

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

LOCAL 8027, AFT-NEW HAMPSHIRE, AFL-CIO, RYAN)
RICHMAN, JOHN DUBE and JOCEYLN MERRILL,)
teachers in the New Hampshire Public Schools, and)
KIMBERLY GREEN ELLIOTT and MEGHAN EVELYN)
DURDEN, parents or guardians of children in the New)
Hampshire public schools.)

Plaintiffs,)
v.)

FRANK EDELBLUT, in his Official Capacity as)
Commissioner of the DEPARTMENT OF EDUCATION,)
CHRISTIAN KIM in his Official Capacity as the Chair of the)
NEW HAMPSHIRE COMMISSION ON HUMAN RIGHTS,)
and JOHN FOMELLA in his Official Capacity as)
ATTORNEY GENERAL of the State of New Hampshire.)

Defendants.)

-----)
ANDRES MEJIA,)
CHRISTINA KIM PHILIBOTTE, and)
NATIONAL EDUCATION ASSOCIATION-NEW)
HAMPSHIRE,)

Plaintiffs,)
v.)

FRANK EDELBLUT, in his official capacity only as the)
Commissioner of the New Hampshire Department of)
Education,)

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

AHNI MALACHI, in her official capacity only as the)
Executive Director of the New Hampshire Commission for)
Human Rights,)

CHRISTIAN KIM, in his official capacity)
only as the Chair of the New Hampshire Commission for)
Human Rights,)

KEN MERRIFIELD, in his official capacity only as the)
Commissioner of the Department of Labor,)

Defendants.)
)

Civil No. 1:21-cv-01077-PB

**PLAINTIFFS’ STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF THEIR
JOINT MEMORANDUM OF LAW IN SUPPORT OF
THEIR MOTION FOR SUMMARY JUDGMENT
[***REDACTED PUBLIC VERSION***]¹**

¹ An unredacted, sealed version of this statement has been filed with the Court.

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Plaintiffs in the first above-captioned action (the “AFT Plaintiffs” or the “AFT Action”) and Plaintiffs in the second above-captioned action (the “Mejia Plaintiffs” or “Mejia Action”) each filed separate complaints in this consolidated case challenging the provisions of Sections 297 and 298 of 2021 House Bill 2 (“HB2”), codified at N.H. Rev. Stat. Ann. (“RSA”) 354-A:29-:34 and RSA 193:40. These provisions were enacted on June 25, 2021 and ban teaching, instructing, inculcating, or compelling a student to express belief in (or support for) four concepts in public schools and places of public employment. They are herein referred to as the “Amendments” and are attached, along with Plaintiffs’ other exhibits, as Ex. 1 (Depo. Ex. 1) to the accompanying declaration of Attorney Gilles Bissonnette. Plaintiffs have moved for summary judgment as to (i) the Fourteenth Amendment’s procedural due process/vagueness claim alleged in Counts I and II of the AFT Action and in Count I of the Mejia Action and (ii) the First Amendment’s freedom of speech claim alleged in Count III of the AFT Action given the Amendments’ impact on educators’ private, extra-curricular speech.

In support of this Motion for Summary Judgment, Plaintiffs submit this Statement of Undisputed Facts pursuant to Local Rule 56.1(a).

STATEMENT OF UNDISPUTED FACTS [LOCAL RULE 56.1(A)]

I. The Educator Code of Conduct and the Department of Education’s Complaint Process Generally

1. RSA 193:40, IV states that a violation of RSA 193:40 constitutes an independent violation of the Educator Code of Conduct.

2. The Educator Code of Conduct was authored by the Department of Education (“DOE”) in 2018 in response to a legislative enactment. *See* Fenton Depo. 16:15-17:2.²

² Attorney Fenton’s deposition transcript referenced throughout is attached as Ex. 3 to the accompanying declaration of Attorney Gilles Bissonnette.

3. Any person, aggrieved or not, may file a complaint about an educator's conduct with the DOE.³ Complaints under the Code of Conduct can come from several different sources, including individual parents, self-reporting through superintendents or their staff, principals, law enforcement, and the Department of Children, Youth, and Families ("DCYF"). See Farrell Depo. 15:25-16:22.⁴

4. Complaints under the Code usually arrive at the DOE by email or phone call. See Farrell Depo. 16:23-17:1. Conceivably though, the DOE's administrative rules allow the DOE to open cases because of a news article or posting on social media which contain information related to possible misconduct by an educator.⁵

5. While the Human Rights Commission ("HRC") can only take action against a "public employer" under RSA 354-A:31 of the Amendments⁶, a violation of RSA 193:40 is enforceable against an individual educator. 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.").

6. The DOE has the sole authority to enforce the Educator Code of Conduct. DOE Attorney Diana Fenton acknowledged at deposition that the Educator Code of Conduct is

³ See Fenton Depo. 41:3-7, 17-19 ("Q. Is there any language that you're aware of in the code of conduct in Exhibit 2 that limits who can make a complaint under the code? A. No."; acknowledging that "anyone can make a complaint under that language").

⁴ Investigator Farrell's deposition transcript referenced throughout is attached as Ex. 4 to the accompanying declaration of Attorney Gilles Bissonnette.

⁵ N.H. Code Admin. R. Ed 511.01(a) of the Educator Code of Conduct states that "[a] case shall be opened when a complaint of possible misconduct against a credential holder has come to the attention of the department either through direct reporting or other means." (emphasis added)

⁶ See Cohen Depo. 60:20-61:8 ("Q. What I'm trying to get at is under RSA 354-A:31, can an individual public employee be sued? MR. KENISON-MARVIN: Same objection. Q. Or is that statute limited to public employers? That's really the question that I'm trying to get at. MR. KENISON-MARVIN: Same objections. A. It appears from the writing of 354-A:31 and the definition of what a public employer means at 354-A:30 that a public employer includes the state or any subdivision, does not include individuals in that definition."), 118:6-9 ("The intake inquiries have been generally from the documentation the School Districts with the exception I think as I recall one is naming the Commissioner of Education directly.").

investigated and enforceable by the DOE,⁷ and that a violation of the Amendments constitutes a violation of the Educator Code of Conduct.⁸

7. As N.H. Code Admin. R. Ed 511.01(a) of the Educator Code of Conduct states, “[a] case *shall* be opened when a complaint of possible misconduct against a credential holder has come to the attention of the department either through direct reporting or other means.” (emphasis added). When a case is “opened,” the DOE investigator “would document the name of the person [that] the allegation is against, the name of the person making the allegation, the school district, [and] any other facts which might be relevant.”⁹ *See also Ex. 109 (Depo. Ex. 2)* (Educator Code of Conduct).

8. In practice, and according to rule, the DOE “opens a case” and conducts an “initial review” on every complaint it receives in which any possible misconduct is alleged.¹⁰ *See* N.H. Code Admin. R. Ed 511.01 (a)-(b). This occurs before the DOE determines that a “possible

⁷ *See* Fenton Depo. 24:24-25:15 (acknowledging that “the Department of Education enforce[s] the code of conduct”), 151:25-152:2 (same).

⁸ *See* Fenton Depo. 35:18-36:6 (testifying that a violation of HB2 “would be a violation of the Educator Code of Conduct”), 151:25-152:5 (“Q. And violations of HB 2 are violations of the code of conduct, are they not? A. That is what the law says.”); *see also* Edelblut Depo. 124:18-126:12 (RSA 193:40, IV “states clearly that the 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”).

⁹ *See* Fenton Depo. 152:23-153:10 (“Q. And when it says ‘a case shall be opened,’ can you describe for me what it means for a case to be opened? A. I’ve already testified to that. Q. Well, you said that things get documented, but you didn’t specify how they get documented. A. I believe I did go into detail as to what that means. Q. I don’t recall. Can you refresh my recollection? A. In large part, it would be the investigator, Richard Farrell, and he would document the name of the person the allegation is against, the name of the person making the allegation, the school district, any other facts which might be relevant.”).

¹⁰ *See* Fenton Depo. 46:4-25 (“Q. [I]s it inaccurate to say that the Department makes a determination as to whether or not possible misconduct occurred before opening a case? A. I think that Ed 511.01 (A) has to be read in conjunction with Ed 511.01 (B). Q. Okay. Is there a difference between opening a case and opening an investigation within the Department? A. Based upon my understanding of the code of conduct and Ed 511, yes, there is. ... Q. Does the Department make a determination as to whether possible misconduct may have occurred in deciding whether to open a case? A. No. Q. So how do you -- how would you then explain the process in deciding whether to open a case, just so I understand the process clearly. A. My understanding of the code of conduct in Ed 511.01 and the Department of Education’s practice as it relates to this area is that a case is opened when information is received.”)

violation of the code of conduct” exists and before the DOE opens a formal investigation under N.H. Code Admin. R. Ed 511.01(b).¹¹

9. These “initial reviews” occur any time a case is “opened” under N.H. Code Admin. R. Ed 511.01(a) and are done so the DOE can determine whether there was a “possible violation of the code of conduct” that would then require the opening a formal investigation under N.H. Code Admin. R. Ed 511.01(b).

10. These “initial reviews” can take many forms depending on the facts of the case. They may include interviewing the complainant, contacting superintendents, principals, and other school administrators to interview them or request information, contacting witnesses, including other rank and file teachers or other school employees, and requesting documents.¹²

11. DOE Investigator Richard Farrell has informed school districts about complaints under the Code of Conduct concerning school library books even before a case was opened under N.H. Code Admin. R. Ed 511.01(a) or before there was a determination that the book or teaching of a book potentially violates the Code of Conduct under N.H. Code Admin. R. Ed 511.01(b).¹³

¹¹ See Fenton Depo. 47:17-21 (acknowledging that, “[i]n terms of documenting information received,” a case will be opened before a determination has been made that there’s possible misconduct), 45:8-46:18 (acknowledging that facts could be gathered by reaching out to school superintendents in deciding whether to open a case, including the requesting of documents); Farrell Depo. 23:19-25 (“Q. And all the factual investigation that goes—that comes after the opening of a case? A. Yes. Q. Okay. And this is before the Department of Education determines whether to open a formal investigation, right? A. Yes.”), 25:1-3 (noting that, in deciding whether to open a case, he “look[s] at the complaint, the facts of the complaint, and determine whether or not the code of conduct applies”).

