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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

May 4, 2021

Representative Christine Drazan
House Republican Leader
900 Court Street NE H395
Salem OR 97301

Re: House Bill 2001 -6 Amendments

Dear Representative Drazan:

You have asked about the -6 amendments to House Bill 2001 in relation to Title VII of the Civil Rights Act and the United States Constitution. Our answers are provided below.

Overview of -6 Amendments to House Bill 2001

The -6 amendments to House Bill 2001 address the situation when a school district is required to make reductions in teacher staff positions as a result of the school district's lack of funds.[1] The amendments retain the current statutory prioritization based on seniority when determining which teachers will be retained,[2] but establish an exception to that prioritization. The exception requires a school district to retain a qualified teacher with cultural or linguistic expertise who has less seniority than another teacher if the release of the teacher would decrease the school district's diversity ratio.[3]

The first step required under the exception is for a school district to determine if the release of a teacher will decrease the school district's diversity ratio. For the purpose of that determination, the term "diversity ratio" is defined to mean:

> [T]he ratio of all diverse persons employed as teachers by a school district compared to all diverse students enrolled in the public nonchartered schools located in the boundaries of the school district, as calculated based on data available to the school district over the previous three-year period.[4]

The diversity ratio of a school district is heavily dependent on the interpretation of the term "diverse." The term "diverse" is given the meaning of that term in ORS 342.433,[5] which defines that term for purposes of the Educators Equity Act. First enacted 30 years ago, the goal of the

[1] House Bill 2001-6, section 1 (2) (amending ORS 342.934).
[2] *Id.* at section 1 (4)(a).
[3] *Id.* at section 1 (4)(b).
[4] *Id.* at section 1 (1)(d).
[5] *Id.* at section 1 (1)(c).

Educators Equity Act is to increase the percentage of diverse educators in public schools.[6] For the purposes of that Act, the term "diverse" is defined to mean:

> [C]ulturally or linguistically diverse characteristics of a person, including:
> (a) Origins in any of the black racial groups of Africa but is not Hispanic;
> (b) Hispanic culture or origin, regardless of race;
> (c) Origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent or the Pacific Islands;
> (d) Origins in any of the original peoples of North America, including American Indians or Alaskan Natives; or
> (e) A first language that is not English.[7]

For the Educators Equity Act and House Bill 2001, the definition of the term "diverse" includes both racially-neutral and racially-oriented characteristics. For example, a teacher whose first language is Spanish would be designated as diverse, regardless of the teacher's race. Similarly, a teacher who has an origin in "any of the black racial groups of Africa" also would be designated as diverse.[8]

Under the -6 amendments, if the release of a teacher would result in a decrease of the school district's diversity ratio, then the school district must proceed to the second step of the exception established under the amendments. The requirement of proceeding to a second step means that a school district is not required to retain a diverse teacher for the sole purpose of preventing a potential decrease in a school district's diversity ratio. In other words, a school district would not be required to retain a diverse teacher whose release would decrease a school district's diversity ratio if the teacher is not a qualified teacher with cultural or linguistic expertise.

The second step in applying the exception is for the school district to determine if the teacher with less seniority is a qualified teacher with cultural or linguistic expertise.[9] Under the amendments, a teacher is qualified if the teacher has: (1) more cultural or linguistic expertise than a teacher with more or equal seniority; and (2) proper licensing or credentials.[10] The requirement related to licensing or credentials mirrors current law as applied to retention based on seniority. For example, under this requirement, a high school orchestra teacher could not be retained by a school district to teach kindergarten. The requirement related to cultural or linguistic expertise is more complex and requires a more detailed analysis.

Determining if a teacher has more cultural or linguistic expertise is based on consideration of three possible factors. Each factor is distinct and all three factors are not required. The three factors are: (1) linguistic ability in relation to an in-district language; (2) participation in a program, plan or practice to increase educator diversity or retain diverse educators; or (3) a teacher's current work assignment serving diverse students.[11] None of the factors specifically mentions race. Each of the three factors is discussed in greater detail below.

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[6] ORS 342.437 (1).
[7] ORS 342.433 (1).
[8] ORS 342.433 (1)(a).
[9] House Bill 2001-6, section 1 (4)(b) (amending ORS 342.934).
[10] *Id.* at section 1 (1)(g).
[11] *Id.* at section 1 (1)(b).

