

Students for Fair Admissions

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To: U.S. Department of Education, Office for Civil Rights
From: Edward Blum, President, Students for Fair Admissions
Re: Wisconsin Minority Teacher Loan Forgiveness Program
Date: March 9, 2020

Students for Fair Admissions (SFFA) files this complaint with the U.S. Department of Education, Office for Civil Rights, on behalf of our organization. SFFA is a 501 (c)(3) membership organization with over 21,000 members, some of whom live in Wisconsin. We request that this program be made available to all qualified students regardless of their race or ethnicity. Because the loan program is only available to those who fall into the racial classification as “minority students,” it is subject to an equal protection challenge by any non-minority student who meets the remaining qualifications.

The State of Wisconsin recently expanded the Minority Teacher Loan program which was initially established in state law in 1989 and administered by the Wisconsin Higher Educational Aids Board (or “HEAB”). Prior to its most recent expansion, the program only applied to students agreeing to teach in Milwaukee. Now the program provides and then forgives loans to minority college students in the state studying to become elementary or secondary school teachers if they agree to teach in school districts where minority students constitute at least 40% of the population. Wis. Stat. § 39.40; Wis. Admin. Code HEA § 11.01– .08. The program is only available to “minority student[s],” which the law defines to include “Black American,” “American Indian or Alaskan native,” “Hispanic,” “[a] person of Asian or Pacific Island origin,” or “[a] person whose ancestry includes 2 or more races.” Wis. Stat. § 39.40(1).

To be eligible, minority students must also be (1) Wisconsin residents enrolled in an in-state college, (2) studying to become a teacher in a discipline identified as a “teacher shortage area” by the U.S. Department of Education, and (3) maintain a 3.0 or above grade point average. Until 2019, loan recipients had to agree to teach in an elementary or secondary school in the Milwaukee area; the Legislature amended the statute to extend to any “school district in [Wisconsin] in which minority students constitute at least 40 percent of the membership.”

Recipients can receive up to \$10,000 annually over a three-year period, with a \$30,000 maximum. The HEAB forgives 25% of the loan for each year that recipients maintain satisfactory employment in a qualifying school district. Accordingly, a recipient can have their loan fully forgiven after four years. *See also* Wis. HEAB, *Wisconsin Minority Teacher Loan Program Information*, <http://heab.state.wi.us/docs/programs/mtlflyer.pdf>. Wis. HEAB, *Minority Teacher Loan Recipient Agreement for the 2019-20 Academic Year*, <http://www.heab.state.wi.us/docs/finadmin/forms/1920form-mtlagreement.pdf>.

The statutes and regulations governing the program do not provide any statement of purpose, or explain the need for the law. Although we were unable to locate any legislative history for the original 1989 legislation, the legislative record for Assembly Bill 51 (the recent bill expanding the program)—and public statements by the bill’s co-sponsors—leave no doubt on the legislature’s rationale: They believe that putting minority teachers into classes with minority students is better for minority students, so they are willing to distribute the taxpayer’s money based on race to achieve that result.

Representative Amy Loudenberg, who introduced Assembly Bill 51, testified in a committee hearing that “Schools across Wisconsin are trying to close the achievement gap between white and nonwhite students and research indicates that hiring teachers of color can help close achievement gaps.” March 28, 2019 Hearing Before the Assemb. Comm. On Colleges and Universities, Assemb. B. 51 (testimony of Rep. Amy Loudenberg), <https://bit.ly/2Fhvj4C>. Senator Dale Kooyenga, who co-sponsored the bill, explained “[w]e have minorities throughout our state and it would be helpful for minority students throughout the state to have minority teachers.” Laurel White, *Bill Would Expand Minority Teacher Loan Program*, Wisconsin Public Radio, Sept. 3, 2019, <https://bit.ly/37tCNxm>. According to that same article, “Kooyenga and other sponsors of the bill to expand

the Minority Teacher Loan Program have pointed to research that's shown better classroom outcomes for minority students who have minority teachers." *Id.*

Another co-sponsor of AB 51, Representative LaKeisha Myers, was more explicit when testifying this year on the same subject:

When students of color have a teacher of color, they are more likely to graduate from high school. In 2017, National Public Radio News surveyed more than 80,000 African American and Hispanic public school students in fourth through eighth grade that lived in six different states. The survey concluded that when students had teachers of the same race, they reported feeling more cared for, more interested in their schoolwork, and more confident in their teachers' abilities to communicate with them. These students also reported putting forth more effort in school and having higher college aspirations.