¹² See Fenton Depo. 45:8-13 (“Q. Okay. Are facts gathered by reaching out to school superintendents at this stage in deciding whether to open a case? A. That could be done, yes. Q. Are documents requested? A. That request could be made, yes.”), 48:20-49:6 (“Q. So in determining whether there has been a possible violation, I want to make sure I understand your testimony correct. That would also include reaching out to gather information from school districts, correct? A. It could. Q. What else could it include? A. We could talk to other individuals that might be administrators. Depends on the nature of the facts. Q. And it could include requesting documents from school districts, right? A. I believe I’ve already testified to that, yes.”); Farrell Depo. 17:16-18:5 (“Q. Okay. And now when you receive one of these complaints, can you describe what you do as the investigator for the Department of Education? A. The first thing that I would do is determine back up. I will gather facts and circumstances from the complainant. Q. Does that include reaching out to superintendents? A. Occasionally. Q. Does that include speaking to principals? A. Occasionally. Q. Does that include speaking to other educators at the school? A. Sometimes. Q. Does that include requesting documents? A. Sometimes.”).

¹³ See Farrell Depo. 124:24-129:9 (“Q. And each time you go and you speak with the superintendent about the book being where it was complained of, something similar? A. Yeah. You know, is it in the high school library? Is it the

Investigator Farrell has, in fact, conducted initial reviews of books and school libraries based on these complaints.¹⁴

12. Commissioner of Education Frank Edelblut also will often personally react to parental complaints of alleged educator misconduct by responding to parents directly and/or contacting superintendents and other school administrators to alert them to the complaint, and will sometimes do so even when there is no possible violation of the Code of Conduct raised.¹⁵

13. The Commissioner engages in these inquiries, in part, because the Commissioner views parents as his “customers,” and “if I have a complaint from a parent, I bring that to the attention of the superintendent so they can manage it appropriately.”¹⁶ He also views teachers as having a “[r]esponsibility to support the parents and not undermine their values.” *See Ex. 40 (Depo. Ex. 14)* at PL00683.

14. After the DOE’s “initial review” of a complaint under the Code of Conduct, the DOE has little discretion in deciding to conduct a formal investigation if it concludes that there has been a “possible violation.” This is because an investigation *shall* be opened if there is a

middle school library? Is it in the elementary school library? Those have bearings. You know, those are important facts to know. Or is it even in the building at all? And is it in the SORA app? So it’s a fact-based question. Is it there? Isn’t it there? Once I get the facts, I provide it to Diana Fenton for her review. Q. And just in the stage of, you know, sort of from the code of conduct, what you’re describing is not a formal investigation, but it’s when a complaint—a case has been opened because of a complaint? A. It’s even before the case has been opened. I mean, so a parent is angry and upset about a book being in a library. So let’s collect the data and determine whether or not we even go to the triage phase.”).

¹⁴ *Id.*

¹⁵ *See* Edelblut Depo. 20:22-22:4 (noting his communication with these parties) 24:9-25, 58:18-59:16 (noting he contacted a superintendent directly about a parent complaint);32:2-16 (explaining a meeting with superintendent and assistant superintendents about a parent complaint); 38:4-13 (acknowledging direct communication with a parent about a curricular complaint) *see also* *Ex. 57*, DOE 857 (elevating parental concern under the Amendments about usage of the film “White Like Me” without determining whether there was a violation).

¹⁶ *See* Edelblut Depo. 29:4-8 (“So my duty is to support my customers to the agency which include a variety of constituencies. Parents are one of them. So I try to be as prepared as possible to support my constituencies.”), 77:15-78:9 (“What is within the domain of the Department is to make sure that the system is able to function well, and part of functioning well is to make sure that the constituencies are being served. So as I support my superintendents, if have a complaint from a parent, I bring that to the attention of the superintendent so they can manage it appropriately.”).

“possible violation of the code of conduct.” *See* N.H. Code Admin. R. Ed 511.01(b) (emphasis added).

15. If an investigation is formally opened under N.H. Code Admin. R. Ed 511.01(b), the employing superintendent and usually the educator’s union attorney are notified via letter. *See* Fenton Depo. 63:2-14, 154:1-4. Subsequent steps by the DOE could include receiving additional documentation from the school district, further conversation with school administration, meeting with the educator, interviewing other witnesses, and speaking with the educator’s union representative. *See* Fenton Depo. 63:21-64:3.

16. Whether a “violation” has occurred under N.H. Code Admin. R. Ed 511.01(j)(2) is determined solely by the DOE and depends on the “individual facts of the case.” There are no additional criteria as to what constitutes a “violation” beyond what exists in the Code of Conduct. *See* Fenton Depo. 65:22-67:9.

17. Commissioner Edelblut, DOE Attorney Fenton, DOE Investigator Richard Farrell, and occasionally DOE Deputy Commissioner Christine Brennan meet regularly in a meeting called the “Educator Misconduct Meeting” where they discuss investigations that are ongoing or finished. *See* Farrell Depo. 29:2-16; Edelblut Depo. 41:20-42:3, 42:19-43:4.¹⁷ The group discusses the facts of individual cases, any necessary next steps, and possible sanctions for the educator. *See* Farrell Depo. 28:24-30:1; Edelblut Depo. 45:6-19. Depending on the facts and circumstances of the specific case, any one of those persons may make the recommendation as to what sanction should issue, but ultimately the Commissioner must agree with any recommendation made.¹⁸

¹⁷ Commissioner Edelblut’s deposition transcript referenced throughout is attached as Ex. 2 to the accompanying declaration of Attorney Gilles Bissonnette.

¹⁸ Farrell Depo. 40:12-25 (“Q. I just want to be clear. The commissioner is involved in the decision as to whether there’s been a violation of the code of conduct, right? A. He is—the meetings have different levels within the meetings and different stages of the investigation, so to the extent that he—we conduct those meetings, and he asks questions, he is involved in the process. But it’s not until a decision is made that he then becomes in agreement or disagreement with the recommendation. Q. Right. And I think you said the buck stops with him, right? A. Correct. Q. So he’s thumbs

18. While the DOE has discretion regarding what sanction will be imposed, it has far less discretion in declining to discipline at all. “If the investigation finds a credential holder in violation of a rule of the code of conduct as specified in Ed 510.01 through Ed 510.04, the department *shall* propose a form of discipline as follows: a. Suspension; b. Revocation; or c. Reprimand.” N.H. Code Admin. R. Ed 511.01(j)(2) (emphasis added); *see also Ex. 50 (Depo. Ex. 3)*, at DOE-05662 (listing sanctions in superintendent presentation); *Ex. 51 (Depo. Ex. 7)*, at DOE-10084-86 (in DOE presentation to educators, listing sanctions and considerations); *Ex. 44 (Depo. Ex. 24)*, at DOE-09674-76 (same). If there is a violation, “[m]ore likely than not” a sanction will be issued. *See* Farrell Depo. 32:6-10.

19. The DOE considers various aggravating and mitigating circumstances in imposing a sanction. N.H. Code Admin. R. Ed 511.01(j)(3)-(5) (listing aggravating and mitigating circumstances that shall be considered in imposing a sanction).

20. Once determined by Commissioner Frank Edelblut, DOE Deputy Commissioner Christine Brennan, DOE Attorney Fenton, and DOE Investigator Farrell—or some combination thereof—the proposed sanction is conveyed to the educator. *Id.* Ed 511.01(j)(6). The educator can either accept the sanction and sign an agreement with the DOE under N.H. Code Admin. R. Ed 511.02(a) or request an adjudicatory hearing to contest the proposed sanction under N.H. Code Admin. R. Ed 511.03.

21. If the educator chooses to contest the proposed sanction, a hearing examiner holds an adjudicatory hearing to determine a sanction to recommend to the State Board of Education, which then makes the final determination. *Id.* Ed 200 et. seq.; *see also* Farrell Depo. 138:10-21

up, thumbs down? A. At the end of the day.”); *see also* Edelblut Depo. 45:13-19 (“Well, I mean we all are collaborating around what would happen next. So it would depend on the individual case. Q. And to coin a phrase, does the buck stop with you, sir? MR. KENISON-MARVIN: Objection. Vague. A. The buck does stop at Commissioner.”).

(stating that “the hearings officer will make a recommendation based upon a hearing with the Department of Education, me, Attorney Fenton, and witnesses, and they would make a proposal to the state board after that hearing for sanction. So the state board takes the action.”). Appeals from the State Board of Education’s decision are made to the New Hampshire Supreme Court under N.H. RSA ch. 541.

22. In a contested or non-contested matter, if an educator’s credential is suspended or revoked, it becomes public. N.H. Code Admin. R. Ed 502.01(a)(3) (“Pursuant to RSA 91-A:5, V, the following limited credential status information shall be available to the general public, upon written or verbal request: The individual’s suspension, if applicable, including effective dates of each suspension period, reason for the suspension, and revocation, if applicable.”).

23. DOE presentations to administrators—including those that reference the Amendments—state that school officials should call the DOE “[a]nytime [sic] there is a suspected [Code of Conduct] violation.” *See Ex. 50 (Depo. Ex. 3)*, at DOE-05652, 5654, 5656 (DOE presentation stating that the DOE should be called “as soon as possible”).

24. A licensed educator’s failure to report a suspected violation of the Code of Conduct is itself punishable as a violation of the Code. *See* N.H. Code Admin. R. Ed 510.05(a) (stating that “[a]ny credential holder shall report any suspected violation of the code of conduct following the school, school district, or SAU reporting procedures”); *id.* Ed 510.05(f) (stating that, “[i]f the department has reason to suspect that any violation of the code of conduct enumerated in Ed 510.01 through Ed 510.04 was known by a credential holder and not reported, the department shall undertake an investigation, as enumerated in Ed 511.01, against that credential holder as required by Ed 510.05(a), (b), or (c)”)¹⁹.

