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VIA EMAIL (Louis.F.Edelblut@doe.nh.gov)

December 4, 2023

Frank Edelblut
Commissioner of Education
New Hampshire Department of Education
25 Hall Street
Concord, NH 03301-3860

**Re: DOE Correspondence With the Dover School District;
The DOE's September 6, 2023 Technical Advisory; and
Request under the Right-to-Know Law**

Dear Commissioner Edelblut:

We write on behalf of the ACLU of New Hampshire ("ACLU-NH")—a non-profit organization working to protect civil liberties and First Amendment rights throughout New Hampshire for over fifty years—and GLBTQ Legal Advocates & Defenders ("GLAD")—an organization that has, for over forty-five years, protected people in New England and across the country from discrimination based on gender identity, sexual orientation, and HIV status. Together, our organizations have been collaborating for decades to ensure that all people in New Hampshire, including LGBTQ+ public school students, can live, thrive, and express themselves on their own terms.

This letter addresses three matters. The first matter concerns the DOE's alarming and extraordinary communications with the Dover School District raising questions about whether the books *Boy Toy* by Barry Lyga and *Gender Queer* by Maia Kobabe may be "developmentally inappropriate," thereby insinuating that the District should consider whether or not to ban these texts from its high school library (though *Gender Queer* was not actually available at that library). These communications are attached as *Exhibit 1*. The second matter concerns our disagreement with the DOE's September 6, 2023 Technical Advisory entitled "Objectionable Material Policy" interpreting RSA 186:11, IX-c. This Advisory is attached as *Exhibit 2*. Finally, this letter serves as a request under New Hampshire's Right-to-Know Law. See RSA ch. 91-A.

I. The DOE's Correspondence With the Dover School District Implicating Book Banning.

The DOE's communications with the Dover School District stating that there are questions about whether the books *Boy Toy* by Barry Lyga and *Gender Queer* by Maia Kobabe are "developmentally inappropriate" is concerning. Of course, the DOE may not use "developmental appropriateness" as a proxy for discrimination based on the books' various viewpoints in violation of the First Amendment and Part I, Article 22 of the New Hampshire Constitution. Indeed, any suggestion that books be banned frays the bonds of trust and cooperation among parents, schools, and students. They track politicized and partisan narratives in the larger culture and regularly target books that discuss or depict the experiences and history

of members of the LGBTQ+ community and/or communities of color. Concessions to these demands—including even moving requested titles to segregated locations or making them only available behind a librarian’s desk¹—undermine diversity and inclusion in our schools and raise serious legal questions. These efforts are also costly and detract from the important work that needs to be done to improve our educational system.

These free speech concerns are brought front and center in the context of the DOE’s insinuation that the Dover School District should consider whether or not to ban *Boy Toy* and *Gender Queer* from its high school library. At the outset, the Dover High School library does not actually have a copy of *Gender Queer*, and thus it is unclear why the DOE would target this book—a book that has been the subject of challenges across the country. In any event, *Gender Queer* expresses LGBTQ+ themes and can be of obvious value to youth facing questions about gender identity. Rather than being “developmentally inappropriate,” *Gender Queer* has been recognized as a 2020 American Library Association Alex Award Winner, as well as a Stonewall Honor Book in Non-Fiction. See <https://www.ala.org/yalsa/2020-alex-awards>; <https://www.ala.org/rt/rrt/award/stonewall/honored>. The School Library Journal, in a starred review, stated that this book is “a great resource for those who identify as nonbinary or asexual as well as for those who know someone who identifies that way and wish to better understand.” See <https://www.slj.com/review/gender-queer-a-memoir>.

In the spirit of the DOE’s concern raised in its July 6, 2023 letter about “serious child mental health issues[,]” the DOE should consider how important access to this book could be to the mental health of a student who is grappling with gender identity. Nationally, LGBTQ+ youth are far more likely to be bullied and harassed at school, alienated from their families and communities, and suffer from depression and suicidal ideation than their non-LGBTQ+ peers.² For LGBTQ+ youth who are isolated at home, in school, or in their community, access to LGBTQ+ representation or information in books and literature can be a refuge.

The DOE’s concerns about *Boy Toy* are similarly invalid. This book depicts Josh, who is about to graduate high school, dealing with the news that Eve, a female history teacher who manipulated him into a sexual relationship when he was twelve, is soon to be released from prison. In other words, this book depicts one boy’s experience with sexual abuse—an unfortunate reality of life for many children. This book does not condone or promote abuse; rather, it tells the story of victimization. One reviewer from the *Chicago Tribune*

¹ See *Viriden v. Crawford Cnty.*, No. 2:23-cv-2071, 2023 U.S. Dist. LEXIS 161533 (W.D. Ark. Sept. 13, 2023) (allowing claims to proceed against a public library process that separated out LGBTQ-related materials.).

