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AUTHOR	Alger, Jonathan
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ABSTRACT

Legal challenges to affirmative action continue in a variety of contexts within higher education, creating confusion and uncertainty for colleges and universities. This paper examines cases brought in federal court, although other complaints related to affirmative action programs have been filed in state courts and with the U.S. Department of Education's Office for Civil Rights, the U.S. Equal Employment Opportunity Commission, and other federal and state agencies. Statistics show that members of many minority groups are underrepresented within student and faculty ranks throughout higher education, and significant barriers to equal access in higher education remain. The first section presents cases related to student recruitment, admissions, and financial aid, discussing the desegregation context of several cases and looking at cases against federal programs. The next section examines cases related to faculty employment decisions. The final section focuses on cases that have arisen in elementary and secondary education, which have struggled for years with court ordered desegregation. (SM)

American Association of University Professors

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Jonathan Alger, Counsel
American Association of University Professors
Updated as of December 2, 1999

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I. Introduction

Affirmative action continues to be a source of heated legal, political and social debate, with much of the attention focused on higher education. Ever since Justice Powell's opinion in the Supreme Court's 1978 ruling in Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978) stated that a university could take race into account as one among a number of factors in student admissions for the purpose of achieving student body diversity, affirmative action programs in student admissions and financial aid, as well as in faculty employment, have largely been based on diversity. In recent years, however, affirmative action programs--and the diversity rationale in particular--have been challenged in cases like Hopwood v. Texas, 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2580 (1996) (asserting, contrary to Justice Powell's opinion in Bakke, that diversity does not provide a compelling interest for race-conscious decisions in student admissions) and Piscataway v. Taxman, 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 117 S. Ct. 2506, *cert. dismissed*, 118 S. Ct. 595 (1997) (holding that diversity could not serve to justify a race-based decision in the context of teacher layoffs). The Supreme Court refused to review Hopwood--though the case is now back in a federal appellate court--and Piscataway was settled prior to argument in the Supreme Court. The Court also declined to review an appeals court decision upholding the validity of Proposition 209 in California, a state constitutional amendment which prohibits state and local agencies--including public colleges and universities--from using preferences based on race or gender. Coalition for Economic Equity, et al. v. Wilson, 122 F.3d 692 (9th Cir.), cert. denied, 118 S. Ct. 397 (1997).

The two major justifications for race-conscious affirmative action in higher education that have been recognized under the existing civil rights statutes are remedying the present effects of past discrimination and diversity. In recent decisions, courts have looked more carefully at the nature and weight of the evidence required to prove present effects of past discrimination, and have focused narrowly on an institution's ability to remedy effects of past discrimination within that institution only (as opposed to systemic or societal discrimination). As to diversity, courts have been looking for articulated evidence of the educational benefits of diversity, and for how those benefits are tied to the educational mission of colleges and universities. In order to address this concern, the American Association of University Professors (AAUP), American Council on Education (ACE), and other organizations are currently conducting a survey of faculty members at Research I universities around the country with regard to the educational benefits of faculty and student diversity from their perspective as frontline educators.

The Supreme Court has not issued an opinion on affirmative action in the higher education context since Bakke, and the settlement of Piscataway means that the Court will not issue any definitive guidance on these issues in the immediate future (although lower court cases are pending which could eventually be reviewed by the Supreme Court, as discussed below). Individual federal circuits and districts, however, have precedents in place such as Hopwood and Piscataway that have had a chilling effect on affirmative action programs in higher education throughout the country.

Legal challenges to affirmative action continue in a variety of contexts within higher education, creating

confusion and uncertainty for colleges and universities throughout the country. The cases discussed below primarily involve cases brought in federal court, although other complaints related to affirmative action programs have been filed in state courts, as well as with the U.S. Department of Education's Office for Civil Rights (primarily involving student issues under Title VI of the 1964 Civil Rights Act), the U.S. Equal Employment Opportunity Commission (primarily involving employment issues under Title VII of the Civil Rights Act), and other federal and state agencies. Washington State voters passed an initiative banning race-conscious affirmative in the public sector (similar to California's Proposition 209) in November 1998, and similar legislation has been discussed in other states and at the federal level. In the meantime, statistics continue to show that members of many minority groups (especially African-Americans, Hispanics, and Native Americans) are underrepresented within student and faculty ranks throughout higher education, and significant barriers to equal access to higher education--such as disparities in elementary and secondary education opportunities based on the segregation of local school districts--remain.

