



May 12, 2021

Office of the Attorney General
Attorney General Austin Knudsen
215 North Sanders, Third Floor
PO Box 201401
Helena, MT 59601-1401

Dear Attorney General Knudsen:

Pursuant to M.C.A. 2-15-501(7), as Superintendent of Public Instruction for the State of Montana, I hereby formally request an Attorney General Opinion on the legality of teaching so-called “antiracism” and Critical Race Theory in Montana Public Schools. Specifically, I request your opinion as to whether these practices may violate Title VI of the Civil Rights Act of 1964, the Equal Protection Clause of the Fourteenth Amendment, Article II, Section 4 of the Montana Constitution, or other applicable nondiscrimination laws.

Standing

The Montana Office of Public Instruction (OPI) is the State Education Agency responsible for supervision of the state’s local education agencies (LEAs). As recipients of Federal financial assistance, OPI and its LEAs are subject to various federal civil rights statutes. One of these statutes 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 Montana must operate in a nondiscriminatory manner.

Legal Analysis

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 (Apr. 19, 2021). The rule would offer priority to grant “projects that incorporate racially, ethnically, culturally, and linguistically diverse perspectives.” *Id.* at 20349. OPI has serious concerns about the effect of this proposal on the education of students in Montana. 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 “antiracist” teachings and “Critical Race Theory” into classrooms. The proposal notes that “schools across the country are working to incorporate antiracist practices into teaching and learning.” 86 Fed. Reg. 20349. It explains:

As the scholar Ibram X. Kendi has expressed, “[a]n antiracist 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. Antiracist 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.

Id. (citing Ibram X. Kendi, *HOW TO BE AN ANTIRACIST* (2019)). Accordingly, “[u]nder this priority, the applicants propose projects that incorporate teaching and learning practices that reflect the diversity, identities, histories, contributions, and experiences of all students create inclusive, supportive, and identity-safe learning environments.” 86 Fed. Reg. 20349. This includes requiring applicants to “incorporate[] teaching and learning practices that ... [t]ake into account systemic marginalization, biases, inequities, and discriminatory policy and practice in American history.” *Id.*

Ibram Kendi’s *How to Be an Antiracist* is quite radical. It contends that “the most threatening racist movement is ... the regular American’s drive for a ‘race-neutral’ [state].” *Ibram X. Kendi defines what it means to be an antiracist*, Penguin Press, June 19, 2020 (excerpt from *HOW TO BE AN ANTIRACIST*).¹ Incorporating the ideas of “institutional racism,” “structural racism,” and “systemic racism,” it argues that:

A racist policy is any measure that produces or sustains racial inequity between racial groups. An antiracist 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.*

The most shocking aspect of this philosophy is the pronouncement that “[t]he only remedy to past discrimination is present discrimination. The only remedy to present discrimination is future discrimination.” *Id.*

“Antiracism” is closely linked with a discipline known as “Critical Race Theory” (“CRT”). CRT stresses racial divisions and sees society in terms of minority racial groups oppressed by the majority. CRT critiques liberalism and 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 fallacious, but they also lead to discrimination when implemented. For example, the City of Seattle’s Office of Civil Rights developed a “race and social justice”

¹ <https://www.penguin.co.uk/articles/2020/june/ibram-x-kendi-definition-of-antiracist.html>

training which required white employees to examine their “relationships with white supremacy, racism, and whiteness” and explain how their “[families] benefit economically from the system of white supremacy even as it directly and violently harms Black people.” See Christopher F. Rufo, *Seattle Office of Civil Rights Training on “Internalized Racial Superiority for White People,”* July 29, 2020.² One prominent critic of CRT argues that “[u]nder the banner of ‘antiracism,’ Seattle’s Office of Civil Rights is now explicitly endorsing principles of segregationism, group-based guilt, and race essentialism—ugly concepts that should have been left behind a century ago.” *Id.*

These fringe ideas have now found their way into schools. In the spring of 2019, the Evanston/Skokie School District in Illinois began developing the “Black Lives Matter at School” curriculum, which “unapologetically aims to create a new generation of allied activists.” Conor Friedersdorf, *What Happens When a Slogan Becomes the Curriculum* THE ATLANTIC (Mar. 14, 2021).³ The District then went on to:

- Separate administrators in a professional development training program into two groups based on race—white and non-white.
- Offer various “racially exclusive affinity groups” that separated students, parents and community members by race.
- Implement a disciplinary policy that included “explicit direction” to staffers to consider a student’s race when meting out discipline.
- Carry out a “Colorism Privilege Walk” that separated seventh and eight grade students into different groups based on race.

Carl Campanile, *US Dept. of Education curbs decision on race-based ‘affinity groups’*, N.Y. POST (Mar. 7, 2021).⁴ On Nov. 25, 2020, the U.S. Department of Education’s Office for Civil Rights opened an investigation of a complaint against the District for possible violation of Title VI. *Id.*

Evanston/Skokie even indoctrinates kindergarteners with “anti-racist” ideas via an assigned book, *Not My Idea: A Book About Whiteness* where:

[P]arents are asked to quiz their kids on whiteness and give them approachable examples of “how whiteness shows up in school or in the community.” In its focus on “whiteness” and its invitation to readers to challenge racism by interrogating and rejecting it, the worldview of *Not My Idea* is similar to that of Robin DiAngelo’s *White Fragility*, now a staple of diversity-and-inclusion programs and anti-racism training.

Friedersdorf, *supra*. As another example, the New York Department of Education’s Early Childhood Division also sponsored an “anti-racist Community Meeting” where teachers were segregated into discussion groups based on skin color, race and ethnicity. Kathianne Boniello and Susan Edelman, *NYC teachers segregated by race for ‘affinity groups’ amid protests*, N.Y. POST (June 20, 2020).⁵

²<https://christopherrufo.com/seattle-office-of-civil-rights-training-on-internalized-racial-superiorityfor-white-people/>

³<https://www.theatlantic.com/ideas/archive/2021/03/should-black-lives-matter-agenda-be-taught-school/618277/>

⁴<https://nypost.com/2021/03/07/education-dept-curbs-decision-on-race-based-affinity-groups/>

⁵<https://nypost.com/2020/06/20/nyc-teachers-segregated-by-race-for-affinity-groups-amid-protests/>

Actions such as these seem to violate the plain language of Title VI because they treat individuals 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 separates or excludes students on the basis of race for these “antiracist” activities, it clearly constitutes different treatment.

Additionally, in some instances 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. *See Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. 4271 (Jan. 31, 1994). Thus, if a school allows students 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).

Thank you for considering this important matter. I look forward to receiving your response.

Sincerely,

Elsie Arntzen
State Superintendent
Montana Office of Public Instruction

A handwritten signature in blue ink, appearing to read 'Elsie Arntzen', is written over a large, faint circular stamp. The signature is fluid and cursive, with a long horizontal stroke at the end.