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May 15, 2008

The Honorable Martin J. O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: Senate Bill 438 and House Bill 905

Dear Governor O'Malley:

We have reviewed Senate Bill 438[1] and House Bill 905, identical bills entitled "Institutions of Higher Education–Plans for Programs of Cultural Diversity." While we approve both bills, we write to advise that any program be carefully implemented so as to avoid constitutional problems.

Senate Bill 438 and House Bill 905 address cultural diversity programs in Maryland higher education institutions. The bills require both public and non-public institutions of higher education to report to the Maryland Higher Education Commission (MHEC) regarding their plans to promote and enhance cultural diversity and require that MHEC, in turn, submit a statewide report to the General Assembly. The bills also require public institutions to develop and implement such plans, and specifies a wide range of elements to be included in the plans, including processes for reporting campus-based hate crimes, programming to enhance cultural diversity sensitivity through training of students, faculty and staff, and a summary of resources needed "to effectively recruit and retain a culturally diverse student body."

[1]Senate Bill 438 was previously approved for constitutionality and legal sufficiency by our office on a letter to you dated April 11, 2008.

As originally introduced, Senate Bill 438 defined the phrase "cultural diversity" to include "the variety of characteristics and experiences that define an individual including the primary dimensions of race, ethnicity, gender, age, religion, disability, and sexual orientation and the secondary dimensions of communications style, organizational role and level, economic status, and geographic origin." The original version of House Bill 905 had no definition of "cultural diversity," effectively leaving it up to the institutions to define. Amendments resulted in a much narrower definition being included in both bills, limiting the definition to "the inclusion of those racial and ethnic groups and individuals that are or have been underrepresented in higher education." It is our view that the bills do not limit the existing authority of higher education institutions to formulate plans based on a broader and more inclusive definition of cultural diversity, and that, where such plans meet the constitutional requirements set out in recent Supreme Court cases, they may make use of race-conscious criteria. If, however, a higher education institution develops a program confined to the narrow definition of cultural diversity used in the bills, that program must be limited to race-neutral remedies.

Efforts to achieve diversity in public higher education institutions are governed by principles first articulated in Justice Powell's concurring opinion in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978). In *Bakke*, the Court rejected a race-based affirmative action program at the University of California medical school as violating the Equal Protection Clause of the Fourteenth Amendment of the Constitution. Justice Powell's concurrence, however, held out the possibility that the consideration of an applicant's race or ethnicity as part of a systematic effort to achieve a diverse student body could be permissible, provided that any favorable treatment of race and ethnicity did not operate as a "quota" and that race or ethnicity was "only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body." *Id.* at 314.

Justice Powell's suggestion that certain affirmative action measures to promote a diverse student body at an institution of higher education may be constitutionally acceptable, and his guidance on the parameters of an allowable diversity plan, were adopted by the Supreme Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003) and reinforced recently in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. ____, 127 S.Ct. 2738 (2007). In *Grutter*, the Court held that diversity in the higher education setting can be a compelling State interest, and that narrowly tailored efforts targeted specifically at enhancing the racial and ethnic diversity of a campus may be a constitutionally acceptable component of such an effort.

In articulating the standards for an acceptable diversity initiative with respect to student admissions, however, the Court re-emphasized the importance of including a broad array of factors other than race and ethnicity.[2] According to the *Grutter* Court, the purpose of a permissible diversity effort is to achieve, "exposure to a widely diverse people, cultures, ideas, and viewpoints." *Id.* at 330. Quoting *Bakke,* the *Grutter* Court reiterated that the kind of compelling state interest that allows for diversity initiatives "is not an interest in simple ethnic diversity." *Id.* at 325, quoting *Bakke,* 438 U.S. at 315. The Court observed that the University of Michigan law school's diversity plan at issue in *Grutter* gave "substantial weight to diversity factors besides race," *id.* at 339, and, in fact, provided "many bases for diversity admissions" including international experience, fluency in languages other than English, past career experiences, or a record of having overcome adversity and hardship. Thus, the *Grutter* Court concluded that "by this flexible approach, the Law School sufficiently takes into account, in practice as well as in theory, a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body." *Id.*

The importance of a broad conception of diversity in higher education initiatives was reiterated in the Court's 2007 *Seattle School District* opinion. In rejecting Seattle's voluntary elementary and secondary school desegregation plan on various grounds, the Court contrasted the Seattle program with the acceptable *Grutter* plan. Importantly, it emphasized that "what was upheld in *Grutter* was consideration of 'a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.'" *Seattle School District,* 127 S.Ct. at 2753, citing *Grutter,* 539 U.S. at 325, quoting *Regents of University of California v. Bakke,* 438 U.S. 265 (1978).

