June 15, 2022

Christina Hull Paxson
President
Brown University
1 Prospect Street
Box 1860
Providence, RI 02912
president@brown.edu

Sent via email

Re: The MBSR Teacher Training Program for People Who Identify as Black, Indigenous, and/or Latino/Latina/Latinx

Dear President Paxson:

The Foundation Against Intolerance & Racism 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 100 chapters and tens of thousands of members nationwide, including in Rhode Island. 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 us through our transparency website, fairtransparency.org. That report, in pertinent part, states the following:

> I'm a student who is going through the MBSR teacher training program. MBSR stands for Mindfulness-Based Stress Reduction. Most students in this certificate program are mature adults, many of whom are re-training for a second career as meditation teachers. I'm currently mid-way through my training. Brown is offering a RACE-BASED teacher training program that is ONLY open to certain demographics (black, latino, indigenous). The teachers will also only be members of what they call the BIPOC community (with support from senior teachers who may be white)...This program will also offer grants to these students to help manage the cost of the program. Financial assistance is NOT being offered to members of other demographics who may not be able to afford the program either.

As an organization committed to pro-human anti-racism, FAIR supports efforts to achieve greater fairness and assist those in need of financial assistance in higher education. We believe, however, that establishing a teacher training program based on skin color or ancestry violates Title VI of the Civil Rights Act. That statute 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, 2000d-4a(2); *see Regents of University of California v. Bakke*, 438 U.S. 265, 266 (1978) ("Title VI of the Civil Rights Act of 1964…provides…that no person shall on the ground of race or color be excluded from participating in any program receiving federal financial assistance."). As a recipient of federal funds, Brown is required to comply with Title VI.

Under Title VI (and the Equal Protection clause from which it is derived), any distinction based on skin color is strictly scrutinized. *Gratz v. Bollinger*, 539 U.S. 244, 275-6 & n.23 (2003). A racial classification will pass strict scrutiny only if the entity demonstrates (1) it has a "compelling interest" in treating individuals differently based on skin color 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 "less restrictive alternative is readily available." *Boos v. Barry*, 485 U.S. 312, 329 (1988).

The Supreme Court has recognized only two interests compelling enough to justify racial classifications. *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. *Grutter v. Bollinger*, 539 U.S. 306, 328-33 (2003). The second is to remedy the effects of past discrimination. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-504 (1989). For discrimination that is intended to achieve diversity, a university may consider skin color only if it is a "plus" factor among many other criteria and the applicants are still evaluated holistically. *Grutter*, 539 U.S. at 328-33; *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 317 (1978) (Powell, J., plurality opinion). For remedial discrimination, the entity must produce "a strong basis in evidence" of present ill effects caused by specific acts of past discrimination in the industry and locality at issue. *J.A. Croson*, 488 U.S. at 492, 498-500. Amorphous claims of general or societal discrimination are insufficient. *Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 276 (1986); *Bakke*, 438 U.S. at 307-10.

The case of *Podberesky v. Kirwan* is instructive. There, the University of Maryland established a scholarship solely for students of one skin color, for the stated purpose of remedying statistical disparities in attendance and graduation rates. *Podberesky*, 38 F.3d 147, 152 (4th Cir. 1994). An ineligible student filed suit, alleging unlawful discrimination. Citing *J.A. Croson*, the Court of Appeals held that the university was required to produce strong evidence that the university had discriminated in the past, that the past discrimination was connected to the present disparities, and that the scholarship was narrowly tailored to remedy the discrimination. *Podberesky*, 38 F.3d at 153-4, 158-61. Because the university failed to do so, the Court of Appeals ruled against it. *Id.* at 162.

Brown appears to have created the teacher training program for remedial purposes: "Despite the potential, mindfulness instruction in the West has historically been available to a narrow range of people, and all too often has failed to include and address the needs, life experiences, and priorities of marginalized communities. This program seeks to open opportunities for teacher trainees, participants, and a wider audience to engage with mindfulness practices taught by teachers and with trainees who are all members of underrepresented populations." As established by the Supreme Court in *J.A. Croson*, *Wygant*, and *Bakke*, however, disparities

existing generally in the world cannot legally justify remedial discrimination. Brown has identified no past discrimination it committed, nor any deleterious present effects at the university that were caused by past discrimination. Even if the program's purpose, which includes access to scholarship money, were to diversify the student body, it would still be impermissible because "BIPOC" identity is not a "plus" factor but a necessary precondition for eligibility.[1]

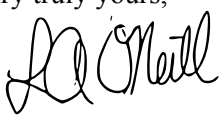
Administering a program that excludes students based on skin color also appears to conflict with Brown's admirable core principles:

> It is imperative that all members of our community—regardless of race, ethnicity, gender, sexual orientation, nationality, religion, political views, physical ability and other aspects of their identities—are accepted, valued and provided with equal opportunities to thrive at Brown.

It is generous and thoughtful of Brown to offer teacher training and scholarships based on economic need or other criteria unrelated to immutable traits. Under Title VI, however, it may not offer such a benefit only to certain students based on their skin color or ancestry. We urge the university to open the program to any deserving student without regard to their immutable traits. We also believe that such a gesture would demonstrate Brown's commitment to non-discrimination and equal access.

We would like to give the university an opportunity to respond. Please let us know within the next week if you intend to do so.

Very truly yours,



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

cc: olugbenga@brown.edu

[1] It is irrelevant that the scholarship is privately endowed. Federal regulations clarify that a recipient of federal funds may not determine financial aid or other benefits "directly *or through other arrangements*" that "have the effect of subjecting individuals to discrimination because of their race, color, or national origin." 34 C.F.R. § 100.3(b)(2) (emphasis added).