The first factor involves linguistic ability in relation to an in-district language,[12] which is a language spoken by five percent or more of the students of the school district.[13] Race is not a component of this factor. Under this factor, a white teacher who is fluent in Russian could be retained at a school where five percent or more of the students at the school speak Russian. Conversely, under this factor, a Native American teacher who is fluent in a language that is not English but that is not spoken by five percent or more of the students at the school may be released.

The second factor involves participation in any program, plan or practice to advance the Educators Equity Act or to otherwise increase educator diversity or retain diverse educators.[14] This factor potentially requires more from a teacher than passively being diverse, depending on the requirements of the program, plan or practice. Nonetheless, being designated as diverse is a key element of this factor and, as discussed above, the definition of the term "diverse" does have a racial component. Under this factor, a teacher could be retained because the teacher participated in a program to increase educator diversity and the teacher may have participated in that program because of the teacher's race. This factor could be problematic, as discussed below.

The third factor involves a teacher's work assignment that requires the teacher to work at least 50 percent of the teacher's work assignment time with a student population that is at least 25 percent diverse.[15] This factor does not have a racial component, and could be equally appliable to any teacher regardless of race.

In conclusion, a school district making teacher staff reductions under the -6 amendments must follow a two-step process when determining if a less senior diverse teacher must be retained. While the first step may involve consideration of characteristics other than race, race alone is an allowed deciding characteristic. Under the second step, a school district considers three specified factors related to a teacher that appear race neutral; however, one of the factors may be strongly, if not solely, dependent on a teacher's race. The potential for race being a significant factor for determining if a teacher must be retained could be problematic and is explored in greater detail below. Not explored in this analysis is the potential for racially discriminatory applicability of the amendments, or a disparate impact based on race. Disparate impact is not explored because that analysis requires a review of the effects of a race-neutral law, and those effects cannot be analyzed until the law has been put into practice.

Equal Protection Clause of the Fourteenth Amendment to the United States Constitution

As explained above, House Bill 2001 may cause a teacher's race to be a significant factor that leads to the retention of the teacher when a school district is making reductions in teacher staff. A law that makes race a factor for determining how a person is treated should be analyzed under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Equal Protection Clause provides "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[16]

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[12] *Id.* at section 1 (1)(b)(A).
[13] *Id.* at section 1 (1)(e).
[14] *Id.* at section 1 (1)(b)(B).
[15] *Id.* at section 1 (1)(b)(C).
[16] Fourteenth Amendment to the United States Constitution. Due to time constraints, we did not specifically conduct an analysis under the related provision of the Oregon Constitution. That provision is Article I, section 20, of the Oregon Constitution, which provides that "[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." An analysis under the equal protection

In essence, the Equal Protection Clause mandates that state and local governments treat similarly situated persons equally under the law.[17] When a law treats individuals differently based on race, the United States Supreme Court has concluded that such laws are inherently suspect and subject to strict scrutiny.[18] The strict scrutiny analysis requires that a law that treats individuals differently based on race: (1) serve a compelling government interest; and (2) be narrowly tailored to achieve that interest.[19]

For the purpose of determining how the United States Supreme Court would apply a strict scrutiny analysis to the -6 amendments, a good starting place is *Wygant v. Jackson Board of Education*.[20] Under *Wygant*, the Court reviewed a school district's collective bargaining agreement that protected teachers of certain minority groups from layoffs.[21] This case is important for reviewing the -6 amendments because the Court considered the argument that retaining a diverse teacher workforce is a compelling government interest. Ultimately, the Court rejected the lower court's finding that the school district was justified in enacting a race-based policy to provide "minority role models for its minority students, as an attempt to alleviate the effects of societal discrimination."[22] Furthermore, the Court rejected the linking of the percentage of minority teachers with the percentage of minority students,[23] expressing concern that, taken to the extreme, such policies could result in a segregated education system that had been expressly rejected by the Court.[24] Instead, the Court required a showing of prior discrimination by the specific school district that could be remedied by the law[25] and that could be demonstrated based on a comparison between the racial composition of the staff of the school district and the racial composition of the qualified public school teacher population that made up the labor market serving that school district.[26]

