UNITED STATES COMMISSION ON CIVIL RIGHTS

1331 PENNSYLVANIA AVENUE , NW, WASHINGTON, DC 20425 www.usccr.gov

October 13, 2020

Dr. Michael R. Lovell
President
Zilber Hall, 411
Marquette University
1250 W. Wisconsin Avenue
Milwaukee, WI 53233

Dear Dr. Lovell:

I write as one member of the U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole, regarding a September 3 statement you and Dr. Kimo Ah Yun issued that was entitled, "Update from president and provost following meeting with Black student leaders."[1]

In this statement, you and Dr. Ahn wrote:

> [M]any of our students took part in a demonstration against racial injustice in our country and on our campus. We – along with other senior university leaders – met with the Black Student Council and other concerned students following the student demonstration. ***Their stories made vividly clear that racism – both systemic racism and racist, discriminatory actions – are part of our campus life***. Sadly, ***the stories they shared are not new***, especially for our Black students. They were highlighted in our climate survey in 2015 and have been spoken about by our students, alumni, staff and faculty for many years. [emphasis added]

Marquette is bound by Title VI of the Civil Rights Act of 1964, which provides, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, *or be subjected to discrimination under any program or activity receiving Federal financial assistance*."[2]

Marquette University has undoubtedly certified that it is in compliance with Title VI and is therefore eligible for federal funding. It is distressing to learn, based on the statement quoted above, that these certifications appear untrue, and that Marquette has been engaging in racist behavior for many years.

[1] Michael R. Lovell and Kimo Ah Yun, "Update from president and provost following meeting with Black student leaders," Marquette Today, Sept. 3, 2020, https://today.marquette.edu/2020/09/update-from-president-and-provost-following-meeting-with-black-student-leaders/.
[2] 42 U.S.C. § 2000d.

The Seventh Circuit has repeatedly noted that if an institution (whether that is an employer or a recipient of federal funds) treats members of one racial group differently than members of another racial group, that institution has discriminated on the basis of race.[3] You wrote in your statement to the Marquette community, "Their stories made vividly clear that racism – both systemic racism and racist, discriminatory actions – are part of our campus life", and "the stories they shared are not new, especially for our Black students". Ergo, you admit that Marquette has treated black students differently than white students, and therefore that Marquette has discriminated on the basis of race.

Your statement also sets forth a number of actions Marquette intends to take to improve its racist actions. Alas, time only moves forward, and this does not eliminate the problem that Marquette apparently certified to the federal government that Marquette does ***not*** discriminate on the basis of race.

Marquette's professed intention to change its behavior going forward does not relieve it of responsibility for its past racist actions. As the Seventh Circuit has noted, "discriminating against a person on the basis of his race is not offset by discriminating in favor of other persons of the same race."[4] Likewise, if Marquette has been discriminating *in favor* of white students, it cannot now discriminate *against* white students in an effort to reach some sort of cosmic equilibrium of racial discrimination.

The University's plan to create a "Black Living Learning Community in a residence hall" and a "dedicated space for Black students" violates Title VI.[5] Yes, I know other universities have racially segregated housing. It's still illegal. Title VI prohibits intentional segregation on the basis of race.[6] There are surprisingly few cases on this point because most people in authority since *Brown v. Board of Education* have had the good sense to avoid encouraging racial segregation. But, as the Second Circuit has said, the question of whether a school has violated Title VI turns on the question of intent.[7] And in this case, Marquette's plan to create a residential

---

[3] *See* Williams v. Wendler, 530 F.3d 584, 588 (7th Cir. 2008)("plaintiffs argue that disciplining blacks more harshly than whites for offenses of similar gravity is evidence of racial discrimination, and that is true, as many cases hold"); Crawford v. Indiana Harbor Belt R. Co., 461 F.3d 844 (7th Cir. 2006)(if plaintiff can show she was treated more harshly than comparable white employees for no non-discriminatory reason, she has made a prima facie case of discrimination).

[4] Williams v. Wendler, 530 F.3d 584, 587 (7th Cir. 2008).

[5] Lovell and Yun, *supra* note 1.

[6] 42 U.S.C. § 2000d. See Castaneda v. Pickard, 648 F.2d 989, 995 (5th Cir. 1981)(noting the school district's "earlier unlawful policy of segregation"); Ayers v. Allain, 893 F.2d 732, 734 (5th Cir. 1990)("At the time of the Meredith decision, the Board had implemented segregative policies encompassing: (1) student enrollment; (2) the maintenance of branch centers by the historically white universities in close proximity to the historically black universities; (3) the employment of faculty and staff; (4) facility provision and condition; (5) the allocation of financial resources; (6) academic program offerings; and (7) the racial composition of the Board and its staff.");

[7] Parent Ass'n of Andrew Jackson High School v. Ambach, 598 F.2d 705, 715 (2nd Cir. 1979)("Plaintiffs urge . . . that under Title VI, segregative effects alone without discriminatory intent, establish a prima facie violation. We

community for black students (and to a lesser extent, its plan to create "dedicated spaces for black students") are evidence of segregative intent. It does not matter that these segregated spaces are desired by some black students. Some white students in the 1960s may have preferred whites-only spaces, but their preferences didn't matter either – racial segregation is illegal when federal funds are involved. Similarly, Marquette's expressed intent to provide "additional financial support to Black students" is unlawful if it bases financial support not on merit or need, but on race.

When Marquette discriminates anywhere in its operations, it violates Title VI. If Marquette scraps its plan to create the Black Living Learning Community but continues to prefer "counselors of color" in hiring, it violates Title VI (in addition to Title VII). "Entire entities receiving federal funds – whether governmental entities, school systems, or universities – must comply with Title VI, rather than just the particular program or activity that actually receives the funds."[8]

Marquette can discriminate on the basis of race, or it can receive federal funding. There is no third option. I will forward a copy of this letter to the Office for Civil Rights at the Department of Education, should it wish to investigate.

Sincerely,

Peter Kirsanow
Commissioner

think, however, that Title VI does not authorize federal judges to impose a school desegregation remedy where there is no Constitutional transgression, i.e., where a racial imbalance is merely de facto.").

[8] D.J. Miller & Associates, Inc., v. Ohio Dep't of Admin. Services, 115 F.Supp.2d 872 (S.D. Ohio 2000)(*quoting* Grimes v. Superior Home Health Care, 929 F.Supp. 1088 (M.D. Tenn. 1996).