

**THE RESURGENCE OF BOOK BANS
AND OTHER ODDITIES**

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2022 SPRING GENERAL PRACTICE CLE**

**THE VIEWS AND OPINIONS EXPRESSED ARE SOLELY THOSE OF THE AUTHR
AND SHOULD NOT BE INTERPRETED TO REFLECT THE VIEWS AND OPINIONS
OF ANY PAST, PRESENT OR FUTURE EMPLOYER**

I. Modern-Day Book Bans

The American Library Association's Office for Intellectual Freedom (OIF) reports that in 2021 there were 729 challenges to library, school, and university materials and services, representing challenges to 1,597 individual book titles. The Association claims this is the largest number of attempted book bans in public and school libraries since it began tracking challenges 20 years ago.

In Texas, State Representative Matt Krause recently identified more than 850 books for targeted investigation, many of them dealing with race and LGBTQ issues. The list can be found here: [krausebooklist.pdf \(texastribune.org\)](https://www.texastribune.org/2021/07/27/krause-book-list/)

In Tennessee, Greg Locke, a local pastor, held a book-burning celebration to commemorate the destruction of objectionable books, such as Harry Potter and Twilight characterizing them as “Demonic” materials.

In 2021, New Hampshire passed a law outlawing the teaching of implicit/unconscious bias, and created a private cause of action for any person who believes the statute has been violated. Subsequently, the Mom’s of Liberty New Hampshire offered a \$ 500.00 incentive for anyone who would bring such a claim.

The Oklahoma legislature is considering a bill which would prohibit the teaching of any topic in the classroom that is in opposition to the closely held religious beliefs of students. Moreover, any named person whose act or omission constitutes a violation of this section would be strictly liable for damages at a minimum of \$10,000.00) per incident.

Florida recently rejected 54 math books, claiming they promoted critical race theory.

Several other states have bills pending that would make it criminal for educators to discuss or present objectionable books or divisive concepts in the classroom.

Iowa is not immune. Iowa legislators proposed a bill would make teachers criminally liable for sharing pornographic or obscene materials in the classroom. The bill also would give parents the right to maintain a civil action of a minimum of \$ 10,000 against teachers (HF 2176).

Iowa legislators also proposed bills that would subject teachers to discipline for teaching concepts contrary to HF 802 (SF 2037); discipline teachers for failing to cite the pledge of allegiance or stand for the pledge of allegiance (SF 2043); and require livestreaming of classroom instruction (HF 2177).

School Districts in Ankeny, Indianola, Johnston, Urbandale, Waukee and West Des Moines have recently had to address challenges to remove books from school libraries and curricula.

II. Book Banning and Burning Not New

Uncle Tom’s Cabin

Gone with Wind

Ulysses

To Kill a Mocking Bird

Grapes of Wrath

Animal Farm

III. Book Banning Not a Strictly American Phenomenon

Iran – Satanic Verses (Salman Rushdie)

Italy – A Farewell to Arms (Ernest Hemingway), All Quiet on the Western Front (Erich Maria Remarque)

Russia – Animal Farm (George Orwell), The Rights of Man (Thomas Paine)

South Africa – Why We Can't Wait (Dr. Martin Luther King Jr.), The Autobiography of Malcolm X (Malcolm X), The Struggle is My Life (Nelson Mandela)

IV. Recent Survey Results

Fortunately, most Iowans, like most Americans, are against censorship in most forms, and profoundly against civil/criminal penalties for teachers and administrators accused of distributing objectionable books.

A Des Moines Register/Mediacom Poll, conducted Feb. 28-March 2, 2022, by Selzer & Co. of Des Moines, found 64% of Iowans oppose creating new criminal penalties for teachers and school administrators for distributing books that are found to contain obscene material. Just over one-quarter, 27%, favor such legislation. Additionally, 71% of Iowans oppose allowing parents to sue school districts for distributing books the parents believe include obscene material. Twenty-five percent favor it. Des Moines Register 3-16-2022.

The results from a nationwide survey yielded similar results. A national poll commissioned by the American Library Association (ALA) shows that seven in 10 voters oppose efforts to remove books from public libraries. Three quarters of parents of public school children (74%) express a high degree of confidence in school librarians to make good decisions about which books to make available to children, and when asked about specific types of books that have been a focus of local debates, large majorities say for each that they should be available in school libraries on an age-appropriate basis.

The national poll found that most “parents [92%] hold librarians in high regard, have confidence in their local libraries to make good decisions about what books to include in their collections, and agree that libraries in their communities do a good job offering books that represent a variety of viewpoints.”

Nearly eight in 10 parents (79%) say libraries in their community do a good job of offering books that represent a variety of viewpoints and 74% of parents are confident in public school libraries' decisions about their collections.

Majorities of public school parents affirm that various types of books should be available in school libraries on an age-appropriate basis. This includes works about U.S. History that focus on the role of slavery and racism in shaping America today, such as the “1619 Project” (84%);

works of literature that use racial slurs, such as “Huckleberry Finn,” “To Kill a Mockingbird,” and “Of Mice and Men” (82%); novels for young adults that portray police violence against Black people, such as “Ghost Boys” and “The Hate U Give” (68%); fiction and non-fiction books about lesbian, gay, and transgender individuals, such as “George” and “This Day in June” (65%); and works of fiction that have sexually explicit content, including scenes of sexual violence, such as “Beloved” and “Looking for Alaska” (57%).

The survey was conducted by the bipartisan team of Hart Research Associates and North Star Opinion Research on behalf of ALA among 472 parents of children in public school. The survey was conducted March 1 to 6, 2022, and the sample is reportedly demographically and geographically representative of U.S. voters and parents. Additional survey findings and methodology can be found on [ALA’s website](#).

V. Common Themes of Banned Books

Modern-day censorship of books revolves largely around books discussing history and life from the perspectives of African American and LGBTQ persons and writers.

