnson, who became a preeminent Kentucky civil rights leader, sued the University of Kentucky in 1949.<sup>55</sup> In reviewing the Hardin book the *Journal of Southern History* observed that Hardin's research "convincingly documents the ways in which Kentucky's white politicians kept black colleges starved for cash, hoarded funds for black over white schools, refused to make any meaningful attempt to establish black graduate schools, and resisted black attempts to challenge either such inequities or the segregated educational system itself."<sup>56</sup>

Kentucky's segregation laws were featured in two major Supreme Court decisions, one in 1917 striking down the Louisville law, upheld by Kentucky courts, that

<sup>50</sup> Ibid.

<sup>51</sup> C. Vann Woodward, "The Atlanta Compromise," Chapter 12, *Origins of the New South, 1877-1913*, Baton Rouge, LSU Press, 1951; Booker T. Washington, *Up from Slavery*, New York: Heritage Press, 1970, reprint of original 1901 ed, chapter 13.

<sup>52</sup> W.E.B. DuBois and Augustus Granville Dill, *The College-Bred Negro American*, Atlanta: Atlanta Univ. Press, 1910, p. 13.

<sup>53</sup> Ibid., 55.

<sup>54</sup> John A Hardin *Fifty Years of Segregation Black Higher Education in Kentucky, 1904-1954*, Lexington: University Press of Kentucky, 1990; *Sweatt v. Painter*, 339 U.S. 629 (1950).

<sup>55</sup> Doris Wilkinson, "In Memoriam. Personal Reflections on the Life of Lyman T. Johnson, 1906-1997," *The Journal of Blacks in Higher Education*, No. 18 (Winter, 1997-1998), pp. 135

<sup>56</sup> *The Journal of Southern History*, Vol. 66, No. 3 (Aug., 2000), pp. 668-69.

mandated residential apartheid, literally making it illegal for families to move into zones reserved for the other race.<sup>57</sup> In the case from Berea College, the Supreme Court upheld the Kentucky law that prohibited this progressive small private college from continuing its practice of educating black, as well as white students, unless they did so on racially separate campuses at least 25 miles apart.<sup>58</sup> Although Kentucky was one of the last states to embrace segregation laws after the end of Reconstruction, it adopted and enforced a wide array of them.

Like other states with segregation laws, Kentucky did not create equal colleges for black students and, in many fields, especially in graduate and professional education, it had nothing. The state provided a small amount of money to send away a few black students to institutions in other states that would accept them. Before the *Brown* decision, after the idea of sending students away was struck down by the Supreme Court, state officials tried to preserve segregation when qualified black students applied by sending professors over to teach a single student at Kentucky State College rather than admit him to a white campus. At one point a number of law professors were driving from the University of Kentucky to Kentucky State to teach a single black student. These practices were challenged both in the courts and the legislature after World War II, but no significant change occurred until after the *Brown* decision.

After the Supreme Court ruled unconstitutional the operation of educational institutions segregated by law, Kentucky was obliged to overcome its history of discrimination. The 1954 *Brown v. Board of Education* case built on earlier cases on the segregation of graduate and professional education and made it apparent that the use of state power to segregate higher education was unconstitutional. In the aftermath of the decision many colleges ended their formal prohibition on enrollment of black students but did very little to overcome the legacy of generations of segregation. Change was very slow. When Congress passed the 1964 Civil Rights Act, the foundation stone for modern civil rights law, things began to change more rapidly. The law required that all institutions receiving federal funds end discrimination on the grounds of race or national origin and gave both the Justice Department and the new Office for Civil Rights powerful tools and major responsibilities.<sup>59</sup> The federal government first acted at the end of the Lyndon Johnson Administration in 1968, formally informing educators in some states of their responsibility to desegregate higher education. With the coming of the Nixon Administration there was a general shutdown of the enforcement of the provisions of the 1964 Civil Rights Act, which called for cutting off federal aid to colleges and schools which did not desegregate.<sup>60</sup> In an extraordinary set of federal court decisions, the courts found that the Nixon Administration had violated provisions of

---

<sup>57</sup>*Buchanan v. Warley*, 245 U.S. 60 (1917).

<sup>58</sup>*Berea College v. Kentucky*, 211 U.S. 45 (1908)

<sup>59</sup>Gary Orfield, "The 1964 Civil Rights Act and American Education," in Bernard Grofman, ed., *Legacies of the 1964 Civil Rights Act*, Charlottesville, Univ. of Virginia Press, 2000, pp. 89-128.

<sup>60</sup>Leon Panetta and Peter Gall, *Bring Us Together*, Philadelphia: Lippincott, 1971.

the Act that mandated action in the face of discrimination, in a 1973 case called *Adams v. Richardson*.<sup>61</sup> After the federal courts ordered the Office for Civil Rights (OCR) to enforce the law against segregated higher education systems, the federal government developed policies in the late 1970s requiring all states to create plans for equal access to their colleges and universities and to remedy the history of inferior resources for the historically black campuses.

In Kentucky, the state and OCR came to an agreement over a set of policies and programs. The first Desegregation Plan was approved by OCR in 1982 and ran for five years, ending in 1987; it was followed by plans in 1990, 1997, and the 1999 Partnership Agreement. The 1990 and 1997 plans are referred to as The Kentucky Plans. The succession of plans were intended to overcome the history of separation and inequality on both the historically white and black campuses. They have been a very important element in higher education policy in the state for three decades.

The 1973 *Adams* decision set off twelve years of efforts by the courts to trigger action by the federal Office for Civil Rights to desegregate higher education systems in *de jure* states. That led the Carter Administration to issue policies in 1978 requiring states to draw up plans to assure equal access to college for minority and white high school graduates and to equalize and encourage desegregation of the historically white and black campuses.<sup>62</sup> With the coming of the Reagan administration, which was skeptical about civil rights laws, the focus shifted from goal-oriented policies, to examination of states to see whether or not specific things that the state had promised to do had actually been done. Less attention was given to whether or not the state had actually worked to remedy educational inequality.<sup>63</sup> During the 1980's a number of states were released from their plans but Kentucky was not.

The Supreme Court did nothing to spell out the specific obligations for higher education desegregation in the *de jure* states until the *Fordice* decision in 1992. *Fordice* made it clear that there must be positive action taken to dismantle separate and unequal higher education institutions.<sup>64</sup> The *Fordice* decision required that states examine a variety of factors that could perpetuate the effects of a history of segregation and inequality by race, and take action to overcome them.<sup>65</sup>

During the Clinton Administration there was a revival of enforcement of the Civil Rights Act and special emphasis on requirements to equalize the historically black institutions. In the George W. Bush Administration, on the other hand, the key leaders of both the Justice Department and the Office for Civil Rights were opponents of

---

<sup>61</sup> *Adams v. Richardson*, 356 F. Supp. 92 (D."D.C. 1973), and many succeeding orders.

<sup>62</sup> Williams, J.B., ed., *Desegregating America's Colleges and Universities: Title VI Regulation of Higher Education*. New York: Teachers College Press, 1988.

<sup>63</sup> Norman C. Amaker **Civil Rights and the Reagan Administration**, Washington: Urban Institute, 1988.

<sup>64</sup> *United States v. Fordice*, 505 U.S. 717 (1992).

<sup>65</sup> *U.S. v. Fordice*, 505 U.S. 717 (1992)

affirmative action. The Justice Department even filed an unsuccessful Supreme Court brief in the Michigan cases opposing affirmative action.

Enforcement of higher education desegregation, in other words, has been highly inconsistent both in terms of objectives and methods, and changes have been strongly related to changes in Administration. Authority for private litigation to enforce Title VI of the 1964 Civil Rights Act was sharply limited by the Supreme Court in the Supreme Court's 2001 *Sandoval* case, which has made the executive branch even more dominant in determining the meaning of the federal anti-discrimination law.<sup>66</sup> The Office for Civil Rights has a great deal of power in this arena but a poor record on consistency. Kentucky officials should be aware of the possibility of future changes in OCR policy.

What this history clearly shows is that institutions of higher education have a positive responsibility to end the vestiges of segregation and that that responsibility is likely to be interpreted quite differently under administrations with different ideologies. The Kentucky Plan took shape during the Reagan Administration and was significantly modified during the Clinton Administration following the Supreme Court's decision in *Fordice*. Kentucky officials planning for the future have to keep in mind the broad power of the OCR and the fact that its policies have changed quite dramatically with changes in administrations and could change again.

## The Civil Rights Act and the Kentucky Plan

In 1981 the federal government notified the state that its segregated higher education system violated the antidiscrimination provisions of the 1964 Civil Rights Act. A year later the Office for Civil Rights accepted the state's plan to upgrade its historically black campus, to desegregate all the campuses through student recruitment and appointment of diverse faculties, and to diversify the governing boards. The plan was known as The Commonwealth of Kentucky Higher Education Desegregation Plan and it would be known in its later incarnations over the years as "The Kentucky Plan." A second plan with identical goals lasted from 1990 to 1996.

The Clinton Administration brought a revived enforcement of the Civil Rights Act, and a strong desire to seek collaborative solutions rather than to initiate federal enforcement and fund cutoff actions or Justice Department lawsuits. This, together with the Supreme Court decision in *Fordice*, led to the development of the series of agreements extending the Kentucky Plan beyond 1997, agreements now still in effect pending a federal decision on the plan's status. The Clinton Administration formally notified states how it would apply the *Fordice* standard to all pending statewide higher education desegregation plans, indicating that it would comprehensively review the systems to assure that they had been truly desegregated and that no unfair burden had been placed on black students and faculty. It notified the states that it

---

<sup>66</sup> Alexander v. Sandoval, 532 U.S. 275 (2001)

planned to "strictly scrutinize state proposals to close or merge traditionally or historically black institutions ... or diminish the unique roles of those institutions."<sup>67</sup>

The basic goals of the plans were to increase African American enrollments and employment across the system and to substantially upgrade Kentucky State University. The specific commitments included raising both the enrollment and graduation rates of blacks to the white levels, increasing black graduate and professional enrollments and completions, increasing black faculty, and creating the needed on-campus support programs to make desegregation successful.

The Council in its 2003 report on the plan noted what had been accomplished in upgrading the state's traditional black institution, saying that "The commonwealth has ... demonstrated its commitment to enhance Kentucky State University ... by spending over \$26 million in capital enhancements .... Under the initial plan, enhancement included the development of a new mission for Kentucky State University, strengthening its academic programs and service to state government, improving funding, and improving the campus facilities and physical plant .... Under the Kentucky Plan, enhancement ... is seen as a special responsibility shared jointly by the Commonwealth, CPE, and Kentucky State University."<sup>68</sup> The vagueness of the "sharing" was far from a clear fixing of responsibility, and the agreement did not create a specific definition of what enhancement would amount to, or any assurance about how it would be financed or how differences of opinion between Kentucky State University and the Council would be resolved. KSU obviously wanted to control its own destiny, but the state was the key source of funding and had ultimate approval of institutional missions, so what kind and how much enhancement would take place was left to future negotiations between the University and state authorities.

In 1999 the federal enforcement officials accompanied state officials in visits to the University of Kentucky, KSU, and the University of Louisville.<sup>69</sup> New efforts led to renewed discussions and the initiation of a partnership approach beginning in 1999 designed to answer federal requirements, while avoiding a threat to cutoff federal funds. The agreement included the following language:

OCR acknowledges the substantial efforts and accomplishments Kentucky has made under its voluntary desegregation plans .... These legally appropriate steps demonstrate Kentucky's strong, good faith commitment to eliminating the vestiges of the prior segregated system as well as ensuring equal access to higher education. OCR anticipates that successful implementation of the actions outlined in the commitments will effectively address and resolve any

---

<sup>67</sup> 59 Fed. Reg. 4272.

<sup>68</sup> Kentucky Council on Postsecondary Education, "Partnership Agreement, The Commonwealth of Kentucky and the U.S. Department of Education, Office for Civil Rights," 2003, p. 5.

<sup>69</sup> *Ibid.*, 5-7.

remaining Title VI and *Fordice* issues within the Kentucky public institutions of higher education.<sup>70</sup>

The core of the agreement involved four pages of specific commitments and an expectation that they would be finished by 2002, unless an extension was needed. The agreement called for \$12.5 million in renovation of KSU campus buildings, and an “assurance that any change in the funding formula will not disadvantage KSU, and will take into account the institution’s status as the Commonwealth’s historically black university and its unique mission as the Commonwealth’s small liberal arts university.” It promised review of funding arrangements “to ensure continued enhancement of KSU” but there was no specific funding agreement. The agreement promised to strengthen the KSU education program and to “substantially lower” the performance gap on the teacher’s examination between KSU and other Kentucky institutions.<sup>71</sup>

A number of the assurances were about improving recruitment and attainment of African American students, and improving campus climates for African American students across the state. Northern Kentucky University was expected to raise its low black enrollment and the University of Louisville was to make certain that the process of raising its standards and diverting poorly prepared students to community colleges through the “Pathways to Success” initiative did not reduce access for black students. All campuses were expected to show progress on graduate enrollment for black students and have campus committees working to create “a positive, nurturing environment for African American students.”<sup>72</sup> The institutions were to strengthen efforts to diversify their faculties and staffs, including top administrators, and each campus was to have a high ranking official working on these issues.

The Council on Postsecondary Education submitted its “Final Status Report” on the Partnership Agreement five years ago in March 2003, with scores of pages documenting various specific efforts under the agreement. A number of the agreement’s provisions, such as equalizing access and attainment by race were not examined systematically. Much of the report was about the status of Kentucky State University. In assessing its compliance, the Council noted that some of the promised upgrades of KSU buildings had not yet been funded but were requested.<sup>73</sup> The Council said that the upgrading of the KSU education program was complete “with ongoing initiatives” while conceding that only 36% of KSU students passed the teacher’s exam in comparison with 93% statewide.<sup>74</sup> KSU was implementing a plan it devised to respond to the problem. In the report to OCR, the Teacher Education Committee reported that they had substantially raised the passing rate on the teacher

---

<sup>70</sup> Ibid., 9.

<sup>71</sup> Ibid, 10-11.

<sup>72</sup> Ibid., 12-13.

<sup>73</sup> Council on Postsecondary Education, “Final Status Report, Partnership Agreement,” March 5, 2003, p. 1.

<sup>74</sup> Ibid., 2.

exam though a number of strategies, one of the most important of which was to require “students to pass the PRAXIS II exam before they can begin their student teaching. This will ensure a ... pass rate of 100%.”<sup>75</sup> In other words, not counting education students as part of the testing population until they had already passed the test would, by definition, eliminate the low passing rate problem, probably at the cost of simply subtracting a number of students who had majored in education from the reported denominator. In addition there were very extensive drill and test-taking skill courses created. As all of these changes were being implemented the number of education graduates fell substantially. A high percentage was passing in part because more were being excluded. This technique is being adopted by a number of education programs as federal and state pressure on test score results of education graduates grows under the federal Higher Education Act and various state policies. This is one of the causes of low entry of black and Hispanic students into the teaching profession.<sup>76</sup> (The fact that almost 96% of Kentucky teachers were still white in the 2006-2007 school year shows how important this issue is.)

The Council’s 2003 report noted that KSU and state authorities had agreed to appoint a consultant, Baker and Hostetler, to make recommendations on the overall educational mission and resources at KSU. The consultant team was headed by attorney Raymond Pierce, who had been the deputy director of OCR during the Clinton Administration.<sup>77</sup> The Council’s final report said nothing about what would be done to implement the consultants’ recommendations except that KSU funding increase requests were to be considered when the report came in. The Baker and Hostetler report cited with approval a variety of steps that had been taken at the University of Louisville in response to the partnership agreement. It did not offer conclusions about the success in campus climate, faculty and staff diversity, and other issues that had been part of the agreement.

The Baker and Hostetler report, *Kentucky State University: Planning for Renewed Excellence*, was submitted in April 2003.<sup>78</sup> The report saw as basic KSU problems the radical instability of leadership, which saw five changes of presidents from 1990 to 2002, and the state’s adoption of an inappropriate funding formula that could seriously damage the university. The consultant study was supposed to determine how to treat KSU for funding purposes, because KSU argued that CPE benchmark process was harmful. As a result of the B&H study the CP did make a recommendation that provided increased funding to support KSU. That study also helped support the small institution adjustment as a budgetary tool to compensate

---

<sup>75</sup> David J. Herbert, “Summary of Current Issues being studied by the Teacher Education Committee,” October 9, 2002.

<sup>76</sup> Ellen Riojas Clark and Belinda Bustos Flores “Narrowing the Pipeline for Ethnic Minority Teachers: Standards and High-Stakes Testing,” *Multicultural Perspectives*, Volume 4, Issue 2, April 2002 , pages 15 – 20.

<sup>77</sup> Now Law School Dean at North Carolina Central University.

<sup>78</sup> Baker and Hostetler LLP, *Kentucky State University: Planning for Renewed Excellence*, April 25, 2003.



KSU but did not produce an agreed long-term approach. The 1982 plan had included a special funding package for the liberal studies program and created a policy that forbade any institution except KSU from offering educational programming to state employees. The policy did not, however, forbid an employee who paid his/her own tuition and attended another institution on his/her own time from doing so.

The consultants' report cast a generally positive tone over a difficult situation, did not look systematically at the statistics on student performance, and said nothing on a number of issues in the Kentucky Plan agreement. But it strongly recommended finding and keeping a strong KSU President and enhanced board in place for a good period, upgrading administrative capacity, and making some hard decisions about directions and priorities. One valuable section of the report discussed the inappropriateness of the funding formula used by Kentucky, which funded the University, based on costs of institutions that really were not comparable because of their larger enrollments and economies of scale.<sup>79</sup> If KSU were to become equal in any meaningful sense with a far lower base enrollment, and much more limited campus with many infrastructure needs, its per student costs were certain to be higher than the average state level. The study states that "the CPE budget model is a problem primarily because the 'comparable institutions' have much larger enrollments and therefore greater economies of scale" leaving the college without the essential resources needed at the same time it was supposed to be implementing changes to overcome the history of inequality and develop successful new missions. The basic problem is that there are many fixed costs to running a university that are higher per student in a small school.

The consultant report showed low enrollments and numbers of graduates in a variety of fields, something state policy defined as "low productivity," referring to traditional program productivity reports intended to identify academic programs that are not producing a minimum number of graduates. The consultants reported grim conditions in the liberal arts program that undermined the long-proclaimed goal of creating an attractive small liberal arts college. The consultant report found:

... a number of factors have made it difficult for KSU to meet effectively its liberal arts *and* its HBCU missions. Both of those important and compatible missions require creating and sustaining an academic environment where students overwhelmingly succeed and faculty are intellectually empowered. Yet, at KSU only 28% of the students graduate after six years and a large number of unfilled tenure-track positions has left the existing faculty so overwhelmed ...

What seems to be an almost assembly line process of getting students in entry-level courses has left both faculty and students operating well below their potential. Moreover, because so much faculty time must be devoted to entry-level instruction — in English, for example, 82% of all courses taught in Fall

---

<sup>79</sup> Ibid., 21-22.

2000 were remedial or liberal studies core classes—key upper division courses are offered sporadically or not at all ...

The results ... are unfortunate. There is an increase in time to degrees as students wait for required classes to be offered. To circumvent this faculty then try to accommodate students by offering, on an overload basis, courses where only a few (often less than 5 and as low as 1 or 2) are enrolled ...<sup>80</sup>

Although Kentucky State occupies a decisive central position in the history of African American education in the state and, over its history, has trained many of the state's black leaders, it found itself in an extremely tight bind, far behind as the state seeks to end the Kentucky Plan. The cumulative impact of 125 years of unequal provision is all too evident as one drives the 26 miles between the black and white land grant colleges, KSU and UK.

In the discussion of Kentucky State, one repeatedly encounters frustration on both sides. On the state side, it seems like substantial additional resources have been provided but there is still a low enrollment and limited educational success. On the side of KSU there is the perception that needed resources were never provided and that there is too much competition for talented black students who are being offered opportunities KSU lacks resources to match. KSU supporters feel that there is far too little appreciation of the very difficult challenges the school continually undertakes, how it is trying to save students not prepared well in some public schools, and of the great tradition it represents in the state's black community. If the state ignores the historical inequalities and treats it like any other university for funding, its small size and accumulated inequalities could make its situation impossible. Some state officials and people on other campuses are skeptical, but the current KSU leaders see themselves as able to rise to a new level with the needed support.

As in many states with a history of overt segregation and discrimination, the fact that the great majority of black students are now enrolling in white institutions does not end deep unease at the possibility of losing a historically vital institution which is carrying on the HBCU tradition. What if civil rights pressure is taken off the white institutions or affirmative action becomes illegal? Will black access decline as it did in California? A strong HBCU with an unequivocal central mission of serving black students is an asset that seems well worth preserving. How can this be done without external civil rights protection if KSU must compete against much larger and more powerful institutions, which all have urgent needs of their own, and two of which are right in the neighborhood? These are the dilemmas that Kentucky educators and federal civil rights officials must resolve. They have not been solved yet.

### **The Persisting Confusion about Kentucky State University's Mission**

Kentucky Higher education officials have repeatedly defined KSU as a small regional liberal arts university operating on a non-racial basis since the 1970s. They have

---

<sup>80</sup> Ibid., 33-34.

power to define institutional missions and responsibility to see to it that the plans are fulfilled. The federal policies announced in the 1990s, however, made their task more complex by making a very strong warning against diminishing the historic role of black colleges in the process of implementing the desegregation requirements. The 1994 federal regulation interpreting the Supreme Court's *Fordice* decision stated that federal authorities would very strictly examine any state policies that would "diminish the unique roles" of HBCUs.<sup>81</sup> Not only is there some tension between the state mission and the federal regulation but there have been some serious disagreements in basic perspectives between state and KSU officials, disagreements persisting to the present. In this situation state officials tend to blame KSU for not following clear guidance but, at the same time, the state has not effectively used its authority to deliver on what was promised in the early 1980s. It would require commitment, skill and resources to create the kind of institution the state plan foresaw in a region with serious competition from other institutions. Without a clear agreement on the destination and a serious plan to get there it seems unlikely that either goal will be successfully achieved any time soon. The state cannot claim to be in compliance with a plan by merely adopting the goal, which obviously has not been achieved, and blaming KSU. (If that were an adequate concept of compliance, to suggest an analogy, a company could tell the IRS that it had adopted a policy that its taxes would be paid but some of its employees had used the money for something else and therefore it should not be held responsible for not paying.) The state made the commitment to the federal government to actually achieve its goal and it has the ultimate responsibility to fulfill its promises or to negotiate modifications. Otherwise civil rights enforcement would just be about rhetoric.

The initial Kentucky higher education desegregation plan negotiated with the federal government defined the role of KSU without any significant reference to its historic role as an HBCU. The plan noted that the state's Council on Higher Education had created non-racial mission statements for all of the state's universities in 1977 after considering many alternatives and "showing a growing concern for the role its is traditionally black institution" which had received special funding in the 1970s. The 1977 decision called for KSU to be a traditional regional university with a special focus on programs for state Government officials, including master's degrees in public administration, citing the fact that KSU was the only university in the state capitol, with 12,000 state employees.<sup>82</sup> In the 1982 plan the state conceded that "expectations made of the University had not always been realistic" and offered what it saw as a "concise, realistic and achievable set of responsibilities." The refined mission statement "calls for the university to excel in three areas: delivering a liberal studies curriculum, meeting the educational needs of community students, and serving the educational needs of state employees." It defined the role "as the unique, small, liberal studies institution in the state system. It was expected to excel as a small

---

<sup>81</sup> 59 Fed. Reg. 4272 (1994) (Notice of Application of Supreme Court Decision).

<sup>82</sup> "Commonwealth of Kentucky Higher Education Desegregation Plan," January 21, 1982, revised Aug. 31, 1983, pp. 8-11.

university with the lowest undergraduate faculty-student ratio among the state's public institutions.”<sup>83</sup>

In the most recent state-approved mission statement, adopted two decades later by the KSU Board and Faculty Senate, and the Council on Postsecondary Education, the mission remained relatively similar, though there were references to the relationship with African American issues.

Kentucky State University is committed to providing a liberal arts education of high quality to a diverse student body and to fulfilling its mandates of teaching, research, outreach, and accessibility as a Land Grant institution. Consistent with this mission and our African-American heritage, we are committed to offering a variety of undergraduate and graduate programs that serve citizens. Small classes at Kentucky State University provide a nurturing and stimulating environment that prepares undergraduate and graduate students to become educated citizens and professionals.

We are also committed to collaborating with other institutions in the Commonwealth to increase the effectiveness of Kentucky's system of Postsecondary education. Unique endeavors include our responsibility to serve public employees, our Program of Distinction in Aquaculture, and the Center of Excellence for the Study of Kentucky African Americans.<sup>84</sup>

Examining Kentucky State's own website in May 2008, however, shows a quite different emphasis in its current mission statement:

Kentucky State University, building on its legacy of achievement as a historically black, liberal arts, and 1890 land-grant university, affords access to and prepares a diverse student population of traditional and non-traditional students to compete in a multifaceted, ever-changing global society by providing student-centered learning while integrating teaching, research, and service through high-quality undergraduate and select graduate programs. Kentucky State University is committed to keeping relevant its legacy of service by proactively engaging the community in partnerships on civic projects driven by the objective of positively impacting the quality of life of the citizens of the Commonwealth.<sup>85</sup>

In this statement there is no mention of the high quality liberal arts campus, no mention of the role of educating state officials, and a very explicit focus on black students both in the beginning of the statement and in various photos featured on the site.

From the state government perspective it can be argued that the state settled the issue of mission three decades ago and provided special funding to make the changes

---

<sup>83</sup> Ibid., 22-23.

<sup>84</sup> KSU, *Mission Statement*, approved by KSU Board October 24, 2003, approved by Council on Postsecondary Education, November 2003.

<sup>85</sup> KYSU.edu website, accessed May 25, 2008.

happen, and that the problem is that KSU has not succeeded in realizing those goals. From the institution's perspective there was never real consensus about ending its historic special role with black Kentucky, and its efforts to reach other potential students have had only limited success, usually occurring outside of normal school hours in special programs. From the perspective of the federal regulations, the HBCU role may have been slighted. When one looks at the results in terms of either service to the black community or producing a competitive small liberal arts college able to draw an adequate enrollment of well prepared students, especially from central Kentucky, the results are deeply disappointing. Without assessing blame, it is clear that neither goal has yet been achieved and that there is no consensus today between institutional and state officials either about goals or the current level of success.

The truth is that accomplishing any of the desired goals would be a complex and challenging task in an institution with limited student demand and clear problems in graduating its students, strong competition in its traditional market, as well as a historic identity as a black institution--which would require it to overcome racial stereotypes of potential white students and to successfully integrate them into campus life. Without any clear definition of mission and skillful mobilization of resources to realize the goal, the prognosis is poor. If the state's obligation is to produce some kind of post-desegregation adaptation of the HBCU that can be self-sustaining without extraordinary resources, it has not yet arrived at that goal. If the implicit mission of the institution is to be primarily a resource for a relatively small group of predominantly poorly prepared African American undergraduates and the provider of some other specialized curricula for state officials or special programs, not really integrated into the life of the college, this is clearly a costly and difficult mission and it is not yet being performed at a high level. A particularly sensitive element here is that the institution and the state want the KSU leadership to solve the problem, but there is no agreement about what the goal really should be or what the appropriate outcome measures and necessary budgets are. Incoherence about goals can make the difficult impossible. The experience of the past three decades, and the large gaps still separating the visions of state officials and campus officials a few miles apart in Frankfort suggest the need for a new approach with some very clear benchmarks and strong support, and regular monitoring by experts respected by both state and university officials.

It should not be surprising that it is so very difficult to resolve these issues. They go to the core of the legacy of segregation, and they require a difficult agreement and complex implementation over a number of years in situation where trust and mutual respect as well as key fiscal and leadership resources may be lacking. We will suggest a possible procedure in our recommendations.

Although the KSU issues have been the most difficult to resolve, the Kentucky Plan, of course, involved a great deal more than the KSU situation, and the state's final report included substantial materials from other campuses on progress under other specific agreements. State officials have developed and monitored eight major goals for each of the predominantly white institutions and have been pursuing them year by

year, goals which focus on increasing admissions and success by African American students and increasing the numbers and proportions of black faculty and staff hired and retained in each of the institutions. The initial goal, for instance, of ending the racial gap in college going and completion has led to major progress but has yet to be fully achieved. Major sections of the remainder of this report consider success to date.

The Office for Civil Rights has yet to rule on the status of the Kentucky Plan five years after the state's Final Report. At a March 2008 hearing in the House of Representatives, the federal Office for Civil Rights was accused of permitting backward movement on civil rights in Southern systems of higher education. The Education Department responded that it "has had plans in place to make further and faster progress" in reviewing desegregation plans, completing reviews by the end of the year.<sup>86</sup>

While the state waits, it has been continuing to carry out the plan through a remarkable committee of the Kentucky Council on Postsecondary Education.

### **The State's Civil Rights Policy**

Before examining how the Committee on Equal Opportunities works, it is important to note that the Committee draws its authority not only from the partnership agreement with the federal government but also from Kentucky's own state policy. As part of the historic Kentucky Postsecondary Education Act of 1997, the state set the goal of greatly increasing access to higher education, and making certain that all the sectors of education in the state worked effectively together. Amendments enacted in July 2006 spelled out the legal authority of the council to make and enforce civil rights goals. (This authority was originally given to the CPE by the Kentucky General Assembly in 1992; it was continued in HB 1 passed by the 1997 General Assembly.) The very significant powers and duties of the Council included the authority to:

Define and approve the offering of all postsecondary education technical, associate, baccalaureate, graduate, and professional degree, certificate or diploma programs ...

Eliminate, in its discretion, existing programs or make any changes in existing academic programs .... Postpone the approval of any new program at a state postsecondary educational institution, unless the institution has met its equal educational opportunity goals, as established by the council. In accordance with administrative regulations promulgated by the council, those institutions not meeting the goals shall be able to obtain a temporary waiver, if the institution has made substantial progress ...<sup>87</sup>

---

<sup>86</sup>Paul Baskin, "Historically Black Colleges Tell Congress of Problems," *Chronicle of Higher Education*, March 28, 2008, p. A23.

<sup>87</sup> Amended 2006 Ky Acts ch. 211, sec 101, effective July 12, 2006.

The state's enforcement process also draws authority from executive orders issued by two Kentucky Governors in the 1980s requiring compliance with affirmative action plans across state government.<sup>88</sup> The existence of state legal authority substantially strengthens the Council in its work since those sources of authority would continue even after the termination of OCR supervision.

---

<sup>88</sup> Executive Order, 84-549, June 29, 1984; Executive Order, 88-100, Jan. 18, 1988.

## **SECTION III: THE ENFORCEMENT PROCESS AND KENTUCKY'S UNIVERSITIES**

Development of a new diversity plan for Kentucky and its institutions will raise, of course, the question of how such a plan should be administered at the state level. Since the state Council on Postsecondary Education has played a central and powerful role in implementing the plan that has led to successful compliance and major changes in the state higher education system, it is very important at this stage to evaluate what has been learned from this process, what its strengths and weaknesses may be, and how leaders of Kentucky colleges evaluate the process and what suggestions they make about the future.

### **The Council and the Committee on Equal Opportunities**

The implementation of the complex plan to change access to college in Kentucky has been in the hands of a critical institution created for this role. Changing the realities of racial inequality is a complex and difficult task. The inequality is imbedded in so many aspects of unequal lives--families and communities with fewer resources and connections and less education, negative stereotypes held by many whites, less adequate care for chronic health problems that affect the ability to learn, as well as difficulty in attaining housing in good neighborhoods and jobs in the suburban job center, and many other aspects of inequality.<sup>89</sup> For many reasons inequality tends to perpetuate itself through the generations, and the mere removal of overt discrimination does not resolve these imbedded inequalities of preparation. Almost a fourth, 23%, of children under 18 in Kentucky were living in poverty in 2006 and the number was substantially higher for black children.<sup>90</sup> Frequently institutions try some policy to end discrimination and quietly give it up when it proves to be too complex, blaming the unequal preparation that students bring to school with them. The fact that Kentucky has persisted, has developed a systematic process and clear goals, and that major progress has been achieved is related to the creation of an effective process.

Serious progress on race relations requires long-term investments, personnel who understand the underlying issues, strong leadership, sophisticated initiatives, and persistence. Since college leaders always face an array of demands and racial change is not something they are basically selected for rewarded for, real transformation of higher education requires a framework of accountability and leadership. Kentucky has addressed this issue through the establishment of the Committee on Equal Opportunities, a special committee of the state's higher education coordinating board, the Kentucky Council on Postsecondary Education. This committee, whose duties include the oversight and implementation of the Kentucky Plan across the complex

---

<sup>89</sup> Richard Rothstein, *Using Social, Economic, and Educational Reform to Close the Black-White Achievement Gap*, Washington: Economic Policy Inst., 2004.

<sup>90</sup> Kentucky Youth Advocates, *Kentucky Kids Count, 2007 County Data Book*.



state system, has made a great deal of difference for Kentucky and is in important respects a model for the nation. Established in 1987, this powerful committee, now in its 21<sup>st</sup> year of operation, can report to the Council that institutional goals under the plan are not being met, triggering a freeze on the creation of new programs at the institution unless a waiver is granted. This is a powerful sanction and it has been used extensively and with effect.

The committee has a clear goal, strong measures of progress, energetic oversight and enforcement, a powerful sanction, and operates above politics with a widely respected professional staff. The staff for a huge state-wide task amounts to one principal staffer, Sherron Jackson, who is only assigned to the committee for one-third of his time. Mr. Jackson carries two major administrative responsibilities as both Assistant Vice President for Finance and Assistant Vice President for Equal Opportunities of the Council on Postsecondary Education. His finance jobs involved major responsibilities for the agency's budgeting and planning. In just one-third of his time, he has been managing the Kentucky plan oversight and implementation for the Council.<sup>91</sup> The staff work required to keep track of implementation across the state has grown greatly but requests for additional resources have not been successful. As Mr. Jackson, observes, "The committee takes its charge seriously and peers into every possible area to encourage institutions to embrace and pursue diversity" and the staff work is much more than can be fit into part of an eight- hour day. His only assistant, a young African American scholar, Dr. Rana Johnson, is herself a product of the Kentucky diversity initiatives.<sup>92</sup>

The Committee has requested more funds and staff in recent years without success. It requested \$100,000 to fund five spaces in the Doctoral Scholars Program to increase the faculty pipeline in the state and funds to prevent a substantial shrinkage of the Governor's Minority Student College Preparation Program, which is designed to spur better information about and preparation for college. And at the beginning of the budget process for the 2008-10 biennium, the committee asked for \$10 million to support diversity work across the state, money which would fund three new positions to support this work at each campus and two for the Council itself; \$4 million would have been for scholarships and academic support programs to increase student success on campus, and \$3 million would have gone for building collaboration between public schools and campuses and community groups. Within the state's budget process, all of these requests were cut back to a total of \$300,000. Then, however, the Governor responded to projected deficits by recommending a drastic overall cut of 15% in the budgets for higher education as state revenues dropped. The

---

<sup>91</sup>Council on Postsecondary Education, Position Description, Sherron Jackson, Assistant Vice President for Finance and Equal Opportunities, Dec. 15, 2006.

