



TEXAS HOUSE *of* REPRESENTATIVES

*James White**House District 19
Jasper, Newton, Hardin, Polk, Tyler*HOMELAND SECURITY
& PUBLIC SAFETY, CHAIR

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The Honorable Ken Paxton, Attorney General
Office of the Attorney General
Attention Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

RQ-0421-KP
File# ML-48984-KP
I.D.# 48984

Dear General Paxton,

Per Section 402.042 of the Texas Government Code, I respectfully request your opinion on matters related to the application of mandatory "antiracism" teachings and Critical Race Theory (CRT) principles in Texas public schools, universities, agencies, and county and local subdivisions. Specifically, I request your opinion as to whether "antiracism" teachings or CRT practices may violate Title VI of the Civil Rights Act of 1964, the Equal Protection Clause of the Fourteenth Amendment, Article 1, Section 3 and Section 8 of the Texas Constitution, or any other applicable laws.

Background

The CRT academic movement began in the mid 1970s and is primarily used as a method to critically examine the history and policies of the United States through observations of racism and inequality. Practitioners of CRT state that it is "an approach to grappling with a history of white supremacy¹ that rejects the belief that what's in the past is in the past, and that the laws and systems that grow from the past are detached from it."² CRT has been used as an academic lens to "examine how institutional racism manifests in instances like housing segregation, bank lending, discriminatory labor practices and access to education."³ Critics of the theory argue that CRT lacks supporting evidence, rejects the need for evidence in favor of storytelling, and objects

¹ The term "white supremacy" has been broadened by CRT and Antiracism. See, e.g., Robin DiAngelo on Educators' 'White Fragility', 76 EDUCATIONAL LEADERSHIP, no. 7, Apr. 2019 ("The term white supremacy certainly includes what we would think of as neo-Nazism or outright racism. But it is also a highly descriptive sociological term for the society we live in, in which all institutions—languages, norms, policies—reflect and affirm white people at the expense of others. It's the water we've been swimming in and we've all been shaped by it, consciously or not.").

² Cady Lang, President Trump Has Attacked Critical Race Theory. Here's What to Know About the Intellectual Movement, TIME MAGAZINE (Sept. 29, 2020) (quoting CRT co-founder Kimberlé Crenshaw), <https://time.com/5891138/critical-race-theory-explained/>.

³ Lang, *supra* note 2.



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to the rule of law.⁴ Despite their narratives, CRT critics and proponents should understand the differences between an academic lens or methodology employed in a graduate humanities, social science, or law school seminar versus imposing CRT dogma on institutions, policies, procedures, statutes, and rules even when it is contrary to federal and state constitutions and statutes.

“Antiracism” training and education is a core tenet of the CRT movement. The Smithsonian National Museum of African-American History and Culture (NMAAHC) defines “[b]eing antiracist” as “fighting against racism.”⁵ NMAAHC also makes a clear distinction that “being antiracist is different for white people than it is for people of color.”⁶ The CRT movement, which claims to fight for unity and equity, unashamedly advocates for racially determined interpretations of what it means to be “antiracist”. Antiracism and CRT emphasize that racial divisions are the foundation of our American society, rejecting the time honored classical liberal principle of equality under the law.

“All men have one common origin, they participate in one common nature, and consequently have one common right. No reason can be assigned why one man should exercise any power over his fellow creatures more than another, unless they voluntarily vest him with it,” wrote Alexander Hamilton in 1774.⁷

Even before, the Bible teaches equality under the law:

“You and the foreigner shall be the same before the Lord: The same laws and regulations will apply both to you and to the foreigner residing among you.”⁸

⁴ Farber, Daniel A.; Sherry, Suzanna (1997). *Beyond All Reason: The Radical Assault on Truth in American Law*. Oxford University Press.

⁵ Being Antiracist, SMITHSONIAN NAT’L MUSEUM OF AFRICAN AMER. HIST. & CULTURE, <https://nmaahc.si.edu/learn/talking-about-race/topics/being-antiracist> (last visited July 27, 2021)

⁶ Id.

⁷ Alexander Hamilton, “A Full Vindication of the Measures of the Congress”, National Archives of Founders Online. Harold C. Syrett, ed. (1961). *The Papers of Alexander Hamilton*. 1 (1768–1778). New York: Columbia University Press. pp. 45–78. (15 December 1774).

⁸ Numbers 15:15.



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Followers of antiracist ideology and CRT call for a commitment “to making unbiased choices, and being anti-racist in all aspects of our lives.”⁹ In practice, CRT requires its practitioners to denounce one’s whiteness and advocate for its prescribed policy initiatives. This world view includes specific ideals and perceptions regarding history, social science, politics and legality. Any deviation or questioning of this worldview is viewed as racist. Leaders of "anti-racist" teachings, namely Ibram X. Kendi and Robin DiAngelo, have morphed the message of their teachings from a cry for equity to an attack on those hindering their movement’s progress.