From July 1, 2021 to March 31, 2022, PEN America, an organization of writer’s dedicated to preserving freedom of expression, documented more than 1,586 instances of individual books being banned, affecting 1,145 unique book titles. PEN noted the common themes of discussions of race and racism in American history, LGBTQ+ identities, and sexual education in schools. Of the unique books, 467 contain protagonists or prominent secondary characters of color (41%), and 247 directly address issues of race and racism (22%); 379 titles (33%) explicitly address LGBTQ+ themes, or have protagonists or prominent secondary characters who are LGBTQ+; 283 titles contain sexual content of varying kinds (25%), including novels with sexual encounters as well as informational books about puberty, sex, or relationships. There are 184 titles (16%) that are history books or biographies. Another 107 titles have themes related to rights and activism (9%). *Banned in the USA: Rising School Book Bans Threatens Free Expression and Student’s First Amendment’s Rights*, PEN America (found at: [Banned in the USA: Rising School Book Bans Threaten Free Expression and Students’ First Amendment Rights - PEN America](#)).

The American Library Association list these books – which have common themes of race and/or LGBTQ - as the top ten challenged books across the nation:

1. Gender Queer by Maia Kobabe
2. Lawn Boy by Jonathan Evison
3. All Boys Aren’t Blue by George M. Johnson
4. Out of Darkness by Ashley Hope Perez
5. The Hate U Give by Angie Thomas
6. The Absolutely True Diary of a Part-Time Indian by Sherman Alexie
7. Me and Earl and the Dying Girl by Jesse Andrews

8. *The Bluest Eye* by Toni Morrison
9. *This Book is Gay* by Juno Dawson
10. *Beyond Magenta* by Susan Kuklin

VI. First Amendment Caselaw – School Libraries and Curricula

A. Tinker v Des Moines Independent Community School District, 393 U.S. 503 (1969)
– Right to Self-expression.

High School principal banned students from wearing of black armbands in protest against the United States actions in Vietnam.

“First Amendment rights applied in light of special circumstances of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate.” *Tinker*, 393 U.S. at 506.

B. Board of Education, Island Trees Union Free School District No. 26, et al v. Pico, 457 U.S. 853 (1982) - Right to Receive Information.

The Board of Education removed books from the local high school and middle school libraries because it found the books “anti-Christian, Anti-Semitic and just plain filthy.” *Pico*, 457 U.S. at 857.

“[The Board] rightly possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner. If a Democratic School board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access. The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration. Our Constitution does not permit the official suppression of ideas. Our Constitution does not permit the official suppression of ideas. Thus whether [the Board’s} removal of the book from their school libraries denied [students} their First Amendment rights depends upon the motivation behind the petitioners’ actions.” *Pico*, 457 U.S. at 870-871.

“In brief, we hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek their removal to ‘prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.’ (citation omitted). Such purposes stand inescapably condemned by our precedents.” *Pico*, 457 U.S. at 872.

VII. Anatomy of a Book Challenge

In 2021, a parent in the West Des Moines School District, sought removal of book, *Gender Queer: A Memoir*, by Maia Kobabe, from the West Des Moines Valley Southwoods library.

West Des Moines Community Schools – Board Policies

The Board of Education of the West Des Moines Community School District recognizes that the selection of instructional materials is a vital component of the school district's curriculum. The district provides a wide range of instructional materials on all levels of difficulty, with diversity of appeal and the presentation of different points of view and allows review of allegedly inappropriate instructional materials through established procedures.

The instructional materials selected will be those which:

- support the educational philosophy, goals and objectives of the school district;
- consider the needs, age and developmental levels of students;
- foster respect and appreciation for cultural diversity, race and ethnic differences, and persons with disabilities;
- stimulate growth in factual knowledge and literary appreciation;
- encourage students to become decision-makers, to exercise freedom of thought and to make independent judgment through the examination and evaluation of relevant information;
- portray the variety of careers, roles and lifestyles open to all persons;
- increase an awareness of the rights and responsibilities of each member of a multicultural society

Policy 605.02: SELECTION OF INSTRUCTIONAL MATERIALS

The responsibility for selecting instructional materials for the media center and making the recommendation for purchase is delegated to the teacher librarians.

- a. In coordinating the selection of materials for school media programs, the teacher librarians, in consultation with administration, faculty, students and parents, will evaluate the existing collection; assess curricula needs; examine materials and consult reputable, professionally prepared selection aids.
- b. Gift materials will be judged by the selection criteria and accepted or rejected on that basis.
- c. Selection is an ongoing process which includes the removal of inappropriate materials and the replacement of lost and worn materials still of educational value.
- d. Media hardware sufficient to deliver the varied types of media in the school collections will be selected and ordered by the professional media staff after consultation with administration, faculty and students.
- e. All selection and purchase of materials must have the approval of the appropriate building administrator. Purchases will also be approved by the Board.

Policy 605.03: RESPONSIBILITY AND PROCEDURE FOR SELECTION OF INSTRUCTIONAL MATERIALS FOR THE MEDIA CENTER

Materials provided in each school will be appropriate for the age range of students attending the school. The materials will encompass a broad range of topics including topics that may be viewed as controversial. The materials will represent diverse religious, political and ideological views without any attempt to sway readers' opinions. The schools will provide a variety of materials addressing issues such as race, ethnicity, gender, age, sexual orientation, and religion. The material will reflect sensitivity to the needs, rights and aspirations of men and women without preference or bias. Factual medical and scientific information will be provided. Material of a sensitive nature will be subjected to a test of literary merit by the individuals selecting the materials. Recommendations from experts in the field of child and adolescent literature may be used in selecting materials.

