BRIAN E. FROSH
ATTORNEY GENERAL

ELIZABETH F. HARRIS
CHIEF DEPUTY ATTORNEY GENERAL

CAROLYN A. QUATTROCKI
DEPUTY ATTORNEY GENERAL

SANDRA BENSON BRANTLEY
COUNSEL TO THE GENERAL ASSEMBLY

KATHRYN M. ROWE
DEPUTY COUNSEL

JEREMY M. MCCOY
ASSISTANT ATTORNEY GENERAL

DAVID W. STAMPER
ASSISTANT ATTORNEY GENERAL

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

November 27, 2018

The Honorable William E. Kirwan
Chair, Commission on Innovation and Excellence in Education
120 House Office Bldg.
Annapolis, Maryland 21401

Dear Chair Kirwan:

You asked for advice whether "[i]n making its funding decisions, may the Commission (and the State) allocate education funding based on the racial classification of students?" As explained in more detail below, under the Equal Protection Clause of the U.S. Constitution a government program that makes funding allocations based on race is constitutional only if the formula is narrowly tailored to support a compelling government interest. In order for the State to enact a race-based funding formula that will survive constitutional scrutiny, the Commission or the legislature must have a strong basis in evidence that establishes a sufficient factual predicate that the race-based funding formula is needed to support its compelling interest.

Legal Standards Applicable to Race-Based Government Programs

The use of race in a government program raises an issue under the Equal Protection Clause of the U.S. Constitution. The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. Maryland's Constitution contains no equal protection clause, but "the concept of equal protection is embodied in the due process requirement of Article 24" of the Maryland Declaration of Rights. *Tyler v. City of College Park*, 415 Md. 475, 499 (2010). A government program that uses a racial classification is constitutional if it is narrowly tailored to support a compelling government interest. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). "Because a race or gender-conscious program is constitutionally suspect, the Supreme Court has essentially put the burden on a government entity with such a program to justify the program with findings based on evidence." 91 *Opinions of the Attorney General* 181, 183 (2006). *See also Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 784 (2007) ("The government bears the burden of justifying its use of individual racial classifications.").

The Supreme Court has "insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications, such as race-conscious university admissions policies." "*Johnson v. California*, 543 U.S. 499, 505 (2005). *See also Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 343 n.14 (4th Cir. 2001) (observing that the Fourth Circuit has noted that the Supreme Court's "application of strict scrutiny has been unwavering"). If the asserted State interest is to remedy discrimination, "a government must have a 'strong basis in evidence' of the discrimination, and any remedy must target only 'the effects of identified discrimination' within the relevant governmental unit." 99 *Opinions of the Attorney General* 88, 125 (2014) (quoting *Croson*, 488 U.S. at 500).[1] *See also H.B. Rowe v. Tippett*, 615 F.3d 233, 241 (4th Cir. 2010) (noting that "'to justify a race-conscious measure, a state must 'identify that discrimination, public or private, with some specificity,' and must have a 'strong basis in evidence for its conclusion that remedial action [is] necessary'") (citations omitted); *Podberesky v. Kirwan*, 38 F.3d 147 (1994). The *Podberesky* case is one of the few cases that addressed the constitutionality of the consideration of race in a financial aid program. The program at issue reserved a number of merit scholarships for black students. The State's asserted interest was rectifying past discrimination.[2] The Fourth Circuit found that the University of Maryland failed to present sufficient evidence that a remedial race-conscious program was justified because the court held that the University had not discriminated against high achieving black students; the court also found that the program was not narrowly tailored.

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[1] In *Croson*, the Court held that a statistical disparity alone was not sufficient to demonstrate that the remedial measure outlined in the city's minority business enterprise law at issue was necessary. 488 U.S. at 499 (stating "[w]hile there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts"). The Court noted, however, an inference of discrimination could arise if the government had evidence of a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors hired by the area's prime contractors. In *H.B. Rowe*, the Fourth Circuit further required that such evidence be "corroborated by significant anecdotal evidence of racial discrimination." 615 F.3d at 241. Ultimately, the court in that case carefully examined the disparity study and anecdotal evidence presented by the government and found that it supported some portions of the minority business participation program but not others, which were then found invalid. *Id.* at 256-257.