II. Cases Regarding Student Recruitment, Admissions, and Financial Aid

Title VI of the 1964 Civil Rights Act applies to student recruitment, admissions, and financial aid programs. Some key factors in the review of such programs include the following:

- (1) the use of separate procedures, tracks, criteria, or committees for white and minority students;
- (2) the number and weight of criteria used in such decisions other than race;
- (3) the availability of alternative, race-neutral criteria such as class and geography, and their likelihood of providing similar diversity; and
- (4) the relationship of such programs to the stated educational mission of the institution, taking into account its service area and the relevant applicant pool.

The most important current cases include challenges to the procedures used at the University of Michigan for both its undergraduate and law school admissions, and at the University of Washington law school. The Bakke case remains the Supreme Court precedent applicable nationally on student admissions, although the Fifth Circuit's Hopwood decision (suggesting that Justice Powell's opinion in Bakke, which found that diversity could serve as a compelling interest in higher education to justify the consideration of race in student admissions, is no longer good law) has been used by some other courts to question the continued viability of the diversity rationale from Bakke. After the Fifth Circuit's 1996 Hopwood decision (the case is back in the Fifth Circuit on appeal), the state of Texas passed legislation that permits students within the top 10% of their graduating class at all Texas high schools to be admitted to the University of Texas system. In the wake of Proposition 209, California has also adopted a plan to accept the top 4% of high school seniors in the state to the University of California system. Florida recently followed suit with the One Florida Initiative announced by Governor Jeb Bush in November 1999, which would eliminate the consideration of race in admissions and guarantee admission at the state's public colleges and universities to the top 20% of graduating seniors from all Florida high schools.

The U.S. Department of Education has issued policy guidance setting forth the circumstances under which race-targeted financial aid is permissible under Title VI as interpreted by the federal government. See 59 *Fed. Reg.* 8756 (Feb. 23, 1994). This guidance has been reiterated in light of subsequent federal court decisions and has been interpreted by the Department's Office for Civil Rights (OCR) in a number of agency findings, including a decision stating that privately funded "minority scholarships" at Northern Virginia Community College were not justified under Title VI because the College failed to demonstrate that the scholarships were needed for recruitment and retention of minority students, and because the college was involved in the creation of a foundation to administer the scholarships. A race-targeted financial aid program founded to remedy discrimination has also been struck down by a federal court based

on the nature and weight of the evidence offered to support it. See Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994), cert. denied, 115 S. Ct. 2001 (1995) (invalidating scholarship program for African-American students only in formerly *de jure* segregated state system of higher education).

Important recent cases include the following:

A. University of Texas (Hopwood): In a ruling on damages, a federal district court recently ruled that the University of Texas School of Law could not use race as a factor in its admissions program for the purpose of diversity. That ruling has paved the way for a new appeal in this case, in which the Fifth Circuit had previously struck down a particular two-track admissions process in which minority and non-minority applicants were considered separately. In that ruling, the Fifth Circuit also stated that diversity could not serve as the basis to justify the consideration of race in student admissions, and asserted that Justice Powell's opinion to the contrary in the Supreme Court's 1978 Bakke decision was not binding precedent. In 1996 the Supreme Court declined to review that ruling, but two of the justices indicated at that time that the case was considered moot because the law school had already modified the two-track admissions system. A number of Fifth Circuit judges who had not served on the original panel in this case criticized the Fifth Circuit panel decision and urged review by the entire Fifth Circuit. For this next appeal, *en banc* review has been sought.

