

Opinion No. 2013-045

August 15, 2013

The Honorable Linda Pondexter Chesterfield
State Senator
12 Keo Drive
Little Rock, Arkansas 72206

Dear Senator Chesterfield:

This is in response to your request for my opinion about a proposed school district policy. You provide the following information:

It is my understanding a school board is looking at creating a policy to support equal opportunity as well as economic development across the community by enacting a policy to support the participation of firms owned and controlled by minority persons in construction programs, professional services and in the purchase of other goods and services for the school district. Their annual procurement goal is 20% with minority businesses each year. A minority business is defined as a resident of the state who is African-American, Hispanic American, American Indian or Asian Pacific Islander.

The school district will not discriminate on the basis of race or ownership in awarding contracts, and the policy acts to set goals and track those vendors who voluntarily disclose their racial status. All contracts will be awarded based on the best interest of the district, without regard to the race, gender, national origin etc. of the owners, operators or management company.

Your questions are:

1. Are there any state or federal regulations that would be in conflict with this policy/goal?

2. Under Arkansas law, can you provide the legal definition of “goal” vs. “mandate” and include how it relates to public school policy?

RESPONSE

In my opinion – based on your representation that “the school district will not discriminate on the basis of race” – a school district’s adoption of a policy goal to achieve a stated level of minority participation in contracting would not, alone, be in clear conflict with state or federal law. As discussed further below, however, absent a finding supported by strong evidence that the school district has a past history of discrimination in contracting, the district could not take any race-conscious steps to advance its stated policy goal. And the mere existence of the goal in district policy might well subject the district to lawsuits or other challenges by contractors contending that the district had considered race in favoring one contractor over another. Thus, it is not clear that adopting such a policy goal would have any practical benefit and it might well have materially adverse effects.

I know of no legal definition of the word “goal” or the word “mandate” under Arkansas law. But I comment below on how the words might relate to the equal protection issues your first question raises.

Question 1 – Are there any state or federal regulations that would be in conflict with this policy/goal?

The State and federal constitutions guarantee equal protection of the law.¹ These guarantees mean, among other things, that absent extraordinary circumstances, a governmental body (including a school district) may not distinguish between people on the basis of race:

¹ See U.S. Const. amend. XIV, § 1 (No State may “deny to any person within its jurisdiction the equal protection of the law”); Ark. Const. art. 2, §§ 2 (“All men are created equally free and independent”), 3 (“The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity; nor exempted from any burden or duty, on account of race, color or previous condition”), 18 (“The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens”).

Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people, and therefore are contrary to our traditions and hence constitutionally suspect. Because racial characteristics so seldom provide a relevant basis for disparate treatment, the Equal Protection Clause demands that racial classifications be subjected to the most rigid scrutiny.

To implement these canons, judicial review must begin from the position that any official action that treats a person differently on account of his race or ethnic origin is inherently suspect. Strict scrutiny is a searching examination, and it is the government that bears the burden to prove that the reasons for any racial classification are clearly identified and unquestionably legitimate.²

Thus, any race-conscious³ governmental action will be considered presumptively invalid⁴ in an equal protection challenge, regardless of the claimed motivation or the identity of the racial group benefited or burdened.⁵

If a school district takes race-conscious action, it will have the burden of proving in the event of a challenge that it has a legitimate, compelling interest to be

² *Fisher v. University of Texas at Austin*, No. 11-345, slip op. at 8 (U.S. June 24, 2013) (citations and internal quotation marks omitted).

³ By “race-conscious” I mean the taking into account of a person’s race in making a decision about who will enjoy some governmental benefit (like a contract with a public body) or suffer some burden imposed by the government. Any such taking into account appears to be sufficient to constitute a racial classification. It appears, in other words, to make no difference for equal protection purposes whether race is the sole determinant or is merely one factor among many – both are disfavored in law and subject to strict judicial scrutiny. *See, e.g., Fisher, supra* note 2, slip op. at 3 (Ginsburg, J., dissenting) (action taken under university’s affirmative action program that considered race not as a determinant but only as a “factor of a factor of a factor of a factor” was nonetheless subject to strict scrutiny). I also characterize as “race-conscious” for purposes of this opinion any action taken on the basis of a seemingly race-neutral distinction between people that is in fact a proxy for race. *See, e.g., Sherbrooke Turf, Inc. v. Minnesota Dept. of Transp.*, 345 F.3d 964 (8th Cir. 2003) (plan favored “socially and economically disadvantaged individuals” but defendant government conceded that plan created racial classifications in fact).

