

INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

District Director
Western Key District Office (EP/EO)
Information Copy: Chief, EP/EO Division

Taxpayer's Name:	Kamehameha Schools/ Bernice Pauahi Bishop Estate
Taxpayer's Address:	567 So. King St. Honolulu, HI 96813
Taxpayer's Identification Number:	99-0073480
Years Involved:	1992-1996
Date of Conference:	Developmental Conference February 4, 1999

ISSUE:

Whether the subject organization's restriction of admissions to children of Hawaiian ancestry is consistent with the requirements of exemption under section 501(c)(3) of the Internal Revenue Code.

FACTS:

The Kamehameha Schools/Bernice Pauahi Bishop Estate ("the Estate") is exempt under section 501(a) of the Code as an organization described in section 501(c)(3). The Estate is also an educational organization described in sections 509(a)(1) and 170(b)(1)(A)(ii). The Estate was created by the Will of Bernice Pauahi Bishop ("the Will") to erect and maintain two schools ("the Schools"), one for boys and one for girls. The Schools were established in the late 1880's and have been continuously maintained since that time. The original single-sex Schools have since been combined into one co-educational School.

The five trustees of the Estate are appointed by a majority of the Justices of the Supreme Court of the State of Hawaii. The Trustees annually make a full and complete report of the condition of the schools to the Chief Justice of the Hawaii Supreme Court. The Trustees were directed by the Will to expend such amounts as they deem best, not to exceed one-half of the funds in the purchase of suitable premises, not land, erection of school buildings, and furnishing of said buildings. The

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remainder is to be invested with the income to be used for maintenance of the Schools, including all operational costs. A portion of each year's income is to be devoted to the support and education of orphans and others in indigent circumstances, giving preference to Hawaiians of pure and part aboriginal blood.

The trustees were granted broad discretionary powers to establish all the rules and regulations that they might from time to time deem necessary for the government of the Schools and the regulation of admissions to them. Pursuant to such powers, the trustees have limited admission to applicants who can prove their Hawaiian ancestry. Applicants of any racial or ethnic background are admitted, as long as they have at least one Hawaiian ancestor.

The Estate operates a preschool, an elementary school, and a secondary school at a central campus in Honolulu, an elementary school on each of the islands of Maui and Hawaii, and family-based education centers that include preschool programs throughout the State of Hawaii. These schools are collectively known as "The Kamehameha Schools." In addition, the Estate operates, through the secondary school, summer school programs serving students statewide.

The Estate also operates Department of Education ("DOE") site schools. There are 18 DOE preschool sites with the salaries of personnel paid by the Estate. The DOE schools follow DOE boundaries, and all children who are legal residents of those school districts are eligible to apply. Although the students do not have to be Hawaiian, the classrooms are located in predominately Hawaiian areas. There is no tuition charged.

The Schools process between 5,000 and 6,000 applications per year. Because there are more applicants than available seats at the School, competition for entrance is keen, and those with no Hawaiian ancestry are not considered. Competitive tests are used to determine the most eligible applicants. Ancestry is not verified until a child has been accepted.

All printed material denotes the Hawaiian preference policy. The tie breakers include quantum Hawaiian, staff, parent, and/or alumni status. Financial aid is given to approximately 40 to 45 percent of the students, based on need. Partial financial aid is offered. In addition, annual tuition is subsidized by the Bishop Estate and ranged from \$553 for Grades K-6 to \$688 for Grades 7-12 for the 1998-99 school year. Meal and activity fees are also subsidized.

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The School's admissions process is competitive based on geographic area and admissions are equally divided between girls and boys. To enroll, students must have an Hawaiian ancestor and parents or legal guardians must be residents of the islands. If a child has moved to live with relatives in order to attend school, the individuals formally establish a change in guardianship to meet the residency requirements. The selection process includes a "first screening" based on development skills and an "observation phase." A certain number of slots are reserved for orphaned and/or indigent children without regard to geographic district. Hawaiian children who are orphaned and/or living in indigent circumstances are given special consideration for kindergarten. The secondary school, grades 7 through 11, will admit all qualified orphans as determined by the admissions and testing process. This has been interpreted in practice to be 15 percent of the class admitted in a year. In 1991 orphan/indigent students became a separate admissions category that is given consideration before decisions regarding regular admissions are made.