In a related development, Texas Attorney General John Cornyn has withdrawn his predecessor's 1997 legal opinion that restricted Texas colleges from offering race-exclusive scholarships. In a letter to state lawmakers, Cornyn said that his predecessor had offered too broad an interpretation of the Fifth Circuit ruling (which concerned the two-track admissions program, not financial aid or other programs).

B. University of Texas (LeSage): On November 29, 1999, the U.S. Supreme Court ruled that the University of Texas at Austin cannot be punished for using an allegedly unconstitutional affirmative-action policy to reject a white applicant, so long as the applicant would have been turned down anyway and the program is not now in use. The Court did not base its decision on the Hopwood precedent discussed above. Francois LeSage charged that the University's entrance criteria for a doctoral program in counseling psychology discriminated in favor of black and Hispanic applicants, but in 1997 a federal district court judge ruled that his denial of admission had nothing to do with the University's affirmative-action policies at the time and dismissed the case. The Fifth Circuit subsequently ruled that the case should be reconsidered, holding that in a Title VI suit, the existence of an affirmative-action plan was evidence of discrimination against non-minority applicants "sufficient to automatically refute the university's legitimate and undisputed non-discriminatory reasons for its admissions decisions."

C. University of Michigan: In the fall of 1997, two class action lawsuits were filed by the Center for Individual Rights on behalf of white students denied admission to the University of Michigan's undergraduate and law school programs. The suits allege that the University utilizes different standardized test score/grade-point average standards for white and minority students, based on admissions grids obtained by a professor that allegedly demonstrate that higher combinations of test scores and grades are required of white applicants. The University countered that race is only one among a number of factors taken into account in its admissions processes. (It has since adopted new admissions guidelines that assign points to applicants for academic and non-academic factors, including race, instead of adding point fractions based on non-academic factors to a student's grade-point average. The University asserts that the new

system maintains its commitment to affirmative action and was under development before the lawsuit. The Center for Individual Rights has faulted the new system for also making race too large a factor in admissions.)

Both suits would hold administrators involved in admissions decisions personally liable under a federal statute (42 U.S.C. §1983) which provides recourse against persons who violate a plaintiff's civil rights "under color of law." Officials enjoy qualified immunity under that law, however, if they base their decisions in good faith on "objectively reasonable reliance on existing law." Nevertheless, officials of Cuyahoga Community College in Ohio were held personally liable for damages in a lawsuit in which a federal court struck down a policy requiring that at least 10% of the total value of contracts at the College be awarded to minority-owned businesses. The officials contended that they were obligated under state law to adopt a set-aside policy that benefited minority businesses, but a federal judge held that recent U.S. Supreme Court rulings striking down minority set-asides in contracting were sufficiently clear to warrant liability.

The Michigan cases are important because the University of Michigan is a highly selective public institution in a state with no history of *de jure* segregation. Thus the state will have to rely on the diversity rationale in its defense rather than remedying discrimination. The Sixth Circuit ruled in August 1999, however, that black and Hispanic students can intervene in the lawsuits to argue that the university needs affirmative-action policies in place to remedy its own racial discrimination (an argument disputed by the university itself). The state's efforts have been quite successful in increasing minority representation within its programs over the past decade or so. These class action cases are expected to go to trial late in the Year 2000.

D. University of Washington: In March 1997, a white female student filed a lawsuit against the University of Washington claiming that she was denied entry to the University's law school for the 199495 academic year and that less qualified minority applicants were admitted over her. As in the Michigan cases, the plaintiff alleges that the University utilized different standards for white and minority applicants. The law school has stated that its admissions process used tiers based on grade-point averages and test scores. Applicants in the top tier were almost always offered admission; applications in the middle and lowest tier were subject to further review by the admissions committee. The assistant dean also had discretion to admit some applicants from the lower tiers or to refer them to the admissions committee for further consideration.

In November 1998, voters approved a state initiative to ban race-conscious affirmative action in the public sector (Initiative 200). Shortly thereafter, the University announced that it was taking steps to suspend the consideration of race and gender in admissions. Statistics from March 1999 indicated that minority applications to the University of Washington Law School dropped 41% from the previous year.