Policy 605.04: GUIDELINES FOR POTENTIALLY CONTROVERSIAL MATERIAL

Occasional objections to instructional materials located in the media center may be made despite the selection process (Board policy 605.4). The procedure for handling reconsideration of challenged materials in response to questions concerning their appropriateness is as follows:

1. The teacher librarian at the school will listen to the concerns of the complainant, inform the complainant of the selection procedure and attempt to resolve the situation informally.
2. If there is no resolution reached informally, the teacher librarian will request the complainant to submit a formal "Reconsideration Request Form" to the building principal.
3. The teacher librarian will inform his or her respective building principal about the complaint.
4. Upon receipt of the completed form from the complainant, the principal will request review of the challenged material by an ad hoc instructional materials committee and notify the Superintendent that such a review is being conducted. The Review Committee will be appointed by the principal within ten (10) school days of receipt of the written complaint. It will include another principal, a teacher librarian from another school, two teachers (including one member from the grade level or department where the instructional materials are being used), three community residents and two secondary students (students in grades nine through twelve). A school district employee will not chair the committee.
5. Challenged materials will be kept on the shelves during the reconsideration process, unless the Review Committee requests temporary removal for unusual circumstances.
6. The Review Committee will take the following steps after receiving its appointment.
 - . Set a date for completion of the review process
 - a. Read, view or listen to the material in its entirety

- b. Check the general acceptance of the material by reading reviews and consulting recommended lists
- c. Determine the extent to which the material supports the curriculum
7. The Review Committee will present one of the following courses of action to the complainant and the Associate Superintendent, Teaching and Learning Services in a timely manner: (1) retain the material, (2) withdraw all or part of the material or (3) limit the educational use of the challenged material. The committee will make a decision based on majority vote.
8. An appeal of the Review Committee's decision may be filed in writing by the complainant with the Associate Superintendent, Teaching and Learning Services.
9. Within ten (10) school days of receipt of an appeal, the Associate Superintendent, Teaching and Learning Services will convene the Teaching and Learning Services Advisory Committee to consider and review the decision of the Review Committee.
10. The Teaching and Learning Services Advisory Committee will present one of the following recommendations to the Superintendent in a timely manner: (1) retain the material, (2) withdraw all or part of the material or (3) limit the educational use of the challenged material.
11. The Superintendent will review the Teaching and Learning Services Advisory Committee's recommendation and will respond to the Review Committee Chairperson, the Associate Superintendent, Teaching and Learning Services and the complainant within fifteen (15) school days.
12. Following the Superintendent's decision, the complainant or the chairperson of the Review Committee may file a written appeal of the decision to the Board of Education for review. The Board of Education will hear the appeal within one month following the filing of the appeal. Following the appeal hearing, the Board will decide whether to sustain or to overrule the Superintendent's decision.
13. Pursuant to state law, any eligible person dissatisfied with the decision of the Board may appeal to the Iowa Department of Education.
14. Under unusual circumstances, the Board of Education may waive the timelines as stated in this policy.

Policy 605.05: CHALLENGED MATERIALS – MEDIA CENTER

Occasional objections to instructional materials may be made despite selection guidelines (board policy 605.04). The procedure for handling reconsideration of challenged materials in response to questions concerning their appropriateness is as follows:

1. The staff member will listen to the concerns of the complainant and attempt to resolve the situation informally.
2. If there is no resolution reached informally, the student involved in the challenge will be provided alternative materials and not be required to participate in lessons

or activities involving the challenged materials during the challenge process if his or her parent or guardian so requests. The staff member will request the complainant to submit a formal “Reconsideration Request Form” to the building principal.

3. Upon receipt of the completed form from the complainant, the principal will request review of the challenged material by an ad hoc instructional materials committee and notify the Superintendent that such a review is being conducted. The Review Committee will be appointed by the principal within ten (10) school days of receipt of the written complaint. It will include another principal, a media professional, two teachers (including one member from the grade level or department where the instructional materials are being used), three community residents and two secondary students (students in grades nine through twelve). A school district employee will not chair the committee.
4. Challenged materials will continue to be used during the reconsideration process with students other than the student involved in the challenge (if his/her parent or guardian has requested alternative materials) unless the Review Committee requests temporary removal for unusual circumstances. The Review Committee will take the following steps in a timely manner after its appointment:
 - . Set a date for completion of the review process
 - a. Read, view or listen to the material in its entirety
 - b. Check the general acceptance of the material by reading reviews and consulting recommended lists
 - c. Determine the extent to which the material supports the curriculum.
5. The Review Committee will present one of the following courses of action to the complainant and the Associate Superintendent of Teaching and Learning Services in a timely manner: (1) retain the material, (2) withdraw all or part of the material or (3) limit the educational use of the challenged material. The committee will make a decision based on majority vote.
6. An appeal of the Review Committee’s decision may be filed in writing by the complainant with the Associate Superintendent of Teaching and Learning Services.
7. Within ten (10) school days of receipt of an appeal, the Associate Superintendent of Teaching and Learning Services will convene the Teaching and Learning Services Advisory Committee to consider and review the decision of the Review Committee.
8. The Teaching and Learning Services Advisory Committee will present one of the following recommendations to the Superintendent in a timely manner: (1) retain the material, (2) withdraw all or part of the material or (3) limit the educational use of the challenged material.
9. The Superintendent will review the Teaching and Learning Advisory Committee’s recommendation and will respond to the Review Committee Chairperson, the Associate Superintendent, Teaching and Learning Services and the complainant within fifteen (15) school days.

10. Following the Superintendent's decision, the complainant or the chairperson of the review committee may file a written appeal of the decision to the Board of Education. The Board of Education will hear the appeal within one month following the filing of the appeal. Following the appeal hearing, the Board will decide whether to sustain or to overrule the Superintendent's decision.
11. Pursuant to state law, any eligible person dissatisfied with the decision of the Board may appeal to the Iowa Department of Education.

Parents and other members of the school district community may view all the instructional materials used by the students and teachers.

The instructional materials may be viewed on school district premises or checked out with the permission of the school administrator.

Policy 605.07: INSPECTION OF INSTRUCTIONAL MATERIALS

Decision

An Academic Review of Gender Queer: A Memoir by Maia Kobabe Timeline:

On November 11th of 2021, pursuant to the parental challenge to the book listed above, a review committee (as instructed in Board Policy 605.05) was formed to evaluate said book and determine if it meets the selection criteria as delineated in Board Policy 605.04.

At that meeting, the committee reviewed both policies and then distributed copies of the challenged book to each member.