<sup>92</sup> She with a Ph.D. in Communications from the Univ. of Kentucky in 2001 under the Southern Regional Education Board's Doctoral Scholars Program, a major regional effort to increase the supply of black faculty in the South. (Univ. of Kentucky News Release, May 2002, "UK Leads Southern Regional Education Board States in Program to Produce Minority Professors.")

legislature enacted a cut of 6%, meaning that the Committee's effort received no new money at all for 2008-2010.<sup>93</sup>

The committee's work has reflected seriousness and dedication in spite of its very modest resources. Our project has had extensive contact with civil rights enforcement efforts across the country and we think that Kentucky is singularly impressive in mounting a very serious effort, drawing on the skills and intense commitment of people who want to implement these policies in the most effective possible way.

The Kentucky enforcement process is driven by setting objectives in eight categories for universities, and four categories for community and technical colleges, by examining and commenting on the relevant statistics, by requiring annual reports, by using enforcement mechanisms when necessary, and by conducting formal visits from the Council to the universities to hear testimony of interested parties and to question leading university administrators about areas in which there are unresolved problems or unmet goals. The entire process means that the issue is very much on the agendas of system leaders. Sometimes the process causes friction and resentment, but the Council's overall stance and oversight is clearly related to the progress that has been achieved. The Committee's campus visits and oversight hearings in Frankfort turn the spotlight on the performance of top leadership in the various institutions and often produce intense discussions.

Relationships between bodies charged with civil rights enforcement and the institutions that are being pressed to improve their performance are often difficult and sensitive in their nature. The trick is to find a way to seriously enforce policies without creating unnecessary conflict and polarization. Tension between statewide system offices and individual institutions commonly occurs in many policy areas with leaders of the universities and community colleges wishing more autonomy, while state officials seek to implement statewide goals and priorities that may seriously conflict with institutional priorities. Some of these tensions are inherent in the and, of course, policies of racial change can be highly sensitive, heightening the normal tensions.

There is no doubt that the Council has a credible sanction and has shown its determination to use it; these are key elements of serious civil rights enforcement. The sanction authorized in state legislation is a prohibition on creation of new programs by institutions not meeting Council goals. It is a highly visible sanction and very much in the minds of college presidents, who find it a potentially serious obstacle to their institutional plans and ambitions. Needless to say, using this sanction creates friction but also puts the goals high on the agenda of administrators, who often discuss their success in complying with the objectives as something on which they are evaluated and on which they evaluate their subordinates. To be successful, of course, the goals must be attainable ones that can be achieved with a serious effort by

---

<sup>93</sup>2008-2010 Kentucky Branch Budget Requests and Operating Budget Requests; Communication from Sherron Jackson, April 8, 2008.

the institutions. There are some clear signs of success in the statewide data as well as evidence of tasks yet to accomplish.

Racial change is never easy, and even after considerable progress has been achieved, expression of extreme racial stereotypes and racial harassment sometimes occur and can have deeply chilling effects on race relations. The Campus Environment Teams file reports with the CEO committee and several have conducted campus surveys. Some campuses have reacted very forcefully to racial incidents or drops in minority enrollment.

### **Visiting Campuses**

Examining reports of the teams, we found considerable variation in terms of the comprehensiveness and sophistication of the efforts. In its June 2007 report the CEO staff summarizes the CET annual reports from the campuses. The university teams included administrators, faculty, staff, and, usually, students and community leaders. In terms of evaluating their campuses and their own success, some campuses provided organized data and others did not, though all had to submit discussion of their evaluation plans. One university did not have a team in place.<sup>94</sup>

The initiatives reported by the teams varied widely. At Eastern Kentucky, for example, there were small grants “to provide incentives for faculty members to develop diversity-oriented courses.” The Multicultural office conducted training programs for the police.<sup>95</sup> Morehead State University reported a review of its advising program and hiring a minority retention coordinator as well as diversity workshops for faculty and staff.<sup>96</sup> At Murray State University the Blue Ribbon Task Force on Diversity interviewed black faculty and staff to “develop strategies to offset the perception of isolation” among blacks, and a new position was created to “increase institutional emphasis on African American graduate enrollments and faculty recruitment.” In response to the survey of black faculty members a new Black Faculty and Staff Association was created which carried out numerous events over the year. A graduate fellowship program for minority students was initiated and a minority teacher scholarship initiated, and special scholarships were offered to students in the YMCA Black Achievers programs in two cities.<sup>97</sup>

At Northern Kentucky University the Campus Climate Task Force supported a survey of minority students on courses in the “race and gender curriculum” and organized meetings between leaders of black student organizations and the University’s top

---

<sup>94</sup> Committee on Equal Opportunities, Council on Postsecondary Education, “Institutional Campus Environment Team Report,” June 18, 2007.

<sup>95</sup> Eastern Kentucky University, Campus Environment Team Report, January 1, 2006 to December 31, 2006.

<sup>96</sup> Morehead State University, Campus Environment Report, January 1, 2006 to December 31, 2006

<sup>97</sup> Murray State University, Blue Ribbon Task Force on Diversity, Campus Environment Team Report, 2006-2007.

leaders which led to the creation of the African American Male Mentoring Program to help deal with a very high attrition rate.<sup>98</sup>

At the University of Kentucky a sudden 40% decline in black freshmen in 2005 led to a major review of many issues and appointment by President Lee Todd of a Task Force on Racial Diversity and Equality in December of that year. The campus committed \$500,000 to new diversity scholarships, reviewed the entire recruitment process, created a new enrollment process and “implemented a new, holistic admissions review process” which included “leadership experience, special talents and contributions to community diversity.” and made key high ranking appointments.<sup>99</sup> At Western Kentucky University the committee’s faculty survey found a lack of clarity and understanding of campus goals and considerable minority faculty dissatisfaction. The summary of findings reported that “the climate is disrespectful and racist. Insensitive comments or gestures were a concern.” The report concluded that “the institution tends to pay a lot of lip service to issues related to diversity but the reality is more accurately reflected in the lack of significant resources ....”<sup>100</sup> The survey reported perceptions that some units were not serious about faculty diversity or “did not possess the requisite knowledge and skills necessary to conduct searches capable of attracting African American applicants.”<sup>101</sup>

The committee’s campus hearings often address these issues. Reviewing the final reports of the campus visits, one gets a sense of the concerns of the committee and the issues in the various universities. We reviewed the final reports on campus visits from 2003-2006. When the committee visited Eastern Kentucky University in 2005, for example, it met with administrators, students, faculty and others who wished to speak. The committee concluded that this 16,000 student university “exhibits a strong outward reaching commitment to diversity” and praised President Joanne Glasser, finding that there had been clear improvements since the previous two campus visits, and that diversity concerns were central in the institution’s strategic plan which included attracting diverse students and creating a positive climate as well as “maintaining a connection with Appalachia” as basic objectives. The report, however, noted a lag in faculty diversity. Progress included important new staff appointments, a new African American studies program, and the implementation of the McNair Scholars program to engage minority students in research to encourage graduate studies, working with the local police, sponsoring lectures related to diversity and increased scholarships. Among many other initiatives one of the colleges had developed a collaborative relationship with a high school in the midst of Louisville’s black community

---

<sup>98</sup> Northern Kentucky University, The Campus Climate Task Force (CCTF) Report, 2006-07.

<sup>99</sup> Memorandum from Terry Allen, Univ. of Kentucky to Sherron Jackson, “Information Requested by the Committee on Equal Opportunities,” May 30, 2007.

<sup>100</sup> Diversity Environment Committee, Western Kentucky Univ., “Diversity Environment Survey Report and Recommendations, 2007,” December 2006.

<sup>101</sup> Ibid.

The reports from most campuses did not reflect any serious on-campus research with the exception of a few surveys. Systematic studies of campus climate could be carried out by faculty and institutional research and data staff.

The committee offered many suggestions for possible further improvements at many levels of the university, both in policy and in staffing, and special recruiters were working to attract minority students from the state's urban centers. The report dealt with many of the complexities and challenges of recruiting and successfully keeping black faculty in a community where they felt and were isolated.<sup>102</sup>

In its 2005 visit to the headquarters of the Community and Technical College system, the committee took on the issues of the huge state wide system of 16 rapidly growing colleges, which were making irregular progress and where there had been some real tension between the Council Committee and the system. The committee noted that "of the 16 institutions, 10 noted some improvements since the last Degree Program Eligibility Status Report." It observed that "the enrollment of African American undergraduates has remained steady" since 1998 but had fallen slightly in 2005. The committee noted that the system President hadn't allowed his staff member responsible for liaison with the committee to address the group during its visit. It observed that the former technical college campuses were lagging behind in diversity "having the appearance of perpetuating the old separate but 'unequal' rule of segregation." It advised the system president to build in success in reaching Kentucky Plan goals into his assessment of his administrators. In general the committee wanted a more active and forceful plan for the system, communicated more effectively with serious internal accountability. The committee requested a follow up report from the system within a few months.<sup>103</sup>

## **Kentucky's Universities and Plan Enforcement**

Kentucky has eight public universities located across the state, varying considerably in size and mission as well as a large and rapidly growing system of community colleges. They will shape the future of higher education diversity in the state and all have goals to meet under the plan. All provide graduate work, but only two, the University of Kentucky and the University of Louisville, offer wide ranging graduate programs leading to the doctorate and receive substantial external research funding. Some of the campuses are essentially regional institutions, strongly linked to their geographic service area and offering relatively limited graduate level training. All are important sources of educators for Kentucky's schools. The universities are the key to the state's ambitious effort to double the number of college graduates. Although they are experiencing cuts in state funding for the next two years, they have enjoyed increased state funding since 1997 and have expanded significantly. All universities

---

<sup>102</sup> Council on Postsecondary Education, "Eastern Kentucky University Campus Visit Report," Visit: October 17-18, 2005; report adopted, February 2006.

<sup>103</sup> Council on Postsecondary Education, "Jefferson Community and Technical College Campus Visit Report," Visit: September 29, 2006; report adopted: Feb. 20, 2007.

and fifteen of sixteen community and technical colleges are now seen by the Council on Postsecondary Education to be making sufficient progress on their goals to be permitted to create new programs during calendar year 2008 without facing the Council's sanction. As part of the research for this report we examined the data and conducted interviews with all of the University Presidents as well as examined survey data collected from their students and the reports of the campus visits by the CEO committee.

Though Kentucky's higher education institutions share many common challenges in meeting *The Kentucky Plan*, a systematic program of visits by the Committee on Equal Opportunities (CEO) uncovered distinct challenges by institution and region. Those in the areas with few African American residents tend to experience special problems in meeting goals. A common challenge faced by all institutions is recruiting and retaining African American students, faculty, and staff. The state's modest black population and large areas that are virtually all white pose real problems. Institutions report various approaches to addressing these hurdles, including working with their regional school districts and working with their area's community and technical colleges as well as hiring recruiters, sometimes with limited success.

The Committee continuously monitors data from all of the institutions and also carries out periodic visits to discuss progress and challenges with institution leaders, faculty, students and others. A core theme carried across most all of the visit reports by the Committee is the importance of institutional leadership in promoting, achieving, and maintaining diversity. The reports suggest, for example, that university leaders must implement staffing policies that ensure access and opportunity by requiring search committees to produce applicant pools that are diverse. One of the reports, for example, praises University of Louisville President James Ramsey for strongly urging that the University's Board of Trustees "include as a high priority in his annual performance evaluation the institution's progress toward campus diversity."

Reading the reports shows that implementation is uneven and that there are some students and faculty of color who feel uncomfortable and unwelcome on some campuses. The reports convey a sense of a process well under way but needing continual attention and leadership. Our interviews with the Presidents of all Kentucky universities and the community and technical college system as well as the institutional questionnaires they submitted show that the process has produced a very widely shared support of the goals of diversity on campus and a sense that the work is not finished but is a continuing challenge. The Presidents were assured that their comments would not be attributed directly to them or their campus to encourage a frank discussion. The Presidents agreed that leaders must lead on this issue and that board diversity and board support are very important in assuring continued priority for the issue. This support for the goal and the sincere statements many leaders made about their personal attitudes and the experiences of change on their campuses were highly positive outcomes of the process.

Each of the institutions is, of course, important for attaining the overall goals of diversity and for the success for minority as well as white students in the state. Three institutions, however, deserve especially close attention--the University of Louisville and the University of Kentucky, because of their large enrollments of black students, and Kentucky State University, because of its historic role as the state's only HBCU (historically black college or university) and the only campus where more than a handful of black students were educated before the civil rights revolution of the 1960s. Examining the statistics for the classes of 2001 to 2006, Kentucky's public institutions awarded a total of 5611 BA degrees to blacks in this six year period, just 688 degrees to Latinos, 79,973 degrees to students who identified themselves as whites and 440 to students who did not report their racial identity, most of whom, other research suggests, are likely to be white.<sup>104</sup> In 2006, three of the eight campuses educated substantially more than their proportionate share of the state's African American students—Kentucky State University, the University of Louisville and Western Kentucky University, though the WKU results may well be, in part, because Western is the only University that operates a closely related separate campus that functions much like a community college<sup>105</sup> whose students are counted just the same as students on the four-year main campus.

As part of this study, the eight four-year campuses answered an anonymous questionnaire concerning various elements of affirmative action policy. Most were answered by the university's president. When asked how important the goal of diversity was to their institution, four institutions responded that it was essential, three that it was "important" and one that it was "somewhat important." Some had detailed and specific definitions of the goal; others were far more general. One campus, for example, said it was a "core value" with the mission statement. Another said: "we are a diverse community" and called for "respect for diversity" seeing it as "a crucial characteristic of an optimal education." Another reported that it had no "comprehensive diversity plan" but cited the state's plan and the work of two campus committees. Kentucky State University, as the state's only HBCU, answered differently: "We were established to provide educational opportunities to African Americans and other underserved populations. Our doors have always been open to anyone who desired/chose to attend. Diversity is essential in preparing our students to compete in a global society." Another institution pointedly went beyond the state plan: "We define diversity as being inclusive of everyone. Our diversity goals place emphasis on African Americans as defined by the KY Plan for students, faculty, and staff. However, women and other underrepresented groups are part of the goals in addition to the curriculum and campus climate." Another institution quoted its strategic plan: "We honor and pursue a university climate that respects and celebrates the diversity of peoples and seeks to embrace all individuals and prohibits judgments based on race, ethnicity, religion, socioeconomic status, gender, sexual orientation

---

<sup>104</sup> Kentucky Council on Postsecondary Education, Comprehensive Database, March 19, 2007.

<sup>105</sup> Western does not officially operate a community college, according to state policy, but it has a nearby campus for freshman and sophomores that operates like a community college.

and physical disabilities.” One president commented: “It’s a big old world out there and anybody that’s traveled at all knows that in the United States of American we have to compete globally, which means we have to become more of a microcosm of what’s happening around the world and not just the microcosm of Kentucky .... We’re going to put effort into minority recruitment across the board ... because that’s essential in the 21<sup>st</sup> century to help people be prepared for a world that’s a browning world.”

A President of a campus with one of the larger African American enrollments summarized the half-complete sense of many discussions: “I feel good ... about our progress .... We have made pretty steady progress in our employment actions and the diversity of our workforce, although I’m not at all satisfied ... but I feel good about where we’re heading.”

There was widespread belief that the focus of the Kentucky Plan was too narrow. Kentucky was mandated to do a plan because of its history of de jure discrimination against African Americans so the plan naturally emphasized creating access and success for African Americans. There were no other substantial nonwhite populations in the state

when the issue first arose. In discussions with the University Presidents about the current situation, however, there was broad awareness of the growth of the Latino population and belief that they and other minority groups should be included, though the primacy of the issue of black opportunity in the Kentucky context was frequently acknowledged. Most of the institutions favored including also Latinos, Asians, and American Indians, even though Asians are not typically defined as an underrepresented minority since they have higher average college attainment levels than whites (though there are subgroups of both Asians and whites who experience severe problems of access). One institution included women, although women have a much higher college graduation rate than men in the state. In other words, there was a strong desire to broaden the plan but no clear and explicit understanding of how and why to do it, apart from a virtual consensus that Latinos should be included.

Our discussions with leaders showed there was a mix of justifications for affirmative policies, justifications based on equity and repairing a history of discrimination against African Americans, as well as strong belief in the educational value of diversity. In terms of the educational value the leaders clearly saw that this value would be aided by very broadly defining the goals. A number of the leaders pointed out that global diversity is a vital goal in a world where Kentucky students were too isolated from contact with foreign students and cultures, which hurt them in preparing for an increasingly globalized economy.

There were divided opinions of the value of state policies in pursuing the diversity goals. One campus claimed that the state’s policies “somewhat restricted” its goals, two said that they “somewhat helped” and three said that they “greatly helped.” The most positive comment noted the importance of the Council’s concrete goals and



accountability, the direct measures of success, and the consequences of failing to meet the goals.

There was also deep division about the role of the local communities in influencing the campus efforts. One campus reported that local community conditions “greatly restricted” the efforts because of the “lack of products and services for people of color.” Another saw some negative impacts, others, no effect, and one reported positive support.

There was widespread disagreement as well on the impact of the federal Office for Civil Rights, the institution whose enforcement activities had triggered the development of the Kentucky Plan. In terms of achieving student diversity, plans to comply with federal requirements were seen as essential by two institutions, important by two and “not important” by three others. There also was a deep split in rating the importance of federal policy for achieving faculty diversity. Since the entire effort under the Kentucky plan was triggered by federal policy requirements under the 1964 Civil Rights Act, it is difficult to explain these responses. (Our conversations with institutional presidents showed some confusion about the origin of the requirements--two of them spoke of the role of federal courts, even though there was no lawsuit or court order involving the Kentucky institutions as in the state-wide court orders in Mississippi, Alabama and Louisiana and the court order ordering the merger of the historically black and white universities in the Nashville area. We have found, in other research, that with the passage of time, and the arrival of new leaders, the original source of civil rights policies often becomes vague).

The primary obstacles to success, according to the institutions, were the lack of qualified black students applying for their college, the lack of significant local black residential population and institutions, and the limited tools and resources they had to accomplish the difficult changes. The explanations were telling:

“Geographic location; lack of community services; relatively little institutional aid.”

“Geography/location, demographics, limitations on out-of-state enrollment; [lack of] competitive scholarship dollars.”

“Lack of a critical mass, financial, small number of diverse students resident in service counties.”

“Availability of students, funding, historical reputation of not being a welcoming institution.”

“Lack of funds to establish scholarships for diverse students.”

In our interviews with campus Presidents, many, including the President of the state’s HBCU, which has strong links and alumni representation in cities in other states, saw a negative impact of the state’s restrictive policy of only counting black students from Kentucky in assessing the achievement of diversity goals. A number of institutions

located in parts of the state with limited black residents found it easier to recruit minority students from nearby cities in other states and had recruitment efforts and special reciprocity and other reduced tuition arrangements lowering out-of-state fees for students from cities with large nonwhite enrollments.

Since the Kentucky plan is fundamentally a remedial plan to repair the historic discrimination by Kentucky against the state's own black students, it is not difficult to understand the origin of the policy of counting only Kentucky students in assessing success. As the state moves from a remedial context to one fundamentally based on the educational value of diversity, it will become far more difficult to defend this policy since representation of nonwhite students from a variety of local contexts is likely to actually increase the diversity of views and experiences.

One of the most important goals of this study is to suggest possible improvements in the enforcement process. Looking at the relationship between the front-line officials enforcing civil rights and the institutions that are under pressure to make difficult changes is always complex. Institutions being regulated often are convinced that there is not enough respect for their good intentions and hard work, and that regulators do not understand the problems they are coping with. The civil rights officials, on the other hand, often see too little urgency on the part of the local institutions to achieve the goal and are acutely aware of the problems and obstacles that minority students and faculty still are dealing with. In some situations, the relationship deteriorates, such as when the local institutions believe that they are being unfairly accused of negative racial attitudes or biases.

When administrators who are working on the problems face what they see as implicit charges of racism, the situation is incendiary. Sometimes, of course, when institutions are truly recalcitrant, such confrontations may be needed. Often there is need for serious discussion of overly optimistic institutional views of what has been accomplished, views that may not square with the perceptions of minority faculty and students. In the end, however, the irony of civil rights enforcement is that often it is the officials accused of inaction or worse who must implement the reforms at the ground level. This works best when they can be converted rather than forced to do the minimum necessary. This is a situation in which some friction is inevitable but where careful leadership on both sides produces the best results. This does not mean that diversity policies must be sacrificed or goals abandoned, but it does mean that civility, common problem solving, always maintaining communication, and avoiding personalized accusations are very important. The ideal enforcer has workable goals, firm policy, a willingness to listen, and develops positive relationships with the institutions to the greatest possible extent. The ideal institutional leader recognizes legal and moral responsibility, develops and effectively implements strategies to make the needed change, maintains communication with the enforcers, and conveys a positive message about a plan to solve the problem within his own institution. When this works well, there may come to be a genuinely shared vision and a well implemented and successful reform.

One can hardly expect that university presidents, who always crave autonomy and control over their institutions, are going to be highly positive about being regulated on very sensitive issues. In the responses to our institutional questionnaire and interviews with Presidents there were signs that the relationships need improving. When asked “how much do you feel your institution is supported by your state’s postsecondary education council in pursuing racial/ethnic diversity” only two institutions responded “a great deal”; five said “somewhat” and one was uncertain.

When asked about the role of plans “developed to comply with the U.S. Office for Civil Rights” two campuses said that they were “essential” in increasing student diversity, three said they were “important” and three said they were “unimportant.” On a related question on the role of federal regulations (which are OCR policies), there was also a wide spread of opinions about effectiveness, with only one saying the policies were “essential.” All of the institutions reported that they had been monitored by state or federal officials concerning their performance on diversity goals.

Only five institutions said that they were achieving their general diversity goals and only two of them claimed to be meeting all of their goals. Two said that they had “achieved a few of our diversity goals” and one said that it needed “to do better, particularly around student, faculty and staff retention.” Most institutions said that they had done or were planning studies of their own racial situation. Only two institutions employed a chief diversity officer and reported that they were “very satisfied.” Two reported that they lacked funding for such a position and one that there was “board and some community resistance” to creating such a position.

Almost all of the university respondents acknowledged that they had far to go in making nonwhite students comfortable and welcome on campus. When asked about academic settings only two institutions’ respondents thought that minority students were “very welcome and/or supported”, five said “somewhat” and one said “minimally.” In terms of social settings, none thought that the student were “very welcome.”

In responding to questions about affirmative action policies there was a wide spread of practices. Only three of the institutions indicated that they had an “explicit written plan for increasing student racial/ethnic diversity” while five said it was essential to consider race to achieve diversity. Three institutions said that there was no policy on the explicit use of race at their institution while three said it could be used “but only as one factor among many.”

Since some of the institutions were relatively unselective in admissions, they had no affirmative action at that stage. Affirmative outreach and financial aid were more common with five universities reporting racially targeted outreach and recruitment and three financial aid policies that considered race.

Six institutions reported that they had no outreach, recruitment or aid policies that were solely based on race, with three saying that there had never been such policies. Three institutions reported that they had had policy reviews that led to modifications

of previous policies. Some of the changes were obviously related to the Supreme Court's decision in the Michigan cases. One institution, for example, changed its African American scholarships to scholarships emphasizing broad goals of diversity. One changed its Division of Minority Affairs to Division of Multicultural Affairs.

There was serious concern, however, about what would happen if universities could not consider race in making decisions and running programs. Three institutions indicated simply that "we would not be able to achieve the student race/ethnic diversity we seek" while two others said they would be "greatly impeded." One said that there would be no impact. Obviously this will be an essential issue to address in terms of post-Kentucky Plan strategies.

The Universities range widely from a statewide flagship research university drawing students from many locations within and outside Kentucky, to campuses that are overwhelmingly serving local commuter students. One university for example reported that about 70% of its students were commuters. Obviously such a university is overwhelmingly dependent on the population of its commuting area.

Faculty issues were difficult. All of the institutions reported that they had "policies and/or programs that consider faculty race/ethnicity in outreach/recruitment and/or hiring decisions." None said that their nonwhite faculty felt supported "a great deal" by faculty peers. Seven said "somewhat" and one institution said "uncertain." Five of the eight responding institutions said that they had faculty training on diversity but none said that they were "very satisfied" with it. The respondents were very divided in their opinions of the extent to which "your faculty reflects diversity in teaching styles and diversity of viewpoints", with only two saying "a great deal," four saying "somewhat," and the other two saying "uncertain." Yet in response to the question "How important do you believe it is that diversity be woven into and across your campus" seven said it was "essential" and the other two "important." When asked how important it was to "your students' educational experience," seven of the eight said "essential." The educational need was compelling and more work was needed to realize the potential. The Presidents all talked about the struggle to attract and hold African American faculty and staff, particularly those in areas without significant black communities. One President commented about the local isolation for faculty of color: "The percent of minority persons in our region is very small. In some of our communities, for example, there are no minority persons unless you consider Eastern European folks that came over generations ago ..."

Kentucky universities, like many others, tended to have policies that created a financial incentive for departments and schools to find and hire qualified minority faculty. One President noted, "if we can identify a minority candidate ... we will make money available to hire that position and we'll put money into another position." Several others discussed similar strategies. Some institutions mentioned special efforts to develop their own students into potential faculty members. One President noted "We have developed our own internal fellowship program for minority doctoral students." This program funded successful MA graduates to go on

for a doctorate elsewhere “with the understanding they would come back here and give us back a few years of their time.”

The role of the Council’s CEO Committee provoked division among the institutions. Some had positive views. “I thinking having a coordinating council in the state is a helpful thing,” said one president; “... they have held up the goals of the eight areas in the Kentucky Plan. Every year we review the Plan goals, we report on our results, and then the council makes decisions ...” He added, “I think that if we didn’t have that, probably some people wouldn’t pay any attention to it.”

Another President commented: “In our view the Kentucky Plan is fine. The numbers called for in the eight categories are reasonable. We don’t think there’s anything particularly aggressive in that. We qualified in all eight categories this year.” But he thought the plan could be improved by reflecting “all minorities or underrepresented populations” and by including those who came from outside Kentucky.

Others were upset with the atmosphere and assumptions that they sometimes saw in Committee hearings or campus visits. They spoke of feeling unfairly accused by some members and of failure to listen to and provide assistance for obstacles campuses faced even when seriously trying to achieve the goals. One of the presidents said, “One of the widespread concerns in Kentucky is that this committee has tended to be very heavy-handed in its approach ... and been very much ones to try to find the worst case story.”

Sometimes pursuing the goals led to unwise strategies. The pressure to increase minority enrollment, one President noted, meant that “we have probably been willing to accept minority students that are not as well prepared ... but that comes back to bite you later .... Then retention becomes an issue.” Because the Council required progress on both dimensions, the university had to find ways to increase both enrollment and success.

The universities often operate in communities with a long history of racial inequality and stereotypes and those issues are not fully resolved. “The community has been more challenging and slower to come along,” said one president. “African-American students will sometimes say there’s not a place in town I can get my hair fixed .... We don’t have any traditional African-American restaurants in town. The community has begun to hire minority students in our restaurants and our hotels .... That was slow coming .... The closest African-American church is a good drive ....” Some communities were described as negative influences.

Some campuses were actively trying to develop strategies beyond the Kentucky Plan, strategies that would easily stand the test of current Supreme Court law for voluntary affirmative action. One of the non-racial scholarships, for example, was described by a university president: “We have a modest number of diversity scholarships, but they’re open to any student. They write an essay and we have white students receive those, depending on their proclivity, their interest, their willingness to enhance a

diverse campus; ... it's based on being part of the solution rather than part of the problem.”

Our dominant sense from the data and conversations was that university leadership recognized that there was a continuing problem, saw it in a broader context than the current Kentucky Plan, wanted broader goals and more institutional autonomy and ability to innovate. At the same time, they recognized that the time had not come, not nearly come, when there would be no more need for a positive policy to identify, support, and graduate more of Kentucky's nonwhite students. The Presidents varied greatly in terms of their understanding of the civil rights policy and enforcement but not in terms of expressing recognition of the importance of the goal.

## **SECTION IV: CHALLENGES KENTUCKY FACES**

Civil rights remedies have often focused most of their attention at getting nonwhite students into schools where they were historically excluded. If there is to be a sound diversity plan for Kentucky that meets goals of equal educational opportunity, successful diversity, and rapidly increasing the educational level of the state's population, as required by Kentucky's higher education legislation, it must be based on a thorough understanding of where the weaknesses are in the state's educational pipeline and a well designed plan to respond to them. This requires a careful consideration of where the leakages occur, what situations may create obstacles, and what institutional changes may be necessary within institutions and within the entire Kentucky higher education system and the public schools that feed it. A voluntary diversity plan is no longer just meeting some external requirements, it must focus on achieving successful outcomes and that requires a much broader set of considerations.

### **The Leaking Pipeline and Graduation Trends and Inequality**

Affirmative admissions policy is a very important issue but there are many other dimensions that are involved in truly opening up a higher education system to all. There is strong research showing that students and families across the country from all racial and ethnic groups share high aspirations for college education, but that the pipelines carrying students from one level of education to another are dangerously leaky, especially for black and Latino students, and for students living in long-term poverty. The Kentucky data show a massive loss of students before high school graduation, a relatively low enrollment in four-year colleges, a poor transfer rate from the community and technical colleges to the four-year campuses, and very serious loss of students who come to college but fail to graduate. In other words, the opportunity pipeline has gigantic holes and Kentucky is losing much of its talent at a number of key transition points. The leaks tend to be more serious for black students, which compounds the inequalities. It is essential to understand where students are lost as they pass through the system and to consider strategies to repair the severe leakage.

The total educational enrollment at all ages in Kentucky was 1.0 million in 2006, 671,000 of whom were children in elementary and secondary schools. All higher education institutions enrolled 257,000. (The rest were in preschool.) Kentucky's leaders have decided that it is urgently important for the state's future that there be a rapid increase in the percentage of college graduates.

Kentucky has long lagged behind the nation in the levels of school attainment for both whites and blacks. In 1960, only 28% of Kentuckians 25 years old and older were high school graduates. This proportion rose sharply to 53% in 1980 and to 74% in the 2000 Census, still well behind the reported national averages. In 1960, only 4.9% of the state's residents 25 and over had college degrees, a number which rose to 11.1% in 1980, 17.1% in 2000, and 20.0% in 2006, according to Census statistics. In 1990, the state ranked 47<sup>th</sup> in BA completion rates, rising to 45<sup>th</sup> in 2000. The state

has been far behind and has embarked on a serious plan to move up to the national average in college education levels.

The black college graduation rates lagged far behind the white levels. Only 3.3% of blacks had BAs in 1970, rising to a reported 7.5% in 1990 and to 10.7% in 2000. Although the black rate rose significantly, blacks had a gap of 4.6% fewer college grads than whites in 1970, which actually grew to 7.3% in 2000.<sup>106</sup> These gaps have intergenerational impacts since less education means less income and more poverty for children, which leads to a decreased capacity to find housing in areas with good schools, which leads to weaker preparation for college. All of these factors are strongly related to lower achievement, which is, in turn, related to higher dropouts and lower college enrollment. The real racial gap in graduation rates is probably larger since the Census only surveys the non-institutionalized population and admits a serious undercount problem especially for minority males. It has been obvious for many years that the state needs to raise its college-educated population and to close the gap between whites and blacks. One of the fundamental problems facing Kentucky is that many of the state's African American parents were not educated well and have lived and raised children with diminished resources, passing disadvantages on to their children. Higher education can help break this cycle and enhance the state's future.

Some of the gaps that the state must face in its future plan require collaboration with institutions outside of higher education. Kentucky has long had a low high school graduation rate and a low college graduation rate. As have many other states, Kentucky has chronically underreported high school dropouts. State officials have reported graduation rates far beyond those shown in independent analyses. When officials rely on schools to report who has dropped out and do not check the accuracy of the reports, schools often report inaccurately that students have transferred somewhere else. It is much easier to assume the best than to report that students are dropping out of your school. Like most states, Kentucky does not have an established longitudinal data system that follows all students to find out who actually graduates. The 2006 report of the Kentucky Auditor of Public Accounts documents serious problems with the state's methods and notes, "The Alliance for Excellent Education ... estimated that more than 18,000 students did not graduate from Kentucky's high schools in 2004, costing the state more than \$4.8 billion over a lifetime in lost wages, taxes, and productivity."<sup>107</sup> Graduating students is a very good investment for the state and is an essential prerequisite for the kind of increased college graduation rate the state's plan calls for.

---

<sup>106</sup> Census data from the tables included in the Data Library of the Southern Regional Education Board, downloaded April 1, 2008.

<sup>107</sup> Richard Innes, "On Graduation Rates," Testimony for the Subcommittee on Elementary and Secondary Education Interim Joint Committee on Education Kentucky Legislature November 3, 2003; Swanson, 2004; Commonwealth of Kentucky, Auditor of Public Accounts, "Performance Audit of Kentucky's Dropout Rate," October 12, 2006.



Having been continuously involved in research on dropout rates since 2001<sup>108</sup> we are convinced that the most useful computations (until a state develops a high quality longitudinal data system) use the Cumulative Promotion Index developed by Christopher Swanson, now director of research for Editorial Projects in Education Research Center, the research arm of *Education Week*. Kentucky reported a graduation rate of 83.3% for 2006, far above the national rate.<sup>109</sup> In *Quality Counts 2007 Report*, published by *Education Week*, the estimate for Kentucky's graduation rate was 69.7% and far lower for African American students.<sup>110</sup> If, in fact, the state is losing almost a third of its total enrollment and half of the non-white enrollment before high school graduation, then this is a fundamental obstacle not only to achieving diversity and full integration in higher education but also to moving toward a more competitive level of college education for its adult population. Any serious approach to equity in higher education must focus not only on the institutions but also on the pipeline. It is clear that the pipeline needs repair, as well as a better plan for accurately reporting and strongly addressing the dropout crisis in the high schools.

