

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

NATIONAL EDUCATION
ASSOCIATION-NEW HAMPSHIRE;
OYSTER RIVER COOPERATIVE
SCHOOL DISTRICT; DOVER SCHOOL
DISTRICT; SOMERSWORTH SCHOOL
DISTRICT; GRANTHAM SCHOOL
DISTRICT; DOTTIE MORRIS; JAMES
T. MCKIM, JR.; and NEW HAMPSHIRE
OUTRIGHT,

Plaintiffs,

v.

JOHN M. FORMELLA, in his official
capacity only as the Attorney General of
the State of New Hampshire;

CAITLIN DAVIS, in her official capacity
only as the Commissioner of the New
Hampshire Department of Education;

CHARLIE ARLINGHAUS, in his official
capacity only as the Commissioner of the
New Hampshire Department of
Administrative Services; and

MONICA MEZZAPELLE, in her official
capacity only as the State Treasurer of
New Hampshire,

Defendants.

Case No.: 1:25-cv-293-LM

**PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION FOR
SUMMARY JUDGMENT AND
PERMANENT INJUNCTION**

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INTRODUCTION

“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). Our schools cannot fulfill their role as the nation’s “nurseries of democracy,” *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 190 (2021), without teaching students about the world, including the historical and lived experiences of people of different races, genders, and abilities. Providing inclusive and expansive educational opportunities strengthens school communities and prepares all students to succeed in a pluralistic democratic society. An inclusive education means ensuring that students with disabilities receive the access to which they are entitled under federal law. An inclusive education means ensuring that transgender students are protected from discrimination. An inclusive education means ensuring that girls are provided meaningful sports opportunities. Through New Hampshire’s enactment of RSA 21-I:112–16 and RSA 186:71–77 in House Bill 2 (“HB2”) purporting to ban “diversity, equity, and inclusion,” the State has called into question all of these vital—and legally mandated—practices that foster a learning environment where every student can thrive. As this Court correctly observed at the preliminary injunction stage: “The breadth of the anti-DEI laws’ prohibition is startling. The definition of ‘DEI’ contained therein is so far-reaching that it prohibits long-accepted—even legally required—teaching and administrative practices. It is hard to imagine how schools could continue to operate at even a basic level if the laws’ prohibitions were enforced to their full extent.” *NEA-NH v. N.H. Att’y Gen.*, 806 F. Supp. 3d 166, 195 (D.N.H. 2025) (issuing preliminary injunction) (ECF No. 40). This Court’s conclusion was correct then, and it is correct now. Accordingly, a permanent injunction should be issued.

Effective July 1, 2025, RSA 21-I:112–16 and RSA 186:71–77 in HB2 purport to prohibit the implementation or “promot[ion]” of, or engagement in, “initiatives, programs, training, or policies” in public entities and “public schools” that are “related” to “diversity, equity, or inclusion” (or “DEI”). *See* RSA 21-I:112–14; RSA 186:71–73. A “public school” is broadly defined as “any school, academic institution, or institution of higher education in this state supported by public funds.” *See* RSA 186:71, II. “DEI” is defined as “any program, policy, training, or initiative that classifies individuals based on a characteristic identified under RSA 354-A:1”—namely, age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, or national origin—“for the purpose of achieving demographic outcomes, rather than treating individuals equally under the law.” *See* RSA 21-I:112, II; RSA 186:71, I. “Classif[ying]” and “achieving demographic outcomes” are undefined under HB2. The law does not define how “related” to “DEI” a program must be before it becomes unlawful. HB2 also seeks to categorically ban “implicit bias training,” “critical race theory,” and “DEI assessments,” each of which is undefined, leaving educators and public employees to guess what is covered. The law does not provide any provision authorizing state agencies to interpret its terms through rulemaking. This law is attached as *Exhibit 1*.¹

Here, Plaintiffs seek judgment on Counts I, II, and III in Plaintiffs’ Complaint for Declaratory and Injunctive Relief² and a final order consistent with this Court’s preliminary injunction order issued on October 2, 2025, as the arguments here largely mirror the arguments

¹ All references in this memorandum to “Exhibits” are to the exhibits accompanying the Declaration of Gilles Bissonnette in Support of Plaintiffs’ Motion for Summary Judgment and Permanent Injunction.

² To ensure that they are preserved, Plaintiffs also have brought claims under Part I, Article 15 and Part I, Article 22 of the New Hampshire Constitution (Counts IV and V), but are not seeking summary judgment as to these claims. Plaintiffs defer to this Court as to whether they should be dismissed without prejudice to refiling in state court, as Plaintiffs recognize the doctrine set forth in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984), as well as this Court’s discretion to “decline[] to exercise supplemental jurisdiction and dismiss[]” these claims “without prejudice to refiling in state court.” *See Cushing v. Packard*, 691 F. Supp. 3d 379, 390 (D.N.H. 2023); *see also Ramos-Echevarria v. Pichis, Inc.*, 659 F.3d 182, 191 (1st Cir. 2011).

made at the preliminary injunction stage of this case. *See* ECF No. 40. As with other prior state and federal efforts to ban “DEI” that have been found to be constitutionally defective, HB2 is unconstitutional. “DEI as a concept is broad: one can imagine a wide range of viewpoints on what the values of diversity, equity, and inclusion mean when describing a program or practice,” and HB2’s definition does nothing to constrain the broad scope of that concept. *See Nat’l Educ. Ass’n v. United States Dep’t of Educ.*, 779 F. Supp. 3d 149, 188 (D.N.H. 2025) (McCafferty, C.J.); *see also Local 8027 v. Edelblut*, No. 21-cv-1077-PB, 2024 U.S. Dist. LEXIS 94052, at *12 (D.N.H. May 28, 2024) (holding that the prohibitions in a New Hampshire law “against teaching banned concepts are unconstitutionally vague”) (Barbadoro, J.) (appeal filed July 26, 2024; 1st Cir. argued Apr. 8, 2025).³ In addition to its unconstitutional ambiguities, HB2 also violates the First Amendment rights of academics and educators in educational settings by discriminating against specific viewpoints—including viewpoints that “promote” “critical race theory,” “implicit bias training,” or viewpoints that “classify” groups to “achieve demographic outcomes” for these groups—that are part of a “program” or “initiative.” RSA 21-I:112–13; RSA 186:71–72; *see Nat’l Educ. Ass’n*, 779 F. Supp. 3d at 196 (“[P]laintiffs are likely to succeed on the merits of their First

³ *See also Jackson Fed’n of Teachers v. Fitch*, 799 F. Supp. 3d 571, 588 (S.D. Miss. 2025) (granting preliminary injunction with respect to Mississippi law imposing restrictions on Mississippi public institutions of education, prohibiting speech and programming related to so-called “divisive concepts,” with withdrawal of all state funding at risk); *AFT v. Dep’t of Educ.*, 779 F. Supp. 3d 584, 624 (D. Md. 2025) (staying Dear Colleague Letter of February 14, 2025 pursuant to 5 U.S.C. § 705 pending final resolution by the court); *AFT v. Dep’t of Educ.*, 796 F. Supp. 3d 66, 80 (D. Md. 2025) (granting summary judgment on same grounds); *NAACP v. United States Dep’t of Educ.*, 779 F. Supp. 3d 53, 68 (D.D.C. 2025) (preliminarily enjoining defendants from implementing and enforcing DEI certification requirement); *Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, 641 F. Supp. 3d 1218, 1287 (N.D. Fla. 2022) (preliminarily enjoining Florida’s H.B. 7’s prohibition on college instruction in part because it was “impermissibly vague”), *appeal filed and stay of injunction denied*, Nos. 22-13992-J, 22-13994-J, 2023 U.S. App. LEXIS 6591 (11th Cir. Mar. 16, 2023); *Honeyfund.com, Inc. v. DeSantis*, 622 F. Supp. 3d 1159, 1180–84 (N.D. Fla. 2022) (enjoining, in part, on vagueness grounds a Florida law that sought to bar employers from holding mandatory meetings for their employees if those meetings endorsed viewpoints that the state found offensive), *aff’d*, 94 F.4th 1272, 1283 n.6 (11th Cir. 2024) (declining to address vagueness claim); *Black Emergency Response Team v. Drummond*, 737 F. Supp. 3d 1158 (W.D. Okla. 2024) (preliminarily enjoining portions of similar state law) (appeal filed July 16, 2024); *Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump*, 508 F. Supp. 3d 521, 529, 543–45 (N.D. Cal. 2020) (holding unconstitutional an executive order that prohibited the promotion of “divisive concepts” within federal trainings, including the idea that “the United States is fundamentally racist or sexist”).

Amendment claim with respect to NEA’s members in higher education.”). These prohibitions at institutions of higher education impact, for example, members of Plaintiff National Education Association-New Hampshire (“NEA-NH”) who teach at the University of New Hampshire Franklin Pierce School of Law (“UNH Law”).

As this Court has explained, “[t]he stakes for noncompliance with” HB2 are “high,” with millions of dollars hanging in the balance. *NEA-NH*, 806 F. Supp. 3d at 180. For any violation—*even an “unknow[ing]” one*—public schools *shall* lose “all sources of public funding to that public school[.]” *See* RSA 187:77 (emphasis added). The penalty is mandatory. The “public funding” that can be lost includes state funds, and possibly even federal funds where the New Hampshire Department of Education (“NHDOE”) acts as a “pass through” in distributing these funds to public school districts. Only “public schools” are subject to these penalties in the event of a violation; other “public entities” are excluded from these funding penalties. *Compare* RSA 186:77 *with* RSA 21-I:112–17. For public school districts, the state funds that hang in the balance include the \$4,265.64 (for fiscal year 2026) per pupil base adequacy aid amount and other per pupil differentiated aid amounts (including for students who receive free or reduced meals, who are English language learners, and who receive special education services) that the State provides to school districts under RSA 198:40-a, II. This can amount to millions of dollars for an individual public school district. Yet disbursement of these state funds to public school districts is not optional or conditional; the State is obligated to disburse these funds so districts can provide an adequate education consistent with Part II, Article 83 of the New Hampshire Constitution. For public and private colleges and universities in New Hampshire, too, the funding penalties are significant. In addition to operating costs provided to public colleges and universities, there also is at stake at least \$22 million in UNIQUE Program state scholarships (both Annual and

Endowment) disbursed through June 30, 2025 and over \$2 million in Governor’s Scholarship Program state funds disbursed in fiscal year 2025. In other words, HB2 appears to condition state scholarship aid to New Hampshire-resident students on their college complying with HB2. If the college does not comply (even unknowingly), HB2 would cruelly rip away that student’s aid through no fault of the student.

Especially because a violation can occur “unknowingly,” HB2 allows every person who speaks for a school district to expose the district and its public funding to risk. As one court explained, “[t]he chilling effect is compounded in the academic context, where the fear of losing state funding compels institutions to over-correct in ways that suppress constitutionally protected speech[.]” *See Miss. Ass’n of Educators v. Bd. of Trs. of State Insts. of Higher Learning*, No. 3:25-cv-00417-HTW-LGI, 2025 U.S. Dist. LEXIS 140078, at *13 (S.D. Miss. 2025) (issuing temporary restraining order). And HB2 imposes these penalties while providing no process—let alone process that is due—to contest the unilateral decision of NHDOE that a “knowing” or even an “unknowing” violation has occurred. With critical funding in the balance, NHDOE serves as the judge, jury, and executioner as to whether all “public funding” is revoked.

HB2’s anti-DEI provisions harm Plaintiff educators and trainers. Plaintiffs NEA-NH higher education members and Dr. Dottie Morris⁴ are chilled in their college and law school classrooms and academic work. And the enactment of HB2 effective July 1, 2025 left educators in K-12 schools scrambling with the impossible task of reconciling state requirements for teaching history and critical thinking skills with the contradictory prohibitions of HB2 as the 2025-26 school year was set to begin. Had this Court not issued a temporary restraining order on September 4,

⁴ On April 20, 2026, the President of Keene State College (“KSC”) informed Dr. Morris that her position as Associate Vice President for Community and Belonging served “at the pleasure of the President” and that, “because of changes in strategic direction,” “the decision has been made to conclude [her] employment in that role at the end of the spring 2026 term [effective around May 21, 2026].” *See* Statement of Facts (“SF”) No. 27.

2025 and a preliminary injunction on October 2, 2025, these educators risked baseless investigations, employment consequences, the possible revocation of teaching licenses, and loss of their profession. Without this relief, Plaintiff School Districts themselves risked losing millions of dollars in public funding that are critical to their ability to educate and support their communities. Plaintiffs James T. McKim, Jr., New Hampshire Outright, and Dr. Dottie Morris—all of whom conduct trainings addressing implicit bias and diversity, equity, and inclusion principles in various contexts—are unsure how to conform their trainings to HB2’s prohibitions. They, too, risk investigation and complaints, as well as the pass-through effect of loss of funds for the public schools they serve. Between the passage of HB2 and this Court’s granting of a temporary restraining order, Plaintiffs James T. McKim and New Hampshire Outright had school districts—which were concerned about the risk and consequences of violating the law—revoke training opportunities since the enactment of HB2. If HB2 is not permanently enjoined, these injuries will resume.

HB2’s provisions also directly contradict federal and state civil rights laws that guarantee integration, and inclusion (particularly for individuals with disabilities). School districts and NEA-NH members who are special educators, in particular, are unsure how to comply with HB2’s requirements while also complying with their obligations under federal law to provide services for students with disabilities should the law be allowed to go into effect. HB2 specifically incorporates “physical or mental disability” into its definition, thereby prohibiting public schools from “classify[ing]” people with disabilities “for the purpose of achieving demographic outcomes.” Based on the dictionary definitions of these terms, HB2 prohibits schools from considering a person’s disability for the purpose of achieving disability-related outcomes. But federal disability rights laws—including the Americans with Disabilities Act (“ADA”), Section 504 of the

Rehabilitation Act (“Section 504”), and the Individuals with Disabilities Education Act (“IDEA”)—*require* exactly the conduct that HB2 *prohibits*: namely, (i) identifying (or “classifying” under HB2) students as disabled, and (ii) providing accommodations, services, and supports to disabled students (or “implementing programs or initiatives”) that treat disabled students differently instead of “equally” under HB2, (iii) in order to achieve disability-based outcomes, such as access, participation, inclusion, and integration (or “achieving demographic outcomes” for disabled students under HB2). Indeed, the foundational concepts of individualized education plans and reasonable accommodations under disability rights laws are, at their core, about addressing the individualized needs of specific disabled people—namely, providing individualized services, accommodations, and supports that, by definition, are not provided to others. Thus, HB2’s artificial dichotomy between “demographic outcomes” or “treating individuals equal under the law” renders nearly all compliance with disability rights laws unlawful.

HB2’s threats are made more concrete by NHDOE’s enforcement, which was put on hold through this Court’s September 4, 2025 temporary restraining order and October 2, 2025 preliminary injunction. Before these orders, this enforcement included the publication of letters on July 11, 2025 and July 17, 2025, respectively, directed to K–12 public school districts and public/private colleges that receive “public funds” demanding and/or requesting a certification of compliance with the law under the pains and penalties of perjury by September 5, 2025. Before this Court’s orders, NHDOE also had established a website that published NHDOE’s enforcement efforts. If HB2 is not permanently enjoined and if the interim relief provided by this Court is lifted, this enforcement will resume.

HB2 infringes on Plaintiffs’ legal rights, causing irreparable injury that cannot be outweighed by any legitimate governmental interest. As the United States District Court for the District of New Hampshire has explained, prohibiting diversity, equity, or inclusion, requiring certification, and threatening enforcement actions for violations combine to threaten “the ‘supremely precious’ yet ‘delicate and vulnerable’ nature of the right to free speech in our country,” *Nat’l Educ. Ass’n*, 779 F. Supp. 3d at 186 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)), particularly given that these prohibitions “sweep in a wide swath of conduct while leaving individual enforcement decisions to the subjective determinations of enforcement authorities.” *Id.* at 187 (citing *Kolender v. Lawson*, 461 U.S. 352, 353–54 (1983)). In passing and in enforcing HB2, New Hampshire has failed to adhere to these principles.