Dr. Gloria Ladson-Billings, a professor of education at the University of Wisconsin - Madison stated, "A more diverse population of teachers alone won't help students of color. To change attitudes and behaviors about school, we need teachers who view their students of color as whole people." The increase of minorities in education and diversifying Wisconsin's educational workforce is needed in order for more minority students to have access to teachers that can become their role models and mentors.

. . . It is my hope that by supporting the Minority Teacher Loan Program, this will be a first step in increasing the number of teachers of color in our state. It is also my hope that through this program, we can begin to attract and retain minority teachers at a rate that mirrors the population of our schools and our state. Ensuring that each educational institution in Wisconsin has a diverse staff is imperative. As our state becomes more diverse, the teaching force should mirror the student population. . . .

April 23, 2019 Hearing Before the Sen. Comm. On Universities, Technical Colleges, Children and Families, Sen. B. 55 (testimony of Rep. LaKeisha Myers), <https://bit.ly/2ZJamcd>.

When discussing AB 51, HEAB's Executive Secretary Connie Hutchison struck the same chord: "I think it's important for students to see people who look like them who are teachers. If you are in a place where you never see someone who

looks like you as an educator, it might not occur to you to ever be an educator.” Logan Wroge, *Lawmakers look to expand eligibility for loan program to diversify teaching pool after drop in applications*, Wisconsin State Journal, June 20, 2019, <https://bit.ly/39v7LXI>.

While improving student performance, especially minority student performance is a laudable goal, even laudable goals cannot be obtained by unconstitutional means. Good intentions do not trump the constitution. Of course, it is unlikely that a non-minority student studying to be a teacher with a desire to help struggling students in a high minority district, or even that the minority students that might have learned to read if she were able to teach in the district, would consider exclusion from this loan forgiveness program laudable.

This program, subject to OCR jurisdiction under Title VI of the Civil Rights Act, is subject to strict scrutiny under the Equal Protection Clause. The Fourteenth Amendment’s equal protection clause provides that, “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const., Amdt. 14, § 1. The central purpose of the clause “is to prevent the States from purposefully discriminating between individuals on the basis of race.” *Shaw v. Reno*, 509 U.S. 630, 642 (1993). “[A]t the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007) (plurality opinion of Roberts, C.J.) (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)) (internal citation omitted).

The Supreme Court has emphasized time and again that broad racial classifications that fail to regard the individual are at odds with equal protection. See, e.g., *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (“One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”); *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (“At the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.”); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (“Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are

founded upon the doctrine of equality.”); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289 (1978) (opinion of Powell, J.) (The Fourteenth Amendment creates rights “‘guaranteed to the individual. The rights established are personal rights’”).

Accordingly, “[i]t is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.” *Parents Involved*, 551 U.S. at 720. This is because “‘racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.’” *Id.* (quoting *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003)). To satisfy strict scrutiny, the government must demonstrate that the use of race is “‘narrowly tailored’ to achieve a ‘compelling’ government interest.” *Id.* (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

While one need look no further than the actual words of the statute establishing the program, the words restricting participation in an educational loan forgiveness program to minority students, the legislative history demonstrates that Wisconsin established and expanded the minority teacher loan program based on the perceived benefit of exposing minority students to minority teachers. This use of race is at odds with several guiding principles in the Supreme Court’s equal protection jurisprudence.

First, the Court has rejected this sort of “role model” theory in *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267 (1986), when it invalidated a provision in a collective bargaining agreement that provided preferential protections against layoffs to minority schoolteachers. The Court explicitly rejected the school board’s asserted “interest in providing minority role models for its minority students, as an attempt to alleviate the effects of societal discrimination.” *Id.* at 274–276 (plurality opinion); *id.*, at 295 (White, J., concurring in judgment). In reaching this conclusion, the Court explained that the role model theory was “an attempt to alleviate the effects societal discrimination,” which is generally insufficient to justify a racial classification. *Id.* at 274. Instead, a record of “prior discrimination by the governmental unit involved” must be “the justification for, and the limitation on, a State’s adoption of race-based remedies.” *Id.* The Court explained that “[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy,” and warned that without “particularized findings” of past discrimination, “a court could uphold remedies that are ageless in

their reach into the past, and timeless in their ability to affect the future.” *Id.* at 276; *see also Grutter v. Bollinger*, 539 U.S. 206, 342 (2003) (“all governmental use of race must have a logical end point”); *Parents Involved*, 501 U.S. at 731 (warning that “racial balancing has ‘no logical stopping point’”). In addition, the *Wygant* Court noted that the idea that “black students are better off with black teachers could lead to the very system the Court rejected in *Brown v. Board of Education*, 347 U.S. 483 (1954).” 476 U.S. at 276.

