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RESPONSE TO THE ATTORNEY GENERAL'S OPINION

On August 16, 2021, the duly elected Attorney General issued an AG's Opinion – 2021-042 to Representative Mark Lowery. Mr. Lowery posits whether it would be illegal for schools and universities to teach critical race theory (CRT) or introduce the concept of "antiracism" within their curricula. Mr. Lowery wanted to know whether teaching CRT would violate Title VI of the Civil Rights Act, the Fourteenth Amendment, and Article II of the Arkansas Constitution. The Attorney General issued an opinion assuring Mr. Lowery that teaching these concepts within our public schools would indeed violate these above-mentioned laws.

First, and foremost, there is no public school in the State of Arkansas that teaches CRT or "antiracism." The Attorney General's opinion contends that if schools were inclined to teach courses on CRT and/or "antiracism," this would violate Title VI of the Civil Rights Act of 1964 (as amended), as well as the Equal Protection clause of the Fourteenth Amendment to the United States Constitution. The Attorney General's opinion is flawed for many reasons. A few will be discussed herein.

Many have tossed around the concept of Critical Race Theory (CRT), without evewn having an understanding of what it really is. Critical Race Theory began in the 1980's and 1990's as a course of study that is designed to examine the ways that race impacted laws and policies of this country. As an article published by the American Bar Association Human Rights Magazine notes:

> CRT is not a diversity and inclusion 'training' but a practice of interrogating the role of race and racism in society that emerged in the legal academy and spread to other fields of scholarship. [Kimberlé] Crenshaw - who coined the term 'CRT" –

> notes that CRT is not a noun, but a verb. It cannot be confined to a static and narrow definition but is considered to be an evolving and malleable practice. It critiques how the social construction of race and institutionalized racism perpetuate a racial caste system that relegates people of color to the bottom tiers. CRT also recognizes that race intersects with other identities, including sexuality, gender identity, and others. CRT recognizes that racism is not a bygone relic of the past. Instead, it acknowledges that the legacy of slavery, segregation, and the imposition of second-class citizenship on Black Americans and other people of color continue to permeate the social fabric of this nation.[1]

The Attorney General opines that to teach CRT in public schools would violate Title VI of the Civil Rights Act of 1964 (as amended), which is not the case. Title VI of the Civil Rights Act of 1964 (as amended) is codified at 42 U.S.C. § 2000d. The 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 program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d.

The purpose of Title VI was to ensure that black children were receiving an educational experience that was equal to their white counterparts. Teaching such things as CRT, 1619 Project, would not violate Title VI. There is no doubt that like so many other southern states, Arkansas has a sordid history in terms of race relations, but this is our history! The United States Supreme Court gave its seal of approval for segregation and white supremacy in the case of *Plessey v. Ferguson*. In the wake of *Plessey v. Ferguson*, and the decision of *Brown v. Board of Education*, many southern states erected confederate monuments, an afront to black people.

CRT examine laws that were put in place to preserve white supremacy. During the *Jim Crow* era, many southern states including Arkansas, passed laws that t prohibited interracial marriages, that prohibited black nurses from providing care to white patients, that prohibited newborn black babies from sharing the same space with newborn white babies, and that prohibited

[1] Janel George, *A Lesson on Critical Race Theory*, American Bar Association – Vol. 46, No. 2: Civil Rights Magazine Reimaging Policing.

blacks and whites from being buried in the same cemetery – just to name a few. Many of these laws remained on the books well into the 1970's, 80's, and 90's. CRT examines why such laws were passed in the first place, and their effect on the psyche of black people, as well as how those laws impact behaviors today. CRT examines why policing in Black America is different from that in white America and dispels the myth that we live in a color blind society. It highlights the fact that racism is systemic, and not merely an aberration.

Certainly, learning about the true history of this country in terms of race will make some uncomfortable. American history includes many harsh episodes, the lynching of thousands of African Americans, the oppression of blacks, Jim Crow laws that sought to uphold the myth of White Supremacy, segregation, and the genocide of black people, i.e., Tulsa Race riots, and Elaine Race riots. If we fail to heed the lessons of our past, we are doomed to repeat them.

Title VI of the Civil Rights Act makes it unlawful to deny an educational benefit to children based on their race. The 10th Circuit Court of Appeals stated "[It] protects the right to be free from discrimination under a program that receives federal funding." Bryant v. School District No. I 38 of Garvin City, Oklahoma, 334 F.3d 928, 931 (10th Cir. 2003).