In terms of the outcomes of the higher education system, the statistics from the state institutions show both real progress and much work to be done. Over an eight year period from 1998 to 2006, public institutions in KY awarded almost 102,000 BA degrees. Less than 6,500 went to African Americans, 769 to Hispanics, and only 229 to American Indians. In other words, blacks received about one-sixteenth of the degrees, Hispanics less than one percent and American Indians less than one in every 400. Kentucky has, in general, a low level of college completion and it is seriously worse for nonwhite students, even those who make it to college but it is improving.

Masters degrees are particularly relevant to higher skills jobs. During these same eight years, whites received more than thirty thousand M.A. degrees while blacks obtained less than two thousand.

---

<sup>108</sup> Gary Orfield, ed., *Dropouts in America: Confronting the Graduation Rate Crisis*, Cambridge: Harvard Education Press, 2004. The Civil Rights Project sponsored the first national conference on dropout research in many years in 2001 and has cosponsored seven regional conferences and prepared a number of reports on the issue since that time.

<sup>109</sup> Kentucky Department of Education - Office of Assessment And Accountability *Graduation Rate Trend Data 2002 – 2006*, May 8, 2007.

<sup>110</sup> Education Week, *Quality Counts 2007 Report*, January 2007.

**Table 2:**

<b>Degrees Conferred by Level and Race Kentucky Public Universities, 1999/2000 - 2005/2006</b>								
<b>Baccalaureate Degrees</b>								
	<b>1999</b>	<b>2000</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>
Black	658	679	747	848	791	889	896	961
American Indian or Alaskan Native	27	28	23	34	27	23	34	33
Asian or Pacific Islander	155	182	152	188	177	167	180	204
Hispanic	81	96	67	86	94	102	119	124
White	10,744	10,682	10,639	11,004	11,115	11,688	12,064	12,781
<b>Total</b>	<b>12,014</b>	<b>11,962</b>	<b>11,937</b>	<b>12,483</b>	<b>12,466</b>	<b>13,123</b>	<b>13,555</b>	<b>14,423</b>
<b>MA Degrees</b>								
	<b>1999</b>	<b>2000</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>
Black	211	211	195	213	212	266	326	333
Asian or Pacific Islander	54	50	59	90	127	160	153	139
Hispanic	26	36	40	27	33	101	103	56
White	3,438	3,335	3,418	3,297	3,649	4,195	4,378	4,416
<i>Source: Kentucky Council on Postsecondary Education</i>								

In 2006, according to the Census Bureau’s estimates, 80% of Kentucky people 25 years and over had at least graduated from high school, and 20% had a Bachelor's degree or higher. 20% were dropouts; they were not enrolled in school and had not graduated from high school. Given that these percentages are derived from self reports and there are serious problems associated with Census survey response rates particularly for nonwhite students, these are, no doubt, somewhat optimistic numbers.

**Table 3:**

<b>The Educational Attainment of People in Kentucky in 2006</b>	
<b>Highest Level</b>	Graduate or professional degree <b>8%</b>
	Bachelor's degree <b>12%</b>
	Associate's degree <b>6%</b>
	Some college, no degree <b>18%</b>
	High school diploma or equivalency <b>35%</b>
	Less than high school diploma <b>21%</b>
<i>Source: U.S. Bureau of the Census, 2007</i>	

A 2006 report from the State Higher Education Executive Officers (SHEEO), *Kentucky Higher Education: The View from a Distance*, compared Kentucky with other states across the U.S. in a series of graphs and tables. The data showed, as Kentucky's own studies have recognized, that college graduation was quite consistently linked to income levels. Kentucky was one of the four lowest states in college attainment and substantially below average in average income. Even at Kentucky's family income level there were a number of states with a higher level of education. The data also showed similar relationships between education and income at the county level within the state. Since young adults with low levels of education were moving into the state while there was a net out-migration of those with Bachelors degrees the need for increasing college completion rates was all the more urgent.

### State Funding and College Costs

Across the U.S. college costs are rising and the public support for higher education has been lagging in state budgets. Like many states, Kentucky is now dealing with cutbacks resulting from declines in state tax receipts. In national comparisons over recent years, however, Kentucky does quite a good job of supporting its universities, but lags badly in funding its large community college system. Like many states, it has put a large burden on students by rapidly increasing college costs. Kentucky's instructional expenditures were close to national averages at the University level, but far below, less than half the average, at the community college level. Kentucky commissioned a report in 2006 from SHEEO, a nonprofit, nationwide association of the chief executive officers serving statewide coordinating boards and governing boards of postsecondary education, which is a very important source of comparative national statistics. The SHEEO report showed that per capita appropriations for education, controlled for inflation, fell in the early 1980s, then rose significantly with the economic boom of the late 80s, only to decline and flatten out in the early 1990s before reaching a peak in the late 1990s as the economy grew and state reforms were implemented, followed by a drop. The most recent SHEEO national report, issued in February 2008, showed that in fiscal year 2007, Kentucky did better than most states in appropriations. It was also spending substantially more per student than the national average.<sup>111</sup> In 2008, the Governor proposed a 15% decline in funding as state revenues fell; the legislature then voted for a 6% cut.<sup>112</sup> Periodic cuts related to recessions tend to disrupt reforms and lead to sudden increases in tuitions across the country.

Overall, Kentucky was supporting its institutions with per capita funding above the national average and devoting a significantly higher than average share of the state's total income to supporting higher education. It was, however, following the national trend in terms of increasing the percent of total costs carried by students through

---

<sup>111</sup> SHEEO, *State Higher Education Finance, FY 2007*, early release, February 2008, appendix B.

<sup>112</sup> SHEEO, *Kentucky Higher Education: The View from a Distance*. August 2006.

tuition and fees—with students paying over 35% of the total costs by 2005. Student costs began to rise rapidly across the nation in the early 1980s as the earlier movement toward low-cost, open access, higher education gave way to the idea that college was a “private good” and that more of the costs should be shifted to students and families.

In spite of the state’s relative poverty, by 2007 Kentucky was charging tuition and fees well above the national average relative to local costs according to SHEEO.<sup>113</sup> It was increasing its student aid to well faster than the national average, reflecting the “high tuition, high aid” philosophy. (Research shows that low income students and families tend to be much more influenced by the stated tuition cost--the sticker price--than by what turns out to be the real net price after discounting aid.) Kentucky was one of the one-third of states that substantially increased both tuition and state funding per student from 1991 to 2005, quite significantly increasing the net resources for higher education. In spite of its increased resources, it was well below the national average in terms of the production of BA graduates. It did, however, substantially above average in terms of the level of pre-BA credentials produced for a much lower level of per student investment at two year campuses.<sup>114</sup> In terms of production of college graduates, the state’s investment was not meeting the state policy makers’ goals. There can, of course, be a lag time in such investments and these costs may be part of the ramping up of the system.

### **Kentucky’s Plan to Increase College Attainment**

The Council on Postsecondary Education (CPE) is working to pursue the state’s goal of greatly increasing access to higher education and preparation for success in higher education. The high schools were increasing college preparation. During the period from 1998 to 2003 the state’s average ACT score rose slightly from 20.2 to 20.3 but there was much more progress was recorded on the goal of completing more college level courses during high school by passing AP courses at the mandated level. In 1997, the number of successful passes per 1000 high school juniors and seniors was 77, or about one for every 13 students. Six years later, in 2003, it was better than one per every 3 students.

In 2002, only about 38% of Kentucky ninth graders enrolled in college within 4 years. In 2004, the rate of completing the first year of college varied from about two-thirds at Kentucky State and Northern Kentucky to more than 80% at the University of Kentucky and the University of Louisville. The low numbers led Northern Kentucky to raise both its admissions standards and its outreach and preparation programs in order to admit students more likely to succeed. The community colleges reported 56% of their students completing the first year. Although the community college system had a huge enrollment, it created only relatively small numbers of transfer students, and the Kentucky public universities received only about 2,500 transfers in 2004, actually down from 1998. The most recent data show transfers have

---

<sup>113</sup> SHEEO, *State Higher Education Finance, FY 2007*, early release, February 2008, appendix C.

<sup>114</sup> *Ibid.*

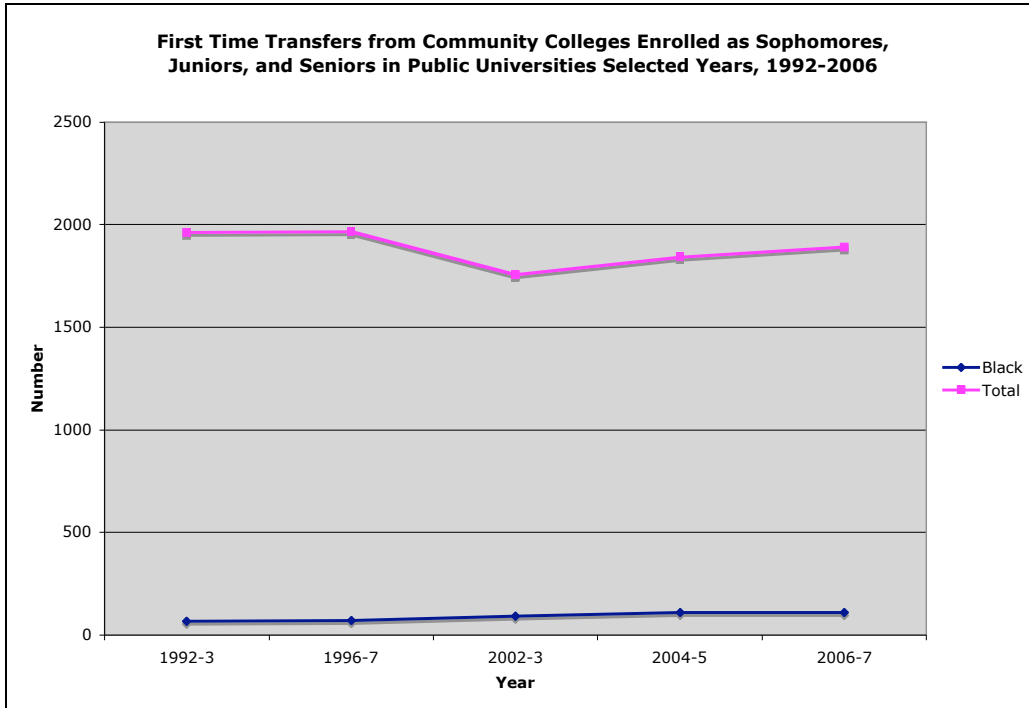
remained low. The following table, based on tracking records of individual students, shows that in examining first-time transfer students from the entire huge system, there were actually fewer transfer students beyond the freshman level in universities in 2006 than 14 years earlier. The total number of black transfer students remained below 6% throughout this period.

**Table 4:**

<b>First Time Transfers from Community Colleges Enrolled as Sophomores, Juniors, and Seniors in Public Universities Selected Years, 1992-2006</b>		
<b>Year</b>	<b>Black</b>	<b>Total</b>
1992-3	68	1961
1996-7	72	1966
2002-3	93	1756
2004-5	110	1842
2006-7	109	1890

*Source: Civil Rights Project computations from data supplied by Kentucky Higher Education Institutions*

**Figure 1:**



A central goal of the state is to increase the production of BA graduates to improve the economy and the quality of participation in civic life and participation, while greatly lowering the likelihood of unemployment and criminal activity.<sup>115</sup> In 2004, only 44% of university students were graduating within six years of enrolling. This percent topped 50% only at the University of Kentucky and Murray State University, the state's "public Ivy." Kentucky State University had the lowest record with 29.5%, while the University of Louisville and Eastern Kentucky University were only a few percent higher. The state's goal was to rapidly increase these outcomes.<sup>116</sup> Statistics through 2007 show high attrition but some real gains.

The Council adopted an ambitious set of targets and goals for improvement in its 2020 Initiative, which sought to implement the 1997 Kentucky Postsecondary Education Improvement Act's plan. The Initiative called for catching up with the national average for college completion by 2020 by doubling the number of BA grads in Kentucky. This would mean an increase of 400,000 graduates. The Council's staff devised a plan that called on the state's colleges to increase graduates 89% by 2020, with goals ranging from 42% for the University of Louisville to 137% for Kentucky State University, and big increases for non-public campuses as well. The University of Kentucky was expected to increase graduates by 93%, reaching 6,300 per year. Kentucky State was expected to climb from 229 graduates in 2005 to 542, fifteen years later. In 2005, Kentucky State accounted for only 1.7% of the state's public university graduates.<sup>117</sup>

The Kentucky Council on Postsecondary Education's 2007 report, *Double the Numbers: Kentucky's Plan to Increase College Graduates*, reports that, though there has been substantial progress in eleven years under the plan, it is not nearly enough. With just 12 more years before reaching 2020, the state is on track to have a level of college completion one-fourth below the projected national average. Since income is strongly related to college education, continuing this trend would mean that it could take a century and a half for the state to reach the average national income.<sup>118</sup>

The state's plan looks at many angles of the education deficit. It calls for a major effort to raise high school graduation from a reported 72% to 81%.<sup>119</sup> This goal does not, however, face up to the real level of dropouts in Kentucky.<sup>120</sup> The state's plan also calls for substantially increasing the enrollment of the community college system

---

<sup>115</sup> Ibid., 6-7.

<sup>116</sup> Kentucky Council on Postsecondary Education, "Key Indicators of Progress toward Postsecondary Reform," May 18, 2005.

<sup>117</sup> Council on Postsecondary Education, "2020 Bachelor's Degree and Undergraduate Enrollment Targets," Sept. 17, 2006

<sup>118</sup> Kentucky Council on Postsecondary Education's, *Double the Numbers: Kentucky's Plan to Increase College Graduates*, October 2007, p. 5.

<sup>119</sup> Ibid, p. 10

<sup>120</sup> Christopher B. Swanson, "Sketching a Portrait of Public High School Graduation: Who Graduates? Who Doesn't," in G. Orfield, *Dropouts in America: Confronting the Graduation Rate Crisis*, Cambridge: Harvard Education Press, 2004, p 23.

since the “four year universities do not have the capacity to serve the additional students needed” to reach the state’s goals. This would work in terms of sharply increasing the number of students with BA degrees only if the rate of successful transfer to the four-year institutions soared. The plan’s goal was to increase transfers from 4,500 to 11,300.<sup>121</sup> Although the growth of enrollment of the community colleges is so far exceeding the plan’s goals, the transfer process is falling far short. One of the proposed remedies calls for “concentrated efforts across the system to strengthen guidance and support for students at every stage of their academic careers” and another proposes “redesigned and expanded financial aid programs.”<sup>122</sup>

Although the community college system had a huge enrollment, it created only relatively small numbers of transfer students and the Kentucky public universities received only about 2500 transfers in 2004, actually down from 1998. Transfers have remained low in the most recent data. Table 5, based on following records of individual students, shows that in examining the first time transfer students from the entire huge system the transfer students beyond the freshman level in universities in 2006 accounted for a very small share of all university students.

The most recent overall state statistics, covering the 2007 enrollments, were released in early 2008. Although these show significant increases, most institutions did not reach their targeted growth goals, and most of the growth was concentrated in community colleges, which have still failed to increase transfer numbers significantly. The Council reported:

In fall 2007, Kentucky’s public institutions continued to break enrollment records. Overall, 212,994 students enrolled in public universities and community and technical colleges, a 3.2% increase over fall 2006 and a 34.4% increase since postsecondary reform began in fall 1998. Undergraduate enrollment increased by 3.5% while first-professional enrollment rose 2.4%. Graduate enrollment remained relatively flat .... The Kentucky Community and Technical College System and Kentucky State University experienced the largest growth in undergraduate enrollment, up 7.3% and 7.2%, respectively. Undergraduate enrollment was flat at most institutions, while Murray State University and the University of Kentucky saw undergraduate enrollment decline .... The University of Louisville, Western Kentucky University, and KCTCS are the only institutions that met proposed enrollment goals for fall 2007.<sup>123</sup>

Our research shows that a great deal has been accomplished, but that the state must overcome serious obstacles if it is to come near its goals. Though nonwhite enrollment was rising faster than white enrollment last year, large gaps remain before and after enrollment. Achieving a representation of African Americans reflecting

---

<sup>121</sup> Double the Numbers, p. 12.

<sup>122</sup> Ibid., 23.

<sup>123</sup> Council on Postsecondary Education, “Fall 2007 Enrollment Report,” February 1, 2008.

their share of the state’s high school graduates, or share of the state’s population, among each new class of admitted students, would be, of course, a major accomplishment. If those students are not welcomed on campus and if they do not graduate, then potential gains will be lost. A college degree can and often does transform a student’s life. A college debt without a degree is something very different.

**Table 5:**

		<b>Black</b>	<b>White</b>	<b>Total</b>
1992	Number	124	3126	3250
	<i>% of All Students</i>	0.2	4.5	4.7
1993	Number	123	2996	3119
	<i>% of All Students</i>	0.2	4.4	4.6
1994	Number	154	3042	3196
	<i>% of All Students</i>	0.2	4.6	4.8
1995	Number	137	2899	3036
	<i>% of All Students</i>	0.2	4.4	4.6
1996	Number	124	2918	3042
	<i>% of All Students</i>	0.2	4.5	4.7
1997	Number	131	2973	3104
	<i>% of All Students</i>	0.2	4.5	4.7
2001	Number	134	2623	2757
	<i>% of All Students</i>	0.2	4.0	4.2
2002	Number	155	2581	2736
	<i>% of All Students</i>	0.2	3.8	4.0
2003	Number	142	2553	2695
	<i>% of All Students</i>	0.2	3.7	3.9
2004	Number	183	2567	2750
	<i>% of All Students</i>	0.3	3.7	3.9
2005	Number	167	2530	2697
	<i>% of All Students</i>	0.2	3.6	3.9
2006	Number	162	2585	2747
	<i>% of All Students</i>	0.2	3.7	3.9

*Source: Civil Rights Project Computations from Institutional data.*

### **Student Success and Student Loss: What Happens After Enrollment?**

It is very difficult to evaluate the flow of groups of students through colleges simply by looking at yearly enrollment and graduation statistics. Many students leave or transfer or “stop out.” As part of our research we obtained data from the University records that allowed us to follow each individual student over a period of years so we could know what actually happened to groups of white and nonwhite students over their time in college within the various universities and community colleges. We focused on students beginning in the early 1990s and students beginning in 2001 to see what kind of persistence to graduation black and white students experienced over



time. The 2001 freshman class was the most recent we could follow over a six-year period. This data clearly shows something Kentucky policy makers have often talked about—that the state has far to go in graduating its students. The data shows progress; rates of persistence and graduation have clearly improved from very low levels since the early 1990s. But persistence is still low and racial differences still large.

Our data shows a very low rate of timely movement from enrollment to graduation in Kentucky colleges, perhaps, in part, because of the high level of part-time study and work. The record of delayed movement through the institutions is particularly striking for black students. Of the 9929 white students who were freshmen in Kentucky colleges in 1992 only 1918, or 19%, were on-time seniors four years later. Just 81 of the 955 black students, or 8%, were on-time seniors. Since many financial aid packages provide only four years of aid, this is a massive problem in terms of ability to continue, particularly as the state’s college costs rise very rapidly. By the sixth year after enrollment, 42% of the whites who entered had senior status or had graduated but only 28% of the black students. African Americans had begun as 9% of the white numbers but slipped to 7% of a seriously shrunken cohort by the sixth year.

In spite of the state’s intense effort to increase college going, the freshman class of 2001 wasn’t much larger than nine years earlier — an increase of less than a thousand for whites and only 17 students for blacks. The black proportion of freshman students actually dropped slightly. There was, however, a significant improvement in timely movement through school, especially for African American students, even though serious gaps remained. For black students of the class entering in 2001 the persistence rate to the senior year was as high as it had been for white students in the 1992’s cohort, but white performance increased too, so a serious gap remained.

**Table 6:**

<b>1992 and 2001 Cohorts in Four Year Institutions, by Race</b>						
	1992	Freshman '92	Sophomore '93	Junior '94	Senior '95	Seniors or more By 1997
White		9929	2984	2204	1918	4177
<i>% of White Freshman Cohort</i>		100	30	22	19	42
Black		955	150	92	81	265
<i>% of Black Freshman Cohort</i>		100	16	10	8	28
	2001	Freshman '01	Sophomore '02	Junior '03	Senior '04	Seniors or more By 2006
White		10886	3843	3172	2987	5915
<i>% of White Freshman Cohort</i>		100	35	29	27	54
Black		972	217	167	134	416
<i>% of Black Freshman Cohort</i>		100	22	17	14	43

*Source: Civil Rights Project computations from data supplied by Kentucky Higher Education Institutions.*

## Trends in Graduation

Most of the focus in the early years of affirmative action and civil rights enforcement has been on admitting more students of color to traditionally white institutions. Admissions opens a door of opportunity, of course, but if a student invests years of his or her life to college, borrows money, and forgoes income, and does not graduate, much of the potential is lost and the student has lost income and incurred debt. Across the state as we have talked with educational leaders there has been a very strong sense that retaining and graduating students of color must be a central focus of the next generation of civil rights policy. The graduation statistics show clear progress on some dimensions but also show that there is more work to be done.

## BA Degrees

Substantially increasing the state's yearly production of BA graduates (see table 7) has been a central priority of state policy makers, especially since the enactment of the 1997 reform. B.A. production is growing but only gradually, climbing from 11,161 in 1993 to 13,756 thirteen years later in 2006, an increase of 23%, all of which has come since 2002, suggesting that the initiative may finally be starting to kick in. The number of white graduates has gone up by 20% to 12,763 students, while the number of black graduates increased from 552 to 993, a dramatic increase of 80% from a low starting point, a gain of 441 students. In 2007 blacks accounted for 7.2% of the graduates receiving BA's, up from 4.9% in 1993, a substantial accomplishment. Campuses are having greater success in graduating the black students they enroll but the number is still low. If this progress can be continued it would be a very important victory for the diversity effort. If the state is to double the number of its college graduates, however, it will have to greatly increase the fraction of students finishing high school and persisting through college because 2008 projections by the Western Commission on Higher Education indicate the number of Kentucky high school graduates will decline modestly after the class of 2009 and the white share will slip significantly.

**Table 7:**

	Number of Baccalaureate Degrees Awarded in 1992-3 and 2006-7, by Race and Institution					
	1992-3			2006-7		
	Black	White	1992-3 Total	Black	White	2006-7 Total
Eastern Kentucky University	75	1,596	1,671	86	1,783	1,869
Kentucky State	122	50	172	134	48	182
Morehead State	28	1,045	1,073	39	1,009	1,048
Murray State	26	1,043	1,069	72	1,388	1,460
University of Kentucky	79	2,540	2,619	152	3,166	3,318
University of Louisville	140	1,726	1,866	268	1,885	2,153
Western Kentucky University	67	1,723	1,790	174	2,099	2,273
Northern Kentucky University	15	886	901	68	1,385	1,453
<b>Total</b>	<b>552</b>	<b>10,609</b>	<b>11,161</b>	<b>993</b>	<b>12,763</b>	<b>13,756</b>

*Source: Civil Rights Project computations from data supplied by Kentucky Higher Education Institutions*

The University of Louisville is by far the state's leading producer of black BA graduates, accounting for 27% of the state's total in 2006, followed by Western Kentucky, the University of Kentucky and Kentucky State University. Eastern, Morehead and Northern Kentucky and the University of Kentucky have the lowest shares of black students in their 2006 graduating class. Eastern and Morehead are regional institutions in parts of the state with few black residents.

Kentucky State, the only HBCU, has had a very disproportionate historic role in the production of black graduates in spite of its small size. It still accounted for 22% of the state's total black graduates in 1993, nearly 40 years after the *Brown* decision, declining slowly to 13% in 2006, even though its number of black graduates had recently increased significantly. 87% of black students are graduating from largely white institutions, a remarkable historic reversal.

**Table 8:**

	<b>Percentage of Kentucky Public University Baccalaureate Degrees Awarded in 1992-3 and 2006-7, by Race and Institution</b>			
	<b>%Black (Column Totals)</b>		<b>%White (Column Totals)</b>	
	1992-3	2006-7	1992-3	2006-7
Eastern Kentucky University	14	9	15	14
Kentucky State	22	13	0	0
Morehead State	5	4	10	8
Murray State	5	7	10	11
University of Kentucky	14	15	24	25
University of Louisville	25	27	16	15
Western Kentucky University	12	18	16	16
Northern Kentucky University	3	7	8	11
<b>% of Total</b>	<b>4.9</b>	<b>7.2</b>	<b>95.1</b>	<b>92.8</b>

*Source: Civil Rights Project computations from data supplied by Kentucky Higher Education Institutions*

Kentucky is not, of course, unique in having a differential rate of college success for white and nonwhite students. New research presented in 2008 shows that there are systemic differences in the pipeline to and through college in most states and in most flagship state universities and the gaps are often substantial. Educators across the country are struggling with issues of closing gaps at all levels of education.

### **Master's Degrees**

An increasing number of jobs either require or strongly reward MA degrees and all of the eight universities award them. The number of MA degrees awarded in Kentucky increased almost 50% from 3,076 in 1993 to 4,571 in 2007. In 1993 there were 111 MA degrees awarded to blacks from a total of 3,076, or 3.6%. In 2006, 302 African Americans received degrees accounting for 6.6% of the total. The state was becoming richer in people with post-B.A. training and expertise and racial inequality had declined.

**Table 9:**

	1992-3			2006-7		
	Black	White	1992-3 Total	Black	White	2006-7 Total
Eastern Kentucky University	11	358	369	18	611	629
Kentucky State	4	7	11	24	13	37
Morehead State	4	255	259	8	387	395
Murray State	11	247	258	39	411	450
University of Kentucky	30	774	804	54	903	957
University of Louisville	35	686	721	104	986	1,090
Western Kentucky University	15	474	489	43	620	663
Northern Kentucky University	1	164	165	12	338	350
<b>Total</b>	<b>111</b>	<b>2,965</b>	<b>3,076</b>	<b>302</b>	<b>4,269</b>	<b>4,571</b>

*Source: Civil Rights Project computations from data supplied by Kentucky Higher Education Institutions*

Back in 1993 the University of Kentucky and the University of Louisville each trained about a third of the state's new black MA graduates but, over time, the role of UK has declined to 18% in 2007 and the importance of the University of Louisville has increased to 34%. Murray State University and Western Kentucky are the other leading trainers. At the M.A. level Kentucky State generally trains almost 8% of Kentucky black graduates in 2006 (and it awarded one third of its MA degrees to white students).

**Table 10:**

	Percentage of Masters Degrees Awarded in 1992-3 and 2006-7, by Race and Institution			
	%Black (Column Totals)		%White (Column Totals)	
	1992-3	2006-7	1992-3	2006-7
Eastern Kentucky University	10	6	12	14
Kentucky State	4	8	0	0
Morehead State	4	3	9	9
Murray State	10	13	8	10
University of Kentucky	27	18	26	21
University of Louisville	32	34	23	23
Western Kentucky University	14	14	16	15
Northern Kentucky University	1	4	6	8
<b>% of Total</b>	<b>3.6</b>	<b>6.6</b>	<b>96.4</b>	<b>93.4</b>

*Source: Civil Rights Project computations from data supplied by Kentucky Higher Education Institutions*

### Doctorate Production: The Pipeline for Future Faculty

In our discussions with campuses about meeting the goals of the Kentucky Plan, education leaders repeatedly speak about the serious challenge of finding and recruiting African American faculty members. Many Kentucky faculty are, of course, native Kentuckians who were educated in Kentucky. Such faculty members obviously have a greater probability of wanting to live and work in the state and to want to stay

there as their careers develop. So one of the critical questions the state's educators and policy makers need to examine as they look forward is how well the state is doing in "growing its own" doctorates.

We looked at the graduation numbers for black and white students from the doctoral programs at the state's two research universities, the University of Kentucky and the University of Louisville, in 1992-3, and 2006-7. Over this fourteen-year period the total number of doctorates awarded grew from 168 to 231, and the percent of recipients who were black increased from almost 2% to almost 10%, from 3 to 22 students. This is a substantial increase from a very low base. If sustained for a long period and if the doctorates were distributed reasonably by field, this could go a long way toward helping with the diversification of faculties. Obviously, in the past, universities had to search outside of Kentucky for black faculty with advanced degrees.

**Table 11:**

	Number of Doctoral Degrees Awarded in 1992-3 and 2006-7, by Race and Institution					
	1992-3			2006-7		
	Black	White	1992-3 Total	Black	White	2006-7 Total
University of Kentucky	2	130	132	18	134	152
University of Louisville	1	35	36	4	75	79
<b>Total</b>	<b>3</b>	<b>165</b>	<b>168</b>	<b>22</b>	<b>209</b>	<b>231</b>

*Source: Civil Rights Project computations from data supplied by Kentucky Higher Education Institutions*

Between the 1999-2000 school year and the 2005-06 academic year a total of 2339 doctoral degrees were awarded in Kentucky according to Council data. These students were the primary source of college faculty and advanced researchers and, in some fields, high educational administrators, in the state. Of these degrees only 102 were awarded to black students and only 31 to Latinos and 12 to American Indians. 1566 were awarded to U.S. whites, while nonresident aliens received 532, or about five times as many as the state's African Americans. Blacks received about 4% of these degrees and Latinos about 1% during this period. 23% were going to a group the state classified as non-resident aliens. When we examined the fields of study from 1999-2006 we found that more than two-fifths of degrees awarded to African Americans were in education, and a number of others were in fields such as clinical psychology, more likely to produce practitioners than faculty members. On a positive note, there was a clear tendency for the fields of study to expand over time and a significant presence beginning to develop in some parts of the sciences and social sciences. The trend was toward an increase of numbers and of fields over time, which means that Kentucky's research universities are in the process expanding the pool of qualified potential faculty of color. This is a very encouraging recent trend and sustaining it could make a major difference.

**Faculty**

Faculty diversity is an integral part of creating successfully integrated colleges. When we talk about affirmative action and desegregation we tend to focus on changes in student population and admissions, especially at the schools that once were reserved for whites only. Much has been learned about the benefits of diversity and some of the important lessons are about the importance of having the faculty and staff as well as the student bodies become more representative of Kentucky's community. How can a university achieve the rich blend of perspectives in teaching and research without a diverse faculty? How can nonwhite students feel genuinely comfortable and welcome in a campus where the faculty does not include mentors and researchers who understand their communities and whose research reflects that understanding? Faculty integration is a much more complex job than recruiting and admitting students, but it is vitally important. Our interviews with leaders of the state's higher education institutions, discussed later in this report, showed that none of the institutions are satisfied with their accomplishments in hiring, retaining, and promoting a diverse faculty.

**Professional Degrees**

In terms of first professional degrees, the disproportion was large. 5060 degrees were awarded from 1999-2006, but only 244 to blacks (two-thirds of them going to women), and just 49 to Latinos. Blacks were getting 4.8% while Latinos were receiving less than 1%. Recipients of professional degrees receive the highest average incomes, provide critically important services, and provide leadership in public life and in many vital fields. There is still far to go in this realm.

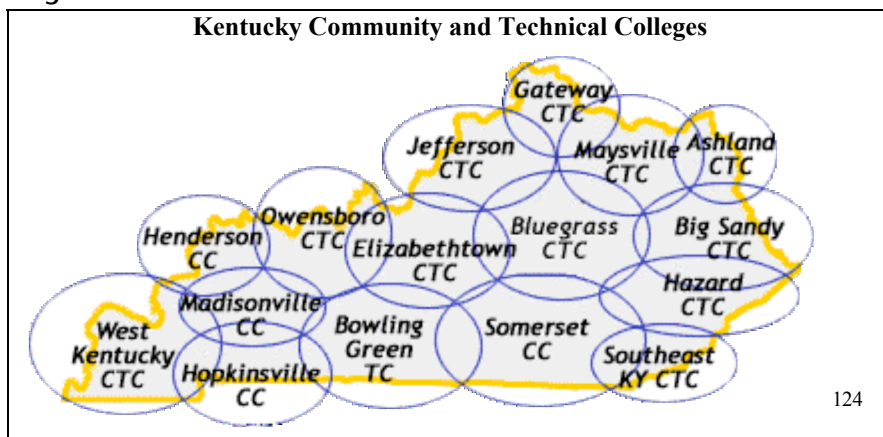
In assessing progress to date, there is much to congratulate Kentucky educators about but serious problems still to address. Kentucky has done better than many states in reflecting its black population in the enrollment of its universities and both the enrollment and graduation numbers have gone up in recent years though the state is still short of equal accomplishment for black and white students. Some campuses have been particularly important in this growth. The state still, however, loses very large numbers of students as high school dropouts, has a poor persistence record in college, has yet to develop a strong pattern of successful transfers from community colleges, and is very far from producing a strongly representative future faculty of doctoral recipients. The state's former HBCU still faces many serious challenges. Little attention has been paid to the one significantly growing sector of future collegians, the Hispanics. The cost of college is relatively high for a low income state and promises to increase substantially in the near future, raising the question of whether or not historically excluded groups will have the means to walk through the doors that have been opened and to study long enough to gain the degrees that so deeply impact their lives.

## Community Colleges and Their Contribution: Developing a Critical Resource

The most dramatic change in Kentucky higher education since the “Double the Numbers” goal was set in 1997 is a huge expansion of community college enrollment, well beyond the state goals. Just between 2006 and 2007 enrollment grew 7.3%. This could be a sign of a great expansion of the flow of students who would eventually receive a BA degree, but so far it has been deeply disappointing in the transfer numbers which have stalled. This raises a large question about what is happening in that system and in the relationships between the public two year and four-year institutions.

Kentucky has an unusual history in its two-year institutions. Although most U.S. community colleges have long combined academic and technical training, Kentucky had separate systems until the merger little more than a decade ago. The academic community colleges used to be under the University of Kentucky and there were many separate technical institutions. The Community and Technical College system was created through a 1997 merger of the state’s community and technical colleges, bringing together the college transfer function, the technical training function, and all other forms of activity in a combined two-year college system which now constitutes 16 consolidated institutions. That merger, of course, brought into the system large numbers of staff who had been trained and worked in institutions where transfer was not an option, which may account for some of the difficulties it faces on that dimension.