The legislative history provides another cause for concern: Representative Myers stated that she hoped the state could “attract and retain minority teachers at a rate the mirrors the population of our schools and our state,” because “the teaching force should mirror the student population.” The Supreme Court has repudiated the idea that racial balancing can be a compelling state interest. *Parents Involved*, 551 U.S. at 729–33; *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989); *Wygant*, 476 U.S. at 275; *Grutter*, 539 U.S. at 330. And while the state may argue that the program is justified by its interest in promoting diversity in the k-12 classroom, the program’s use of race—and race alone as the deciding element not just as a factor—does not pass muster. *See Parents Involved*, 551 U.S. at 723 (contrasting school district’s program with the diversity interest in higher education upheld in *Grutter*, because the district’s policy “rel[ie]d] on racial classifications in a ‘nonindividualized, mechanical’ way”).

And, even to the extent the availability of the student loan forgiveness program is argued to help a university maintain a diverse student body or the completion of the degree program by a diverse student body, this is not a situation where race is but one factor to be weighed: the binary initial factor to qualify is race. This is not race being the “factor of a factor of a factor” approved in *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 2207 (2016). Nor is it the plus factor approved in *Grutter*, “Universities can, however, consider race or ethnicity more flexibly as a “plus” factor in the context of individualized consideration of each and every applicant. *Ibid.*” *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003).

For purposes of legal analysis, a minority only loan forgiveness program is similar to a minority only scholarship program. Both have race as the limiting factor- they are racially exclusive. While no ultimate appellate court has held that the bold use of racial exclusion in such a fashion is constitutional, unless to remedy past discrimination, OCR evaluated racially exclusionary scholarships in an

investigation of a complaint filed against the University of Missouri (UM), and found to the contrary. (OCR Docket # 07052028)

The complaint was filed in 2005, but was not resolved until 2012. OCR determined that the award of racially exclusionary scholarships, only awarded based on racial status, was permissible, because you had to consider all of the scholarships and financial aid the university made available, not just the racially exclusive scholarships. OCR purported to make this decision based on the 1994 OCR guidance, caselaw, and the 2011 OCR guidance.

<https://www2.ed.gov/about/offices/list/ocr/docs/investigations/07052028-a.htm>.

As this office knows, the 2011 guidance that was partially relied upon in the UM case has been withdrawn as of 2018. While a resolution agreement is not binding legal guidance, clearly there is an obligation to resolve a complaint in accord with the applicable legal principles. It could be helpful if the investigation of this complaint, or related or independently undertaken policy guidance, perhaps even addressing the 1994 guidance, would clarify that racially exclusive programs, such as the loan forgiveness program at issue in this complaint, cannot be justified by anything but addressing prior discrimination.

This office previously reached a legally sufficient resolution with the State of Wisconsin, regarding a similar racially exclusionary program, expanding the program, as set out in the *Chronicle of Higher Education*

From 1985 until 2004, Wisconsin's Minority Precollege Scholarship Program provided money for minority students in grades six through 12 to attend precollege courses at campuses across the state. Under pressure from the federal Office for Civil Rights, the State Department of Public Instruction altered the eligibility criteria to eliminate any consideration of ethnicity or race, and instead limited participation to students whose low family incomes qualified them for federal school-lunch subsidies. The overall size of the program remained the same. Of the 1,366 students who took part last summer, 65, or just under 5 percent, were white. Kevin Ingram, who directs the state agency's Educational Opportunity Programs, says that as a result of the changed eligibility criteria, the precollege program now serves "more kids who are more needy" and no longer enrolls young people from financially well-off families "who are participating just because they are minority students."

<https://www.chronicle.com/article/From-Minority-to-Diversity/2985>

