



STATE OF ARKANSAS

House of Representatives

June 7, 2021

Leslie Rutledge, Attorney General
State of Arkansas
323 Center Street, Suite 200
Little Rock, AR 72201

Dear General Rutledge:

Please be advised that I write to request your opinion regarding the legality of teaching so-called “anti-racism” and Critical Race Theory in Arkansas public schools and universities. More specifically, I request your opinion as to whether these practices appear to violate Title VI of the Civil Rights Act of 1964, the Equal Protection Clause of the Fourteenth Amendment, Article II, the Arkansas Constitution, or other applicable nondiscrimination laws.

As recipients of federal financial assistance, Arkansas public schools and universities are subject to various federal civil rights statutes. One such statute is Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and its implementing regulations at 34 C.F.R. Part 100, which prohibit discrimination on the basis of race, color, or national origin. As a result, educational programs and activities in Arkansas must operate in a nondiscriminatory manner.

The U.S. Department of Education recently released a proposed new rule establishing priorities for grants in “American History and Civics Education” programs. *Proposed Priorities-American History and Civics Education*, 86 Fed. Reg. 20348 (April 19, 2021). This rule would offer priority to grant projects that “incorporate racially, ethnically, culturally, and linguistically diverse perspectives.” *Id.* at 20349. I believe this will result in serious negative effect on education in Arkansas. It also raises serious questions as to whether it encourages schools to treat students differently on the basis of race in violation of federal and state nondiscrimination laws.

The most troubling aspect of the proposal is the incorporation of so-called “anti-racist” teachings and “Critical Race Theory” into classrooms. The

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proposal notes that “schools across the country are working to incorporate anti-racist practices into teaching and learning.” 86 Fed. Reg. 20349. It explains:

As scholar Ibram X. Kendi has expressed, “[a]n anti-racist idea is any idea that suggests the racial groups are equals in all their apparent differences - that there is nothing right or wrong with any racial group. Anti-racist ideas argue that racist policies are the cause of racial inequities.” It is critical that the teaching of American history and civics creates learning experiences that validate and reflect the diversity, identities, histories, contributions, and experiences of all students.

Kendi’s HOW TO BE AN ANTI-RACIST is radical in its contention that “the most threatening racist movement is ... the regular American’s drive for a ‘race-neutral’ [state].” Incorporating the ideas of “institutional racism,” “structural racism,” and “systemic racism,” he argues that:

A racist policy is any measure that produces or sustains racial inequity between racial groups. An anti-racist policy is any measure that produces or sustains racial equity between racial groups. By policy, I mean written and unwritten laws, rules, procedures, processes, regulations, and guidelines that govern people. There is no such thing as a nonracist or race-neutral policy. Every policy in every institution in every community in every nation is producing or sustaining either racial inequity or equity between racial groups. *Id.*

Kendi’s most shocking pronouncement is the belief that “[t]he only remedy to past discrimination is present discrimination. The only remedy to present discrimination is future discrimination.” *Id.*

“Anti-racism” is closely linked with a discipline known as “Critical Race Theory” (CRT), which stresses racial divisions and sees society in terms of minority racial groups oppressed by the majority. CRT argues that whites have been the primary beneficiaries of civil rights legislation. CRT stands against the liberal claim to colorblindness in favor of racial, ethnic, gender, and sexual

differences as the basis for the constitution of a pluralistic and democratic society.

These ideas are not only fallacious, they also lead to discrimination when implemented. For example, students and faculty have been asked to catalogue their “anti-racist” activities including the imposition of the now seemingly acceptable label of “white fragility” for those who rationally choose not to join in such McCarthyite activities.

Indeed, many can recall the now-tinge worthy claims of “female fragility” of times past. Those are thankfully now eschewed, but the ease with which that very same collective pseudo-psychological emotional characterization is welcomed discourse regarding, in this case, a racial group underscores that under new leftist doctrine, majority-cohort membership alone justifies those in that class being saddled with the condemnation of inherent bias and collective wrongdoing. And the similar activity seen across various university enlightenment assemblies and corporate wokeness sessions of proclaiming one’s inherent racism calls for a comparable moral self-flagellation by those culpably born into the new acceptably derided class of “privilege,” be it based on race, economic status, or yet another improper factor on which to judge individual worth.

All of these activities are designed to force a public accounting, at public institutions, at the behest of entrenched bureaucrats, of one’s moral worth on a leftist political scale in contravention of the simple fact that not pursuing an anti-racist agenda does not necessarily make for a racist nor even a beneficiary of racism. Plenty of non-minorities have profited from no kind of privilege – ever-present attempts to cast them otherwise due to their cohort membership notwithstanding.

Actions such as these appear to be in violation of the plain language of Title VI because individuals are treated differently based on race. *See* 42 U.S.C. § 2000d (“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.”). When a school or university separates or excludes

students on the basis of race for these “anti-racist” activities, it clearly constitutes different treatment.

Additionally, these materials may cause a racially hostile environment under Title VI, *i.e.*, harassing conduct, if they are sufficiently severe, pervasive, or persistent so as to interfere with or limit the ability of a student to participate in or benefit from the services, activities or privileges provided by a school – with similar concerns in the employment context for faculty under Title II. *See Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. 4271 (Jan. 31, 1994). Thus, if a school or university allows students or faculty to be judged, labeled, or assigned guilt according to their race, that could create an impermissible hostile environment. *See id.* (a school has subjected an individual to different treatment on the basis of race if it has effectively caused, encouraged accepted, tolerated or failed to correct a racially hostile environment of which it has actual or constructive notice).

As always, your prompt attention and efforts are appreciated. I look forward to hearing from you soon.

Sincerely,

A handwritten signature in black ink that reads "Mark Lowery". The signature is written in a cursive, flowing style.

Mark Lowery
State Representative
District 39

ML/dl