On November 18th of 2021, the committee reconvened. A discussion occurred regarding both the book and the merits of the challenge. The members voted unanimously to keep the book available for check out in the Valley Southwoods Freshman High School library. The book is not a required reading for any academic class.

Discussion Summary: This book is nonfiction; it is a subset of biography referred to as a memoir. The author reports biographical events, presenting the information to the reader in pictures, commonly referred to as graphic novel form (a book in comic strip format), rather than strictly text form. The committee found that the book is in line with the board selection policy as written: Materials provided in each school will be appropriate for the age range of students attending the school. The materials will encompass a broad range of topics including topics that may be viewed as controversial. The materials will represent diverse religious, political and ideological views without any attempt to sway readers' opinions. The schools will provide a variety of materials addressing issues such as race, ethnicity, gender, age, sexual orientation, and religion. The material will reflect sensitivity

to the needs, rights and aspirations of men and women without preference or bias (Board Policy 605.04).”

This book covers the same type of material as many other text-based books. Menstruation, body image, masturbation, oral and vaginal sex are all topics covered in both biographies and young adult (YA) books commonly found in high school libraries. After reading the book, the committee found the primary purpose of the book to be autobiographical, and not to be pornographic or obscene. The selection policy also states that “Material of a sensitive nature will be subjected to a test of literary merit by the individuals selecting the materials.”

The committee spent time discussing available reviews for this book. The book has won two literary awards: • ALA Alex Award (The Alex Awards are given to ten books written for adults that have special appeal to young adults, ages 12 through 18) • ALA Stonewall Book Awards - Israel Fishman Non-Fiction Award (The Stonewall Book Award of the American Library Association is given annually to Englishlanguage books of exceptional merit relating to the gay, lesbian, bisexual, and transgender experience. The award has a specific subcategory for nonfiction books called the Israel Fishman Award)

The committee endorses that high school libraries should be a safe and inclusive place for students of any sexual orientation or gender identity. Books that deal with these topics are appropriate for the age range of Valley Southwoods Freshman High School and support WDMCS Board Policy 605.04

Reconsideration Appeal: Teaching and Learning Services Advisory Committee
The Teaching and Learning Services Advisory Committee reviewed the building review committee decision along with the complainant’s appeal information on Jan. 27, 2022. The Teaching and Learning Services Committee upheld the decision of the building review committee by a majority vote to retain the book as recommended by the Review Committee. 8 members voted to retain. 1 member voted to withdraw all or part of the material or and 1 member voted to limit the educational use of the challenged material.

1. Review and discuss the Review Committee’s recommendation

→ This was specific to VSW. There are other books being reviewed in other buildings.

→ Just seeing the pictures is very different from reading the book. There is value for our LGBTQ students in having access to this book considering the challenges they are facing in addition to possibly not having support from their families.

→ Looking at the images alone completely takes it out of context and the purpose of the book. Reading it cover to cover you understand that it is a coming of age story.

→ This is a story that students can connect to, about adolescent development, a sense of belonging, connecting to others, healthy relationships, the topic of consent.

→ Students need to be connected to school, and a book like this could help students feel that sense of belonging.

→ Important to also consider the educational program around gender fluidity. What else is included within the curriculum about this topic. This book talks about biology, being an outsider, being excluded. It challenges us as a system to think differently. What might be other opportunities within health and SEL instruction for educational opportunities around these topics in addition to healthy relationships and consent.

→ The book talks about consent. What kind of vocabulary do we have around consent? Experience someone feeling uncomfortable, stop at this place. These are conversations that we need to have at an early age.

→ We have a lot of student clubs as well where kids can advocate and find connection

2. Review and discuss the appeal

→ The first part of the appeal references the policy and is not part of the book recommendation. That is a policy committee decision and this will be one of the policies that we will review at the committee level when it is time to review the 600 series.

→ There are parents that do want their kids to have access to these types of books, if parents want to limit what their child checks out they can notify the school and the teacher librarian and limit what is available to their child.

→ Iowa Code 728.1.5 talks about obscene material and defines that "...taking the material as a whole and applying contemporary community standards... would find appeals to the prurient interest and is patently offensive;" this text as a whole is autobiographical. It is a memoir and the purpose is not excessive interest in sexual matters

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Recommendation

Recommend to uphold the decision to keep the book, Gender Queer: A Memoir, in the VSW library.

Details

Principal Kuhnert received a completed reconsideration request form regarding the library book, Gender Queer: A Memoir. He reviewed board policy 605.05 and started putting together the review committee as stated in policy. The review committee set meeting dates and the date for completion of the process. Each member had the opportunity to read the book and review other pertinent information as stated in the policy. See the committee summary attached. Once the committee finalized their work a copy of the report was sent to the complainant.

The complainant then appealed the review committee decision to the Teaching and Learning, TLS, Advisory Committee as stated in policy. The TLS Advisory Committee also had the opportunity to read the book and review the final decision of the review committee. There was discussion at the January TLS meeting. The TLS Advisory Committee decided to uphold the review committee's decision.

The Superintendent then reviewed the TLS Advisory Committee decision and emailed the complainant, review committee chair, Associate Superintendent of Teaching and Learning and the TLS Advisory Committee my decision to uphold the committee's decision to keep the book on the shelf in the library.

Now the Board of Education is being asked to review the decision and decide whether to sustain or to overrule the Superintendent's decision based on Board Policy 605.05.

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Minutes from Special Meeting – March 28, 2022

Complainant [Parent] shared her thoughts and concerns behind her appeal to the decision to keep the book, Gender Queer: A Memoir, in the VSW library. She answered questions from board members & each board member was also given the opportunity to share their thoughts about the book. They also thanked [Parent] for her courage to bring this topic forward for discussion.

A motion was made and seconded to uphold the decision for the book to remain in the VSW library.

Motion carried: 6 – 1.

VIII. DIVISIVE CONCEPTS

The American Library Association reports that since January 2021, 156 educational gag order bills have been introduced or prefiled in 39 different state - 12 have become law in 10 states and 113 are currently live in 35 different states. Of those currently live 105 target K-12 schools, 49 target higher education and 62 include a mandatory punishment for those found in violation.