² Based on a 2022 survey, 39% of LGBTQ youth in New Hampshire seriously considered suicide in the past year, 10% of LGBTQ youth in New Hampshire attempted 39% suicide in the past year, 72% of LGBTQ youth in New Hampshire reported experiencing symptoms of anxiety, and 55% of LGBTQ youth in New Hampshire reported experiencing symptoms of depression. See Trevor Project, “2022 National Survey on LGBTQ Youth Mental Health: New Hampshire” (2022), <https://www.thetrevorproject.org/wp-content/uploads/2022/12/The-Trevor-Project-2022-National-Survey-on-LGBTQ-Youth-Mental-Health-by-State-New-Hampshire.pdf>. In addition, a 2019 survey showed that more than half of LGBTQ students report feeling unsafe at school because of their sexual orientation, leading to increased likelihood of missing school, lower grade point averages, increased likelihood of discipline at school, and higher levels of depression, with even greater disparities among LGBTQ youth of color. See GLSEN, The 2019 National School Climate Survey (2020), https://www.glsen.org/sites/default/files/2021-04/NSCS19-FullReport-032421-Web_0.pdf.

noted that it was an “astounding portrayal of what it is like to be the young male victim.”³ The American Library Association similarly designated this one of the “Best Books for Young Adults” in 2008.⁴ It should go without saying that this book could create a vital sense of belonging for a victim of abuse, as well as help that young victim cope with the trauma of that experience. To remove this book would be to deprive young people of this resource. As Dover’s book reconsideration committee correctly asserted: “School libraries are responsible for circulating books which reach a wide range of appeal, viewpoints, and abilities. While ‘Boy Toy’ has mature content, the words and descriptions are familiar to the majority of students at DHS, and the book contains sufficient literary value to merit its continued inclusion in the DHS library.”⁵ Fortunately, the Dover School Board rejected efforts to remove this book from its high school.⁶

In addition to protecting the right to equality, our laws protect freedom of speech and the related right of students to receive information—including information contained in these two books. Unreasonable censorship of students’ access to information and to a range of ideas presents profound issues of free expression. As a plurality of the Supreme Court has recognized, students’ freedom of speech incorporates a right to receive information and ideas, which “is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom.” *Bd. of Educ., Island Trees Free School Dist. v. Pico*, 457 U.S. 853, 866-67 (1982) (plurality opinion). In the words of the Court’s plurality, “just as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.” *Id.* at 868. Our contemporaneous open letter to New Hampshire’s superintendents, school committees, and community members provides an analysis of the legal rights at issue here.

Notwithstanding any efforts to characterize objections to certain books as rooted in “developmental appropriateness” or protection from obscenity or vulgarity, the current national calls to remove books that center the experiences of LGBTQ+ individuals and individuals of color run parallel to a nationwide political effort to censor more inclusive representations from the marketplace of ideas. *See Pico*, 457 U.S. at 870-71 (discretion to control content of school libraries “may not be exercised in a narrowly partisan or political manner” or “to deny [students] access to ideas with which [some] disagree[]”); *id.* at 907 (Rehnquist, J. dissenting) (restrictions motivated by “partisan or political” interests, as well as those based on “racial animus,” are unconstitutional).

Lastly, under the law, the legal question of what constitutes “developmental appropriateness” is left for local school districts pursuant to their local policies, not the DOE. As Ed 306.08(a)(1) states, “[t]he local school board shall require that each school: (1) Provides a developmentally appropriate collection of

³ <https://www.thebooksmugglers.com/2012/04/i-hunt-killers-blog-tour-giveaway-a-chat-with-barry-lyga.html>.

⁴ <https://www.ala.org/awardsgrants/content/boy-toy>.

⁵ *See* Ian Lenehan, “‘Boy Toy,’ book at Dover High School library, targeted for removal. Board to vote Nov. 1,” *Portsmouth Herald* (Oct. 31, 2023), <https://www.fosters.com/story/news/local/2023/10/31/boy-toy-book-at-dover-nh-high-school-library-targeted-for-removal/71386092007/>.

⁶ *See* Ian Lenehan, “‘Boy Toy’ to stay in Dover High School library; author addresses resident's removal bid,” *Portsmouth Herald* (Nov. 2, 2023), <https://www.fosters.com/story/news/local/2023/11/02/boy-toy-to-stay-in-dover-nh-high-school-library-author-defends-book/71406333007/>.



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instructional resources, including online and print materials, equipment, and instructional technologies, that shall be current, comprehensive, and necessary to support the curriculum as well as the instructional needs of the total school population;” (emphasis added). Consistent with the plain terms of Ed 306.08—as well as New Hampshire’s rich history of local control—these questions are left for “local school boards” and their policies. It is not the DOE’s prerogative to dictate what is, and is not, “developmentally appropriate.”