The -6 amendments propose a policy that is more nuanced than the policy reviewed under *Wygnant*. While race could be a decisive factor under the first step of the amendments, a diverse teacher still must be a qualified teacher with cultural and linguistic expertise and that expertise must be demonstrated through factors that may be race neutral. As discussed above, however, one of those factors could be significantly race based. The fact that a person could satisfy the requirements of both steps based primarily on race causes the drawing of a strong comparison between the -6 amendments and *Wygnant*. The similarities between these policies make the amendments legally risky because a court may be required to reconsider and reject parts of *Wygnant.* The bill itself and testimony presented by the chief sponsor appear to lay some of the groundwork for reconsideration.[27] That groundwork presents the argument that the state interest in having and promoting the development of a diverse teacher workforce should be brought to the logical conclusion of providing employment stability and preserving the gains made in developing that workforce. While that may be a valid argument and could constitute a compelling state

provisions of the Oregon Constitution is similar to an analysis of the equal protection provisions of the United States Constitution. *Olsen v. State*, 276 Or. 9 (1976).
[17] *See Engquist v. Or. Dept. of Agriculture*, 553 U.S. 591, 601 (2008).
[18] *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999).
[19] *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).
[20] 476 U.S. 267 (1986).
[21] *Id*. at 269.
[22] *Id*. at 274.
[23] *Id*. at 275.
[24] *Id*. at 276, *referring to Brown v. Board of Education*, 347 U.S. 483 (1954).
[25] 476 U.S. at 274.
[26] *Id*. at 275.
[27] *See* the preamble to House Bill 2001 and the testimony presented by Speaker of the House Tina Kotek on February 23, 2021, and April 30, 2021.

interest, we are unaware of any existing case law that clearly would guide a court to that conclusion.

Even if a court could be convinced that there is a compelling state interest in preserving gains made in diversifying the teacher workforce, a court still would be required to find that the -6 amendments are narrowly tailored. The Court has not given favorable consideration to layoff policies that protect certain groups[28] and draws a distinction with hiring practices, stating that "[d]enial of a future employment opportunity is not as intrusive as loss of an existing job."[29] The Court concluded by stating that the "selection of layoffs as the means to accomplish even a valid purpose cannot satisfy the demands of the Equal Protection Clause."[30]

In summary, the policy presented by the -6 amendments has elements that are racially neutral and may survive a review under the Equal Protection Clause; however, there also are parts of the policy that are racially driven and would be subjected to a strict scrutiny analysis. Under a strict scrutiny analysis, a showing must be made that there is a compelling state interest in a policy that treats people differently based on race and that the policy is narrowly tailored. While there is potential that a court could reconsider past case law and find a compelling state interest consistent with the policy presented by the -6 amendments, we believe the policy could not survive a review of being narrowly tailored.

Interaction of Title VII of the Civil Rights Act

In your request, you asked if the definition of "diverse" in House Bill 2001 contradicts Title VII of the Civil Rights Act of 1964. Title VII prohibits public and private employers from failing or refusing to hire or to discharge a person because of the person's race, color, religion, sex or national origin.[31] Analysis under Title VII often is very similar to analysis under the Equal Protection Clause,[32] but Title VII applies to actions taken by employers while the Equal Protection Clause applies to actions taken by state and local government.

As discussed above, many of the employment decisions made by a school district under the -6 amendments may be based on race-neutral factors. Nonetheless, there are situations allowed under the amendments that could cause race to be a significant factor for an employment decision. When a school district makes an employment decision based on a race-neutral factor, we do not believe there would be any conflict with Title VII. When race plays a more significant role in the school district's employment decision, we believe the school district could be in violation of Title VII.

We hope this answers your questions.

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[28] 476 U.S. at 282, *citing Firefighters v. Stotts*, 467 U.S. 561, 574-576, 578-579 (1984).
[29] 476 U.S. at 282-283.
[30] *Id*. at 284.
[31] 42 U.S.C. 200e-2 (a)(1).
[32] *See General Elec. Co. v. Gilbert,* 429 U.S. 125, 133 (1976).

the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

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