September 26, 2022

Paul Sally, Ed.D.
Superintendent
New Trier Township High School District

Sent via email

Dear Dr. Sally:

The Foundation Against Intolerance & Racism (FAIR) is a nonpartisan, nonprofit organization dedicated to advancing civil rights and liberties and promoting a common culture based on fairness, understanding, and humanity. We have more than 80 chapters and tens of thousands of members nationwide, including in Illinois. Our website, fairforall.org, can give you a fuller sense of our identity and activities.

We write in response to two incident reports regarding New Trier Township High School District submitted to FAIR on August 31 and September 19. The reports allege that New Trier students have been given various surveys and assignments that do one or more of the following: 1) require students to state their preferred pronouns; 2) ask the students to identify in whose presence those pronouns can be used (family, classmates, or other teachers); and 3) provide only certain students with the opportunity to join a skin-color based affinity group. It was directly and anonymously reported to us that in one case, students were not permitted to submit one of these surveys without indicating their preferred pronouns.

We are concerned that these practices have variable First Amendment free speech and religious freedom implications, potentially infringe parents' rights, and violate the Fourteenth Amendment's Equal Protection guarantee and Title VI of the Civil Rights Act.

Compelled Pronouns

First, requiring students to announce their pronouns violates the free speech protections of the First Amendment. That guarantee denies states and their agencies (including public schools) the power to require adherence to any particular set of ideological beliefs. *See West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943) (public school students cannot be required to recite the Pledge of Allegiance); *Oliver v. Arnold*, 3 F.4th 152, 162 (5th Cir. 2021) (public school teachers may not give assignments for the purpose of compelling students to assert specific ideological beliefs). Declaring pronouns is not comparable to supplying anodyne, non-ideological facts such as the pronunciation of one's name or a list of activities engaged in during the summer. Rather, pronoun selection is necessarily based on the ideological beliefs that pronouns refer to gender and not sex, that gender is independent of sex, and that gender (or sex) is a matter of personal choice. When posed to children, pronoun selection questions also assume yet another personal ideological belief: that gender transition is appropriate for children. In the words of Justice Jackson, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or

other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642. While New Trier should permit students to declare their pronouns if they so choose, they may not require them to do so.

Requiring pronoun declarations would also potentially violate students' religious rights. Many religions reject the claims that sex and gender differ and that individuals can choose and change their sex or gender. Compelling students to affirm ideas contrary to their sincerely-held religious beliefs, with no ability to opt out, violates their religious rights as guaranteed by the First Amendment. *See Hurley v. Irish-American Gay, Lesbian, & Bisexual Grp.*, 515 U.S. 557, 573 (1995); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts.").

Even independent of the First Amendment, we believe directing students to ascribe to a particular set of beliefs is antithetical to education. One of the central purposes of education is to enable students to learn about, weigh, and explore competing ideas in order to reach their own conclusions. Put differently, when it comes to social, political, and ideological matters, public schools should teach students how to think, not what to think. Mandating that students affirm a specific set of ideological beliefs contravenes that purpose.

While we assume that New Trier's implementation of these practices was well-intentioned, requiring pronoun declarations can backfire with negative consequences. Demanding pronouns will involuntarily "out" those who are grappling with their gender identity but are not yet ready to disclose it to third parties. For students experiencing gender dysphoria, it could exacerbate their condition or interfere with their psychological treatment. We do not believe New Trier would wish to harm its students in that way.

Parental Rights Infringement

One survey submitted to FAIR asks the students to identify in whose presence their preferred pronouns can be used (family, classmates, or other teachers), which troublingly implies that teachers may withhold this important information from parents at a student's request. Parents have a "fundamental right" under the Due Process Clause of the Fourteenth Amendment to direct the upbringing, care, and control of their children. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65-6 (2000) ("[T]he interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court"). It is parents, and not the state or its schools, who have the primary role in the care and rearing of children. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (stating that it "is now established beyond debate" that parents have the "primary role" in rearing their children); *see Pierce v. Society of Sisters*, 268 U.S 510, 535 (1925) ("[A] child is not the mere creature of the State."). Parental authority over their minor children is broad. *Parham v. J.R.*, 442 U.S. 584, 602 (1979). It includes involvement in their children's medical and personal decisions, as "most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment." *Id.* at 603. Socially transitioning from using the pronouns consistent with a student's biological sex profoundly affects a child's mental, emotional, and physical development. Involvement in that process is well within the scope of parents' fundamental rights. By allowing and encouraging students to identify themselves with alternative pronouns and indicate whether or not the school may

share that with the parents, the school deprives parents of those rights with no due process. This is an infringement upon parents' fundamental due process rights and is unconstitutional.