II. The DOE’s Technical Advisory Is Incorrect and Unenforceable.

Relatedly, we have multiple concerns with the DOE’s September 6, 2023 Technical Advisory entitled “Objectable Material Policy” and which interprets RSA 186:11, IX-c. RSA 186:11. IX-c states as follows:

The state board of education shall, in addition to the duties assigned by RSA 21-N:11:

IX-c. Require School Districts to Adopt a Policy Allowing an Exception to Specific Course Material Based on a Parent’s or Legal Guardian’s Determination that the Material is Objectable **The policy shall also require the school district or classroom teacher to provide parents and legal guardians not less than 2 weeks advance notice of curriculum course material used for instruction of human sexuality or human sexual education.** The policy shall address the method of delivering notification to a parent or legal guardian. To the extent practicable, a school district shall make curriculum course materials available to parents or legal guardians for review upon request. The name of the parent or legal guardian and any specific reasons disclosed to school officials for the objection to the material shall not be public information and shall be excluded from access under RSA 91-A. (emphasis added).

At the outset, it is unclear why the DOE is issuing this Advisory 6 years after the enactment of this statute in 2017 through HB103, especially where the DOE already issued a Technical Advisory on this statute on August 25, 2017. This previous August 25, 2017 Advisory is attached as Exhibit 3. It is also unclear whether the DOE currently believes that there are now specific books that should be covered under RSA 186:11, IX-c, but that local school districts have not considered covered over the last 6 years. If you have a list of such books, please provide them.

a. The DOE’s Technical Advisory Broadens RSA 186:11, IX-c beyond Its Plain Terms.

The DOE’s September 6, 2023 Technical Advisory broadens the scope of RSA 186:11, IX-c beyond its plain terms in at least two ways and is inconsistent with the DOE’s prior August 25, 2017 Technical Advisory interpreting this statute.

First, the September 6, 2023 Advisory broadly states that, “[f]or example, curriculum content that includes information about ‘human sexuality’ in an English Arts Class or a Social Studies class would invoke the notice requirement of RSA 186:11, IX-c.” But the statute, on its face, does not encompass curriculum

course material that merely “includes” information on “human sexuality.” Rather, the statute makes clear that it only applies to curriculum course material that is specifically “*used for* instruction on human sexuality.” In other words, contrary to the Advisory’s assessment—and consistent with RSA 186:11, IX-c’s focus on sexual education—the statute does not apply to curriculum or texts used in an English or Social Studies class that merely include information about “human sexuality.” Instead, to be covered under RSA 186:11, IX-c, the curriculum course material in these classes must be specifically *used for* instruction on “human sexuality.”

Indeed, the DOE’s new Advisory is contradicted by the DOE’s prior August 25, 2017 Advisory, which states the following: “The legislative record makes clear that the intent of the amendment was to address material *used in the instruction of human sexuality or human sexual education, such as in health class and biology class.*” See *Exhibit 3* (emphasis added). It adds the following: “It is important to note that the legislative intent of HB103 does not apply to literature or other content that might have or be perceived to have sexual content.” Why the DOE now appears to take a different position in its September 6, 2023 Advisory is unclear. And how the DOE’s prior August 25, 2017 Advisory can be reconciled with the DOE’s new September 6, 2023 Advisory is impossible to decipher.

Second—in addition to the September 6, 2023 Technical Advisory’s odd effort to bootstrap RSA 193-E:2-a’s definition of “curriculum” concerning the adequacy of education to a different chapter governing school organization—the Advisory broadens RSA 186:11, IX-c’s scope by using a definition from *The Encyclopedia of Evolutionary Psychology Science* to define “human sexuality” to cover “[s]cientific perspectives of human sexuality,” including “its reproductive, *social, cultural*, emotional, and biological aspects.” (emphasis added). In other words, the DOE’s selective and creative decision to use a scientific text to define a phrase that is being used in the education context is not only odd, but also broadens the phrase “human sexuality” to include not just specific teaching about this subject,⁷ but also concepts implicating “social” and “cultural” “perspectives on human sexuality.”

The DOE’s exceedingly broad interpretation of this statute to include “social” and “cultural” perspectives on human sexuality also is unworkable. For example, almost every book in a high school English class either directly or indirectly conveys a “social” or cultural “perspective on human sexuality.” William Shakespeare’s *Romeo & Juliet*, for example, explores a heterosexual relationship among young teenagers, often in explicitly sexual terms.⁸ Based on the DOE’s broad definition of “human sexuality” it is difficult

⁷ As other scholars have explained specifically in the education context, “[s]exuality education is defined as teaching about human sexuality, including intimate relationships, human sexual anatomy, sexual reproduction, sexually transmitted infections, sexual activity, sexual orientation, gender identity, abstinence, contraception, and reproductive rights and responsibilities.” <https://pubmed.ncbi.nlm.nih.gov/27432844/#:~:text=Sexuality%20education%20is%20defined%20as,and%20reproductive%20Rights%20and%20responsibilities.>