> Courts have applied the familiar McDonnell Douglas burden-shifting analysis to cases arising under Title VI. *Fuller v. Ryburn*, 161 F.3d 516 (8th Cir. 1998); *Jackson v. University of New Haven*, 228 F.Supp.2d 156, 159-60 (D.Conn. 2002); *McKie v. New York University*, No. 94 Civ. 8610 (LMM), 2000 WL 1336055, at *1 (S.C.N.Y. Sept. 15, 2000).
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> > Under this analytical framework, the Court will examine three different requirements. First, the plaintiff has the burden of establishing a prima facie case of racial discrimination. *McDonnell Douglas Corp*., 411 U.S. at 802 [93 S.Ct. 1817]; *see also Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 222 (5th Cir. 2000). Second, if the plaintiff establishes a prima facie case of racial discrimination, the Court presumes discrimination is present, and the defendant has the burden of rebutting this presumption by articulating a legitimate, nondiscriminatory reason for the alleged discrimination. *McDonnell Douglas Corp*., 411 U.S. at 802-03 [93 S.Ct. 1817]; *Russell*, 235 F.3d

> at 222; *Olitsky v. Spencer Gifts, Inc*., 964 F.2d 1471, 1478 n. 19 (5th Cir. 1992). Third, the burden shifts back to the plaintiff to produce evidence that the defendant's proffered explanation is 'mere pretext for unlawful discrimination.' *Williams* [*v. Galveston Indep. School District*.], 256 F.Supp.2d [668] at 672 [(S.C. Tex. 2003]; *see also McDonnell Douglas Corp*., 411 U.S. at 804-05 [93 S.Ct. 1817]
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> Gant v. Southern Methodist School of Law, No. CIVA305CV1455K, 2006 WL 2691301, *2 (N.D. Tex. Sept. 19, 2006).

Lopez v. Webster Central School District, 682 F.Supp.2d 274, 279-80 (W.D.N.Y. 2010).

In *Bryant*, supra., the plaintiff alleged that the school district was deliberately indifferent to the plaintiff's complaints of discrimination. Student's alleged that the principal was aware of other students' use of racial slurs, writing racial graffiti on school furniture, and placing racial notes on student lockers. The school allowed white students were allowed to wear T-shirts with confederate flags, swastikas, KKK symbols, and hangman nooses and to display these symbols in their vehicles. Despite the fact that parents complained about this, the school did not do anything to correct this behavior. The appellate court ruled in favor of the students stating:

> [W]e are holding that when administrators who have a duty to provide a nondiscriminatory educational environment for their charges are made aware of egregious forms of intentional discrimination and make the intentional choice to sit by and do nothing, they can be held liable under § 601.

Bryant v. School District No. I 38 of Garvin City, Oklahoma, 334 F.3d 928, 933 (10th Cir. 2003).

> Title IX of the Civil Rights Act is a similar statute, that shares the same goals as Title VI.
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> As noted by the second Circuit Court of Appeals, '[b]ecause the statutes share the same goals and because Title IX mirrors the substantial provisions of Title VI of the Civil Rights Act of 1964, courts have interpreted Title IX by looking to the body of law developed under Title VI, as well as the caselaw interpreting Title VII.

Lopez v. Webster Central School District, 682 F.Supp.2d 274, 277 (W.D.N.Y. 2010), *quoting*, Curto v. Edmundson, 392 F.3d 502, 504 n. 3 (2nd Cir. 2004).

Teaching about history and the role race and racism play in shaping this country through the use of certain laws does not subject one to a hostile educational environment as the Attorney General contends. If a child is being subjected to racial name calling, racial slurs and epithets, which constitute a hostile educational environment, and the school district does not take any action to remedy the situation, this would violate Title VI of the Civil Rights Act of 1964 (as amended), and would make the school district liable.

The Attorney General contends that to teach CRT in public schools would somehow violate the equal protection clause of the Fourteenth Amendment to the United States Constitution but failed to state how. The very essence of the equal protection clause of the Fourteenth Amendment is to provide for the equal rights of the citizens of this country, regardless of race. The United States Supreme Court had to address whether segregation within our school system violated the equal protection clause of the United States. The Court stated that it did.

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[2]

It is a fundamental right of every student to be empowered with an education that embraces the truth of the impact of race in an accurate historical, political and social context. Critical Race Theory seeks equality in education and does not violate Title VI of the Civil Rights Act, the Fourteenth Amendment, or Article II of the Arkansas Constitution.

/s/ Austin Porter Jr.

[2] Brown v. Board of Education, 347 U.S. 483, 493 (1954).