We note that *Grutter* specifically addressed diversity measures in higher education admissions. We believe, however, that the courts would readily apply the Supreme Court's principles with equal force in other aspects of higher education diversity programs. In fact, the U.S. Department of Education's Office for Civil Rights routinely applies the *Grutter* principles in its review of campus efforts to enhance diversity through financial aid, student

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[2]Also important to the Court in upholding the affirmative action measures in *Grutter* were the absence of rigid minority student quotas, the individualized, "holistic" nature of the evaluation of each student's application, and the lack of feasible race-neutral alternatives for achieving the university's diversity goals. *Grutter,* 539 U.S. at 337, 339. Although the diversity plans ultimately developed under either bill must acknowledge these principles, they are not implicated in a review of the bills' facial constitutionality.

recruitment efforts, and student support programs.[3] Thus, in reviewing the constitutionality of Senate Bill 438 and House Bill 905, we are guided by the *Grutter* principles.

As a result, we conclude that the broad requirement that each public institution of higher education adopt a diversity plan raises no constitutional questions. Moreover, the specific elements of those plans, and the reporting requirements imposed upon institutions and MHEC by the bills do not violate the Constitution. We believe, however, that the bill's narrow definition of "cultural diversity" – expressly limited to race and ethnicity – is inconsistent with the *Grutter* principle that campus diversity plans that have race-conscious elements should extend beyond consideration of just race and ethnicity. Thus, in developing their diversity plans under these bill, institutions that wish to include such elements should be advised not to limit the scope of those plans to the elements of the bill's definition of "cultural diversity."[4]

Rather, consistent with *Grutter*, each institution properly may define its own interest in promoting diversity by analysis of its individual educational mission, the kinds of student backgrounds and experiences that would enhance the achievement of that mission, and the means the institutions feels are appropriate to achieve its goal. In accepting the diversity plan of the University of Michigan Law School, the *Grutter* Court invoked its tradition of deference to university officials in matters of academic decision making, thus "taking into account complex educational judgments in an area that lies primarily within the expertise of the university." *Id.* at 328 (other citations omitted). Again quoting Justice Powell in *Bakke*, the *Grutter* Court observed that "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body," and that university officials are uniquely able to "select those student who will contribute the most to the robust exchange of ideas." *Id.*, quoting *Bakke*, 438 U.S. at 312-13.

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[3]See, e.g., U.S. Department of Education, Office for Civil Rights, *Achieving Diversity: Race Neutral Alternatives in American Education* (2004) (emphasizing the importance of the consideration of non-race based alternatives in developing diversity programs).

[4]We understand that some Maryland public institutions already have cultural diversity plans in place that include, but extend well beyond, the enhancement of racial and ethnic diversity. We do not believe that the General Assembly intended for Senate Bill 438 and House Bill 905 to require a narrowing of the scope of diversity promoted by existing campus plans.

While race and ethnicity may receive substantial consideration in the development of a university cultural diversity plan, a plan that will include race-conscious elements should not be implemented in a manner that will limit the elements of "cultural diversity" solely to racial and ethnic considerations. With this caveat, we believe that the cultural diversity plans required by Senate Bill 438 and House Bill 905 may be implemented effectively and in a manner consistent with the requirements of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. We recommend, however, that legislation be introduced in the next session to expand the definition of "cultural diversity" to one that is consistent with the holding of the *Grutter* Court.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/KMR/kk

cc: The Honorable Verna L. Jones
The Honorable Ana Sol Gutierrez
The Honorable Dennis C. Schnepfe
Joseph Bryce
Karl Aro