When academic methodology morphs into application, CRT and “antiracism” become radicalized ideologies that in some instances advocate for clear segregation and separate treatment based on race. “Critical race theorists attack the very foundations of the liberal legal order, including equality theory, legal reasoning, Enlightenment rationalism and neutral principles of constitutional law.”¹⁰ In other words, CRT adherents are promoting a fundamental displacement of the ideals that undergird American pluralism. Prominent CRT and Antiracism scholar, Ibram X. Kendi has taken the ideology as far as to state “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.”¹¹ Kendi continues by saying “[t]he only remedy to past discrimination is present discrimination. The only remedy to present discrimination is future discrimination.”¹² CRT in practice is racialism on steroids. We have seen failed racist systems: South African apartheid and Jim Crow. After experiencing the socioeconomic disaster that these two racist systems produced, the only remedy was the tenets of classical liberalism: individual freedom, equality under the law, the rule of law. However, the purveyors of CRT are attempting to do the opposite: transition a system of racialism from a culture of classical liberalism.

While proponents of these views argue that their intent is to eradicate racism, its practical application in policy has proven to demonstrate just the opposite. Indeed, many antiracist and CRT based programs being implemented in the United States have likely violated the U.S. Constitution by separating participants into racial training groups, compelling apologies for “whiteness”, and conducting compulsory “privilege walks” under this programming.

⁹ Being Antiracist.

¹⁰ Jeffrey J. Pyle, Race, Equality and the Rule of Law: Critical Race Theory’s Attack on the Promises of Liberalism, 40 B.C. L. REV. 787, 788 (1999).

¹¹ Ibram X. Kendi, HOW TO BE AN ANTIRACIST (2019).

¹² Id.



CRT and radical antiracist ideology are entering American schools, businesses and government institutions.

- The Evanston/Skokie school district in Illinois began implementing a CRT based training that forced educators, parents, and children to be segregated, called for teachers to implement racially guided discipline policies, assigned the book, *Not My Idea: A Book About Whiteness* to kindergartners, and conducted a “colorism Privilege Walk” among middle school students.¹³
- Seattle’s Office of Civil Rights called for employees to examine their “relationships with white supremacy, racism, and white-ness.”¹⁴
- The University of Oklahoma reportedly forced some of its employees to apologize for being white.¹⁵
- The United States Department of the Treasury’s racial diversity training stated “virtually all White people, regardless of how ‘woke’ they are, contribute to racism.”¹⁶

These instances are just a few examples of how "antiracist" propaganda is being implemented in our society. However, not all diversity and equality training materials or programs are based on the beliefs and ideologies of CRT. It is important to differentiate between the productive messages of unity we should be instilling in our society and the damaging impact of CRT and “anti-racism”. For instance, an agency diversity training that teaches about historical policies which promoted racial inequality, without segregating its workers or creating a hostile

¹³ Carl Campanile, US Dept. of Education curbs decision on race-based ‘affinity groups’, N.Y. POST

(Mar. 7, 2021), <https://nypost.com/2021/03/07/education-dept-curbs-decision-on-race-based-affinitygroups/>; see also Ben Zeisloft, Tulane hosts anti-racism teach-in with profs divided by race, CAMPUS

REFORM (May 3, 2021), <https://campusreform.org/article?id=17344>; Benjamin Fearnow, Minnesota

College Sparks Backlash With Anti-Racist ‘Struggle Sessions’ Segregated by Race, NEWSWEEK (Apr.

19, 2021), <https://www.newsweek.com/minnesota-college-sparks-backlash-anti-racist-struggle-sessions-segregated-race-1584776>.

¹⁴ Christopher F. Rufo, Seattle Office of Civil Rights Training on “Internalized Racial Superiority for

White People,” CHRISTOPHERRUFO.COM (Jul. 29, 2020), <https://christopherrufo.com/separate-butequal/>.

¹⁵ Mike Brake, Does OU diversity training violate federal labor law?, OKLAHOMA COUNCIL OF PUB. AFFAIRS (Feb. 4, 2021), <https://www.ocpathink.org/post/does-ou-diversity-training-violate-federal-labor-law> (noting “some universities have already faced lawsuits for diversity programs where “they make people get down on the floor and apologize for being white”).

¹⁶ Exec. Order No. 13950, 85 Fed. Reg. at 60684.



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environment, is conducive in societies effort to address racial equity. In contrast, the message of the CRT movement does not seek this togetherness, but instead a message of imposed guilt, hostility, and segregation.

