September 14, 2021

State Board of Education
25 South Front Street
Columbus, Ohio 43215

SYLLABUS: 2021-022

1. As a general matter, the State Board of Education has authority to direct the Department of Education to reexamine the academic content standards and model curriculums to make recommendations to the State Board of Education as necessary to eliminate bias and ensure that racism and the struggle for equality are accurately represented. Without knowing what standards or curricula the Department of Education is considering, no opinion can be offered as to whether the standards and curricula adopted violate the law.

2. As a general matter, the State Board of Education has authority to require employees of the Department of Education to take implicit bias training. However, the training must comply with limits imposed by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2, the Ohio Civil Rights Act, R.C. 4112.02, the Fourteenth Amendment to the United States Constitution, and Article I, Section 2 of the Ohio Constitution as discussed in the Opinion.

3. The State Board of Education does not have authority to require that all contractors working with the Department of Education take implicit bias training.

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OPINION NO. 2021-022

State Board of Education
25 South Front Street
Columbus, Ohio 43215

Dear State Board of Education:

On July 14, 2020, the State Board of Education issued a resolution entitled: "Resolution to Condemn Racism and to Advance Equity and Opportunity for Black Students, Indigenous Students and Students of Color." You have requested an opinion regarding whether the Board had authority to adopt the Resolution and whether its doing so violated any state or federal laws. This opinion responds to that request.

I

I begin by considering what, exactly, the Resolution is. Most of the document appears to be symbolic in signaling the Board's views on race and racism. The symbolic portions appear in numerous "whereas" clauses followed by statements alluding to various ills associated with racism. Many of these vague statements contain non-binding resolutions or statements of opinion. For example, the Board condemns hate speech and hate crimes, and recommends that local school districts examine all facets of their schools' operations.

The Resolution's symbolic nature accords with the Board's role—in many respects, the Board's task is advisory and consultative in nature. *See, e.g.,* R.C. 3301.07(A) ("The state board shall exercise policy

forming, planning and evaluative functions for the public schools of the state except as otherwise provided by law."); *see also Merslie v. Ohio Dept. of Adm. Servs.,* 105 Ohio App.3d 386, 391-392 (10th Dist.1995) ("R.C. 3301.07(B) places a duty on the State Board of Education to provide consultive and advisory services to all school districts with respect to" all aspects of education."); *Hartley v. Berlin-Milan Local School Dist.*, 6th Dist. Erie No. E-80-17, 1980 Ohio App. LEXIS 12430, *8 (December 31, 1980) ("[T]he state board serves only an advisory or consultative function on matters of local school board interest.") The General Assembly requires local school districts to take some actions. But it has also assigned significant discretionary authority to local boards of education. *See generally* R.C. Chapter 3313. Of particular importance for purposes of the Resolution, local boards of education are "the sole authority in determining and selecting" academic curricula, textbooks, and instructional material for their schools. R.C. 3313.21; *see also* R.C. 3313.60. School districts are not required to use the model curricula developed by the Board. R.C. 3301.079(B).

Although the Resolution is *largely* symbolic, it contains a few operative (or arguably operative) provisions. Three stand out:

- The clause directing the Ohio Department of Education to reexamine academic content standards and model curricula to make recommendations to the Board to "eliminate bias and ensure that racism and the struggle for equality are accurately addressed."

- The clause requiring all employees working with the Department to take trainings "to identify their own implicit biases so that they can perform their duties to the citizens of Ohio without unconscious racial bias."

- The corollary requirement that all contractors working with the Department take trainings "to identify their own implicit biases so that they can perform their duties to the citizens of Ohio without unconscious racial bias."

These portions of the Resolution go beyond symbolism, requiring individuals and entities to undertake certain tasks.

II

With that in mind, I turn to your request. You ask whether the "Resolution as adopted conforms with state and federal laws." But you have not specified any state or federal laws that you would like me to analyze. It is unfathomable for this office to attempt to answer whether the Resolution passes muster under every state or federal statute and regulation. *See* 2021 Op. Att'y Gen. No. 2021-006, Slip. Op. at 11. Therefore, I will generally discuss the statutory and constitutional schemes that relate to the Resolution, and lay out some guidelines and warnings. And I will discuss those issues only in response to the three operative clauses discussed above. No doubt, purely symbolic acts by the government can, in some cases, violate the law. *See United States v. Parma*, 661 F.2d 562, 574 (6th Cir.1981) (city council's failure to adopt a resolution welcoming "all persons of goodwill to the [city,]" although only symbolic, could be part of a pattern and practice of violating the Fair Housing Act if there was other testimony that the city was hostile to racial minorities). But because the legality of the resolution is most likely to hinge on the legality of the actually operative provisions, I focus on those.