STATEMENT OF FACTS

Pursuant to Local Rule 56.1, Plaintiffs hereby submit this statement of material facts:

I. HB2’s Anti-DEI Provisions and Their History.

1. The anti-DEI provisions at issue in this case were enacted in late June 2025 as part of House Bill 2 (“HB2”), one of the legislature’s biannual budget bills, and became effective on July 1, 2025. HB2’s anti-DEI provisions were enacted in two new subdivisions. *See* 2025 N.H. Laws ch. 141, §§ 321–22.⁵

2. The House Finance Committee voted to approve these two new subdivisions on April 1, 2025, which was the deadline when that Committee was required to finalize HB2 for full

⁵ *Exhibit 1*. First, HB2 amended RSA chapter 21-I by enacting a new statutory subdivision entitled “Prohibition on Diversity, Equity, and Inclusion.” 2025 N.H. Laws ch. 141, § 321. This new subdivision comprises RSA 21-I:112 through :116, and applies to “public entit[ies],” “agencies,” and “political subdivisions.” RSA 21-I:113-114; *accord* RSA 21-I:115, :116. Second, HB2 amended RSA chapter 186 by enacting a new statutory subdivision entitled “Prohibition on Diversity, Equity, and Inclusion in Public Schools.” 2025 N.H. Laws ch. 141, § 322. This new subdivision comprises RSA 186:71 through :77, and it applies to “public school[s].” RSA 186:72; *accord, e.g.*, RSA 186:73.

consideration before the House of Representatives.⁶ These provisions were introduced one day earlier on March 31, 2025 and were initially intended to be modeled after President Trump’s January 20, 2025 Executive Order 14151.⁷ During this budget process, opponents expressed their view that these provisions were vague and conflicted with federal disability laws.⁸ Nonetheless, the legislature passed these provisions, and HB2 was signed into law on June 27, 2025.⁹ The complete legislative history can be found at Exhibits 7–17.

3. Because a “public school” is defined as “any school, academic institution, or institution of higher education in this state supported by public funds,” see RSA 186:71, II (emphasis added),¹⁰ HB2 applies not only to public school districts serving students in grades K–12, but also to private (including religious) K–12 schools that receive “public funds,” including through Education Freedom Accounts (“EFAs”). *Id.*¹¹

⁶ Exhibit 10, at 14:7-14 (Apr. 1, 2025 Transcript, With Margin Notes By Pls.’ Counsel) (“And I simply want to point out that if the public has not said already that they want input on big decisions such as this one, and they see again that this committee is going to go ahead and jam through on literally the last day something like this without proper notice, proper discussion, and input from the community, I think they are going to lose their confidence in this body.”) (emphasis added).

⁷ Exhibit 8 (Mar. 31, 2025 Transcript); Exhibit 7 (Mar. 28, 2025 Proposal Presented on Mar. 31, 2025, stating that “[t]his subdivision shall be interpreted and enforced in a manner consistent with Executive Order 14151”). Executive Order 14151, in part, directed all executive branch agencies to “terminate . . . ‘equity-related’ grants or contracts.” Exec. Order No. 14151, *Ending Radical and Wasteful Government DEI Programs and Preferencing*, Executive Order of January 20, 2025, 90 Fed. Reg. 8339 (Jan. 29, 2025), available at <https://www.whitehouse.gov/presidential-actions/2025/01/ending-radical-and-wasteful-government-dei-programs-and-preferencing/>; <https://public-inspection.federalregister.gov/2025-01953.pdf>.

⁸ Exhibit 10, at 8:4-10, 12:18-13:7, 22:10-24 (Apr. 1, 2025 Transcript, With Margin Notes By Pls.’ Counsel); Exhibit 15 (May 27, 2025 Transcript), at 4:15–19, 4:22-5:1, 5:13-25.

⁹ Exhibit 12 (HB2 Docket).

¹⁰ HB2’s definition of “public school” is materially different—and more expansive—than how a “public school” is defined elsewhere in New Hampshire law. See N.H. Code Admin. R. Ed 401.01(f) (“‘Public school’ means a school which is established and operated by a school district, maintained primarily by public funds, and administered by a school board whose members are elected as provided under the laws of the state of New Hampshire.”).

¹¹ During the 2024-2025 academic year, 56.88% (or \$11,501,321) of total EFA spending was directed to tuition at private K-12 schools. See Children’s Scholarship Fund, *Delivering Educational Freedom: 24–25 EFA Expenditure Overview: Highlights from a Year of Strong Program Utilization*, (2025), https://nh.scholarshipfund.org/wp-content/uploads/2025/12/2024-2025_EFA_Expend_Report_DRAFT_YEAR4.pdf. During the 2024-25 academic year, the top five private school recipients of EFA funds were the following: (i) Portsmouth Christian Academy (\$542,534.20, or 2.68% in EFA total expenditures); (ii) Trinity High School in Manchester (\$487,356.45, or 2.41% in EFA total expenditures); (iii) Trinity Christian School in Concord (\$483,297.89, or 2.39% in EFA total expenditures); (iv) Concord Christian Academy (\$475,929.36, or 2.35% in EFA total expenditures); and (v) Mount Royal Academy (\$428,400.90, or 2.12 in EFA total expenditures). *Id.*

4. Furthermore, HB2’s “public school” definition applies to public colleges and universities in New Hampshire. RSA 186:71, II. This includes UNH Law and the University of New Hampshire (“UNH”). *Id.*

5. This “public school” definition also means that HB2 applies to private (including religious) colleges and universities in New Hampshire that are “supported by public funds.” RSA 186:71, II. Consistent with this interpretation, on July 17, 2025, Defendant NHDOE directed a letter to both public and private colleges and universities in New Hampshire—including Dartmouth College, Southern New Hampshire University, Saint Anselm College, and Thomas More College of Liberal Arts, among others—requesting compliance with HB2 on the ground that these institutions “receive[] public support” through state-funded scholarships provided to students under the UNIQUE Program (both Annual and Endowment) and the Governor’s Scholarship Program.¹²

6. While NHDOE decided to enforce HB2 against private (including religious) colleges and universities that receive public funds through state scholarship grants, NHDOE did not enforce HB2 against private K–12 institutions (including religious schools) that receive public funds through EFAs.¹³

7. HB2’s “DEI-related” prohibitions do not just apply to “public schools”; these prohibitions also independently apply to any “public entity” (which also would include public K-12 school districts). RSA 21-I:113–14. In other words, HB2 includes “programs” and “initiatives” of “public entities” like public libraries, Defendant New Hampshire Department of Justice (“NHDOJ”), Defendant NHDOE, the state police, the Police Standards and Training Council

¹² Exhibit 3 (NHDOE July 17, 2025 Letter and College/University Report List).

¹³ Exhibit 2 (NHDOE July 11, 2025 Letter to public school districts, excluding private K-12 schools that receive public funds through EFAs); Exhibit 3 (NHDOE July 17, 2025 Letter to higher education leaders, including public and private institutions).

(“PSTC”), every police department in New Hampshire, municipalities, and the Department of Health and Human Services, among many others. *Id.*

8. For any violation, public schools shall lose “all sources of public funding to that public school[.]” *See* RSA 187:77. This penalty is mandatory. *Id.* “Public funding” under HB2 includes state funds. *Id.* Only “public schools” are subject to these penalties in the event of a violation; other “public entities” are excluded from these funding penalties. *Compare* RSA 186:77 with RSA 21-I:112–17. For public school districts, the state funds that can be lost include the \$4,265.64 (for fiscal year 2026) per pupil base adequacy aid amount and other per pupil differentiated aid amounts (including for students who receive free or reduced meals, who are English language learners, and who receive special education services) that the state provides to school districts under RSA 198:40-a, II.¹⁴ This can amount to millions of dollars for an individual public school district.¹⁵

9. The loss of state funding would cause a crisis for the School District Plaintiffs. For example, as the Somersworth Superintendent John Shea explains: “We cannot afford to lose our state and federal funding support. We are not an affluent community. We do not have a large property tax base. . . . State aid (currently just over \$10 million per year) represents almost 30%

¹⁴ Ben Reynolds, *New Hampshire’s Education Funding Transition Means Reduced Aid for 109 Communities*, New Hampshire Fiscal Policy Institute (Apr. 10, 2026), <https://nhfpi.org/resource/new-hampshires-education-funding-transition-means-reduced-aid-for-109-communities/> (“For SFY 2026, the State determined that the Base Grant would be \$4,265.64 per pupil based on the amounts, with annual adjustment methods prescribed in State law.”). This Court can take judicial notice of this base amount. *See* Fed. R. Evid. 201(b)(2) (providing that “[t]he court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned”).

¹⁵ *Exhibit 5* (N.H. School Funding Fairness Project, “Vague Language in Budget Threatens State Funding for Schools” (June 13, 2025)).

of our overall annual budget. Losing this would be nothing short of catastrophic to our school district.”¹⁶ The same is true for other districts.¹⁷

10. For public and private colleges and universities in New Hampshire, the amount of annual state funds at stake under HB2 includes millions of dollars that the State provides public colleges and universities to support operating costs.¹⁸ Also at stake is at least \$22 million in UNIQUE Program state scholarships (both Annual and Endowment)¹⁹ disbursed through June 30, 2025 and nearly \$2.4 million in Governor’s Scholarship Program²⁰ state funds disbursed in fiscal year 2025. Both funding programs constitute “public funding” according to NHDOE.²¹

¹⁶ *Exhibit 40* (Shea Decl.) ¶ 9.

¹⁷ See *Exhibit 41* (Downing Decl.) ¶ 33 (“Losing this funding would result in a significant budget crisis as it accounts for over 10% of the District’s budget. In such a scenario, the district would likely be forced to implement deep cuts in programs, resources, and staffing ...”); *Exhibit 38* (Shaps Decl.) ¶ 38 (noting significant harms if funding is lost); *Exhibit 39* (Boston Decl.) ¶ 53 (same).

¹⁸ Under the previous budget that ended in June 2025, the University System of New Hampshire (“USNH”) received \$95 million in state aid per year, though the legislature recently reduced that amount in the current budget for 2026 and 2027. See Ian Lenehan, *UNH, Other Public Colleges Could Lose Tens of Millions in State Budget Cuts*, Granite State News Collaborative (Apr. 3, 2025), <https://www.nhpr.org/education/2025-04-03/unh-usnh-university-system-new-hampshire-budget-cuts-state-funding> (“USNH receives \$95 million in state aid per year under the current state budget, according to USNH spokesperson Lisa Thorne.”). Under the current budget that the legislature enacted in June 2025, two-year funding was cut by about \$17.5 million. See Josh Rogers, *Funding Losses and Declining Enrollment Prompt UNH to Seek \$17.5 Million in Fresh Cuts*, NHPR (July 2, 2025), <https://www.nhpr.org/nh-news/2025-07-02/unh-budget-cuts-funding-losses-declining-enrollment>.

¹⁹ *Exhibit 3* (Attachment 3 to NHDOE July 17, 2025 Letter and College/University Report List). According to the University of New Hampshire, “[t]he UNIQUE programs provide increased, equal access and choice for deserving, high-need New Hampshire residents seeking the benefits of postsecondary education at a New Hampshire institution.” See University of New Hampshire, College of Professional Studies, *Federal and State Grant*, <https://cps.unh.edu/online/tuition-aid/types-aid/federal-state-grants> (last visited May 20, 2026). For the UNIQUE Endowment Program, the annual award is up to \$2,000 per semester. To be eligible, the student must, among other things, be a New Hampshire resident, have financial need, and meet certain academic progress requirements. *Id.* For the UNIQUE Allocation Program, the annual award is up to \$1,250 per semester based on available funding. To be eligible, the student must, among other things, also be a New Hampshire resident, have financial need, and meet certain academic progress requirements. *Id.*

²⁰ *Exhibit 3* (attachment to NHDOE July 17, 2025 Letter and College/University Report List). According to the New Hampshire State Treasurer, the Governor’s Scholarship Program “[p]rovides financial assistance to eligible New Hampshire high school graduates or recent graduates who enroll full-time in a participating postsecondary education institution within the state.” See N.H. State Treasury, *Scholarship Programs*, <https://www.treasury.nh.gov/residents/scholarship-programs> (last visited May 20, 2026). Requirements of the Governor’s Scholarship Program are described in RSA 195-H:13.

²¹ *Exhibit 3* (NHDOE July 17, 2025 Letter and College/University Report List). The UNIQUE Scholarship Program and the Governor’s Scholarship Program are managed by an advisory commission, which includes as a member Defendant State Treasurer Monica Mezzapelle. See N.H. State Treasury, *College Tuition Savings Plan Advisory Commission*, <https://www.treasury.nh.gov/about-us/boards-commissions/college-tuition-savings-plan-advisory-commission> (last visited May 20, 2026).

11. Separate from HB2’s funding penalties, school districts themselves have an independent obligation to enforce HB2’s prohibitions at RSA 21-I:113 and RSA 186:72 against individual educators, including fielding complaints and conducting investigations.²²

II. The Effects of HB2’s Anti-DEI Provisions, and Defendants’ Enforcement.

12. NHDOE began enforcing HB2 after it became law on July 1, 2025. On July 11, 2025, NHDOE wrote to public school districts informing them that “each public school (as defined by RSA 186:71, II) must review every program, policy, training, or initiative to identify DEI-related provisions,” as well as demanding that they certify compliance with the law under the pains and penalties of perjury by September 5, 2025.²³ The certification form—in addition to demanding that the public school district certify that it “has reviewed all current contracts and identified whether any contain DEI-related provisions” and provide information on any such contracts—also required the public school district to affirmatively certify: (i) whether it has or has not “implemented, promoted, or engaged in any DEI-related initiatives, training, assessments, or policies”; and (ii) whether it has or has not “used state funds for such purposes for DEI-related activities including but not limited to implicit bias training, DEI assessments, critical race theory, or race-based hiring, promotion, or contracting preferences.”²⁴

13. The July 11, 2025 letter also stated, in part, that “HB 2 prohibits public schools from implementing, promoting, or otherwise engaging in initiatives, programs, training, or policies related to DEI provisions.”²⁵ However, Defendants stated to this Court on August 21, 2025 that

²² *Exhibit 38* (Shaps. Decl.) ¶ 40 (“If teachers do not comply with HB2, the District may be forced to discipline them to prevent the District from losing state funds.”); *Exhibit 41* (Downing Decl.) ¶ 34 (same); see also *Exhibit 39* (Boston Decl.) ¶ 41; *Exhibit 40* (Shea Decl.) ¶ 31.

²³ *Exhibit 2* (NHDOE July 11, 2025 Letter to public school districts stating that certifications “shall be submitted to NHED no later than September 5, 2025”).

²⁴ *Id.*

²⁵ *Id.*

RSA 186:72 “does not prohibit public schools from using other sources of funding [other than state funding] for such activities.” See ECF No. 26, at 5.²⁶

14. On July 17, 2025, NHDOE directed a similar letter to public and private colleges and universities, including private colleges that, in NHDOE’s view, receive state funding through individual state-funded scholarships.²⁷ This letter referenced the same certified report that was referenced in NHDOE’s July 11, 2025 letter to public school districts.²⁸

15. NHDOE, in these July 11, 2025 and July 17, 2025 letters, stated the penalties for noncompliance consistent with RSA 187:77, I–II in HB2: “Should a public school [] fail to abide by any section of the DEI provisions to HB 2, either knowingly or unknowingly, the Commissioner of the Department of Education shall immediately **halt all sources of public funding to that public school**, until such time as the school comes into compliance with all sections of this subdivision.”²⁹ These letters also explained that HB2 can be violated unknowingly.³⁰

16. On July 14, 2025, the ACLU of New Hampshire wrote to NHDOE informing NHDOE that the September 5, 2025 deadline was inconsistent with the statute. See Exhibit 33 (ACLU-NH July 14, 2025 Email to NHDOE).