⁸ SAMPSON: Tis true, and therefore women, being the weaker vessels, are ever thrust to the wall. Therefore I will push Montague’s men from the wall, and thrust his maids to the wall. (1.1.); ROMEO: Well, in that hit you miss. She’ll not be hit With Cupid’s arrow. She hath Dian’s wit. And, in strong proof of chastity well armed From love’s weak childish bow, she lives uncharmed. She will not stay the siege of loving terms, Nor bide th’ encounter of assailing eyes, Nor ope her lap to saint-seducing gold. O, she is rich in beauty, only poor That, when she dies, with beauty dies her store. BENVOLIO Then she hath sworn that she will still live chaste? ROMEO She hath, and in that sparing makes huge waste; For beauty starved with her severity Cuts beauty off from all posterity (1.1.); MERCUTIO: Why, is not this better now than groaning for love? Now art thou sociable.

to imagine this book not being covered under the September 6, 2023 Technical Advisory. But would the DOE actually consider this seminal work to be covered under its own broad definition? That is unclear. The Advisory provides no guidance to educators on this and other such practical questions, further demonstrating the unworkability of the DOE’s expansive interpretation.

Finally, in the face of the DOE’s broad interpretation—and recognizing the current political climate—it is far more likely that this Advisory’s expansive interpretation of “human sexuality” in RSA 186:11, IX-c’s terms will have the practical effect of chilling the use of books that reference gay and lesbian relationships. The DOE’s reference to *Gender Queer* in its correspondence with one school district is a prime example of such targeting that could have the effect of causing educators to self-censor the use of books that merely acknowledge LGBTQ+ relationships. These books are vital to creating a sense of belonging to many marginalized students.

b. The DOE’s Technical Advisory is Not Binding.

The DOE’s (incorrect) interpretation in its Advisory also is not binding and does not have any legal weight. This is for two reasons.

First, the DOE’s interpretation carries little weight where the DOE has no enforcement authority over RSA 186:11, IX-c. As was referenced in HB103’s legislative history, this statute has no independent enforcement provisions. While the State Board of Education is tasked with requiring such a policy under RSA 186:11, IX-c, the statute leaves the ultimate contents and implementation of the policy to local school districts. The legislature concluded that what constitutes “human sexuality” or “curriculum”—or in which contexts the notice requirement applies—is not a decision for the DOE, but rather is reserved to local school districts and their policies consistent with New Hampshire’s foundational principle of local control. And to the extent that the DOE may interpret this statute as constituting a violation of the DOE’s Educator Code of Conduct that is enforceable by the DOE, we do not see a basis for such a conclusion. The legislature elsewhere had made clear that it knows when to enforce statutory violations through the DOE’s Educator Code of Conduct. *See* RSA 193:40, IV (“Violation of this section by an educator shall be considered a violation of the educator code of conduct that justifies disciplinary sanction by the state board of education.”). But the legislature did not do so with respect to RSA 186:11, IX-c.

Second, the DOE’s interpretation of RSA 186:11, IX-c has not gone through any formal rulemaking, and thus it does not have the force and effect of law. And even if the DOE endeavored to create a mechanism that enforces RSA 186:11, IX-c through the administrative rules, it is axiomatic that such rules cannot add material terms that go beyond the intent of the legislature. *See Appeal of Anderson*, 147 N.H. 181, 183 (2001) (noting that the authority to promulgate rules and regulations “is designed only to permit the board to fill in the details to effectuate the purpose of the statute.”) (quoting *Reno v. Town of Hopkinton*, 115 N.H. 706, 707 (1975)); *see also In re Mays*, 161 N.H. 470, 473 (2011) (“Because the Board may not ‘add to, detract from, or modify the statute which [the rule is] intended to implement,’ ... Rule 302.03(b)(1)(a) is

Now art thou Romeo. Now art thou what thou art, by art as well as by nature, for this drivelling love is like a great natural that runs lolling up and down to hide his bauble in a hole. (2.4.).



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necessarily invalid.). Nor does the Advisory constitute an official opinion from the Attorney General pursuant to RSA 7:8 that would constitute an authoritative interpretation of RSA 186:11, IX-c. *See* RSA 7:8 (noting that the attorney general “shall, when requested, advise any state board, commission, agent or officer as to questions of law relating to the performance of their official duties, and he shall, under the direction of the governor and council, exercise a general supervision over the state departments, commissions, boards, bureaus, and officers, to the end that they perform their duties according to law”).

III. Request Under RSA ch. 91-A.

In order to ensure compliance with these important legal principles, this letter also serves as a Right-to-Know request to the DOE pursuant to RSA 91-A and Part I, Article 8 of the New Hampshire Constitution by the ACLU-NH and GLAD. We ask that the DOE waive all fees associated with responding to this request. Please contact me to discuss the fee waiver in advance of preparing any copies. Below are the specific requests:

1. From January 1, 2023 to the present, all documents communications between the DOE and third parties concerning the books *Gender Queer* and *Boy Toy*, including communications with school districts and parents.
2. From January 1, 2023 to the present, all internal DOE documents communications concerning the books *Gender Queer* and *Boy Toy*.
3. From January 1, 2023 to the present, all documents communications between the DOE and third parties concerning books that may be considered developmentally inappropriate, including communications with school districts and parents.
4. From January 1, 2023 to the present, all internal DOE documents communications concerning books that may be considered developmentally inappropriate.
5. From September 6, 2023 to the present, all documents communications between the DOE and third parties concerning the September 6, 2023 Objectionable Material Policy Technical Advisory and how to interpret RSA 186:11, IX-c, including communications with school districts and parents.
6. From September 6, 2023 to the present, all internal DOE documents communications concerning the September 6, 2023 Objectionable Material Policy Technical Advisory and how to interpret RSA 186:11, IX-c.