A

The Resolution "directs the Ohio Department of Education to reexamine the Academic Content Standards and Model Curriculums to make recommendations to the State Board of Education as

necessary to eliminate bias and ensure that racism and the struggle for equality are accurately addressed." I conclude that this command, by itself, comports with state and federal law. But depending on what the standards and curricula say, those standards and curricula may not.

As an initial matter, the General Assembly has empowered the Board to issue statewide academic standards and model curricula pursuant to R.C. 3301.079. The academic standards are incorporated into the proficiency exams given to Ohio students. R.C. 3301.0710; R.C. 3301.0712. The model curricula, however, are guidelines only; local school districts and teachers are not required to use them. R.C. 3301.079(B); *see also Freshwater v. Mt. Vernon City School Dist. Bd. of Edn.*, 137 Ohio St.3d 469, 2013-Ohio-5000, 1 N.E.3d 335, ¶152-153 (O'Donnell, J., dissenting).

There are some matters that the Board *must* incorporate into academic content standards. For example, R.C. 3301.079(A)(1)(b) requires academic content standards to incorporate study of the Declaration of Independence, the Northwest Ordinance, the United States Constitution and its amendments, and the Ohio Constitution. And in at least one content area – health – the Revised Code prohibits the Board from adopting or revising any standards or curricula unless the revisions are also approved by a concurrent resolution of both houses of the General Assembly. R.C. 3301.0718. But in general, the Board has wide latitude in setting standards and curricula. *See* 1991 Op. Att'y Gen. No. 91-004, at 2-24 to 2-25 (whether privately produced television with commercial advertising may be used to satisfy minimum standards is a policy decision for the Board); 1988 Op. Att'y Gen. No. 88-001, at 2-5 (whether religious instruction during "released-time religious instruction" from public school may be used to meet minimum standards is a policy decision for State Board of Education.) Therefore, so long as the Board

follows the requirements set forth in statute, it has general authority to issue academic standards.

In crafting standards and curricula, the Board may enlist the help of the Ohio Department of Education. *See* R.C. 3301.13; *Cuyahoga Falls City School Dist. Bd. of Edu. v. Ohio Dep't of Edn.,* 118 Ohio App.3d 548, 554 (10th Dist.1997) (The Department "is the administrative unit and organization through which the policies, directives, and powers of the State Board of Education are administered. R.C. 3301.13, paragraph one. In this context, [the Department and Board] are one.") Therefore, the Resolution does not exceed the Board's power by ordering the Department to reexamine, and to make recommendations regarding, standards and curricula.

Critically, although the Board has the power to enlist the Department's help in addressing standards and curricula, the standards or curricula adopted could violate state or federal law. Without knowing what standards or curricula the Department is considering no opinion can be offered as to whether the standards and curricula adopted violate the law.

What I can say is this: the curricula and standards will be contrary to law if they treat students differently on the basis of race. For example, standards that differentiate on the basis of race, or that promote the idea that one's race inherently affects one's abilities will violate the legal prohibition on racial discrimination—a prohibition established by the Fourteenth Amendment of the United States Constitution, Article I, Section 2 of Ohio Constitution, Title VI of the Civil Rights Act of 1964, and more besides.

This prohibition on racial discrimination is a commandment to be followed, not an inconvenience to be evaded. "In the eyes of government, we are just one race here. It is American." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (1995)

(Scalia, J., concurring in part and concurring in the judgment). Our laws—not to mention basic morality—entitle each of us to be judged by the content of our character rather than the color of our skin. *See* Dr. Martin Luther King, Jr., *Transcript of "I Have A Dream" Speech*, U.S. Archives, https://perma.cc/Y3Q4-3ZPP. The Department must therefore ensure that its curricula and standards draw no race-based distinctions. Every decent person agrees on the importance of eradicating racial discrimination. And the "way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Community School v. Seattle School Dist. No. 1*, 551 U.S. 701, 748, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) (op. of Roberts, C.J.).

B

The Resolution says that "the State Board of Education shall require training for all employees and contractors working with the Department of Education to identify their own implicit biases so that they can perform their duties to the citizens of Ohio without unconscious racial bias."

The Resolution contains no definition of "implicit bias," nor is there any such definition in the Revised Code. So the phrase would appear to bear its ordinary meaning. I therefore interpret the Resolution as requiring training intended to combat unconsciously held biases held by the Department's employees and contractors. I conclude that this provision is lawful as applied to employees and Board members, but *unlawful* as applied to contractors.