¹⁹ *See also* Fenton Depo. 40:24-41:2, 51:18-52:4, 55:1-13 (“Q. In evaluating the duty to report, the Department can conduct investigations concerning whether an educator has complied with that duty, right? A. You’re referring to

25. This duty to report includes suspected violations of the Amendments. *See Ex. 63 (Depo. Ex. 45)* (in Aug. 17, 2021 email responding to a school board member “about possibly sending out an advisory to all NH districts highlighting the fact that if an educator disregards the [Amendments], they would be violating the educator code of conduct and would face disciplinary action by the state board of education and their local school board,” Commissioner Edelblut acknowledged the duty to report in the Code).

26. DOE Investigator Farrell testified that Commissioner Edelblut may have asked him to request documents from a superintendent in a case, and the Commissioner has sent him emails regarding complaints to look into. *See Farrell Depo. 22:16-23.*

II. The Human Rights Commission Complaint Process Generally

27. The HRC receives intake questionnaires under the Law Against Discrimination, RSA ch. 354-A, which are managed by an intake coordinator. “[T]he intake coordinator’s role is [to] receive calls that come in, inquiries that come into the Commission. These inquiries come in both orally via the phone or via someone coming, a walk-in. Or they come in in written form via email or regular mail. The intake coordinator role is to sort of look at the jurisdictional components, and if the intake meets the jurisdictional components, to send out an intake questionnaire to that person” *See Cohen Depo. 15:7-18.*²⁰ The intake coordinator generally does not do any additional fact gathering beyond asking the complainant to submit an intake

510.05 (A), right? Q. Mm-hm. A. I believe my testimony previous was yes. Q. Okay. A. The Department would have that authority. Q. So my question is can the Department investigate simultaneously a potential duty to report violation alongside an investigation into the educator whose conduct substantively violated the code? A. I suppose that the Department could do that, yes.”), 56:13-58:13 (acknowledging duty, and testifying that educators have a duty to comply with this section, and the DOE can conduct investigations with respect to this duty); Edelblut Depo. 124:4-17 (acknowledging the duty to report under the Code of Conduct); Farrell Depo. 33:3-37:15 (describing duty to report; “Q. But it is possible that you would open an investigation or you would—sorry—you would open a case to look into a failure to report for a teacher that didn’t report a possible violation of the code of conduct? A. It is possible.”); *Ex. 51 (Depo. Ex. 7)*, at DOE-10078 (in DOE presentation to educators, listing duty to report obligation under the Code of Conduct); *Ex. 44 (Depo. Ex. 24)*, at DOE-09668 (same).

²⁰ Attorney Cohen’s deposition transcript referenced throughout is attached as *Ex. 6* to the accompanying declaration of Attorney Gilles Bissonnette.

questionnaire.²¹ The HRC Assistant Director directly supervises the intake coordinators. *See* Malachi Depo. 32:3-4.²²

28. When the complainant submits the completed intake questionnaire, the intake coordinator then evaluates whether the allegation presents a *prima facie* claim of discrimination. *See* Cohen Depo. 15:18-21, 16:13-17. In determining whether there is a *prima facie* claim of discrimination, the HRC “look[s] at the jurisdiction” and “what the statute reads,” and it “determine[s] in a light most favorable to the intake inquiry whether we’ll take it or not. We base it on jurisdiction of number of employees, whether it substantively falls within the scope of 354-A.” *Id.* 12:2-7.²³ Beyond the text of RSA ch. 354-A, there is no written policy or guidance that the Commission uses in determining whether the *prima facie* standard is satisfied.²⁴

29. Intake meetings at the HRC occur bi-weekly. The HRC Assistant Director meets with intake coordinators to “discuss any questions the intake coordinator has about intakes that are coming in.” Sometimes decisions are made in these meetings about whether the *prima facie* standard has been met in a case. Cohen Depo. 11:8-18.

30. The intake coordinator may, though not always, decide whether the *prima facie* standard has been satisfied in consultation with the assistance of the HRC Assistant Director. The HRC Director may further assist if the Assistant Director is unavailable. *Id.* 22:4-22:13; Malachi

²¹ Cohen Depo. 32:6-14 (“Q. Okay. So I guess that’s helpful so beyond kind of reaching out to the complainant and asking them to submit a questionnaire, is there any other fact gathering that the Human Rights Commission would do before it’s decided to docket a complaint? MR. KENISON-MARVIN: Same objection. Scope. A. Not generally.”).

²² Director Malachi’s deposition transcript referenced throughout is attached as *Ex. 5* to the accompanying declaration of Attorney Gilles Bissonnette.

²³ *See also* Cohen Depo. 16:22-17:12 (“From my personal experience, evaluating an inquiry is looking at the statutory jurisdiction of the Commission for Human Rights pursuant to 354-A which looks at number, looking at what type of claim it is, public accommodation, public education, housing, or employment, and looking at the statutory requirements depending on that from there. If it’s employment you look at the number of employees to ensure that there are the requisite number of employees. From there you also look to see if the allegations actually fall within what our statute says we can investigate.”).

²⁴ Malachi Depo. 79:14-21 (“Q. How about this. Beyond the FAQs that we just presented to you ..., and beyond the language of the statute in RSA 354-A:29-34, is there any other policy or guidance that the Commission uses in deciding whether an allegation of discrimination under RSA 354-A:29-34 should be docketed? A. No.”).

Depo. 30:14-20, 35:12-17. The HRC Director may attend intake meetings depending on her schedule. *See* Cohen Depo. 23:19-22. If there is additional consultation needed on whether the *prima facie* standard is satisfied, the HRC will consult the DOJ. *See* Malachi Depo. 30:14-20. Whether the HRC seeks guidance from the DOJ may depend on the complexity of the law being applied. *See* Cohen Depo. 108:4-21. Nevertheless, the HRC Director ultimately decides whether the *prima facie* standard is met. *Id.* 101:8-22.

31. When the HRC finds that an allegation of discrimination meets the *prima facie* threshold of discrimination, the intake coordinator sends the complainant a draft charge of discrimination. *Id.* 11:19-12:7. Upon the HRC's receipt of the charge of discrimination that is signed and verified by the complainant, the complaint now becomes a "docketed complaint"/"docketed charge"/"filed charge" of discrimination. *See* Malachi Depo. 23:13-24:17, 78:17-79:1. To be docketed, the complaint must be "[i]n writing," "[s]igned and dated by the complainant," and "[v]erified." N.H. Code Admin. R. Hum 202.01(b); *see also* RSA 354-A:21, I(a) ("Any person claiming to be aggrieved by an unlawful discriminatory practice may make, sign and file with the commission a verified complaint in writing ..."); Malachi Depo. 28:16-22. Once a charge becomes docketed, both the complainant and the respondent are notified in writing. *See also Ex. 75 (Depo. Ex. 53)*, at DOE-10270-71 (describing the process). The HRC's "Summary Fact Sheet" concerning how it processes cases is here: <https://www.education.nh.gov/sites/g/files/ehbemt326/files/inline-documents/sonh/summary-fact-sheet.pdf>.

32. Once a claim of discrimination is docketed, the HRC Assistant Director assigns the case to one of the HRC's five investigators. *See* Cohen Depo. 21:18-22:7; N.H. Code Admin. R. Hum 206.01(a) ("After the filing of a complaint, the chair of the commission shall designate one

of the commissioners to act as the investigating commissioner for that complaint.”); Malachi Depo. 31:12-17. The HRC Assistant Director meets with investigators monthly about the status of docketed cases that are being investigated.²⁵

33. The investigator investigates the case, including “requesting information” and “interviewing complainants and individually named parties and any other witnesses that would have relevant information for the case.” *See* Cohen Depo. 18:12-18, 98:18-99:22 (describing the investigation process); *see also* N.H. Code Admin. R. Hum 206.03(a) (“The staff investigator shall: (1) Discover facts; (2) Make reports and recommendations to the investigating commissioner; and (3) Assist the parties in settlement negotiations.”). With respect to complaints in the education context, this investigation can involve contacting school principals and school superintendents. *See* Cohen Depo. 99:23-100:6. The investigator has discretion with respect to who is contacted. *See id.* 100:12-15; *see also* N.H. Code Admin. R. Hum 207.02(a) (noting the information that the investigator “shall” request from the respondent if “the investigator considers the information relevant to the investigation”); RSA 354-A:21, II(a) (“After the filing of any complaint, one of the commissioners designated by the chair shall make, with the assistance of the commission’s staff, prompt investigation in connection therewith....”).

34. After an investigation, the investigator then determines whether there is probable cause for a case to move forward.²⁶ As HRC Assistant Director Sarah Burke Cohen explained: “If a case is found to be no probable cause, it is dismissed with appeal rights. If the case is found to

²⁵ Cohen Depo. 12:13-19 (“I meet with the investigators once a month. We discuss their caseload, we discuss any questions they have moving cases along legal standard wise, any research that we need to do relative to a specific case, and I review their reports before they go up to the Commissioners to ensure they are complete.”).

²⁶ Cohen Depo. 13:7-14 (“You have cases that we go through what we call a full investigation so they get to the point where there is a finding issued by an investigating commissioner of either probable cause or no probable cause.”); *see also* N.H. Code Admin. R. Hum 210.01(a) (“On the basis of the investigative report the investigating commissioner shall make a determination of probable cause or no probable cause.”); *Ex. 75 (Depo. Ex. 53)*, at DOE-10271 (describing the process after a PC/NPC finding is made).

be probable cause, it moves on in the process towards the public hearing. In between the public hearing and moving it from probable cause to public hearing, the parties meet for a conciliation and a prehearing, and then it moves to public hearing. After probable cause is found, both parties have the ability to remove the case to Superior Court.” *See* Cohen Depo. 116:4-18; *see also* N.H. Code Admin. R. Hum 210.01(c)-(e) (describing events after PC/NPC determination); RSA 354-A:21, II(a) (describing process, including that, “if such commissioner shall determine after such investigation that probable cause exists for crediting the allegations of the complaint, the commissioner shall immediately endeavor to eliminate the unlawful discriminatory practice complained of by conference, conciliation and persuasion”).