The admissions policy does not exclude an individual of any particular racial or ethnic group as long as the Hawaiian ancestry requirement is met. Students belong to a wide variety of ethnic and racial groups. For the 1997/98 school year 78.3 percent of the students were of Caucasian ancestry, 73.7 percent Chinese ancestry, 30.9 percent Filipino ancestry, 27.7 percent Japanese ancestry, and 23.4 percent were of other ancestries. Other ancestries include African-American, Arabian, Brazilian, Indian, Native Alaskan, and Native American.

There are two types of summer programs: Campus Day Programs and Campus Boarding Programs. These programs include Summer School, Performing Arts Academy, Summer Science Institute, Ho'omaka'ika'i Explorations, Kamehameha Computer Camp, Kulia I Ka Pono, and International Studies Institute. Each program has different requirements, including several programs without the Hawaiian ancestry requirement.

The financial aid program is a compilation of various fund sources developed over the years. Funds are administered by the Financial Aid Department and are categorized into those which assist students currently enrolled at the school and those which assist students pursuing post-secondary studies. A child need not be enrolled in the school to receive post-secondary studies aid, but must be of Hawaiian descent. The programs are called the Preschool through Grade Twelve and Post-High Programs. Financial aid is determined by a method developed by the College Scholarship Service, the American College Testing Service, and the U.S. Office of Education.

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The issue that is the subject of the current technical advice request was previously considered by this office in a Technical Advice Memorandum ("TAM") dated July 24, 1975. There, we concluded that,

the Kamehameha Schools (1) have a racially nondiscriminatory policy as to students within the purview of Revenue Ruling 71-447, and (2) are thus being operated exclusively for educational purposes within the meaning of section 501(c)(3) of the Code. Therefore, the Bernice P. Bishop Estate should continue to be recognized as exempt from federal income tax under section 501(c)(3) of the Code.

The TAM also stated the following:

The nature of the schools' operating policy is not in dispute. The schools, the press, and the Hawaiian community all recognize and defend the policy of limiting admission to individuals of Hawaiian ancestry. The schools contend that they are conscientiously carrying out the charitable purposes of the Will. They regard the allegation of racial discrimination as specious and misleading. It is their view that, because they admit students of every racial type as long as one of their ancestors was Hawaiian, they are comparable to any other integrated schools in the nation.

Regarding the racial composition of the school, the TAM stated:

It is seriously questionable whether there is any racial discrimination in fact in the schools inasmuch as virtually all races and ethnic groups are represented in the student body.

In the 1975 TAM the Service also determined, in light of the past history and present status of the Schools, that the Hawaiian admission requirement did not rise from and did not create the sort of societal ills that are associated with racially discriminatory policies addressed by Rev. Rul. 71-447, 1971-2 C.B. 230, and Brown v. Board of Education, 347 U.S. 483 (1954). It is readily apparent that the schools were not initially established as an alternate to desegregated public schools, which was the kind of activity that initially led to judicial intervention in this general area of law. There is no segregation of students on the basis of color or other physical features. There is no evidence that, after admission, the

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students are treated any differently due to their heritage and quantum Hawaiian.

In the current request for technical advice the Key District Office ("KDO") states that the Will does not require that admission be limited to those of Hawaiian blood, or that they be given preference other than in assistance to orphans and indigents. The KDO notes that the School admitted non-Hawaiians during the period 1920 to 1925, 1931, and 1946 to 1962. The KDO also states that, in its view, the law has changed since the issuance of the TAM in 1975. In support of this proposition it cites cases such as Regents of the University of California v. Bakke, 438 U.S. 265 (1978), and Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

Attorneys representing the Estate note that the United States Government has a historical and legal obligation to the Native Hawaiian people as indigenous people of Hawaii, and that such obligation has been acknowledged in various legislative acts for over 70 years. The Government's relationship has been specifically acknowledged in:

Native Hawaiian Education Act, 20 U.S.C. 7901, et seq., (Supp. 1997) - The statute provides financial assistance for Hawaiian students pursuing higher education, grants for gifted and talented Hawaiian students in elementary and secondary schools, and a foundation for special disability programs for Hawaiian children. The statute also found that educational risk factors start even before birth for many Native Hawaiian children; Native Hawaiian students often lag behind other students in terms of readiness factors such as vocabulary test scores; Native Hawaiian students continue to score below national norms and in achievement levels; and, Native Hawaiian students are under-represented in institutions of higher education.

