UNITED STATES COMMISSION ON CIVIL RIGHTS

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MICHAEL YAKI
COMMISSIONER

July 6, 2005

The Honorable Margaret Spellings
Secretary of Education
U.S. Department of Education
Washington, DC 20202

Re: Letter from U.S. Commission on Civil Rights

Dear Secretary Spellings:

I am writing to you in my capacity as an individual member of the U.S. Commission on Civil Rights in response to the letter sent by five members of the Commission on July 5, 2005. I strongly disagree with the letter sent by my colleagues. Furthermore, I join with the NAACP Legal Defense and Educational Fund ("LDF") in asking that you and your staff meet with the LDF to respond to the concerns enunciated in their "Closing the Gap" report.

From the very first *Brown* decision, the Supreme Court has recognized that integration of educational facilities is essential to equal educational opportunity. The Supreme Court in *Grutter v. Bollinger,* 539 U.S. 306 (2003), continued to hold that student body diversity is a compelling state interest that can justify using race in university admissions. *Grutter* recognizes the need for, and gives deference and flexibility to, colleges and universities to use a broad array of tools, including race-conscious policies, to take steps to close these gaps. In addition, as the LDF report notes, outside the context of university admissions decisions involved in *Gratz*, even race-exclusive support programs may be permissible under the logic of *Grutter*; these programs play a critical role in opening the doors to higher education for minorities and in keeping those doors open. The Department of Education ("DOE"), especially its Office of Civil Rights ("OCR"), should be dedicated to ensuring that our colleges and universities are doing the maximum – not the minimum – in opening the doors of admission to the widest, broadest, and most diverse student body possible.

While my colleagues point out "limitations" in the Court's holdings in the Michigan cases, none of the points raised by my colleagues address the key fundamental underpinning of *Grutter* – that the use of diversity goals in university admissions processes is constitutionally permissible and that relying on ethnicity and race as a "plus" factor in meeting a diversity goal is also constitutionally permissible. Indeed, the Court found that "[b]y virtue of our Nation's struggle with racial inequality, such students are both likely to have experiences of particular importance . . . . and less likely to be admitted in meaningful numbers on criteria that ignore those experiences."

My colleagues also seem to believe that the termination of racial and ethnic preferences in university admissions should come sooner, rather than later, citing the *Grutter* court's language that all programs have a "termination point." I would note that the *Grutter* court seemed to be in no hurry to establish what such a termination point should be other than to state its wish that "25 years from now the use of racial preferences will no longer be necessary."

I do not understand for what reason the letter was sent by my colleagues. If it was sent in response to a request by DOE and OCR, I wonder why an Executive Branch agency requires the imprimatur of a non-partisan, independent agency "watchdog" for civil rights. Surely DOE and OCR have the legal and public relations resources, not to mention the array of resources available to them from the White House, to deal with criticism from the LDF. An outside observer could speculate that it is an effort by DOE and OCR to have the U.S. Commission on Civil Rights "bless" the activities of DOE and OCR and therefore, by association, give its current programs and policies a legitimacy they do not deserve without a full and fair debate on the issue. I would point out that the letter by my colleagues was sent without a full briefing of this issue to the Commission by DOE and OCR – which would have been proper protocol -- and that I was informed of the letter only after it was drafted.

To ensure a fair and balanced debate on this subject, I will ask my colleagues to invite DOE and OCR to come before the Commission, along with the LDF, to present their viewpoints on the Department's policies with respect to university admissions enforcement. I believe this would result in a very productive and informative session. I would hope you would support and welcome such an invitation.

The reason for my request is clear: it is alleged that universities are being urged to take race completely off the table without regard for the efficacy of race-neutral means. I am informed that universities and university admission offices have been bombarded with threats of OCR investigations on admission policies that have any race-conscious component to them. OCR's focus on race-neutral alternatives runs counter to the dictates of the Court in *Grutter*, especially considering the strong language that institutions are not required to exhaust "every conceivable race-neutral alternative."

Because of these allegations, I am concerned that DOE and OCR have become, knowingly or not, participants in a concerted effort to damp down affirmative action and eliminate race-conscious admissions programs in favor of race-neutral programs that do not allow universities to conduct the types of individualized assessments that result in racial diversity of their student bodies. I am concerned that DOE and OCR are narrowly reading *Grutter* and its companion case, *Gratz* and, while hoisting the banner of race-neutrality, are taking part in an effort to diminish diversity in our colleges and universities and diverting us from our path of establishing a truly color-blind society. And most of all, I am concerned that the path to educational opportunity lit by the sacrifices of Oliver Brown, Dorothy Davis, Spottswood Bolling, James Meredith, and countless others is being dimmed by inaction, or worse, direct action..

Again, I speak for myself in my individual capacity as a Commissioner, and not for the entire Commission, and I wish to thank you for your attention to my views. A robust and free discussion on this important and controversial issue can only benefit our country. I look forward to your response.

Sincerely,

MICHAEL YAKI
Commissioner

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