Outstanding Legal Question

The following information provides context to questions previously presented to the legislature or other governing bodies that remain unsatisfactorily and insufficiently answered. These questions relate to "anti-racism" teachings, CRT, and have been raised by various stakeholders, including members of the legislature, constituents, school boards, advocacy groups, and citizens.

The U.S. Department of Education recently proposed a new rule which establishes priorities for grants under the “*American History and Civics Education*” programs.¹⁷ This rule offers priority consideration to grant “projects that incorporate racially, ethnically, culturally, and linguistically diverse perspectives.”¹⁸ *Id.* at 20349. Most concerning, applicants must demonstrate that their project incorporates teaching and learning practices that:

- Take into account systemic marginalization, biases, inequities, and discriminatory policy and practice in American history;
- Encourage students to critically analyze the diverse perspectives of historical and contemporary media and its impacts¹⁹

Clearly, grant requirements such as these reflect the integration of “anti-racist” teachings and CRT into classrooms. As expressed by the rule itself, “schools across the country are working to incorporate antiracist practices into teaching and learning.”²⁰ The Evanston/Skokie School District in Illinois illuminates the validity of this statement, as well as concerns regarding its legal implications.

¹⁷ *Proposed Policies - American History and Civics Education*, 86 Fed. Reg. 20348 (Apr. 19,2021)

¹⁸ *Id.* 20349

¹⁹ *Id.*

²⁰ *Id.*



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During the spring of 2019, the Evanston/Skokie School District developed the "Black Lives Matter at School" curriculum, which "unapologetically aims to create a new generation of allied activists".²¹ This curriculum:

- Separated administrators, during a professional development program, based on race.
- Offered various "racially exclusive affinity groups" that separated students, parents and community members by race.²²
- Implemented a disciplinary policy that included "explicit direction" to staffers to consider a student's race when meting out discipline.
- Carried out a "Colorism Privilege Walk" that separated seventh and eighth grade students into different groups based on race

Following the implementation of these "anti-racist" and CRT teachings, the U.S. Department of Education's Office for Civil Rights (OCR) issued a preliminary statement to the teacher-complainant which suggested a potential violation of Title VI of the Civil Rights Act²³. Interestingly, "proceedings were suspended by OCR pending its reconsideration of the case in light of the Executive Orders on racial equity issued by President Biden"²⁴, namely an order titled the "Advancing Racial Equity and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation."

Similar legal concerns originate from our own State. Teachers from the Highland Park Independent School District, in Dallas, Texas, recommended a book to young, impressionable students which was also included in Evanston/Skokie School District's "Black Lives Matter curriculum" - "*Not My Idea: A Book About Whiteness*".²⁵ This children's book echoes the misguided philosophy of Kendi and DiAngelo that "whiteness" is to blame for minority issues today and that white people are more responsible than other races for fixing race-related issues. In this tome, "a white child, prompted by TV-news coverage of a police shooting, goes to the library stacks to find out about racial history. "Whiteness is a bad deal. It always was," the child

²¹ Conor Friedersdorf, *What Happens When a Slogan Becomes the Curriculum*. The Atlantic (Mar. 14, 2021)

²² *Id.*

²³ <https://nypost.com/2021/03/07/education-dept-curbs-decision-on-race-based-affinity-groups/>

²⁴ *Id.*

²⁵ <https://www.newyorker.com/news/annals-of-inquiry/what-do-conservatives-fear-about-critical-race-theory>



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eventually concludes” as she scorns and runs away from her family.²⁶ Additionally, in the back of the book, the author offers interactive pages for children, one of which involves signing a “whiteness” contract handed to you by the devil suggesting that if you sign your soul away and remain white then you get stolen land, riches, special favors and the authority to “mess endlessly with the lives of your friends, neighbors, loved ones, and all fellow humans of color.”²⁷

As demonstrated, questions regarding the constitutionality of these actions are apparent, specifically within the context of Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. Further, beyond the questions concerning a violation of the U.S. Constitution, these types of trainings and education also seem to work outside of the framework of the Texas Constitution.

