U.S. Department of Education

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Notice of Application of Supreme Court Decision

January 31, 1994

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SUMMARY: In *United States v. Fordice*, U.S. , 112 S. Ct. 2727 (1992), the Supreme Court held that States that operated *de jure* segregated higher education systems have an affirmative duty under the Equal Protection Clause of the Fourteenth Amendment to the Constitution and Title VI of the Civil Rights Act of 1964 to dismantle those systems and their vestiges. This notice is published in response to a number of questions the Department has received concerning the effect of this decision.

EFFECTIVE DATE: January 28, 1994.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. 2000d *et seq*., prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving Federal financial assistance. The Department of Education (Department) has promulgated regulations in 34 CFR part 100 to effectuate the provisions of title VI with regard to programs and activities receiving funding from the Department. Title VI also guides the Department's enforcement policies regarding State higher education

systems that were previously determined to be segregated pursuant to State law. This notice outlines the procedures and analysis that the Office for Civil Rights (OCR) of the Department of Education will follow when investigating States with a history of *de jure* segregated systems of higher education.

This notice is published in response to a number of questions the Department has received concerning the effect of the Supreme Court's decision in*United States v. Fordice*, U.S. , 112 S. Ct. 2727 (1992), on the Department's enforcement policies under Title VI regarding State higher education systems that were segregated pursuant to State law.

In *Fordice*, the Supreme Court held that States that operated *de jure* segregated higher education systems have an affirmative duty under the Equal Protection Clause of the Fourteenth Amendment to the Constitution and Title VI to dismantle those systems and their vestiges. The Court, while acknowledging the differences between public higher education systems and elementary or secondary school systems, based this holding on the precedent established in its 1954 decision in *Brown v. Board of Education of Topeka* and its progeny in elementary and secondary school desegregation cases. 112 S. Ct. at 2736.

The Supreme Court also held that before a determination can be made that a State has discharged its affirmative duty to eliminate the vestiges of its *de jure* system, an examination must be made of a "wide range of factors to determine whether [a] State has perpetuated its formerly *de jure* segregation in any facet of its institutional system." 112 S. Ct. 2735. This holding is consistent with the Department's policy requiring that the vestiges of *de jure* segregation be eliminated system-wide in State higher education systems, which is reflected in the Department's published "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 FR 6658) ("Revised Criteria"). The "Revised Criteria" specify a broad range of factors, which include those addressed in *Fordice*, that must be included in a statewide higher education desegregation plan to be acceptable under Title VI.

The Supreme Court made clear in *Fordice* that (1) a State will not have complied with its affirmative duty to dismantle the vestiges of segregation if it merely adopts race-neutral policies and (2) "[i]f a State perpetuates policies and practices traceable to its prior system that continue to have segregative effects - whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system - and such policies are without sound educational justifications and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system. " 112 S. Ct. 2735, 2737. The Supreme Court emphasized that the burden of proof falls on each State to establish that it has dismantled its prior *de jure* segregated system. 112 S. Ct. at 2741.

In light of the *Fordice* decision, the Department reaffirms that all States with a history of *de jure* segregated systems of higher education have an affirmative duty to ensure that no vestiges of the *de jure* system are having a discriminatory effect on the basis of race. If OCR receives information indicating that a State has not met this affirmative duty, OCR will take appropriate action.

OCR will apply the standard set out in *Fordice*, requiring the elimination of the vestiges of prior *de jure* segregation, to all pending Title VI evaluations of statewide higher education systems with OCR-accepted desegregation plans that have expired. The States with expired plans are Florida, Kentucky, Maryland, Pennsylvania, Texas, and Virginia. OCR will 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 will consider includes those addressed in *Fordice* and those reflected in the ingredients for acceptable desegregation plans

specified in the Department's "Revised Criteria." Accordingly, OCR will ensure that these States have implemented their OCR-approved desegregation plans and have eliminated the vestiges of their *de jure* segregated systems.

Finally, the Department reaffirms its position reflected in the "Revised Criteria," which is consistent with *Fordice*, that States may not place unfair burdens upon black students and faculty in the desegregation process. Moreover, the Department's "Revised Criteria" recognize that State systems of higher education may be required, in order to overcome the effects of past discrimination, to strengthen and enhance traditionally or historically black institutions. The Department 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.

Dated: January 26, 1994.

Norma V. Cantú,

Assistant Secretary for Civil Rights.
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Top

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