We do not object to identifying information with respect to parents or educators being redacted.

In responding to this request, please consider the time limits mandated by the Right-to-Know law. In discussing those limits in *ATV Watch v. N.H. Dep’t of Res. & Econ. Dev.*, 155 N.H. 434 (2007), the New Hampshire Supreme Court has stated that RSA 91-A:4, IV requires that a public body or agency, “within 5 business days of the request, make such records available, deny the request in writing with reasons, or to



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furnish written acknowledgement of the receipt of the request and a statement of the time reasonably necessary to determine whether the request shall be granted or denied.” *Id.* at 440.

If produced, these records must be produced irrespective of their storage format; that is, they must be produced whether they are kept in tangible (hard copy) form or in an electronically-stored format, including but not limited to e-mail communications. If any records are withheld, or any portion redacted, please specify the specific reasons and statutory exemption relied upon. *See* RSA 91-A:4, IV(c) (“A public body or agency denying, in whole or part, inspection or copying of any record shall provide a written statement of the specific exemption authorizing the withholding of the record and a brief explanation of how the exemption applies to the record withheld.”).

Thank you for your anticipated cooperation. I look forward to hearing from you as soon as possible. Of course, if you have any questions or concerns, do not hesitate to contact me.

Best,

A handwritten signature in black ink, appearing to read "Gilles Bissonnette".

Gilles Bissonnette
Legal Director
ACLU of New Hampshire

A handwritten signature in black ink, appearing to read "Chris Erchull".

Chris Erchull
Attorney
GLBTQ Legal Advocates & Defenders

cc: Diana Fenton, Esq., Officer of Governance (Diana.Fenton@doe.nh.gov)
Richard Farrell, DOE Investigator (Richard.J.Farrell@doe.nh.gov)



Frank Edelblut
Commissioner

Christine M. Brennan
Deputy Commissioner

STATE OF NEW HAMPSHIRE
DEPARTMENT OF EDUCATION
25 Hall Street
Concord, NH 03301
TEL. (603) 271-3495

July 6, 2023

(sent via electronic mail)

William Harbron, Superintendent
(w.harbron@dover.k12.nh.us)
Dover School District
McConnell Center
61 Locust Street, Suite 409
Dover, NH 03820-4132

Dear Superintendent Harbron:

As you know, there have been several inquiries to the department of education relative to the content of certain reading materials in the Dover school district. I am reaching out to gain greater clarity relative to the process of determining the developmentally appropriateness of instructional materials in your district.

ED 306.08 Instructional Resources states that the local school board shall require that each school:

"Provides a developmentally appropriate collection of instructional resources, including online and print materials, equipment, and instructional technologies, that shall be current, comprehensive, and necessary to support the curriculum as well as the instructional needs of the total school population."

Inquires to the department question the developmentally appropriateness of certain instructional materials available in the Dover school libraries. These include, by way of example only, Gender Queer and Boy Toy. These materials have received ratings and warning from various rating systems that raise questions about the developmentally appropriate nature of the underlying instructional materials.

- **Gender Queer**
 - **American Library Association:** "considered to be sexually explicit."
 - **BookLooks:** "This book contains obscene sexual activities and sexual nudity; alternate gender ideologies; and profanity" and "Not for Minors"
 - **Commonsensemedia:** "Explicit but not erotic illustrations of sexual activity include masturbation, oral sex, sex toys, kissing in an implied sex position, and a fantasy image inspired by Greek art showing a bearded man with an erection holding a boy's erect penis. The image is next to a reference to Plato's *Symposium*. There are no violent acts, but there are a few bloody,

nightmarish pictures showing fear and trauma surrounding menstruation and getting a Pap smear. Strong language includes "d--k," "c--k," "f--k," and "s--t. Rated age 16+"

- **Boy Toy**

- **American Library Association:** "Josh's middle school teacher taught him more than history. Five years later, her release from jail forces him to confront the past in this frank depiction of sexual abuse."
- **BookLooks:** "A young man recalls the molestation he endured by his teacher when he was twelve years old. This book contains explicit sexual activities including a minor with an adult; sexual nudity; and excessive/frequent profanity. Not for minors."
- **Commonsensemedia:** "Parents need to know that this book is about a boy who is molested by his teacher; Eve tricks Josh into believing they are in love even though he is only 12. Their sex life is graphically described, including depictions of oral sex and the watching of a pornographic film. Their relationship is discovered after Josh attacks a girl in a closet during a teen party. Josh is later beaten up by Eve's husband. The book also features language that is as mature as its subject matter. Rated age 16+"

As you know, there is a very serious child mental health issue that we are all concerned about and working on. Exposure to developmentally inappropriate materials has the effect of exacerbating those mental health issues that students are struggling with.