1

The Board generally has authority over the Department and its employees. R.C. 3301.07(N); R.C. 3301.13. No statute explicitly requires the Board or any other state agency to require that its employees take implicit bias training. Nor does any statute explicitly prohibit it from so requiring. Employee

training, however, is generally recognized as a core aspect of the employer-employee relationship. *See, e.g., LaMusga v. Summit Square Rehab, LLC*, 2017-Ohio-6907, 94 N.E.3d 1137, ¶17 (2nd Dist.)*; Wade v. Scheib*, 6th Dist. Fulton No. F-98-007, 1999 Ohio App. LEXIS 177, *6, *9 (Jan. 29, 1999); Ohio Adm.Code 4141-3-05(B)(2). I see no reason training required by the Board of the Department's employees, whom it oversees through the superintendent of public instruction, should be treated differently. (Collective bargaining agreements the Board has reached with its employees may alter its ability to require certain trainings. But I generally refrain from discussing such agreements, and do not address them here. 2021 Op. Att'y Gen. No. 2021-001, Slip. Op. at 4-5, 2-3.)

Although the Board generally has authority to require Department employees to take training, the content of the training could implicate prohibitions on racial discrimination, including the constitutional and state or federal prohibitions discussed above. Equal protection requirements apply to the state when it is acting as an employer. *See Sherman v. Ohio Pub. Emp. Retirement Sys.*, 163 Ohio St.3d 258, 2020-Ohio-4960, 169 N.E.3d 602, ¶25-26. In addition, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2, and the Ohio Civil Rights Act, R.C. 4112.02, prohibit employers from discriminating against employees based on race, national origin, or other factors in any matter relating to employment. The scope of the Ohio Civil Rights Act is interpreted similarly to that of Title VII. *Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St.3d 175, 2004-Ohio-723, 803 N.E.2d 781, ¶15; *Plumbers & Steamfitters Joint Apprenticeship Commit. v. Ohio Civ. Rights Comm.*, 66 Ohio St.2d 192, 196, 421 N.E.2d 128 (1981). Civil rights laws in the employment context are broad in scope. And state-employer required trainings promoting the idea that an individual is biased *because of* his skin color risks running afoul of those standards. The same goes for trainings that promote the idea that individuals may be judged based on race, religion, sex, ethnicity, and so on.

Because your question does not ask for an analysis of any particular implicit-bias training, I will refrain from offering any views on the matter.

2

Although the Board may require its *employees* to take implicit bias training, it cannot force all its *contractors* to do so.

The Resolution covers the entire universe of contractors with whom the Department might contract, including general and information technology supplies and services. Such contracts are generally within the authority of the Department of Administrative Services and not the Department. *See generally* R.C. Chapter 125. These contractors have no duties related to teaching, education policy, or licensing. Implicit bias trainings have no direct relationship to the contractors' ability to perform their contracts.

The Board's powers and duties are prescribed by statute. *See* Ohio Constitution, Article VI, Section 4. No statute allows the Board to require that all its contractors take implicit bias trainings, or other trainings that have no direct relationship to the contractors' duties. Therefore, it may not do so.

The conclusion is bolstered by the fact that, in the Revised Code, the General Assembly already took steps to prevent discrimination by state contractors. For example, state contractors and subcontractors are prohibited from discriminating against any employees based on certain protected classes. R.C. 125.111(A). State contractors must also have "a written affirmative action program for the employment and effective utilization of economically disadvantaged persons." R.C. 125.111(B). The contractor must file a plan with the Department of Administrative Services and annually provide a progress report on its

implementation of the plan. *Id.* (effective September 30, 2021, the statute will change to require that the plan be provided to the Department of Development.) The statutes show that the General Assembly considered the issue of preventing discrimination by contractors. The fact that it did so, combined with the fact that it never empowered agencies to impose requirements of their own, suggest it intended not to give them any such power.

C

Several other clauses of the Resolution also contain directives: a directive that the Board shall offer implicit bias training to its own members; a directive that the Department must "continue the practice of ensuring all state administered tests are free of racial bias"; and a directive that the Board will be guided by its previously approved strategic plan for education. None of these directives create legal concerns on their face—each falls within the Board's power to oversee its employees, or to supervise the development of standards and curricula. They should, however, all be implemented within the statutory and constitutional requirements outlined in this Opinion.

Conclusion

Accordingly, it is my opinion, and you are hereby advised that:

1. As a general matter, the State Board of Education has authority to direct the Department of Education to reexamine the academic content standards and model curriculums to make recommendations to the State Board of Education as necessary to eliminate bias and ensure that racism and the struggle for equality are accurately represented. Without knowing what standards or curricula the Department of Education is considering, no

opinion can be offered as to whether the standards and curricula adopted violate the law.

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3. The State Board of Education does not have authority to require that all contractors working with the Department of Education take implicit bias training.

Respectfully,

DAVE YOST
Ohio Attorney General