A. Iowa HF 802 – Prohibits teaching or communicating the following concepts

“Specific defined concepts” includes all of the following:

- (1) That one race or sex is inherently superior to another race or sex.
- (2) That the United States of America and the state of Iowa are fundamentally or systemically racist or sexist.
- (3) That an individual, solely because of the individual’s race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.
- (4) That an individual should be discriminated against or receive adverse treatment solely or partly because of the individual’s race or sex.
- (5) That members of one race or sex cannot and should not attempt to treat others without respect to race or sex.
- (6) That an individual’s moral character is necessarily determined by the individual’s race or sex.
- (7) That an individual, by virtue of the individual’s race or sex, bears responsibility for actions committed in the past by other members of the same race or sex.
- (8) That any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of that individual’s race or sex.
- (9) That meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race.
- (10) Any other form of race or sex scapegoating or any other form of race or sex stereotyping.

Chilling effect was immediate. Just the discussion of the bill chilled delivery of educational services

Iowa public radio reported that the Iowa Department of Education postponed its scheduled “Social Justice and Equity in Education Conference” in response to the introduction of the legislation which ultimately bans teaching these “divisive concepts” in government agency diversity training and school curriculum.

B. Protection from discomfort apparently only flows one-way.

The Sac and Fox Tribe of the Mississippi in Iowa — the Meskwaki — requested that 66 Iowa schools retire their Native-themed mascots and the dehumanizing stereotypes they perpetuate. Little response.

Legislation aimed at eliminating discomfort to Native Americans failed to move out of committee. H.F. 2224 - Proposed new section 280.32 Prohibition of Native American Mascots provides:

1. On or after January 1, 2024, a public or nonpublic school shall not have or adopt a name, symbol, or image that depicts or refers to a Native American tribe, individual, custom, or tradition to be used as a mascot, nickname, logo, letterhead, or team name of the school.

2. This section shall not apply to a school under the control of a Native American tribe and under the purview of the bureau of Indian education.

Moreover, no recognition of the “discomfort, guilt, anguish, or any other form of psychological distress” from students whose experiences and contributions to America will continue to be discounted. The Act protects one class of students to the detriment of another class of students.

It does not appear that HF 2513, which would have prohibited discrimination and harassment in schools based on racial biases and stereotypes associated with hair types and textures made it through the funnel.

C. Inconsistent with other related statutes and regulations creates confusion

Pursuant to the Due Process Clause of the Fourteenth Amendment an enactment is void for vagueness if its prohibitions are not clearly defined. HF 802 appears to be inconsistent with other laws and regulations and forces teachers in the untenable position of deciding which laws to follow.

280.9A History and government required — voter registration.

1. The board of directors of each local public school district and the authorities in charge of each nonpublic school shall require that all students in grades nine through twelve complete, as a condition of graduation, instruction in American history and the governments of Iowa and the United States, including instruction in voting statutes and procedures, voter registration requirements, the use of paper ballots and voting systems in the election process, and the method of acquiring and casting an absentee ballot.

Is it possible to teach the history of voting rights in America without discussing the concepts of race, sex or oppression?

256.11 Educational standards.

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5. In grades nine through twelve, a unit of credit consists of a course or equivalent related components or partial units taught throughout the academic year. The minimum program to be offered and taught for grades nine through twelve is:

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b. Five units of the social studies including instruction in voting statutes and procedures, voter registration requirements, the use of paper ballots and voting systems in the election process, and the method of acquiring and casting an absentee ballot. All students shall complete a minimum of one-half unit of United States government and one unit of United States history. The one-half unit of United States government shall include the voting procedure as described in this lettered paragraph and section 280.9A. The government instruction shall also include a study of the Constitution of the United States and the Bill of Rights contained in the Constitution and an assessment of a student's knowledge of the Constitution and the Bill of Rights.

The Constitution contains several clauses which inherently makes inferior ad superior classifications based upon race and sex. Can this be taught?

256.18 Character education policy.

1. a. It is the policy of the general assembly that Iowa's schools be the best and safest possible. To that end, each school is encouraged to instill the highest character and academic excellence in each student, in close cooperation with the student's parents, and with input from the community and educators.

b. Schools should make every effort, formally and informally, to stress character qualities that will maintain a safe and orderly learning environment, and that will ultimately equip students to be model citizens. These qualities may include caring, civic virtue and citizenship, justice and fairness, respect, responsibility, trustworthiness, giving, honesty, self-discipline, respect for and obedience to the law, citizenship, courage, initiative, commitment, perseverance, kindness, compassion, service, loyalty, patience, the dignity and necessity of hard work, and any other qualities deemed appropriate by a school.

256.37 School restructuring and effectiveness — policy — findings.

It is the policy of the state of Iowa to provide an education system that prepares the children of this state to meet and exceed the technological, informational, and communications demands of our society. The general assembly finds that the current education system must be transformed to deliver the enriched educational program that the adults of the future will need to have to compete in tomorrow's world. The general assembly further finds that the education system must strive to reach the following goals:

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3. Students graduating from Iowa's education system must demonstrate competency in challenging subject matter, and must have learned to use their minds well, so they may be prepared for responsible citizenship, further learning, and productive employment in a global economy.

...

5. Every adult Iowan must be literate and possess the knowledge and skills necessary to compete in a global economy and exercise the rights and responsibilities of citizenship.

Suppression the free exchange of ideas is antithetical to the goal of these subsections.

Iowa Administrative Code Chapter 281

12 GENERAL ACCREDITATION STANDARDS PREAMBLE The goal for the early childhood through twelfth grade educational system in Iowa is to improve the learning, achievement, and performance of all students so they become successful members of a community and workforce. . . . Provisions for multicultural and gender fair education, technology integration, global education, gifted and talented students, at-risk students, students with disabilities, and the professional development of all staff shall be incorporated, as applicable, into the comprehensive school improvement plan.