35. Cases can get resolved in other ways, including where a complainant removes the case to superior court, the case settles, or the complainant decides to no longer pursue the case.²⁷ Absent resolution through these alternative ways, HRC investigators complete reports concerning their investigation of docketed complaints. *See* Cohen Depo. 14:1-6.

36. “Complaints received by the HRC under the amendments are docketed and processed the same way as all other cases. The cases are processed in accordance with N.H. Rev. Stat. Ann. § 354-A and the HRC’s administrative rules” *See Ex. 47 (Depo. Ex. 58)* (HRC Int. Resp. No. 2).

²⁷ Cohen Depo. 13:15-23 (“However, there are other times that a case can sort of be resolved at the Commission. Complainants have the ability to remove the case to court. There’s also potential of settlement of the cases. So if there’s a resolution of settlement, then it gets closed. Or there are times where complainants decide they do not want to pursue their charge at the Commission any longer.”).

III. The Amendments' Origins

A. Increasing Diversity and Inclusion Efforts in New Hampshire Following George Floyd's May 2020 Murder

37. Following George Floyd's murder on May 25, 2020, many schools created diversity, equity, and inclusion ("DEI") positions in an increased effort to expose students to the lived experiences, contributions, and history—both past and present—of BIPOC (Black, Indigenous, and People of Color) individuals. These efforts are part of a growing and widespread consensus among educators that inclusive education practices giving voice and attention to the experiences of all students are critical.²⁸ Students must see themselves in the books they read and in their classroom discussions to become contributing participants in our increasingly diverse and multi-racial democracy. Educational opportunities for all students are expanded by presenting a more informed and truthful portrayal of topics such as the empowering experiences and achievements of BIPOC and marginalized communities in the face of African enslavement, Jim Crow, segregation, and racial discrimination, as well as discussing with students the existing legacy of these actions, racial stereotypes, prejudice, explicit and implicit bias or "unconscious bias." This expansion of educational opportunities takes many forms, but is unified in ensuring equal access to educational content for students of all backgrounds, and exposure to various perspectives that reflect the diversity of New Hampshire and America. See *Ex. 13*, Philibotte Decl.

¶¶ 6-8.

²⁸ See, e.g., Thomas Dee & Emily Penner, *The Causal Effects of Cultural Relevance: Evidence from an Ethnic Studies Curriculum*, 54 Am. Educ. Res. J. 127 (2017) ("These surprisingly large effects suggest that CRP ["culturally relevant pedagogy"], when implemented in a high-fidelity context, can provide effective support to at-risk students."), <https://files.eric.ed.gov/fulltext/EJ1132535.pdf>; Alfred Tatum, Aaron Johnson, & David McMillon, *The State of Black Male Literacy Research, 1999-2020*, 70 Literacy Research: Theory, Method, and Practice 129-151 (Nov. 2021) (explaining "how literacy research positions Black males to sustain, empower, and protect themselves and their communities within and across social and scientific disciplines and technical and nontechnical fields"), <https://journals.sagepub.com/doi/epub/10.1177/23813377211038368>; *Understanding Culturally Responsive Teaching* New America (discussing and citing studies), <https://www.newamerica.org/education-policy/reports/culturally-responsive-teaching/understanding-culturally-responsive-teaching/>.

38. Similarly, in the wake of George Floyd’s murder, many New Hampshire educators engaged in professional development opportunities to enhance their skills to teach both (i) to BIPOC students and students from historically marginalized groups, and (ii) about these groups’ experiences and perspectives. *See Ex. 7*, Tuttle Decl. ¶ 6.

39. For example, in 2020, Misty Crompton, a member of the Plaintiff NEA-NH and an educator who teaches in Derry, was awarded the prestigious Christa McAuliffe Sabbatical from the New Hampshire Charitable Foundation for her project called “Promoting Just Schools.”²⁹ The sabbatical, created in 1986 in honor of the Concord High School teacher and astronaut, gives one exemplary New Hampshire teacher a year off with pay and a materials budget to bring a great educational idea to fruition. Ms. Crompton’s project focused on educational equity—namely, levelling the playing field for students by recognizing how identity, race, and culture of students and teachers play out in the classroom. *See Ex. 7*, Tuttle Decl. ¶ 7.

40. The 2020 census confirmed the importance of elevating the perspectives and histories of individuals of color. The results indicated that New Hampshire is rapidly growing more racially diverse. While New Hampshire’s population grew by a modest 4.6% during the past decade, the number of residents who are people of color increased by 74.4% to 176,900 in 2020. Black, Hispanic, and other people of color now represent 12.8% (176,900) of the state’s population compared to 7.5% (101,400) in 2010.³⁰

41. This diversity is particularly prevalent in the southern part of New Hampshire. For example, the population of Manchester and Nashua was 98% White in 1980.³¹ Manchester now

²⁹ Dave Tirrell-Wysocki, *Misty Crompton Awarded Christa McAuliffe Sabbatical*, N.H. Charitable Foundation (June 11, 2020), <https://www.nhcf.org/what-were-up-to/misty-crompton-awarded-christa-mcauliffe-sabbatical/>.

³⁰ Kenneth Johnson, *Modest Population Gains, but Growing Diversity in New Hampshire with Children in the Vanguard*, Carsey School of Public Policy (Aug. 30, 2021), <https://carsey.unh.edu/publication/modest-population-gains-but-growing-diversity-in-new-hampshire-with-children-in-vanguard>.

³¹ *See* Census Data for 1980, available at <https://www.census.gov/content/dam/Census/library/working-papers/2005/demo/POP-twps0076.pdf> (Table 30, page 76).

is 80.3% White, 11.0% Hispanic (approximate population 12,665), and 6.0% Black (approximate population 6,908).³² Nashua now is now 79.2% White, 13.2% Hispanic (approximate population 12,033), and 3.6% Black (approximate population 3,281).³³

42. As the Carsey School of Public Policy at the University of New Hampshire explained, “children are at the leading edge of the state’s growing diversity.”³⁴ The *Union Leader* also reported that “more than 2 of every 5 children in Manchester and Nashua hail from families of color,” and that, “[i]n 30 years, Manchester’s youngest generation has shifted from 94% White in 1990 to 57% last year.”³⁵ Students of color in Manchester are also more likely to live in poorer areas of the city.³⁶

43. Consistent with these demographic trends, the Manchester School District—the largest and most diverse school district in New Hampshire—hired a Chief Equity Officer, Plaintiff Christina Kim Philibotte, in the summer of 2021. This position was crafted to ensure that—especially given the disproportionate rates of graduation, reading and math proficiency, as well as suspension rates among students of color—institutional systems are created to support and rectify the hardship that many students of color experience.³⁷ One of the goals of this work is to train

³² 2022 Population Estimates for Manchester, <https://www.census.gov/quickfacts/fact/table/manchestercitynewhampshire/PST045219>.

³³ 2022 Population Estimates for Nashua, <https://www.census.gov/quickfacts/fact/table/nashuacitynewhampshire/PST045219>.

³⁴ Kenneth Johnson, *Modest Population Gains, but Growing Diversity in New Hampshire with Children in the Vanguard*, Carsey School of Public Policy (Aug. 30, 2021), <https://carsey.unh.edu/publication/modest-population-gains-but-growing-diversity-in-new-hampshire-with-children-in-vanguard>.

³⁵ See Michael Cousineau, *NH grows more diverse, faces call for change*, *Union Leader* (Dec. 18, 2021) (updated Mar. 20, 2022), https://www.unionleader.com/news/business/whats_working/nh-grows-more-diverse-faces-call-for-change/article_8c1cfc2d-73c1-51f3-9a5d-939525c3c21e.html.

³⁶ See Michael Cousineau, *Manchester schools’ Diversity Efforts Will Take Years*, *Union Leader* (Dec. 18, 2021) (updated Mar. 20, 2022), https://www.unionleader.com/news/business/whats_working/manchester-schools-diversity-efforts-will-take-years/article_e92b6c28-4b28-5df0-b407-7d5bc2031009.html.

³⁷ For example, a report from the Juvenile Reform Project—a coalition of New Hampshire advocacy organizations—demonstrates that school discipline in New Hampshire is disproportionately harsh on students of color. During the 2014-2015 academic year, “[w]hile students of color made up 13.9 percent of the student population, they comprised approximately 22.7 percent of students receiving out-of-school suspensions.” *Keeping Kids in School: The Urgent Need for Reform of School Discipline in NH* (January 2019), available at https://www.nhla.org/assets/customContent/FINAL_Keeping_Kids_in_School_-

teachers and faculty to understand the needs of students of color and those with marginalized identities by creating a more culturally fluent teaching staff to better connect with their learners. This effort reinforces the creation of a sense of belonging for students where they feel more connected to, and better represented in, the books they read and the discussions they have in the classroom. *See Ex. 13*, Philibotte Decl. ¶¶ 3-4.

44. The Exeter Region Cooperative School District—and later the entire SAU16—made a similar decision, hiring Plaintiff Andres Mejia as Director of Diversity, Equity, Inclusion, and Justice (“DEIJ”). He started in this role on August 2, 2021, but only on behalf of the Exeter Region Cooperative School District. His role expanded to the entire SAU16 on July 1, 2022. *See Ex. 15*, Mejia Decl. ¶ 3. As the District’s then superintendent, Dr. David Ryan, stated in announcing the position: “The work around diversity, equity, inclusion and justice is critically important and is helping us create an educational community where every student, educator, parent, guardian and community member feels like they belong.”³⁸ This work is also vital in SAU16. As of the 2022-2023 academic year, SAU16 has 4,779 students, with at least 425 students of color. Approximately 153 students identify as Asian, approximately 53 identify as Black/African American, approximately 124 identify as Hispanic or Latino, approximately 28 identify as Native American/Alaska Native, approximately 10 identify as Native Hawaiian/Pacific Islander, and approximately 59 identify as belonging to two or more races. This work not only helps White students in the Exeter area learn about the growing diversity of their community, but

[The Urgent Need to Reform School Discipline in NH.pdf](#). Concord High School also experienced similar racial disparities. *See* Eileen O’Grady, *Suspensions, Expulsions are Used Disproportionately to Discipline N.H. Students of Color*, CONCORD MONITOR (July 4, 2020), <https://www.concordmonitor.com/Race-and-discipline-in-NH-schools-34921292> (“That data showed that in the 2015-16 school year at Concord High School, Black students made up 8% of the student body, but made up 22% of out-of-school suspensions.”).

