

September 3, 2021

Dr. Adam Swinyard
Superintendent
Spokane Public Schools
AdamSw@spokaneschools.org



Sent via Email

Dear Dr. Swinyard:

I am an attorney at the Foundation Against Intolerance & Racism (FAIR), a nonpartisan organization dedicated to advancing civil rights and liberties rooted in our common humanity. We have tens of thousands of members nationwide and more than 60 chapters from coast to coast, including in Spokane. FAIR's advisory board includes John McWhorter, Ayaan Hirsi Ali, Steven Pinker, Bari Weiss, and others similarly dedicated to our mission. Our website, fairforall.org, can give you a fuller sense of our identity and activities.

We write in response to an incident report submitted to FAIR on September 1 through our transparency website, fairtransparency.org, regarding Spokane Public Schools. That report states:

The Spokane Public School District is implementing a POC-led multicultural club in each school with a pilot to begin this year. They do not explain how they will select this POC or who will qualify as POC. I have sent each school board member and the district superintendent an e-mail expressing my concern and that it is likely a violation of the Civil Rights Act, but none of them responded to my concern.

The incident report also attaches a June 2021 "Priority Goals Report" ostensibly issued by Spokane Public Schools. Goal 9 of that report states, in relevant part, that Spokane Public Schools will "hire [a] person of color-led consulting company with established experience in diversifying employee pools in large organizations." Goal 11 states, in pertinent part, that the schools will "invest in the development of a person of color-led multi-cultural club in every single school."

Those goals, if implemented, would violate numerous federal and state civil rights protections. Perhaps most obviously, they violate the Equal Protection guarantee of the Fourteenth Amendment, which denies states (and their agencies) the power to treat individuals differently based on skin color. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). Regardless of their purported motivation, such distinctions are presumptively invalid and will be upheld only upon extraordinary justification. *Personnel Admin. v. Feeney*, 442 U.S. 256, 272 (1979); see *Fisher v. University of Texas*, 570 U.S. 297, 310 (2013) (courts will strictly scrutinize state programs that utilize racial classifications). Historically, courts have sanctioned consideration of skin color only if the purpose is to remedy past prejudice in the specific locality and industry at issue, or to achieve diversity in the relevant population -- *provided* skin color is

only one among many factors and the candidates are still evaluated holistically. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 720-3 (2007); *Grutter v. Bollinger*, 539 U.S. 306, 328-33 (2003); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-504 (1989).

Neither of those conditions appears to exist with respect to Goals 9 and 11. Spokane Public Schools have made no showing of past discrimination in their diversity consulting hires or multicultural clubs that would justify limiting the pool of candidates to certain skin colors. Nor have they claimed racial discrimination is needed to achieve diversity in either the club or the roster of school consultants. Indeed, it is difficult to see how a club that is necessarily diverse (a *multicultural* club) and an industry that is predicated on diversity (*diversity* consulting) require extraordinary measures to achieve what they presumably already have. In any case, the goals hint at no holistic review of the candidates: skin color is not one among many variables, but the controlling qualification. Equal Protection forbids that.

In addition, Goals 9 and 11 violate Washington state law. Washington guarantees “the right to be free from discrimination because of race, creed, color, national origin,” and other characteristics. R.C.W. § 49.609.030(1). That right is broad and protects applicants for employment as well as independent contractors. *Marquis v. City of Spokane*, 130 Wash. 2d 97, 110-3 (1996). In limited cases, some immutable characteristics (such as sex) may be legitimate occupational qualifications, but race and color virtually never are. *See Blackburn v. State of Wash. Dept. of Soc. & Health Servs.*, 186 Wash. 2d 250, 259-60 (2016) (hospital that assigned staff to patients based on matching skin colors violated anti-discrimination laws). Accordingly, Spokane Public Schools may not make skin color a determining factor in hiring consulting firms, as contemplated by Goal 9.

Washington also prohibits discrimination and preferences based on color “in the operation of public education.” R.C.W. § 49.60.400(1). That law is liberally construed and permits race-conscious decisions only in “strikingly rare” circumstances, such as to overcome segregation or to prevent loss of federal funding. 2017 Wash Att’y Gen. Op. No. 2 (Mar. 20, 2017); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 149 Wash. 2d 660, 683-90 (2003). No rare circumstance exists here: there is no indication that selecting club leaders based on color will desegregate the schools or ensure retention of federal funds. As such, Washington law precludes Spokane Public Schools from implementing Goal 11 and selecting club leaders based on race.

Goal 11 would also contravene Title VI of the federal Civil Rights Act, if the club relates to a federally funded program. 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, Spokane Public Schools must comply with Title VI. *Mercer Island Sch. Dist. v. Office of Superintendent of Pub. Instruc.*, 186 Wash. App. 939, 965-7 (Wash. Ct. App. 2015). Consequently, to the extent the multicultural club is connected to federal monies received by Spokane Public Schools, its leadership may not be restricted based on skin color.

FAIR supports lawful measures to achieve diversity. Goals 9 and 11, however, do not qualify. Rather than evaluating applicants as individuals, they make color a determining factor and exclude any candidate whose skin bears the wrong hue. Respectfully, that is the opposite of antiracism, for in the words of Justice Roberts in a case involving Washington schools, “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” We urge Spokane Public Schools to reconsider Goals 9 and 11.

We would like to give Spokane Public Schools an opportunity to respond. Please let us know within the next five business days if you intend to do so.

Very truly yours,

Letitia Kim
Managing Director of the Legal Network
Foundation Against Intolerance & Racism
letitia@fairforall.org

cc: Jerrall Haynes, President of Spokane Public Schools Board of Directors