Hawaiian Homes Commission Act ("HHCA"), Pub. L. No. 67-34, 42 Stat. 108 (1921) - The statute designated Hawaiian home lands for Native Hawaiians.

Hawaiian Statehood Admission Act of 1959, Pub. L. No. 86-3, sec. 4, 73 Stat. 5 - The statute required as condition for statehood that Hawaii's state constitution incorporate the HHCA and transfer certain federal lands to the state government to hold and use in public trust for the betterment of the condition of Native Hawaiians.

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Native Hawaiian Health Care Act of 1988, 42 U.S.C. 11701, et seq. (Supp. 1997) - The statute provides certain health services for Native Hawaiians.

Other statutes providing benefits for Native Americans, specifically including Native Hawaiians, include: Native American Languages Act, 25 U.S.C. 2901 et seq.; Native American Programs Act of 1974, 42 U.S.C. 2991 et seq.; American Indian Religious Freedom Act, 42 U.S.C. 1996; Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001 et seq.; and, National Historic Preservation Act, 16 U.S.C. 470 et seq.

APPLICABLE LAW:

Section 501(c)(3) of the Code provides, in part, for the exemption from Federal income tax of organizations organized and operated exclusively for charitable and educational purposes.

Section 1.501(c)(3)-1(d)(3)(i)(a) of the Income Tax Regulations defines "educational" as relating to the instruction or training of the individual for the purposes of improving or developing his or her capabilities. This includes an organization such as a primary or secondary school, or a trade school which has a regularly scheduled curriculum, a regular faculty, and a regularly enrolled body of students in attendance at a place where the educational activities are regularly carried on.

Section 1.501(c)(3)-1(d)(2) of the regulations defines the term "charitable" as including the promotion of social welfare by organizations designed to relieve the poor and distressed or the underprivileged.

Rev. Rul. 71-447, 1971-2 C.B. 230, provides that a private school that does not have a racially nondiscriminatory policy as to students does not qualify for exemption from federal income tax under section 501(c)(3) of the Code. It defines a racially nondiscriminatory policy as meaning:

that the school admits the students of any race to all the rights, privileges, programs, and activities generally accorded or made available to students at that school and that the school does not discriminate on the basis of race in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs.

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Rev. Proc. 75-50, 1975-2 C.B. 587, sets forth guidelines and recordkeeping requirements for determining whether private schools that are applying for recognition of exemption from Federal income tax under section 501(c)(3) of the Code, or are presently recognized as exempt from tax, have racially nondiscriminatory policies as to students. Section 3.02 provides that a policy of a school that favors racial minority groups with respect to admissions, facilities and programs, and financial assistance will not constitute discrimination on the basis of race when the purpose and effect is to promote the establishment and maintenance of that school's racially nondiscriminatory policy as to students. Section 4.05 states, in part, that scholarships and loans that are made pursuant to financial assistance programs favoring members of one or more racial minority groups that are designed to promote a school's racially nondiscriminatory policy will not adversely affect the school's exempt status.

In Brown v. Board of Education, 347 U.S. 483 (1954), racial discrimination in public education was held to be unconstitutional and contrary to public policy where African-American minors had been denied admission to public schools attended by white children under laws requiring or permitting discrimination. The Supreme Court stated that segregation with the sanction of law has a tendency to retard the educational development of African-American children and deprive them of the benefits they would receive in a racially integrated school system.