⁴ *See, e.g., Personnel Adm’r of Massachusetts v. Feeney*, 442 U.S. 256 (1979).

⁵ *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Feeney, supra* note 4.

advanced by the racial classification and that the racial classification is narrowly tailored – not more extensive than necessary – to further the compelling governmental interest.⁶

What governmental interests are compelling? In the public contracting context, it appears that the only governmental interest that can ever be sufficiently compelling to justify race-conscious action is remedying past racial discrimination in contracting for which the government itself was responsible.⁷ A desire for more minority participation for its own sake, or a desire to remedy past or present discrimination in society at large, is not sufficient and cannot serve as a compelling governmental interest.⁸ And a state or local government must have a strong basis in evidence, something at least approaching a *prima facie* case that discrimination has in fact occurred.⁹

Even if a compelling interest can be demonstrated, the school district would further have to show that the race-conscious action taken was narrowly tailored to advance the compelling interest without unnecessarily trammeling the rights of those not favored.¹⁰ In determining whether race-conscious action is narrowly tailored, courts consider the prevailing facts and circumstances, including the availability and efficacy of alternative (race-neutral) remedies, the flexibility (*e.g.*, waivers) and duration of the race-conscious action, the relationship between the stated goal and the racial composition of the relevant market, and the impact of the action on third parties.¹¹

⁶ *See, e.g., id.*

⁷ *Croson, supra* note 5, 488 U.S. at 486-493 (race-based measures to increase minority participation in government contracting may be permissible to remedy government's own discrimination or discrimination by private actors resulting in private system of racial exclusion in which government has become passive participant).

⁸ *Id.*

⁹ *Id.*

¹⁰ *See, e.g., Croson, supra* note 5, 488 U.S. at 507.

¹¹ *See, e.g., United States v. Paradise*, 480 U.S. 149, 171 (1987).

Your opinion request does not even allege that the school district has engaged in any past discrimination in contracting. Nor does your request state whether the district has considered alternative policies, whether the goal will be of limited duration, or whether the 20% level stated in the goal bears any relation to the proportion of minority-owned businesses in the pool of all potential contractors. Without more, the facts stated in your opinion request would be insufficient to justify race-conscious action under strict scrutiny.

The foregoing is a discussion of law that applies when a government takes race-conscious action.¹² But you state that “[t]he school district will not discriminate on the basis of race” I interpret that statement to mean that the district will not take any race-conscious action in furtherance of the goal. That is a critical fact, and my opinion that the goal you describe would not be in clear conflict with state¹³ or federal law hinges on that fact.

Judging solely from the information provided in your opinion request, the goal – not rising to the level of a plan or program – apparently contemplates almost no action at all, only the “set[ting of] goals and [the] track[ing of] vendors who voluntarily disclose their racial status.” It is a “time-honored principle that the [equal protection clause of the] Fourteenth Amendment, by its very terms, prohibits only [discriminatory] state *action*.”¹⁴ The mere existence of a governmental goal, without actual discrimination on the basis of race, likely would not support a finding against the district if a lawsuit were filed. But, as discussed below, even the existence of the stated goal might well lead to litigation against

¹² Because I interpret your request to involve a scheme that does not include any race-conscious action, I have only briefly discussed equal protection analysis of race-conscious action. Predecessors in this office have considered the constitutionality of affirmative action plans in greater detail in Op. Att’y Gen. 95-116, 94-402, 91-036, and 89-023. As even my abbreviated discussion should make clear, because racial classifications are presumptively invalid and may be used only in limited circumstances and on exacting conditions, a school district or other local government should use race-conscious means in making contracting or other decisions only in accordance with local counsel’s advice.

¹³ School districts are subject to a statute governing the purchase of “commodities,” a term broadly defined to include some services. A.C.A. §§ 6-21-301 to -306 (Repl. 2007, Supp. 2011). I assume your statement that “contracts will be awarded based on the best interest of the district” contemplates compliance with this statute and any other similar applicable state laws, which I do not consider further here.