²⁶ See also *id.* at 26 (“In sum, the phrases that the plaintiff argues are unconstitutionally vague are not intended to identify prohibited ‘DEI-related initiatives, programs, training, or policies.’ RSA 186:72. They only identify ‘DEI-related activities’ for which ‘[n]o state funds shall be expended[.]’ RSA 186:72. Thus, ‘DEI assessment[s].’ ‘implicit bias training[s].’ and ‘critical race theory’ are not necessarily prohibited by the challenged provisions, but the expenditure of state funds on any of those activities is prohibited.”) (emphasis added).

²⁷ Exhibit 3 (NHDOE July 17, 2025 Letter to higher education leaders “requesting submissions by September 5, 2025” to permit NHDOE “to compile the results and meet its statutory reporting requirement to the legislature of October 1, 2025”).

²⁸ *Id.* The Certified Report Form and Certified Report Addendum attached to Exhibit 2 has been attached to Exhibit 3, as such documents pertain to “Institution[s] of Higher Education.”

²⁹ Exhibit 2 (NHDOE July 11, 2025 Letter to public school districts) (emphasis in original); Exhibit 3 (NHDOE July 17, 2025 Letter to higher education leaders, including public and private institutions) (emphasis in original).

³⁰ Exhibit 2 (NHDOE July 11, 2025 Letter to public school districts); Exhibit 3 (NHDOE July 17, 2025 Letter to higher education leaders, including public and private institutions).

17. NHDOE also established a website that publishes NHDOE’s enforcement efforts.³¹ This website included which schools had been directed to submit certifications, which schools had returned certifications, and the contents of the returned certifications.³² As of August 31, 2025—four days before this Court issued a temporary restraining order on September 4, 2025—43 out of 180 listed public school districts had submitted certifications under the NHDOE’s September 5, 2025 deadline.³³ As of August 31, 2025, seven out of 38 listed charter schools had submitted certifications under the NHDOE’s September 5, 2025 deadline.³⁴

18. On July 11, 2025, after receiving the letter, the superintendent of one school district asked then-NHDOE Commissioner of Education Frank Edelblut several questions about what HB2 means, including “What school actions meet ‘the purpose of achieving demographic outcomes’?”, and “What is the definition of ‘program’ under this subdivision?”³⁵ Commissioner Edelblut responded with the following: “Thank you for your questions. For clarification on the application of RSA 186:71 through 186:77, we recommend reaching out to your local district counsel. They are best positioned to interpret how this statute applies to your specific circumstances.”³⁶

³¹ The Wayback Machine’s capture of this website as of August 31, 2025 is here (<https://web.archive.org/web/20250831225359/https://www.education.nh.gov/who-we-are/deputy-commissioner/office-governance/legislation/prohibition-diversity-equity-and-inclusion-public-schools>), and can be found at *Exhibit 46*.

³² The Wayback Machine’s capture of this website as of August 31, 2025 is here (<https://web.archive.org/web/20250831225817/https://www.education.nh.gov/who-we-are/deputy-commissioner/office-governance/legislation/prohibition-diversity-equity-and-inclusion-public-schools/public-schools-certified>), and can be found at *Exhibit 47*.

³³ *Id.* Of these 43 public school districts, two school districts (the Monroe School District and the Raymond School District), as well as four schools in the Monadnock Regional School District, submitted certification forms that left some boxes blank. *Id.*

³⁴ The Wayback Machine’s capture of this website as of August 31, 2025 is here (<https://web.archive.org/web/20250831225815/https://www.education.nh.gov/who-we-are/deputy-commissioner/office-governance/legislation/prohibition-diversity-equity-and-inclusion-public-schools/charter-schools-certified>), and can be found at *Exhibit 48*.

³⁵ *Exhibit 31* (NHDOE July 15, 2025 Grantham Response); see also *Exhibit 41* (Downing Decl.) ¶¶ 27–28.

³⁶ *Exhibit 31* (NHDOE July 15, 2025 Grantham Response); see also *Exhibit 41* (Downing Decl.) ¶¶ 27–28.

19. Furthermore, on July 23, 2025, Defendant New Hampshire Department of Administrative Services directed state agencies to identify all contracts that include DEI-related provisions and submit that information to the Department by October 1, 2025.³⁷

20. After HB2's anti-DEI provisions became law on July 1, 2025, Plaintiff Dr. Dottie Morris had her title changed by Keene State College ("KSC") from Associate Vice President for Institutional Equity and Diversity to Associate Vice President for Community and Belonging on around June 30, 2025, and she immediately began discussing with colleagues the ways in which HB2 would change her equity work and her course instruction.³⁸

21. In early July 2025, KSC also removed the contents of its website entitled "Justice, Equity, Diversity, and Inclusion" following the enactment of HB2's anti-DEI provisions.³⁹ Similar websites promoting the value of diversity, equity, and inclusion were pulled by UNH, UNH Law, Plymouth State University, River Valley Community College, among others, and were replaced on the UNH and UNH Law websites with the following statement:

The recently enacted state budget includes a prohibition on "DEI-related initiatives, programs, training, or policies." In response to these provisions, the university's Diversity, Equity, Access & Inclusion webpages have been temporarily taken offline to permit a thorough review of university programs, policies, and online materials as we plan for how best to foster a campus culture that supports access, belonging, and student success in a way that fully complies with state law.⁴⁰

22. UNH also temporarily stripped the title of its chief diversity officer, who had been in this role since 2020.⁴¹ Her title was changed to associate vice president for community, civil

³⁷ *Exhibit 4* (July 23, 2025 Department of Administrative Services Email, With Spreadsheet Altered For Size).

³⁸ *Exhibit 42* (Morris Decl.) ¶¶ 3, 8–10.

³⁹ *Exhibit 19* (KSC's Pre-HB2 websites); *Exhibit 20* (KSC's July 10, 2025 website).

⁴⁰ See, e.g., *Exhibit 23* (UNH's May 2025 website); *Exhibit 24* (UNH's July 10, 2025 websites); *Exhibit 25* (UNH Law's Jan. 2025 website); *Exhibit 26* (UNH Law's Aug. 4, 2025 website); see also *Exhibit 27* (PSU April 2025 website); *Exhibit 28* (PSU's July 2025 website); *Exhibit 29* (River Valley Community College "You Belong Here" website as of March 2025); *Exhibit 30* (removal of that website as of July 2025).

⁴¹ *Exhibit 21* (UNH July 1, 2025 Letter); see also Ian Lenahan, *Under Threat From State, UNH Makes DEI-related Changes*, Seacoast Online (July 1, 2025), <https://www.seacoastonline.com/story/news/local/2025/07/01/under-threat->

rights, and compliance.⁴² UNH also announced its intention to “thoroughly assess programs, policies, and online materials in light of the new statute.”⁴³ UNH President Elizabeth Chilton announced these changes to the university community on July 1, 2025 and explained that “the broad language of the provision and the risk of significant financial penalties require us to take proactive steps to mitigate uncertainty.”⁴⁴

23. On July 2, 2025, leaders of the New Hampshire House of Representatives responded on X.com (formerly Twitter) to the changes made at UNH following HB2 by stating that, “[t]hanks to the budget’s anti-DEI provisions, UNH will effectively defund itself if it presses ahead with radical leftist indoctrination—and mere title changes won’t achieve compliance.”⁴⁵

24. RSA 21-I:116 states that NHDOJ “shall establish a process by which all political subdivisions review their existing contracts for the presence of DEI-related provisions.” RSA 21-I:116. Pursuant to this provision, Defendant NHDOJ sent an email on January 8, 2026 to all municipal town and city clerks attaching a memorandum and a “Political Subdivision Certification of Compliance with RSA 21-I:116” form that was required to be completed by no later than February 28, 2026.⁴⁶ In this correspondence, NHDOJ states that RSA 21-I:112 to RSA 21-I:116 “prohibits all public entities, including political subdivisions, from implementing, promoting, or otherwise engaging in any ‘DEI-related initiatives, programs, training, or policies.’”⁴⁷ In executing the certification form, the political subdivision would be certifying that it “has reviewed

[from-state-unh-makes-dei-related-changes/84428786007/?gnt-cfr=1&gca-cat=p&gca-uir=false&gca-epti=z117405p119750n00---c00---e001800v117405&gca-ft=167&gca-ds=sophi](https://www.unh.edu/newsroom/2025/07/01/unh-from-state-unh-makes-dei-related-changes/84428786007/?gnt-cfr=1&gca-cat=p&gca-uir=false&gca-epti=z117405p119750n00---c00---e001800v117405&gca-ft=167&gca-ds=sophi).

⁴² *Exhibit 21* (UNH July 1, 2025 Letter).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Exhibit 49* (July 2, 2025 X Post); *see also* N.H. House GOP (@NHHouseGOP), X (July 2, 2025), <https://x.com/NHHouseGOP/status/1940505724393832843>.

⁴⁶ *Exhibit 50* (NHDOJ Jan. 8, 2026 correspondence on HB2).

⁴⁷ *Id.*

its existing contracts for prohibited DEI-related provisions.”⁴⁸ NHDOJ’s certification form sent to all “New Hampshire Political Subdivisions” also states, in part, that “[p]rohibited DEI-related provisions include the following: (1) implicit bias training; (2) DEI assessments; (3) critical race theory; or (4) any other provision that classifies individuals based upon age, sex, gender identity, race, creed, color, marital status, familial status, physical or mental disability or national origin and has a primary purpose of achieving demographic outcomes.”⁴⁹

25. NHDOJ’s January 8, 2026 enforcement letter to municipal town and city clerks does not state—in contrast to Defendants’ August 21, 2025 statements to this Court—that, for “public entities like municipalities, . . . this prohibition [in RSA 21-I:113] only bars the use of ‘state funds’” for “‘DEI-related activities’ such as ‘implicit bias training DEI assessments, critical race theory, or race-based hiring, promotion, or contracting preferences.’” See ECF No. 26, at 5.⁵⁰

26. After receiving outreach from Plaintiffs’ counsel, Defendant NHDOJ submitted an update to all municipal town and city clerks on February 26, 2026 that recited the terms of this Court’s October 2, 2025 preliminary injunction, made clear that school districts are not subject to the certification requirement stated in the January 8, 2026 correspondence, and extended the certification requirement to March 30, 2026.⁵¹

27. On April 20, 2026, the President of KSC informed Dr. Morris in writing that her position as Associate Vice President for Community and Belonging served “at the pleasure of the President” and that, “because of changes in strategic direction,” “the decision has been made to conclude [her] employment in that role at the end of the spring 2026 term [effective on around

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See also *id.* at p. 24 (“Thus, the challenged provisions may permit a municipality to put on an implicit bias training for all of its employees so long as its purpose is not to achieve demographic outcomes, and it does not expend state funds to do so.”) (emphasis added).

⁵¹ Exhibit 51 (NHDOJ Feb. 26, 2026 correspondence on HB2).

May 22, 2026].”⁵² KSC offered Dr. Morris a six-month paid administrative leave to begin at the end of the spring 2026 term on May 22, 2026 and to conclude on November 21, 2026.⁵³ However, the President alternatively extended to Dr. Morris the option of returning to the faculty of KSC’s Psychology Department effective August 17, 2026, rather than separating her from employment at KSC.⁵⁴ Given KSC’s decision to terminate her diversity, equity, and inclusion work, Dr. Morris has decided to not accept this offer to return to the faculty of KSC’s Psychology Department.⁵⁵ Accordingly, she will no longer be employed as KSC’s Associate Vice President for Community and Belonging as of May 22, 2026, and will be on paid administrative leave until November 21, 2026 unless she begins another position of employment within the University System of New Hampshire or with a third party before the conclusion of this six-month leave period.⁵⁶

III. The Confusion Caused by HB2’s Anti-DEI Provisions.

28. “Programs” and “initiatives” are undefined terms in HB2, but presumably could include “programs of study” which capture curricular instruction.⁵⁷ This curricular scope impacts the members of NEA-NH, especially those who regularly wrestle with issues concerning disability, race, and other classifications in providing programmatic and special education services, as well as curricular instruction at colleges and universities.⁵⁸ Educators have also articulated concerns that numerous policies (including those that relate to demographic data collection), practices, “programs,” “initiatives,” and curriculum could be covered under HB2.⁵⁹

⁵² *Exhibit 53* (Morris Supp. Decl.) ¶ 2.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* ¶ 3.

⁵⁶ *Id.*

⁵⁷ *Exhibit 38* (Shaps Decl.) ¶ 6 (“‘Programs’ and ‘initiatives’ also are undefined terms in HB2, but presumably include ‘programs of study’ which capture curricular instruction.”); *Exhibit 39* (Boston Decl.) ¶ 16 (same).

⁵⁸ *Exhibit 34* (NEA-NH Decl.) ¶¶ 17–20; *Exhibit 35* (NEA-NH Member A Decl.) ¶¶ 5, 9, 13–18; *Exhibit 36* (NEA-NH Member B Decl.) ¶¶ 7, 8, 12–13; *Exhibit 37* (NEA-NH Member C Decl.) ¶¶ 15, 17–19, 22.

⁵⁹ See, e.g., *Exhibit 38* (Shaps Decl.) ¶¶ 20, 26–32, 35; *Exhibit 41* (Downing Decl.) ¶¶ 24–26; *Exhibit 40* (Shea Decl.) ¶¶ 21–23, 27; *Exhibit 39* (Boston Decl.) ¶¶ 37–38, 46.

29. For example, as NEA-NH Member A explains, it is not clear whether educators can comply with RSA 189:11, I-c(j)'s requirement to include instruction on “[h]ow intolerance, bigotry, antisemitism, and national, ethnic, racial, or religious hatred and discrimination have evolved in the past, and can evolve, into genocide and mass violence, such as the Holocaust, and how to prevent the evolution of such practices” when this instruction helps “achieve” the “demographic outcome” of protecting Jewish students from discrimination.⁶⁰ Plaintiff School Districts have expressed similar uncertainty about how to comply with both HB2 and RSA 189:11, I-c(j).⁶¹

30. Plaintiff James T. McKim, who conducts trainings for law enforcement employed by “public entities” under HB2, is similarly confused as to whether his trainings are covered.⁶²

31. As HB2 also does not define the terms “implicit bias training,” “critical race theory” or “DEI assessments,” educators like Plaintiff Dr. Dottie Morris and those who give trainings to public entities (like Plaintiffs James T. McKim, Jr. and New Hampshire Outright) are confused about where the line is between what is allowed and what may be punishable.⁶³

32. Two NEA-NH higher education members at UNH Law who discuss race in their work have conveyed to NEA-NH how HB2 impacts their instruction, especially where “discussion

⁶⁰ *Exhibit 34* (NEA-NH Decl.) ¶ 18; *Exhibit 35* (NEA-NH Member A Decl.) ¶¶ 14–17. The three declarations filed by educators and NEA-NH members—Members A, B, and C—in support of this Motion for Summary Judgment and Permanent Injunction are the same versions of these declarations filed in Plaintiffs’ August 8, 2025 Complaint and in support of Plaintiffs’ August 11, 2025 Emergency Motion for Preliminary Injunction. Unredacted versions of these three declarations that contain personally identifiable information were filed with this Court under seal per this Court’s August 25, 2025 order. See ECF No. 35.

⁶¹ *Exhibit 40* (Shea Decl.) ¶ 26; *Exhibit 38* (Shaps Decl.) ¶ 35; *Exhibit 39* (Boston Decl.) ¶ 38.

⁶² *Exhibit 43* (McKim Decl.) ¶¶ 3–4.