In Green v. Connally, 330 F. Supp. 1150 (D. D.C. 1971), aff'd sub nom., Coit v. Green, 404 U.S. 997 (1971), and in the revised injunction orders issued on May 5 and June 2, 1980, the Internal Revenue Service is prohibited from: "according tax-exempt status to, and from continuing the tax-exempt status now enjoyed by, all Mississippi private schools or the organizations that operate them, which:

- (1) have in the past been determined in adversary or administrative proceedings to be racially discriminatory; or were established and expanded at or about the time the public school districts in which they are located or which they serve were desegregating, and which cannot demonstrate that they do not racially discriminate in admissions, employment, scholarships, loan programs, athletics, and extracurricular programs.

- (2) The existence of conditions set forth in paragraph (1) herein raises an inference of present

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discrimination against blacks. Such inference may be overcome by evidence which clearly and convincingly reveals objective acts and declarations establishing that such is not proximately caused by such school's policies and practices. Such evidence might include, but is not limited to, proof of active and vigorous recruitment programs to secure black students or teachers, including students' grants in aid; or proof of meaningful public advertisements stressing the school's open admissions policy; or proof of meaningful communication between the school and black groups and black leaders within the community and any other similar evidence calculated to show that the doors of the private school and all facilities and programs therein are indeed open to students or teachers of both the black and white races upon the same standard of admission or employment."

In Morton v. Mancari, 417 U.S. 535 (1974), the Court found that Title VII of the Civil Rights Act of 1964 did not repeal the employment preference provision of the Indian Reorganization Act of 1934 (the IRA) nor did the preference constitute invidious racial discrimination in violation of the due process clause of the Fifth Amendment. The Court noted the preference was not directed at a racial group consisting of all Indians, but was political rather than racial in nature. The Court stated as long as the special treatment contributed rationally to the fulfillment of the Congress' unique obligation toward Indians, such legislative judgment would not be disturbed.

In Norwood v. Harrison, 382 F. Supp. 921 (N.D. Miss. 1974), on remand from the Supreme Court, 413 U.S. 455 (1973), and in Brumfield v. Dodd, 425 F. Supp. 528 (E.D. La. 1976), the courts analyzed whether private schools were racially discriminatory. The courts held that a prima facie case of racial discrimination arises from proof (a) that the school's existence began close upon the heels of the massive desegregation of public schools within its locale, and (b) that no blacks are or have been in attendance as students and none is or has ever been employed as a teacher or administrator at the private school.

The Supreme Court, in Regents of the University of California v. Bakke, 438 U.S. 265 (1978) considered whether a white male applicant was discriminated against when denied admission to the medical school at the University of California at Davis. Specifically, the university's special admissions program considered race in admitting students. The Supreme Court, in a divided opinion, affirmed the lower courts and agreed that the special admissions program was unlawful. The Justices

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could not, however, agree on a standard which should be applied. Four Justices did agree that racial classifications call for strict judicial scrutiny; however, that under certain circumstances race could be used as a factor in university admissions.

In Prince Edward School Foundation v. United States, 478 F. Supp. 107 (D. D.C. 1979), aff'd D.C. Cir. 6/30/80, cert. denied, 450 U.S. 944 (1981), the court held that private schools administering racially discriminatory admissions policies are excluded from tax-exempt status under section 501(c)(3) of the Code. The court further held that the foundation had failed to meet its burden of establishing its entitlement to exemption under section 501(c)(3) because the foundation's record was completely devoid of evidence that it was administering a nondiscriminatory admissions policy. The court also stated that the inference that the Foundation administered a racially discriminatory policy may be drawn from the circumstances surrounding the school's establishment. Similar inferences as to the existence of a racially discriminatory policy based on facts surrounding a school's establishment and lack of minority enrollment have been drawn by other courts.