Skin-Color-Based Affinity Groups

One report submitted to FAIR included a form where students can elect to join certain affinity groups: the "Combined Racial Affinity Group" or the "White Anti-Racist Affinity Group." Based on this report, we believe New Trier is in violation of Title VI of the Civil Rights Act and the 14th Amendment to the Constitution. Title VI provides:

> 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.

42 U.S.C. § 2000d. As recipients of federal funds, public school districts must comply with Title VI. *Campaign for Fiscal Equity, Inc. v. New York*, 631 N.Y.S.2d 565, 573 (N.Y. 1995).

Under Title VI (and the Equal Protection clause from which it is derived), all distinctions based on skin color are "strictly scrutinized" by the courts. *Adarand Constr., Inc. v. Pena*, 515 U.S. 200, 227 (1995). Strict scrutiny applies not only to invidious racial discrimination. Rather, it applies to distinctions that are "benign" or that purport to treat people "differently yet equally." *See Johnson v. California*, 543 U.S. 499, 506 (2005). The *Johnson* case is instructive. There, an inmate challenged a prison policy that separated new inmates according to skin color: Latino prisoners were housed with other Latinos, black inmates with other black inmates, and so forth. *Id.* at 502. The corrections department argued that strict scrutiny should not apply because the separation was for a benign purpose—reduction of gang-based violence—and all inmates were still treated equally within their respective groups. *Id.* The Court rejected that rationale:

> The CDC claims that its policy should be exempt from our categorical rule because it is "neutral"—that is, it "neither benefits nor burdens one group or individual more than any other group or individual." In other words, strict scrutiny should not apply because all prisoners are "equally" segregated. The CDC's argument ignores our repeated command that "racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally." Indeed, we rejected the notion that separate can ever be equal—or "neutral"—50 years ago in *Brown v. Board of Education*, and we refuse to resurrect it today.

Id. at 506 (internal citations omitted); *see also Powers v. Ohio*, 400 U.S. 400, 410 (1991) (rejecting the argument that race-based peremptory challenges were permissible because they applied equally to white and black jurors and holding that "[i]t is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree"). Thus, even if New Trier's segregated affinity groups were benign or "separate but equal," they will still be strictly scrutinized.

Strict scrutiny "is a searching examination" that is rarely survived. *Fisher v. University of Texas*, 570 U.S. 297, 310 (2013); *Burson v. Freeman*, 504 U.S. 191, 211 (1992). Racial classification such as in New Trier's affinity groups will pass strict scrutiny only if the entity proves it has a "compelling interest" in treating individuals differently based on skin color, and the means used to achieve that interest are "narrowly tailored." *Adarand*, 515 U.S. at 227. A policy is not narrowly tailored if a "less restrictive alternative is readily available." *Boos v. Barry*, 485 U.S. 312, 329 (1988).

A screenshot of the survey submitted to FAIR shows that the affinity groups sign-up form states that the "White Anti-Racist Affinity Group" "provides white students with the opportunity to deepen their personal understanding of what it means to be a white ally when it comes to anti-racist work." While New Trier may have an interest in providing instruction on anti-racist work, separating students by skin color is not narrowly tailored to achieve that goal. Many other non-discriminatory alternatives are readily available, such as encouraging students to speak openly and freely, allowing equal time for each student who wishes to speak, giving students an option to submit comments and questions anonymously in advance, and articulating rules and expectations of respectful conduct and dialogue. The message that students should be separated by their skin color in order to learn effectively stigmatizes all. As stated by the Supreme Court, instead of helping individuals, separating them by color "threaten[s] to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Shaw v. Reno*, 509 U.S. 630, 643 (1993).

We hope that going forward, New Trier will host learning spaces and other events where all students are welcome, regardless of their immutable traits. Additionally, we urge the School District to cease requiring pronoun declarations and suggesting that teachers will keep gender transition information from parents. Such changes will help promote understanding, tolerance, and a sense of shared belonging among New Trier's student body, and ensure that the partnership between the school, student, and parents is honored.

We would like to give New Trier an opportunity to respond. Please let us know within a week if you intend to do so.

Very truly yours,

Leigh Ann O'Neill
Staff Attorney
Foundation Against Intolerance & Racism

Cc: Paul Waechtler, Principal, New Trier High School - Northfield Campus
Denise Dubravec, Principal, New Trier High School - Winnetka Campus
Keith Dronen, President, Board of Education