⁶³ *Exhibit 42* (Morris Decl.) ¶ 9 (“I do not know whether I can reference implicit bias either to students or fellow staff members out of fear of being accused of violating the law—an accusation that could cause KSC to lose vital public funding.”); *Exhibit 43* (McKim Decl.) ¶¶ 5–6 (“I am especially confused about what the phrase ‘achieving demographic outcomes’ means in HB2’s definition of ‘DEI.’”); *Exhibit 44* (N.H. Outright Decl.) ¶¶ 6, 11 (“Because HB2 does not define the term ‘implicit bias training’ or explain what ‘achieving demographic outcomes’ means, New Hampshire Outright has to wonder where the line is between what is allowed and what is punishable, all while often being contractually required to comply with New Hampshire law during these trainings.”).

of race is critical to educating law students not only in the legacy of race in how the law has developed, but also how to effectively represent clients from diverse communities.”⁶⁴ As NEA-NH further explains on behalf of its members at UNH Law:

Students need to be sensitive to the lived experiences of those being represented. Student-lawyers also, in some circumstances, need to be trained that race can be an important component of legal arguments based on precedent and that to not understand that is risking ineffective representation Given that their work intersects with HB2, these educators are concerned that they may be subjected to adverse employment action and/or their school’s funding affected if they continue to assign readings, engage in discussions with students, provide instruction, student programming, or professional development, or otherwise operate their programs in ways that are or could be construed to be related to race, diversity, equity, or inclusion.⁶⁵

33. One of the legislators who supported HB2’s anti-DEI provisions cited instruction at Southern New Hampshire University on “socioeconomic factors” (including posing questions like “why is it that you have better health outcomes in white neighborhoods”) in higher education as an example for why the law was necessary.⁶⁶ Accordingly, Plaintiff Dr. Dottie Morris has explained that HB2 made her work at the higher education institution of KSC more difficult, including her ability to teach on implicit biases in her psychology classes.⁶⁷ She added that, at KSC, she is “seeing significant stress from” her “colleagues who do not know what HB2 means and do not know how to comply. Some are so afraid of making a mistake that will be costly to the college that they are telling [her] that they likely will err on the side of not including certain content

⁶⁴ *Exhibit 34* (NEA-NH Decl.) ¶ 8; *see also* ABA Standards and Rules of Procedure for Approval of Law Schools 2022-2023, Standard 303(c) (Am. Bar Ass’n 2022); *see also* Neil W. Hamilton and Louis D. Billionis, *Revised ABA Standards 303(b) and (c) and the Formation of a Lawyer’s Professional Identity, Part 1: Understanding the New Requirements*, National Association for Law Placement, Inc. Bulletin (Mar. 2022), <https://www.nalp.org/revised-aba-standards-part-1>. On May 15, 2026, the council of the American Bar Association Section of Legal Education and Admissions to the Bar voted to send for notice and comment the repeal of Standard 303(c), which requires law schools to provide education related to cultural competence, racism and bias. *See* Julianne Hill, *ABA Legal Ed Council Votes to Repeal Diversity and Inclusion Standard*, ABA Journal (May 15, 2026), <https://www.abajournal.com/web/article/aba-legal-ed-council-votes-to-repeal-diversity-and-inclusion-standard>.

⁶⁵ *Exhibit 34* (NEA-NH Decl.) ¶ 8.

⁶⁶ *Exhibit 10* (April 1, 2025 Transcript, With Margin Note By Pls.’ Counsel), at 15:7–23.

⁶⁷ *Exhibit 42* (Morris Decl.) ¶¶ 18–19.

that may be considered covered.”⁶⁸ Similar fears exist for NEA-NH members who are on the UNH Law faculty.⁶⁹

34. Implicit bias is a concept regularly addressed in law enforcement trainings, especially after the May 2020 killing of George Floyd, including those conducted by NHDOJ.⁷⁰ Implicit bias trainings for law enforcement were embraced by Governor Chris Sununu and the Commission on Law Enforcement Accountability, Community, and Transparency (“LEACT”), which recommended in August 2020 that police be trained on implicit bias. This training has subsequently occurred throughout New Hampshire.⁷¹ Plaintiff James T. McKim regularly conducts these trainings for public entities and public schools throughout New Hampshire, and he helped develop the implicit bias training for the PSTC.⁷² Plaintiff Dr. Dottie Morris too has regularly addressed these topics in trainings and when she has taught as a psychology professor.⁷³ And NEA-NH Member B also taught implicit bias in a high school sociology class, though Member B recently removed it from the curriculum given the current climate.⁷⁴

⁶⁸ *Id.* at 22.

⁶⁹ *Exhibit 34* (NEA-NH Decl.) ¶ 8.

⁷⁰ *Exhibit 6* (Implicit Bias Training Hosted by the New Hampshire Attorney General’s Office on Nov. 20, 2020 (addressing concepts like “structural/systemic discrimination” and “white privilege” in slides 11–12, 33 of James T. McKim’s presentation “Are You Your Implicit Bias?”); *see also* Organizational Ignition, *Implicit Bias Training*, <https://organizationalignition.com/event/implicit-bias-training/> (last visited May 20, 2026).

⁷¹ *See Commission on Law Enforcement Accountability, Community as Transparency*, New Hampshire governor Chris Sununu, <https://www.governor.sununu.nh.gov/accountability>; *see also LEACT Recommendations Completed & In Progress as of 9/21/21*, New Hampshire Governor Chris Sununu, <https://www.governor.sununu.nh.gov/sites/g/files/ehbemt336/files/inline-documents/sonh/20210830-leact-recommendations-completed-and-in-progress-final.pdf> (noting in Sept. 2, 2021 LEACT Tracking Report completion of the following: “1-B. Mandate NH PSTC training on implicit bias and cultural responsiveness, ethics and de-escalation”; “2. Encourage all law enforcement agencies to require implicit bias and cultural responsiveness, ethics and de-escalation training”; and “18. Require implicit bias training for all prosecutors, criminal defense attorneys and judges.”); *LEACT Dashboard*, New Hampshire Governor Chris Sununu, (June 9, 2021) <https://www.governor.sununu.nh.gov/sites/g/files/ehbemt336/files/inline-documents/sonh/060921-dashboard.pdf> (noting in LEACT May 2021 Dashboard that “State Police completed additional training on de-escalation and is in progress on training on ethics and implicit bias”).

⁷² *Exhibit 43* (McKim Decl.) ¶¶ 3–4, 7–9.

⁷³ *Exhibit 42* (Morris Decl.) ¶¶ 8, 18.

⁷⁴ *Exhibit 36* (NEA-NH Member B Decl.) ¶ 17.

35. Former NHDOE Commissioner Frank Edelblut has criticized “critical race theory” in the context of race-conscious remedies, and argued that New Hampshire’s 2021 “banned concepts” law was necessary to prevent its instruction in schools.⁷⁵ This law was declared unconstitutional by the United States District Court for the District of New Hampshire, and that decision is on appeal. *See Local 8027 v. Edelblut*, No. 21-cv-1077-PB, 2024 U.S. Dist. LEXIS 94052 (D.N.H. May 28, 2024).

IV. Plaintiffs’ Compliance with Federal Disability Civil Rights Laws.

36. Public schools “classify” individuals with disabilities to fulfill the requirements under the ADA, 42 U.S.C. §12101 *et seq.*, and Section 504, 29 U.S.C. § 794, by, for example:

- a. Adjusting the physical layout of a classroom for a teacher who uses a wheelchair⁷⁶;
- b. Modifying the standard grading policy with respect to attendance for a student who misses classes frequently to receive cancer treatment⁷⁷;
- c. Modifying a general “no pets” policy at a school to permit a student to bring her service dog into the school⁷⁸; and
- d. Providing an ASL interpreter for one Deaf student whose primary language is ASL, and providing a different Deaf student real-time captioning, rather than providing all Deaf students identical auxiliary aids and services.⁷⁹

37. Further, public schools “operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities,” *see* 28 C.F.R. § 35.150(a) (ADA) and 34 C.F.R. § 104.21 (Section 504), as required by the ADA and Section 504 by, for example:

⁷⁵ *Exhibit 32* (Edelblut June 13, 2021 op-ed).

⁷⁶ *Exhibit 38* (Shaps Decl.) ¶ 26; *Exhibit 41* (Downing Decl.) ¶ 21.

⁷⁷ *Exhibit 38* (Shaps Decl.) ¶ 26; *Exhibit 39* (Boston Decl.) ¶ 43.

⁷⁸ *Exhibit 38* (Shaps Decl.) ¶ 26; *Exhibit 39* (Boston Decl.) ¶ 43; *Exhibit 41* (Downing Decl.) ¶ 21.

⁷⁹ *Exhibit 39* (Boston Decl.) ¶ 43; *Exhibit 41* (Downing Decl.) ¶ 21.

- a. Ensuring their classrooms educate disabled students in “the most integrated setting” by placing a specific number of students with disabilities in general education classrooms to maintain a ratio of disabled to non-disabled students⁸⁰; and
- b. Installing wheelchair ramps to ensure that the school is “readily accessible” to students, teachers, and visitors with mobility disabilities.⁸¹

38. For schools, compliance with the obligations in the IDEA to provide special education services and supports necessary to deliver a Free Appropriate Public Education (“FAPE”) includes:

- a. Including in the IEP of a student with ADHD that the student may take tests in a quiet setting, outside of the regular classroom and without other students present⁸²;
- b. Including in the IEP of a student with an intellectual disability that she will receive 1:1 paraprofessional support so that she can participate in a general education classroom with her nondisabled peers⁸³;
- c. Including in an IEP that a student will read complete sentences with first-grade vocabulary words by the end of the academic year⁸⁴; and
- d. Creating a schoolwide behavioral framework that provides tiered support to students with behavioral disabilities to make sure that students with disabilities are not disproportionately suspended.⁸⁵

ARGUMENT

A movant is entitled to summary judgment where they “show[] that that there is no genuine dispute as to any material fact and [that he] is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). When parties cross-move for summary judgment, this Court “view[s] each motion

⁸⁰ *Exhibit 38* (Shaps Decl.) ¶ 26; *Exhibit 39* (Boston Decl.) ¶ 14; *Exhibit 41* (Downing Decl.) ¶ 21.

⁸¹ *Exhibit 38* (Shaps Decl.) ¶ 26; *Exhibit 41* (Downing Decl.) ¶ 21.

⁸² *Exhibit 38* (Shaps Decl.) ¶ 29.

⁸³ *Exhibit 38* (Shaps Decl.) ¶ 29.

⁸⁴ *Exhibit 38* (Shaps Decl.) ¶ 29; *Exhibit 41* (Downing Decl.) ¶ 25.

⁸⁵ *Exhibit 38* (Shaps Decl.) ¶ 29; *Exhibit 41* (Downing Decl.) ¶ 25.

separately, drawing all inferences in favor of the nonmoving party.” *Giguere v. Port Res. Inc.*, 927 F.3d 43, 47 (1st Cir. 2019) (quotation omitted).

I. HB2 Violates the Fourteenth Amendment’s Prohibition on Vagueness (Count I).

At the outset, the standard to be applied in a facial vagueness claim has been addressed by this District, including in this case. *See NEA-NH*, 806 F. Supp. 3d at 192 n.16.⁸⁶ “[T]he void-for-vagueness doctrine does not require a showing that a statute is vague in all of its applications.” *Local 8027 v. Edelblut*, 651 F. Supp. 3d 444, 459 (D.N.H. 2023) (Barbadoro, J.). “[T]hat some conduct clearly falls within the” law’s “scope is insufficient to defeat [a] vagueness claim.” *Id.*

The Fourteenth Amendment prohibits vagueness as “an ‘essential’ of due process, required by both ordinary notions of fair play and settled rules of law.” *Sessions v. Dimaya*, 584 U.S. 148, 155 (2018) (internal quotations and citation omitted). A rule is impermissibly vague if it either “fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits” or “authorizes or even encourages arbitrary and discriminatory enforcement.” *Hill v. Colorado*, 530 U.S. 703, 732 (2000). This principle applies to administrative, civil, and criminal prohibitions. *See, e.g., FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253–54 (2012) (civil fines); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048–51 (1991) (state bar rule).⁸⁷

⁸⁶ *See also Local 8027 v. Edelblut*, 651 F. Supp. 3d 444, 457–59 (D.N.H. 2023) (Barbadoro, J.); *Local 8027 v. Edelblut*, No. 21-cv-1077-PB, 2024 U.S. Dist. LEXIS 94052, at *12 (D.N.H. May 28, 2024) (Barbadoro, J.) (appeal filed July 26, 2024; 1st Cir. argued Apr. 8, 2025); *Nat’l Educ. Ass’n v. U.S. Dep’t of Educ.*, 779 F. Supp. 3d 149, 185–86 (D.N.H. 2025) (adopting standard in *Local 8027*) (McCafferty, J.).

⁸⁷ To ensure that it is preserved, Plaintiffs bring a similar claim under Part I, Article 15 of the New Hampshire Constitution (Count IV), but are not seeking summary judgment as to this claim and, instead, defer to this Court as to whether it should be dismissed without prejudice to refiling in state court. Indeed, these same vagueness principles apply under Part I, Article 15 of the New Hampshire Constitution. *See Bleiler v. Chief, Dover Police Dep’t*, 155 N.H. 693, 701 (2007) (same principles under Part I, Article 15); *see also Montenegro v. N.H. DMV*, 166 N.H. 215, 221–22 (2014) (applying vagueness principles under New Hampshire Constitution in speech context). Further, all Plaintiffs in this case—including the Oyster River Cooperative School District, Dover School District, Somersworth School District, and the Grantham School District—are asserting a claim under Part I, Article 15 of the New Hampshire Constitution, while these four school districts are not asserting a Fourteenth Amendment vagueness claim. This is because a state may not be “bound by substantive fourteenth amendment limitations (due process and equal protection) when dealing with its municipalities.” *See Santiago Collazo v. Franqui Acosta*, 721 F. Supp. 385, 393 (D.P.R. 1989). However, the New Hampshire Supreme Court has assumed, without deciding, that Article 15 due process claims can

Where, as here, a vague rule “abuts upon sensitive areas of basic First Amendment freedoms . . . [u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone.” *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal quotations omitted). For this reason, “[t]he general test of vagueness applies with particular force.” *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610, 620 (1976). Likewise, a rule is “subject to the most exacting vagueness review” when, as here, it imposes severe consequences such as penalties “that strip persons of their professional licenses and livelihoods.” *See Local 8027*, 2024 U.S. Dist. LEXIS 94052, at *18–20 (quoting *Sessions*, 584 U.S. at 184 (Gorsuch, J., concurring in part)); *see also Nat’l Educ. Ass’n*, 779 F. Supp. 3d at 191 (same); *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 95–96 (1st Cir. 2004) (“[V]agueness concerns are more pressing when there are sanctions (such as expulsion) attached to violations of a challenged regulation.”). Even where a more stringent test for vagueness does not apply, “[v]ague laws in any area suffer a constitutional infirmity.” *Ashton v. Kentucky*, 384 U.S. 195, 200 n.1 (1966) (collecting cases).

A. HB2 is Devoid of Objective Guidelines, and Educators are Left Without Notice and Chilled in Their Ability to Educate Consistent With the Standards of Their Profession and Other State and Federal Regulations.

HB2 purports to prohibit the implementation or “promot[ion]” of, or engagement in, “initiatives, programs, training, or policies” in public entities and “public schools” that are “related” to “diversity, equity, or inclusion” (or “DEI”). *See* RSA 21-I:112–14; RSA 186:71–73. DEI is defined as “any program, policy, training, or initiative that classifies individuals based on a characteristic identified under RSA 354-A:1”—namely, age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, or

be made against the state by political subdivisions. *See Appeal of Rye Sch. Dist.*, 173 N.H. 753, 758–59 (2020) (“assum[ing], without deciding, that the District may bring its due process challenges against the State Board [of Education]”).

national origin—“for the purpose of achieving demographic outcomes, rather than treating individuals equally under the law.” *See* RSA 21-I:112, II; RSA 186:71, I. HB2 is replete with vagueness for each of the reasons explained below.