A federal district court judge recently held that the passage of Initiative 200 made much of the case moot, including class-action claims seeking to declare the old admissions policy unconstitutional. He also held that the discrimination case should be decided based on principles enunciated in the Supreme Court's 1978 *Bakke* decision. The judge has allowed the plaintiffs to appeal these rulings to the Ninth Circuit Court of Appeals; accordingly, the trial will be delayed for several months.

E. University of California: In October 1997, an alumnus of the University of California at

Berkeley's Boalt Hall Law School sued the University, claiming that the law school and the University purposely circumvented Proposition 209 (the state constitutional amendment prohibiting public institutions from using preferences based on race or gender). In November 1997, the Supreme Court declined to review a challenge to the constitutionality of Proposition 209, leaving intact an appeals court decision upholding this state constitutional amendment. The lawsuit specifically claims that University officials violated Proposition 209 by encouraging the alumni association to raise private funds to sponsor scholarships for minority and female students. Further, the suit claims that the alumni association is partly financed with state funds which are being used to create minority scholarships that the University cannot itself establish under Proposition 209.

In February 1999, a coalition of civil rights organizations in California filed a class action suit in federal court alleging that the admissions criteria and definition of merit used by the University of California at Berkeley disproportionately deny admission to qualified minority applicants, without adequate educational justification. The complaint cites, for example, the University's special consideration of Advanced Placement courses (which are less accessible in many minority-serving high schools) and "undue" reliance on standardized test scores. A suit has also been filed against the state of California and its Board of Education for failure to provide equal access to Advanced Placement courses.

F. University of Maryland School of Medicine: A complaint filed in May 1998 in a federal district court in Baltimore alleges that the University of Maryland School of Medicine discriminates against white applicants "by maintaining drastically lower standards for the admission of members of certain favored minority groups, especially blacks." Plaintiff Rob Farmer, who eventually enrolled at a medical school in the Netherlands Antilles, alleges that his grades, test scores, and other criteria used by the University in selecting entering students were far above the average of black students who were accepted for the class entering in September 1996 (for which he applied). Farmer had previously participated in an Advanced Premedical Development Program offered by the University during the summer for students from a minority or disadvantaged background. In March 1999, a federal district court held that the plaintiff could pursue aspects of his complaint under the Fourteenth Amendment and Title VI, and directed him to amend his complaint in accordance with its order. 41 F. Supp.2d 587 (D. Md. 1999).

G. Oklahoma State Regents for Higher Education: In October 1998, a white male student at the University of Tulsa filed a class action suit against the Oklahoma State Regents for Higher Education in federal district court, challenging the legality of a scholarship program that sets different test-score requirements for members of different racial groups and for men and women. The Oklahoma Academic Scholars Program was set up by state law and provides scholarships to in-state students with high test scores. In June 1999, the state eliminated the race-and gender-specific features of the program.

Desegregation Context

As was true of Podberesky and Hopwood (in Maryland and Texas, respectively), a number of recent cases have involved challenges to a variety of affirmative action measures related to attempts to carry out longstanding mandates resulting from court and agency-ordered desegregation. In United States v. Fordice, 505 U.S. 717 (1992), the Supreme Court held that state systems of higher education have an affirmative obligation to eliminate the vestiges of discrimination within their systems. The litigation involving the Mississippi system of higher education addressed in Fordice is still ongoing. Note also the following cases:

H. University of Georgia: In March 1999, a federal district court judge dismissed a portion of a discrimination lawsuit in which four Georgia residents charged that policies at the state's three historically black, public universities have prevented "meaningful desegregation" of the state's higher education system. The plaintiffs had sought to eliminate the "racial identifiability" of campuses in the state system and the consideration of race in admissions, hiring, and other decisions. Other plaintiffs in the lawsuit have alleged that the University of Georgia's past and present admissions system was and continues to be racially discriminatory because it uses different admissions criteria for white and black applicants. In January 1999, the district court judge ruled that one white male applicant was illegally denied admission in 1995 (when the University used a now-abandoned dual system with separate consideration and criteria for students based on race), holding that the University's now-abandoned dual system (under which white and minority students were considered separately, with different criteria) was not a valid diversity-based program under *Bakke* principles.