Figure 2:



<sup>124</sup> K. Dougherty, *The Contradictory College: The Conflicting Origins, Impacts and Futures of the Community Colleges*, Albany: SUNY Press, 1994; D.E Leigh and A. M. Gill, “Do Community Colleges Really Divert Students from Earning Bachelor’s Degrees?” *Economics of Education Review*, vol 22, no. 1 (2003), pp. 23-30; G. Orfield, et al, *The Chicago Study of Access and Choice in Higher Education*, Chicago: Report to the Illinois State Senate, 1984; P. Gandara, G. Orfield, and C. Horn, eds., *Expanding Opportunity in Higher Education*, Albany: SUNY Press, 2006.

### Transfer and BA Attainment

Several things about transfer and BA attainment are well established in the academic literature. First, it is clear that enrollment in a community college, controlling for everything else, diminishes the probability of attaining a BA degree and delays the process for those who do succeed. (But often everything else is not equal and it is, of course, the only option for many students, particularly those with limited funds, jobs and responsibilities, and the need for a nearby commuter institution open to all). Second, research shows that enrollment directly out of high school increases the probability of completion as does being a full-time student with no more than 15 hours weekly of work. Third, it is clear that different community colleges have very different connections with four year colleges and very different records of successfully transferring their students. Fourth, it is clear that many community college students have little understanding of what is needed for successful transfer, and that the low funding of community colleges mean that they often have few resources to support transfer. Fifth, data shows that huge numbers of community college students arrive with very serious needs for remedial courses before they are ready for college level work.

Kentucky is working hard to raise its education attainment, but the rapidly growing community colleges get only about a fourth of their students from typical college age students, about half the national average<sup>125</sup> and they have much smaller than average per student budget resources to work with. Nationally about two thirds of community college students attend part-time but in Kentucky it is about 80%.<sup>126</sup> The colleges are trying to educate students under more difficult circumstances with less money.

Looking at Associate Degrees awarded for the classes of 2000 to 2006, blacks received 2221 of the 40,640 awarded, about 5.5%, while Hispanics got 367, less than 1%, and whites received 36,198.<sup>127</sup>

The community college system is very centralized with one statewide board, with the presidents of all the colleges reporting directly to the President, with central control over budgets and appointment of college Presidents. The community colleges had been part of the Kentucky plan under the University of Kentucky's supervision. The combined institutions were expected to meet goals of the plan. This was difficult in many ways. In the early years there were lots of problems consolidating the data systems and conflicts between the system and the Council over the compliance statistics.

In addition to interviewing the system President Michael McCall,<sup>128</sup> who has been with the system since the beginning, we surveyed all sixteen of the colleges and

---

<sup>125</sup> U.S., National Center for Education Statistics, Profile of Undergraduates in U.S. Postsecondary Education Institutions: 2003-04, with a Special Analysis of Community College Students, June 2006, p.3.

<sup>126</sup> Ibid., v, Interview with KCTCS President Michael McCall March 11, 2008.

<sup>127</sup> Kentucky Council on Postsecondary Education, Comprehensive Database, March 19, 2007

<sup>128</sup> Interview with KCTCS President Michael McCall March 11, 2008



received responses from 15 of them. The respondents were guaranteed confidentiality and sent the responses directly to our offices. The responses we received showed that there were generally broad agreements across the system about some basic issues.

Community college leaders feel that they have limited tools to deal with diversity and that they face some severe problems. The only specific tools that were highlighted were the John Smith scholarship for minority students. Though some campuses had wanted to limit it to black students, the system's legal counsel warned against it. In fact, though the Kentucky Plan focused exclusively on blacks, the community colleges were moving strongly toward a multiracial approach. Among the strategic goals of the consolidated system which was merged by the state legislation in 1997 is to "expand diversity and global awareness." According to the system office, the diversity goals include not only representation of blacks but also of Latinos, Asians, American Indians and Pacific Islanders. The leaders believe that state policies have little impact on the goal, neither helping nor hindering. They see resistance in some of the local communities where the colleges operate and see as major positives, the institutions' action in supporting the John T. Smith scholarships and in helping hire diversity directors through the KCTCS Fellows Program, which temporarily subsidizes African American staff newly hired by colleges.

While the state is not seen as a major force in this area, the federal Office for Civil Rights is seen as important in helping institutions achieve both student and faculty diversity. The system sees the major monitoring of its efforts related to the annual report it is required to submit on progress on Kentucky plan goals. The community and technical college system reports that it has achieved "most of all of our diversity goals." The Council on Higher Education is seen as "somewhat" helpful.

The leaders view student diversity to be essential to "student's educational experience" and report that they have policies that "consider faculty race/ethnicity in outreach/recruitment and/or hiring decisions." Bluegrass Community and Technical College in Lexington, for example, is operating under a strategic plan that includes Goal #22, "Improve Diversity within student, faculty and staff populations" and Goal #23, "Enhance diversity outreach services/programs for students, faculty and staff." Among its "key measurements of success" it calls for yearly increases of overall enrollment by 2.5% and of minority students by 4% as well as increasing student enrollment in multicultural classes by 1% per year.<sup>129</sup>

None of these campuses are selective and, for that reason, did not practice affirmative action in the manner of the elite colleges, but they were expected to make substantial progress toward diversifying enrollments and faculties and to do it with limited tools. They were monitored by the Council on Postsecondary Education CEO committee, especially in earlier years of the newly combined system, in a way they found to be very tough. The Council imposed its most feared sanction on the colleges — the

---

<sup>129</sup> Bluegrass Community and Technical College, *Strategic Plan, 2006-2010*, undated report, pp. 17-18, 23-24.

denial of permission to create new programs, when they fell significantly behind the goals. The technical schools until 1997 were a part of the Executive Branch of Government, and, while they were not included in the Kentucky Plan, they were subject to equal opportunity requirements that were established by Governor Brown for the Executive Branch of Government—that standard was 7.0% black participation, but they were not part of the rigorous monitoring and sanction system operated by the CEO until 1997.

The main tools the colleges had were a limited scholarship fund for black students, limited money from the central system to hire black fellows with the system office paying half the salary for two years while they got ready. The Fellows program in which the system office provides half the salary of an African American employee for 2 years was intended “to help demonstrate that there are qualified people out there.” Each campus has one position and it had been, President McCall said, “one of the best tools that we’ve had.” After 2 years the fellows have to go through the regular hiring process. The system has issued a directive to colleges that they must hire a cultural diversity director, and a number of colleges have hired people initially identified and tested through the fellows program. Such a race exclusive tool, of course, would have to be redesigned in a post-Kentucky Plan environment.

We received institutional surveys from 15 of the 16 colleges as well as the state system’s president. 12 of the questionnaires were filled out by the institutions’ presidents, the others by high ranking administrators. The responses showed a very broad conception of diversity goals. Some colleges simply reflected the strategic goal of the system-- “to expand diversity and global awareness”-- but others spelled it out in their own words:

“To provide high quality educational opportunity to all who can benefit. We reach out to underrepresented persons such as low income, women and minorities.”

“To establish and maintain a welcoming and inclusive environment that recognizes and values the contributions of the diverse populations ... and, if groups are underrepresented, to make every effort to reach out to them.”

“Our goals are based upon a belief that we must increase access and participation among minorities, improve educational success and attainment, and to enhance the campus awareness and appreciation for multi-culturalism.”

“To strive to maintain a high retention rate (at least 90 percent of the number enrolled for each batch of students) of African American and other minority students. To achieve graduation rates of at least 90 percent for final-year African American and minority students ...”

“The College does not merely allow, but welcomes, includes, and glories in every variety of human being as part of the body of the College and of human life itself. As we take into account every variety, we enlarge the

intellectual and personal growth of each individual in the College, and make the whole a better institution working for a better community.”

“The ultimate goal of inclusion will be achieved where diversity is not just a race, culture or gender issue, but a human concern. Therefore, creating a holistic view where human differences and similarities are welcomed, valued and utilized at every level of the institution.”

A number of the campuses spoke of compliance with the Kentucky plan’s goals and of a special focus, in various ways, on recruitment and nurturing of African American students. Both the system and the individual colleges, however, displayed a much broader conception of diversity. A large majority of the campuses as well as the system included not only Latinos in their definition but also American Indians and Asians (who are often not included in affirmative action plans in other states); and four of the campuses included whites among the diversity goals. If the present Kentucky Plan were to be replaced by one that was explicitly multiracial, the leaders of this system would clearly support it. There was consensus on this issue. Eight of the institutions believed such a broadening of the definition of diversity was “essential” and the rest said it was “important.”

When asked how important diversity was, all the colleges said that it was either “essential” or “important.” 13 of the 15 colleges said that increasing diversity was a very important part of their mission.

When asked to describe the “most important obstacles” to creating greater diversity among students, the colleges pointed mostly to the lack of minority residents in their service areas and the lack of funds. Since community colleges are basically local commuter schools, enrolling great numbers of adult students who have jobs and study part time, the local demographics create a major problem in the various areas of Kentucky with very few black residents. Those colleges in the few large urban centers often had a much broader market of nonwhite students. One college explained, “the region we serve is isolated and remote with a very small non-white population,” while another noted that its region had less than 2% minority population and “most of the area schools do not have minority students.” Community colleges are designed as commuter campuses. A number of other campuses pointed to the same problems and noted that it also applied to hiring faculty and staff in what are usually local job markets, especially in skills training areas. Since most of the colleges were near the state’s borders and many drew students from other states at in-state tuition under reciprocity agreements, their logical areas from which to recruit more students of color were across those state lines.

Other obstacles cited included “lack of resources,” “insufficient student financial aid to offer” and “lack of funding appropriate to the effort.” On the academic front they mentioned the problems caused by lack of diverse faculty and staff, “student apathy,” the greater prestige of four-year schools, the lack of interest in technical fields

and what one president described as “low academic ambition among African American males.”

The reality, according to system leaders, is that because there are very limited tools and resources for either student or faculty recruitment at the campus level, it is very difficult to find employees to meet those goals. There was clear consensus that the faculty diversity issue needed to be addressed, with eight institutions saying it was important and six rating it as “essential.” A substantial majority said that it was “essential to your students’ educational experience.” Thirteen reported that they had “policies and/or programs that consider faculty race/ethnicity in outreach/recruitment and/or hiring decisions” while only two said they did not.

Opinion was more divided about how well the minority faculty members had been accepted on campus and whether they felt “supported and/or comfortable with faculty peers.” Seven institutions said “a great deal” while the others said “somewhat.” Eight of the institutions reported that they had faculty training in diversity, but only two reported that they were “very satisfied” with the results. There was no agreement about how strongly faculty hiring would be affected by a possible prohibition on consideration of a candidate’s race or ethnicity. Four institutions said that they would fail to meet their goals, and three more thought their efforts would be “greatly impeded,” compared to six which expected marginal negative impacts and two saying it would make no difference.

There was much more division with regard to the role of the state. Two colleges actually said that the state policies had negative impacts, three said that the state policies were “greatly helpful,” and six said that they were “somewhat” or “minimally” helpful. Five said that the policies did not “restrict our institution’s ability to increase diversity.”

One leader was skeptical about the Council’s committee, saying that “they really badgered our people,” that it was “almost vindictive.” The Committee, he said, needs to be given some strong orientation to “deal not with a heavy hand” and to make them understand that “everyone needs to work,” but he conceded that “in the long run it has come out very well.” “We’ve come light years ahead” and 15 of the 16 institutions are in compliance.

There was a strong division among college leaders in impressions of the role of local communities. Five campuses reported that local attitudes had varying degrees of influence restricting the “institution’s ability to increase diversity.” Only three reported substantial local help on this goal while two reported no negative influence. A number did not answer this question.

A small number of programs had been eliminated in outreach and financial aid, programs funded by the state and federal governments. The consequence in two of the cases was to “decrease the number of underrepresented minority students served.” Substantially more institutions, seven, had actually added more race conscious programs and policies, mostly on outreach and recruitment. Only two schools said

that they had actually abandoned race-conscious programs while six said that they had created additional racially targeted ones under internal leadership, partially because new resources had become available.

The campuses gave importance to the U.S. Office for Civil Rights, the agency that had negotiated the Kentucky Plan with state leaders and had to decide whether or not it had been fulfilled. Only two of the colleges said it was not important and most said it was essential or important in helping achieve student diversity. In terms of the effort to diversify the faculties, both the OCR and the state were seen as major forces, with the state “policies and regulations” listed as more important and only one institution reporting that they were not important.

The institutions’ assessments of their own progress toward their goals were mixed. Four said that they had met all of the goals, nine reported success on most, while three took credit for achieving a few, and one simply said it has not achieved them. The colleges reported a variety of partnerships in working toward the goals, the most popular being with the public schools and agencies, followed by private business. Nine worked with the federal Upward Bound program which is dedicated to recruiting and preparing students who would otherwise be excluded. All of them reported that they had chief diversity officers working on the issue, and most reported that they were very satisfied or somewhat satisfied with the results of their work.

All campuses valued student diversity with ten reporting that it was “essential,” but there was less optimism about how well the goals of fully integrating the students into campus life had been accomplished. Eight of the institutions reported that they had an “explicit written plan” for achieving diversity. When assessing how well nonwhite students felt accepted and welcomed in academic settings six said that it was going very well, eight felt it was accomplished “somewhat,” and one campus reported it was still “minimal.” In terms of social settings relating to campus life the split was very similar, except that one campus reported that students felt “not welcome and/or supported.”

Race conscious plans were widely seen as necessary to achieve student diversity. Five colleges said they were “essential” while nine others found them to be important. None said that they were not important. Nine institutions said they had race targeted outreach and recruitment efforts and ten had race-targeted student aid. Two said that they had no such programs. Three institutions reported that they had outreach efforts that considered race as the “sole criterion” and three said the same about financial aid policies and programs. Five said that “we used to have such programs but they were modified.” Six institutions reported that they had carried out or were conducting an institution-wide review of such programs. Six institutions reported that they had modified programs and practices primarily because they feared “possible future legal challenges.” Should race-conscious programs be forbidden, seven institutions reported that they would be “greatly impeded” or simply fail in their diversity efforts while five felt that “we could still achieve some level of diversity.”

When thinking about the resources that they had that were most critical for increasing minority enrollment, most emphasized scholarships, especially the racially targeted John T. Smith scholarship, followed by outreach, recruitment and marketing strategies and staff. Discussing recent on-campus changes that relate to the diversity goals, a number of institutions spoke of the importance of appointments of campus diversity directors, some mentioned new diversity courses and programs, some discussed the development of multicultural student organizations on campus, one mentioned a “minority student mentoring program,” and some mentioned federally funded outreach and training programs. One noted, however: “We have much work still to do. Diversity has not been achieved to the level that it should. Many biased attitudes still exist.”

Overall it appears that the community colleges are making some serious efforts in spite of very limited resources and the complexities of serving a low density, slow-growth state with limited resources, large concentrations of rural and small town poverty, and low historic levels of educational attainment.

Like most community college systems, Kentucky’s is made up of an active and adaptive set of institutions, committed to increasing college going in the state and to providing courses and programs to meet whatever needs existed or could develop in the future. It is a system under strong pressure to expand given the state’s ambitious goals to raise its college going rate. It is also a system that needs more help, both to address the diversity issues and to improve a weak record of transfer to BA-granting institutions.

The issues bearing on the future of racial equity go far beyond affirmative action. The community college system reported that its three year persistence rate for students seeking credentials rose from 41.4% to 43.3% from 2001 to 2005, but that the number of transfers fell from 1268 to 1041 even as the number of students seeking credentials rose substantially from the low 9000s to about 13,000. This system is a central part of the puzzle of increasing access to college completion in Kentucky, and the Council should give very high priority in the next phase to standards and support systems that focus very squarely on raising the level of successful transfers. The transfer and ultimate graduation numbers for African American and Hispanic students are very low. Both the two-year and four-year campuses in each region should be expected to develop pathways, counseling and information systems that are easy for students to understand and explicit expectations for annual progress. The community college system needs more students who enroll right after high school and more full-time students, two factors which could considerably enhance transfer rates. These are urgently important issues.

The ambiguous relationship between the system and the Kentucky Council deserves further attention. The community and technical colleges have been through major institutional transformations and see themselves as being very different with much more limited resources and much more dependent on local conditions than the state’s universities. The leadership of the system believes that the conditions have not been

adequately taken into account by the state officials and report very difficult relationships with the Council, particularly with the visits of its Equal Opportunity Committee.

Nonetheless, the leaders are proud that almost all of the institutions have now complied sufficiently with those requirements and regained their authority to initiate new programs. They concede that some kind of state oversight is needed and do not have an alternative suggestion to make but express a strong desire for a relationship that is somewhat more understanding and supportive, trying to help the colleges figure out how to meet their challenges rather than simply blaming them after the fact for things they have relatively limited capacity to change.

### **A Viable Future for Kentucky State University**

Kentucky State University is the most difficult unsolved piece of the puzzle of a future diversity plan for the state. Since it is the most enduring symbol of the racial history, this is not surprising. Kentucky was supposed to create land grant colleges for blacks and whites that were equal if they were to be separate. Like all the other states with segregation laws, Kentucky fell far short of this goal and continued segregation and profound inequality for generation after generation. How KSU fits into a desegregated Kentucky public postsecondary system remains a challenge. The historically white campuses are now desegregated, and the great bulk of African American students choose to enroll in them, undermining KSU's traditional role, and KSU has a far higher percentage of white students than most HBCUs but it retains a large black majority.

The Council's Final Report suggested that the job of overcoming the history of inequality was nearly complete at KSU. We strongly disagree. KSU has improved in recent years, doubling a small freshman enrollment, but still has limited applications and admissions compared to other campuses. It has very high rates of remediation, little attraction of non-African American students to its regular undergraduate programs, poor graduation rates, and ongoing fiscal challenges caused by inadequate funding. The state has other institutions that struggle with remediation and graduation rates but KSU has the largest challenges.

Among the 19 states with HBCUs the situation of institutions created formerly to provide a desperately important opportunity in a totally segregated society have to change to flourish in a post-civil rights era where highly qualified black students and professors have many options but racial inequality is still very real. Without question, HBCUs are highly important institutions that make very important contributions. One recent federal report cites a study by the National Science Foundation, concluding that though they were only 3% of the nation's colleges, HBCUs "conferred 23.6% of bachelor's degrees earned by blacks in 2001. Moreover, HBCUs conferred 13.1% and 10.6% of master's and doctoral degrees earned by blacks, respectively. In 2004, HBCUs enrolled 276,000 of the 2,165,000 black collegians. In 2004 HBCUs awarded 26,550 BA's to black students and 4,980 MA degrees. In 2001,

81% of the students in HBCUs were black, 2.4% were Hispanic, and 15.9% were white. 14.1% of all black students were in HBCUs. Figuring out the future of Kentucky's HBCU is of great importance to the institution, the state system, and the state's black community. KSU's present strategy is to continue its HBCU heritage, to try to develop a strong regional campus and to offer land grant college extension programs and provide professional education to state employees, all these quite different missions in a small university. Not surprisingly, there are problems.

One of the most challenging educational jobs in Kentucky is held by Mary Evans Sias, President of Kentucky State University. Dr. Sias was the Associate Provost and Senior Vice President at the University of Texas at Dallas before taking the job of strengthening KSU. One President of another University who is very familiar with KSU commented that she "is the strongest KSU leader for many years." She faces a situation, however, in which this institution, that was the only public source of college education for blacks for many years, now produces only 15% of the state's black public university BA graduates. Further complicating this situation is the fact that KSU costs considerably more than other campuses per student to operate, in part because of its small enrollment compared with the state's other universities and the serious developmental needs of most of its students. Many of the problems Pres. Sias is trying to cope with accumulated over many years.

The *U.S. News and World Report* ranked seventy of the nation's Historically Black Colleges and Universities for the first time in 2008. In those rankings, which are, of course, subject to many limitations, Kentucky State University was part of a six-way tie for 26<sup>th</sup> position out of seventy ranked HBCUs, many of which are also facing serious fiscal challenges. Compared to its sister institutions, KSU did not fare well in its freshman retention rate and in its graduation rate, which was reported to be only 30%. Still, in the overall ranking, most of the HBCUs were significantly below KSU.

KSU's basic perspective is that the state's responsibility for upgrading the university has not been fulfilled, although the state has delivered on a number of the specific commitments made in the Partnership agreement. Though there was a previous history of weak management at the institution, the institution has been audited, management is being tightened, and KSU's current leaders see great potential. They hope that the Commonwealth will commit the additional resources to move the campus to the position where it can be seen as an equal and competitive option that will draw enough students to permit it to carry out its unique mission at a normal per student cost. The plan is to grow enrollment, improve the institution, and raise graduation numbers. They see recent gains as showing that the campus has the potential of a major transformation. Enrollment has grown significantly and the dorms are fully occupied. Growth has been an average of 16% a year from a very small starting point. KSU projects that if recent trends continue the campus could by 2015 reach the 4138 enrollment it needs to bring costs down to the per student cost level of other campuses, with little or no need for more faculty. That kind of growth together with improved retention and graduation could dramatically change the situation. Remediation policies and costs are part of the problem for Kentucky's only



HBCU. The Council has just raised ACT scores needed to avoid remediation, pushing more students into that category. The higher cut point will increase the financial burden for remediation on KSU. The problem is compounded by the fact that, because of financial aid time limits, the same students who must take and pay for remediation courses with no-credit granted need to also start earning a full load of credits to make regular graduation before their aid runs out. Remedial courses mean they run the risk of running out of financial aid eligibility by the middle of their junior year, forcing them to drop out. Money prevented a number of students from graduating last year because they could not pay their accounts despite working two or more jobs, and carrying substantial indebtedness. KSU would like to become more demanding by running summer programs before the arrival of students and make participation a condition for admissions so that remediation would not eat into their college time.

KSU has surveyed some of its students to find out why they enroll. The 2008 survey produced the following responses:

**Table 13:**

<i>Why Do Students Choose to Attend Kentucky State University? Spring 2008 Survey Results</i>		
<b>Rank</b>	<b>Reason</b>	<b>% of Respondents</b>
1	Status as an HBCU	67%
2	Size	52%
3	Distance from Home	51%
4	Academic Opportunities	42%
5	Cost	40%
6	Availability of Scholarships	38%
7	Historic Reputation	34%
8	Diversity	33%
9	Availability of Major(s)	30%
10	Athletics	28%
11	Attractiveness of the Campus	21%
12	Availability of Need-based Assistance and other Financial Aid	20%
13	Family Tradition (Legacy)	17%
14	Social Reputation	11%
15	National Reputation	10%
16	Miscellaneous Items (each representing less than 10% points)	23%
<i>KSU Survey, Sample Population = 118</i>		

KSU reports that the survey and other evidence indicate that "students attend KSU primary because of its status as a HBCU." The second reason given by 52% of the responding students was its small size, a size which means that they can receive close personal attention. KSU reports that more than 60% of the students are first generation college students. Many students' families are poor. In spite of what its students see as positive values, however, KSU draws a small share of Kentucky black students and they do much less well in completing college than blacks on other

campuses. KSU is dealing with many students who come to college with very weak preparation who need extensive support to develop their talents.

The University is connected to black communities in other states and has 30% out-of-state students, drawing students wanting an HBCU experience from Detroit, Chicago, St. Louis, Indianapolis and Ohio cities. Several of these states have no HBCU. State policy, however, requires that out of state students pay much higher tuition, which is a barrier to potential recruiting. Like many of the Presidents of other Kentucky universities, KSU leaders speak of the small pool of black high school graduates in the state and want to be able to treat out-of-state students as in-state students in terms of tuition and count them for accomplishing diversity goals.

In spite of its historic role for African American students, the American Association of University Professors reports that KSU has more than a third white students, ranking 6<sup>th</sup> among the 104 HBCUs in its proportion of white students. Four HBCUs elsewhere have become majority white institutions--two in West Virginia, one in Alabama and one in Missouri. Under the federal program supporting HBCUs, a school that was created to serve black students remains defined as an HBCU regardless of its current enrollment.<sup>130</sup>

The current economic and budgetary environment in Kentucky creates a challenging climate for the institution. KSU is concerned about the fate of the special funding to support its efforts over the long-term and believes that recent supplemental funding needs to continue. KSU leaders see state budget policies threatening the resources it needs to realize its promise, and rests major hopes on the Baker and Hostetler, LLP, consultant report (April 2003), which supports the need for new graduate programs. However the state has not yet provided the resources needed to implement this successfully.

KSU is initiating a new program this fall to help its incoming students. After an extensive campus planning process to try to improve results on a campus where four of every five students need remediation and half of the new students need remediation in all three areas, the focus was on a new approach to helping these students succeed in college and develop the attitudes that would keep them moving toward graduation. A pilot project will begin this fall for 60 students needing remediation in reading, writing and math and the college will create a control group to help assess impacts. Each group of 15 will be scheduled into classes together, live together in special parts of the dorms, and have special counseling to help these small learning communities work to create positive attitudes, mutual support, and timely help when needed. This trial is meant to provide feedback to the college and prepare the way for a much bigger effort the following year. The development and funding of an intense and effective intervention for incoming students with such serious multiple problems would be an important step.

---

<sup>130</sup> AAUP, "Black Colleges with Highest White Enrollments," [aaup.org/AAUP/comm./rep/HBCUChart, htm](http://aaup.org/AAUP/comm./rep/HBCUChart.htm), Downloaded July 16, 2008.

When supplemental funding was available, KSU led the Commonwealth in enrollment growth for two years and it doubled the size of its incoming freshman class from a small base. The University also wants state funding for its developmental education expenses, which are considerable, including the Summer Academic Bridge Program. These expenses are above normal operating costs for KSU. The campus also has a number of serious capital needs, including a major new system for campus technology and communications.

State authorities did not assign KSU the future role of being a black-oriented institution serving highly disadvantaged students, though that was its historic mission. Many of the problems between KSU and the state relate to the fact that there has not been a clear agreed mission and that the state's system of assessment and funding does not fit well with KSU's historic role and current student body. Had the Commonwealth collaborated more closely and effectively with KSU over the last quarter century its student body would likely be quite different but that did not happen. Serious challenges remain that must be remedied.

The CEO committee's February 2007 visit to Kentucky State University touched on many issues of basic concern to the Kentucky Plan. It noted that KSU has met its immediate undergraduate enrollment growth objective, as well as improving its six-year graduation rate, but spoke of internal tension about the campus' selectivity: "The president advocates for the educationally nontraditional student, and promotes the unique KSU mission in their quest to admit, enroll, and meet the students where they are." However, the report notes that "approximately 81 percent of KSU students require developmental education" and that some faculty and staff have suggested that the "university might cure concerns regarding enrollment, retention, and graduation by being more selective." The committee recognized the extremely disadvantaged nature of the student body in which 81 percent of the students needed developmental aid, and 87 percent of the African American students got financial aid. It noted, however, that the number of graduates had declined recently, and concluded that "KSU is experiencing a moderate degree of progress" but that challenges remained, including more work on attracting non-black students. A number of recommendations focused on addressing the poor completion rate, increasing counseling and financial support and better treatment of students by campus police. The committee was obviously concerned with the inadequate links with the other campuses awarding doctoral and professional degrees. Despite the fact that KSU is Kentucky's only historically black college/university, the report expresses concern regarding minority recruitment and retention of both undergraduate and graduate students, as well as difficulties the University was experiencing in recruitment and retention of African American staff and faculty.

The committee recommended working on "stronger relationships within the larger Frankfort community ... and promoting the positive reputation of the university" to overcome negative stereotypes. Kentucky State is, of course, in the state capital, and the committee expressed an urgent need for the college to become more connected if

it is to serve as an effective regional university something that has long been seen as part of KSU's mission but has been disappointing to date.

An important and predominant theme across the CEO report is the need for Kentucky State University to work on solidifying its relationship with peer institutions like the University of Kentucky, the University of Louisville, and Northern Kentucky University, in an effort to work on establishing a pipeline into graduate and professional school programs for KSU students. Some HBCUs have great success in preparing students for graduate school.

Its deep historic link with the destiny of Kentucky's black community means that KSU should draw a larger proportion of black students than other campuses. KSU has a substantial white enrollment, but white students largely attend special courses and programs in evenings and weekends. Although its historic role as the unique source of college opportunity for African Americans was a by-product of rigid segregation and cannot be recreated when black students have many options, it will always have a special link with the black community.

KSU has not become a regional liberal arts school as envisioned by the 1982 Higher Education Desegregation Plan. It currently defines its mission in a three-fold way, as an HBCU, a land grant college, and a regional university, but these roles are unevenly developed, and its undergraduate regular program is much closer to the HBCU model than the others.

One mission that the college could fulfill as it now stands is as an open access regional university with a special focus on African American students and curricula and well supported developmental education with an increasing outreach to incorporate Hispanics, and poor whites in need of the same kind of support, while increasing the strength of already well functioning programs and fields. Some Texas HBCUs have had notable success in this role, and President Sias' experience in enrollment management in Dallas would doubtless be beneficial on this front. A number of other HBCUs including Texas Southern University, Fayetteville State University in North Carolina, and Huston-Tillotson University in Austin are among the HBCUs drawing substantial Latino enrollments and many other campuses have expressed interest.<sup>131</sup> KSU is starting to work on a serious recruiting effort. If the supply of African American students is not adequate to meet the college's important goals for growth, it might be possible to expand its tradition to a primary mission of being a "minority serving institution."

Another option would be to achieve the mission assigned to the college by state officials three decades ago to create a competitive small public liberal arts university within the state system. That would involve actively recruiting students of all races from the region, seeking students ready to function in regular college courses, and strong marketing of a different image for the college. This is a very different mission

---

<sup>131</sup> Ronald Roach, "HBCUs Reach Out to Latino Students: Schools cite similar needs and goals," *Diverse Education*, Sept. 22, 2005.

requiring very different strategies and priorities. It would take a major reorientation and investment.

To secure its future, KSU needs to clarify its strategy in collaboration with state authorities, expand substantially, and to find a role within the state system that works to draw both students and the resources it needs from the state to be competitive. The state officials need to understand its mission and develop ways to fairly measure and support the value it adds to the state system. Without a clear agreement about goals and assessment it is unlikely that the future of this important institution can be secured.

## **CONCLUSIONS AND RECOMMENDATIONS: FRAMEWORK FOR THE FUTURE**

Kentucky institutions of higher education had very unequal patterns of access and success in college before the civil rights era and have made major progress under the Kentucky Plan. Many officials and leaders in Kentucky higher education express strong support for the goals of diverse and successfully integrated campuses, and for providing access and success to groups of students historically excluded or segregated in the system. We conclude that there has been very real progress in the state, that it has been built into the operations and goals of many institutions, and that there have been examples of powerful leadership. There is a generation of leaders in Kentucky institutions whose goals have been strongly influenced by the Kentucky Plan and who embrace its objectives. Kentucky should be very proud of these accomplishments.

In our extensive discussions and analysis of data and records from across the state, however, we find no indication that the problems have been fully resolved, nor that underlying inequalities affecting education for nonwhite students no longer exist. Further progress will require active focus and accountability on diversity goals. The preparation of black and white students for college in the state remains highly unequal, as do the family and community conditions in which children develop. Students still encounter negative attitudes and stereotypes in some Kentucky community and campus settings. African American faculty are still present in small numbers and sometimes confront isolation or hostility. Whether or not these problems are caused by the higher education system, they are the product of the history of the state, and of its public and private institutions. These underlying conditions must be considered when thinking about how to attain the goal of equal higher educational opportunity by race. Obviously, the universities need supportive policies from the public schools and other state and local institutions.

It takes commitment of resources and hard work to provide equal educational opportunity in an unequal setting. Indeed, with scarce resources, a very unequal society, and many counter pressures on universities to reduce costs and increase their competitive standing and prestige, there would be serious risk of loss of focus were the effort to end. We conclude that not only would minority students and communities suffer from such reversals, but that the state's wise and ambitious goals (of substantially raising the educational level of its young adults in a single generation) would become far less attainable. Virtually all the leaders we interviewed acknowledged that the job is not done and that there is a need for continuing efforts, though most would like to see changes implemented.

If Kentucky institutions were simply required to stop considering race in making decisions about admissions, aid, and hiring, university leaders believe that things would move seriously backward. One Kentucky campus responded to the Supreme Court's Michigan decision dramatically by terminating racially targeted policies, "and

ended up having a 40% drop in African American freshmen.” It was forced to quickly come up with a variety of new policies in its effort to recover. Clearly, even after the Kentucky Plan ends, the system will need an affirmative policy and, of course, one that is fully legal. We recommend that the state move now to finish the unfinished business of the Kentucky Plan and devise a new plan to reflect both the changing realities of the state and the legal principles for voluntary plans spelled out by the U.S. Supreme Court in 2003. This plan will involve moving from a partnership with the federal Office for Civil Rights to a new partnership with Kentucky’s institutions and communities.

We conclude that there is unfinished business under the Kentucky Plan. In particular, the state has not reached the goal of solidifying the future of Kentucky State University as the small liberal arts institution envisioned in the 1982 Higher Education Desegregation Plan, and there are still very serious gaps in the educational pipeline that the plan aimed to close. So it is essential to consider both how to finish those tasks and how to prepare the way for what comes next.

One university president commented, “the state government could help this become less of a duty and more of a competition to excel, something that greatly stimulates academic leaders.” There could be, he said, “scholarships, enrichment programs” and the “need to think about connecting students with universities earlier—weekend, summer programs.” Kentucky could create inter-university research centers on issues of race and racial change. There could, of course, be further development of university efforts to help communities and school systems. Apart from these particular ideas, the concept of taking what had been a burden and turning it into an opportunity--of turning something imposed from the outside to something creatively imagined from within the institutions and the state--could create the best kind of new plan.

The Kentucky Plan has done a great service to Kentucky and its institutions, much progress has been made in many places, and many of the institutions now have leaders both committed to goals of diversity and with practical experience to make it work. A number of them also have ideas about how to make it more effective. As the state and the institutions move toward a new stage, it is both a challenge and an opportunity to devise a stronger plan. Many of the changes presently needed are about change within institutions, and it is very important to build on the lessons of the last quarter century.

It is obvious that Kentucky’s problems are not just problems of the campuses and that a broader commitment from state and local institutions would greatly help reach the goals.

### **Basic Recommendations**

- 1) Substantially increase high school and community college counseling resources and summer remedial programs.