“Achieving Demographic Outcomes”: “Classif[y]ing” and “achieving demographic outcomes” are undefined under HB2, leaving educators to guess what is covered. “Classify” is defined in the dictionary to mean “to consider (someone or something) as belonging to a particular group.”⁸⁸ And “demographic” is defined to refer to “the statistical characteristics of human populations (such as age or income) used especially to identify markets.”⁸⁹ As this Court has opined, “[t]aken together, these definitions suggest that the anti-DEI laws prohibit public entities and public schools from considering a person as belonging to an enumerated demographic group set forth in RSA 354-A:1 (such as a particular age, race, sex, gender identity, or disability status) for the purpose of achieving a result that relates to one of those enumerated characteristics.” *NEA-NH*, 806 F. Supp. 3d at 194. Indeed, because all of the characteristics in RSA 354-A:1 are, of course, “statistical characteristics of human populations,” HB2 would appear to prohibit public schools, and by extension their educators, from “considering” any such characteristics for the purpose of achieving any outcomes related to those characteristics. Further, “programs” and “initiatives”—as well as the term “promote”—too are undefined terms in HB2, but presumably

⁸⁸ Merriam-Webster Dictionary, *Classify*, <https://www.merriam-webster.com/dictionary/classify#:~:text=1,belonging%20to%20a%20particular%20group> (last visited May 18, 2026).

⁸⁹ Merriam-Webster Dictionary, *Demographic*, <https://www.merriam-webster.com/dictionary/demographic> (last visited May 18, 2026).

could include “programs of study” which capture curricular instruction. *See* Statement of Facts (“SF”) No. 28.⁹⁰

HB2’s application of the “DEI” definition to protected classes under RSA 354-A:1 makes the law’s prohibitions particularly indecipherable and at least arguably covers well-established (and legally-mandated) “programs” and “initiatives” that school administrators, school districts, and their educators employ every day to make certain “demographic” groups feel more welcome and able to access education on equal terms. These “programs” or “initiatives” could include, just to name a few:

- A school district’s tracking—consistent with Section 1111(c)(2) of the federal Elementary and Secondary Education Act (“ESSA”) of 1965 (*see* 20 U.S.C. § 6311(c)(2))—of racial and ethnic groups, which appears to constitute classifications designed to “achieve demographic outcomes.” *See Exhibit 38* (Shaps Decl.) ¶¶ 20, 30; *Exhibit 41* (Downing Decl.) ¶ 26⁹¹;
- A school district’s tracking of “children with disabilities” or “English learners” under federal law—paired with the targeted interventions that may be legally required for these groups—which too seem to constitute classifications based on disability or national origin designed to “achieve demographic outcomes” for these groups. *See Exhibit 40* (Shea Decl.) ¶¶ 21–22; *Exhibit 38* (Shaps Decl.) ¶¶ 26, 28; *Exhibit 39* (Boston Decl.) ¶ 46; *Exhibit 41* (Downing Decl.) ¶¶ 24–25⁹²;
- To comply with Title IX, a public high school creating school sports teams for girls⁹³ or adding education programs designed to increase the representation of girls in STEM classes. *Exhibit 38* (Shaps Decl.) ¶ 31⁹⁴; and

⁹⁰ New Hampshire’s Administrative Rules for Education broadly define “program” as “a grouping of interrelated activities, opportunities, and resources designed to implement a particular goal.” N.H. Code Admin. R. Ed 306.02(z).

⁹¹ *See also* NHDOE, *Consolidated State Plan, The Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act*, at 16 (Revised Submission V.4 ~ February 1st, 2025), https://www.education.nh.gov/sites/g/files/ehbemt326/files/inline-documents/sonh/nh-state-plan-2023_used_0.pdf.

⁹² *See also id.*

⁹³ *See* 44 Fed. Reg. 71413, 71418 (1979) (establishing three-part test to determine whether an educational institution is considered to be in compliance with Title IX).

⁹⁴ *See* Tara P. Nicola, *STEM Gender Gaps Significant Among Gen Z*, *Gallup Blog* (Dec. 5, 2023), <https://news.gallup.com/opinion/gallup/544772/stem-gender-gaps-significant-among-gen.aspx#:~:text=Women%20make%20up%20half%20of,fields%20such%20as%20computer%20science> (“Female Gen Z youth report learning about fewer technical STEM concepts in their middle and high school coursework than their male counterparts do.”).

- A high school social studies course covering historical topics where an educator is viewed as “promoting” the concept of “systemic racism” despite the educator’s obligation to help students understand “the history of the United States through multiple perspectives” and the “on-going struggle to realize” our “founding principles.” N.H. Code Admin. R. Ann. Ed 306.23(f)(3)(f)(1); *see Exhibit 38* (Shaps Decl.) ¶¶ 32, 35; *see also Exhibit 39* (Boston Decl.) ¶¶ 37–38; *Exhibit 40* (Shea Decl.) ¶ 27.

See also SF Nos. 28-32. Additionally, this Court correctly explained that the plain language of the anti-DEI provisions in HB2 could prohibit schools and their teachers from, among other things:

- “Identifying students based on age for the purpose of ensuring that children enrolling in kindergarten will be five years old by September 30 of the year of their enrollment”;
- “Identifying students based on sex or gender identity for the purpose of restricting bathrooms to members of a particular sex or gender identity”; and
- “Identifying students with mental health diagnoses for the purpose of ensuring that such students have adequate access to their guidance counselors.”

See NEA-NH, 806 F. Supp. 3d at 195 (reciting examples).

In short, as this Court summarized, “[t]he breadth of the anti-DEI laws’ prohibition is startling. The definition of ‘DEI’ contained therein is so far-reaching that it prohibits long-accepted—even legally required—teaching and administrative practices. It is hard to imagine how schools could continue to operate at even a basic level if the laws’ prohibitions were enforced to their full extent.” *Id.* The record bears this out. For example, as NEA-NH Member A explains, it is not clear whether educators can comply with RSA 189:11, I-c(j)’s requirement to include instruction on “[h]ow intolerance, bigotry, antisemitism, and national, ethnic, racial, or religious hatred and discrimination have evolved in the past, and can evolve, into genocide and mass violence, such as the Holocaust, and how to prevent the evolution of such practices” when this instruction helps “achieve” the “demographic outcome” of protecting Jewish students from discrimination. SF No. 29. As a result, “teachers could . . . be left with ‘an impermissible Hobson’s choice’: shirking their responsibilities under RSA § 189:11, or teaching what RSA § 189:11

requires and potentially violating the prohibition[s]” in HB2’s anti-DEI provisions. *See Local 8027*, 651 F. Supp. 3d at 462. Plaintiff School Districts have expressed similar uncertainty about how to comply with both HB2 and RSA 189:11, I-c(j). SF No. 29. And, as explained in more detail in Section III *infra*, these ambiguities are especially pronounced in the context of disability—a classification specifically covered in HB2’s prohibitions through its incorporation of RSA 354-A:1—where federal law requires that public entities, schools, and educators implement individualized programs that improve integration and outcomes for this demographic group.

This confusion is no less present outside of the education context, including in the context of the trainings that Plaintiff James T. McKim conducts for law enforcement employed by “public entities” under HB2. SF No. 30. For example, would a police department engaging in training—consistent with the enactment of HB596 in 2024⁹⁵—to reduce racial profiling of Black and Hispanic people to alleviate racial disparities in policing⁹⁶ and to address judicial decisions implicating the stops of several “non-Caucasian males”⁹⁷ be covered under HB2 as seeking to “achieve” a “demographic outcome,” as such training would be designed to ensure that people of color are not subjected to discriminatory police practices? Relatedly, would HB2 prevent a law enforcement agency from engaging in efforts—including the efforts of the Manchester, Portsmouth, and UNH police departments through the “30 x 30” initiative—to expand the number

⁹⁵ H.B. 596, 2024 N.H. Legis. (2024), https://gc.nh.gov/bill_status/legacy/bs2016/billText.aspx?sy=2024&id=543&txtFormat=pdf&v=current.

⁹⁶ Paul Cuno-Booth, *How Pretextual Traffic Stops by N.H. Police Disproportionately Affect Black and Latino Drivers*, NHPR (May 17, 2022), <https://www.nhpr.org/nh-news/2022-05-17/pretextual-traffic-police-stops-racial-disparities-black-latino-drivers-nh>.

⁹⁷ *See United States v. Hernandez*, 470 F. Supp. 3d 114, 128 (D.N.H. 2018) (addressing stop of “a non-Caucasian male” where trooper was suspicious, in part, because the defendant’s “hands on the steering wheel” were at “ten and two”) (McCafferty, J.); *State v. Perez*, Nos. 218-2018-CR-334, 218-2018-CR-335, 2019 N.H. Super. LEXIS 19, at *2–3 (N.H. Super. Ct. Rockingham Cty. Oct. 4, 2019) (Schulman, J.) (addressing stop of a “non-Caucasian male” where the driver, in part, had his hands at “ten and two” on the wheel, as drivers are trained to do, yet the trooper found this “odd”) (citing *Hernandez*, 470 F. Supp. at 127–28).

of women represented in their agencies?⁹⁸ HB2 is indecipherable and unclear on all these important questions, leaving enforcers to selectively apply HB2’s prohibitions and people like James T. McKim to “try to alter [their] training programs and consulting/speaking work to comply with HB2’s vague terms.”⁹⁹

“DEI”-“related” and “Promote”: Adding to this confusion, HB2 does not just prohibit “DEI”; it also prohibits DEI-“*related*” initiatives, programs, training, or policies. *See* RSA 21-I:113–14 (emphasis added); RSA 186:72–73 (emphasis added). However, as this Court previously noted, “[n]owhere in the anti-DEI laws is there a definition of ‘DEI-related,’ or any criteria by which to assess how ‘related’ a program or policy must be to one that comes within the definition of DEI in order to be prohibited.” *See NEA-NH*, 806 F. Supp. 3d at 195–96. For example, would a Black history student group or a Christian student group be DEI-“related” solely because it mentions a protected characteristic like race or religion? Would a guidance counselor’s informational course on gender violence be considered DEI-“related” because of its focus on gender? And would a counselor recommending resources for a group of students at higher risk of depression or suicide¹⁰⁰ be “related” to “DEI” if that grouping of students or the recommended

⁹⁸ *See* 30x30, *About 30x30*, <https://30x30initiative.org/about-30x30> (last visited May 18, 2026) (“The 30×30 Initiative is based on evidence indicating the importance of achieving at least 30% representation to empower a group to influence an organization’s culture.”; indicating participating New Hampshire agencies); *MPD Takes 30×30 Pledge: The Goal is a 30% Female Police Force by 2030*, *Manchester Ink Link* (Mar. 26, 2021), <https://manchester.inklink.news/mpd-takes-30x30-pledge-the-goal-is-a-30-female-police-force-by-2030> (“By 2030, women will hopefully comprise 30 percent of officers on the Manchester Police Department. Police Chief Allen D. Aldenberg, at a news conference Thursday outside headquarters on Valley Street, said the department is the first in the state—and one of the few large departments nationwide—to sign on to the 30×30 Pledge, an initiative affiliated with the Policing Project at NYU School of Law and the National Association of Women Law Enforcement Executives.”).

⁹⁹ *Exhibit 43* (McKim Decl.) ¶ 4.

¹⁰⁰ *See* New Hampshire Outright, “Culturally Responsive Engagement with LGBTQ+ Students & Families,” Slide 18 attached to *Exhibit 44* entitled “The Impact of Discrimination on LGBTQ+ Youth,” attached to Declaration of New Hampshire Outright (“N.H. Outright Decl.”) (noting that “Nationally, 39-40% of LGBTQ+ youth seriously considered suicide in the past year & 12-19% [attempted]”); *see also* Trevor Project, *2024 U.S. National Survey on the Mental Health of LGBTQ+ Young People* (“39% of LGBTQ+ young people seriously considered attempting suicide in the past year”; “12% of LGBTQ+ young people attempted suicide in the past year”).

resources implicate mental disabilities or another characteristic listed in RSA 354-A:1? HB2 says nothing about whether these programs or initiatives are sufficiently “related” to DEI to now be unlawful.¹⁰¹

Public entities and “public schools” are now not allowed to “implement, promote, or otherwise engage in” (also undefined terms) these DEI-“related” activities. It is unclear if simply mentioning the existence of “DEI” programs in a classroom would be considered impermissible “promotion.” The word “promote” has been specifically identified by the Supreme Court as being “susceptible of multiple and wide-ranging meanings.” *See United States v. Williams*, 553 U.S. 285, 294 (2008). For example, could a professor at UNH Law teach key constitutional law cases addressing affirmative action—including endorsing Justice Sotomayor’s dissent in *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 318 (2023), which states that the Fourteenth Amendment’s guarantee of racial equality “can be enforced through race-conscious means”—without potentially being accused of “promoting” a “DEI” “related” “program”? The law is unclear. *See Local 8027*, 2024 U.S. Dist. LEXIS 94052, at *33 (noting that the text of New Hampshire’s “banned concepts” law “provides no hint” of whether a teacher can teach court cases on affirmative action, thereby “leaving the teacher’s fate subject only to an enforcing agency’s subjective interpretation of what was taught”).

“Implicit Bias Training,” “Critical Race Theory,” and “DEI Assessments”: HB2 also is ambiguous in purporting to label certain undefined concepts like “implicit bias training,” “critical race theory,” and “DEI assessments” as unlawfully “DEI-related.” *See* RSA 21-I:113

¹⁰¹ *See, e.g., Exhibit 38* (Shaps Decl.) ¶ 25 (“Given HB2’s vague assertion that anything DEI-‘related’ violates the law, I am fearful that NHDOE and others could view goals central to the District’s work as violating HB2.”); *Exhibit 40* (Shea Decl.) ¶ 12 (“The law also does not make clear how ‘related’ to ‘DEI’ a program must be for it to violate the law.”).

(“No state funds shall be expended for DEI-related activities, including but not limited to”); RSA 186:72 (same).

At the outset, these topics deemed “related” to “DEI” are not comprised in an exclusive list, meaning that there could be other, unspecified topics that are sufficiently “related” to “DEI” to be unlawful. *See Bellevue v. Miller*, 536 P.2d 603, 607 (Wash. 1975) (noting that a law’s inclusive list of examples which may be considered unlawful cannot save the law where “there are plainly no actual limitations placed on the exercise” of discretion). And HB2’s explicit recitation of topics that are categorically “DEI-related” suggests that these listed topics confusingly are prohibited even if they do *not* meet the law’s definition of “DEI” under RSA 21-I:112, II and RSA 186:71, I. In other words, as this Court correctly noted, “the inclusion of specific statutory categories purported to be illustrative of ‘DEI-related activities’ exacerbates rather than diminishes vagueness concerns, because ‘implicit bias training’ and ‘critical race theory’ do not necessarily meet the statutory definition of ‘DEI,’ and are not necessarily ‘related’ to that definition either.” *See NEA-NH*, 806 F. Supp. 3d at 198.

HB2 also does not define the terms “implicit bias training,” “critical race theory” or “DEI assessments” themselves, leaving educators like Plaintiff Dr. Dottie Morris and those who give trainings to public entities (like Plaintiffs James T. McKim, Jr. and New Hampshire Outright) to wonder where the line is between what is allowed and what may be punishable. SF No. 31. Where some courts have found as impermissibly vague efforts at defining “critical race theory” in seeking to ban certain concepts from being taught in schools, HB2 abandons that effort altogether in leaving this term undefined, further enhancing how this law can be arbitrarily enforced. *See Miss. Ass’n of Educators*, 2025 U.S. Dist. LEXIS 140078, at *14 (“Terms like ‘divisive concepts’ are undefined, granting enforcers unbounded discretion.”); *Local 8027*, 2024 U.S. Dist. LEXIS 94052,

at *23 n.6 (noting that the legislative intent in banning four concepts in New Hampshire schools was, in part, to ban “critical race theory”); *Mae M. v. Komrosky*, 111 Cal. App. 5th 198, 204 (2025) (holding that the trial court erred in denying preliminary injunctive relief to bar enforcement of a school board’s resolution prohibiting the teaching of critical race theory because success on the merits was likely in establishing the resolution was unconstitutionally vague on its face).

