MONTANA UNIVERSITY SYSTEM
OFFICE OF THE COMMISSIONER OF HIGHER EDUCATION

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To: Clayton T. Christian, Commissioner of Higher Education

From: Ali Bovingdon, Chief Legal Counsel AliBovingdon

Date: 02/19/2025

Re: February 14, 2025 Dear Colleague Letter issued by the United States Department of Education, Office of Civil Rights

The February 14, 2025 Dear Colleague Letter from the Department of Education ("ED letter") reaffirms the existing legal requirements under Title VI of the Civil Rights Act of 1964, the Equal Protection Clause of the Unites States Constitution, and other relevant authorities.

Specifically, the letter states that "[f]ederal law prohibits covered entities from using race in decisions pertaining to admissions, hiring, promotion, compensation, financial aid, scholarships, prizes, administrative support, discipline, housing, graduation ceremonies, and all other aspects of student academic, and campus life. Put simply, educational institutions may neither separate or segregate students based on race, nor distribute benefits or burdens based on race."

The U.S. Supreme Court's 2023 decision in *Students for Fair Admissions v. Harvard* held that "[e]liminating racial discrimination means eliminating all of it." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 207 (2023). The Court noted that "[a]ny exception to the Constitution's demand for equal protection must survive a daunting two-step examination known in our cases as 'strict scrutiny.'" *Id.* Therefore, classification or assignment of students based on their race is unlawful, unless the classification satisfies strict scrutiny. This means that any use of race must be "narrowly tailored—meaning necessary—to achieve" a compelling state interest. *Id.*

Following that decision, the Montana University System ("MUS") reviewed its admission practices and determined that no institution of the MUS uses race-based classifications in their admissions processes. The MUS admission criteria for traditional students require a student to meet one of the following criteria: (1) earn at least a 2.5 high school GPA; (2) rank in the top half of the school's graduating class; or (3) earn an ACT composite score of 22 or higher, or SAT total score of 1120 or higher (exception: MSU-Northern: ACT score of 20, SAT score of 1050). A non-traditional student must provide one of the following: an official high school transcript listing graduation date; an official high school equivalence completion assessment designated by the Board of Public Education; or a Compass proficiency test result. The MUS is a universal admit system, and a student who meets one of the required criteria is automatically admitted.

We are also able to affirm that our employment and educational policies and practices comply with the DOE letter. Board of Regents policy expressly provides that "[e]ach campus of the Montana University System **shall insure that no employment or educational policy is discriminatory on the basis of race, color**, religion, creed, political ideas, sex, gender identity, sexual orientation, age, marital status, physical or mental disability, national origin, or ancestry." See Policy 703—Non-Discrimination (emphasis added). The MUS does not consider race in hiring, compensation or any other aspect of employment, nor do campuses "separate or segregate students based on race" or "distribute benefits or burdens based on race."

The MUS does work collaboratively with tribal governments to increase the recruitment and retention of tribal students. Initial review of the policy of the state legislature and the Board of Regents to allow for tuition waivers for tribal students indicates the waivers are permissible under U.S. Supreme Court precedent. The Supreme Court has recognized that distinctions based upon tribal enrollment are a political classification, not a classification based upon race.

In *Morton v. Mancari*, the U.S. Supreme Court described the special relationship between Congress and the tribes. The Court noted that the issue of whether an employment preference for Native Americans violated the Civil Rights Act turned on "the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." The Court further explained that "[t]he plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, § 8, cl. 3, provides Congress with the power to 'regulate Commerce . . . with the Indian Tribes,' and thus, to this extent, singles Indians out as a proper subject for separate legislation. Article II, § 2, cl. 2, gives the President the power, by and with the advice and consent of the Senate, to make treaties. This has often been the source of the Government's power to deal with the Indian tribes." *Morton v. Mancari*, 417 U.S. 535, 551-552 (1974).

The Court found that the preference at issue in the case was not a racial preference, but a political one, noting "[t]he preference is similar in kind to the constitutional requirement that a United States Senator, when elected, be 'an Inhabitant of that State for which he shall be chosen,' Art. I, § 3, cl., or that a member of a city council reside within the city governed by the council." *Id.* at 54. The *Mancari* decision remains good law. *See Haaland v. Brackeen*, 599 U.S. 255, 273, 275 (2023) (citing *Mancari* in support of the conclusion that Congress has "well established and broad" power to legislate with respect to the tribes).

While our review shows that the MUS is in compliance with the guidance from ED, campuses should be vigilant to ensure that they do not have programs or practices that do not provide universal access or that segregate students or distribute benefits or burdens based on race.