³⁸ *See* ‘Deep Understanding’: Exeter Schools Hire New Director to Focus on Diversity and Equity, PORTSMOUTH HERALD (Aug. 2, 2021), <https://www.seacoastonline.com/story/news/2021/08/02/exeter-nh-schools-hire-new-director-focus-diversity-and-equity/5455939001/>.

also helps students of color in the Exeter area know that they are not alone and that they are welcome. *See Ex. 15*, Mejia Decl. ¶¶ 3-4, 6-7.

45. Plaintiffs Andres Mejia and Christina Kim Philibotte have dedicated their professional lives to learning and advancing DEI principles. Their experiences confirm the findings that such instruction is vital for the provision of a quality education and thriving democracy for all Granite Staters, and particularly Granite Staters of color. This instruction has increased the engagement, participation, and sense of belonging for students of color in their districts. And students of color have expressed to Mr. Mejia and Ms. Philibotte their desire to gain greater exposure to the perspectives of communities of color and theories related to race and gender because such conversations make them feel more connected to the curricula and prepared to tackle the issues facing their communities. White students also have asked them to learn more about DEI concepts, gender, LGBTQ+ race, racism, and other perspectives about marginalized identities. These courageous conversations are essential for all students—especially those of color—as they build community where people feel seen and validated in a secure space, and thus more comfortable speaking and sharing their experiences on complex topics which, in turn, teaches other students. *See Ex. 15*, Mejia Decl. ¶ 9; *Ex. 13*, Philibotte Decl. ¶¶ 12-13.

46. Since the filing of this lawsuit, the Oyster River Cooperative School District hired a DEIJ Coordinator who started in August 2022.³⁹ And, in November 2022, the Concord School District hired a DEIJ Director.⁴⁰ *See Ex. 15*, Mejia Decl. ¶ 4.

47. These New Hampshire efforts at improving diversity, equity, and inclusion were not limited to education in the wake of George Floyd’s murder. Following the August 31, 2021

³⁹ *See* Eileen O’Grady, “Concord School District hires DEIJ director,” *Concord Monitor* (Nov. 8, 2022), <https://www.concordmonitor.com/Concord-School-District-hires-DEIJ-coordinator-48720832>.

⁴⁰ *See* Eileen O’Grady, “Concord School District hires DEIJ director,” *Concord Monitor* (Nov. 8, 2022), <https://www.concordmonitor.com/Concord-School-District-hires-DEIJ-coordinator-48720832>.

recommendations of the Commission on Law Enforcement Accountability, Community, and Transparency (“LEACT”), trainings on implicit bias have occurred for New Hampshire prosecutors and state judges. *See Ex. 76* (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 McKim’s presentation “Are You Your Implicit Bias?”); *Ex. 77* (May 3, 2021 and May 4, 2021 Presentations to N.H. Court System; addressing concepts like “structural/systemic discrimination” and “white privilege” in slides 12-13 of James McKim’s May 3, 2021 presentation “Introduction to Diversity, Equity, and Inclusion,” and slides 18 and 26 of James McKim’s May 4, 2021 presentation “Race in NH”).

B. The Backlash

48. Amidst the political intensity of the 2020 general election—and in the wake of these types of efforts in New Hampshire and nationally—then President Donald J. Trump signed an Executive Order on September 22, 2020 entitled “Executive Order on Combatting Race and Sex Stereotyping.” *See Ex. 78* (Sept. 22, 2020 Trump Executive Order).

49. The Executive Order sought to censor certain viewpoints and chill speech. The Executive Order, in part, banned federal contractors and federal grant recipients from engaging in workplace training that purportedly “inculcates” employees on the following “divisive” concepts:

- (1) one race or sex is inherently superior to another race or sex;
- (2) the United States is fundamentally racist or sexist;
- (3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
- (4) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex;
- (5) members of one race or sex cannot and should not attempt to treat others without respect to race or sex;
- (6) an individual’s moral character is necessarily determined by his or her race or sex;
- (7) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;
- (8) any individual should feel discomfort, guilt, anguish, or any other form of

psychological distress on account of his or her race or sex; or (9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. [(10)] The term “divisive concepts” also includes any other form of race or sex stereotyping or any other form of race or sex scapegoating.

See id. (Sept. 22, 2020 Trump Executive Order, with the emphasized text reflecting those concepts that are substantially similar to the prohibited concepts in the Amendments).

50. The Executive Office of the President’s September 28, 2020 memorandum implementing this Order specifically referenced the Order’s third banned concept—namely, that “an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.” The memorandum made clear that it was targeting trainings that, for example, used the phrases “white privilege,” “intersectionality,” “systemic racism,” “racial humility,” and “unconscious bias.” *See Ex. 55* (Sept. 28, 2020 Executive Office of the President’s Memorandum indicating that such phrases “may help to identify the type of training prohibited by the” Executive Order). This banned concept in the Executive Order is analogous to the second banned concept in the Amendments challenged in this case.

51. The Executive Order followed President Trump’s September 17, 2020 announcement that he was establishing the “1776 Commission.” This Commission was created to oppose Critical Race Theory, the New York Times’ 1619 Project, and Howard Zinn’s *A People’s History of the United States*—a 1980 book that offers an alternative to telling the story of the United States via the top-down achievements of elite White men.⁴¹

⁴¹ Olivia B. Waxman, *Echoing Decades of Fighting Over U.S. History Classrooms, President Trump Announces a Push for ‘Patriotic Education’*, TIME (Sept. 17, 2020), (“Speaking on Constitution Day from the National Archives—where original copies of the Declaration of Independence, the Constitution of the United States and the Bill of Rights are on display—during a White House conference on American History, President Donald Trump announced that he was signing an executive order to establish the ‘1776 Commission,’ a group that would ‘promote patriotic education,’ and that the National Endowment for the Humanities would be awarding a grant to support the development of a ‘pro-American curriculum that celebrates the truth about our nation’s great history.’”), <https://bit.ly/3xs1qHX>; Establishing the President’s Advisory 1776 Commission, Pres. Exec. Order No. 13958, 85 Fed. Reg. 70951 (Nov. 2, 2020),

52. On December 22, 2020, a federal court partially enjoined President Trump’s Executive Order, in part, ruling that plaintiffs were likely to succeed on their vagueness challenge. *See Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump*, 508 F. Supp. 3d 521, 543 (N.D. Cal. 2020). The district court found that the Executive Order’s banned concepts are “so vague that it is impossible for Plaintiffs to determine what conduct is prohibited.” *Id.*⁴²

53. This Executive Order was rescinded by President Joseph R. Biden on his first day in office.⁴³

IV. The Drafting of the Amendments in New Hampshire

54. Despite the Court’s decision in *Santa Cruz Lesbian & Gay Cmty. Ctr.*, bills copying President Trump’s Executive Order began spreading in statehouses throughout the United States, in part, at the initiative of political activists. These activists—including Christopher Rufo, who was then a visiting fellow at the Heritage Foundation and who promoted and helped draft President Trump’s Executive Order—brought forward proposals to limit how race and gender are taught in schools under the premise that “critical race theory” was being taught in schools. “Critical race theory” is a phrase that Mr. Rufo has acknowledged is being used to conflate any number of

<https://www.federalregister.gov/documents/2020/11/05/2020-24793/establishing-the-presidents-advisory-1776-commission>.

⁴² A separate lawsuit was filed by the NAACP Legal Defense Fund in October 2020 (amended complaint filed in January 2021), challenging the Executive Order on behalf of the National Urban League, the National Fair Housing Alliance, and the American Association for Access, Equity and Diversity. *See National Urban League v. Trump*, 1:20-cv-03121-APM (D.D.C. Jan. 11, 2021), available at <https://www.naacpldf.org/wp-content/uploads/Amended-Complaint-EO-AAAED.pdf>. The lawsuit raised three constitutional claims: vagueness, viewpoint discrimination, and equal protection. The Court did not issue any substantive orders in the case. The plaintiffs filed a notice of dismissal with prejudice on June 15, 2021.

⁴³ Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Pres. Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021), <https://www.federalregister.gov/documents/2021/01/25/2021-01753/advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government>.

topics.⁴⁴ Anti-“critical race theory” laws or restrictions have been passed in approximately 18 states as of June 2023.⁴⁵

55. New Hampshire is one of these 18 states and was among the first to propose such a law. The complete paper legislative history of the Amendments was filed with this Court on May 16, 2022 and is incorporated here by reference. *See* Docket No. 43.

A. The New Hampshire House of Representatives

56. The Amendments’ origin begins with its precursor, HB544. HB544 was proposed in January 2021 and was entitled “Propagation of Divisive Concepts Prohibited Act.” HB544 copied all ten banned concepts contained in President Trump’s September 22, 2020 Executive Order and applied them not only to all government agencies and primary and secondary public schools, but also to (i) private companies that contract with the state, and (ii) course instruction at New Hampshire public colleges and universities. *See Ex. 79* (HB544 Docket and Language).

