MEMORANDUM

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TO: Ames High School Principal

FROM: Ames School District Attorney

RE: Ambassadors to the World Spring Trip

Ames High School will be sponsoring an "Ambassadors to the World" trip which will take place in the spring. The group, traveling to Havana, Cuba, will consist of twenty students. Five of the students are from targeted positions reserved for students of diverse backgrounds including students of color, members of the LGBTQ communities, and students with disabilities. The five targeted students will be traveling at no cost. One targeted student has withdrawn and Student Chandler Terry Smith applied to fill the vacant slot even though she was not eligible for a targeted position based on the criteria. Chandler feels she was discriminated against both economically and in terms of her background. She has requested a meeting with the principal to discuss what she believes to be an unfair discriminatory selection process.[1]

Diversity and affirmative action are subject to scrutiny to prevent unlawful reverse discrimination which is defined as discrimination against members of a historically advantaged group or majority. To prove that reverse discrimination has occurred, the person must show proof that the discrimination was based on inclusion in a protected group of people such as that person's sex, age, religion, or race. In educational settings, discrimination complaints are generally filed under the areas of Title VI of the Civil Rights Act of 1964,[2] Title IX of the Education Amendments of 1972,[3] and under the Equal Protection Clause of the 14th Amendment

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[1] "Diversity Disagreement?" (Attachment A)
[2] Civil Rights Act of 1964 SEC. 2000e-2 (Section 703)
[3] Title IX of the Education Amendment of 1972

which protects life, liberty, or property by providing that no one of these rights is denied without due process of law.[4]

The United States Constitution does not explicitly mention education and the United States Supreme Court ruled that education is not a right protected by the Constitution in the 1973 case of *San Antonio Independent School District v. Rodriguez*.[5] This puts public education largely under the province of state and local governments.[6] Although education is shown importance as a guaranteed right by the Connecticut Constitution under Article VIII,[7] many of the constitutional principles that would apply to educational issues do not apply to participation in extracurricular activities due to the limited reach of Connecticut's state constitutional rights to education. Extracurricular activities, such as a school trip, are defined as "voluntary activities sponsored or sanctioned by a school that supplement or complement the school's instructional program but are not part of it."[8]

Students do have the right to due process before being deprived of a property right under the 14th Amendment, but their rights are severely limited in the area of extracurricular activity as the vast majority of courts have ruled that extracurricular activities do not rise to the level of property interest and have shown little if any, legal standing.[9] In *Poling v. Murphy* the 6th Circuit Court found no protected right to participate in student council elections.[10] In *Farver v. Board of Education of Carroll County*, the Court found in favor of the Board of Education to suspend students from extracurricular activity who violated school alcohol policies.[11] In

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[4] U.S. Constitution (Amendment XIV)
[5] San Antonio School District v. Rodriguez, 411 U.S. 1 (1973)
[6] Victoria J.Dodd, Practical Educational Law for the Twenty-First Century 21 (Carolina Academic Press (2003)
[7] CT Constitution; Article VIII Sections 1-4
[8] Martha McCarthy and Nelda Cambron-McCabe, Public School Law, Teachers; and Student' Rights, 3d ed., pg 131 (Boston: Allyn and Bacon, 1992)
[9] Jean M. Cary, Legal Issues Related to Extracurricular Activities, 23 Sch. L. Bull. 15 (1992)
[10] Poling v. Murphy, 872 F.2d 757, 764 (6th Cir. 1989)
[11] Farver v. Board of Education of Carroll County, 40 F. Supp. 2d 323 (D. Md. 1999)

Pelgram v. Nelson, the federal court ruled that "the opportunity to participate in extracurricular activities is not, by itself, a property interest."[12] The Supreme Court has also twice ruled that school districts can limit or condition access to extracurricular activities in the cases of *Verona School District 47J v. Acton*[13] and in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls.*[14] Without the level of property interest and entitlement to due process, there is also no entitlement to a hearing for a student to be told why they are being excluded from an extracurricular activity.[15]

Discrimination based on gender in education programs or activities that receive federal financial assistance are protected under Title IX. Title VI also prohibits discrimination on the basis of race, color, or national origin under any program or activity receiving federal financial assistance. The school trip has not excluded students based on gender nor is it receiving federal financial aid. Students are traveling at their own expense and targeted students are traveling at no cost due to outside fundraising and financial supplementation by the other fifteen students who are paying and extra $400.00 per person over the actual $1700.00 per person cost of the trip.[16] A discrimination claim under these acts would not apply.

The Supreme Court has ruled that fixed quotas are prohibited in affirmative action programs but it has held it is constitutionally permissible for universities to use race as a criterion in admission policies in higher education. The 1978 the case of Regents *of the University of California v. Bakke*[17] and the 2013 case of *Fisher v. University of Texas at Austin*[18] survived

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[12] Pelgram v. Nelson 469 F. Supp. 1134 (1979)
[13] Verona Sch. Dist. 47J v. Acton, 515 U.S,.646 (1995)
[14] Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002)
[15] Jean M. Carey, Legal Issues Related to Extracurricular Activities, 23 Sch. L. Bull. 15 (1992)
[16] "Diversity Disagreement?" (Attachment A)
[17] Regents of the University of California v. Bakke 438 U.S. 265 (1978)
[18] Fisher v. University of Texas at Austin 579 U.S. (2016)

strict scrutiny and were found to be lawful under the Equal Protection Clause upholding the use of affirmative action in college admissions.

Chandler was not wholly denied an opportunity to be chosen by the selection committee as fifteen of the twenty positions were open to all students. Her argument of exclusion based on economic hardship is not compelling as this is not a protected class. These arguments however, are irrelevant as voluntary participation in a school trip does not rise to the level of basic educational protection. In the arena of extracurricular activities "local school boards and school districts are enabled to limit a student's rights, giving school officials control and discretion in determining whether to offer such activity and in setting conditions for participation. Such activities are viewed as a privilege, not a right." [19] The selection committee has the legal entitlement to use "broad discretion to waive academic and community service requirements" [20] so as to remain committed to diversity and inclusion.

[19] Thomas B. Mooney, Shipman & Goodwin LLP (2008) A Practical Guide to Connecticut School Law, Sixth Edition
[20] "Diversity Disagreement?" (Attachment A)

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