12.5(3) Elementary program, grades 1-6. The following areas shall be taught in grades one through six: English-language arts, social studies, mathematics, science, health, human growth and development, physical education, traffic safety, music, and visual art. . . . b. Social studies. Social studies instruction shall include citizenship education, history, and social sciences. Democratic beliefs and values, problem-solving skills, and social and political participation skills shall be incorporated. Instruction shall encompass geography, history of the United States and Iowa, and cultures of other peoples and nations. American citizenship, including the study of national, state, and local government; and the awareness of the physical, social, emotional and mental self shall be infused in the instructional program

12.5(17) Twenty-first century learning skills. Twenty-first century learning skills include civic literacy, health literacy, technology literacy, financial literacy, and employability skills. Schools and school districts shall address the curricular needs of students in kindergarten through grade twelve in these areas. In doing so, schools and school districts shall apply to all curricular areas the universal constructs of critical thinking, complex communication, creativity, collaboration, flexibility and adaptability, and productivity and accountability.

a. Civic literacy. Components of civic literacy include rights and responsibilities of citizens; principles of democracy and republicanism; purpose and function of the three branches of government; local, state, and national government; inherent, expressed, and implied powers; strategies for effective political action; how law and public policy are established; how various political systems define rights and responsibilities of the individual; the role of the United States in current world affairs.

...

e. *Employability skills*. Components of employability skills include different perspectives and cross-cultural understanding; adaptability and flexibility; ambiguity and change; leadership; integrity, ethical behavior, and social responsibility; initiative and self-direction; productivity and accountability.

Again, it appears that the prohibitions in HF 802 may be antithetical to these requirements.

12.5(4) Junior high program, grades 7 and 8. The following shall be taught in grades 7 and 8: English-language arts, social studies, mathematics, science, health, human growth and development, physical education, music, visual art, family and consumer education, career education, and technology education. Instruction in the following areas shall include the contributions and perspectives of persons with disabilities, both men and women, and persons from diverse racial and ethnic groups, and shall be designed to eliminate career and employment stereotypes. Computer science instruction incorporating the standards established under rule 281-12.11 (256) shall be offered in at least one grade level commencing with the school year beginning July 1, 2023.

...

b. Social studies. Social studies instruction shall include citizenship education, history and social sciences. Democratic beliefs and values, problem-solving skills, and social and political participation skills shall be incorporated. Instruction shall encompass history, economics, geography, government including American citizenship, behavioral sciences, and the cultures of other peoples and nations. Strategies for continued development of positive self-perceptions shall be infused.

...

i. Family and consumer education. Family and consumer education instruction shall include the development of positive self-concept, understanding personal growth and development and relationships with peers and family members in the home, school and community, including men, women, minorities and persons with disabilities. Subject matter emphasizes the home and family, including parenting, child development, textiles and clothing, consumer and resource management, foods and nutrition, housing, and family and individual health. This subrule shall not apply to nonpublic schools.

12.5(5) High school program, grades 9-12. In grades 9 through 12, a unit is a course or equivalent related components or partial units taught throughout the academic year as defined in subrule 12.5(14). . . .

The three units of social studies may include the existing graduation requirements of one-half unit of United States government and one unit of United States history.

In implementing the high school program standards, the following curriculum standards shall be used.

a. English-language arts (six units). English-language arts instruction shall include the following communication processes: speaking; listening; reading; writing; viewing; and visual expression and nonverbal communication. Instruction shall incorporate language learning and creative,

logical, and critical thinking. The program shall encompass communication processes and skills; written composition; speech; debate; American, English, and world literature; creative dramatics; and journalism.

b. Social studies (five units). Social studies instruction shall include citizenship education, history, and the social sciences. Instruction shall encompass the history of the United States and the history and cultures of other peoples and nations including the analysis of persons, events, issues, and historical evidence reflecting time, change, and cause and effect. Instruction in United States government shall include an overview of American government through the study of the United States Constitution, the bill of rights, the federal system of government. . . . Students' knowledge of the Constitution and the bill of rights shall be assessed. Economics shall include comparative and consumer studies in relation to the market and command economic systems. . . . Sociology, psychology, and anthropology shall include the scientific study of the individual and group behavior(s) reflecting the impact of these behaviors on persons, groups, society, and the major institutions in a society. Democratic beliefs and values, problem-solving skills, and social and political skills shall be incorporated. All students in grades nine through twelve must, as a condition of graduation, complete a minimum of one-half unit of United States government and one unit of United States history and receive instruction in the government of Iowa.

...

e. Health (one unit). Health instruction shall include personal health; food and nutrition; environmental health; safety and survival skills; consumer health; family life; human growth and development; substance abuse and nonuse; emotional and social health; health resources; and prevention and control of disease, including sexually transmitted diseases and acquired immune deficiency syndrome, current crucial health issues, human sexuality, self-esteem, stress management, and interpersonal relationships.

...

i. Vocational education - school districts (three units each in at least four of the six service areas). A minimum of three sequential units, of which only one may be a core unit, shall be taught in four of the following six service areas: agricultural education, business and office education, health occupations education, home economics education, industrial education, and marketing education. The instruction shall be competency-based; shall provide a base of knowledge which will prepare students for entry level employment, additional on-the-job training, and postsecondary education within their chosen field; shall be articulated with postsecondary programs of study, including apprenticeship programs; shall reinforce basic academic skills; shall include the contributions and perspectives of persons with disabilities, both men and women, and persons from diverse racial and ethnic groups.

Iowa Admin. Code r. 281-12.5(5).

Currently policy requires teachers to discuss cause and effect of historical events. Quite simply, this is not possible without discussion of topics prohibited by HF 802.

IX. Lawsuits in Other Jurisdiction to Prevent the Suppression of Ideas

A. Oklahoma: *BERT, et al v. O'Connor*, Case 5:21-cv-01022-5 United States District Court, Western District of Oklahoma. Widely believed to be the first state-level challenge against Divisive Concepts laws.