⁴⁴ *See* Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict Over Critical Race Theory*, NEW YORKER (June 21, 2021) (“Soon after, Rufo flew to Washington, D.C., to assist in drafting an executive order, issued by the White House in late September, that limited how contractors providing federal diversity seminars could talk about race.”), <https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory>; Trip Gabriel, *He Fuels the Right’s Cultural Fires (and Spreads Them to Florida)*, N.Y. TIMES (Apr. 24, 2022) (“The next day [after appearing on Fox News in 2020], he said, he received a call from Mark Meadows, the White House chief of staff, telling him that Mr. Trump had seen him on Fox, and asking him to consult on an executive order.”), <https://www.nytimes.com/2022/04/24/us/politics/christopher-rufo-crt-lgbtq-florida.html>; Laura Meckler & Josh Dawsey, *Republicans, spurred by an unlikely figure, see political promise in targeting critical race theory*, WASHINGTON POST (June 21, 2021), <https://www.washingtonpost.com/education/2021/06/19/critical-race-theory-rufo-republicans/> (“Spurred by Rufo, this complaint has come to dominate conservative politics. Debates over critical race theory are raging on school boards and in state legislatures.”; noting Mr. Rufo’s tweet: “We have successfully frozen their brand—‘critical race theory’—into the public conversation and are steadily driving up negative perceptions. We will eventually turn it toxic, as we put all of the various cultural insanities under that brand category The goal is to have the public read something crazy in the newspaper and immediately think ‘critical race theory.’ *We have decodified the term and will recodify it to annex the entire range of cultural constructions that are unpopular with Americans.*”) (emphasis added); Matthew S. Schwartz, *Trump Tells Agencies To End Trainings On ‘White Privilege’ And ‘Critical Race Theory*, NPR (Sept. 5, 2020), <https://www.npr.org/2020/09/05/910053496/trump-tells-agencies-to-end-trainings-on-white-privilege-and-critical-race-theor> (“On Saturday, Trump retweeted Rufo’s appearance on Fox, arguing that diversity training is a threat to American unity.”).

⁴⁵ *See* Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, Education Week (updated June 13, 2023), <https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06>.

57. The text of HB544, for example, banned any form of “race or sex scapegoating” and any other teaching concept that “[a]ny individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex.” *See* Docket No. 43-1, Filed Legislative History of HB544 at 0005, 06 (HB544 as introduced).

58. The chief sponsor of HB544 argued that this legislation was necessary to address “critical race theory” and, more specifically, to ban certain “diversity training or inclusion training[s],” which he described as “snake oil” that “propos[es] to cure a disease but in actuality it’s even making it worse.”⁴⁶

59. Other proponents of HB544 argued that the bill was necessary to eliminate discussion of and instruction on concepts like “implicit bias,” “systemic racism,” “white privilege,” and “anti-racism” in schools and in government trainings, with many specifically calling such topics “Marxist” or “advancing Socialism,” and identifying certain books as problematic. *See Ex. 80* (Select Written Testimony from Public Supporting HB544 to House Executive Departments and Administration Committee, With Highlights Added).

60. National anti-“critical race theory” activist Christopher Rufo also testified in support of HB544 before the New Hampshire House Executive Departments and Administration Committee.⁴⁷

61. On April 7, 2021, as part of a legislative strategy to ensure the passage of HB544’s language in the face of a threatened veto, the House of Representatives amended the larger budget trailer bill, HB2, to insert the operative provisions of HB544. HB2 passed the House that same

⁴⁶ *See* Executive Departments and Administration Hearing on HB 544 (Feb. 11, 2021), <https://www.youtube.com/watch?v=ycrODcuaLDc> (Rep. Keith Ammon’s remarks at 1:31:50, with quotation at 1:37:20).

⁴⁷ *See* Executive Departments and Administration Hearing on HB 544 (Feb. 18, 2021), <https://www.youtube.com/watch?v=0ClrvZ-lv4> (Rufo’s remarks at 4:09:40).

day. See Ex. 81 (HB2/Budget Trailer Materials, Docket Entry Approving Amendment 2021-1059h). The next day, having accomplished its mission of passing this legislation through the budget process, the House of Representatives tabled the original version of HB544. See Ex. 79 (HB544 Docket and Language).

62. At around this time, Representative Ken Weyler, the House Finance Chair and a supporter of HB544, “warned the Senate that the ban on critical race theory is essential for the budget to pass. Weyler said the votes are simply not there if the Senate ditches the ban. Weyler himself considered critical race theory to be a ‘Marxist, anti-American, anti-White’ program.” See Ex. 82 (Damien Fisher, *Compromise Sought on Anti-Critical Race Theory Bill*, N.H. Journal (Apr. 19, 2021)).

63. After this language was inserted in HB2, one legislator supporting HB544 explained that the legislation was needed to address, for example, a staff training in a school district that referenced “white privilege,” as well as programs at one New Hampshire university where employers and managers discuss “unconscious bias.” See Ex. 83 (Rep. Daniel Itse, *Taxpayers Money is Being Used to Promote Systemic Racism in NH*, Union Leader (Apr. 28, 2021)).

B. The New Hampshire Senate, and the Commissioner’s June 13, 2021 Op-ed

64. When HB2 moved to the Senate, the Senate Finance Committee, on or about May 28, 2021, proposed an amendment to HB2’s “divisive concepts” provisions. See Ex. 81 (HB2/Budget Trailer Materials, Senate Finance May 28, 2021 2021-1799s amendments). This amendment deleted six of the ten “divisive concepts” and made some other changes to the language.

65. In an effort to rebrand the restrictions as an “anti-discrimination law,” the amendment also inserted its banned concepts in the Law Against Discrimination at RSA ch. 354-A and expanded the focus of the restrictions from “race or sex” to “age, sex, gender identity, sexual

orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin.” Lastly, the amendment changed the restrictions to no longer apply to (i) private companies contracting with the State of New Hampshire, or (ii) course instruction at state colleges and universities by faculty. *See* RSA 354-A:29, III.

66. However, New Hampshire’s Law Against Discrimination as amended in 2019—as well as the DOE’s administrative rules—already banned discrimination on the basis of race, gender, and other classes. *See* RSA 354-A:27-28; RSA 193:38; N.H. Code Admin. R. Ed 510.01(b)(1), 510.02(b)(1), 510.03(b)(1) (banning discrimination under RSA 354-A:1).

67. With these changes in the Senate, the four concepts that were to be banned in teaching, instruction, and advocacy in schools and places of public employment were the following:

(A) That one’s age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion or national origin is inherently superior to people of another age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin;

(B) That an individual, by virtue of his or her age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;

(C) That an individual should be discriminated against or receive adverse treatment solely or partly because of his or her age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin; and

(D) That people of one age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin cannot and should not attempt to treat others without regard to age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin.

68. Notwithstanding the Senate’s effort to rebrand these provisions as an “anti-discrimination law,” the Senate went even further than the original language in HB544 insofar as

this new version now included the penalty provisions specifically targeting certified educators by making violations of the law punishable under the Educator Code of Conduct. *See* RSA 193:40, IV.

69. The new language also provided a private right of action for a violation of the Amendments, stating that “[a]ny person claiming to be aggrieved by a violation of this section, including the attorney general, may initiate a civil action against a school or school district in superior court for legal or equitable relief, or with the New Hampshire commission for human rights as provided in RSA 354-A:34.” RSA 193:40, III.

70. When the Senate Finance Committee debated the new Senate version on May 27, 2021, supporter Senator Bob Giuda stated that it is designed, in part, “to ensure that the minds of the future generations of our state are not being unduly influenced by advocacy for such toxins as critical race theory.”⁴⁸

71. Statements from at least one prominent supporter after the enactment of the Amendments further confirm that supporter’s view that the law would impact diversity, equity, and inclusion instruction. During the January 11, 2022 testimony of Chairman of the House Education Committee Rick Ladd on an unsuccessful bill designed to expand the Amendments to public colleges, he critiqued “critical race theory,” and noted that “[a]ny instructor aligning and communicating one’s own vision of race’s relations, where the national narrative that uses diversity and inclusion as its platform, is unacceptable.” *See Ex. 84* (PL00789-9, at p. 3:9-13).

72. On June 3, 2021, the Senate passed HB2, including the provisions constituting the Amendments, by a vote of 14 to 9. *See Ex. 81* (HB2/Budget Trailer Materials).

⁴⁸ Senate Finance Committee, May 27, 2021 HB2 Deliberations (at 27:13), <https://www.youtube.com/watch?v=0AbLc51xKrU>.

73. The House did not concur with the Senate’s version of HB2. As a result, a committee of conference was appointed.

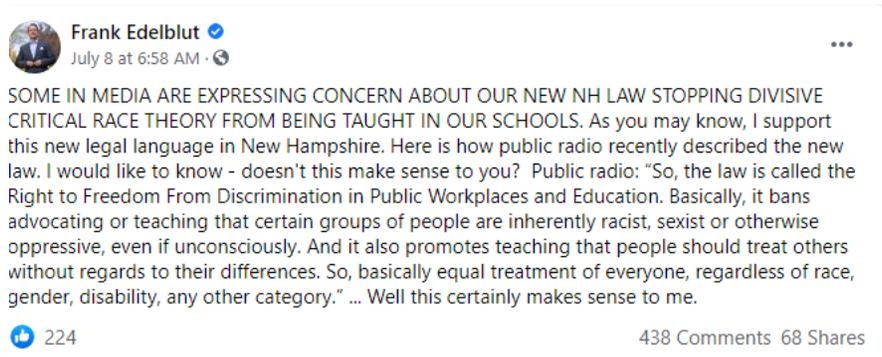
74. As this committee of conference process was getting underway, Defendant Commissioner Edelblut published an op-ed on June 13, 2021 in which he attacked “those who promote Critical Race Theory or similar concepts,” and claimed that the Amendments were “important” and “needed” to prevent concepts like those in Dr. Ibram X. Kendi’s 2019 book *How to Be an Antiracist* from being taught in schools. See Ex. 21 (Depo. Ex. 4).

75. In the meantime, the committee of conference ultimately agreed on a report recommending the language to be included in HB2, and it included the Senate’s version of the Amendments. This report was filed on June 24, 2021, and it was approved in both chambers. See Ex. 81 (HB2/Budget Trailer Materials).