Texas’ Equal Protection clauses state that all people are seen as equal by the courts and the state.²⁸ By suggesting white students are better than students of color or making white students feel bad for being white, CRT teaches that the State does not view people equally based on the color of their skin. If a public school, university, agency, or workplace separates employees, citizens, and students by race they may be creating an environment that becomes racially hostile or akin to segregation. If allowed, these trainings could go further and encourage other students or employees to treat others differently based on their race. This is especially concerning when taught to children as young as five years-old. Texas courts have ruled that a state agency must treat individuals equally and to the extent that an agency may have to show differentiation between citizens, the agency must exhibit a rational basis for eligibility restrictions.²⁹

²⁶ *Id.*

²⁷ *Anatasia Higginbotham. 2018. “Not My Idea: A Book About Racism”. Dottir Press.*

²⁸ *The Constitution of Texas Art. 1, sec. 3-3a*

²⁹ "Court of Appeals of Texas, Austin. The UNIVERSITY INTERSCHOLASTIC LEAGUE, Appellant v. SOUTHWEST OFFICIALS ASSOCIATION, INC., d/b/a Texas Association of Sports Officials, Appellee. No. 03-10-00030-CV". *UNIVERSITY INTERSCHOLASTIC LEAGUE v. SOUTHWEST OFFICIALS ASSOCIATION INC.* Court of Appeals of Texas Austin: FindLaw, a Thomson Reuters business. 27 August 2010. Retrieved 11 March 2016.



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Additionally, CRT asks white students to admit they are racist or privileged. However, the Texas Constitution also recognizes a Texan's freedom of speech.³⁰ This clause, similar to the U.S. Constitution's First Amendment, also prohibits compelling or forcing speech. It is the people's right to say or not say something. However, if a white student or employee does not want to say they are racist because they are white they may face backlash from their peers and be ostracized by CRT's circular logic.

Conclusion: Request for Legal Opinion

At its onset, the Equal Protection Clause and the Fourteenth Amendment were designed to prevent states from "denying to any person within its jurisdiction the equal protection of the law" and to "prevent the States from purposefully discriminating between individuals on the basis of race".³¹ Since then, the jurisprudence of the Supreme Court views the use of race as presumptively invalid³² unless under narrow circumstances which have been recognized by the Supreme Court.³³ Currently, the consideration of race-centered policies only survive strict scrutiny under two circumstances. First, when "remedying the effects of past intentional discrimination" and, second, when addressing "diversity in higher education."³⁴ Still, limitations for these two exceptions seem to limit their application.

First, when an governmental entity evokes remedial measures to rectify a past discrimination it must "tailor remedial relief to those who truly have suffered the effects of prior discrimination," provide "a strong basis in evidence that remedial action is necessary,"³⁵ and may not use societal discrimination as a legitimate basis for race driven policies.³⁶ Second, while student body diversity remains a compelling interest, schools still bear the burden of demonstrating that

³⁰ *The Constitution of Texas Art. 1, sec. 8*

³¹ <https://www.law.cornell.edu/constitution/amendmentxiv>

³² *Shaw v. Reno*, 509 U.S. 630, 642 (1993)

³³ *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2208 (2016)

³⁴ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720, 722 (2007)

³⁵ *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 518 (1989)

³⁶ *Id.*



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workable race-neutral alternatives do not suffice and that any policy citing "diversity in higher education remains highly focused on an individual rather than any particular racial group."³⁷

- With the jurisprudence of the Fourteenth Amendment in mind, would the continued implementation of CRT and “anti-racist” teachings into public schools, universities, and agencies be determined unconstitutional and undermine its principles?

Any violation of the Equal Protection Clause of the Fourteenth Amendment also seems to imply a violation of the Civil Rights Act of 1964.³⁸

- With the jurisprudence of the Civil Rights Act of 1964 in mind, would the continued implementation of CRT and “anti-racist” teachings into public schools, universities, and agencies be determined unconstitutional?

Similar to the Fourteenth Amendment, the Texas Constitution’s Equal Protection clauses prohibit different treatment between citizens based on race. Additionally, there is extensive case law in Texas prohibiting racial segregation in schools and in the workplace. *Board of Trustees v. Kreger* determined race-based segregation in public schools was unconstitutional³⁹. *Extendacare Health Sys. v. Gisch* also decided that race-based discrimination, creating a hostile work environment, or the *future* threat of either in a workplace demonstrated a violation of the Texas Constitution⁴⁰.

- With the Texas Constitution in mind, would the continued implementation of CRT and “anti-racist” teachings into public schools, universities, and agencies be determined unconstitutional?

Finally, some diversity trainings and programs which appropriately address racial inequities, as previously mentioned in this request for opinion, are effective in their pursuits. Those efforts are important in upholding our rights guaranteed by State and Federal law and should not be outlawed due to the warped philosophies espoused by CRT and "anti-racism" teachings.

³⁷ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720, 722 (2007)

³⁸ *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003)

³⁹ *Board of Trustees v. Kreger*, 369 S.W.2d 916

⁴⁰ *Extendacare Health Sys. v. Gisch*, 1996 (Tex. App. 5, *pet. denied*)



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- With State and Federal law in mind, at what point do programs or trainings that address racial inequities become unconstitutional?

Respectfully,

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