- 2) Greatly expand campus outreach to public schools and their students, including summer training programs.
- 3) Give highest priority to affordable access to four-year campuses in development of tuition and aid policies.
- 4) Create annual goals for increases in attainment of degrees and for increases in transfer from community colleges to public universities. Provide students with very clear information on transfer requirements and on which courses are approved for transfer to certain campuses.
- 5) Develop plans to raise retention and graduation levels of universities at least to the average of the institutions each university now compares itself to.
- 6) The Plan should include Hispanics and American Indians in all integration goals.
- 7) Ask state and public school leaders to create improvement goals of approximately 3% a year in the real high school graduation rate for students of each race until the proportion reaches 90%.
- 8) The Commonwealth and KSU should develop a strategic plan aimed at making the campus competitive and able to operate within normal state budgeting parameters. Appoint leading educators from across the country, including top ranked HBCUs, to work with the leadership of KSU and the Council (see detailed recommendations below).
- 9) Consider the creation of a system of accountability for recruiting and enrolling more students of any race from the poorest counties in Eastern Kentucky.
- 10) Develop a system of periodic campus visits preceded by an institutional self study and plan to help meet goals.
- 11) Serious pursuit of increased institutional and Council funding for diversity work
- 12) Develop and implement the holistic review techniques of applications for admissions at competitive campuses and for aid at all campuses.
- 13) Include out-of-state nonwhite students in assessing compliance with diversity standards
- 14) Expand “grow your own” and SREB plans for increasing the supply of qualified minority faculty and careful monitoring of retention and promotion processes, making sure that tenure and promotion rules and regulations are standardized, clear, and conspicuous. This should include efforts to increase diversity among chairs and administrators.

#### **Specific Recommendations for KSU**

- 1) To fully implement the mission of KSU, the Council on Postsecondary Education, the Governor, and the General Assembly must implement a clear and feasible plan to help the institution implement and realize its



liberal arts mission, including consistent funding, a strong board of regents, and a clear structure to assess progress.

- 2) The CPE and KSU must agree on an appropriate financial model to provide funds that will allow KSU to acquire and invest in new programs, increase enrollment, further upgrade the campus, as well as relieve its budget of the recent increase in bonded debt. One strategy is the small school adjustment that has been used in the past.
- 3) Create a longer range solution including a plan and a metric for measuring success that recognizes the reality of KSU and its students, agrees about its goals, and sets out reasonable measures for progress.
- 4) A clear vision has never been fully fleshed out, agreed to by the campus, or reflected in student applications to the college with coherent priorities and benchmarks. The state needs an independent study of the feasibility of the major alternatives. The study should include an analysis of the feasibility of reaching out to the rapidly growing Latino population, which could benefit from some of the nurturing experience and values of the HBCU tradition. Since Kentucky's black population is far smaller than that of most states with HBCUs and it already has a third white students and a number of programs serving large white enrollments there needs to be a clear plan for successfully managing diversity. The new market for a minority serving institution will be the rapidly expanding Latino population and KSU is beginning to reach out to them.
- 5) If the choice is to develop a strong and competitive small liberal arts university, we recommend that the Council on Postsecondary Education support a process of intense collaboration with the University of Kentucky, which would include: making UK courses available to KSU students; creating bus routes between the campuses; allotting visiting professor stipends for faculty to teach or collaborate in courses on each other's campuses or to co-teach courses, and allocating serious resources for collaborative research on issues of equity in Kentucky.
- 6) If that is the goal, we recommend that the Council ask the two institutions to prepare a plan that would take advantage of some potential synergies as well as work with the local community colleges to think of possible linkages in remedial education and creation of stronger transfer pathways. We recommend bringing in a small group of outside experts, including experts from leading HBCUs to help. Obviously the failure to resolve these issues successfully over the past three decades is not the sole responsibility of the state government but a shared responsibility with KSU. If an external report, in a procedure parallel to that used for the Baker-Hostetler, LLP, report in 2003, is commissioned, the KSU Board and President should be charged with producing a coherent and unambiguous plan, in collaboration with the Council, that details clear benchmarks and timelines, agreed to by both parties, with the

understanding that the state will provide fiscal and administrative support and evaluate benchmarks in the agreement. (This idea would not be putting KSU under the control of UK, it would be a genuine collaboration between two independent institutions of very different sizes, supported by the Council to capitalize on the existing and potential resources of both institutions and offer students in each choice that they had not had before.)

The Commonwealth and KSU should establish a bold plan with serious follow up. Otherwise KSU may stagnate and the state is going to be facing this issue again twenty-five years from now and the institution will continue to be vulnerable to attacks (efforts to date have skirted around these choices). The risk to the system and KSU, if the mission concerns are not resolved, is that without the external protection of a federal civil rights policy, it may not be able to protect its status as a four-year public university, which we believe to be deeply important and which should be a fundamental part of all planning.

### **The Logic of the Reforms**

Our recommendations include a number of major changes for the state and its institutions. The body of the report contains justifications for many. In the following section we offer further explanation of selected recommendations.

### **Redefining the Diversity Goals: Include Latinos, Native Americans, and Whites from Areas of Intense Local Poverty.**

Civil rights policies concentrate largely on undoing the impact of past injustices. A good diversity plan must think about the present and probable future changes in the society and economy. Beyond the scope of the Kentucky Plan, educators and policy makers know that Kentucky has become more diverse since the civil rights era. It is no longer sufficient to focus only on black students. Latino students are now the nation's largest and most segregated minority community. Although Kentucky now has a small Latino population, the numbers are projected to grow very substantially. As a new plan is drawn, it will be essential to include Latinos, whose right to be considered in desegregation remedies was recognized by the U.S. Supreme Court in 1973.<sup>132</sup> Nine Kentucky counties, mostly in the center of the state, had more than five percent Hispanic children by 2007.<sup>133</sup> Though Kentucky was originally Cherokee land before the expulsion of Indians, it has a very low American Indian population but Indians still face massive educational problems and their historic claim to be included in affirmative action is obvious.

Kentucky also has a large population of poor whites living in areas of concentrated intergenerational white poverty, particularly in Eastern Kentucky. Few U.S. white communities have the kind of profound rural white poverty found in Appalachia.

---

<sup>132</sup> *Keyes v. School District No. 1, Denver, Colorado*. 413 U.S. 189 (1973). Although this was a case about public school desegregation the essential finding was that the severe history of discrimination against Latinos entitled them to rights similar to those accorded blacks in desegregation plans.

<sup>133</sup> Kentucky Youth Advocates, *Kentucky Kids Count, 2007 County Data Book*, p. 10

Although this is not part of civil rights compliance, we recognize that the problems of these students and communities are very severe and in some ways similar to those that confront African American students in segregated neighborhoods. We commend those Kentucky officials and educators who are trying to address them. We believe that it would be appropriate for Kentucky officials to consider adding to its goals a special outreach to students in concentrated poverty counties and to communities with very low high school graduation and college going levels. This should be considered an additional goal rather than a substitute for affirmative action. It will be very important to think very carefully about the definition of poverty, in order to emphasize persistent and isolated poverty, such as counties or communities where 40% or more of the children grow up in poverty, and where the large majority of white and nonwhite children are from families below the free lunch line in the local schools. A policy giving colleges credit for enrolling and graduating these students would better recognize the contributions of campuses in areas which are highly isolated from nonwhite populations.

### **Patching the Pipeline: Address High School Dropouts, Pre-college Remediation, and Community College Transfers**

The pipeline to attainment of higher education has massive leaks. Very large numbers of Kentucky's African American students do not graduate from high school. This problem needs to be seriously faced. The state needs accurate counts of dropouts and the adoption of goals and accountability methods for raising the graduation rate. The pipeline problems begin long before college age and addressing them will require the Council and universities to ask assistance and offer collaboration to public school authorities and state policy makers. One of the clearest needs, if the goal of doubling college graduates is to be reached anytime soon, is to have more Kentucky students finish high school.

Graduation rates can be improved. Since "dropping out" permanently damages both the student and his family, and high dropout rates devastate communities, improving these rates should become a basic part of accountability in high schools. A system that follows individual students longitudinally should be established to find out what actually happens to students who disappear from high school classes. High schools should implement ninth grade transition programs, hire special dropout counselors who link with social workers and others, and utilize other proven techniques for improving retention and completion. Increasing these rates would increase the wealth and diminish the social service and criminal justice burdens of the state. In a situation of slow population growth, these measures would provide an important increase in the population of potential college graduates.

There is a great deal of discussion about K-16 collaboration, but we see relatively little college-public school collaboration and a serious gap between the community colleges and the universities. Unless strong, clear, and effective bridges can be constructed between these institutions, there will be massive losses among

disadvantaged students who are not prepared to figure out the system nor make the transitions. State committees and pronouncements are good, but this requires very strong leadership at the top of state government and in each major community or region. In collaboration with the state board of education, the Council needs to create indicators of college going rates and then report back to high schools with information about the success or failure of their students.

Kentucky students going into college have a tremendous need for remediation. Coping with the time and expense of taking pre-collegiate courses in college is costly and greatly decreases the probability of graduating. Since it is a systemic problem, the state needs to mobilize around this effort. If these problems could be identified early and addressed as much as possible before the beginning of the freshman year, everyone would benefit. We recommend that the Council and the State Board of Education jointly create a proposal to the state government for summer courses located in high schools and nearby campuses. This would address the remedial needs, at limited or no cost to the students, before the college term begins. A program of this sort could significantly increase the productivity of the colleges in reaching the goals of increased numbers of graduates and would also conserve each student's aid eligibility to permit them to finish their course of studies.

The transfer process between community colleges and the state's universities is functioning very poorly and is a basic threat to the state's educational goals. We recommend a strong investment in transfer information and counseling at the community colleges, university admissions and financial aid staff working regularly with community college students on site, as well as annual goals for improving the levels of transfer for both the individual community colleges and the four year campuses. Research shows that many community college students have a very poor understanding of transfer requirements and financial aid. Good information and support are vital elements. At the community colleges, very clear labeling of courses that are and are not eligible for transfer credit at receiving universities, and sufficient course offerings of needed transfer courses are very important goals. For the staff of the former technical colleges where transfer was not a previous goal, staff training may be in order, especially for campuses that transfer few students.

Needless to say, transfer chances are enhanced by rapid and successful experience in community college. Part-time participation with full-time employment is related to delay and dropping out. There should be a serious effort to encourage enrollment of new high school graduates taking full time coursework and to connect eligible students to financial aid to increase the probabilities of success.

### **Financial Aid and Information: Improve Aid, Communication, and Enable Timely Progress to Graduation**

To the extent that talented students miss the chance to go to college because they either do not understand the true costs and financial aid available, or simply give up without getting any information because of what they fear, the state loses talent and

its goals are damaged. Particularly at a time when there are soaring costs, the state must provide better information and better levels of support. A leader of one of the Universities wrote:

One of the overriding concerns regarding the recruitment and retention of minority students is the escalating cost of a higher education .... Parents are asked to assume an increasing burden as tuition increases occur while federal and state financial aid funds do not keep pace ...

The University needs to better publicize how tuition and costs can be met with Pell and Kentucky scholarships since the net cost is much less than many families assume. As costs soar, the adequacy of information about financial aid becomes ever more critical. There are very dramatic relationships— independent of test scores--between family income, wealth and level of college completion, grades and other measures of preparation. Research shows that students with parents who are not college graduates have weak and often inaccurate information about college costs and aid. This means that good aid packages, good information about aid, and personal contacts helping students and their parents understand the options, can transform the possibilities of going to college and staying to completion. Aid packages are time limited so it is very important to emphasize to students that they must not only make regular progress before their aid runs out, but also make timely transfers if they begin in a community college and seek a four year degree. It is very important that staff at high schools, colleges, and community organizations work hard to communicate accurate information and help families to understand and complete the forms in time to obtain needed assistance. It is, of course, vitally important that as costs go up, the state and institutions invest in the aid needed to prevent closing the doors of the system to poor and working class families. If this were to happen, the goals of Kentucky plan could not be realized.

Opening the door to college means very little if students do not know they can afford to come, their families do not understand what aid is, and neither understands how to access it. Unless this gap is covered, many students will not come or will carry too much work and be unable to succeed and stay.

### **The University and the Community: Foster Community Outreach and Collaboration**

It is obvious as we look at the differences between the state's white and minority communities that the problems did not begin on the campuses and that they cannot be fully resolved there. Poverty, segregation, family decay, child development issues and many more conditions underlie and help sustain the inequalities that colleges and other institutions must try to cope with. The colleges and universities are, of course, powerful institutions in many ways—as sources of ideas and information, as forums for public discussion, as major employers, and as very important shapers of local communities. The institutions in the two largest metropolitan areas — the University of Louisville and Northern Kentucky University have begun wide-ranging collaborations to address general social and economic problems in their metropolitan

regions and we commend their example. At NKU, for example, the staff worked with the school district and community service agencies and businesses on a program called Strive, which tries, among other things, to give additional advice and financial help to students to get ready and to go to college. The university is helping staff, and also supports a regional planning process to upgrade education and the economy called Vision 2015. The University of Louisville has a number of programs including major involvement with several schools in the city, the school district and communities. It has a well-respected urban studies program that provides research to help illuminate important city policy issues.

Both the University of Louisville and Northern Kentucky University are serving large metropolitan areas divided by the Ohio River, which include the extensive Indiana suburbs of Louisville and the Ohio city of Cincinnati across from the Kentucky suburbs. In both cases the universities are deeply involved in a variety of educational and development programs trying to help address urban needs. These include a number of outreach programs in Louisville connecting the state's most diverse university to the community and very active metropolitan collaboration with universities and community organizations in greater Cincinnati. A "last dollar" effort to guarantee qualified students in the area the funds they would need to go to college has led to a surge of applications for a campus that has had trouble drawing and graduating black applicants.

We recommend that the council's staff identify best examples of such collaboration now existing in Kentucky and other states and convene a summer planning session where the leaders who have accomplished the most will work with teams of top leaders from each university. They will initiate action plans for better collaboration, not only among educational institutions, but with health care, business leaders, social work, recreation and library programs, nutrition programs, housing agencies, the United Way and private charities, the criminal justice system and other institutions to alleviate underlying causes of educational inequality and create the bridges that the students and their families need. Needless to say, such enterprises are very complex and difficult but extremely important. Educators sometimes blame other institutions for not providing them with the students they would like to have. They need to be actively engaged in creating the conditions that make that happen. One President mentioned, for example, the remarkable Kalamazoo, Michigan "First Dollar" initiative guaranteeing coverage of college tuition for any graduate of public schools. Universities have expertise to help, they are not part of the turf battles that often impede change, and they can be neutral meeting places that can positively contribute to creating needed change.

### **The State Accountability System under a Diversity Plan: Adopt Appropriate Outcomes, Incentives, and Enforcement Policies at the State Level**

One of the most important decisions about the future of equity in Kentucky's higher education system concerns the role of the Council on Postsecondary Education which has been responsible for setting statewide accountability systems. We believe that

role has been vital to the considerable success the state has achieved to date and that it has been carried out skillfully and at low cost. Unquestionably it is valuable to have a state policy on these issues and to deal with institutions across the state under a clear policy. We have suggested changes in the manner in which the Council's committee interacts with campuses, an extension of goals to incorporate Latino and American Indian students and, perhaps, white students in areas of extreme isolated poverty. We believe that the Council has measured appropriate outcomes and has a sanction that gives its goals very serious consideration by college leaders. We see no legal limitation on the Council setting goals and checking performance so long as there is nothing that would amount to a quota system or any requirement for admitting students or hiring faculty exclusively on the basis of race. We do believe that as a clearer and mutually agreed strategy for Kentucky State University is developed, if its role is defined in a way that is distinctly different from the other campuses, an appropriate metric for measuring accomplishments within that unique role should be developed. For instance, if the state expects KSU to deal with the least prepared and most disadvantaged students, its success would be measured in terms of progress made rather than against other institutions with different missions and different student bodies.

#### **Improving Management of Diversity Policies: Mutual Sensitivity and State Leadership for Staying on Task**

There is widespread support for efforts to diversify Kentucky institutions. All of the Presidents of the Universities and the community college system expressed a concern for attracting and serving diverse student bodies and making progress in integrating their faculties. The Kentucky Plan and the Council on Postsecondary Education have triggered production of plans which have now been built into the operations of Kentucky's institutions of higher education for a generation. In our discussions we heard no dispute about the general objectives and many strong affirmations of the broad goals but considerable differences of opinion about the precise standards, the role of the council and what should be done when the OCR agreement ends. All of the college presidents thought that there should be some mechanism for affirmative action, but a number expressed resentment and opposition to some of the methods used by the Council. None, however, offered a clear alternative. The two basic ideas were for a different style of operation by the Council's CEO committee and more ability at the university level to exercise some discretion in defining goals and implementing policies. The campuses wanted more understanding and support, more incentives, and fewer sanctions.

The basic criticisms from several of the presidents concerned what they saw as the sometimes adversarial nature of oversight by the Council's CEO committee. There were no such criticism about relationships with the Council's staff who were seen as more experienced, and diplomatic. The critics saw some committee members as seeking out incidents and claims and using them to publicly embarrass the campus administrators without first talking to them about the problems, checking their facts, and offering positive ideas for solving the problems. One President commented that

he saw himself as the victim of unfair cross pressures and said that the Council Committee's oversight campus visit "was a pretty nasty meeting." State officials, on the other hand, express concern about the adversarial nature of some of the college officials.

The administrators said they were committed to equity goals and deeply resented what they saw as implications that they were hostile or disinterested. Some thought some members of the committee did not understand how colleges actually run and greatly overestimated the command authority of the top administrators who operate institutions of decentralized authority where most people have lifetime tenure. They believe they have been working hard on tough issues, usually meeting the Council objectives, but receiving little positive feedback. Some talked about ending the committee's role but no one suggested a specific alternative and everyone conceded that the goal was essential and the job wasn't over.

We conclude that the Council is the only logical focal point for enforcing a diversity policy. The record of success to date, the recognition that policies and monitoring are necessary, the expertise of the staff, and the list of major issues that will need to be addressed in creating voluntary plans in compliance with the Supreme Court policies, all indicate that state leadership will be necessary for developing and implementing a diversity policy to take effect when the existing plan ends. The Council on Postsecondary Education is the only good place to locate this responsibility. We recommend that the Council, the committee and the staff meet with the Presidents and their staff and brainstorm with them about how to better manage the relationships between the CEO Committee and the campuses, relationships that could be improved on both sides under a new plan. Both campus executives and committee members need to participate in training processes in which frustrations can be expressed and better procedures and styles of relationships worked out. We recommend continuing the committee's work which has kept racial equity high on the agenda. Future appointments should include some members with extensive university administrative experience who could understand the limited power and frustrations confronting the university executives. We commend the staff of the committee for a job well done with very limited resources.

Civil rights enforcement should be firm but unfailingly polite. In terms of accomplishing racial change one must always keep in mind that the people who will ultimately have to make it work are the same people who might now be attacked for their shortcomings. Whether or not sanctions are imposed, it is very important to continually affirm common objectives and avoid personalizing issues. Some administrators take what they see as unfair attacks very personally. The style of the relationship does not imply giving up on objectives — it is a recognition that, ultimately, change requires willing and positive partnership where possible. At a time when the major challenges are not so much about enrolling students as producing successful graduation, closing holes in the pipeline through collaboration among institutions, and identification and retention of faculty of color, these are issues that call for much deeper change than simply instituting recruitment and admitting more



students of color. Increasing the success along these dimensions requires changes that reach deeply into the institutions, changes that require learning and leadership within each institution.

Style, language and respect matter very much in academic settings. Former college administrators, who have had real success in implementing such changes, and who can talk easily to their counterparts about how to do it in practical terms -- emphasizing long-term institutional benefits -- can serve as consultants to campuses developing strategies. This is also an area in which university leadership could be more appreciative of the hard work of the committee and staff and of their frustration at what still needs doing after many years of effort.

Basic monitoring of trends at the various campuses is now done through reports and statistics submitted to the Committee. That should continue. Obviously, visits to campuses put administrators on the spot and put the issues higher on the agenda at least for a time. In future campus visits, it may be more effective to use a model like accreditation, asking the institution to respond to a few key issues, carry out a self study and come before the committee with conclusions and a plan for improvement. Actually producing a diverse faculty that works effectively together requires many levels of transformation in decentralized university hiring and promotion processes, and the same is true about producing positive relationships across racial and ethnic lines among students and between students and faculties. It requires leadership, knowledge and persistence and building-in different kinds of incentives and support systems with a process of mutual problem solving, drawing in a more organized way on the capacity of each university to use internal resources to solve problems. This does not mean that accountability would end, or that sanctions could not be used if necessary, only that there would be more of an interactive learning process, more likely to be effective in dealing with the kinds of challenges now facing the state's institutions.

As the state enters into a period of more complex multiracial change, it can draw on the good investment it has made in opening up higher education to black students. We believe that great progress has been achieved, that the state has received good service from those working on the issue at the Council on Postsecondary Education and its staff. There needs to be some serious investment to carry the state and its institutions through the next stage of developing more complex ways of reaching out to underrepresented groups of students in ways that comply with the Supreme Court's recent decisions.

We support continued visits to campuses and reports on progress and challenges by the CEO, but would suggest two significant changes. First, the reports now deal with too many issues, making it impossible to explore them in depth or to follow up thoroughly. Fifty suggestions not ranked by priority are less useful to administrators than four or five that are developed and fully articulated. We recommend that the visits be preceded by a review of data and reports and by framing a small number of central questions. In this way, everyone will be encouraged to participate in

discussion, and administrators can bring relevant data and responsible officials to the discussion. This would not preclude focus groups or open meetings, but we think it would better move the process at this stage, producing more specific and focused recommendations that could more readily be built into a leadership agenda.

The second change would be one of tone. Sometimes committee meetings and visits feature exchanges that university administrators perceive to be hostile, uninformed and grandstanding to various constituencies. It is easy to understand why people who have been working on issues of racial equity for decades develop strong feelings and have, of course, encountered real prejudice and discrimination in various settings, but it is important to channel this energy and concern in the way that will make the most difference. We believe it would be, in most cases, much more fruitful for state officials to treat university officials as colleagues engaged in discussions about how to solve difficult problems.

In our interviews with the Presidents, all were quite frank in conceding that considerably more work and some form of ongoing oversight and reporting were necessary. Difficult issues and institutional inadequacies can be raised and fully discussed and the Council should use sanctions when there are no good alternatives. The key is showing respect and professionalism in the way the issues are faced. Treating university officials as colleagues will be paramount since their active support and professional skills will be needed to move further along the path. Frank exchanges in a situation of mutual respect and mutual problem solving should prevail. When institutions name new leaders who do not have previous experience with the Kentucky process, a key part of their orientation should be a full briefing by Committee staff.

When institutions are required to gather and report data, it costs time and money that could be used for other things. Even as the committee constantly presses the universities to be more productive in reaching its goals, even when they receive no new resources, so the committee should review its own productivity. Reporting requirements were almost always created for some good purpose at the outset, but they tend to keep going after that purpose has been achieved or the process becomes an empty formula. We suggest that the committee look at each element and ask what it adds, what are the central questions of interest, and whether needed answers can be produced with a simpler questionnaire administered every two or three years, supplemented by pointed direct inquiries when crises arise. There may also be new issues on which data is badly needed. Campus liaisons might be quite helpful in thinking such issues through. Data is a crucial element for good policy, but reports can become formulaic over time. The key is to obtain the data that is most essential as problems evolve and to reduce the cost when the data is no longer needed.

University administrators frequently raised the question of whether or not it would be possible to receive not only regulation but help from the state government. The minority scholarships which are provided were seen as valuable and essential tools. Any other help would be much appreciated. We recommend the following:

- 1) A program of recognition for outstanding accomplishment in campus equity
- 2) Creation of a small cadre of consultants with experience in effectively addressing these problems and, if possible, with understanding of the Kentucky communities and systems — consultants the Council could make available to top university administrators
- 3) Funds for developing potential doctoral students of color and giving them post-docs to help with the tenure process

### **Prepare for Holistic Admissions to Selective Institutions**

When Kentucky has fully complied with the Kentucky Plan, it will need to have admissions strategies, at least for its selective institutions, that comply with the Supreme Court's requirement for "holistic review" of students. Race is to be considered as one of a number of factors in the pursuit of a diverse student body, which the Court has recognized as a compelling educational and social interest for universities.

Simply abandoning the kinds of race conscious targets and procedures used under the Kentucky plan would produce a rapid decline in diversity. At most selective campuses that have tried seriously to maintain diversity without direct consideration of race, it has been critical to end excessive reliance on selection methods that strongly tend to choose relatively privileged white students, such as very strong reliance on admissions tests whose results are strongly linked to parent income and educational levels. To continue to pursue diversity in compliance with the Supreme Court's standards for voluntary affirmative action, campuses will need procedures that define the multiple dimensions that will be considered in making decisions and providing aid "holistically," considering each applicant as a whole person. Campuses across the country are coming to terms with these standards, spelled out in the legal section of this report, and the Council should create an opportunity for administrators to meet with their counterparts from campuses that have been through this process to talk about the nuts and bolts of doing it efficiently and effectively.

### **The Critical Role of Leadership: Provide Diverse Governing Boards**

In order for diversity to become more than a state-mandated compliance requirement, the principles of diversity must be embraced as core institutional values across all segments of the campus community. This extends to institutional governance boards, who not only lead by example, but authorize budgets, policy requirements, and set institutional goals and expectations. Therefore, as Kentucky prepares to transition compliance standards from the Kentucky Plan to a post- *Grutter v. Bollinger* landscape, an important recommendation to the Council on Postsecondary Education and the Governor is to ensure that more under-represented minority candidates and candidates who are interested in pursuing diversity are appointed to its university boards. This would better protect diversity as a core institutional value. In interviews with Presidents, the importance of diversity in board membership and appointments was repeatedly emphasized, as it had been in the Kentucky Plan. As federal oversight

of the state's universities recedes, the quality and the diversity of appointments to these boards will become even more critical.

Eastern Kentucky University	11 member Board; 3 women; 1 URM
Ky Community & Tech. College System	14 member Board; 5 women; 1 URM
Kentucky State University	11 member Board; 5 women; 8 URM
Morehead State University	11 member Board; 5 women; 1 URM
Murray State University	11 member Board; 5 women; 1 URM *
Northern Kentucky Univ.	11 member Board; 6 women; 1 URM
University of Kentucky	20 member Board; 7 women; 2 URM
University of Louisville	20 member Board; 6 women; 2 URM
Western Kentucky University	11 member Board; 8 women; 1 URM

URM= underrepresented minority \*1 Asian

University leadership must work towards ensuring that there is clear communication among all constituencies involved (this includes the campus community, the extended community, sister organizations of higher education, and of course the Council). A clear and consistent message concerning the value of diversity should help promote diversity efforts. Research on successful management of diversity shows that communication of a strong positive message about fairness from institutional leaders is an essential element.

This was a central postulate of Gordon Allport's work on conditions of successful integration in *The Nature of Prejudice*<sup>134</sup> more than a half century ago. Hundreds of studies across the world have now confirmed those conditions. Boards play a vital role in this process, both in the adoption of policies and in selection of leaders. If there are to be highly positive racial outcomes, strong and positive leadership conveying a clear message is a necessary ingredient. A number of university leaders noted how important the attitudes of their boards were. Some reported very strong interest and support, while others described their efforts to educate disinterested boards on the issue. Several pointed to the great importance of the role played by minority members of the boards. One president commented that "if we didn't have representation, it would be a very different board." The current representation of nonwhites on the boards is very limited in a number of cases. As the state assumes central responsibility in the area, this issue is more important than ever.

### **Continuous Learning: Create Ongoing Research and Communication**

The next step of the process in Kentucky has to move beyond existing models and it should tap into the research capacity of the universities. As one Kentucky university president noted, "nobody is looking at best practices, why are some more successful." We have encountered successful dimensions of leadership in many places in Kentucky and elsewhere. There is no need for each campus to reinvent the wheel, and

<sup>134</sup> Gordon Allport, *The Nature of Prejudice*. Reading, MA: Addison-Wesley, 1954; This theory has been confirmed in hundreds of studies across the world: Thomas F. Pettigrew and Linda R. Tropp, "A Meta-Analytic Test of Intergroup Contact Theory," *Journal of Personality and Social Psychology*, 2006, 90, no. 5, 751-783.

there are experiences with things that work in Kentucky that could be fully documented and communicated across the state.

Universities too rarely turn their research talents toward the solution of their own institutional challenges and too seldom systematically evaluate their own experiences. We recommend that there be a systematic process of learning from things that are working somewhere in the state and from things that are working elsewhere. Educational reforms, particularly in higher education, require both leadership by presidents and others, and also information and experience. These requirements convince those who need to act within their decentralized and political institutions that feasible and cost-effective techniques and policies exist and produce measurable gains. These are researchable questions and vital issues for the future of Kentucky. The state should focus some of its academic talent in addressing them through research and evaluation. We suggest that the Council create a research enterprise in collaboration with the campuses. This would entail issuing a call for research papers systematically evaluating campus level interventions aiming to address racial inequality in campus access and success, and holding a statewide conference on the results. Each campus could be asked to provide a modest research stipend to those chosen to do the research; the Council could bring in one or two national experts to comment on the work and add ideas from research elsewhere, and the Council or the University of Kentucky Press could publish the results, giving the authors the right to publish technical versions in appropriate peer-reviewed scholarly journals. At the statewide conference, the Presidents or other campus leaders who initiated the successful programs could be brought in to discuss key implementation issues which would be of great interest to other campuses. Those presentations could be web cast for interested viewers across the state and edited transcriptions included in the publication. Successful implementation of complex changes could be greatly aided by bringing to bear the state's scholarly resources. Creating research and publication opportunities would doubtless engage the energies and talents of faculty members who could help improve the process. Locally produced evidence by trusted colleagues could have large impacts on campus attitudes. The results could also be used for presentations and training efforts on individual campuses. If the effort were successful it could be hosted annually, rotating among the campuses. The costs of such an effort would be modest and locally developed knowledge would doubtless carry extra conviction. This would be another way in which Kentucky could provide a model for the nation.

## **APPENDIX: THE LAW AND THE PLAN**

It is, of course essential that any new plan developed in Kentucky comply with the law. In response to the Council's request we offer the follow analysis written by one of the country's leading experts, Professor Angelo Ancheta of the University of Santa Clara Law School. Because of its technical nature, we publish it as an appendix, but the issues discussed here are vital for the future of Kentucky's plans and policies, and our recommendations are framed to be consistent with the law as interpreted in this analysis.

### **Legal Issues for Kentucky Higher Education Officials.**

As the Commonwealth of Kentucky moves forward with strategic planning and policy making designed to promote diversity in its higher education system, it faces a number of challenges. First, the Commonwealth must revisit the basic justifications for many of its race-conscious educational policies, since numerous policies in its public colleges and universities are predicated on remedying racial segregation in the higher education system. A remedial rationale, which has been reflected in the Commonwealth's recent partnership agreement with the U.S. Department of Education's Office for Civil Rights and the Kentucky Plan for Equal Opportunities in Higher Education, provides justification for more extensive and explicit uses of race compared to a diversity-based rationale. The current agreement with the Office for Civil Rights may be modified or may terminate in the near future, and many of the Commonwealth's higher education policies should be revised in order to satisfy constitutional and federal statutory requirements under a diversity rationale. Moving from desegregation to diversity also has important implications for the system's historically black university, Kentucky State University, whose enhancement has been a key element of the Commonwealth's remediation activities. As noted in this Report, full compliance with the OCR agreement requires further remediation measures, and even if the agreement is terminated, maintaining a commitment to the enhancement of KSU will require additional planning that complements a statewide diversity plan.

Another set of challenges for the Commonwealth lies in addressing Kentucky's evolving racial and ethnic demographics and in expanding the scope of educational policies to address those demographics. Past discrimination against African Americans in Kentucky has provided the justification for race-conscious policies that promote greater opportunities for black students, faculty, and staff, but many educational policies limit their coverage and benefits to blacks only. Other racial and ethnic minority populations in Kentucky, including Latinos, Asian Americans and Pacific Islanders, and Native Americans, are increasing in size, and many of the Commonwealth's higher education programs draw significant numbers of students from outside of Kentucky. Emerging populations must be taken into account and incorporated into diversity-based policies. At the same time, the demographics of the Commonwealth may impose limitations on achieving diversity within some of its

institutions; institutions that draw heavily from local and regional populations — populations that may lack significant racial and ethnic diversity — must also address the challenge of establishing appropriate goals and measures of success (and failure) in achieving diversity.

A third set of challenges for the Commonwealth focuses on the uncertainties in the law under a diversity rationale. While the U.S. Supreme Court has provided clear legal guidelines for diversity-based admissions policies in higher education, the Court has not provided comparable guidance in areas outside of admissions, including race-conscious outreach and recruitment, financial aid, and support programs for students. Nor has the Court offered definitive case law regarding diversity-based affirmative action programs for university faculty or staff. Case law, statutes, and federal guidelines do provide significant support for many race-conscious policies outside of admissions, although some policies may be more risky than others in exposing the Commonwealth to potential liability, and the Commonwealth must be prepared to assess that risk and develop appropriate policies in accordance with its risk assessment.

A number of institutions within Kentucky's higher education system, such as the University of Kentucky and the University of Louisville, have already implemented planning and policy making to promote diversity in their student bodies, and have put in place transitions from remediation-based policies to diversity-based policies. Institutions have incorporated diversity planning into a number of key areas, including university mission statements, strategic planning, establishing goals and priorities, policy development and implementation, and program evaluation. Both the processes and the programs that have been adopted at a number of universities provide useful examples for other institutions in the Kentucky higher education system to emulate. Nonetheless, institution-specific planning must be undertaken to address significant differences among the various components of the statewide system. The Council on Postsecondary Education, the Commonwealth's coordinating body for higher education, must be prepared to develop overall standards for diversity planning, but it also must take into account the reality that a one-size-fits-all approach may not comply with legal mandates and may not lead to the most effective policies for individual institutions.

The following analysis addresses some of the major legal issues and challenges that face the Kentucky higher education system as it develops and implements a diversity plan. The analysis is divided into six parts. Part I briefly discusses Kentucky's present legal environment for race-conscious higher education policy making, including federal mandates and the requirements under the current OCR partnership agreement and the Kentucky Plan for Equal Opportunities in Higher Education. Part II provides an overview of constitutional law and federal statutes applicable to diversity-based policies in higher education. Part III examines the legal standards for diversity-based admissions policies articulated in the 2003 University of Michigan affirmative action cases. Part IV discusses institutional considerations and procedures in developing diversity-based admissions policies. Part V examines the law applicable to diversity

policies outside of admissions, including outreach and recruitment, financial aid, academic support programs, and university employment. Part VI offers suggestions for legal planning and risk assessment, as well as possibilities for race-conscious policies that promote and maintain student body diversity.