76. The governor signed the Amendments, along with all of HB2, into law on June 25, 2021 as part of the larger budget process. The Amendments immediately became effective upon this signing. See Ex. 81 (HB2/Budget Trailer Materials).

V. The Amendments’ Confusion and Defendants’ Purported “Guidance”

77. On July 8, 2021, Defendant Commissioner Edelblut again criticized “CRITICAL RACE THEORY” and stated that he “support[s] this new legal language in New Hampshire.”



78. He tweeted this July 8, 2021 “support” for the Amendments—and published a June 13, 2021 op-ed stating that the Amendments were an “important” and “needed contribution to our education system” (see *Ex. 21 (Depo. Ex. 4)*)—despite testifying at deposition that “[w]e do not take positions on legislation. We simply provide legislators with either the benefits or the negative consequences as we understand them associated with proposed legislation.” See Edelblut Depo. 146:20-147:4.⁴⁹ “Critical race theory” and the Amendments were also referenced by Commissioner Edelblut in various emails. See e.g., *Ex. 85* (in February 1, 2022 email from Commissioner Edelblut, stating that, as part of a particular contract, he has “reserved ... the right to edit such content to ensure that the ‘woke’ CRT type concepts would not be included in this program *that may be a violation of our laws*”) (emphasis added).

79. On July 8, 2021, Commissioner Edelblut also raised a concern at a State Board of Education meeting about Tiffany Jewell’s 2020 book entitled *This Book is Anti-Racist*—a book by a woman of color with a focus on 11-to-15-year-old students of color. At this meeting where the Commissioner referenced the Amendments, the Commissioner read portions of Chapter 10 from this book to rebut the claim of “people [who] will say like, well, this doesn’t happen in New Hampshire.” See *Ex. 56* (Transcript of July 8, 2021 remarks). As noted below, Commissioner

⁴⁹ Similarly, while DOE Attorney Fenton testified that the DOE “only provides what we refer to as technical assistance” to the legislature and does not support or oppose legislation, see Fenton Depo. 30:18-24, 171:3-8, the DOE openly advocated to the legislature on March 8, 2023 for the passage of an amendment to HB533 that would give the DOE subpoena power under the Educator Code of Conduct. See *Ex. 65 (Depo. Ex. 6)*, at PL0803 (DOE Investigator Farrell noting that “I am asking, the agency is asking, and we need to do three things”; “Our children should be protected, and subpoena power will allow us to do that.”). This bill was retained before the House Judiciary Committee.

Commissioner Edelblut also issued a public statement on May 18, 2023 in response to the House of Representative’s indefinite postponement of the so-called “parental bill of rights” bill at SB272. He stated: “The New Hampshire Department of Education is disappointed with the indefinite postponement (of) SB 272 by the House and is hopeful that this conversation will continue, since it is possible to simultaneously support students, educators and parents...” <https://twitter.com/KlandriganUL/status/1659249716335345668>. At deposition, despite this public statement, Commissioner Edelblut would not concede that this statement indicated support for the bill because “it’s not possible to support something that is no longer a bill and is indefinitely postponed.” See Edelblut Depo. 148:8-15.

Edelblut also cited Ms. Jewell's book as an attachment to an April 15, 2022 op-ed in which he argued that educators were overstepping and that "biases are beginning to seep into our own institutions." See Ex. 40 (Depo. Ex. 14), at PL00682, 742-745 (attaching chapter of this book).

80. After the Amendments were enacted, Plaintiff NEA-NH received information from its members that they are confused about what is and is not permissible under the law. See Ex. 7, Tuttle Decl. ¶ 8. AFT-NH, too, had many questions from its members about prohibited topics of instruction. See Ex. 8, Howes Decl. ¶¶ 7-9. Accordingly, on July 12, 2021, NEA-NH President Megan Tuttle wrote to the DOJ requesting clarification of the Amendments given their ambiguities. See Ex. 42 (Depo. Ex. 11). The letter asked 12 specific questions reflecting NEA-NH members' concerns regarding the Amendments' impact on them. AFT President Deb Howes, too, requested that Commissioner Edelblut attend a Town Hall to explain the Amendments because her members were having similar difficulty understanding the law and its prohibitions. See Ex. 8, Howes Decl. ¶ 13.

81. The DOJ did not respond to that NEA-NH letter. See Ex. 7, Tuttle Decl. ¶ 9. Commissioner Edelblut declined to speak to the AFT. See Ex. 8, Howes Decl. ¶ 13.

82. On July 21, 2021, Defendants DOE Commissioner Frank Edelblut, Attorney General John Formella, and HRC Director Ahni Malachi issued "guidance" on the Amendments in the form of FAQs. See Exs. 41 (Depo. Ex. 9), 44 (Depo. Ex. 24), 45 (Depo. Ex. 55).

83. The answers to Question Nos. 11 and 12 in these FAQs do not explicitly state that a complaint under the Amendments cannot be filed with the DOE. See Exs. 41 (Depo. Ex. 9), 44 (Depo. Ex. 24), 45 (Depo. Ex. 55); see also Farrell Depo. 57:22-58:3, 92:11-15 (noting that "it doesn't say either way" whether "a complaint can be filed for a code of conduct violation with the Department of Education"). The DOE was one of the entities that issued the FAQs.

84. As these July 2021 FAQs confirm, “[t]he prohibitions apply to all activities carried out by public schools in their role as public schools, including extracurricular activities that are part of the public school’s work.” Exs. 41 (Depo. Ex. 9), 44 (Depo. Ex. 24), 45 (Depo. Ex. 55) (emphasis added). The DOJ, HRC, and DOJ also acknowledged in their interrogatory responses that “the amendments apply to all activities carried out by public schools in their role as public schools, including extra-curricular activities that are part of the public school’s work.” See Exs. 46, 47 (Depo. Ex. 58), 48 (Depo. Ex. 57) (DOJ Int. Resp. Nos. 8; HRC Int. Resp. 8; DOE Int. Resp. No. 8).

85. Given what Plaintiff NEA-NH perceived to be as deficiencies in the July 21, 2021 FAQs, the NEA-NH wrote Defendants Attorney General Formella and Commissioner Edelblut on August 5, 2021 presenting a plausible interpretation of the Amendments, based on the FAQs. They asked for confirmation that their interpretation of the guidance was correct before disseminating that advice to their concerned members prior to the 2021-2022 school year. For example, the NEA-NH sought confirmation, among other things, that the following was appropriate:

(i) “[i]ntroducing students to the concept of implicit bias, discussing the topic, and discussing student experiences with bias is permitted, so long as students are not taught that bias is inherent in students due to their status as members of a specific group”;

(ii) discussion of “Structural Racism (a.k.a Societal Racism, Systemic Racism) [which] describes the ways in which institutional, historical, cultural, and interpersonal practices that are learned or imposed create racism within structures of society, the economy and the government”;

(iii) “[a]ssigning students the writings of certain authors that express the author’s particular view or theory about discrimination, racism or other prejudices is permitted provided the educator conveys to students that the book represents the author’s opinion or theory and the educator does not require the student to adopt the theory or opinion”; and

(iv) discussion of “the subject of ‘white privilege,’ a set of social and economic advantages that are a product of systems, structures, and learned biases, so long as

the privilege is not discussed in such a way as to indicate that the racial favoritism at the core of white privilege is ‘inherent’ or cannot be overcome.”

See Ex. 42 (Depo. Ex. 11).

86. The NEA-NH also sought confirmation that “[s]pecific books or works of certain authors are not ‘banned’ under the law.” *Id.* The NEA-NH asked this question because, as the letter explained, “[o]n June 13, 2021 Commissioner Edelblut wrote an Op-Ed in the *Union Leader* leaving the distinct impression that Dr. Ibram Kendi’s book, *How to be an Anti-Racist* may not be assigned under the new law. He raised the same proposition at the July 8, 2021 State Board of Education Meeting.” *See Ex. 42 (Depo. Ex. 11).* The NEA-NH added that, “if there are certain texts which your offices believe are *per se* prohibited under this law, please provide a list so educator’s know that prior to making 2021-2022 lesson plans.” *Id.*

87. Neither the DOJ nor Commissioner Edelblut responded to the NEA-NH’s August 5, 2021 letter. *See Ex. 7*, Tuttle Decl. ¶ 9; *see also* RSA 21-N:1, II(a) (noting that “[t]he department [of education] shall have the dual role of providing regulatory direction and instructional assistance to public elementary and secondary schools”).

88. Commissioner Edelblut stated in a July 26, 2021 email that the Amendments’ fourth banned concept was confusing, writing that “[t]he double negative is confusing (welcome to legislative language).” *See Ex. 19.*

89. Assistant Director Cohen testified that the HRC consulted with the DOJ on at least one complaint concerning the Amendments because the HRC was “looking for clarity on how to apply the new amendments.” *See* Cohen Depo. 55:4-21, 104:14-108:21. DOE Attorney Fenton further testified that, if she received questions during educator presentations as to what might be covered under the Amendments, she thinks that she would have referred them “to the Attorney General’s Office,” as she “would not have felt comfortable answering them.” *See* Fenton Depo.

94:7-14. She added that “there was a lot of confusion in the field” concerning the Amendments, including among attorneys, superintendents, and parents—many of whom are “fairly educated people.”⁵⁰ And when DOE Investigator Farrell was asked at deposition “[w]hat would [he] not be able to teach under” the Amendments if he knew, he said “I don’t.” *See* Farrell Depo. 52:12-18.