Although a federal judge dismissed the complaint of a white 1997 applicant on the basis that he lacked the necessary combination of grades, test scores, and other factors to be admitted, the judge (in July 1999) also criticized the university's consideration of race in admissions and stated that it appeared to be unconstitutional. The judge characterized the university's goal of diversity as on shaky legal ground, calling it an "abstract concept" that changes depending on who is talking and in what context. He rejected the university's argument that racial diversity is needed to bring a greater mix of views, experiences, and backgrounds into classrooms and on the campus.

In August 1999, the University of Georgia announced that it would stop giving an automatic preference in admissions to male applicants, although it is still studying the issue of whether race should be considered. The change followed a lawsuit in which a woman claimed she was rejected because she is white and female. Three white women have filed a subsequent lawsuit, charging reverse discrimination on the basis of race and gender, and are now seeking to expand their suit into a class action. The university president has indicated that he is willing to face litigation to keep race as a factor in some freshman admissions, however.

I. Alabama State University: In an effort to attract more white students to Alabama State University and Alabama A&M University, the state's two historically black institutions, a federal judge in 1995 ordered each institution to spend up to $1 million a year for ten years in new state funding on scholarships open exclusively to white students. In the 1996-97 school year, the university allegedly awarded 40% of its grant money to white students--enough to provide scholarships covering tuition, fees, room and board for nearly every white student on campus. In order to qualify, white students reputedly needed only a "C" average and a high-school equivalency. In the summer of 1997, a lawsuit was filed by the Center for Individual Rights on behalf of four Alabama State students who were not white and thus ineligible to receive a portion of this $1 million scholarship fund. The lead plaintiff (Tompkins) is a black graduate student who was denied funds from the white scholarship pool, and who claims that black students must meet higher standards in order to be eligible for grants. The scholarship program complaint has been merged with the state's broader college-desegregation case. In part in response to the suit, Alabama State University has recently raised its eligibility standards for the scholarships for white students.

Federal Programs

J. National Science Foundation: A white male graduate student at Clemson University filed suit in federal court in Alexandria, Virginia against the National Science Foundation (NSF) for denying him a chance to apply for one of several hundred slots in its Minority Graduate Research Fellowship Program based on his race. The slots are reserved for members of groups traditionally underrepresented in science and engineering--blacks, Hispanics, Native Americans, and Pacific Islanders. The plaintiff's application for one of 2250 other slots in the program had previously been rejected. NSF contended that its mandate for the graduate fellowship program came directly from its founding mission to strengthen U.S. science and from more recent legislation ordering it to take steps to increase the number of minorities in science. The suit was settled in June 1998, and for the future NSF is developing a single new program of graduate fellowships that will make financial awards to institutions instead of to individual students.

A similar case was settled in favor of a white female plaintiff who challenged a federal summer science camp program at Texas A&M University. The program was sponsored by the National Institutes of Health (NIH) and the Department of Agriculture (USDA) and aimed at attracting more minorities into biomedicine and health careers. Under the December 11, 1997 settlement, NIH and USDA agreed to abandon all criteria based on race or ethnicity and to pay $25,000 in legal fees. A case against NSF involving a science camp at the same University was settled in 1996, and NSF has since changed the focus to disadvantaged students. The Center for Individual Rights has supported the plaintiffs in all of these cases.

These cases are important because they involve federal programs. The Constitution grants Congress unique powers under the 14th Amendment to carry out the purposes of the Equal Protection Clause, but the Supreme Court ruled in 1995 that federal programs containing racial classifications will be subject to the same level of strict scrutiny as state and local programs. See Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

III. Cases Regarding Faculty Employment

Title VII of the 1964 Civil Rights Act applies to employment decisions (e.g., hiring, promotions, layoffs, etc.). Some critical factors used in analyzing race-conscious employment decisions include the following:

- (1) the number and weight of criteria used other than race;
- (2) the degree to which slots appear to be reserved as "quotas" for members of specific minority groups (which are generally illegal); and
- (3) the burden placed on non-minorities by the particular type of decision (e.g., hiring v. layoffs).

