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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

February 18, 2014

Representative Sara Gelser
900 Court Street NE H285
Salem OR 97301

Re: Constitutionality of SB 1538-A (2014)

Dear Representative Gelser:

Senate Bill 1538-A (2014) provides, in part:

> [A] public charter school may give priority for admission to students who have historically been underserved due to race or ethnicity, students in low-income households or English language learner students.[1]

You ask whether this provision violates the Equal Protection Clause of the United States Constitution or the Equal Privileges and Immunities Clause of the Oregon Constitution. We conclude that the answer is likely yes under both the federal and state Constitutions.

We turn first to analysis under the Equal Protection Clause of the United States Constitution. Under Equal Protection Clause jurisprudence, any legislation that establishes classification based on race or ethnicity must meet strict scrutiny and is valid only if narrowly tailored to serve a compelling governmental interest.[2] While racial or ethnic quotas designed to achieve racial balancing are patently unconstitutional, a decision to pursue student body diversity may, under certain circumstances, meet strict scrutiny.[3] Particularly in the context of K-12 education, however, a racial and ethnic classification cannot be transformed from unconstitutional balancing to a narrowly tailored and compelling state interest merely by asserting that it promotes racial diversity.[4] In the case of an educational policy that grants priority based on race or ethnicity, a school employing the policy bears the burden of demonstrating that use of race or ethnicity is not the defining feature justifying the classification, but rather that the school promotes a goal of student body diversity to be achieved through a broad array of qualifications and characteristics of which race or ethnicity is only a single, though important, element.[5]

[1] Section 4 of SB 1538-A, amending ORS 338.125. This opinion is limited to considering the constitutionality of the quoted material and does not address any other changes proposed in SB 1538-A.
[2] *Grutter v. Bolinger*, 539 U.S. 306, 326 (2003).
[3] *Grutter* at 328.
[4] *Parents Involved in Community Schools v. Seattle School Dist. No 1.*, 551 U.S. 701, 732 (2007).
[5] *Fisher v. Univ. of Texas*, 133 S. Ct. 2411, 2422-2424 (2013).

Applying these standards to SB 1538-A, we conclude that a public charter school would be unable to meet a strict scrutiny threshold to justify racial or ethnic prioritization in admission decisions. Although remedying the effects of past intentional discrimination is a compelling interest, the United States Supreme Court has found that interest does not satisfy strict scrutiny in the context of K-12 education involving school districts that were never segregated by law or subject to court-ordered desegregation.[6] Oregon public charter schools would not have been segregated by law, nor were Oregon school districts ever subject to court-ordered desegregation. The court has also found that the strict scrutiny standard is not satisfied when race or ethnicity is not simply one factor weighed with others in making an admission decision but instead is *the* factor considered in making the decision.[7] Under SB 1538-A, race or ethnicity can be the sole factor justifying giving priority admission to some students over others. Accordingly, we conclude that SB 1538-A would not satisfy strict scrutiny standards and a court would likely find that the bill violates the Equal Protection Clause of the United States Constitution.

Article I, section 20, of the Oregon Constitution, prohibits laws that grant privileges or immunities to any citizen or class of citizens that do not apply on the same terms to all citizens. There are no cases that directly consider whether racial or ethnic prioritization in the context of public charter school admissions would be prohibited by the equal privileges and immunities guarantee in the Oregon Constitution. However, general principles developed under the Equal Privileges and Immunities Clause strongly suggest that a court would find SB 1538-A unconstitutional on these grounds as well. Article I, section 20, protects against disparate treatment between "true classes," or, in other words, classes that have identity apart from the law that is being challenged.[8] A subset of true classes, "suspect" classes are those defined in terms of characteristics that reflect invidious social or political assumptions, such as prejudice or stereotyped prejudgments. Laws that create disparate treatment between suspect classes are inherently suspect and subject to heightened scrutiny. Such laws may be upheld only if the disparity can be justified by genuine differences between the disparately treated class and the class to whom privileges and immunities are granted.[9] Applying these standards to SB 1538-A, we conclude that public charter school admissions prioritization creates suspect classes based on race and ethnicity and warrants heightened scrutiny. Further, we conclude that a court would be unable to identify genuine differences between racial or ethnic classes that could justify such disparate treatment. Therefore, SB 1538-A is likely unconstitutional under Article I, section 20, as well.

Please advise if we can be of further assistance in this matter.

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[6] *Parents Involved in Community Schools* at 720-721.
[7] *Parents Involved in Community Schools* at 723.
[8] *Tanner v. Oregon Health Sciences Univ.*, 157 Or. App. 502, 521 (1998).
[9] *Tanner* at 522-523.

city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

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