Your help in explaining how your district makes a determination that materials, such as the examples above, fit within the developmentally appropriate expectation of the ED 306 rules would be helpful.

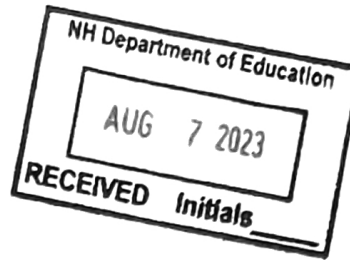
Thank you again for your assistance.

Sincerely,



Frank Edelblut
Commissioner of Education

July 31, 2023



Frank Edelblut
Commissioner
NH Department of Education
25 Hall Street
Concord, NH 03301

RE: Reading Materials/ Dover School District

Dear Commissioner,

This office is in receipt of your July 6, 2023 letter to Superintendent William Harbron in which you request clarity related to certain reading materials in the Dover School District. Please allow this letter to serve as the District's response.

The Dover School District selects all curricular materials in accordance with state law. Pursuant to its legal obligations under RSA 189 and NH Admin. Code Ed. 300, the Dover School Board oversees the selection of instructional resources.

In the event that parents, guardians or community members object to particular instructional materials, they may appeal to the School Board pursuant to Policy KEC (attached for your convenience).

To answer your specific questions, *Gender Queer* is not currently in the Dover School District Library. *Boy Toy* is available in the Dover High School Library (consistent with its rating of age 16+) and is currently undergoing review pursuant to Policy KEC.

The Dover School District is also extremely concerned about the mental health of its students and all school children in New Hampshire and looks forward to your forthcoming proposal to the legislature regarding the allocation of significant funds to school districts for the hiring and retention of school social workers, school counselors, licensed mental health counselors, and drug and alcohol counselors.

Sincerely,

A handwritten signature in cursive script that reads "Meghan S. Glynn".

Meghan S. Glynn



Frank Edelblut
Commissioner

Christine M. Brennan
Deputy Commissioner

STATE OF NEW HAMPSHIRE
DEPARTMENT OF EDUCATION
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August 16, 2023

(sent via electronic mail)

William Harbron, Superintendent
(w.harbron@dover.k12.nh.us)
Dover School District
McConnell Center
61 Locust Street, Suite 409
Dover, NH 03820-4132

Dear Superintendent Harbron:

I received a letter dated July 31, 2023, from Meghan Glynn of Drummond Woodsum in response to my July 6, 2023, letter to you. As you were not included on that correspondence from Attorney Glynn, I am enclosing it here for your convenience.

I appreciate your willingness to address my inquiry and I am writing to gain clarity on Attorney Glynn's response. In Attorney Glynn's response, she stated that:

The Dover School District selects all curricular materials in accordance with state law. Pursuant to its legal obligations under RSA 189 and NH Admin. Code Ed. 300, the Dover School Board oversees the selection of instructional resources.

I am encouraged that you are following both statute and administrative rule. In my initial letter, however, I was seeking clarity pursuant to ED 306.08, (a)(1), relative to Instructional Resources. ED 306.08 Instructional Resources states that the local school board shall require that each school:

Provides a developmentally appropriate collection of instructional resources, including online and print materials, equipment, and instructional technologies, that shall be current, comprehensive, and necessary to support the curriculum as well as the instructional needs of the total school population.

The Dover School Board policy, which was included in Attorney Glynn's response, acknowledged the importance of care in the selection of instructional materials. Specifically, the policy provides that:

- KEC, II states, "Selection of such materials should be made only after a determination that such materials are age appropriate ..."

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- KEC, VI B. states, "When deciding whether to purchase materials, school librarians consider many factors including the recommended age range or grade range of a specific title ..."
- KEC, VI B. further states, "... school librarians must rely on professional review sources to assist them in making determinations about what to include in their collections."

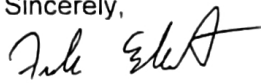
However, these general statements, which are relative to compliance with statutory and administrative regulations, do not directly address the concerns that I raised in my initial inquiry. Specifically, my questions are as follows:

- What criteria are used to determine that educational materials are "age appropriate," as referenced in KEC, II;
- What criteria are used to determine the "recommended age range or grade range of a specific title," as referenced in KEC, VI B;
- What professional review sources are relied upon by school librarians "to assist them in making determinations about what to include in their collections," as referenced in KEC, VI B. As was noted in my initial request, cited professional review sources have rated certain materials "Not for minors" and "Rated Age 16+."

Once again, I thank you for your assistance into this matter. As you know, the Department of Education continues to receive inquiries relative to the content of certain reading materials in the Dover School District. Clear information about the process of determining how resources meet the criteria of the statute, administrative rules, and the Dover High School policy will increase transparency and benefit our families and students.