The vague and undefined terms “implicit bias training” and “DEI assessments” may encompass a large range of common employment and educational practices, including things like testing accommodations or assessments regarding language acquisition and readiness. And is the mere mention of “systemic” or “structural” racism against communities of color in classrooms and trainings throughout New Hampshire now covered as illegal “implicit bias” or “critical race theory,” including at UNH Law? The answer is far from clear. With this lack of clarity, NEA-NH higher education members at UNH Law who discuss race in their work do not see how they can comply with HB2 while recognizing that “discussion of race is critical to educating law students not only in the legacy of race in how the law has developed, but also how to effectively represent clients from diverse communities.” SF No. 32. Moreover, in recent years, “critical race theory” has become a phrase that can mean whatever one wants it to mean, including any mention of the view that race-conscious approaches may assist in remedying past discrimination. Former NHDOE Commissioner Edelblut, himself, has criticized “critical race theory” in the context of race-conscious remedies, and argued that New Hampshire’s 2021 (and now declared unconstitutional) “banned concepts” law was necessary to prevent its instruction in schools. *See Local 8027*, 2024 U.S. Dist. LEXIS 94052, at *23 n.6; SF No. 35.

For higher education instructors in particular, for example, these undefined prohibitions raise the specter that they include researching, writing on, or teaching—including as part of a

Human Rights/Social Justice class or other “program” of study—books like Michelle Alexander’s *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010) or articles on “systemic racism” in the United States’ immigration laws.¹⁰² This concern is made even more real by the fact that NHDOE immediately began enforcing HB2 after its enactment on July 1, 2025 against colleges and universities (until this Court’s September 4, 2025 temporary restraining order), *see* SF No. 14, and where one of the legislators who supported the law cited instruction on “socioeconomic factors” (including posing questions like “why is it that you have better health outcomes in white neighborhoods”) in higher education as an example for why the law was necessary. SF No. 33. With this context in mind, Plaintiff Dr. Dottie Morris has explained that her work at the higher education institution of KSC would be made more difficult by HB2, including her ability to instruct on implicit biases in her psychology courses. *Id.* She added that, at KSC, she saw “significant stress from” her “colleagues who do not know what HB2 means and do not know how to comply. Some are so afraid of making a mistake that will be costly to the college that they are telling [her] that they likely will err on the side of not including certain content that may be considered covered.” *Id.* Similar fears exist for NEA-NH members who are on the UNH Law faculty. *Id.*

Implicit bias also is a concept regularly addressed in law enforcement trainings (including those conducted by NHDOJ) to help ensure that New Hampshire’s enforcement of the laws is fair following the May 2020 killing of George Floyd and the racial justice movement that followed. SF No. 34. Implicit bias trainings for law enforcement were embraced by Governor Chris Sununu and the LEACT Commission, which recommended in August 2020 that police be trained on

¹⁰² *See* Kevin R. Johnson, *The Jerome Hall Lecture: Systemic Racism in the U.S. Immigration Laws*, 97 *Ind. L.J.* 1455, 1460 (2022).

implicit bias. This training has subsequently occurred throughout New Hampshire. *Id.* Plaintiff James T. McKim regularly conducts these trainings for public entities and public schools throughout New Hampshire, and he helped develop the implicit bias training for the PSTC. *Id.* Plaintiff Dr. Dottie Morris too regularly addressed these topics in trainings and in her classes as a psychology professor. *Id.* And NEA-NH Member B also taught implicit bias in a high school sociology class, though Member B recently removed it from the curriculum given the current climate. *Id.*

HB2’s viewpoint-based inclusion of topics like “critical race theory” also demonstrates that the law’s prohibitions—consistent with its broad terms implicating “programs” and “initiatives,” and consistent with the intent of one of its legislative proponents¹⁰³—go beyond hiring and contracting decisions, but also include “programs” of study that impact curricular instruction in both public schools and higher educational institutions that receive public funding. This curricular scope impacts the members of NEA-NH, especially those who regularly wrestle with issues concerning disability, race, and other classifications in providing programmatic and special education services, as well as curricular instruction at colleges and universities.¹⁰⁴

B. HB2’s Arbitrary Enforcement and Lack of a Scierter Requirement.

The open-ended and subjective nature of HB2’s prohibitions allow for arbitrary and discriminatory enforcement, leaving enforcers like NHDOE with the ability to pick and choose how to apply its terms based on their own preferences. For example, as explained above, what constitutes “implicit bias,” “critical race theory,” or a “program” that “classifies individuals based” on a protected characteristic “for the purpose of achieving demographic outcomes” turns on

¹⁰³ See Exhibit 10 (April 1, 2025 Transcript, With Margin Notes By Pls.’ Counsel), at 15:7–23 (referencing “DEI principles in the classroom and in the curriculum” at Southern New Hampshire University).

¹⁰⁴ See Exhibit 34 (NEA-NH Decl.) ¶¶ 17–20; Exhibit 35 (NEA-NH Member A Decl.) ¶¶ 5, 9, 13–18; Exhibit 36 (NEA-NH Member B Decl.) ¶¶ 7, 8, 12–13; Exhibit 37 (NEA-NH Member C Decl.) ¶¶ 15, 17–19, 22.

subjective judgments—including the subjective assessments of legislators who may believe that such topics constitute “radical leftist indoctrination,” *see* SF No. 23—and incorporates the same types of vague terms and viewpoint discriminatory prohibitions that have been found constitutionally suspect in other laws. *See, e.g., Local 8027*, 2024 U.S. Dist. LEXIS 94052, at *50; *Nat’l Educ. Ass’n*, 779 F. Supp. 3d at 188. As this Court has noted, “[t]he government cannot simply tell people to ‘be good’ and leave it up to the enforcers to decide what ‘good’ is.” *NEA-NH*, 806 F. Supp. 3d at 198 (internal quotation omitted). Yet this is precisely the problem with HB2.

Although HB2’s requirements are not clear, NHDOE’s intent to enforce them is. NHDOE, in its July 11, 2025 and July 17, 2025 enforcement letters, states the penalties for noncompliance consistent with RSA 187:77, I–II in HB2: “Should a public school . . . fail to abide by any section of the DEI provisions to HB 2, either knowingly or unknowingly, the Commissioner of the Department of Education shall immediately **halt all sources of public funding to that public school**, until such time as the school comes into compliance with all sections of this subdivision.” SF No. 15 (emphasis in original). These letters correctly explain that, consistent with HB2’s terms, the law can be violated even unknowingly, further enhancing the discretion NHDOE has to enforce the law’s provisions. As this Court and one other has opined, “[t]he standardless sweep of the anti-DEI laws is exacerbated by the lack of a scienter requirement.” *NEA-NH*, 806 F. Supp. 3d at 199; *see also Local 8027*, 2024 U.S. Dist. LEXIS 94052, at *40.¹⁰⁵ Defendant Department of Administrative Services has similarly required compliance from state entities. SF No. 19. In

¹⁰⁵ To be clear, HB2’s anti-DEI provisions would be unconstitutionally vague even if they had a scienter requirement given these provisions’ ambiguities. A “scienter requirement cannot save a statute . . . that has no core of meaning to begin with,” especially where that core has no textual nexus to criminal activity. *See Lifchez v. Hartigan*, 735 F. Supp. 1361, 1372 (N.D. Ill. 1990) (citing *Colautti v. Franklin*, 439 U.S. 379, 395 n.13 (1979)); *see also Coleman v. Richmond*, 364 S.E.2d 239, 5 Va. App. 459, 466 (Va. Ct. App. 1988) (finding vagueness in a loitering law even with specific intent requirement because, “since loitering is not unlawful, the statute proscribes no illegal conduct”).

January 2026, NHDOJ also demanded compliance from non-school, municipal political subdivisions. SF Nos. 24-26.

The vagueness of HB2 is of special concern given, as this Court previously noted, its “crippling penalties for noncompliance,” which includes the potential to lose millions of dollars in public funding. *See NEA-NH*, 806 F. Supp. 3d at 200. And in the wake of these enormous financial penalties that would destroy a school district’s ability to educate its students, this Court correctly noted that HB2’s anti-DEI provisions “provide no mechanism for a public school to challenge a determination by the Commissioner that the school has committed a violation. If the Commissioner concludes that a school has violated his or her beliefs as to what conduct is punishable under the anti-DEI laws, the *only way* for that school to regain critical public funding is to bow to the Commissioner’s demands.” *Id.* (emphasis in original). In other words, NHDOE is the judge, jury, and executioner, with millions of dollars of state (and possibly even federal) funding on the line that NHDOE can either (i) revoke altogether without explanation in imposing a *de facto* “death penalty” for a district, or (ii) coercively hold hostage until a district complies with NHDOE’s unilateral interpretation of HB2’s vague provisions. This is of special concern where NHDOE’s enforcement decisions have, in the past, been influenced by “personal opinions on what is appropriate instruction, as expressed in [the Commissioner’s] op-ed articles, to guide their efforts.” *See Local 8027*, 2024 U.S. Dist. LEXIS 94052, at *41.

Further compounding the chill educators will experience if HB2 is allowed to be enforced, NHDOE’s July 11, 2025 and July 17, 2025 letters provide no guidance as to what HB2’s anti-DEI provisions mean beyond reciting the provisions of the law. When the superintendent of one school district, on July 11, 2025 after receiving the letter, asked then-NHDOE Commissioner of Education Frank Edelblut several questions about what HB2 means, Commissioner Edelblut

provided no further guidance and referred the superintendent “to your local district counsel.” SF No. 18. With millions of dollars of public funding in the balance if a district unknowingly fails to comply with HB2, NHDOE left districts in the dark.

Further demonstrating HB2’s ambiguities and the prospect of arbitrary enforcement, NHDOE has already selectively applied HB2’s anti-DEI provisions in at least three ways. *First*, as previously noted by this Court, while NHDOE is seeking to apply HB2 to private (including religious) colleges and universities in New Hampshire that receive state scholarship funds for individual students through the UNIQUE Program (both Annual and Endowment) and/or the Governor Scholarship Program, *see* SF No. 5, NHDOE selectively is *not* applying HB2’s anti-DEI provisions to private K–12 schools that receive public funds either through EFAs. SF No. 6; *see also NEA-NH*, 806 F. Supp. 3d at 199 (noting this “incongruity”). There is no credible basis for NHDOE’s position that HB2 applies to a private college that receives state scholarship funds, but *not* a private K–12 school that receives state funds through EFAs. This “incongruity” is unsurprising where the former Commissioner of NHDOE—who was still serving as the Commissioner at the time of NHDOE’s July 2025 enforcement letter—has made public statements of support for EFAs.¹⁰⁶

Second—and as previously highlighted by this Court—while HB2’s anti-DEI provisions require public schools to submit a signed and certified report “identifying any contract containing DEI-related provisions,” *see* RSA 186:75, II, the law does “not require public schools to

¹⁰⁶ This Court can take judicial notice of the fact that the former Commissioner of NHDOE—who was still serving as the Commissioner at the time of NHDOE’s July 17, 2025 letter to both public and private colleges and universities in New Hampshire—has made public statements of support for EFAs. *See, e.g.,* Frank Edelblut, *Public Education for All*, Union Leader (Dec. 21, 2024), https://www.unionleader.com/opinion/op-eds/frank-edelblut-public-education-for-all/article_a64a263a-bbb6-11ef-90e2-4f7979de820e.html; WMUR-TV, Frank Edelblut Touts Unheralded Changes As He Prepares to Depart Department of Education, CloseUp, YouTube (May 18, 2025), <https://www.youtube.com/watch?v=JdUH1uQ9LhA> (starting at 1:10); *see also NEA-NH*, 806 F. Supp. 3d at 199 (taking judicial notice of this fact under Fed. R. Evid. 201(b)(2)).

affirmatively disclose whether they have previously, or are currently, engaged in DEI-related activities, or whether they have expended, or are expending, state funding on such activities.” *See NEA-NH*, 806 F. Supp. 3d at 201. However, NHDOE Commissioner’s July 11, 2025 enforcement letter to public school districts attached a certification form that purports to require public schools to do so anyway under the pains and penalties of perjury or else face a loss of all sources of public funding, SF No. 12—a requirement that exceeds what is required under RSA 186:75. Similarly, while NHDOE’s July 11, 2025 enforcement letter to public school districts stated, in part, that “HB 2 prohibits public schools from implementing, promoting, or otherwise engaging in initiatives, programs, training, or policies related to DEI provisions,” *see* SF No. 13, Defendants’ later August 21, 2025 statements to this Court suggest that RSA 186:72 “does not prohibit public schools from using other sources of funding [other than state funding] for such activities.” *See* ECF No. 26, at 5.¹⁰⁷ Which is it? These contradictory enforcement statements as to public schools confirm arbitrary enforcement.

Third, while Defendants told this Court on August 21, 2025 that, for “public entities like municipalities, ... this prohibition [in RSA 21-I:113] only bars the use of ‘state funds’” for “‘DEI-related activities’ such as ‘implicit bias training DEI assessments, critical race theory, or race-based hiring, promotion, or contracting preferences,’” *see* ECF No. 26, at 5¹⁰⁸, NHDOJ’s subsequent enforcement as to municipalities has been broader without any “state funds” limitation. NHDOJ’s January 8, 2026 enforcement letter sent to all “New Hampshire Political Subdivisions”

¹⁰⁷ *See also* ECF No. 26 at 25 (“In sum, the phrases that the plaintiff argues are unconstitutionally vague are not intended to identify prohibited ‘DEI-related initiatives, programs, training, or policies.’ RSA 186:72. They only identify ‘DEI-related activities’ for which ‘[n]o state funds shall be expended[.]’ RSA 186:72. Thus, ‘DEI assessment[s],’ ‘implicit bias training[s],’ and ‘critical race theory’ are not necessarily prohibited by the challenged provisions, but the expenditure of state funds on any of those activities is prohibited.”) (emphasis added).

¹⁰⁸ *See also* ECF No. 26 at 24 (“Thus, the challenged provisions may permit a municipality to put on an implicit bias training for all of its employees so long as its purpose is not to achieve demographic outcomes, and it does not expend state funds to do so.”) (emphasis added).

states, in part, that RSA 21-I:112 to RSA 21-I:116 “prohibits all public entities, *including political subdivisions*, from implementing, promoting, or otherwise engaging in any ‘DEI-related initiatives, programs, training, or policies.’” SF No. 25 (emphasis added). NHDOJ’s failure to include any “state funds” limitation in its January 8, 2026 correspondence to municipalities—as well as its contradictory statements as to the law’s application—further confirms arbitrary (and broader) enforcement.¹⁰⁹

II. HB2 Violates the First Amendment (Count II).

In the context of institutions of higher education, HB2 violates the rights under the First Amendment of academics and educators in these settings by discriminating against specific viewpoints—including viewpoints that “promote” “critical race theory” or “implicit bias training,” or viewpoints that “classify” groups to “achieve demographic outcomes” for these groups—that are part of a “program” or “initiative.” These prohibitions at institutions of higher education impact members of Plaintiff NEA-NH who teach at UNH Law, as well as impacted Plaintiff Dr. Dottie Morris who discussed implicit bias concepts in her prior work at KSC.

“The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection.” *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (cleaned up). For this reason, academic freedom is “a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.” *Id.*; *see also, e.g., Sweezy v.*

¹⁰⁹ Moreover, before interim relief was provided by this Court, NHDOE insisted that public school districts submit certifications by September 5, 2025. However, HB2 makes clear that districts need only submit their certification by “[n]o later than September 30, 2025.” *See* RSA 186:75, II (emphasis added). Here, NHDOE was, for its convenience in complying with its own October 1, 2025 deadline to submit a report to the legislature under RSA 186:74, simply ignoring the districts’ September 30, 2025 deadline that the legislature specified. On July 14, 2025, the ACLU-NH wrote to NHDOE informing NHDOE that the September 5, 2025 deadline was inconsistent with the statute. SF No. 16. The deadline was not changed prior to this Court’s issuance of a temporary restraining order on September 4, 2025.

New Hampshire, 354 U.S. 234, 250 (1957) (“The essentiality of freedom in the community of American universities is almost self-evident. . . . To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.”). Courts throughout the country hold that the First Amendment forbids censoring academic speech in the nation’s colleges and universities. This includes protecting professors who are public employees, where a government employer would otherwise have broad authority. *See, e.g., Kilborn v. Amiridis*, 131 F.4th 550, 558 (7th Cir. 2025) (declining “to extend [*Garcetti v. Ceballos*, 547 U.S. 410 (2006)] to speech involving university teaching and scholarship when the Supreme Court was unwilling to do so”) (collecting cases).