[2] In the *Parents Involved* decision, the issue was the constitutionality of school desegregation efforts to achieve diversity, which was the asserted state interest. Both plans at issue were declared unconstitutional because they were not narrowly tailored. Nevertheless, Justice Kennedy's concurring opinion concluded that school systems may consider race as one part of a broader pursuit of diversity. The Attorney General previously observed that no single opinion in *Parents Involved* received support from a majority of the Court, but "because the four dissenting justices agreed with Justice Kennedy's conclusion..., his views on the issue represent those of a majority of the Court." 99 *Opinions of the Attorney General* at 124 n.15. It is unclear whether that view would remain the view of the majority of the Court.

It may be that the State will assert that closing the racial achievement gap is its compelling government interest. Even if a court accepts the interest as compelling, the State also would have to show that the race-based education funding formula is narrowly tailored to accomplish the goal of closing the achievement gap. *Grutter*, 539 U.S. at 333 ("The means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose."). In addition, the Supreme Court has also declared that "'[n]arrow tailoring also requires that the reviewing court verify that it is 'necessary' for a [government entity] to use race to achieve the" asserted interest. *Fisher v. University of Texas*, 570 U.S. at 297, 312 (2013) (citing *Regents of University of California*, 438 U.S. 265, 305 (1978)). *See also Gratz v. Bollinger*, 539 U.S. 244 (2004) (invalidating, as not narrowly tailored, an admissions policy that automatically distributed one-fifth of points needed to guarantee admission to every single underrepresented minority applicant solely because of the applicant's race). Moreover, before implementing any race-based criteria, the State should first engage in a "good faith consideration of workable race-neutral alternatives" to achieve the State's goals. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).[3] Finally, the State must subject the program to a periodic review to evaluate if any race considerations are still necessary. *Id.* at 341-42. *Accord Belk*, 269 F.3d at 344 (stating that the Fourth Circuit "has emphasized that "[t]he use of racial preferences must be limited so that they do not outlast their need; they may not take on a life of their own") (quoting *Hayes v. North State Law Enforcement Ass'n*, 10 F.3d 207, 216 (4th Cir. 1993)).

Conclusion

In order "to allocate education funding based on the racial classification of students" in compliance with the Equal Protection Clause of the U.S. Constitution, the funding program must be narrowly tailored to support a compelling State interest. Accordingly, in order for the State to implement a race-based funding formula that will survive constitutional scrutiny, the Commission or the legislature must set forth an adequate factual predicate to sufficiently establish a strong basis in evidence that the race-based funding formula is needed to support a compelling State interest. I could find no court opinion addressing whether a State may voluntarily provide increased school funding on the basis of the racial classification of students to address racial disparities in academic achievement or any other concern. Thus, a funding formula that uses race as a factor in the education funding formula is likely to face a court challenge, given the jurisprudence on race-based government programs. *See* Joseph O. Oluwoke, Preston C. Green, III, "No Child Left Behind Act, Race, and Parents Involved," 5 *Hastings Race & Poverty L. J.* 271, 296 (Summer 2008) (concluding that "if a state implements [No Child Left Behind] sanctions and remedies race-consciously or targets

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[3] Courts have typically found support services to be constitutional race neutral alternatives. *See, e.g., H.B. Rowe,* 615 F.3d at 252 (characterizing as "race neutral" North Carolina's decision to contract "for support services to assist disadvantaged business enterprises with bookkeeping and accounting, taxes, marketing, bidding, negotiation, and other aspects of entrepreneurial development"); *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1557-58 (11th Cir. 1994) (characterizing as "race-neutral" employee recruitment programs targeting minority college students and outreach programs).

funding with a consciousness of race, such measures would likely be challenged under the federal Equal Protection Clause"). [4]

In short, if the race-based formula is proposed as a remedy to discrimination, the case law indicates that the existence of a racial disparity alone is not sufficient. Rather, in order to survive a court challenge on equal protection grounds, the Commission and the State must put forth evidence that the State's education system has been discriminatory on the basis of race and that the race-based proposal put forth is narrowly targeted to remedy that discrimination. A reviewing court will also be assessing whether the State has tried, in good faith, race-neutral alternatives to reach the same goal.

Sincerely,

Sandra Benson Brantley
Counsel to the General Assembly

[4] I note, however, that to predict an outcome of a potential court challenge is challenging without a specific funding proposal.