A. University of Nevada at Reno: In the wake of the settlement of the Piscataway case, the Supreme Court declined to review another faculty employment case in which the Nevada Supreme Court upheld the University's right to consider race as a factor to diversify its faculty. The plaintiff had been a finalist for position in the sociology department in 1991, when the University instead hired an African-American and paid him more than the posted salary range. At that time, only 1% of the University's faculty members were black, and the University maintained a "minority bonus program" that allowed a department to hire an additional faculty member if it first hired a minority. One year later, the sociology department filled the additional slot created by the minority bonus program by hiring the plaintiff. She was offered $7,000 less per year than the black male when he was hired.

The white female plaintiff filed a suit claiming that the University violated the Equal Pay Act by paying her less than a comparably qualified male peer, and the Civil Rights Act by basing its hiring and pay decision on race. The Nevada Supreme Court overruled a jury verdict in favor of the white plaintiff, relying on Bakke to find that NevadaReno had a "compelling interest in fostering a culturally and ethnically diverse faculty. . . . A failure to attract minority faculty perpetuates the university's white enclave and further limits student exposure to multicultural diversity." University and Community College System of Nevada v. Farmer, 930 P.2d 730 (Nev. S. Ct. 1997), *cert. denied* (1998).

B. Columbia University: In December 1997, the U.S. Court of Appeals for the Second Circuit in New York reversed a lower court and ordered a jury trial to review charges that Columbia University discriminated against an instructor because he was not of Hispanic descent. Stern v. Trustees of Columbia Univ. in the City of New York, 131 F.3d 305 (2d Cir. 1997). The plaintiff, who had taught Spanish and Portuguese at Columbia since 1978 and even served as interim director of the University's Spanish language program for two years, was allegedly not seriously considered for the permanent directorship because he is a white male of Eastern European descent. The University claimed that though the plaintiff was a finalist for the position, it chose another candidate based on qualifications, not bias. The person who was hired is described in court papers as an American of Hispanic descent. The plaintiff alleges that this individual had not yet earned his Ph.D, had less teaching experience and had written less extensively than the plaintiff, and was not proficient in Portuguese. The search committee at Columbia asked each of three finalists (including these two) to teach "tryout" classes, and found that the candidate they selected "mesmerized" the class while the plaintiff's teaching was weak.

C. Hill v. Ross: The Seventh Circuit held that a state university may not require that each department's faculty mirror the sexual makeup of the pool of doctoral graduates in its discipline. The court found that such a policy is not narrowly tailored to remedy past sexual discrimination and violates Title VII. The suit was brought by a male psychology professor, recommended for a tenure-track position, whose appointment was blocked because a dean said that the department "needs 3.23 women to reach its target" of 62% women in the department. 80 FEP Cases 88 (7th Cir. 1999).

D. Honadle v. University of Vermont and State Agricultural College: In June 1999, a federal district court ruled that the University of Vermont's minority faculty incentive fund, to the extent it functioned as a racially conscious inducement for departments to recruit minority faculty members, did not create a racial classification subject to strict scrutiny. The court also held that the program would violate equal protection, however, to the extent that it were found to function as an inducement to hire minority applicants based on their race. 56 F. Supp. 2d 419 (D.Vt. 1999).

IV. Elementary and Secondary Education

The battle over affirmative action in the education arena is also being waged at the elementary and secondary school levels. As in higher education, many of the cases have arisen in states and school districts which have struggled for years with court-ordered desegregation.