Although this analysis addresses constitutional and other legal standards applicable to the Commonwealth of Kentucky, the Council on Postsecondary Education, and the various public institutions of higher education within the Commonwealth, it is not a substitute for specific legal advice. Any policies that may be adopted by the Commonwealth, the CPE, or particular higher education institutions should be carefully reviewed by appropriate legal counsel prior to their implementation.

## **I. Desegregation and Existing Legal Requirements of the Kentucky Higher Education System**

### **A. Background**

Race-conscious policies that promote equal educational opportunity in Kentucky's higher education system are rooted in multiple sources of law and public policy, including federal and state law, agreements between the federal government and the Commonwealth, and the Kentucky Plan for Equal Opportunities in Higher Education ("Kentucky Plan"). There is also a long history of racial segregation and desegregation in public education in Kentucky that forms an integral part of the legal landscape within which the higher education system operates. An extensive discussion of the law and the history of desegregation in Kentucky is beyond the scope of this analysis; however, it is essential to highlight key elements of federal law, the OCR partnership agreement, and the Kentucky Plan in order to contrast a potential diversity-based regime with the remediation-based regime under which the Commonwealth presently operates.

Although *de jure* segregation in Kentucky's public education has a lengthy history, the roots of the current desegregation efforts in higher education trace back to the early 1980s. At that time, the U.S. Department of Education's Office for Civil Rights concluded that the Commonwealth of Kentucky was one of several states operating a racially segregated system of higher education in violation of Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race by recipients of federal funding.<sup>135</sup> The OCR consequently entered into negotiations with the Commonwealth to ensure voluntary compliance with desegregation criteria established by federal administrative regulations.<sup>136</sup>

---

<sup>135</sup> 42 U.S.C. § 2000d et seq.

<sup>136</sup> 43 Fed. Reg. 6658 (1978) (Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education).



Since 1982, the Commonwealth has worked with the Office for Civil Rights and has developed voluntary plans designed to dismantle racial segregation in the higher education system. Three distinct plans have been in place since 1982: the Commonwealth of Kentucky Higher Education Desegregation Plan (1982-87); the Kentucky Plan for Equal Opportunities in Higher Education (1990-95, and extended through 1996); and the current Kentucky Plan (1997-2002, and extended to the present). As the current OCR partnership agreement notes, the original 1982 desegregation plan “included a wide range of measures and activities in areas such as enhancement of Kentucky’s historically black university, desegregating student enrollments through increased recruitment and improved retention programs for African American students and desegregating faculties, staffs and governing boards.”<sup>137</sup> Subsequent plans have continued to address these key concerns. The partnership agreement with the OCR has been in place since 1999; although its formal expiration date was at the end of 2002, the partnership agreement has been extended by the OCR and remains operative as of this writing.

Important developments in federal case law and administrative guidelines since 1982 have influenced the evolution of the OCR partnership agreement and the Kentucky plans. The U.S. Supreme Court’s 1992 ruling in *United States v. Fordice*<sup>138</sup> made clear that under Title VI and the Equal Protection Clause of the Fourteenth Amendment, race-neutral policies alone are insufficient to dismantle a de jure segregated system of higher education. According to the standards established by the *Fordice* Court, “[i]f policies traceable to the *de jure* system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational practices.”<sup>139</sup> *Fordice* thus imposes mandates on states to take affirmative race-conscious steps to dismantle previously segregated systems, and race-neutral policies can themselves violate the constitution and Title VI if they cause or maintain segregative effects. Among the factors examined by the *Fordice* Court in determining whether a system was still segregative were student admissions standards and procedures, program duplication, institutional mission assignments, and the operation of a large number of previously segregated institutions.

In response to *Fordice*, the Office for Civil Rights stated in 1994 that it would “examine a wide range of factors to ensure that the vestiges of these States’ de jure systems have been eliminated. The comprehensive array of factors that OCR [would] consider includes those addressed in *Fordice* and

---

<sup>137</sup> Partnership Agreement: The Commonwealth of Kentucky and the U.S. Department of Education, Office for Civil Rights (1999), at 2.

<sup>138</sup> 505 U.S. 717 (1992).

<sup>139</sup> *Id.* at 729.

those reflected in the ingredients for acceptable desegregation plans specified in the Department's 'Revised Criteria.'"<sup>140</sup> In addition, the OCR has made clear that it "will strictly scrutinize State proposals to close or merge traditionally or historically black institutions, and any other actions that might impose undue burdens on black students, faculty, or administrators or diminish the unique roles of those institutions."<sup>141</sup> As a consequence of *Fordice* and the Department of Education's administrative guidelines, the OCR has carefully monitored Kentucky's desegregation activities and has extended the partnership agreement past the original termination date of December 31, 2002.

Adopted in May of 1999, the current OCR partnership agreement outlines the basic standards by which the OCR and the Commonwealth agree to desegregate the system via the Kentucky Plan. The Commonwealth is committed under the agreement to enhance Kentucky State University, the system's historically black university, as well as to continue efforts to enhance campus climate, student recruitment, and student retention for African American students attending both the historically white universities and Kentucky State University. The OCR agreement contains specific commitments to renovate the physical infrastructure at Kentucky State University, to ensure fair funding allocations to KSU, and to enhance and strengthen the educational programs at KSU; the agreement also lists commitments to continue recruitment and retention activities throughout the Kentucky system, as well as specific commitments from particular institutions to ensure that there are no adverse impacts on student retention and graduation of African American students. As noted in this Report, full compliance with the OCR agreement remains problematic because of ongoing problems at KSU and KSU's unequal status within the overall Kentucky higher education system.

### **B. The Kentucky Plan**

The OCR agreement incorporates by reference the specific goals and objectives of the Kentucky Plan. The most recent Kentucky Plan, which was adopted on July 21, 1997, outlines extensive goals and objectives designed to desegregate Kentucky's higher education system at multiple levels. The Plan has three system wide objectives: (1) to provide equal educational opportunities for all Kentuckians by striving to increase African American student enrollments; (2) to increase the number of African-Americans employed at all levels at all institutions; and (3) to

---

<sup>140</sup> 59 Fed. Reg. 4272 (1994) (Notice of Application of Supreme Court Decision).

<sup>141</sup> *Id.*

continue enhancement of the Commonwealth's historically black institution in its important role in the higher education system.<sup>142</sup>

The Kentucky Plan additionally outlines seven commitments that each institution has agreed to follow in order to satisfy the system wide objectives:

1. To maintain/increase the proportion of Kentucky resident African American undergraduate students enrolled in higher education;
2. To increase the retention of Kentucky resident African American undergraduate students and the proportion of Kentucky resident African Americans who graduate to the proportion of white undergraduate students who are retained and who graduate;
3. To increase the proportion of Kentucky resident African American graduate students enrolled in higher education.
4. To increase the number and proportion of African American faculty and staff employed by the institutions of higher education;
5. To increase the number of Kentucky resident African American applicants to, enrollments in, and graduation from first professional programs in dentistry, law, and medicine;
6. To ensure African American representation on the Council on Postsecondary Education, the Kentucky Community and Technical College System (KCTCS), and on each Board of Trustees or Regents; and
7. To establish and maintain campus programs and activities to accomplish the above.<sup>143</sup>

Consistent with the interests in desegregation and remedying past discrimination, as well as the legal requirements of the federal OCR, the Plan's goals and commitments focus on increasing the representation of African Americans throughout the higher education system. The Kentucky Plan further contains an extensive listing of qualitative and quantitative goals, objectives, and individual action plans that have been monitored and periodically updated by the Council on Postsecondary Education and its Committee on Equal Opportunities, the body that has been charged with enforcing compliance with the Plan.

---

<sup>142</sup> 1997-2002 Kentucky Plan for Equal Opportunities in Higher Education (1997), at 19 [hereinafter Kentucky Plan].

<sup>143</sup> *Id.*

A review of the many individual campus commitments and policies is beyond the scope of this analysis, but a thorough review of those objectives, plans, and policies will be essential in order to develop a system wide diversity plan and individual institutional plans that comply with constitutional and federal statutory requirements. The Plan's system wide goals and commitments discuss the "proportion" and "number" of African Americans relative to whites in only the most general terms, but individual campus commitments and policies, if they are un-amended by a new plan, may be more problematic under a diversity rationale. The courts have been reluctant—outside the context of remedying well-documented past discrimination—to approve race-conscious policies that employ quotas or inflexible numerical goals based on fixed numbers or percentages.

It is also important to note that all of the elements of the Kentucky Plan focus on desegregation of the system with respect to African American students and white students (and, except for faculty and staff, with respect to Kentucky residents). The Plan does not address desegregation or equal educational opportunity with respect to other racial and ethnic minority groups, or with respect to other group-based characteristics, such as socioeconomic status, gender, disability, age, or sexual orientation. The creation of any new plan based on diversity will require attention to group characteristics beyond black and white racial characteristics; indeed, a diversity rationale requires that racial selection criteria be embedded as only one factor within a larger, multi-element definition of diversity.

In addition to the Kentucky Plan itself, Kentucky state law provides mechanisms for assessing and making institutions accountable to postsecondary equal opportunity plans, and specifically for enforcing the objectives and commitments of the Kentucky Plan. Senate Bill 398, codified as Kentucky Revised Statutes § 164.020(19), was adopted in 1992 and requires that the Council on Postsecondary Education disapprove new academic programs at higher education institutions that fail to meet equal educational opportunity objectives. Kentucky administrative regulations (13 KAR 2:060) provide more specific enforcement guidelines and also contain qualitative and quantitative waiver provisions for institutions to satisfy basic objectives of the Plan. Like the Kentucky Plan itself, the administrative regulations contain specific references to African American and white students, but do not contain references or objectives affecting other racial and ethnic minority groups within the higher education system. Moving to a diversity rationale will require amendment of these regulations to broaden their scope of coverage and to comply with constitutional requirements for diversity-based policies.

## II. OVERVIEW OF LEGAL STANDARDS AND REQUIREMENTS FOR DIVERSITY-BASED PROGRAMS

Moving to a diversity-based rationale will require that the Commonwealth adhere to a different set of constitutional, statutory, and administrative requirements than presently employed to desegregate the system under the OCR partnership agreement and the Kentucky Plan. The most significant distinction is that once the desegregation rules set by the federal government have been lifted, the Commonwealth will no longer be required to take affirmative steps to comply with the federal constitution and Title VI. In other words, the Commonwealth will not be mandated under federal law to implement policies that remedy past discrimination. Instead, the Commonwealth will be permitted to adopt race-conscious policies that fall within the boundaries of constitutional standards, but will not be obligated by federal law to adopt policies that diversify their institutions. The Commonwealth can thus choose to adopt diversity policies that parallel those already upheld as constitutional by the courts; it can choose to adopt other types of race-conscious policies that do not violate the Equal Protection Clause; or it can choose not to employ race-conscious policies at all. Given both the history of desegregation in Kentucky and the Commonwealth's already widespread use of race-conscious policies to advance equal educational opportunity, pursuing diversity through race-conscious measures and statewide enforcement by the CPE is an appropriate path for the Commonwealth to follow.

In 2003, the U.S. Supreme Court clarified the legal standards for higher education admissions designed to promote student body diversity, and these standards differ significantly from those applicable to remedying de jure segregation. The courts have allowed greater latitude when remedying discrimination is involved, and policies such as quotas and set-aside programs for racial minorities, as well as particularized goals and timetables are frequently used. In the area of diversity-based admissions, permissible policies are much more circumscribed, and the courts are much less tolerant of race-conscious measures. A thorough understanding of the Supreme Court's 2003 decisions in the University of Michigan affirmative action cases — *Grutter v. Bollinger*<sup>144</sup> and *Gratz v. Bollinger*<sup>145</sup> — is essential for diversity planning.

Outside the area of admissions, the law on diversity-based policy making is not as well-defined. While the Supreme Court made clear in its *Grutter* and *Gratz* decisions that promoting diversity within a student body is a sufficiently strong justification for race-conscious admissions policies, it

---

<sup>144</sup> 539 U.S. 306 (2003).

<sup>145</sup> 539 U.S. 244 (2003).

did not delineate the scope of policy making in areas such as outreach and recruitment, financial aid, and academic support programs. Nor has the Court directly addressed the constitutionality of race-conscious measures designed to promote diversity in a university's faculty or staff. The lower courts have, however, provided significant guidance on many of these questions and there is sufficient case law to support the Commonwealth's adopting effective race-conscious measures in areas outside of admissions. Still, there are a few gray areas involving minority-only policies where the Commonwealth and its institutions will need to assess the risk they are willing to bear in order to avoid potential litigation or action by the federal government.

Public institutions of higher education are bound by multiple sources of law when designing race-conscious policies designed to advance diversity. Race-conscious policies are likely to be affected by one or more of the following constitutional, statutory, or regulatory provisions: (1) the Equal Protection Clause of the Fourteenth Amendment; (2) Title VI of the Civil Rights Act of 1964, which prohibits discrimination by recipients of federal financial assistance; (3) 42 U.S.C. section 1981, which prohibits discrimination in contracts; (4) Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment; and (5) Executive Order 11246 and its accompanying regulations, which require affirmative action plans from federal contractors.

#### **A. Equal Protection Clause**

Although the *Grutter v. Bollinger* and *Gratz v. Bollinger* decisions focused on university admissions policies, these decisions, along with the Supreme Court's more recent K-12 school desegregation decision in *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>146</sup> have reinforced several constitutional principles that apply to a variety of race-conscious policies in higher education. First, the Supreme Court has confirmed the basic framework for analyzing race-conscious policies under the Equal Protection Clause of the Fourteenth Amendment. Regardless of the level of government or whether a policy is designed to burden or benefit racial minorities, the courts must apply *strict scrutiny*—the most exacting level of judicial scrutiny—to race-conscious policies. Under strict scrutiny, the courts employ a two-step test in which both the ends and the means adopted to advance a policy are assessed. The courts require that (1) the interest underlying a policy must be sufficiently important to be a *compelling interest* and (2) the policy must be carefully crafted so that it is ruled to be necessary and *narrowly tailored* to advance that compelling

---

<sup>146</sup> 127 S. Ct. 2738 (2007).

interest.<sup>147</sup> Failure to satisfy either element of strict scrutiny invalidates a race-conscious policy.

The Court in *Grutter* also indicated that context is important when applying strict scrutiny and that the academic freedoms which the courts have historically extended to colleges and universities are central to an analysis of higher education policies.<sup>148</sup> Universities enjoy a greater degree of deference than other governmental institutions when the courts review policies designed to enroll student bodies and to develop other institutional characteristics consistent with academic missions. In *Grutter*, for instance, the Court did not require the University of Michigan to present extensive evidence to support its compelling interest in student body diversity and deferred to the University's good faith judgments. In the 2007 *Parents Involved* case, the Court reaffirmed the core rulings of *Grutter*, and distinguished the higher education context from the K-12 context when it declined to extend the same degree of deference to local school boards.<sup>149</sup>

The Supreme Court also made clear in *Grutter* that remedying an institution's past racial discrimination is only one type of interest that can justify a race-conscious policy consistent with the Equal Protection Clause; forward-looking interests that are non-remedial in nature can also be compelling. An interest in promoting student body diversity was ruled compelling in *Grutter*, and other non-remedial interests can be ruled sufficiently important to be compelling as a matter of law. The courts have directly addressed the constitutionality of only a small number of governmental interests challenged in litigation; the Court has, for example, rejected remedying societal discrimination, which differs from an institution's its own specific discrimination, as a compelling interest, and it has declined to recognize promoting of role models for minority students as a compelling interest. But, interests similar to student body diversity that are consistent with a university's academic mission, such as promoting diversity within an institution's faculty, may be more likely to be upheld as compelling.

The Supreme Court has also begun employing narrow tailoring standards in diversity cases that parallel long-established rules applied in remedial affirmative action cases. As discussed in Part III below, basic elements of narrow tailoring require documentation that a policy is flexible, that it does not unduly burden non-minorities, that it is necessary and that the institution has considered race-neutral alternatives, and that a program be periodically reviewed or limited in time, so that it has some logical end point in the future. In the University of Michigan cases themselves, the

---

<sup>147</sup> *Grutter*, 539 U.S. at 326-27.

<sup>148</sup> *Id.* at 327-29.

<sup>149</sup> 127 S. Ct. at 2754.

*Grutter* Court concluded that the University of Michigan’s law school admissions policy complied with all of these requirements, but the *Gratz* Court concluded that the University’s undergraduate policy was not sufficiently flexible because it automatically allocated points to underrepresented minority applicants, which virtually guaranteed their admission.

### **B. Title VI**

The Supreme Court confirmed in both *Grutter* and *Gratz* that all higher education institutions, whether public or private, are bound by strict scrutiny standards if they receive federal funding and are subject to the mandates of Title VI of the Civil Rights Act of 1964. Title VI states in part that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>150</sup> Because the Court has consistently ruled that Title VI is “co-extensive” with the Equal Protection Clause, any entity receiving federal financial assistance—even if entirely private—must comply with the constitutional standards that are applied to state and local governmental bodies, including public higher educational institutions.<sup>151</sup> Independent of its relationship to equal protection law, Title VI and its administrative regulations also prohibit discrimination by recipients of federal funding that is either intentionally discriminatory or results in discrimination because of a disproportional or disparate impact on a racial or national origin group.

### **C. Section 1981**

In both *Grutter* and *Gratz*, the Supreme Court noted that 42 United States Code section 1981,<sup>152</sup> a Reconstruction-era statute designed to address discrimination in the making and enforcement of contracts, is, like Title VI, co-extensive with the Equal Protection Clause. Thus an admissions policy that violated the Equal Protection Clause would also violate section 1981, since “a contract for educational services is a ‘contract’ for purposes of § 1981.”<sup>153</sup> Similarly, many forms of financial aid, such as loan or grants, as well as participation in certain academic support programs, may be established through contractual agreements between students and universities, making section 1981 applicable to many programs outside of

---

<sup>150</sup> 42 U.S.C. § 2000d.

<sup>151</sup> *Grutter*, 539 U.S. at 343.

<sup>152</sup> Section 1981 states in relevant part: “All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens.” 42 U.S.C. § 1981(a). Although the language of section 1981 suggests that it is designed only to protect non-whites, the Supreme Court has upheld the use of section 1981 by white plaintiffs to sue for racial discrimination.

<sup>153</sup> *Gratz*, 539 U.S. at 276 n.23.



the admissions context. Section 1981 may also be an important limitation on non-university entities that are involved in diversity-related programs. Because it covers both governmental actors and private entities, even those that receive no federal funding, section 1981 can be applied to private foundations and organizations that are not directly affiliated with universities, so long as a contract is involved.<sup>154</sup> Section 1981 may, therefore, have important limitations on race-conscious financial aid programs that affect students in the Kentucky system, even if they are not administered by the public institutions within the system.

#### **D. Title VII**

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment and regulates race-conscious affirmative action policies affecting university employees. Title VII is likely to be implicated in two types of employment practices: (1) race-conscious affirmative action policies involving a university's faculty, administration, or staff, and (2) race-conscious employment policies tied to student financial aid packages, such as eligibility for graduate teaching or research fellowships. As discussed more thoroughly in Part V.C below, there are significant overlaps between Title VII case law and equal protection case law, but the Supreme Court has not issued definitive guidance on the use of the diversity rationale to justify race-conscious affirmative action policies in areas of university employment.

#### **E. Federal Regulations**

Executive Order 11246, which is administered by the Office of Federal Contract Compliance Programs, requires all employers with 50 or more employees and federal contracts exceeding \$50,000 to file written affirmative action plans with the federal government. Among the requirements are racial minority hiring goals and timetables to which institutions must commit good faith efforts to attain. All levels of institutional employment, including faculty and academic personnel at colleges and universities, are covered by the regulations.<sup>155</sup> Specific regulations focus on requiring institutions to provide quantitative analyses

---

<sup>154</sup> One legal question that has not been squarely answered by the Supreme Court is whether section 1981 necessarily imports the *constitutional* standard of strict scrutiny when entirely private entities are involved. Language in the footnotes of both *Grutter* and *Gratz* suggests that if section 1981 is fully co-extensive, the courts should impose constitutional standards even on private entities if section 1981 applies to them. But, at least one post-*Grutter/Gratz* court has proposed that section 1981 is only co-extensive with the equal protection clause in requiring proof of intentional discrimination; instead of tracking strict scrutiny, the standards for section 1981 liability involving an entirely private educational institution parallel the standards of Title VII of the Civil Rights Act of 1964, the primary federal statute addressing racial discrimination in employment. *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 470 F.3d 827 (9th Cir. 2006) (en banc), *cert. dismissed*, 127 S. Ct. 2160 (2007).

<sup>155</sup> 41 C.F.R. § 60 et seq.

in areas such as organizational profile, job groups, availability of minorities for jobs, and setting placement goals; additional regulations focus on analyses of academic employments processes to determine where there are impediments to equal employment opportunity. As federal contractors, colleges and universities risk a loss in federal funds for failure to comply with federal regulations on affirmative action.

### III. LEGAL STANDARDS FOR DIVERSITY-BASED ADMISSIONS

#### A. Compelling Interest in Student Body Diversity

Supreme Court case law offers the most clarity in the area of race-conscious admissions. Relying on principles first articulated in 1978 in Justice Powell's controlling opinion in *Regents of the University of California v. Bakke*<sup>156</sup> the U.S. Supreme Court by a 5-to-4 vote in *Grutter v. Bollinger* reaffirmed the compelling interest in promoting student body diversity in higher education. The Supreme Court divided, however, on the question of what would constitute a narrowly tailored admissions plan, and upheld the law school admissions plan in *Grutter* but struck down the undergraduate admissions plan in *Gratz v. Bollinger*.

The language and reasoning of Justice Powell in the *Bakke* case is instructive. In *Bakke*, a fragmented Supreme Court struck down the special admissions policy at the medical school of the University of California, Davis, but reversed a lower court's ruling that an applicant's race could never be considered a factor in admissions. Justice Powell provided the fifth vote for a majority which concluded that the medical school's policy—a plan that set aside sixteen out of 100 seats in the entering class for disadvantaged minority applicants—was illegal because it precluded white applicants from competing for those special seats. But Justice Powell, as part of a different five-member majority, also held that race could be used as one of several factors in a competitive admissions process.<sup>157</sup>

Justice Powell's *Bakke* opinion concluded that a university's interest in promoting broad *educational* diversity — and not just *racial* diversity — within its student body is grounded in the academic freedoms historically accorded to universities and constitutes a compelling interest that can justify the limited use of race. Citing the undergraduate admissions policy at Harvard College as an example, Justice Powell distinguished an impermissible policy such as the Davis plan, in which white applicants could not compete for sixteen seats in the entering class, from a permissible policy such as the Harvard plan, in which race was employed as a “plus”

---

<sup>156</sup> 438 U.S. 265 (1978).

<sup>157</sup> *Bakke*, 438 U.S. at 320.

factor in a process in which all applicants were eligible to compete for seats in the entering class. Under a plus-factor admissions policy, an applicant's race could "tip the balance" in an admissions decision, but race would be only one of many factors under consideration.

Upholding the compelling interest in diversity twenty-five years after *Bakke*, the *Grutter* Court's opinion draws heavily on Justice Powell's reasoning that institutions of higher education enjoy deference by the courts because of academic freedoms rooted in the First Amendment: "Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits. . . . We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."<sup>158</sup> The *Grutter* opinion assumes good faith on the part of universities in selecting their student bodies: "Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that 'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'"<sup>159</sup>

The *Grutter* opinion thus offers a strong endorsement of the value of student body diversity in promoting numerous benefits, including: (1) educational benefits; (2) assisting in the breakdown of racial and ethnic stereotypes; and (3) the development of a diverse, racially integrated leadership class. Supported by data introduced at trial and in *amicus curiae* briefs, the opinion recognizes that student body diversity leads to the promotion of cross-racial understanding, improved classroom discussions and other positive learning outcomes, and enhanced preparation for a diverse workforce and society.<sup>160</sup> In addition, student body diversity "helps to break down racial stereotypes"<sup>161</sup> and "diminishing the force of such stereotypes is both a crucial part of [a university's] mission, and one that it cannot accomplish with only token numbers of minority students. Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."<sup>162</sup>

---

<sup>158</sup> *Grutter*, 539 U.S. at 328-29.

<sup>159</sup> *Id.* at 329 (quoting *Bakke*, 438 U.S. at 318-19).

<sup>160</sup> *Id.* at 330.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 333.

*Grutter* also recognized that colleges and universities, and law schools in particular, provide the training ground for many of our Nation's leaders. According to the Court, "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."<sup>163</sup> Access to higher education "must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America."<sup>164</sup> The Court further noted that "'ensuring that public institutions are open and available to all segments of American society, including people of all race and ethnicities, represents a paramount government objective.' . . . And, '[n]owhere is the importance of such openness more acute than in the context of higher education.' . . . Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."<sup>165</sup>

Notwithstanding the *Grutter* Court's forceful rhetoric on equal educational opportunity, the diversity interest is bounded by certain limits. As the Court later underscored in its 2007 decision in *Parents Involved in Community Schools v. Seattle School District No. 1*, the compelling diversity interest upheld in *Grutter* is specific to higher education and does not encompass racial diversity alone. The *Grutter* Court quoted the articulation of diversity from Justice Powell's *Bakke* opinion, stating that "it is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, that can justify the use of race."<sup>166</sup> Instead, the diversity interest encompasses "a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."<sup>167</sup> Thus the diversity interest covers "all factors that may contribute to student body diversity."<sup>168</sup> Indeed, the *Grutter* Court highlighted the various types of diversity sought by the law school at the University of Michigan: "there are many possible bases for diversity admissions, and [the policy] provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields."<sup>169</sup>

---

<sup>163</sup> *Id.* at 332.

<sup>164</sup> *Id.* at 332-33.

<sup>165</sup> *Id.* at 332 (quoting Brief of the United States as *Amicus Curiae* 13) (citations omitted).

<sup>166</sup> *Id.* at 324-325 (citing and quoting *Bakke*, at 314-315 (opinion of Powell, J.)).

<sup>167</sup> *Id.* at 325 (quoting *Bakke*, *supra*, at 315 (opinion of Powell, J.)).

<sup>168</sup> *Id.* at 337.

<sup>169</sup> *Id.* at 338.

Notwithstanding its limitations, the core ruling of *Grutter* rests on solid ground, and the opinion indicates that the educational benefits of diversity are well established empirically and need not be re-documented by individual institutions in order to satisfy constitutional requirements. (The *Grutter* Court itself relied on multiple sources of evidence related to the benefits of diversity, not just those involving the University of Michigan.) The diversity interest is compelling as a matter of law. This is not to say that the Commonwealth or its colleges and universities should not attempt to articulate institution-specific interests in diversity, nor does *Grutter* imply that institutions should abstain from attempting to document the effects of race-conscious policies on the creation of diverse bodies. The Commonwealth should engage in these in order to develop consistent practices that advance institutional missions and to ensure the ongoing effectiveness of their policies. But it need not document the particularized benefits of diversity to the same level as the University of Michigan in the *Grutter* and *Gratz* cases.

Institutional and state research showing these impacts would be useful both in terms of defending institutional policies in terms of learning how to improve results on campus. The existing surveys contain valuable materials and we suggest a method for high quality research on Kentucky campuses in our recommendations.

And, although the *Grutter* case was decided by 5-to-4 vote, support for the compelling interest in educational diversity is stronger than that vote would indicate. Both Justice Kennedy and the late Chief Justice Rehnquist in their dissenting opinions indicated that they would support a compelling interest in diversity, although would have struck down the actual policy in *Grutter* on narrow tailoring grounds. The Supreme Court in *Parents Involved in Community Schools* also confirmed *Grutter's* ongoing applicability to diversity in higher education, and all of the Justices in *Parents Involved*—whether in the majority, concurring, or dissenting—indicated that *Grutter* was still good law.

### **B. Requirements for Narrowly Tailored Policies**

The more critical constraints on the Commonwealth's diversity planning and policy development lie in the narrow tailoring requirements of strict scrutiny. Under narrow tailoring, the courts evaluate the fit between a compelling interest and the policy adopted to advance that interest. The Supreme Court has not developed a single test of narrow tailoring in equal protection cases, but the Court offered general principles in *Grutter* and *Gratz*, drawing in part on earlier guidelines from *Bakke*. Justice Powell's *Bakke* opinion discussed two elements of narrow tailoring applicable to admissions policies: first, a diversity-based admissions policy must not rely on separate tracks or quotas that insulate racial minorities from competitive

review; second, race must be employed as a “plus” factor that is only one of many factors being weighed in a competitive process that assesses the qualifications of each individual applicant.

Stating that the narrow tailoring test “must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education,”<sup>170</sup> the *Grutter* Court’s narrow tailoring test combines elements from *Bakke* and the Court’s remedial affirmative action case law<sup>171</sup> into five basic inquiries:

- (1) Does the program offer a *competitive review* of all applications (i.e., no quotas or separate tracks to insulate minorities)?
- (2) Does the program provide *flexible, individualized consideration* of applicants so that race is only one of several factors being considered?
- (3) Has the institution considered workable *race-neutral alternatives*?
- (4) Does the program *unduly burden* non-minority applicants?
- (5) Is the program *limited in time*, so that it has a logical end point?

The *Grutter* Court applied all of these inquiries in upholding the University of Michigan Law School’s admissions policy. The *Gratz* Court simply focused on the flexibility inquiry and concluded that the University’s undergraduate admissions policy lacked the flexibility and individualized review to satisfy narrow tailoring. Each of these narrow tailoring requirements is discussed below.

### 1. Competitive Review

The *Grutter* opinion adopts Justice Powell’s prohibition on the use of quotas, set-asides, or separate tracks for minority applicants to advance the interest in diversity.<sup>172</sup> However, as the *Grutter* Court made clear, quotas are distinct from *goals*:

---

<sup>170</sup> *Id.* at 334.

<sup>171</sup> In *United States v. Paradise*, 480 U.S. 149 (1987), a case in which the Supreme Court upheld a court-ordered promotions policy designed to remedy discrimination in public employment, a plurality of the Court examined four narrow tailoring factors: (1) the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief, including the availability of waiver provisions; (3) the relationship of numerical goals to the relevant market; and (4) the impact of the relief on the rights of third parties

<sup>172</sup> It is important to note that quotas or set-asides are not per se unconstitutional. Under *Grutter*, they may not be employed to advance the interest in educational diversity, but they may be used to advance the compelling interest in remedying the present effects of past discrimination; indeed, the Court

Properly understood, a “quota” is a program in which a certain fixed number or proportion of opportunities are “reserved exclusively for certain minority groups.” Quotas “impose a fixed number or percentage which must be attained, or which cannot be exceeded,” and “insulate the individual from comparison with all other candidates for the available seats.” In contrast, “a permissible goal ... require[s] only a good-faith effort ... to come within a range demarcated by the goal itself,” and permits consideration of a “plus” factor in any given case while still ensuring that each candidate “compete[s] with all other qualified applicants.”<sup>173</sup>

Accordingly, an admissions policy that employs race as a plus factor, even if the policy allows race to be weighed more significantly than other factors, is not the equivalent of a quota. Nor does “some attention to numbers” necessarily transform an admissions system into a quota. There is, as Justice Powell indicated in *Bakke*, “some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted.”<sup>174</sup> A goal that seeks racial minority enrollments beyond a token number, but does not establish a fixed number or percentage of admittees, can be an appropriate objective for colleges and universities.

## 2. Flexible, Individualized Consideration

According to the *Grutter* Court:

When using race as a “plus” factor in university admissions, a university’s admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.<sup>175</sup>

The Court’s language implies that race cannot be the sole factor — or even a predominating factor — in admissions decisions. Although colleges and universities are entitled to deference in defining their student bodies, an admissions policy must consider *non*-racial factors to ensure that “all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions.”<sup>176</sup> The *Grutter* Court

---

approved the use of a hiring quota in *United States v. Paradise*, and the lower courts frequently have approved quotas or set-asides as short-term remedies for past discrimination.

<sup>173</sup> *Grutter*, 539 U.S. at 335 (citations omitted).

<sup>174</sup> *Id.* at 336 (quoting *Bakke*, 438 U.S. at 323).

<sup>175</sup> *Id.* at 336-37

<sup>176</sup> *Id.* at 337.

approved an admissions policy that “seriously weighs many other diversity factors besides race that can make a real and dispositive difference for non-minority applicants as well.”<sup>177</sup>

However, an admissions policy that employs race mechanically or automatically in order to assign benefits is not sufficiently flexible. Nor is a policy that offers such a strong advantage to minority applicants that it virtually guarantees their admission. According to the *Gratz* Court, a flexible admissions program does not “contemplate that any single characteristic automatically ensure[s] a specific and identifiable contribution to a university’s diversity.... Instead, ... each characteristic of a particular applicant [is] to be considered in assessing the applicant’s entire application.”<sup>178</sup> Moreover, an argument of administrative convenience—such as having to address a high volume of applications at a large university — may lead an institution to prefer a more mechanical approach over a more individualized and resource-intensive approach, but administrative convenience will not prevent a policy from being declared unconstitutional.<sup>179</sup>

### 3. Race-Neutral Alternatives

Narrow tailoring also requires “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”<sup>180</sup> Consideration of race-neutral alternatives does not, however, require that an institution exhaust every possible alternative, nor does narrow tailoring require that institutions choose between maintaining a reputation for excellence and selectivity on the one hand and maintaining a commitment to diversity on the other. The requirement focuses instead on an institution’s documenting good faith efforts to develop viable solutions that can advance its interests in being both selective and diverse. Kentucky institutions can learn about the feasibility of possible alternatives by drawing on substantial national research on percent plans, etc. and considering how they apply to local conditions.

The *workability* of a race-neutral alternative is critical. As the *Grutter* Court recognized, race-neutral alternatives such as a lottery system or a lowering of admissions standards could seriously compromise a school’s parallel interest in selectivity, and could actually impair diversity by precluding individualized review. Policies such as “percent plans,” which are used in some states to guarantee undergraduate admission to all

---

<sup>177</sup> *Id.* at 338.

<sup>178</sup> *Gratz*, 539 U.S. at 271.

<sup>179</sup> *Id.* at 275 (stating that “the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system”).