The Supreme Court has repeatedly reaffirmed the “bedrock First Amendment principle” that “[s]peech may not be banned on the ground that it expresses ideas that offend.” *Matal v. Tam*, 582 U.S. 218, 223 (2017). Viewpoint discrimination, including in the provision of public funds for private expression, is always impermissible. *See, e.g., Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (“[E]ven in the provision of subsidies, the Government may not aim at the suppression of dangerous ideas,” especially if doing so “result[s] in the imposition of a disproportionate burden calculated to drive certain ideas or viewpoints from the marketplace.” (cleaned up)); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 837 (1995) (holding that a public university may not discriminate against religious viewpoints in the provision of funds for student groups). “The dangers of viewpoint discrimination are *heightened* in the university setting,” *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1127 n.6 (11th Cir. 2022) (emphasis in original) (internal quotation omitted), where a legislature’s suppression of specific views undermines the universities’ “chief mission . . . to equip students to examine arguments

critically and, perhaps even more importantly, to prepare young citizens to participate in the civic and political life of our democratic republic,” *id.* at 1128.¹¹⁰

“The essence of a viewpoint discrimination claim is that the government has preferred the message of one speaker over another.” *McGuire v. Reilly*, 386 F.3d 45, 62 (1st Cir. 2004). Here, again, HB2 announces that “DEI-related” “initiatives, programs, training, or policies” cannot be “implement[ed],” “promote[d],” or “otherwise engage[d] in.” *See* RSA 21-I:113; RSA 186:72. This includes categorical bans on “implicit bias training,” “critical race theory,” and “DEI assessments.” *Id.* One prominent legislative supporter explained that HB2’s prohibitions exist because of “radical leftist indoctrination.” SF No. 23. Another asserted that HB2’s prohibitions helped address curriculum presented in a class at Southern New Hampshire University that addressed “socioeconomic factors,” including questions like “why is it that you have better health outcomes in white neighborhoods?” SF No. 33. In other words, legislators specifically targeted viewpoints in higher education programs and curriculum, including programs and curriculum at private colleges receiving any public funding. Courts have found similar laws prohibiting teaching or discussing concepts related to race, diversity, or equity to be viewpoint discriminatory.¹¹¹

HB2’s ambiguities add to this First Amendment violation. Because HB2 uses an indecipherable definition of “DEI,” does not define terms like “critical race theory”/“implicit

¹¹⁰ To ensure that it is preserved, Plaintiffs bring a similar claim under Part I, Article 22 of the New Hampshire Constitution (Count V), but are not seeking summary judgment as to this claim and, instead, defer to this Court as to whether it should be dismissed without prejudice to refile in state court. As the rights in Part I, Article 22 of the New Hampshire Constitution are at least coextensive with the rights in the First Amendment, this same analysis applies under Article 22. *See State v. Bailey*, 166 N.H. 537, 543 (2014) (“We have not previously construed Part I, Article 22 of the New Hampshire Constitution to be more protective than the First Amendment of the United States Constitution in the context of time, place, and manner restrictions.”).

¹¹¹ *See Pernell v. Fla. Bd. of Governors of the State Univ. Sys.*, 641 F. Supp. 3d 1218, 1277 (N.D. Fla. 2022) (“[T]he State of Florida says that to avoid indoctrination, the State of Florida can impose its own orthodoxy and can indoctrinate university students to its preferred viewpoint. This extravagant doublespeak flies in the face of ‘the invaluable role academic freedom plays in our public schools, particularly at the post-secondary level.’” (quoting *Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991))); *Nat’l Educ. Ass’n*, 779 F. Supp. 3d at 193-96; *Jackson Fed’n of Teachers v. Fitch*, 799 F. Supp. 3d 571 (S.D. Miss. 2025) (appeal filed Sept. 17, 2025).

bias”/“DEI assessments,” and fails to explain what it means to be “related” to “DEI,” educators at colleges and universities must guess—on pain of the imminent loss of all public funding—what speech concerning race, equity, diversity, or inclusion is now prohibited. With massive penalties hanging over their heads, administrators will broadly suppress any speech that is even potentially implicated by HB2, including the constitutionally protected academic speech of NEA-NH Members at UNH Law. Already two NEA-NH members at UNH Law have conveyed the harms of HB2. SF No. 32. Similarly, Dottie Morris reported that some educators “are so afraid of making a mistake that will be costly to the college that they are telling” her “that they likely will err on the side of not including certain content that may be considered covered.” SF No. 33. The First Amendment exists to prevent these very harms.

III. HB is Pre-empted by Foundational Disability Civil Rights Laws (Count III).

Plaintiffs also have established that the ADA, 42 U.S.C. §12101 *et seq.*, Section 504, 29 U.S.C. § 794, and the IDEA, 20 U.S.C. § 1400 *et seq.*, each pre-empt HB2 in two ways: (1) HB2 facially conflicts with these federal disability rights laws; and (2) HB2 stands as an obstacle to the objectives of those laws. The Supremacy Clause of the United States Constitution “prevents the states from impinging on federal law and policy,” *KKW Enters. Inc. v. Gloria Jean’s Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 48 (1st Cir. 1999) (citing U.S. Const., Art. VI, cl. 2), and requires that “any state law . . . which interferes with or is contrary to federal law, must yield,” *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 108 (1992); *Green Enters, LLC v. Hiscox Syndicates Ltd. at Llyod’s of London*, 68 F.4th 662, 665 (1st Cir. 2023) (“Generally, a federal statute preempts any state law with which the federal statute directly conflicts.”). Conflict pre-emption occurs where either: (1) compliance with both federal and state law is a physical impossibility, *see Arizona v. United States*, 567 U.S. 387, 399 (2012), or (2) state law “stands as

an obstacle to the full accomplishment and execution of the full purposes and objectives of Congress,” *see KKW*, 184 F.3d at 49 (internal citations omitted).

The court’s “ultimate task in any pre-emption case is to determine whether state regulation is consistent with the structure and purpose of the [federal] statute as a whole.” *Gade*, 505 U.S. at 98. Where “explicit pre-emption language does not appear, . . . nonspecific statutory language [may] nonetheless reveal a clear, but implicit, pre-emptive intent.” *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 31 (1996). Moreover, “a conclusion that a federal law preempts a given state law requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility.” *NEA-NH*, 806 F. Supp. 3d at 205 (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)).

Under this framework, the First Circuit has found pre-emption based on “[a] direct, facial contradiction between state and federal law.” *KKW*, 184 F.3d at 49. In *KKW*, the Court held that a Rhode Island statute was pre-empted by the Federal Arbitration Act (“FAA”) because it voided any arbitration clause restricting jurisdiction to forum outside Rhode Island. *Id.* at 50. Because the FAA requires courts to enforce arbitration in accordance with “the terms of the agreement,” *id.* (quoting 9 U.S.C. § 3), the state statute sought to “override” these arbitration terms and thus conflicted with the FAA, *id.* at 50, 52.

Courts have also found that state laws are pre-empted because they frustrate the purpose of federal disability rights laws where they “diminish[] . . . incentive to ensure compliance” with the mandates of the federal laws. *Equal Rts. Ctr. v. Niles Bolton Assocs.*, 602 F.3d 597, 602 (4th Cir. 2010). In *Equal Rights Center*, the Fourth Circuit found that a state law indemnity claim was pre-empted by the Fair Housing Act and the ADA because it undermined Congressional intent that parties bear liability for their discriminatory acts. *Id.* The First Circuit has similarly found pre-

emption based on frustration of purpose where state law imposes additional regulations that questions the wisdom of federally-approved activities. *Algonquin Gas Transmission, LLC v. Weymouth, Massachusetts*, 919 F.3d 54, 64 (1st Cir. 2019). In *Algonquin Gas Transmission*, the Court held that a city ordinance that led to the denial of a permit for a natural gas compressor station conflicted with the Federal Energy Regulatory Commission’s (“FERC”) approval of the project. *Id.* at 64–65. Because FERC thoroughly considered the same environmental concerns that led to the denial, the ordinance posed “an effectively complete obstacle” to FERC’s opposing conclusion that the station would “serve the public interest” and not harm the environment. *Id.* at 65.

Here, similarly, HB2 facially conflicts with federal law because it prohibits schools in New Hampshire from meeting their specific legal obligations under the ADA, Section 504, and the IDEA. At minimum, compliance with these laws is frustrated by HB2. It threatens to stop funding any school that implements a “program, policy, training, or initiative that classifies individuals based on characteristics identified under RSA 354-A:1 for the purposes of achieving demographic outcomes, rather than treating individuals equally under the law.” *See* RSA 186:71, I; RSA 186:72. RSA 354-A:1 lists the following characteristics: “age, sex, gender identity, race, creed, color, marital status, familial status, physical or mental disability or national origin . . . [and] sexual orientation.” The term “classif[y]” is defined in the dictionary to mean “to arrange in classes” or “to consider (someone or something) as belonging to a particular group.”¹¹² And “demographic” means “the statistical characteristics of human populations (such as age or income) used especially

¹¹² Merriam-Webster Dictionary, *Classify*, <https://www.merriam-webster.com/dictionary/classify#:~:text=1,belonging%20to%20a%20particular%20group> (last visited April 24, 2026).

to identify markets.”¹¹³ Physical and mental disability, of course, constitute a statistical characteristic of human populations. Combining these meanings, HB2 prohibits schools from considering someone as disabled for the purposes of achieving disability-related outcomes.

HB2 creates liability for virtually everything school districts must do to serve disabled students under the ADA, Section 504, and the IDEA. Every attempt to provide accommodations or special education services to a disabled child necessarily requires the three components prohibited by HB2. Public schools must: (1) consider the person disabled under the ADA, Section 504, or the IDEA; (2) treat them differently by providing accommodations or special education services not provided to others; and (3) achieve individualized and widespread disability-based outcomes, including access, participation, integration, improving academic achievement, or avoiding discipline. These measures provide disabled students a “preference . . . necessary to achieve the [ADA’s] basic equal opportunity goal.” *See U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002). In this Court’s words, “[t]he ADA and Section 504 require schools to treat disabled students differently in order to achieve disability-related outcomes, yet the anti-DEI laws forbid this same conduct.” *NEA-NH*, 806 F. Supp. 3d at 204. HB2 also prohibits a wide range of conduct that schools must undertake to avoid discrimination against staff, teachers, and visitors with disabilities, as this conduct, too, requires public schools and other public entities to take disability into account, and make changes to general practices and procedures, to ensure access and inclusion. Because HB2 thus conflicts with and frustrates the purpose of the ADA, Section 504, and the IDEA, summary judgment is proper as to Count III.

¹¹³ Merriam-Webster Dictionary, *Demographic*, <https://www.merriam-webster.com/dictionary/demographic> (last visited April 24, 2026).

A. HB2 Conflicts with the ADA and Section 504.

The purpose of the ADA, according to Congress, is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” through “clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities,” which “the Federal Government” would “play[] a central role in enforcing[.]” 42 U.S.C. § 12101(b)(1)–(3). Similarly, the predecessor to Section 504 was described as “a national commitment to eliminate the ‘glaring neglect’ of the handicapped.” *Alexander v. Choate*, 469 U.S. 287, 296 (1985) (quoting 118 Cong. Rec. 526 (1972)).¹¹⁴

To remedy this widespread discrimination and exclusion, the ADA and Section 504 each create an overlapping network of requirements and prohibitions that aim to achieve integration and inclusion predicated on taking disability into account. These requirements include two key categories of conduct that are prohibited, or, at the very least, frustrated, by HB2: (i) treating disabled individuals differently; and (ii) achieving widespread demographic outcomes.

1. The ADA and Section 504 Require Schools to Treat Disabled Individuals Differently.

This structure is based on requirements, like the familiar concept of “reasonable accommodations,” to treat individuals with disabilities *differently* from the general population, and to make individualized decisions and changes *because* of the person’s disability to avoid discrimination and achieve disability-related outcomes of integration and equity.

For example, the ADA and Section 504 require covered public entities, like schools, to make “reasonable modifications in policies, or procedures, when the modifications are necessary to avoid discrimination on the basis of disability[.]” 28 C.F.R. § 35.130(b)(7)(i); *Pollack v. Reg’l*

¹¹⁴ Because the ADA and Section 504 impose the same duties, Plaintiffs discuss their pre-emptive effect on HB2 together. *Theriault v. Flynn*, 162 F.3d 46, 48 n.3 (1st Cir. 1998) (“Title II of the ADA was expressly modeled after Section 504 of the Rehabilitation Act, and is to be interpreted consistently with that provision.”).

Sch. Unit 75, 886 F.3d 75, 80–81 (1st Cir. 2018) (“[R]equired modifications, or what we more customarily call ‘accommodations’ include those reasonably necessary ‘to provide meaningful access to a public service.’”). Public entities must also provide auxiliary aids and services to ensure effective communication with a disabled person, based on the individual’s communication method and needs.¹¹⁵ In determining which auxiliary aids and services it provides, public entities must give “primary consideration” to the request of the individual with disabilities. 28 C.F.R. § 35.160(b)(2); *Garcia-Castro v. Puerto Rico*, No. 3:20-CV-01065-JAW, 2024 U.S. Dist. LEXIS 115984, at *26 (D.P.R. June 26, 2024) (same). Public entities are only required to comply with each of these requirements with respect to “qualified individual[s] with a disability” as defined under the laws. *See* 28 C.F.R. §§ 35.103 (ADA); 35.130 (ADA); 42.503 (Section 504). Public schools and entities thus are required to “classify” individuals with disabilities to fulfill these duties.

Public schools comply with these requirements by, for example:

- Adjusting the physical layout of a classroom for a teacher who uses a wheelchair; *see* SF No. 36(a);
- Modifying the standard grading policy with respect to attendance for a student who misses classes frequently to receive cancer treatment; *see* SF No. 36(b); *c.f.* *S.T. v. Los Angeles Unified Sch. Dist.*, 545 F. Supp. 3d 840, 853–54 (C.D. Cal. 2021) (finding triable issue of fact as to whether the District must allow student to leave class early for a snack and provide remote or other physical instruction outside the classroom to accommodate student whose disability prevented her from attending class);
- Modifying a general “no pets” policy at a school to permit a student to bring her service dog into the school; *see* SF No. 36(c); *Doucette v. Georgetown Pub. Sch.*, 936 F.3d 16, 24–25 (1st Cir. 2019) (“But here the section 504 claim, grounded in the refusal of the school district to reasonably accommodate B.D.’s use of the service dog (that is the allegation), involves the denial of non-discriminatory access to a public institution[.]”); and
- Providing an ASL interpreter for one Deaf student whose primary language is ASL, and providing a different Deaf student real-time captioning, rather than providing all Deaf students identical auxiliary aids and services; *see* SF No. 36(d); 28 C.F.R. §

¹¹⁵ 28 C.F.R. §§ 35.160(b)(1)–(2) (ADA), 42.503(f) (Section 504); *see Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 121 (1st Cir. 2003) (holding the ADA and Section 504 requires school to provide deaf student a sign language interpreter as an accommodation to function effectively in class).

35.160(b)(1)(2) (“The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual”); *c.f. Argenyi v. Creighton University*, 703 F.3d 441, 447, 451 (8th Cir. 2013) (finding genuine issue of material fact as to whether defendant denied a student with a hearing disability meaningful access by refusing to provide real-time transcription for lectures and a cued speech interpreter for labs).

Each of these commonsense adaptations treat the disabled person differently *because* of their status as a “qualified individual with a disability” to achieve disability-related, equitable outcomes, such as access, integration, and inclusion. HB2’s prohibition on “classification” runs directly contrary to these obligations. HB2’s apparent acceptance of conduct that “treat[s] individuals equally” would not apply here because, in each of these examples, schools are providing *different* treatment, not available to other students, based on a “classification” as a qualified individual with a disability, in order to achieve a demographic outcome. *See Lartigue v. Northside Indep. Sch. Dist.*, 100 F.4th 510, 521 (5th Cir. 2024) (“[T]he ADA . . . shifts away from similar treatment to different treatment of the disabled by accommodating their disabilities. Of course, children with disabilities receive different treatment, that is the point of an ‘accommodation.’”) (internal quotations omitted).