Boston Latin School (Wessman v. Boston School Comm.): Prior to November 1996, Boston's public schools were committed to an affirmative action admissions program for minority students who applied to the city's top three public high schools: Boston Latin, Latin Academy, and the O'Bryant School of Science

and Mathematics. The policy required the schools to give 35% of their slots to black or Hispanic students. In 1996, a white student who was denied admission to Boston Latin filed a discrimination lawsuit in federal court. The school chose to drop its minority admissions program, and the suit was dismissed. Under a restructured admissions plan, the three schools admitted 50% of applicants based solely on test scores and grade-point averages, and the remaining 50% in proportion to their racial group in the applicant pool. A second white student filed suit in response to this new policy, and a federal appellate court ruled in November 1998 that the policy amounted to "racial balancing" and that diversity in and of itself does not constitute a compelling government interest (although it explicitly recognized that some iterations of diversity might be found to be compelling). The School has decided not to appeal the decision to the Supreme Court and has changed its admissions criteria.

UCLA Laboratory School (Hunter v. The Regents of the University of California): In September 1999, the Ninth Circuit held that an elementary school that serves as a laboratory for the University of California can continue to consider race and ethnicity in deciding who to enroll. The court held that the admissions policy "is narrowly tailored to achieve the necessary laboratory environment to produce research results which can be used to improve the education of California's ethnically diverse urban school population." The school considers race, ethnicity, gender, and family income in admissions, to help insure that the abilities and learning styles of its students reflect those generally found in multicultural urban settings. The court held that the institution could not conduct valid research on the influence of race on learning without considering race in selecting its students. The school is recognized throughout the country as a leader in education research.

Montgomery County, MD (Eisenberg): The Fourth Circuit recently ruled that Montgomery County's policy of considering race and ethnicity in student transfers is unconstitutional racial balancing. A white student sought to leave his neighborhood school and applied for a math and science magnet program, and sued after he was denied admission. The system, designed to prevent schools from becoming racially isolated, tracks demographic trends over three years and does not allow students of a declining racial or ethnic population to transfer out of their schools. Students also cannot transfer to schools where the racial or ethnic mix differs from county averages. The Montgomery County Board of Education agreed in November 1999 to appeal the decision to the U.S. Supreme Court.

Arlington County, VA (Tuttle): In September 1999, the Fourth Circuit ruled that an oversubscribed public school in Arlington County, the Arlington Traditional School, could not use a weighted lottery in admissions to promote racial and ethnic diversity. Unsuccessful applicants sued to enjoin the consideration of race, and the Fourth Circuit held that the policy was not sufficiently narrowly tailored to pass constitutional muster. The school board was instructed that it could present alternative admissions policies for court review.

Other school districts which recently have been or currently are parties to discrimination lawsuits include (among others) Houston, Texas; Los Angeles, California; Prince George's County, Maryland; and Buffalo, New York. Finally, a number of states are addressing the issue of financing of K-12 public education in the wake of challenges to state reliance on property taxes, which result in great disparities based on class differences among local jurisdictions.

Contact: Jonathan R. Alger, Counsel

American Association of University Professors
1012 14th Street NW, Suite 500
Washington, DC 20005
(202) 737-5900, X-3015
fax: 202-737-5526
jalger@aaup.org

* This overview is intended for background informational purposes and is not exhaustive. New developments and cases continue to arise. If readers are aware of pertinent new information and would like to share it, please contact us. Thank you.

For further information contact the Government Relations Office of the
American Association of University Professors
1012 Fourteenth Street N.W. Suite 500, Washington, D.C. 200053465 (202) 7375900 Fax: (202) 7375526
AAUP Home Page *** Diversity & Affirmative Action in Higher Education

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Diversity & Affirmative Action in Higher Education

Affirmative action continues to be a source of heated legal, political and social debate in 1998, with much of the attention focused on higher education. Ever since Justice Powell's opinion in the Supreme Court's 1978 *Bakke* ruling stated that a university could take race into account as one among a number of factors in student admissions for the purpose of achieving student body diversity, affirmative action programs in student admissions and financial aid, as well as in faculty employment, have largely been based on diversity. In recent years, however, affirmative action programs--and the diversity rationale in particular--have been challenged both in the courts and in political arenas at the state and federal levels. The AAUP formally endorsed affirmative action in higher education in 1973, and reaffirmed its commitment several times over the years, most recently with a resolution passed at the 1997 Annual Meeting. New faculty recruited under affirmative action programs have brought new points of view to their colleagues, new areas of research to their labs and studies, and new relevance to their classrooms.