In Bob Jones University v. United States, 461 U.S. 574 (1983), the Supreme Court considered the admissions policies of Bob Jones University and Goldsboro Christian Schools, Inc. Bob Jones University initially prohibited black students from enrolling, later allowed black married students to apply, and finally allowed unmarried blacks to attend, but prohibited interracial dating or marriage. Goldsboro Christian Schools maintained a racially discriminatory admissions policy based upon its interpretation of the Bible and accepted for the most part only Caucasian students. The Court upheld the revocation of exemption under section 501(c)(3) of both schools. The Court concluded that the Service did not err when it refused to continue the tax-exempt status of such schools that either had racially discriminatory admissions policies, or maintained a racially discriminatory code of conduct for students. The Court held that racially discriminatory private schools violate a fundamental public policy and cannot be viewed as conferring a public benefit within the "charitable" concept, or within the Congressional intent underlying sections 170 and 501(c)(3).

In Calhoun Academy v. Commissioner, 94 T.C. 284 (1990), the Tax Court held that a private school failed to show by a preponderance of the evidence that it operated in good faith in accordance with a nondiscriminatory policy toward black students. The private school was formed at the time of desegregation of public schools and never enrolled a black student or employed a

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black teacher. The court concluded that the school did not qualify for exemption under section 501(c)(3) of the Code.

In Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), the Court struck down a program that gave preference to socially and economically disadvantaged individuals. The Court concluded that such preferences led to racial discrimination against people who are not members of minority groups. The decision limited the conditions under which government programs may provide ethnic minorities with special benefits and assistance not available to non-minorities, even though the minority groups have historically been the victims of racial discrimination.

In Rice v. Cayetano, 963 F. Supp. 1547 (1997), aff'd 146 F.3d 1075 (9th Cir. 1998). Note, on March 22, 1999, the U.S. Supreme Court accepted the Ninth Circuit's decision for review. The court considered whether the State of Hawaii may limit those who vote in special trustee elections of the Office of Hawaiian Affairs to those whose benefit the trust was established. The court concluded that the requirements of the Fourteenth and Fifteenth Amendments are not violated by limiting the right to vote to Native Hawaiians because the restriction on the right to vote is not based upon race, but upon a recognition of the unique status of Native Hawaiians. This classification derives from the trust obligations owed and directed by Congress and the State of Hawaii. Consequently, the court found a rational basis for the preference in favor of Native Hawaiians, following and extending the Supreme Court's holding in Morton v. Mancari, supra, to Native Hawaiians. The Court found further that this preference was in accordance with the public policy stated in legislative and judicial precedent.

RATIONALE:

The sole issue in this request for technical advice is whether the Estate's restriction of admissions to children of Hawaiian ancestry is consistent with the requirements for exemption under section 501(c)(3) of the Code. As an organization that operates a private school, the Estate is required to operate in a racially nondiscriminatory manner in accordance with the requirements set forth in Rev. Rul. 71-447, supra, and Rev. Proc. 75-50, supra. In 1975 this office concluded that the Estate's admissions policy was not indicative of racial discrimination. The question presented today is whether our previous holding retains its vitality.

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In order to analyze this issue, a brief review of how the Service arrived at its position in the area of private schools would be useful. Following a lengthy study, the Service concluded in 1967 that racially discriminatory private schools whose operations involved state action constituting a violation of the Constitution or Federal laws were not entitled to tax-exempt status under section 501(c)(3) of the Code. In 1970, the Service announced that regardless of state involvement, racially discriminatory private schools no longer qualified for exemption under section 501(c)(3). The basis for this conclusion was subsequently published in Rev. Rul. 71-447, supra, which defines a racially nondiscriminatory policy as meaning that the school admits the students of any race to all rights, privileges, programs, and activities generally accorded or made available to students at the school and that the school does not discriminate on the basis of race in the administration of its educational policies, scholarship and loan programs, and athletic or other school administered programs. This position was implemented by Rev. Proc. 72-54, 1972-2 C.B. 834, which was superseded by Rev. Proc. 75-50, supra. Rev. Proc. 75-50, together with the provisions contained therein, has not been revoked, modified, or superseded.