2. The ADA and Section 504 Require Schools to Implement Systems to Achieve “Demographic Outcomes.”

Another key aspect of the structure of the ADA and Section 504 is the requirement that public entities, including public schools, consider the systemic impact of their policies and procedures and ensure that these systems do not, as applied to disabled people as a whole, tend to discriminate against them or exclude them. This set of obligations requires public entities to consider whether, as to the “class” of people with disabilities, their policies, practices, or procedures tend to have a discriminatory outcome, and, if they do, treat disabled people differently to change those outcomes.

For example, the ADA and Section 504 prohibit public entities from “utiliz[ing] criteria or methods of administration . . . [t]hat have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity’s program with respect to individuals with disabilities,” 28 C.F.R. §§ 35.130(b)(3)(ii), 42.503(b)(3), or that “screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying a service, program, or activity,” *id.* § 35.130(b)(8); *Guckenberger v. Bos. Univ.*, 974 F. Supp. 106, 135 (D. Mass. 1997) (“[A] university cannot impose upon such individuals documentation criteria that unnecessarily screen out or tend to screen out the truly disabled.”). Public entities are also required to “administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities,” 28 C.F.R. §§ 35.130(d) (ADA), 42.503(d) (Section 504); *Parker v. Universidad de Puerto Rico*, 225 F.3d 1, 6 (1st Cir. 2000) (“Such access must be provided in the ‘most integrated setting appropriate.’”). They must also “operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.” 28 C.F.R. §§ 35.150(a) (ADA), 42.521(a) (Section 504); *see also* 28 C.F.R. § 35.130(b)(4) (ADA).

Public schools comply with these requirements by, for example:

- Ensuring their classrooms educate disabled students in “the most integrated setting” by placing a specific number of students with disabilities in general education classrooms to maintain a ratio of disabled to non-disabled students; *see* SF No. 37(a); 28 C.F.R. § 35.130(d); and
- Installing wheelchair ramps to ensure that the school is “readily accessible” to students, teachers, and visitors with mobility disabilities; *see* SF No. 37(b).

Each of these adaptations ensures that schools meet the “demographic outcomes” of inclusion, integration, and full participation and access to public schools’ programs, as required by the ADA and Section 504 by treating the “class” of disabled people differently. At the same time,

each of these adaptations appears to run afoul of HB2 by assessing impact based on people classified as disabled and making changes to improve outcomes on the basis of that “demographic.”

Because school districts cannot comply with the express requirements of both HB2 and the ADA and Section 504, HB2 is pre-empted and invalid. In the alternative, because HB2 frustrates the purpose and structure of the ADA and Section 504, which require both individualized and systemic review and changes to policies and practices to improve outcomes for disabled students, HB2 is pre-empted and invalid.

B. HB2 Conflicts with the IDEA.

The IDEA similarly pre-empts HB2 because it requires public schools to treat children with disabilities differently and achieve individualized and widespread academic outcomes on the basis of disability.¹¹⁶

1. The IDEA Requires Identifying Disabled Students and Providing Individualized Education Plans that Treat Them Differently.

To address this widespread exclusion of disabled students from public education, the IDEA imposes obligations on public schools to identify and educate disabled students. *First*, schools must identify, locate, and evaluate all children with suspected disabilities (a process known as “child find”) to determine whether they meet eligibility criteria for special education services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a). *Second*, schools must design an individualized education program (“IEP”) for eligible students—the “most important” component of the IDEA—that provides special education services and supports necessary to deliver a Free Appropriate Public Education (“FAPE”). 20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.101(a); *Dracut Sch.*

¹¹⁶ Pub. L. No. 94-142, § 3, 89 Stat. 773, 774-75 (1975), available at <https://www.govinfo.gov/content/pkg/STATUTE-89/pdf/STATUTE-89-Pg773.pdf> (codified as amended at 20 U.S.C. § 1401).

Comm. v. Bureau of Special Educ. Appeals of the Massachusetts Dep’t of Elementary & Secondary Educ., 737 F. Supp. 2d 35, 41 (D. Mass. 2010). A FAPE requires “individualized special education calculated to achieve advancement from grade to grade.” *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 401 (2017). Third, schools must educate disabled students in the least restrictive environment, preferably in general education classrooms alongside their non-disabled peers. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a). Fourth and finally, schools must provide behavioral supports and services to prevent discipline based on manifestations of students’ disabilities. 20 U.S.C. § 1415(k)(1); 34 CFR §§ 300.530–536.

Compliance with the IDEA’s obligations to provide a FAPE includes:

- Including in the IEP of a student with ADHD that the student may take tests in a quiet setting, outside of the regular classroom and without other students present; *see* SF No. 38(a);
- Including in the IEP of a student with an intellectual disability that she will receive 1:1 paraprofessional support so that she can participate in a general education classroom with her nondisabled peers; *see* SF No. 38(b);
- Including in an IEP that a student will read complete sentences with first-grade vocabulary words by the end of the academic year; *see* SF No. 38(c); and
- Creating a schoolwide behavioral framework that provides tiered support to students with behavioral disabilities to make sure that students with disabilities are not disproportionately suspended; *see* SF No. 38(d).

This Court further explained that a child’s IEP may provide:

- “A child who suffers from social anxiety . . . more time for taking tests than other students are given,” *NEA-NH*, 806 F. Supp. 3d at 206;
- “[A] child with an intellectual disability . . . one-to-one paraprofessional support to enable him to be educated in a general classroom setting alongside nondisabled students,” *id.*; and
- “[A] child with autism is exempted from a requirement to attend band or music classes to prevent auditory overstimulation and disruptive manifestations of the student’s disability,” *id.*

“In each of these examples, the school treats students with disabilities differently on the basis of their disability in order to achieve a disability-based result”—integration, academic achievement, and inclusion. *Id.* Put another way, this foundational structure of the IDEA requires

public schools to identify (“classify”) disabled students, and then requires schools to provide disabled students with an *individualized* education plan that, by definition, differs from the general education plan applied to all students (not “equal treatment”), in order to improve academic achievement and reduce disability-based discipline for disabled students (“demographic outcomes”). The familiar, “most important” aspect of schools’ obligations under the IDEA—to create and implement IEPs—appears to be directly prohibited by HB2. *Dracut Sch. Comm.*, 737 F. Supp. 2d at 41.

2. The IDEA Requires Data Collection and Reporting to Achieve “Demographic Outcomes.”

In addition to the individualized requirements for students, the IDEA also includes a range of data and reporting requirements on schools, districts, and states. The IDEA requires collection and reporting of numerical and qualitative data regarding the provision of a FAPE and Child Find, and the creation of a plan that sets “measurable and rigorous targets” with respect to the provision of a FAPE and Child Find, including statistical goals to bring the school into compliance with the law. 20 U.S.C. §§ 1412(a)(16)(D), 1413(a)(7), 1416(a)(3)(A)–(B), (b)(1)–(2), 1418(a); *see DL v. D.C.*, 860 F.3d 713, 730 (D.C. Cir. 2017) (“[I]t makes perfect sense to use such [statistical] evidence where, as here, the violations amount to a systemic failure to find children.”); *see also Exhibit 38* (Shaps Decl.) ¶ 28 (noting IDEA’s tracking requirements). These data and reporting requirements, too, run directly contrary to HB2 because they require school districts to gather information based on students’ disabilities and, where necessary, to make changes based on that data to improve demographic outcomes.

IV. HB2 Should Be Permanently Enjoined.

Plaintiffs meet the requirements for the issuance of a permanent injunction that is identical to the preliminary injunction issued by this Court on October 2, 2025 and that conforms to this

Court's understanding of the parameters set forth in *Trump v. CASA, Inc.*, 606 U.S. 831 (2025). "A plaintiff seeking a permanent injunction must demonstrate: '(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.'" See *Petrello v. City of Manchester*, No. 16-cv-008-LM, 2017 U.S. Dist. LEXIS 144793, at *35-36 (D.N.H. Sept. 7, 2017) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)) (McCafferty, J.); see also *Esso Standard Oil Co. v. Lòpez-Freytes*, 522 F.3d 136, 148 (1st Cir. 2008) (same); *Healey v. Spencer*, 765 F.3d 65, 74 (1st Cir. 2014) (same) (quoting *Asociación de Educación Privada de P.R., Inc. v. Garcia-Padilla*, 490 F.3d 1, 8 (1st Cir. 2007)). Each element is satisfied here.

As to the first element, success on the merits predominates in the assessment of whether a permanent injunction should be issued. See *Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 10 (1st Cir. 2012) ("In the First Amendment context, the likelihood of success on the merits is the linchpin of the preliminary injunction analysis."); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 222 (D.N.H. 2018) (granting permanent injunctive relief in procedural due process case in the voting context); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Asociación de Educación Privada de P.R.*, 490 F.3d at 21 (applying *Elrod* to irreparable harm component of permanent injunction analysis). As explained above, Plaintiffs prevail on the merits, thereby creating irreparable injury, especially where the State seeks to continue to enforce the challenged law. As this Court has already found irreparable harm at the preliminary injunction

stage in its October 2, 2025 order (ECF No. 40), Plaintiffs incorporate by reference this Court's irreparable harm analysis in that order. *See NEA-NH*, 806 F. Supp. 3d at 206-09.

Plaintiffs' injuries are substantial, especially given Defendants' enforcement: HB2 infringes on Plaintiffs' constitutional rights, chills basic educator practices, hinders the ability to provide services to students with disabilities, jeopardizes the livelihoods of Plaintiffs, puts at risk the budgets of school districts, and interferes with the core activities of Plaintiffs NEA-NH, New Hampshire Outright, and James T. McKim. The chill of HB2's anti-DEI provisions exists even without formal enforcement by Defendants, as the mere existence of the law's vague terms creates a climate of fear among educators that pressures them to self-censor vital instruction in order to avoid the prospect of a complaint under the law, the law's penalties, losing one's job, and politically-motivated attacks. For example, New Hampshire's public colleges and universities have rushed to comply with HB2's undefined and vague provisions because of its "broad language" and "risk of significant financial penalties," including by removing webpages, stripping certain administrators of their titles, and "thoroughly assess[ing] programs, policies, and online materials in light of the new statute." SF Nos. 20-22. And, on April 20, 2026, KSC notified Plaintiff Dottie Morris that her role as Vice President for Community and Belonging was terminated effective around May 21, 2026 due to "changes in strategic direction." SF No. 27. This termination letter apparently came 18 days after an April 2, 2026 meeting between one of the lead sponsors of HB2's anti-DEI provisions—Representative Richard Nalevanko—and University System of New Hampshire Chancellor Catherine Provencher where Representative Nalevanko complained that UNH was still employing people in a department that had previously been given

a “DEI” title in violation of the “spirit” of HB2.¹¹⁷ Representative Nalevanko disclosed this meeting during a hearing on House Bill 1788 (“HB 1788”)¹¹⁸ before the Senate Judiciary Committee that took place in the afternoon of April 2, 2026. This termination of Dr. Morris also followed the July 2, 2025 statement of one House of Representatives leader that “mere title changes won’t achieve compliance.” SF No. 23.¹¹⁹ Augmenting this climate of fear created by HB2, independent of HB2’s funding penalties, school districts themselves have an independent obligation to enforce HB2’s prohibitions at RSA 21-I:113 and RSA 186:72 against individual educators, including fielding complaints and conducting investigations. SF No. 11.

As to the second element of whether remedies available at law (such as monetary damages) are inadequate to compensate for this injury, if the State is permitted to continue enforcing the law, Plaintiffs will continue to have their constitutional rights and statutory rights under the ADA violated. As this Court has noted, “[t]he injuries that flow from the anti-DEI laws are substantial.”

¹¹⁷ See <https://www.youtube.com/live/qaGwzaQIQkg> (Apr. 2, 2026 Senate Judiciary Committee hearing on HB1788 starting at 2:56:46/3:55:20 p.m.-2:59:42/3:58:17 p.m.). This Court can take judicial notice of Representative Nalevanko’s statements. See Fed. R. Evid. 201(b)(2) (providing that “[t]he court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned”).

¹¹⁸ This proposed legislation would have made changes to the anti-DEI provisions of HB2, including (i) amending the definition of “diversity, equity, and inclusion” or “DEI” in RSA 21-I:112, II and RSA 186:71, I, (ii) requiring courts to find that contracts that include DEI-related provisions are void, (iii) allowing citizens to sue public entities, public schools, and state agencies for engaging in, or failing to investigate allegations of, contracts with DEI-related provisions of law, and (iv) as to the law’s impact on public schools, making a violation of RSA 186:71-76 a violation of the Educator Code of Conduct. Though this bill passed the House of Representatives by a vote of 179 to 148 on March 11, 2026, the Senate referred the bill to interim study by a voice vote on April 16, 2026, meaning that the bill will not be passed this session. See HB 1788, https://gc.nh.gov/bill_status/billinfo.aspx?id=1603&inflect=2.

¹¹⁹ See also Maya Mitchell, *Executive Council Tables \$1.2 Million for Childcare Program over DEI Language*, N.H. Bulletin (May 6, 2026), <https://newhampshirebulletin.com/2026/05/06/executive-council-tables-1-2-million-for-childcare-program-over-dei-language/> (“The bill was ultimately tabled after Councilor David Wheeler raised concerns that one of Pyramid Model Consortium’s strategic priorities is to advance diversity, equity, and inclusion. ‘Without seeing the curriculum, I can’t support this item,’ Wheeler said. Wheeler also stated he would not approve the contract if there were ‘politically correct teachings’ for a contract over a million dollars.”); N.H. Gov. and Council Meeting, May 20, 2026, <https://www.sos.nh.gov/administration/governor-executive-council/meetings> (voting down previously tabled pyramid model childcare program exclusively funded by federal government by a vote of 3-2) (discussion from 3:39:24 to 3:46:40); N.H. Gov. and Council, May 20, 2026 Agenda, #68 Tabled item, <https://www.sos.nh.gov/meeting/may-20-2026-gc-agenda> (detailing Item #68, which was tabled at the May 6, 2026 Executive Council Meeting and voted down at May 20, 2026 Executive Council Meeting).

NEA-NH, 806 F. Supp. 3d at 207. These injuries are “not accurately measurable or adequately compensable by money damages.” *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 217 F.3d 8, 13 (1st Cir. 2000); *see also Petrello*, 2017 U.S. Dist. LEXIS 144793, *36.

As to the third element, Plaintiffs’ hardships if the injunction is not granted outweigh the State’s interests if the injunction is granted. Again, absent relief from this Court, Plaintiffs will have their constitutional rights violated. In contrast, Defendants “stand to suffer little harm if a [permanent] injunction is granted; a [permanent] injunction would merely maintain the status quo prior to the anti-DEI laws’ enactment.” *See NEA-NH*, 806 F. Supp. 3d at 209.

Finally, as to the fourth element’s inquiry into whether the granting of a permanent injunction will benefit the public interest, this element tends to “merge” with the prior element that balances the parties’ hardships “when the [g]overnment is the opposing party.” *Does v. Mills*, 16 F.4th 20, 37 (1st Cir. 2021) (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)); *Nat’l Educ. Ass’n*, 779 F. Supp. 3d at 200. Here, the State “has no interest in enforcing an unconstitutional law, [and] the public interest is harmed by the enforcement of laws repugnant to the United States Constitution.” *See NEA-NH*, 806 F. Supp. 3d at 209 (quoting *Siembra Finca Carmen, LLC v. Sec’y of Dep’t of Agric. of P.R.*, 437 F. Supp. 3d 119, 137 (D.P.R. 2020)); *see also Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 854 (1st Cir. 1988) (“obviously, should the statute be unconstitutional, the public interest would be adversely affected by denial of [] an injunction.”).

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