Thank you again for your assistance.

Sincerely,



Frank Edelblut
Commissioner of Education

cc: Meghan Glynn, Esq. (mglynn@dwmlaw.com)



Frank Edelblut
Commissioner

Christine M. Brennan
Deputy Commissioner

STATE OF NEW HAMPSHIRE
DEPARTMENT OF EDUCATION
25 Hall Street
Concord, NH 03301
TEL. (603) 271-3495

October 16, 2023

(sent via electronic mail)

William Harbron, Superintendent
(w.harbron@dover.k12.nh.us)
Dover School District
McConnell Center
61 Locust Street, Suite 409
Dover, NH 03820-4132

Dear Superintendent Harbron:

I am following up on my correspondence of August 14, 2023. I have not yet received a response to that inquiry seeking clarity on Attorney Glynn's July 31, 2023, response to my original inquiry of July 6, 2023.

As previously stated, ED 306.08, (a)(1), relative to Instructional Resources requires that the local school board shall require that each school:

Provides a developmentally appropriate collection of instructional resources, including online and print materials, equipment, and instructional technologies, that shall be current, comprehensive, and necessary to support the curriculum as well as the instructional needs of the total school population.

Without a response to this inquiry, I am not able to conclude that the materials provided to students meet this standard of "developmentally appropriate." As I have previously stated and as you know, there are very serious child mental health issues that we are all concerned about and working on. Exposure to developmentally inappropriate materials has the effect of exacerbating those mental health issues that students are struggling with.

If you have not yet been able to make a determination of the developmentally appropriate nature of instructional materials, the prudent action would be to suspend their usage and/or restrict access appropriately until such a determination can be made.

Once again, I thank you for your assistance into this matter and we stand ready to assist in any way that we can. The Department of Education continues to receive inquiries relative to the content of certain reading materials in the Dover School District. Clear information about the process of determining how resources meet the criteria of the statute, administrative rules, and the Dover High School policy will increase transparency and benefit our families and students. Thank you again for your assistance

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Thank you again for your assistance

Sincerely,



Frank Edelblut
Commissioner of Education

cc Meghan Glynn, Esq. (m.glynn@doe.nh.gov)

<p>Subject: <i>Objectionable Material Policy</i></p> <p>Date issued: <i>Sept. 6, 2023</i></p>	<p>Legal Reference –<i>RSA 186:11, IX-c; RSA 193-E:2-a, (IV)(c)</i></p>
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This Technical Advisory provides guidance to schools relative to curriculum course material related to human sexuality.

RSA 186:11, IX-c, requires the State Board of Education to “[r]equire school districts to adopt a policy allowing an exception to specific course material based on a parent’s or legal guardian’s determination that the material is objectionable.” Such a policy:

Shall also require the school district or classroom teacher to provide parents and legal guardians not less than two weeks advance notice of curriculum course material used for instruction of human sexuality or human sexual education. The policy shall address the method of delivering notification to a parent or legal guardian. To the extent practicable, a school district shall make curriculum course materials available to parents or legal guardians for review upon request. The name of the parent or legal guardian and any specific reasons disclosed to school officials for the objection to the material shall not be public information and shall be excluded from access under RSA 91-A. RSA 186:11, IX-c.

The term “human sexuality” is not defined in the statute, and as such, the department understands the statute to invoke the plain-language meaning of that term. The Encyclopedia of Evolutionary Psychological Science, for example, defines the term as follows:

“Human sexuality is most broadly defined as the totality of experiences, systems, attributes, and behavior that characterize the sexual sensation, reproduction, and intimacy of Homo sapiens.

Scientific perspectives of human sexuality encompass, variously, its reproductive, social, cultural, emotional, and biological aspects.¹”

In addition to reminding schools of their obligation to maintain a policy in compliance with the notice requirements of RSA 186:11, IX-c, this technical advisory also clarifies the contexts in which this notice requirement applies.

As noted, RSA 186:11, IX-c requires not less than two weeks advance notice to parents of curriculum course material used for instruction of human sexuality or human sexual

¹ Grebe, N.M., Drea, C.M. (2018). Human Sexuality. In: Shackelford, T., Weekes-Shackelford, V. (eds) Encyclopedia of Evolutionary Psychological Science. Springer, Cham. https://doi.org/10.1007/978-3-319-16999-6_3360-1

education. RSA 193-E:2-a (VI)(c) in turn defines “curriculum” as meaning “the lessons and academic content taught in school or in a specific course or program.”

The applicable definition of “curriculum” means that the notification requirements of RSA 186:11, IX-c, apply to human sexuality or human sexual education that are part of *any* course, even if that course is not specific to health and sex education. For example, curriculum content that includes information about “human sexuality” in an English Language Arts Class or a Social Studies class would invoke the notice requirement of RSA 186:11, IX-c. The notice requirement, as noted above, similarly applies to instruction of human sexuality and human sexual education to the extent it takes place in any other school programming. In short, the notice provisions of RSA 186:11, IX-c, are not limited to “health and sex education” class materials. Rather, the notice provision of the statute is triggered by the nature of the curriculum course material itself and not by the specific instructional setting.