In arriving at the position that racially discriminatory private schools are not exempt under section 501(c)(3) of the Code, Rev. Rul. 71-447 identified a clearly established Federal policy against racial discrimination in education as reflected in the Civil Rights Act of 1964. Brown v. Board of Education, supra. Since the publication of Rev. Rul. 71-447, there have been further judicial decisions reflective of a clear public policy against racial discrimination in education. Specific and prominent examples of such public policy against racial discrimination can be found in the revised injunction in Green v. Connally, the textbook cases of Norwood v. Harrison and Brumfield v. Dodd, Prince Edward School Foundation v. United States, Bob Jones University v. United States, and Calhoun Academy v. Commissioner, all supra. These cases advance the premise of Rev. Rul. 71-447 that an organization may not be exempt under section 501(c)(3) of the Code, if it operates in a manner contrary to public policy.

The most significant judicial precedent in this area is Bob Jones University v. United States, supra, which emphatically and nearly unanimously affirmed the Service's position on racially discriminatory private schools. There, the Supreme Court held that racial discrimination in education is contrary to public policy, and racially discriminatory educational institutions cannot be viewed as conferring a public benefit within the "charitable" concept, or within the Congressional intent

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underlying sections 170 and 501(c)(3) of the Code. Bob Jones specifically involved discrimination against African-American students. The Supreme Court cited an unbroken line of cases as well as numerous federal legislative enactments and Executive Branch Executive Orders for its position that Bob Jones University violated a fundamental public policy. The Court stated:

We are bound to approach these questions with full awareness that determinations of public benefit and public policy are sensitive matters with serious implications for the institutions affected; a declaration that a given institution is not "charitable" should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy.

Bob Jones University, 461 U.S. at 592.

The Court took great care in again emphasizing the limited circumstances in which the Service and the courts should act in this area when it stated: "We emphasize, however, that these sensitive determinations should be made only where there is no doubt that the organization's activities violate fundamental public policy." Bob Jones University, 461 U.S. at 598.

In its analysis, the Key District Office relies upon several Supreme Court opinions addressing the constitutional challenges to governmental actions under the Equal Protection clauses of the Fourteenth Amendment and the Fifth Amendment. The Supreme Court has considered several situations in which remedial action has been taken by governmental entities to, in essence, correct previous effects of past racial discrimination. In Regents of the University of California v. Bakke, 438 U.S. 265 (1978) the Court failed to produce a majority opinion and left unresolved the proper analysis for remedial race-based governmental action. In the end five of the Justices, for varying reasons, decided that the special admissions program administered by the state of California was unlawful. Four of the Justices, however, recognized that there would be situations in which benefits to ethnic minorities would be appropriate to further compelling governmental interests.

More recently, the Supreme Court considered and struck down race-based affirmative action policies in governmental contracting. In Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995), the Court analyzed the status of the law in this area and noted the failure of the Court to produce a majority opinion in Bakke, Fullilove v. Klutznick, 448 U.S. 448 (1970) and Wygant v.

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Jackson Bd. of Education, 476 U.S. 267 (1986). The Court, in analyzing Fullilove and Wygant noted that in both cases, three Justices reiterated the view of the four Justices in Bakke that any race-based governmental action designed to "remedy the present effects of past racial discrimination" should be upheld if it was substantially related" to the achievement of an important governmental objective. Adarand, 515 U.S. at 220-221 (citing Fullilove, supra at 518-519 and Wygant, supra at 301-302.) However, the Court went on to set forth the following standard:

Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.

Adarand, supra at 227.

The Court went on to elaborate when a compelling governmental interest might be present, and stated:

The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.

Adarand, supra at 237.

In both Regents of the University of California v. Bakke, supra, and Adarand Constructors, supra, a sharply divided Supreme Court struck down policies that led to racial discrimination against people who are not members of minority groups. The Court in both cases, however, recognized that there would be situations in which benefits to ethnic minorities would be appropriate to further compelling governmental interests.

