August 24, 2022

Ms. Rochelle Cox
Superintendent
Minneapolis Public Schools
1250 W. Broadway Avenue
Minneapolis, MN 55411

Sent via email

Dear Ms. Cox:

I am an attorney at the Foundation Against Intolerance & Racism (FAIR), a nonpartisan, nonprofit organization dedicated to advancing civil rights and liberties and promoting a common culture based on fairness, understanding, and humanity. 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 August 15 through our transparency website, fairtransparency.org, regarding the 2021-2023 agreement between Minneapolis Public Schools and the Minneapolis Federation of Teachers.[1] According to section 15 of that agreement, titled "Protections for Educators of Color," teachers will be slated for layoffs and reinstatement based on their skin color and ancestry:

> Starting with the Spring 2023 Budget Tie-Out Cycle, if excessing a teacher who is a member of a population underrepresented among licensed teachers in the site, the District shall excess the next least senior teacher, who is not a member of an underrepresented population….
>
> The District shall prioritize the recall of a teacher who is a member of a population underrepresented among licensed teachers in the District…. To do this, the District shall deprioritize the more senior teacher, who is not a member of an underrepresented population, in order to recall a teacher who is a member of a population underrepresented among licensed teachers.

Additionally, the agreement permits MPS to exempt from district-wide layoffs "teachers who are members of populations underrepresented among licensed teachers in the District." The agreement also

[1] Although the agreement is styled as "tentative," it is also labeled as "FINAL" and, according to the MPS website, is the "governing document."

requires MPS to "hold vacancies" at two elementary schools "for Black Men Teach Fellows who are current teachers within MPS or receive an early contract with MPS."

According to the agreement, the purpose of the differential treatment is "to remedy the continuing effects of past discrimination by the District. Past discrimination by the District disproportionately impacted the hiring of underrepresented teachers in the District, as compared to the relevant labor market and the community, and resulted in a lack of diversity of teachers." No evidence of past discrimination in the district or data regarding the local labor market is supplied, however.

Although we favor lawful efforts to diversify the teaching profession, we believe MPS's layoff, reinstatement, and hiring set-aside programs violate the Equal Protection Clause of the Fourteenth Amendment. That clause prohibits any state (including its agencies) from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. A government policy that treats individuals differently based on ancestry will be strictly scrutinized, regardless of the skin color of those burdened or benefited. *Miller v. Johnson*, 515 U.S. 900, 904 (1996); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989). Differential treatment will pass strict scrutiny only if the government agency demonstrates (1) it has a "compelling interest" in treating individuals differently and (2) the methods to achieve that interest are "narrowly tailored." *Adarand Constr., Inc. v. Pena*, 515 U.S. 200, 227 (1995). A policy is not narrowly tailored if a workable, race-neutral alternative is available. *Boos v. Barry*, 485 U.S. 312, 329 (1988). Moreover, public agencies must "carefully examine" neutral or less burdensome alternatives before implementing racial classifications. *Croson*, 488 U.S. at 507.

The Supreme Court has recognized only two state interests compelling enough to justify treating people differently based on their ancestry. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 720-3 (2007). The first is to achieve student diversity in higher education, *Fisher v. University of Texas*, 570 U.S. 297, 310 (2013), which does not apply here. The second is to remedy the effects of past discrimination, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986), which is the asserted basis for MPS's policy. To implement a remedial program, a state agency must have "a strong basis in evidence" of prior discrimination in the industry and locality at issue and resulting inequitable effects. *Id.* at 277; *Croson*, 488 U.S. at 490-500. The existence of general or societal discrimination is insufficient to meet that burden. *Wygant*, 476 U.S. at 276.

In *Wygant*, the Supreme Court considered a teacher layoff policy similar to MPS's. There, a Michigan school district adopted a policy whereby teachers from minority groups could be laid off only in proportion to the percentage of minority students. *Wygant*, 476 U.S. at 270-1. The Court invalidated the policy, finding no strong evidence of past discrimination in the district and pointing out the availability of less disruptive alternatives, such as hiring goals. *Id.* at 277-8, 283. The Court noted the particular importance of the narrow tailoring requirement in discriminatory layoff policies, because depriving employees of their existing jobs is more damaging than not hiring them in the first place:

> While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular

> individuals, often resulting in serious disruption of their lives. That burden is too intrusive.

Id. at 283.

MPS's agreement shows neither a compelling interest nor narrow tailoring in the layoff, reinstatement, and hiring set-aside programs. Rather than identifying specific past discriminatory practices in Minneapolis schools and connecting that discrimination to present inequities, the agreement simply asserts there are "continuing effects of past discrimination by the District." Conclusory statements of past discrimination do not meet the evidentiary burden required by *Croson* and *Wygant*. *See Croson*, 488 U.S. at 500 ("[T]he mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight."). Nor does the agreement indicate that MPS has carefully examined race-neutral alternatives but found none that is workable. Because MPS has the option of establishing hiring goals, as did the school district in *Wygant*, less restrictive alternatives appear readily available instead of removing teachers or disqualifying them from employment because of their skin color.

FAIR supports lawful and pro-human measures to achieve and maintain diversity in public employment. However, MPS's plan to lay off and hire teachers based on ancestry, without having identified past discrimination in the district or good faith consideration of less injurious alternatives, does not comply with the constitutional mandate of equal protection.

We would like to give MPS an opportunity to respond and constructively engage with us on the matters raised in this letter. 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

cc: Ms. Kim Ellison, Chair, Board of Education
Ms. Greta Callahan, President, Minneapolis Federation of Teachers