<sup>180</sup> *Grutter*, 539 U.S. at 339.



students who graduate from their high school with a class ranking above a specified threshold (e.g., the top ten percent), are not viable alternatives at many colleges and universities, particularly graduate or professional schools.<sup>181</sup> A consideration of alternative policies should reflect a serious attempt to weigh effective options, and institutions only need adopt race-neutral policies if the goal of diversity is better served through race-neutrality than race-consciousness.

#### 4. No Undue Burden on Non-Minority Applicants

The *Grutter* Court stated that “[t]o be narrowly tailored, a race-conscious admissions program must not ‘unduly burden individuals who are not members of the favored racial and ethnic groups.’”<sup>182</sup> Although a denial of admission to a college or university imposes a burden on an applicant, selective institutions are typically in the business of rejecting more applicants than they accept, and no student involved in a highly competitive admissions process has a guarantee or right to admission to a school. As the *Grutter* Court noted, a fair and flexible admissions process that considers both racial and non-racial factors will allow non-minority applicants to be competitive with minority applicants, and will not impose an undue burden. An institution can “select non-minority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants”<sup>183</sup> and “a rejected applicant ‘will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname.’”<sup>184</sup>

#### 5. Time Limits and Periodic Review

A final narrow tailoring inquiry focuses on the duration of race-conscious admissions policies. Although an institution may have a long-term interest in gaining the benefits of a diverse student body, its use of race to advance that goal is subject to time limits. The *Grutter* Court stated: “The requirement that all race-conscious admissions programs have a termination point ‘assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.’”<sup>185</sup> However, fixed end dates are not constitutionally required. According to the Court, a time-limit requirement can be satisfied by sunset provisions or by periodic reviews to determine whether a race-conscious policy is still needed to

---

<sup>181</sup> *Id.* at 340. The *Grutter* Court also cautioned that percent plans should be that they do not “preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university.” *Id.*

<sup>182</sup> *Id.* at 341 (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 630 (1990) (O’Connor, J., dissenting)).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* (quoting *Bakke*, 438 U.S. at 318).

<sup>185</sup> *Id.* at 342 (quoting *Croson*, 488 U.S. at 510).

achieve student body diversity. The *Grutter* Court also concluded that the effectiveness of race-neutral policies at other schools should be monitored as part of a periodic review and evaluation of a race-conscious policy.<sup>186</sup>

There is also language in the *Grutter* opinion that has been interpreted by some to impose an end date for all race-conscious affirmative action programs in higher education: “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”<sup>187</sup> This sentence might imply a termination date for all affirmative action admissions policies. The sentence is better construed, however, as the Court’s expressing, by reference to the passage of twenty-five years between the *Grutter* decision and the *Bakke* decision, its aspiration — and not a formal mandate — that there will be enough progress in equal educational opportunity that race-conscious policies will become unnecessary in the long run to ensure diversity. Nor should the Court’s statement be interpreted as undermining the enduring nature of the compelling interest in diversity. Rather, the Court’s language expresses an understanding that the diversity interest will continue to be compelling, but that race-conscious measures may be ultimately unnecessary to produce it—and not that diversity will be any less important in the year 2028.

### C. Comparing the University of Michigan Policies

The University of Michigan Law School’s admissions policy — a form of “whole-file review” — that was challenged in *Grutter* was modeled on the Harvard College plan cited by Justice Powell in *Bakke*. The law school plan employed race as one factor in an individualized review process that also considered numerical criteria such as grades and standardized test scores, along with life experiences and personal backgrounds in order to create a diverse student body. Admissions officers evaluated each applicant on the basis of all of the information in the file, including a personal statement, letters of recommendation, and a personal essay describing the applicant’s potential contribution to the diversity of the Law School. In addition, the policy maintained a special commitment to attaining a “critical mass” of underrepresented minority students, such as African Americans, Latinos, and Native Americans, whose numbers in the student body might not meaningfully contribute to diversity if there were no special commitment. Critical mass was not a fixed number or percentage; instead, it reflected the Law School’s goal of attaining minority enrollments beyond token numbers. The key concepts involved in thinking about critical mass is to

---

<sup>186</sup> *Id.* (“Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop.”)

<sup>187</sup> *Id.* at 343.

avoid the “token” representation where there are too small a number of students from a particular background to permit serious interaction across the campus, a situation which leaves students in very small minority feeling isolated and being expected to represent the views and experiences of an entire community whose internal diversity and complexity becomes apparent when the group is significantly represented, thus breaking simplistic stereotyped view of what it means to be African American or poor or rural, for example.

The *Grutter* Court concluded that the policy satisfied all of the required elements of narrow tailoring. The Court ruled the policy to be flexible, with both racial and non-racial factors being considered to evaluate applications, and with no undue burdens being imposed on non-minority applicants. The Court also concluded that the law school’s goal of attaining a critical mass of underrepresented minority students was not a quota, but was instead a goal, as demonstrated by actual admissions outcomes that showed changes in the percent of minority admissions from year to year. (Admissions results arriving at a fixed percent of African American students year after year could suggest that there was not a genuinely individualized consideration of multiple factors including race and be used to claim that there was some kind of quota system in effect. In the *Grutter* case, the Court ruled that the Law school had met the burden of showing consideration of multiple factors including race and considering race neutral alternatives good faith, and had produced no workable alternatives. Finally, the a time limit requirement was satisfied by the law school’s commitment to terminating its consideration of race as soon as practicable.

Like the law school policy, the policy at the University’s College of Literature, Science, and the Arts drew on Justice Powell’s plus-factor analysis in *Bakke*; however, the undergraduate policy challenged in *Gratz* employed very different procedures. Under a point system that allocated a maximum of 150 points to a given applicant, race was considered along with several other criteria, including grades, standardized test scores, socioeconomic status, geographic factors, alumni relationships, personal achievement, leadership and service skills, and writing an outstanding essay. Members of underrepresented minority groups automatically received twenty points under the system, although the same twenty points were also available to individuals from socio-economically disadvantaged backgrounds, graduates of predominantly minority high schools, scholar-athletes, and individuals who bring special qualities identified by the University’s Provost. Under another challenged element of the undergraduate policy, admissions officers could, after a threshold review, “flag” certain applications to keep the applicant in the pool for consideration at a later time. Applications from underrepresented minority group members could be flagged, as could applications from students who

were at the top of their class; those residing in a preferred county of Michigan; those exhibiting unique life experiences, challenges, interests, or talents; those from a disadvantaged background; and those who are recruited athletes.<sup>188</sup>

The majority opinion in *Gratz* focused on flexibility and individualized consideration under by the undergraduate admissions policy, and made no other inquiries into narrow tailoring. The *Gratz* Court concluded that the point-system policy was unconstitutional because the automatic assignment of points to underrepresented minority applicants lacked the necessary flexibility and individualized consideration mandated under *Bakke* and *Grutter*. According to the *Gratz* Court, “[t]he only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these groups. Moreover, unlike Justice Powell’s example, where the race of a “particular black applicant” could be considered without being decisive ... the LSA’s automatic distribution of 20 points has the effect of making “the factor of race ... decisive” for virtually every minimally qualified underrepresented minority applicant.”<sup>189</sup> The *Gratz* Court also concluded that the undergraduate “flagging” system was unconstitutional; although the system offered the possibility of individualized review, the Court found that it was rarely used and that the review of individual files occurred after admissions officers had already employed the racial plus factor.<sup>190</sup>

---

<sup>188</sup> An undergraduate admissions policy in effect from 1995 to 1998 was declared unconstitutional by the *Gratz* trial court. The admissions policy offered “protected” spaces to ensure the consideration of minority candidates, as well as in-state residents, athletes, foreign applicants, and ROTC candidates, during a rolling admissions process. Under the program, a number of protected spaces were reserved in the overall pool of admittees, and spaces were used up as members of a protected group were admitted over the admissions season. Although the University contended that the policy never separated candidates from competitive review, the district court characterized the protected space as an insulation of minority applicants from competition with non-minorities and as the functional equivalent of a quota. The Supreme Court declined to address the constitutionality of the prior program in its *Gratz* decision and left the lower court’s ruling on this policy intact.

<sup>189</sup> *Gratz*, 539 U.S. at 272 (quoting *Bakke*, 438 U.S. at 317).

<sup>190</sup> The University of Michigan undergraduate policy was subsequently revised by the university to reflect a whole-file review system similar to the law school’s admissions policy. The policy has remained in place for a number of years. On November 7, 2006, the voters of Michigan passed a ballot initiative—Proposal 2 (also known as the Michigan Civil Rights Initiative)—by 58% to 42% margin which amended the state constitution to require that the University “shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” There is ongoing litigation challenging implementation of Proposal 2, and the University has indicated that it remains committed to promoting educational diversity.

#### IV. IMPLEMENTING DIVERSITY-BASED ADMISSIONS

The Supreme Court did not attempt to examine admissions policies outside of the two policies it addressed in *Grutter v. Bollinger* and *Gratz v. Bollinger*, but the University of Michigan decisions have established the basic boundaries within which colleges and universities can implement race-conscious admissions policies. As a result of the decisions, the safest course to follow for Kentucky institutions requiring selective admissions is a path that is similar to the one taken at the Michigan law school: to implement a multi-factored, whole-file-review admissions policy that employs race as a plus factor and allows all applicants to compete in a single pool, that includes periodic reviews, and that has been carefully documented and considered in tandem with race-neutral alternatives. A number of institutions within the Commonwealth, including the University of Kentucky and the University of Louisville, have already incorporated diversity-based procedures into their practices, but for those seeking to develop new programs or to make a transition from remediation-based procedures, the following are important considerations that should be made to ensure compliance with the requirements of *Grutter* and *Gratz*:

- Aligning Institutional Missions and Admissions
- Defining Educational Diversity and the Role of Racial Diversity
- Examining Workable Options (including Race-Neutral Policies)
- Setting Appropriate Goals and Objectives
- Developing Sound Procedures and Practices
- Engaging in Evaluation and Periodic Review

Each of these considerations is discussed below.

##### A. Institutional Missions

Although individual schools, departments, and programs within Kentucky's system of higher education can each employ race-conscious admissions policies, there should be an alignment between the admissions policies and the broader missions of both a university as a whole and its component schools, departments, or programs. The *Grutter* Court stressed the importance of academic freedom in colleges and universities, and the Court deferred to institutional mission in upholding the interest in diversity: "Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that 'good faith' on the part of a university is 'presumed' absent 'a showing to

the contrary.”<sup>191</sup> Because the Court recognized that a university’s “diversity is essential to its educational mission,”<sup>192</sup> institutions seeking to employ race-conscious admissions should articulate the importance of educational diversity at all levels of institutional governance, whether it is in mission statements, multi-year or annual organizational plans, or specific goals and objectives for admission.

The University of Louisville, for example, has incorporated diversity into multiple mission statements. The University’s overall mission statement includes a basic reference to the importance of diversity:

The University of Louisville shall be a premier, nationally recognized metropolitan research university with a commitment to the liberal arts and sciences and to the intellectual, cultural, and economic development of our diverse communities and citizens through the pursuit of excellence in five interrelated strategic areas: (1) Educational Experience, (2) Research, Creative, and Scholarly Activity, (3) Accessibility, Diversity, Equity, and Communication, (4) Partnerships and Collaborations, and (5) Institutional Effectiveness of Programs and Services.<sup>193</sup>

The University of Louisville’s very extensive university-wide diversity plan, which was issued in the Fall of 2003, contains a broadly written vision statement about diversity, as well as an extensive set of multilevel strategies, goals, and unit plans.<sup>194</sup> The vision statement reads:

The University of Louisville strives to foster and sustain an environment of inclusiveness that empowers us all to achieve our highest potential without fear of prejudice or bias. We commit ourselves to building an exemplary educational community that offers a nurturing and challenging intellectual climate, a respect for the spectrum of human diversity, and a genuine understanding of the many differences — including race, ethnicity, gender, socio-economic status, national origin, sexual orientation, disability, and religion — that enrich a vibrant metropolitan research university. We expect every member of our academic family to embrace the underlying values of this vision and to demonstrate a strong commitment to attracting, retaining, and supporting students, faculty, and staff who reflect the diversity of our larger society.

---

<sup>191</sup> *Grutter*, 539 U.S. at 329 (quoting *Bakke*, 438 U.S. at 318-19).

<sup>192</sup> *Id.* at 328.

<sup>193</sup> See <http://louisville.edu/about/mission.html>

<sup>194</sup> See <http://louisville.edu/provost/diversity/localresources/images/DiversityPlan.pdf>

The vision statement includes a broad description of the role of diversity in promoting educational community, and also incorporates the university's particular goals as a research university in an urban center.

Specific units of the University also reflect a commitment to diversity. For instance, the mission statement of the Louis D. Brandeis School of Law provides in part:

To conduct a program of legal education providing students with opportunities to: . . . Understand diverse perspectives that influence and are influenced by the law and its institutions, through a diverse faculty and student body, and through legal research and scholarship.<sup>195</sup>

Similarly, the College of Arts of Sciences' mission statement reads in part:

We believe that an excellent education in the liberal arts and sciences is the best preparation for life and work in a world of increasing diversity and ever-accelerating change because it prepares our graduates to be informed and critical thinkers, creative problem-solvers, and confident communicators.

Our students learn by doing: They conduct research and express their creativity, include ethical considerations in their thinking, and experience the world from the perspectives of other cultures. The College brings the heritage of the intellectual tradition to bear on the challenges of the future.

All of these statements offer general declarations of the importance of diversity that are closely bound to broader educational goals. Individual admissions policies can thus be crafted to promote the diversity sought by the institution or program.

### **B. Defining Educational Diversity**

*Bakke* and *Grutter* made clear that racial diversity alone is not a sufficient justification for a race-conscious admissions policy. Educational diversity must encompass a wide variety of elements—these should include race and ethnicity, but they should also include other attributes that contribute to the overall diversity of a student body, whether it is gender, socioeconomic background, life experience and background, geographic origin, or any number of other characteristics that are valued by a particular institution.

There is no single definition of educational diversity. The Louisville diversity vision statement, for example, has a non-exhaustive list of diversity characteristics that is based on “the spectrum of human diversity” and includes “race, ethnicity, gender, socio-economic status, national

---

<sup>195</sup> See <http://www.law.louisville.edu/mission-statement>

origin, sexual orientation, disability, and religion.” The Kentucky Community and Technical College System (KCTCS) frames diversity in terms of “cultural diversity,” which is defined by “the recognition and understanding of the similarities and differences between ourselves and other people based on race, religion, gender, sexual orientation, ethnicity and/or nationality.”<sup>196</sup> The University of Kentucky employs a more general definition of diversity within its strategic plan, which articulates overall mission, institutional values, goals, and objectives; diversity is not defined by specific characteristics but by reference to important values associated with “diverse communities,” “demographic diversity,” “enlightened worldview,” “cultural knowledge and competence,” and “success in the global economy.”<sup>197</sup>

Other state institutions have adopted broad definitions of educational diversity. For example, the University of Michigan’s Office of Undergraduate Admissions’ Mission Statement provides:

The University of Michigan seeks to enroll and graduate applicants who will develop and grow educationally and personally and contribute to the University community, the State of Michigan, and the broader society. To that end, the role of the Undergraduate Admissions Office is to recruit, admit, and encourage enrollment of applicants who are academically excellent, accomplished in extracurricular endeavors, and broadly diverse. It is the University’s experience and judgment that this mix of students will foster the vibrant educational atmosphere that provides the best educational experience for all students.<sup>198</sup>

Other state institutions have more specific definitions that include lists of characteristics. For instance, the University of California’s system wide Diversity Statement provides in part:

The diversity of the people of California has been the source of innovative ideas and creative accomplishments throughout the state’s history into the present. Diversity – a defining feature of California’s past, present, and future – refers to the variety of personal experiences, values, and worldviews that arise from differences of culture and circumstance. Such differences include race, ethnicity, gender, age, religion, language, abilities/disabilities, sexual orientation, socioeconomic status, and geographic region, and more.<sup>199</sup>

---

<sup>196</sup> See <http://www.kctcs.edu/diversityprograms/page2.html>

<sup>197</sup> See [http://www.uky.edu/ucapp/files/Strategic\\_Plan.pdf](http://www.uky.edu/ucapp/files/Strategic_Plan.pdf)

<sup>198</sup> See <http://www.diversity.umich.edu/about/bp-ugrad-admiss.php>

<sup>199</sup> See <http://www.universityofcalifornia.edu/diversity/diversity.html>



Institutions and programs must develop processes and procedures that allow them to articulate what diversity means in the context of their particular mission and educational strategy, and to incorporate race as a key element of that more general diversity. And while race cannot be the sole or predominant measure of diversity, there is no reason for institutions to shy away from articulating the value of racial diversity and the need for race-conscious admissions to achieve overall educational diversity.

### C. Race-Neutral Alternatives

*Grutter* requires that universities consider workable race-neutral alternatives to race-conscious admissions policies, but the opinion does not require institutions to have implemented race-neutral policies prior to employing race-conscious policies. In other words, it is not necessary to have tried and failed under a race-neutral policy. The *Grutter* Court itself cast doubt on a number of different race-neutral policies, including a lottery system, which could compromise educational excellence at a selective institution, and “percent plans,” which are programs that have been in place in states such as Texas, California, and Florida, and are designed to automatically admit high school students who graduate within a top-ranked percentage of their class (e.g., the top ten percent). Percent plans are not feasible outside the undergraduate admissions context, recent research suggests that they have not been especially effective in increasing minority student enrollment, and the *Grutter* Court questioned whether the policies allowed sufficient individualized consideration to be consistent with other requirements of narrow tailoring.

The *Grutter* case suggests that institutions should carefully evaluate various types of programs, whether by examining their effectiveness at other institutions, conducting simulations, or actually implementing race-neutral policies and determining their relative effectiveness. It should be a key task for institutions to monitor the efficacy of percent plans, which are still in effect in a number of states, as well as race-neutral admissions policies at other institutions that attempt to use characteristics (e.g., socioeconomic status) that can closely correlate with race. In addition, once a race-conscious policy has been implemented at a school, regular evaluation and review should verify that the race-conscious policy itself remains effective.<sup>200</sup>

---

<sup>200</sup> A recent lawsuit filed against the University of Texas at Austin challenging its race-conscious undergraduate admissions policy may in the future provide some guidance on the use of race-neutral alternatives prior to adopting race-conscious policies. The lawsuit, filed by the Project on Fair Representation on behalf of a rejected white applicant, argues that the University’s race-conscious policy is illegal because a race-neutral policy first adopted in 1997 to automatically admit in-state applicants who are in the top 10 percent of their high school’s graduating class is more successful in achieving diversity than a race-conscious policy. See Katherine Mangan, *Lawsuit Accuses U. of Texas*

#### D. Admissions Goals and Objectives

By endorsing the law school's goal of seeking a "critical mass" of underrepresented minority students to achieve its interest in diversity, the Court in *Grutter* reached an important conclusion about numerical targets. "Critical mass" is not a fixed number or percentage of admittees, but is instead a goal designed to attain meaningful numbers of minority students. As the *Grutter* Court stated, a goal is not the same as a quota: "Quotas 'impose a fixed number or percentage which must be attained, or which cannot be exceeded,' and 'insulate the individual from comparison with all other candidates for the available seats.' In contrast, 'a permissible goal ... require[s] only a good-faith effort ... to come within a range demarcated by the goal itself'"<sup>201</sup>

But the *Grutter* Court has also made clear that critical mass should be tied to producing the educational benefits associated with diversity. Critical mass cannot merely act as an attempt to achieve proportionality for proportionality's sake, or, as some members of the Court have framed it, to engage in "racial balancing." And while it is appropriate to examine demographic data to help set numerical goals or target measures, a figure based on simple proportional representation of a state's population (or the national population) would risk being labeled racial balancing. Attention to relevant applicant pools, admissions statistics, and actual enrollment figures would be essential to help determine appropriate goals.

"Critical mass" represented a particular label for the Michigan law school's numerical goals, but it is not the only type of approach that an institution might adopt to comply with *Grutter* and *Gratz*. An institution could choose not to have *any* numerical goals for admitting minority students, although such a strategy, while insulating the institution from attack on the basis of using a quota, could impair the institution's ability to measure the effectiveness of its policy and to determine whether its policy should be modified or ended after periodic review. Another approach is to adopt specific numerical targets that are adjusted each season after an evaluation. A target number is not an admissions quota and need not compromise individualized review. The number merely reflects a goal that the university seeks to attain, and the actual number of admittees and enrollees may fall above or below the goal in a given year.<sup>202</sup>

---

of *Illegally Reintroducing Race-Based Admissions*, Chron. of Higher Educ., Apr. 8, 2008, available at <http://chronicle.com/daily/2008/04/2405n.htm>

<sup>201</sup> *Id.* at 335 (citations omitted).

<sup>202</sup> Indeed, as the tables in the dissenting opinions of Chief Justice Rehnquist and Justice Kennedy in *Grutter* suggest, the Law School itself may have employed not just target numbers but target percentages for minority groups over several years, yet the Court explicitly rejected the dissents' arguments of racial balancing and manipulation of the review process because the actual percentages

The more challenging questions for universities revolve around (1) which groups should be included among the target goals, and (2) how a target goal should be determined. Because of the history of segregation and desegregation within the Kentucky system, attention to the under-representation of African Americans should be a matter of course. But other racial and ethnic minority populations within the Commonwealth are also significant and these populations are growing quickly in size. . Moreover, if an institution chooses to define diversity to include dimensions such as concentrate poverty, gender or disability as well, then target numbers for those groups could be appropriate and might help insulate a policy from legal attack for being too focused on race. Goals also can be program specific as well as institution-wide.

Under-representation can also vary across programs, disciplines, and racial populations. For example, African Americans, Latinos, and women are often underrepresented in the science and engineering fields, particularly in graduate schools, but under-representation may be less of a problem in teacher education programs or in the liberal arts. When taken as a whole, Asian Americans are typically not underrepresented in many academic programs at selective universities, but particular sub-groups, such as Vietnamese and other Southeast Asian groups with refugee histories, are often highly underrepresented. The *Grutter* case suggests that attention to nuance should help guide the setting of target goals.

In establishing specific goals or “critical mass” figures, institutions have a variety of data sources, including state and local demographics, available pools of applicants, recent enrollment trends, and past numerical goals. Because of the past and present Kentucky Plans, the Commonwealth is fortunate to already have a history of setting annual target goals, at least with respect to African American populations. Benchmarks for other racial and ethnic populations should attempt to parallel those set for African American populations, with appropriate adjustments based on demographics and relative representation. The key consideration under *Grutter* is to establish goals that are appropriate targets for admission, but not to become so locked in to particular numbers or percentages that the admissions procedures act as de facto quotas.

### **E. Whole-File Review Procedures**

The law school admissions policy endorsed in *Grutter* has become a template for selective admissions policies throughout the country. Although it is not the only type of policy that can pass constitutional muster, it is the most easily emulated and the most legally defensible. What criteria are chosen—grades, test scores, extracurricular activities, employment history,

---

of enrolled minority students differed substantially from their representation in the applicant pool and varied considerably from year to year.

special skills, family background, legacy status, race, ethnicity, gender, etc.—and the relative weighting of these criteria are matters of discretion for admissions policy makers. But the weighting of race must not be so great that it exceeds the “plus”-factor level approved in *Grutter*. What is important is justifying the relationship between the admissions criteria—both racial and non-racial—and the goal of achieving a diverse student body. Institutions should be able to document how each of the relevant admissions criteria help contribute to the diversity of the student body.

Although the *Gratz* Court struck down a point system designed to admit undergraduates, point systems are not inherently unconstitutional. *Gratz* prohibits the mechanical and automatic assignment of benefits based on race, but it does not necessarily prohibit using a numerical system to make admissions decisions. Consider, for example, an admissions policy that takes into account various factors, including grades and standardized test scores, as well as life experiences, socioeconomic disadvantage, geography — any number of factors that an institution might consider important in producing a diverse student body — and race. If the assignment of points based on race is not automatic and is based on individualized review, then the policy would still be constitutional. A simplified version of policy might look like the following:

<b><u>Admissions Factors</u></b>	<b><u>Maximum Points Available</u></b>
Grade Point Average	40
Standardized Test Scores	25
Life Experiences*	25
Diversity Factors**	10
	==
<b>MAXIMUM TOTAL:</b>	<b>100</b>

\* Work history, extracurricular activities, hardship, and other relevant life experiences

\*\* Race, socioeconomic disadvantage, geography, and other factors contributing to diversity

Assume under this system that each application is subject to individualized review, that the allocation of points for race is not automatic, and that the life experience and diversity categories allows non-minority applicants to compete on an equal footing with minority applicants. *Gratz* may prohibit a fixed allocation of points based on race, but a range of points is probably allowable. As long as the assignment of points for race is not mechanical and is not so heavily weighted that minorities are guaranteed admission, then such a plan should comply with the requirements of *Grutter* and *Gratz*.

In any case, selective admissions procedures paralleling the policy approved in *Grutter* are resource-intensive, especially when dealing with

large applicant pools. Institutions must be committed to expending the resources necessary to process high volumes of applications, to read and evaluate multiple essays and personal statements, and to establish protocols to ensure that admissions decisions are made after a careful and individualized review of applications.

#### **F. Evaluation and Periodic Review**

The evaluation and periodic review of diversity-based admission procedures are essential both to comply with constitutional requirements and to measure the actual effectiveness of race-conscious policies. Monitoring and evaluation should occur during the admissions season, as well as at the conclusion of the season, to measure how well applications, admissions, and enrollments meet original target goals. Because “some attention to numbers” is legally permissible, the *Grutter* Court endorsed regular monitoring of the number of minority admittees during an admissions season. As long as monitoring does not compromise individualized review and race is not given “any more or less weight” based on the information contained in monitoring reports, the process should comply with constitutional requirements.<sup>203</sup> Once an admissions season has ended, admissions offices should assess data comparing target goals, applications, admissions, and enrollment in programs. Some variance between goals and admission/enrollment statistics should be expected, and multi-year comparisons can help determine both the effectiveness of a race-conscious policy and any potential problems that could arise because the numbers appear to be quota-like.

### **V. LEGAL STANDARDS FOR RECRUITMENT, FINANCIAL AID, SUPPORT PROGRAMS, AND UNIVERSITY EMPLOYMENT**

The University of Michigan decisions provide the basic framework for analyzing the constitutionality of admissions policies that promote student body diversity, but the decisions do not provide definitive guidelines for the use of race outside of admissions, such as financial aid, outreach and recruitment, student retention and support, and university employment. Policies outside admissions that are designed to promote student body diversity should satisfy one element of strict scrutiny—promoting a compelling governmental interest; however, there is some degree of uncertainty over whether some policies, particularly those that weight race heavily or limit a scarce resource such as scholarship dollars or academic support only to members of minority groups, would be upheld as narrowly tailored. The *Grutter* and *Gratz* decisions do provide some insights into the constitutionality of non-admissions programs, but additional law lies in lower court decisions that have addressed race-conscious financial aid,

---

<sup>203</sup> *Grutter*, 539 U.S. at 336.

outreach, and recruitment, as well as in federal statutes that apply to a variety of institutions, including private entities that provide scholarships and other assistance to minority students. In any case, the Commonwealth should be confident that outside of minority-only policies the law provides support for significant uses of race in several areas outside of admissions. Given the rarity of litigation and complaints challenging race-conscious measures, one can expect that the vast majority of race-conscious policies will not be subject to legal challenge; even if challenged, the remedies for these challenge would simply involve modification of the policies.

#### **A. Legal Standards for Diversity-Based Recruitment, Financial Aid, and Support Programs**

##### **1. Applying *Grutter* and *Gratz* to Non-Admissions Policies**

The compelling interest in diversity student body upheld in *Grutter* implies that other educational policies designed to create diverse student bodies should be upheld if they also comply with the requirements of narrow tailoring. Outreach and recruitment programs, for example, provide the first step in students' learning about educational opportunities, and many minority students may apply to programs only after they have learned about the programs and have been actively recruited to apply for admission. Scholarships and financial aid packages provide the monetary support that enable students to attend undergraduate, graduate, and professional school programs; without that assistance, enrolling in a student body might be impossible for many admitted applicants. And institutions that do not have selective admissions policies may rely instead on the incentives created by minority-targeted scholarships and financial aid packages in order to develop diversity in their student bodies.

Moreover, the *maintenance* of a diverse student body goes hand in hand with its initial creation. The educational benefits of diversity and the training of future leaders would be compromised if attrition reduced the diversity of a student body. Financial aid packages and student employment, as well as support and retention programs, can provide essential resources for students who might transfer to other institutions or leave school altogether if these benefits were not available to them.

Yet, the narrow tailoring requirements established in *Bakke*, *Grutter*, and *Gratz*, if interpreted strictly, may present barriers to certain types of race-conscious policies. In *Bakke*, the Court struck down an admissions policy that established a set-aside

program under which white applicants could not compete. The University of Michigan decisions reinforced the unconstitutionality of quotas and separate admissions tracks for minority students and stressed the importance of competitive procedures that allowed race to be considered as one of many factors in admissions. *Bakke*, *Grutter*, and *Gratz* suggest that a program that uses race as a plus factor—for instance, a program that considers race among several factors in a competitive process for a scholarship—should satisfy the flexibility requirement of narrow tailoring. However, “race-exclusive” programs such as minority-only scholarships or minority-only academic support programs may be more problematic because they exclude non-minority students from eligibility. One major question is whether the same analysis applied in the admissions process must necessarily be applied outside of the admissions process. Neither the *Grutter* nor the *Gratz* Court addressed this basic question.

## 2. Lower Court Cases and Federal Statutes

### a. Case Law

The lower courts have provided guidance on the legality of race-conscious policies outside of admissions, but the bulk of the federal case law predates the Supreme Court’s *Grutter* and *Gratz* decisions. Nonetheless, the earlier cases are highly instructive because they suggest that the strict scrutiny analysis applied in *Grutter* and *Gratz* to admissions need not necessarily apply in the context of university-based outreach and recruitment policies. As one federal court has stated, there are basic differences between race-conscious recruitment policies that are “inclusive” and selection decisions that are “exclusive”:

There are two basic ways to approach affirmative action: through inclusion or exclusion. Inclusive affirmative action techniques have as their purpose ensuring that the pool of candidates is as large as possible.... Recruitment and other techniques of inclusion do not affect the selection process for hiring or promotion. Rather, inclusive techniques seek to ensure that as many qualified candidates as possible make it to the selection process. In contrast, affirmative action through exclusion

usually works to select some candidates rather than others from a pool.... These affirmative action techniques, to varying degrees, have the potential to help minorities and women actually be selected at the expense of someone else.<sup>204</sup>

Because outreach and recruitment do not typically impose the same burdens on potential applicants that an admissions process can impose — a rejected application for admission and exclusion from the university carries a lesser burden than merely failing to receive additional information about a university through an outreach program — there may be no constitutional injury to trigger strict scrutiny. For example, in *Weser v. Glen*, a 2002 case in which a federal court rejected a challenge to a race-conscious recruitment program at the City University of New York, the court stated: “Racial classifications that serve to broaden a pool of qualified applicants and to encourage equal opportunity, but do not confer a benefit or impose a burden, do not implicate the Equal Protection Clause.”<sup>205</sup> The court concluded that “even if the Law School’s recruitment and outreach efforts were ‘race-conscious’ in being directed at broader recruiting of minorities . . . such efforts would not constitute discrimination.”<sup>206</sup> Similarly, in *Honadle v. University of Vermont*, a 1999 case involving faculty recruitment, the court concluded that “[a] public university may be racially ‘aware’ or ‘conscious’ by . . . encouraging broader recruiting of racial and ethnic minorities without triggering the equal protection clause’s strict scrutiny review. These activities do not impose burdens or benefits, nor do they subject individuals to unequal treatment.”<sup>207</sup>

---

<sup>204</sup> *Shuford v. Alabama State Bd. of Educ.*, 897 F. Supp. 1535, 1551 (M.D. Ala. 1995).

<sup>205</sup> 190 F. Supp. 2d 384, 399 (E.D.N.Y.). *aff’d* 41 Fed. Appx. 521 (2d Cir. 2002).

<sup>206</sup> *Id.*

<sup>207</sup> 56 F. Supp. 2d 419, 428 (D. Vt. 1999). Not all recruitment efforts necessarily escape strict scrutiny, however. Other federal courts have held in the context of public contracting and public employment that strict scrutiny may be triggered by recruitment programs that offer significant benefits to minorities and limit the information provided to non-minorities, or that influence final selection decisions based on race. For instance, the U.S. Court of Appeals for the D.C. Circuit has struck down rules promoting equal employment opportunities in the broadcasting industry because of the pressure that federal agencies can place on businesses to limit their hiring pools. *MD/DC/DE Broadcasters Ass’n v. FCC*, 236 F.3d 13 (D.C. Cir. 2001) Still, broad forms of university recruitment that simply



Race-conscious scholarships and financial aid packages may pose a different set of problems compared to outreach and recruitment. Financial aid can be a critical factor in a student's decision to attend a college or university, and the scarcity of dollars may make scholarships and other forms of financial aid highly competitive. Financial aid policies can therefore be more tightly analogized to selective admissions procedures and be subject to closer scrutiny.

As of this writing, the federal courts have rarely addressed the legality of minority-only scholarships and none has directly addressed a scholarship program focused on promoting diversity.<sup>208</sup> Only one federal appeals court has addressed a minority-only scholarship program, and the Commonwealth of Kentucky does not fall within that court's jurisdiction. In *Podberesky v. Kirwan*, the U.S. Court of Appeals for the Fourth Circuit in 1994 declared the Benjamin Banneker scholarship program at the University of Maryland to be unconstitutional because the program, which limited basic eligibility to African Americans, failed to satisfy strict scrutiny.<sup>209</sup> The court ruled that the university had failed to provide sufficient evidence of the linkages between the university's past discrimination and contemporary problems, including the university's poor reputation among African Americans, a racially hostile campus environment, and the under-representation of African Americans, in order to justify using scholarship program as a remedy. The court also concluded that the scholarship program, which the university employed as a recruitment tool for students from both Maryland and outside the state, was not narrowly tailored to

---

encourage minority applicants to apply may not impose burdens on non-minority applicants that could trigger strict scrutiny.