As discussed above, the Supreme Court in Bob Jones, supra, also made it clear that the role of the Internal Revenue Service is very limited and the Service should act only in those situations where there is no doubt that the organization's activities violate fundamental public policy. Nothing in the Supreme Court's most recent analysis of the constitutional requirement of Equal Protection has changed the Court's holding in Bob Jones. The Supreme Court has given the Service explicit guidelines regarding those limited circumstances when it would be appropriate for action to be taken by the Service to preclude or

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withdraw exemption. The Supreme Court in Bob Jones, supra, concluded that unless there is a clearly established fundamental public policy against granting exemption, an educational organization would qualify for exempt status under section 501(c)(3) of the Code. Here, the factors that have resulted in certain private schools being revoked or denied exemption under section 501(c)(3) are not present. Students of many races are enrolled at Kamehameha Schools with the common bond of all students being that of having some Native Hawaiian descent, and the School has a significantly diverse and multi-racial enrollment with a broad representation of ethnic backgrounds and races in the student body. Furthermore, while the School does give preference to some Hawaiian ancestry, there are many Federal laws designed to provide beneficial treatment to Native Hawaiians. In contrast, we find no laws or court cases indicating that a restrictive admissions policy in favor of Native Hawaiians would cause the Estate to violate clearly established public policy, nor do we find that this policy is of the type, either in origin or result, that gave rise to the opinion in Bob Jones. Instead, in view of the numerous federal and state legislative statutes that provide for an Hawaiian preference in all ways of life, including education, it is reasonable to conclude that there is a public policy in favor of such a preference and that the School's practices are consistent with this policy.

In considering policies of this type, the Supreme Court has drawn a distinction between racial classifications that are prohibited under the civil rights laws and political classifications that are benign. In Morton v. Mancari, supra, and its progeny, the courts have recognized the Federal government's obligations to Native Americans arising from the special fiduciary relationship between the government as guardian and Native Americans as wards. The history of the aboriginal people of Hawaii clearly parallel that of the aboriginal people of the American continent. In Rice v. Cayetano, supra, the Ninth Circuit confirmed that the legal analysis applicable to Native Americans also applies to Native Hawaiians because of the political guardian-ward relationship between the Federal government and the indigenous Native Hawaiian people. See also Naliielua v. Hawaii, 795 F. Supp 1009 (D. Haw. 1997), where the court ruled Native Hawaiians are people indigenous to the State of Hawaii, just as American Indians are indigenous to the mainland United States. The numerous Federal and State legislative enactments that provide beneficial treatment for Native Hawaiians in a variety of contexts (not only education) indicate that the Estate's admissions policy does not rise to the level of racial discrimination in contravention of public policy.

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The 1975 TAM explained that the Estate's admissions policy is consistent with Federal policy, stating that:

[A] strong argument can be made that the Kamehameha schools serve the special social and educational needs of a generally necessitous class of persons who because of their cultural heritage currently tend to be disadvantaged by reason of discrimination. The need for assistance to disadvantaged cultural groups which have had a history of being discriminated against because of their heritage was recognized by Congress in the enactment of the Native American Programs Act of 1974, Title VIII of Pub. L. 93-644, the Community Services Act of 1974. This Act authorizes the Secretary of the Department of Health Education and Welfare to provide financial assistance to certain Native Americans, including Alaskans, Hawaiians, and Indians or to organizations serving these groups.

The Service also recognized that, in light of the past history and present status of the Schools, the Native Hawaiian preference did not arise from and does not create the sort of societal ills that are associated with racially discriminatory policies and that are addressed by Rev. Rul. 71-447, supra. As stated previously, there have been no significant changes that would warrant a different conclusion from that of the 1975 TAM to be reached today. Furthermore, additional legislation has been enacted regarding programs for Native Hawaiians that has been upheld by the courts. Therefore, we conclude that the Estate's admissions restriction for Native Hawaiians remains consistent with current fundamental public policy.

CONCLUSION:

Based upon the foregoing discussion, the Estate's admission policy is consistent with the requirements for recognition of exemption as an organization described in section 501(c)(3) of the Code.

We note that on March 22, 1999, the Supreme Court agreed to review the Ninth Circuit's decision in Rice v. Cayetano, supra. Accordingly, after the Supreme Court issues its decision in this case, the Estate should consider requesting a private letter ruling on whether the decision has any effect on the analysis and decision contained in this TAM.

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EFFECT ON OTHER DOCUMENTS:

The TAM dated July 24, 1975, is affirmed.

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