



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

May 20, 2021

Representative Tina Kotek
Speaker of the House
900 Court Street NE Rm269
Salem OR 97301

Re: House Bill 2001 -7 Amendments

Dear Speaker Kotek:

You have asked if the -7 amendments to House Bill 2001 resolve the constitutional and federal law concerns we raised related to the -6 amendments to House Bill 2001.¹ We conclude that those concerns have been resolved by the -7 amendments, and we conclude that the text of the -7 amendments does not violate the Equal Protection Clause of the United States Constitution or Title VII of the Civil Rights Act.

Comparison Between -6 and -7 Amendments

Both the -6 and the -7 amendments require school districts to prioritize the retention of qualified teachers with cultural or linguistic expertise when experiencing budgetary conditions that require teacher layoffs. There are two significant differences between the amendments, and those differences are: (1) the trigger for when a school district would be required to determine if a teacher has cultural or linguistic expertise; and (2) the factors that a school district would consider when determining a teacher's cultural or linguistic expertise.

The first significant difference between the two sets of amendments is the trigger for when a school district would be required to determine if a teacher has cultural or linguistic expertise. In the -6 amendments, that trigger would be a decrease in the school district's diversity ratio caused by the release of a diverse teacher.² The term "diversity ratio" is defined in those amendments as a calculation that is based on the number of diverse persons employed as teachers in the school district.³ The term "diverse," in turn, is defined to mean certain characteristics of a person, which could include that person's race.⁴ While characteristics other than race could trigger further review of a person's expertise, a person's race alone could trigger that review. A trigger mechanism based solely on race raises significant constitutional concerns.

The concerns related to the trigger in the -6 amendments have been removed from the -7 amendments. In the -7 amendments, references to diversity ratio or a teacher's diverse

¹ See LC Opinion submitted by Representative Christine Drazen, related to House Bill 2001 -6, dated May 4, 2021 (available at <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/CommitteeMeetingDocument/241373>).

² House Bill 2001 -6, section 1 (4)(b) (amending ORS 342.934).

³ *Id.* at section 1 (1)(d).

⁴ *Id.* at section 1 (1)(c) and ORS 342.433 (1).

characteristics have been removed. Instead, the focus is on a teacher's expertise. In the -7 amendments, the trigger is a lowered proportion of teachers with cultural or linguistic expertise.⁵ A school district would be reviewing the skills of a teacher rather than the characteristics of a teacher. The changes to the trigger remove any constitutional concerns.

The second significant difference between the two sets of amendments relates to the factors that a school district would consider when determining a teacher's cultural or linguistic expertise. The -6 amendments include three factors: (1) a teacher's linguistic ability; (2) a teacher's participation in a program, plan or practice to increase educator diversity or retain diverse educators; or (3) a teacher's work assignment.⁶ The first and third factors are not problematic, but the second factor could be problematic because a person could have participated in a program, plan or practice based on the person's race.⁷ A factor for retention based on a teacher's race raises significant constitutional concerns.

The concerns related to the factors for retention in the -6 amendments have been removed from the -7 amendments. As previously mentioned, the first and third factors of the -6 amendments are not problematic, and those factors also are in the -7 amendments. The second factor, however, has been changed. In the -7 amendments, the second factor for retention is for a teacher to have completed a teacher pathway program that focuses on increasing the number of culturally or linguistically diverse teachers. The removal of race as a factor for retention also removes any constitutional concerns.

Review of Language in -7 Amendments

When asked to provide an opinion about the -6 amendments, we expressed concern that the amendments could be found to violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Equal Protection Clause mandates that state and local governments treat similarly situated persons equally under the law.⁸ When a law treats persons differently, any classifications based on a suspect characterization such as race will be subjected to a strict scrutiny review by the courts and will be upheld only if the classification promotes a compelling state interest that is narrowly tailored.⁹ Although the -7 amendments refer to culture, they do not refer to any suspect classifications.

Based on our research, no court has designated culture as a suspect classification. Unlike race, which is based on common physical traits,¹⁰ culture is based on common behaviors or beliefs.¹¹ Courts have recognized culture as a complex and changing concept that is not as definitive as race.¹² When courts have considered classifications based on culture, courts have declined to equate culture with race for purposes of both the Equal Protection Clause¹³ and Title VII of the Civil Rights Act.¹⁴ While case law related to culture and discrimination is limited,

⁵ House Bill 2001 -7, section 1 (4)(b) (amending ORS 342.934).

⁶ House Bill 2001 -6, section 1 (1)(b) (amending ORS 342.934).

⁷ See *id.* at section 1 (1)(b)(B) and definition of "diverse" as provided in section 1 (1)(c) and ORS 342.433.

⁸ See *Engquist v. Or. Dept. of Agriculture*, 553 U.S. 591, 601 (2008).

⁹ See *e.g.*, *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

¹⁰ Merriam-Webster Collegiate Dictionary, <https://unabridged.merriam-webster.com/collegiate/race>

¹¹ Merriam-Webster Unabridged Dictionary, <https://unabridged.merriam-webster.com/unabridged/culture> (last visited May 20, 2021).

¹² *Equal Emp't Opportunity Comm'n v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1033-1035 (11th Cir. 2016).

¹³ See *Livingston v. Ewing*, 455 F.Supp. 825, 831 (Dist. New Mex. 1978).

¹⁴ See *e.g.*, *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1487 (9th Cir. 1993) and *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980).

existing case law leads us to conclude that the text of the -7 amendments does not violate the Equal Protection Clause or Title VII of the Civil Rights Act.

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Very truly yours,

DEXTER A. JOHNSON
Legislative Counsel

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

By
Hannah Lai
Senior Deputy Legislative Counsel