<sup>208</sup> The case law involving race-conscious financial aid is almost nonexistent. In a 1976 case predating the *Bakke* decision, *Flanagan v. President & Directors of Georgetown College*, a federal district court ruled that a race-conscious program at the Georgetown University Law Center designed to increase minority enrollment by offering 60% of the school's scholarship funds, which were need-based, to 11% of its students who qualified as minorities violated Title VI of the Civil Rights Act of 1964. 417 F. Supp. 377 (D.D.C. 1976). In *Pollard v. State of Oklahoma*, a case initiated in 1998, the plaintiff challenged the legality of a scholarship program at the University of Tulsa that based awards on differential test score standards for different racial groups. The case was settled, and the Oklahoma State Regents eliminated the race-conscious (and gender-conscious) elements of the scholarship program the following year.

<sup>209</sup> 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995).

addressing the past discrimination committed by the university; the court indicated that only a better-drawn program which drew on a smaller pool of potential applicants (victims of discrimination and Maryland residents in particular) would fit the university's remedial interest. The *Podberesky* ruling establishes thresholds for institutions seeking to defend scholarship programs designed to remedy past discrimination, but the case is not likely to be useful as precedent to defend financial aid programs that are designed to promote the interest in diversity. *Podberesky* focused on a remedial interest that was specifically linked to the past discrimination of the University of Maryland and was advanced through the blacks-only scholarship program.

*b. Department of Education Policy Guidance*

A "policy guidance" issued by the U.S. Department of Education in 1994 is an additional source for analyzing whether race-conscious financial aid programs comply with Title VI.<sup>210</sup> Although the policy guidance does not carry the force of law and can be revoked by agency action, it suggests principles that parallel the analyses established in *Grutter* and *Gratz*. For instance, in discussing race-conscious financial aid programs to create diversity, the guidance states that universities "may consider race or national origin with other factors in awarding financial aid if necessary to further the college's interest in diversity"; the guidance also states that universities may use race or national origin "as a condition of eligibility in awarding financial aid if this use is narrowly tailored, or, in other words, if it is necessary to further its interest in diversity and does not unduly restrict access to financial aid for students who do not meet the race-based eligibility criteria to promote diversity."<sup>211</sup> Even a minority-targeted scholarship may be legal under Title VI if it clearly promotes the diversity interest and does not overly burden the ability of non-minorities to obtain financial aid.

The policy guidance also proposes that "[a] college may make awards of financial aid to [socioeconomically]

---

<sup>210</sup> 59 Fed. Reg. 8756 (Feb. 23, 1994).

<sup>211</sup> *Id.* at 8757.

disadvantaged students, without regard to race or national origin, even if that means that these awards go disproportionately to minority students”; this statement suggests that facially race-neutral policies that have the effect of assisting minority students will not violate Title VI because awarding aid to disadvantaged students “provides a sufficiently strong educational purpose.”<sup>212</sup> The policy guidance also suggests that “Title VI does not prohibit an individual or an organization that is not a recipient of Federal financial assistance from directly giving scholarships or other forms of financial aid to students based on their race or national origin. Title VI simply does not apply.”<sup>213</sup> Private individuals and foundations that receive no federal funding may therefore be immune from liability under the constitution and Title VI, even if they restrict scholarships to particular minority students.

*c. Section 1981 and Title VII*

In addition to the mandates of the Equal Protection Clause and Title VI of the Civil Rights Act of 1964, a number of federal civil rights laws can affect financial aid policies. In both *Grutter* and *Gratz*, the Supreme Court noted that 42 U.S.C. section 1981 applies to race-conscious admissions policies because of a potential contractual relationship between applicant and university. Similarly, many forms of financial aid, such as loan or grants, as well as participation in certain academic support programs, may be established through contracts between students and universities. Section 1981 may also limit *non*-university entities that are involved in race-conscious financial aid and other diversity-related programs. Because it covers both governmental actors and private entities, even those that receive no federal funding, section 1981 can be applied to private foundations and organizations, so long as a contract is involved. It is important to note, however, that some private scholarships might be characterized as *gifts*, which are normally not treated as bases for

---

<sup>212</sup> *Id.* at 8757-58.

<sup>213</sup> *Id.* at 8757.

enforceable contracts, and might therefore fall outside the reach of section 1981.<sup>214</sup>

Title VII of the Civil Rights Act of 1964 can also be implicated when a race-conscious policy involves an adverse employment decision. For instance, graduate student financial aid packages often consist of fellowships in which students are employed by the university as researchers or instructors; a fellowship program that limited eligibility to minority students alone could be challenged under Title VII. Although a race-conscious employment policy might trigger both constitutional and statutory claims, plaintiffs sometimes raise only Title VII claims because of the availability of administrative enforcement structures unique to Title VII or because they have an interest in shaping Title VII law, which applies to a wide range of both public and private employers.

### **B. Analysis of Common Diversity Programs and Policies**

It is possible to categorize diversity policies across a variety of dimensions. One dimension is based on the type of program: admissions, financial aid, employment, recruitment, support, or retention. A second dimension is based on the type of institutional actor: colleges and universities, governmental agencies, or private foundations and donors. Another dimension is based on the degree and form in which race is used: race-exclusive (minority-only), race-as-a-plus-factor (race is one factor among several factors in a competitive process), or race-neutral (employing factors such as socioeconomic disadvantage that may correlate with race). Some policies should escape strict scrutiny by the courts altogether — for example, race-neutral recruitment activities—and some are illegal under a diversity rationale — for example, admissions quotas or separate tracks for minorities.

Falling within the gray areas are frequently used programs such as university-based scholarship and retention programs that are limited to certain racial or ethnic groups. Also common are financial aid and academic support programs that once targeted minority students but now focus on assisting both minority and non-minority students who have faced significant social and economic disadvantages. It remains to be seen

---

<sup>214</sup> Even if a contract is not involved, another Reconstruction-era statute that covers private entities, 42 U.S.C. section 1982, may apply to certain types of financial aid because property transfers are involved. The statute provides: “All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.” 42 U.S.C. § 1982.

whether programs that have shifted to using race more modestly — or not at all — are actually as effective in assisting minority students.

### 1. Minority-Targeted Outreach and Recruitment

The most common race-conscious program employed by universities to promote diversity is minority-targeted outreach and recruitment. Many undergraduate programs employ multifaceted strategies that include sending recruitment officials to predominantly minority high schools in order to publicize opportunities at their universities; developing minority-specific advertising and public relations materials; sponsoring fairs and open houses for minority students; deploying minority alumni as recruiters; and relying on mailing lists and national databases to target mailings to minority students. In addition to pre-admission efforts, some universities also employ post-admission, on-campus recruitment programs that offer admitted minority students an opportunity to visit the campus and experience college life, often with expenses covered by the university. In fields where minority students are seriously underrepresented, such as in the sciences and engineering, many universities also sponsor pre-college programs targeting minority students in order to increase college preparatory skills and to strengthen pipelines leading to future recruitment to the university.<sup>215</sup> Similar programs operate at the graduate level as well, where minority undergraduate students may be invited to special programs that provide information on graduate opportunities in science and engineering.<sup>216</sup>

Although the constitutionality of minority-targeted outreach programs seems highly defensible, some programs have already been challenged by advocacy groups and have been revised significantly. Outreach activities that simply provide information and encourage minority students to apply are the

---

<sup>215</sup> For instance, at Carnegie Mellon University's Summer Academy for Math and Science, which employs race as a plus factor in selecting students and was formerly for minority students only, students with promise attend a six-week residential program in which they receive classroom instruction, assistance with standardized test preparation, and exposure to academic and social life in a university setting. See [http://www.cmu.edu/enrollment/summerprogramsfordiversity/sams\\_program.htm](http://www.cmu.edu/enrollment/summerprogramsfordiversity/sams_program.htm).

<sup>216</sup> At the California Institute of Technology, for example, GradPreview@Caltech, which recently included white and Asian American students in addition to underrepresented minorities, offers a three-day on-campus program that provides opportunities for approximately thirty participants to interact with faculty and students from academic departments and schools, tour laboratories and investigate graduate options, preview summer research opportunities; and attend sessions on applying for graduate school and investigating financial aid resources. See <http://www.gradpreview.caltech.edu>.

least problematic, presenting examples of “inclusive” activities that encourage equal opportunities and impose no burden on non-minority students. Policies that provide limited benefits to minority students, such as knowledge of university opportunities, and pose no significant burdens for non-minority students should escape strict scrutiny altogether, even if the outreach efforts are limited to minority students.

Recruitment programs that provide specific benefits to minority students that are unavailable to non-minority students may raise different problems. Programs that employ race as a plus factor should clearly satisfy an analysis under *Grutter* and *Gratz*, assuming other narrow tailoring requirements such as time limitations and the consideration of race-neutral alternatives are met. But, if the narrow tailoring analyses of *Grutter* and *Gratz* are interpreted to prohibit any use of race beyond a simple plus factor, then a program that limits eligibility only to minority students or uses race as a predominant factor (i.e., much more than a “plus”) may be problematic if challenged for lacking the flexibility and individualized consideration needed to satisfy narrow tailoring. For instance, in response to a 2006 lawsuit filed by the Center for Individual Rights against the Dow Jones News Foundation, Virginia Commonwealth University, and Media General, Inc., a two-week summer program with the goal of inspiring minority high school students to pursue careers in print journalism was revised in February 2007 to include non-minority students.<sup>217</sup> No case law was established through the litigation, but the changes marked a significant shift in the character of summer programs that had been established at over twenty colleges and universities.

Nonetheless, it should be possible to uphold even a minorities-only policy that does not overly burden non-minority students. The Commonwealth could argue that while the benefits obtained in special recruitment programs such as minority-targeted open houses and preparatory programs may be significant, the burdens imposed on non-minority students who cannot enroll in these programs are actually quite minimal. Opportunities to obtain the knowledge or the skills available in the special programs might be available through other university programs, and the skills themselves might not

---

<sup>217</sup> See Peter Schmidt, Dow Jones Fund Opens Journalism Programs to White Students After Lawsuit, *Chron. of Higher Ed.*, Feb. 23, 2007, at A18.

be so critical that a non-participating student could not otherwise excel at the university. As of this writing, there is no case law that addresses this particular line of argument, but it could certainly be accepted in the future if programs are challenged.

## 2. Minority Retention and Support Programs

Closely related to recruitment programs are academic support and retention programs that target minority students. Examples of these programs are pre-registration summer programs that allow minority students to obtain classroom instruction, to become acclimated to campus, to receive academic and social counseling, and to develop friendships and social networks that will ease the transition from high school to college. Many academic support programs continue after matriculation and include forms of academic assistance, counseling, peer support, and mentoring.<sup>218</sup> For instance, the Minority Engineering Program at the University of Kentucky has a mission of creating a supportive learning environment for minority students and has assisted African American, Hispanic, and Native American students through academic and career counseling, skills workshops, informational seminars for freshmen and transfer students, and social activities to promote networking.

Programs that establish eligibility through socioeconomic disadvantage rather than race are likely *not* to trigger strict scrutiny, even if the impact of applying socioeconomic criteria disproportionately affects minority students. Programs that are restricted to minorities raise the same problems facing minority-only recruitment programs; if one applies a very narrow interpretation of *Grutter* and *Gratz* to an academic support program, then the program may be problematic because it limits eligibility by race. But, if a less cabined interpretation is used, arguments in support of a race-exclusive program could be readily supported by demonstrating the availability of alternative resources for non-minority students, as well as showing the uniqueness of the minorities-only

---

<sup>218</sup> At Yale University, for example, the Cultural Connections program offers approximately 125 incoming students an introduction to academic and co-curricular resources, presentations on campus life by ethnic counselors and current students, visits to local points of interest, and events showcasing the talent of program participants. The Cultural Connections program began as the Puerto Rican Orientation Program in the 1970s and was later renamed the Pre-Registration Orientation Program; in 1999, the pre-orientation program became Cultural Connections, and in 2004 the program was made available to all incoming students. See <http://www.yale.edu/culturalconnections/aboutprogram.html>.

program in providing benefits to minority students. An institution might argue—and empirical evidence substantiating the argument would be highly relevant—that support programs which are limited to minority students provide unique benefits that are unavailable in programs that are not restricted to minorities. The institution could argue, for instance, that peer interactions, open discussions about race and minority status at a selective university, and mentoring relationships might be compromised within a program if it were not limited to members of specific minority groups.

### 3. Race-Conscious Financial Aid

Minority-targeted financial assistance has inherent benefits for students receiving assistance and also provides an important tool for the recruitment and retention of minority students. Financial aid offered by universities can take many forms, including scholarships, grants, loans, and campus employment. An example of a Kentucky scholarship that targets minority students but employs broader criteria in selection is the William C. Parker Scholarship Program at the University of Kentucky, which employs a “holistic evaluation” that includes test scores, grades, an essay, leadership experience, extracurricular activities, awards, and recognition, community service, and contribution to diversity.

Many scholarship programs in other states that were once limited to minorities have recently been revised to make non-minority students eligible, but they still place a strong emphasis on assisting minority students. For instance, the Annika Rodriguez Scholarship at Washington University was previously limited to Latino students but was opened to all students and makes awards based on academic performance, commitment to serving or working with underprivileged populations, and the ability to bring diverse people together.<sup>219</sup> Similarly, the John B. Ervin Scholars program at Washington University was previously limited to black students, but now focuses on academic excellence, leadership, commitment to community service, commitment to bringing diverse people together, and commitment to serving historically underprivileged populations.<sup>220</sup>

---

<sup>219</sup> See [http://admissions.wustl.edu/admissions/ua.nsf/3rd%20Level%20Pages\\_Scholarships\\_scholarship\\_Rodriguez.htm?OpenPage&charset=iso-8859-1](http://admissions.wustl.edu/admissions/ua.nsf/3rd%20Level%20Pages_Scholarships_scholarship_Rodriguez.htm?OpenPage&charset=iso-8859-1)

<sup>220</sup> See [http://admissions.wustl.edu/admissions/ua.nsf/3rd%20Level%20Pages\\_Scholarships\\_scholarship\\_Ervin.htm?OpenPage&charset=iso-8859-1](http://admissions.wustl.edu/admissions/ua.nsf/3rd%20Level%20Pages_Scholarships_scholarship_Ervin.htm?OpenPage&charset=iso-8859-1)



Minority-only scholarships that are funded and administered by universities may raise problems because of their racial exclusivity. However, like other types of diversity-promoting programs that target racial minorities, an institution can argue that the burdens imposed on non-minority students may not be significant; therefore, a distinct legal analysis should be applied to them, rather than a rigid analogy to the admissions policy struck down in *Gratz*. For instance, if a university offers additional scholarship dollars that are available to non-minority students, that fact would militate against the argument that the burden on non-minority students causes a constitutional injury. In addition, universities might contend that minorities-only scholarships serve as important incentive devices to recruit and retain minority students and that opening the programs to non-minority students would undermine the effectiveness of the scholarships.

A related problem revolves around graduate fellowship programs that waive student tuition and provide stipends or employment opportunities through research positions and instructorships. For instance, three fellowship programs at Southern Illinois University—the Bridge to the Doctorate, the Proactive Recruitment and Multicultural Professionals for Tomorrow, and the Graduate Dean’s—focused on increasing the number of underrepresented minority graduate students by providing tuition waivers and stipends and were available only to minority students. In November 2005, the U.S. Department of Justice threatened action against Southern Illinois University if it did not revise the fellowship programs to allow non-minorities to apply, arguing that the fellowships violated Title VII of the Civil Rights Act of 1964. The University and the federal government reached a settlement in 2006 that, among other things, prohibited the “recruitment or employment of individuals in paid fellowship positions exclusively on the basis of race, national origin, or sex.”<sup>221</sup>

Although Southern Illinois University settled with the federal government without admitting liability, no binding precedent was created and universities that continue to use employment-based aid to help increase campus diversity can argue that under Title VII affirmative action standards, which differ in

---

<sup>221</sup> See Dave Newbart, Dave McKinney & Carol Marin, U.S. Accuses SIU of Anti-White Bias, *Chicago Sun-Times*, Nov. 11, 2005; Press Release - Southern Illinois University, Southern Illinois University and U.S. Department of Justice Reach Accord: Consent Decree to Be in Place for Two Years (Feb. 8, 2006), available at <http://news.siu.edu/news/February06/020806dg6001.jsp>

important ways from strict scrutiny standards, they can employ a legitimate affirmative action program for multiple reasons: (1) the program is designed to address the underrepresentation of minorities in its student body; (2) the program does not prevent non-minorities from obtaining scholarship dollars, which are available through other sources, and thus do not trammel non-minority students' rights; and (3) the program only does what is necessary to help increase the number of minority graduate students.

#### 4. Private-Sector Aid to Minority Students

Because many minority-targeted scholarship programs are endowed by individual donors or foundations, universities might also contend that normal constitutional and Title VI standards should not apply to the administration of those programs; indeed, revising the programs would run counter to the intent of the benefactor and might ultimately lead to the withdrawal of funds. It is unlikely that a university can shield itself entirely from Title VI or constitutional review simply because the source of the funding is private, if the university itself is charged with administering the program and with selecting individuals to receive the funding. Even establishing a separate foundation or administrative body to administer the dollars might be inadequate as a shield if the university exerts sufficient control over the separate entity. However, an individual or private foundation that serves as the source of the funding and also administers the program should be able to escape Title VI coverage, as well as constitutional coverage, if it does not receive federal funding.<sup>222</sup>

---

<sup>222</sup> Section 1981, however, could still apply to any university or privately funded program that creates a contractual relationship between the donor and the recipient; the absence of relevant case law, however, makes it difficult to assess when and how section 1981 might be violated by a race-exclusive financial aid package. What remains unsettled is whether the appropriate standard for addressing a potential violation of section 1981 by an entirely private donor is (1) a constitutional one that applies strict scrutiny, (2) a standard drawn from Title VII employment discrimination jurisprudence, or (3) a standard that may be unique to section 1981. Unlike Title VI, where a constitutional standard can be justified because of the close connection between constitutional limitations and the use of governmental funds, section 1981's focus is primarily on private sector behavior in economic markets. Thus, the analogies to Title VII, which focuses primarily on private sector employment discrimination, may be more appropriate. On the other hand, the good-faith deference to university decision making and academic freedoms, which the Supreme Court reaffirmed in the *Grutter* case, does not necessarily apply to non-university institutions providing financial assistance, so the relaxation of standards under Title VII may be countered by a more careful review of private donors' motives and activities. To satisfy either of the existing legal standards, private foundations and donors need to articulate and document that their interests in providing these funds revolve around promoting greater diversity in

### **D. Legal Standards for Faculty and Staff Diversity**

As federal contractors, institutions with the Kentucky higher education system are already bound by the mandates of Executive Order 11246, which requires all employers with 50 or more employees and federal contracts exceeding \$50,000 to file written affirmative action plans with the federal government's Office of Federal Contract Compliance Programs. Federal regulations specify requirements for racial minority and female hiring goals and timetables, and all levels of university employment, including faculty hiring and retention, are covered by the regulations.

When acting as an employer, a public university is also bound by both constitutional standards and federal employment discrimination laws. Because the strict scrutiny standard is more exacting than the affirmative action rules under Title VII of the Civil Rights Act of 1964, a university that satisfies strict scrutiny should also comply with Title VII. *Grutter* and *Gratz* are certainly relevant to affirmative action in university employment, but additional issues arise because of the different institutional roles that a university can play (educator versus employer) and because of the different interests that may be advanced to justify an affirmative action program (student body diversity versus faculty/staff diversity).

#### **1. Equal Protection**

An institution can justify a race-conscious faculty policy on the basis of its interest in student body diversity—relying directly on *Grutter* to satisfy the first half of the strict scrutiny test. However, it may be more prudent for an institution to advance a distinct compelling interest in promoting the diversity of its faculty. It is certainly possible to demonstrate that student body diversity benefits are enhanced because of a greater diversity in faculty: for instance, the presence of minority faculty and courses taught by those faculty could provide incentives for students to attend the university. Still, in earlier cases the Supreme Court has frowned upon looking at teachers as role models in order to justify race-conscious policies, and the courts may not be fully receptive to a line of argument that attempts to link the presence of minority faculty to student enrollment.

Instead, a distinct interest in faculty diversity could be aligned with a university's student diversity interest because of parallel arguments favoring academic freedom, judicial

---

higher education, and that their scholarship programs, if race-exclusive, bear strong relationships to those interests, do not overly burden non-minority applicants, are superior to other methods of providing assistance, and are periodically evaluated or limited in scope and time.

deference to that freedom, and the educational benefits that accrue from having both a diverse faculty and diverse student body, including improved learning environments, greater cross-racial understanding, and the breakdown of racial and ethnic stereotypes. The Nevada Supreme Court recognized this line of argument in *University and Community College System of Nevada v. Farmer*, when it upheld a race-conscious affirmative action plan under Title VII, and stated that “the desirability of a racially diverse faculty [is] sufficiently analogous to the constitutionally permissible attainment of a racially diverse student body.”<sup>223</sup>

A separate question is whether the courts should grant the same degree of deference to universities when they are acting as employers versus when they are acting in their roles as educators and academic decision makers who are creating diverse student bodies and faculties to promote educational benefits. Non-faculty staff members can also make important contributions to the intellectual life and learning environments of a university, so a discrete interest in staff diversity could also be articulated and documented in order to justify a race-conscious employment policy.<sup>224</sup>

In any case, the Supreme Court’s equal protection case law in the employment arena is quite limited, and the constitutional case law on diversity in the lower courts provides only partial guidance. The Supreme Court ruled in *Wygant v. Board of Education*<sup>225</sup> that an interest in remedying societal discrimination through the use of teacher role models was not a compelling interest that could justify a race-conscious layoff policy.<sup>226</sup> On the other hand, lower courts have upheld the use of race-conscious hiring and promotion policies to advance an “operational need” in having a diverse police force that can

---

<sup>223</sup> 113 Nev. 90, 97, 930 P.2d 730, 735 (1997).

<sup>224</sup> Some types of university employment might have less direct effects in creating the same benefits that accrue from diverse student bodies and diverse faculties. For instance, a university-run hospital might want to employ a race-conscious affirmative action policy in hiring and promotions for its administrative and clerical staff, but whether the same educational benefits accrue from the diversity of those particular staff, as compared to the faculty of the medical school, is another question.

<sup>225</sup> 476 U.S. 267 (1986).

<sup>226</sup> Similarly, in *Lutheran Church-Missouri Synod v. Federal Communications Commission*, 141 F.3d 344 (D.C. Cir. 1998), the D.C. Circuit held that diversity in programming was not a sufficiently compelling interest to justify a licensing program that encouraged stations to maintain a workforce that mirrored the racial diversity of surrounding communities.

serve a racially and ethnically diverse population.<sup>227</sup> For example, in *Patrolmen's Benevolent Association v. City of New York*, the Second Circuit “recognized that ‘a law enforcement body’s need to carry out its mission effectively, with a workforce that appears unbiased, is able to communicate with the public and is respected by the community it serves,’ may constitute a compelling state interest.”<sup>228</sup>

The *Grutter* Court stressed that context is critical in strict scrutiny analysis, and the Court may be more inclined to uphold race-conscious policies in employment contexts that closely parallel the higher education context, where the benefits of diversity in the workplace are well documented and race is used as a plus factor in a non-mechanical process that allows both minority and non-minority applicants to compete for jobs or promotions on an equal footing.

## 2. Title VII

The basic legality of private-sector voluntary race- and gender-conscious affirmative action under Title VII has been well established in case law since the 1970s. In *United Steelworkers of America v. Weber*, the Supreme Court upheld the use of race-conscious affirmative action policies that correct a conspicuous racial imbalance in traditionally segregated job categories, but do not “unnecessarily trammel” the interests of non-minorities and do not pose a bar to their advancement.<sup>229</sup> In *Johnson v. Transportation Agency*,<sup>230</sup> the Court expanded this analysis to gender-based affirmative action programs and endorsed the use of a “plus” factor in hiring and promotions decisions.<sup>231</sup>

The standards for enforcement of claims under Title VII are generally more relaxed than constitutional standards, but impose requirements that are similar to the tests of strict

---

<sup>227</sup> See *Patrolmen's Benevolent Assoc. v. City of New York*, 310 F.3d 43 (2d Cir. 2002); *Reynolds v. City of Chicago*, 296 F.3d 524 (7th Cir. 2002); *Petit v. City of Chicago*, 239 F. Supp. 2d 761 (N.D. Ill. 2002); see also *Cotter v. City of Boston*, 323 F.3d 160, 172 n.10 (1st Cir. 2003) (declining to address question of compelling interest but expressing sympathy for “the argument that communities place more trust in a diverse police force and that the resulting trust reduces crime rates and improves policing”).

<sup>228</sup> 310 F.3d at 52 (quoting *Barhold v. Rodriguez*, 863 F.2d 233, 238 (2d Cir. 1988)).

<sup>229</sup> 443 U.S. 193 (1979).

<sup>230</sup> 480 U.S. 616 (1987).

<sup>231</sup> The *Johnson* case involved a government employer, but the Court’s ruling was limited to a Title VII analysis and did not address the constitutionality of the program under the equal protection clause.

scrutiny. In a case involving intentional employment discrimination under Title VII, the plaintiff has the initial burden of producing evidence that creates an inference of discrimination. If this burden is satisfied, the defendant must then articulate a legitimate nondiscriminatory reason — compared to a “compelling” reason under strict scrutiny — for an adverse employment decision. The plaintiff can then present evidence to rebut the employer and demonstrate that the reason for its decision is pretextual and not its true reasons.<sup>232</sup> Title VII case law allows affirmative action programs to satisfy the defendant’s burden of articulating a legitimate nondiscriminatory reason for an employment decision. If the affirmative action policy is rationally related to addressing a manifest imbalance in the employer’s workforce, does not bar the advancement of a non-preferred group or unnecessarily trammel their rights, and does no more than is necessary to achieve a balance, it can justify the defendant’s burden.<sup>233</sup> Unlike the strict scrutiny standard applied to government, Title VII affirmative action law, which has been applied primarily to private-sector employers, only requires a “rational relationship” rather than “narrow tailoring,” and the interest in addressing a manifest imbalance in the workforce is legally sufficient and need not meet the higher constitutional standard of being “compelling.”

The Supreme Court has not, however, provided definitive guidance on diversity-based affirmative action in employment, and the lower courts have divided over the use of diversity as a justification for affirmative action under Title VII. For example, in *University and Community College System of Nevada v. Farmer*, the Nevada Supreme Court upheld a race-conscious faculty hiring plan designed to promote faculty diversity, but in *Taxman v. Board of Education of the Township of Piscataway*, the U.S. Court of Appeals for the Third Circuit ruled that diversity did not provide a sufficient justification under Title VII for using race to make a termination decision between two employees.<sup>234</sup>

Because Kentucky’s public institutions are subject to constitutional standards that are generally more restrictive than Title VII standards, constitutional requirements are likely to

---

<sup>232</sup> The three-part analysis is commonly known as the McDonnell Douglas test. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

<sup>233</sup> See *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

<sup>234</sup> 91 F.3d 1547 (3d Cir. 1996), *cert. dismissed*, 522 U.S. 1010 (1997).

supersede Title VII requirements. Thus if institutions within the Commonwealth are able to develop affirmative action plans that satisfy constitutional standards, they should also satisfy Title VII standards.

## VI. GENERAL RECOMMENDATIONS

Because of the many areas of planning, policy design and implementation, evaluation, and compliance monitoring required to put in place the diversity rationale throughout the Kentucky higher education system, attention to legal requirements and guidelines must occur at multiple levels. Where the courts have provided greater clarity in the law, the CPE and individual institutions can establish procedures for implementing legal programs. These procedures include articulating mission statements that include the benefits of diversity, clarifying definitions of educational diversity, and developing admissions goals and procedures consistent with *Grutter* and *Gratz*. In other areas, where the legal landscape is less clearly defined, the Commonwealth and its institutions should be prepared to inventory and evaluate existing race-conscious policies, consider and weigh alternative policies, and make clear assessments of legal risk when adopting race-conscious policies that employ race beyond a simple plus factor.

In addition to developing a new Kentucky Plan on diversity, the Commonwealth should be attentive to revisions of law and policy at the following levels: (1) state laws and regulations, (2) Council on Postsecondary Education monitoring, and (3) individual institutional planning, self-assessment, and policy design. The Commonwealth must also decide how to maintain enhancement goals for Kentucky State University, since diversity planning may not devote sufficient attention to this ongoing issue.

### A. State Laws and Regulations

Kentucky Revised Statutes § 164.020(19) provides that the Council on Postsecondary Education shall “[p]ostpone the approval of any new program at a state postsecondary educational institution, unless the institution has met its equal educational opportunity goals, as established by the council. In accordance with administrative regulations promulgated by the council, those institutions not meeting the goals shall be able to obtain a temporary waiver, if the institution has made substantial progress toward meeting its equal educational opportunity goals.” The Commonwealth can maintain this language without particular reference to diversity, but it can also choose to amend the statute so that it contains language which emphasizes the importance of diversity at a statewide level.

The corresponding regulations, found in 13 KAR 2:060, extensively cite the goals and commitments in the current Kentucky Plan. Equal educational opportunity is defined by reference to the plan’s “flexible objectives for each state-supported postsecondary education institution in broad categories of student enrollment, retention, graduation and employment of African-Americans,” and the regulations list multiple areas for tracking progress, including five categories of African American student measurement (undergraduate enrollment, retention of first-year undergraduate enrollment; retention of total undergraduate enrollment; award of baccalaureate degrees; and graduate enrollment) and additional categories for African American employment. There are no specific references to diversity or to racial and ethnic groups other than African Americans in the current regulations. The regulations will require extensive amendment to adjust to any new goals and commitments contained in a revised Kentucky Plan, including the incorporation of specific diversity language and the addition of the other measures of diversity beyond African Americans.

### **B. Kentucky Plan**

*Transition from Desegregation to Diversity.* A new Kentucky Plan based on a diversity rationale will have to take into account the important differences between legal standards for desegregation and legal standards for diversity. The basic compliance and monitoring mechanisms of the current plan do not need to be revised in significant ways in order to conform to diversity standards, nor do generally worded goals seeking to advance educational opportunities for African Americans. Numerical goals, however, must be carefully crafted and cannot rely solely on proportional representation based on population figures. As the Supreme Court made clear in *Grutter*, target goals are acceptable so long as the procedures used to attain the goals comply with narrow tailoring requirements. Any new plan must be clear to define educational diversity beyond simple racial diversity and must include goals which show that the CPE and individual institutions seek to attain diverse student bodies along multiple dimensions, not only along racial lines specific to African Americans.

*Defining Diversity.* If the CPE chooses to incorporate a statewide definition of diversity into a new Kentucky plan, it should adhere to the Supreme Court’s admonition that *educational* diversity encompasses more than racial diversity alone. The CPE can be explicit in saying that racial diversity is an important element of a statewide definition of educational diversity, but if it does so it should state that other dimensions of diversity—which might include other traditional measures of under-representation such as gender or socioeconomic status, as well as other characteristics such as life experiences and geographic origin — are also valued.



Although the CPE can adopt an overarching definition of educational diversity that applies to all of the institutions within the system, individual institutions and their components should engage in a process to develop institution-specific and program-specific definitions of diversity that are consistent with broader academic missions. The mission of a graduate program at the University of Kentucky differs from the mission of a college within the KCTCS, just as the mission for Kentucky State University's non-traditional student program differs from the mission for the medical school at the University of Louisville. The diversity rationale endorsed by the Supreme Court is rooted in academic freedom; since a variety of missions and strategies exist within the Kentucky higher education system, definitions of educational diversity should reflect that variety, even though consistent goals and commitments to racial diversity can exist throughout the Kentucky system.

*Goals and Commitments.* As noted above, any numerical or percentage goals in a Kentucky diversity plan must be carefully crafted and cannot rely solely on proportional representation based on population figures. The current plan already contains several benchmarks for individual campuses for African American enrollments and employment, and in developing a new plan the CPE and each institution should pay close attention to relevant applicant pools, actual application statistics, and enrollment/employment data to set target goals. Both statewide and institution-specific goals and commitments should reflect an expansion of equal educational opportunity to include broader forms of educational diversity, and not only increasing enrollments, improving campus climate, and raising employment levels for African Americans. Goals focusing on African Americans need not be abandoned, but the diversity rationale requires attention to additional characteristics. The CPE and individual institutions should analyze state and local demographics to determine appropriate goals for other racial and ethnic minority groups, assess the value of other dimensions of diversity to the Commonwealth and to individual institutions, and develop appropriate benchmarks and measurement tools to assess progress along all of these lines.

Goals and commitments in a diversity-based Kentucky Plan should also address the core question of whether race-exclusive recruitment, outreach, and support programs are appropriate at many of the institutions. The current plan includes several minority-targeted programs, but some of these programs may carry risks because they preclude opportunities for participation by non-African-American students. These types of programs are not necessarily unconstitutional — indeed, most minority-targeted outreach and recruitment programs should not trigger strict judicial scrutiny at all — but some may be problematic because of the limitations of the program and the types of benefits involved. The CPE and individual

institutions should conduct an inventory of the commitments within the current plan, as well as programs on the individual campuses, to determine if they raise constitutional problems.

*Data Collection, Compliance, and Monitoring.* A commitment to monitoring the effectiveness of race-conscious admissions and non-admission policies should be included in a Kentucky diversity plan. The CPE and individual institutions that employ race-conscious policies must examine the viability of race-neutral alternatives, both in admissions and in areas such as recruitment, financial aid, and academic support. Data collection through the CPE or some other centralized body can ensure that race-neutral programs within the Kentucky system and from other states are properly evaluated against race-conscious policies. Other narrow tailoring requirements such as ensuring that admissions programs are sufficiently flexible, do not impose undue burdens on non-minority students, and offer appropriate time limits and periodic review must be monitored both system wide and at individual institutions. The new plan should reflect a strong commitment to this type of data collection and compliance monitoring.

### **C. Enhancement of Kentucky State University**

Enhancement of Kentucky State University has been a central component of desegregation in the higher education system for over twenty-five years. However, as documented in this Report full compliance with the OCR partnership agreement remains a challenge. Although the OCR partnership agreement remains in effect, moving from a desegregation rationale to a diversity rationale in the future could shift attention away from the enhancement goals that have been in place and lead to even greater inequalities. Termination of a partnership agreement with the OCR would remove federal mandates to enhance the KSU campus and curriculum, even though federal funding to support historically black colleges and universities would remain available to the Commonwealth. Diversity goals must be considered hand in hand with the offerings and opportunities at KSU, and any future diversity plan must acknowledge that enhancement remains a strong interest of the Commonwealth and will be accomplished through additional planning and policy initiatives.