¹⁴ *United States v. Morrison*, 529 U.S. 598, 621 (2000) (emphasis added).

the district by a contract bidder who was not awarded a contract. Of course, such lawsuits which did not ultimately conclude with a finding against the school district could well be burdensome and expensive to defend.

Even the adoption of a policy for which no affirmative implementation actions were taken might well pose some risk. I know of at least two matters to consider in that regard.

First, the school board may lack the authority to adopt and maintain the goal. The prevailing opinion in *Croson* noted that a local government may act to remedy past racial discrimination within the locality “if delegated the authority from the State” to do so.¹⁵ A school board’s authority under Arkansas law to take action to alter the racial composition of a group with whom it contracts – or even to proclaim that goal – is less than clear. A school board’s “powers . . . are derived only from legislative authority.”¹⁶ The General Assembly has enacted a statute that enumerates powers granted to, and duties imposed on, school district boards “in order to provide no less than a general, suitable, and efficient system of free public schools.”¹⁷ Boards have broad express authority under that statute, and additional powers implied¹⁸ from those named, to manage the schools. But the General Assembly has given a school board no express statutory authority to alter the racial composition of its contractors. And, it is not clear that a court would find such authority to be implied, given that adopting such a policy goal would be outside the board’s central mission of providing free public schools in the district.

Additionally, our State constitution¹⁹ restricts school funds to uses that are “immediately and directly connected with the establishment and maintenance of a common school system”²⁰ and are “convenient, useful, appropriate, suitable,

¹⁵ 488 U.S. at 491.

¹⁶ *Lynn Sch. Dist. No. 76 v. Smithville Sch. Dist. No. 31*, 213 Ark. 268, 275, 211 S.W.2d 641 (1948).

¹⁷ A.C.A. § 6-13-620 (Supp. 2011).

¹⁸ *See, e.g., Fortman v. Texarkana Sch. Dist. No. 7*, 257 Ark. 130, 514 S.W.2d 720 (1974).

¹⁹ Ark. Const. art. 14, §§ 2, 3.

²⁰ *Gray v. Mitchell*, 373 Ark. 560, 568, 285 S.W.3d 222 (2008) (quoting *Little River Cnty. Bd. of Educ. v. Ashdown Special Sch. Dist.*, 156 Ark. 549, 556, 247 S.W. 70 (1923)).

proper or conducive to the proper maintenance of the schools.”²¹ The propriety of any particular expenditure is a matter for the school board to determine, but the courts have the authority to “ensure that school money is not diverted to an unrelated purpose, such as to subsidize road improvements or to pay a county officer for duties unrelated to the operation of the schools.”²² If the goal’s adoption or maintenance would involve expenditures of school funds, the board should consider whether an attempt to alter the racial composition of its contractors is sufficiently related to the district’s educational purpose.

Second, even if the board had the authority to adopt a pure policy goal, the mere existence of that policy goal may encourage discrimination claims by contract bidders. Any evidence that a government “followed” or “act[ed] in connection with” an affirmative action plan in taking some challenged action could be used to support a claim that the school district unlawfully discriminated in taking the action.²³ A contract bidder bringing a discrimination claim might, in other words, introduce the goal itself as evidence that the district’s official policy called for the consideration of race in making its contracting decisions.

Finally, there can be no assurance that the goal would not result in adverse consequences in ways I have not foreseen.

Because racial classifications are presumptively invalid and may be used only in limited circumstances to remedy past discrimination for which the district was responsible, a school district or other local government should not adopt a policy focusing on race in contracting without very serious reflection on the possible consequences, and only then in accordance with local counsel’s considered advice.

Question 2 – Under Arkansas law, can you provide the legal definition of “goal” vs. “mandate” and include how it relates to public school policy?

²¹ *Id.* at 569.

²² *Id.*

²³ See *Humphries v. Pulaski Cnty. Special Sch. Dist.*, 580 F.3d 688 (8th Cir. 2009).

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I know of no relevant, authoritative definitions of those words under Arkansas law. Even a pure policy goal to increase minority participation that is not accompanied by race-conscious action could well lead to litigation. Any plan that mandates – or even permits – race-conscious actions will be subject to strict judicial scrutiny and would be difficult to defend.

Assistant Attorney General J. M. Barker prepared this opinion, which I approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

DM:JMB/cyh