The notification requirements to parents are not intended to prevent educators from sharing incidental personal information such as marital status or to share, for example, that they attended an event with a spouse or partner. Incidental sharing of such personal information would not extend to or be viewed as human sexuality or human sexual education.

In addition to the notice requirements detailed in RSA 186:11, IX-c, schools and educators should also be mindful of the obligations imposed by Ed 306.08 in assessing curriculum regarding human sexuality or human sexual education.

ED 306.08, “Instructional Resources” states that the local school board shall require that each school:

“Provides a *developmentally appropriate* collection of instructional resources, including online and print materials, equipment, and instructional technologies, that shall be current, comprehensive, and necessary to support the curriculum as well as the instructional needs of the total school population. Ed 306.08(a)(1) (emphasis added).

As such, based on Ed 306.08, schools should take steps to ensure that all curriculum course material used for instruction of human sexuality or human sexual education are developmentally appropriate.

For questions related to this Technical Advisory, please contact:

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New Hampshire

Department of Education

Serving New Hampshire's Education Community

Technical Advisory

Exception To Objectionable Curriculum Course Material	RSA 186:11, IX-c
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*This Technical Advisory continues the New Hampshire Department of Education's communication regarding the new legislation which was passed into law during the 2017 legislative session. **House Bill 103 law became effective June 16, 2017.***

During the 2017 legislative session, RSA 186:11, IX-c, which requires school districts to adopt a policy allowing for an exception to objectionable course material, was amended. HB103 became effective on June 16, 2017. The amendment requires school districts to provide two weeks advanced notice to parents or legal guardians of curriculum course material used for the **instruction of human sexuality or human sexual education**. The new law is posted below in its entirety with the amendment in bold font:

The state board of education shall, in addition to the duties assigned by RSA 21-N:11: . . . IX-c. Require school districts to adopt a policy allowing an exception to specific course material based on a parent's or legal guardian's determination that the material is objectionable. Such policy shall include a provision requiring the parent or legal guardian to notify the school principal or designee in writing of the specific material to which they object and a provision requiring an alternative agreed upon by the school district and the parent, at the parent's expense, sufficient to enable the child to meet state requirements for education in the particular subject area. **The policy shall also require the school district or classroom teacher to provide parents and legal guardians not less than 2 weeks advance notice of curriculum course material used for instruction of human sexuality or human sexual education. The policy shall address the method of delivering notification to a parent or legal guardian. To the extent practicable, a school district shall make curriculum course materials available to parents or legal guardians for review upon request.** The name of the parent or legal guardian and any specific reasons disclosed to school officials for the objection to the material shall not be public information and shall be excluded from access under RSA 91-A.

The terms "human sexuality or human sexual education" are not defined in the statute, although are self-explanatory. The legislative record makes clear that the intent of the amendment was to address material used in the instruction of human sexuality or human sexual education, such as in health class and biology class.

Furthermore, the intent of the amendment was to allow the parent or legal guardian the opportunity to make suitability determinations regarding instructional material which concerns human sexuality or human sexual education. This legislative intent can only be achieved by providing parents timely access to such instructional content. The new law places an affirmative responsibility on the school districts, which control the content, to meet the

Issued by: <i>Frank Edelblut, Commissioner.</i>	Date Issued: August 25, 2017	Supersedes issue dated: NEW	Page 1 of 2
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New Hampshire

Department of Education Technical Advisory

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Exception To Objectionable Curriculum Course Material

RSA 186:11, IX-c

requirement to **provide** parents with the curriculum course material in advance. Simply sending a notice home with a student may not be sufficient to achieve the legislative intent as districts will want to, as much as possible, avoid circumstances in which a school asserts that it provided notice and the parent or legal guardian disputes this assertion.

Therefore, school districts should modify their existing policies, as necessary, to specify how and when advance notification to parents and legal guardians will occur. Strong policies will include multiple modes of notification to provide sufficient assurance that parents or legal guardians have been afforded the appropriate and timely notice that the law requires. Such methods of notification may include email, posting on a web site, a letter sent through the school's parent portal, a handout sent home with students or by other means. Regardless of the exact methodologies that schools decide to utilize, the best method to reach that assurance, would be to have some type of affirmative parental or legal guardian acknowledgement of receipt.

It is important to note that the legislative intent of HB103 does not apply to literature or other content that might have or be perceived to have sexual content. In the case that curricular content may include sexual content outside of the context of instruction on human sexuality or human sexual education, schools should exercise prudent judgment and err on the side of caution by providing advance notice to parents or legal guardians. Additionally, if an outside agency or organization, such as the Motion Picture of America Association, Movie Guide film rating systems, Compass Book Ratings or other rating system, recommends restrictions on content, schools should consider engaging parents before presenting that specific content to students.

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Page 2 of 2