The Oklahoma Law provides:

1. No teacher, administrator or other employee of a school district, charter school or virtual charter school shall require or make part of a course the following concepts:

- a. one race or sex is inherently superior to another race or sex,
- b. an individual, by virtue of his or her race or sex, is inherently racist, sexist or oppressive, whether consciously or unconsciously,
- c. an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex,
- d. members of one race or sex cannot and should not attempt to treat others without respect to race or sex,
- e. an individual's moral character is necessarily determined by his or her race or sex,
- f. an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex,
- g. any individual should feel discomfort, guilt, anguish or any other form of psychological distress on account of his or her race or sex, or
- h. meritocracy or traits such as a hard work ethic are racist or sexist or were created by members of a particular race to oppress members of another race.

70 OK Stat § 70-24-157 (2021)

The Administrative Rules implementing the new law provide:

(c) General Prohibition. No teacher, administrator or other school employee shall require or make part of any Course offered in a public school the following discriminatory principles:

- (1) One race or sex is inherently superior to another race or sex,
- (2) An individual, by virtue of his or her race or sex, is inherently racist, sexist or oppressive, whether consciously or unconsciously,
- (3) An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex,
- (4) Members of one race or sex cannot and should not attempt to treat others without respect to race or sex,
- (5) An individual's moral character is necessarily determined by his or her race or sex,
- (6) An individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex,

(7) Any individual should feel discomfort, guilt, anguish or any other form of psychological distress on account of his or her race or sex, or

(8) Meritocracy or traits such as a hard work ethic are racist or sexist or were created by members of a particular race to oppress members of another race.

(d) Specific Prohibitions Ensuring Compliance. To ensure compliance with 70 O.S. § 24-157(B) and to not discriminate on the basis of race or sex, as a part of any Course or activities, the following requirements shall apply to Public Schools, any Teacher, administrator, other employee, or other individual, group or representative of a Public School:

(1) Public schools in this state shall be prohibited from providing, contracting to provide, offering or sponsoring any Course(s), as defined in subsection (b)(1)(B), that includes, incorporates, or is based on discriminatory practices identified in section (c).

(2) Public schools in this state shall be prohibited from using any monies, property, or any other assets or resources to engage in race or sex-based discrimination, including discriminatory practices identified in section (c).

(3) Public schools in this state shall be prohibited from adopting programs or utilizing textbooks, instructional materials, curriculum, classroom assignments, orientation, interventions, or counseling that include, incorporate or are based on the discriminatory concepts identified in subsection (c).

Okla. Admin. Code § 210:10-1-23

Oklahoma students and educators filed a lawsuit challenging the new law. Alleging that the law is unconstitutionally vague, unconstitutionally restricts discussion of race and gender without any pedagogical justification, and places teachers at risk of losing their licenses and careers for violating the law. Claimant seek a preliminary and permanent injunctions from enforcement of the Act and a finding that the law is unconstitutional under the First and Fourteenth Amendments of the constitution.

Claimants allege they have been informed not to use the terms “diversity” or “white privilege.” The claimants allege librarians are afraid for their careers for ordering books related to race and gender.

Claimants allege the law:

Erases the perspective of historically marginalized communities and restrict the robust exchange of ideas.

Prevents students from accessing information that will help the prepare to be active participants n democracy.

Furtheres the proponents publicly announced purpose of prohibiting discussions of implicit bias and systemic racism.

Silences speech through its vague, overbroad and viewpoint discriminatory terms and intentionally targets and denies access to ideas aimed at advancing the educational and civic equality of historically marginalized students because of lawmakers own discomfort and disagreement with certain viewpoints.

Deprives black and white students of access to diverse texts, particularly texts by non-white and women authors and denies students access to information and ideas that are essential for academic growth.

Forces teachers to reconfigure classroom discussion to avoid topics which might lead to discussion of racism and sexism which may make some student feel discomfort.

Infringes upon the right of students who want access to information regarding the histories and perspectives of Black, Indigenous and other people of color and robs them of opportunities to formulate their own opinions of past causes or solutions regarding the challenge facing American society.

Claimants assert four theories of relief:

1. Fourteenth Amendment Violation: Overbroad, Vague, and Viewpoint Discriminatory

“A law is ‘void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); see also *Faustin v. City & Cty. Of Denver*, 423 F.3d 1192, 1201 (10th Cir. 2005). This principle applies to administrative, civil and criminal prohibitions. See e.g., *FCC v. Fox Television Stations, Inc.*, 67 U.S. 239, 253-254 (2012)(civil fines); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048-51 (1991) (state bar rule). And where First Amendment rights are at stake,’[s]tricter standards of permissible statutory vagueness may be applied.’ *Dr. John’s Inc. v. City of Roy*, 465 F.3d 1150, 1157 (10th Cir. 2006) (quoting *Hynes v. Mayor and Council of Borough of Oradell*, 425 U.S. 610, 620 (1976). A law is permissibly vague if it either ‘fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits’ or ‘authorizes or encourages arbitrary and discriminatory enforcement,’ *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

Claimants argue the law is unconstitutionally vague because it fails to provide fair notice of what educators can and cannot include in their courses, and because it invites arbitrary and discriminatory enforcement – up to and including the loss of teaching licenses.

“The text of the Act is ambiguous and confusing, leaving educators, legislators, and enforcers to guess what it means, chilling protected speech and expression, and encouraging arbitrary and discriminatory enforcement.”

For instance as one commentor mentioned, the law would make it punishable to discuss the reasons for World War II.

“The lack of clarity in the law encourages application to prohibit any discussion or expression that might result in a person experiencing, among other emotions, ‘discomfort’ without regard to intent of the speaker. Students frequently confront subject matter that may prompt ‘discomfort,’ guilt,’ ‘anguish’ or distress. . .Discussions of American history, including the Holocaust, slavery

and segregation, for example, undoubtedly invoke a range of emotions. Moreover, avoiding or ignoring race and sex when relevant to a subject of study or as experienced in students' lives can itself produce feelings of discomfort or anguish. The law therefore puts teachers in an impossible situation."

2. First Amendment Violation

"The First Amendment protects the right to receive information and ideas as well as the right to disseminate ideas. Laws regarding school curricula that impede the rights of students to receive information and ideas, without legitimate pedagogical justification, violate the First Amendment. *See Hazlewood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1998).