Because of the importance and timeliness of these issues we are establishing a special section of the webpage to deal with diversity and affirmative action in higher education. We will post documents here describing the Association's policies and ongoing work on these issues, and other pertinent information to allow members to follow developments in the coming months. We welcome your comments. Please respond to Mark F. Smith, Associate Director of Government Relations.

Diversity & Affirmative Action in Higher Education
Background Documents
Documents & Reports

The Association first addressed the issue of affirmative action in the early 1970's, and included several of these early statements in the Redbook, formally known as AAUP Policy Documents & Reports. The most recent edition of the Redbook, the 8th Edition published in 1995, includes the following statements: On Discrimination (1976), Affirmative Action in Higher Education: A Report by the Council Committee on Discrimination (1973), and Affirmative Action Plans: Recommended Procedures for Increasing the Number of Minority Persons and Women on College and University Faculties (1983).

In recent years, the AAUP Annual Meeting has adopted resolutions supporting affirmative action in higher education. While similar in tone, the 1997 Resolution differed somewhat from the 1996 Resolution.

AAUP's legal office is closely monitoring the various developments affecting higher education. Counsel Jonathan R. Alger has published an article on The Educational Value of Diversity and a Legal Watch column, Bakke-Still Breathing, but Barely, describing the effects of the recent Piscataway case, in Academe. Alger has also analyzed a recent case in Nevada, Farmer v. University and Community System of Nevada, and made numerous presentations examining aspects of affirmative action on behalf of the Association. Recent presentations include The Role of Faculty in Achieving and Retaining a Diverse Student Population, and Affirmative Action in Education: A Current Legal Overview.

Affirmative Action has remained a political issue at both the state and federal level. State ballot initiatives

are possible in several states, and bills in Congress that would limit or abolish affirmative action programs ar always waiting in the wings. The Association has written several letters to Members of Congress expressing our opposition to this legislation and produced a fact sheet on Diversity and Affirmative Action in Higher Education. In November 1997 we sent a letter opposing H.R. 1909, the so-called Civil Rights Act of 1997 to the House Judiciary Committee, and more recently joined a large number of higher education associations in an open letter published in the Washington Post and the Chronicle of Higher Education.

Leaders of the Association have produced several columns that have been distributed electronically for newsletters. Recent columns which have addressed issues surrounding affirmative action include Roxane Gudeman's Building Better Scholarly Environments: One Faculty Member's Perspective on the The Value of Diversity, Michael Olivas' The Hopwood Virus and Hopwood and Beyond, Martha West's Organizing Women Faculty, and Jonathan Alger's How to Recruit and Promote Minority Faculty.

AAUP's Committee L on Historically Black Colleges and Universities and the Status of Minorities in the Profession has focused much of its attention recently on affirmative action. The committee's annual reports for 1997 and 1998 to the Annual Meeting detail some of this activity. The Committee is also working on a major survey instrument, in conjunction with other higher education organizations and researchers, to study the faculty perspective on the educational benefits of faculty and student diversity.

In the spring of 1996 a special AAUP Commission on Governance and Affirmative Action Policy examined the decision of the Board of Regents of the University of California to eliminate affirmative action programs in admission, employment, and contract policies. The May 1996 Report details the Commission's findings, while the executive summary presents the highlights. [Note: the passage of Proposition 209 in California in November 1996 rendered moot some of the affirmative action issues raised in the report, but did not affect the underlying governance issues.]

For further information contact the Government Relations Office of the

American Association of University Professors

1012 Fourteenth Street N.W. Suite 500, Washington, D.C. 200053465 (202) 7375900 Fax: (202) 7375526

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