3. Viewpoint-Based Restriction on Academic Freedom

Claimants alleged the law "prohibits educators from teaching about specific concepts on the topics of race and sex" and is "unconstitutionally designed to promote a narrowly partisan, political or racially based agenda. *See, Pico*, 475 U.S. at 870."

"The Supreme Court has repeatedly held that academic freedom deserves First Amendment protection. *Keyishian*, 385 U.S. at 603; *Sweezy*, 354 U.S., at 250; *Regents of Univ. of Cal. V. Bakke*, 438 U.S. 265, 312 (1998). . .*Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 237 (2000) (Stevens, J., concurring)("Our understanding of academic freedom has included not merely liberty from restraints on thought, expression, and association in the academy, but also the idea that universities and schools should have the freedom to make decisions about how and what to teach.")"

Claimants allege the purpose of the law is to ban speech about biases based on race or sex because of lawmakers' objections to the messages that discussion of such topics may convey. They further allege "The Act is not narrowly tailored to achieve any compelling interest that may be served by this type of censorship."

4. Disparate Impact

"The Act explicitly singles out concepts related to sex and race. The Act will foreseeably disparately harm students of color, with compounded harms for students of color who also identify as women, girls, and LGBTQ+"

The law "targets the elimination of curriculum, instruction, conversation and programming designed to improve the educational, social, and civic experiences of historically marginalized groups. The Act, however, does not address the exclusion and underrepresentation of such historically marginalized groups' interest in the pre-existing curriculum and instruction."

Claimants allege the law was the product of discriminatory motivations. They allege the purpose of the law was to quiet open discussion of systemic race following the George Floyd murder and others, and advocacy for LGBTQ communities, and not concern for improving the quality of education for Oklahoma students.

The harms of HB 1175 disproportionately falls on students of color, with compounded harms for LGBTQ, women and Girls of color. “By further restricting the perspectives of people of color and other marginalized groups H.B. 1775 inflicts pronounced harm on student of color who already do not see their communities reflected in the curricula and therefore feel less engaged by and connected to classroom discussion.

B. New Hampshire - *Local 8027, AFT-New Hampshire et al v. Frank Edelbut, Dept. of educ. Et al*, U.S. District Court District of New Hampshire

In June 2021, New Hampshire enacted the New Hampshire Divisive Concepts statute. Claimants allege the Divisive Concepts Statue is unconstitutionally vague in violation of the Fourteenth Amendment and unconstitutionally chills the freedom of speech in violation of the First Amendment.

As proof of the vagueness, Claimants show that the state on at least twice had to explain its interpretation of the statute. Claimants allege that “[t]he need for repeated clarification and restatement by each of these state entities underscores the law’s vagueness and the unquestionable difficulty public school teachers have understanding it, much less complying with it.”

Claimants allege “teachers now are placed in the impossible position of interpreting a statute that the Attorney General, the State Human Rights Commission and even the Department of Education agree is confusing and one that on its face conflicts with state education laws and curriculum mandates and, which, if the teachers’ interpretation as non-lawyers is in error, subjects them to reputational injury, disciplinary procedures and potentially the loss of their livelihoods, not to mention the vengeance of bounty hunters empowered but the Divisive Concepts Statute to maintain harassing litigation.”

Claimants allege the law conflicts with other laws and lead to confusion as to what laws and regulations to follow.

“For example, New Hampshire has long mandated by statute that in all public and private schools, there shall be courses teaching about “intolerance, bigotry, antisemitism, and national, ethnic, racial, or religious hatred and discrimination [that] have evolved in the past, and can evolve, into genocide and mass violence” and “to prevent the evolution of such practices” in the future. (Emphasis added). New Hampshire law thus requires students to examine – and it follows that teachers shall provide the instruction for students to learn – controversial events from multiple perspectives and ideologies and learn to defend and challenge differing views on a wide variety of topics. In short, New Hampshire state law promises to develop students into well-rounded, well-educated young adults who are prepared to embrace all the challenges, complexities, privileges and responsibilities of American citizenship, who are prepared to live in an increasingly diverse world, and who can compete successfully in the New Hampshire, national and global economies. The accomplishment of that goal has long been a hallmark of New Hampshire and of its educational system. Parents rely on New Hampshire’s public schools to educate their children consistent with those standards.”

“Within our free and diverse educational system, broad exposure and the freedom to explore and examine are scholarship, art, history, and science, together with the development of critical basic skills, are essential to training our young citizens for the privileges and responsibilities necessary for the full participation in a democratic society. Any attempt to diminish public education through misinformation, selective teaching or censorship directly threatens both our young citizens and our democracy. Critical thinking and the ability to independently and freely evaluate ideas exchanged in public are core skills at the foundation of all educational training.”

The Plaintiffs also attack the laws private enforcement process, and highlights the potential for abuse.

“When enforcement power is dispersed and privatized in this manner, there is no consistency in how a law is enforced, which heightens the harm attributable to the unconstitutional vagueness of the Divisive Concepts Statute. No single, publicly-appointable body sets enforcement priorities. Instead individuals are left to determine, without any prior approval or oversight, when a complaint should be prosecuted and why. . . Individuals will have unchecked authority to bring cases under their interpretation of the statute.”

“The private delegation of enforcement authority – combined with the vagueness of the statute will simply embolden those with the most polarizing views, who will seek to use this new power that they have been granted to put pressure on teachers. Teachers will teach with the eyes of these extremists on them, and will no doubt feel compelled to change their lessons plans accordingly. Simply put, the guidance set forth. . . will not stop the white nationalists , for example who have bombarded New Hampshire school board meetings, or “Moms for Liberty [New Hampshire],” from attempting to use the statute’s vague and easily adaptable language to serve their own political purposes.”

Plaintiff’s allege that the Commissioner of Education has already stated he will investigate all complaints against teacher for violating the law, and has created a website to facilitate the reporting of complaints.

The Plaintiff’s ask the court to declare the law unconstitutionally vague, or in the alternative declare what teachers may safely teach and how to avoid a violation of the statute and loss of their licenses.