90. As the 2021-2022 school year was beginning, Commissioner Edelblut, in a late August 2021 *WMUR* interview, stated that, “if there are educators who are concerned about a particular curricular material or something like that, they can reach out to the Department [of Education] and we can take a look at that for them and provide feedback for them on that.”⁵¹ Further, in response to a specific question from *WMUR* as to whether under the Amendments “a teacher should lose their license if they teach [that] systemic racism exists in the United States,” Commissioner Edelblut did not directly answer and, instead, said that the circumstance would have to be looked at individually. He agreed that there is “not a bright line,” but that the “bright line ... [that we] all share is that we are not discriminating against one another, whether that is in the classroom or outside the classroom.”⁵²

91. Commissioner Edelblut also noted in a separate *NHPR* interview in late August 2021 that, “if educators believe that somehow this is providing a chilling effect—the conversations

⁵⁰ *See* Fenton Depo. 158:1-19 (“Q. Okay. Why did you incorporate [sections on the Amendments in your code of conduct training]? A. I incorporated it at the time into my trainings that we’ve referenced because it seemed to me there was *a lot of confusion in the field*. I received calls from attorneys that had some confusion as to the Department’s role under HB 2, and I wanted to take an opportunity to clarify that. Q. So there was confusion among attorneys, you said; is that right? A. Yes. Q. Confusion among superintendents, too, in your view? A. In my view, yes. Q. Among parents as well? A. I would expect so, but my -- when I say there was confusion in the field, I am referring to educators, attorneys for school districts, and union attorneys, and superintendents. Q. Fairly educated people, right? A. In my experience, yes.”) (emphasis added).

⁵¹ Adam Sexton, *CloseUp: Commissioner expects to fund 1000-1500 Education Freedom Accounts this year*, *WMUR* (Aug. 29, 2021), <https://www.wmur.com/article/closeup-commissioner-expects-to-fund-1000-1500-education-freedom-accounts-this-year/37424825> (starting at 9:58).

⁵² *Id.*

that they're having—they should consider what it is that they're talking about.”⁵³ He stated that, under the Amendments, our students should “understand important history, but at the same time, [educators should not] come at those topics with any type of bias.”⁵⁴

92. Commissioner Edelblut made no mention in the *WMUR* or *NHPR* interviews that the DOE does not enforce the Amendments.

93. When pressed for direct answers as to what is covered under the Amendments by one superintendent and at deposition, the DOE referred specific educator questions to the HRC as the agency responsible for applying and enforcing the Amendments.⁵⁵

94. The DOE appears to not have responded to one specific July 22, 2021 question from a media outlet asking whether an “anti-bias, anti-racist” workshop would be covered under the Amendments. *See Ex. 58 (Depo. Ex. 47)*; Edelblut Depo. 133:20-134:12 (not knowing whether there was a response). No written response has been produced in this litigation.

95. In August 2021, one teacher restricted access to his Twitter feed following a DOE presentation regarding the Amendments. *See Ex. 70*.

96. On September 7, 2021, Defendant Attorney General Formella issued “Attorney General Opinion No. 2021-01” entitled “Request for Attorney General’s Opinion Regarding New Anti-Discrimination Protections.” *See Ex. 53 (Depo. Ex. 12)*.

⁵³ “N.H. Education Commissioner: *Divisive Concepts’ Restrictions Won’t Hinder Classroom Conversations*, NHPR (Aug. 24, 2021), <https://www.nhpr.org/nh-news/2021-08-24/nh-education-divisive-concepts-restrictions-wont-hinder-classroom-conversations>.

⁵⁴ *Id.*

⁵⁵ *See Ex. 60 (Depo. Ex. 10)* (in a January 18, 2023 response to an inquiry from a superintendent asking whether “is there somebody at DOE who can speak with a teacher and principal ... with specifics about what she can say or not say regarding issues that might pertain to divisive topics,” DOE Attorney Fenton stated that the issue of “divisive topics is handled by the Human Rights Commission and the AG’s office” and the DOE “has not issued much information on this topic”); Fenton Depo. 105:10-106:2 (“matters falling within HB 2 are to be handled by the Human Rights Commission”); Farrell Depo. 39:18-20 (“We would only be – involve ourselves after the Human Rights Commission process is over.”).

97. The opinion was in response to the HRC’s request for an official opinion “concerning the scope and application of the” Amendments. *See Ex. 53 (Depo. Ex. 12)*. In responding to the Commission, the Attorney General’s nine-page opinion effectively memorialized the July 21, 2021 FAQs, while acknowledging that “[s]ome have voiced concerns that these new statutes are confusing and that public employers and schools will struggle to understand the scope of the new prohibitions.” *See Ex. 53 (Depo. Ex. 12)*, PL00425. Director Ahni Malachi acknowledged that the HRC requested this opinion because the HRC received concerns from some members of the public that the Amendments were confusing and that some would struggle to understand their scope.⁵⁶

98. The DOJ’s September 7, 2021 opinion declares that a violation may occur not just because of the content of a lesson or instructional material, but also because of implications and inferences that a student or trainee may subjectively draw from the material. For example, the opinion explains that, while it may be permissible to provide “Anti-Racist Resources,” those resources may not be offered in a way that “may imply that white people ... are in need of anti-racist resources.” *See Ex. 53 (Depo. Ex. 12)*, PL00431.

99. HRC Assistant Director Sarah Burke Cohen testified that the HRC uses the Attorney General’s September 7, 2021 opinion in applying the Amendments to complaints received, which would include the opinion’s “implication” instruction.⁵⁷ However, Director Malachi testified that the Attorney General opinion “wasn’t requested with the intent to assist the

⁵⁶ *See* Malachi Depo. 88:11-89:16 (“The Commission was aware of concern from the public about Sections 297 and 298 and requested the opinion.”); *see also* Cohen Depo. 107:7-17 (“Q. In your view was there -- shortly after the passage of the amendments, in your view was there confusion amongst the public as to where to file a complaint? MR. KENISON-MARVIN: Objection. Scope. Calls for speculation. Vague. You can answer. A. In my opinion, I suppose. Q. Why do you say that? MR. KENISON-MARVIN: Same objections. A. Because I believe it was in the newspapers, the press.”).

⁵⁷ *See* Cohen Depo. 114:20-115:3 (“Q. Do you know whether anyone at the HRC uses the Attorney General's opinion or the FAQs? MR. KENISON-MARVIN: Objection to form. A. Uses it for what? Q. Applies it to complaints that come in through the complaint process. A. Yes.”).

Commission in enforcing the statute,” and that the HRC has not used the opinion in interpreting RSA 354-A:29-34 relative to an allegation of discrimination received under the Amendments.⁵⁸

100. When the NEA-NH asked the HRC in September 2021 (after being referred to the HRC by the DOE) for “someone ... who might provide further clarification on the law and answer questions from educators using a virtual platform,” no response was received. *See Ex. 43 (Depo. Ex. 54); Ex. 7*, Tuttle Decl. ¶ 10.

101. When AFT inquired on September 22, 2021 about whether the Commissioner would speak about the Amendments, the Commissioner did not directly respond to the invitation, and instead “reiterate[d] our offer to try to work through individual circumstances that may be unclear to teachers. In these cases, the best approach is for them to reach out directly and share the specific facts and circumstances so that we can provide them with clear guidance.” *See Ex. 41 (Depo. Ex. 9); see also Ex. 8*, Howes Decl. ¶ 13 (noting that the Commissioner declined AFT’s invitation to speak at a Town Hall).

102. During an October 7, 2021 meeting of the HRC’s Commissioners, Director Malachi said that the Amendments were “complex.” One commissioner asked Director Malachi what she thought inspired the Amendments. “Assistant Director Burke Cohen and Director Malachi explained that the likely inspiration was that there have been instances in which information has been presented in trainings and K-12 classrooms that states directly and/or impliedly that inherent traits establish a person’s inferiority/superiority.” *See Ex. 20 (Depo. Ex. 56)* (emphasis added).

103. In an October 19, 2021 email, one DEI trainer who has given presentations throughout New Hampshire (including to the New Hampshire Department of Justice, *see Ex. 76*

⁵⁸ *See* Malachi Depo. 93:6-94:4 (“Q. Has the Commission since the issuance of the September 7, 2021, opinion used this opinion in interpreting the provisions of RSA 354-A:29 to 34? A. Could you clarify relative to what? Q. Relative to any allegation of discrimination that has been received by the Commission under the challenged law in this case. A. No.”).

and the state court system, *see Ex. 77*), James McKim, expressed concern to the DOJ that teaching on affirmative action under banned concept three—particularly its use of the phrase “solely or partly because of his or her ... race”—could violate the Amendments. *See Ex. 52*.

104. The Commissioner of Education has received invitations to speak on the Amendments from political groups such as local GOP committees, and he has spoken to political groups where he “may have answered a question on” the Amendments. *See Ex. 59 (Depo. Exs. 37, 52)* (Northwood GOP invitation to speak on the Amendments); Edelblut Depo. 175:20-176:21 (not recalling speaking to the Northwood GOP but acknowledging that he speaks to political groups). One of these groups—the Northwood GOP—told Commissioner Edelblut on November 21, 2021 that he could speak to the group anytime, and that “[w]e are very happy with the new law and sent a flyer with information on it to everyone in our town.” *See Ex. 59 (Depo. Exs. 37, 52)*. That flyer appears to be entitled “CRT Parents’ Guide,” and it states that “NH legislators passed strong anti-discrimination language this year to supplement current civil rights for the protection of all children.” The flyer goes on to include a sample letter to educators asking to “provide a lesson plan for my review if there will be class content, discussion, or assignments related to,” among other things, “Race,” “Gender identity, or LGBT issues,” “Sexuality,” or “Equity.” *See Ex. 22 (Depo. Ex. 51)*. The group added that they had created a “hotline for [their] town to report concerns” about teachers. *See Ex. 59 (Depo. Exs. 37, 52)*.

105. On March 18, 2022, DOE Attorney Diana Fenton acknowledged to one person who had a question about the Amendments that, in part, “the subject matter of HB 544 was put into HB 2.” *See Ex. 86 (Depo. Ex. 23)*; *see also* Fenton Depo. 166:9-12 (standing by what she wrote in that email).

106. In June 2022, a “concerned parent” emailed DOE Investigator Richard Farrell to report a DEI coordinator’s “openly racist blog.” *See Ex. 71 (Depo. Ex. 36)*. The parent, citing the Amendments, attached images of the coordinator’s personal blog, which that parent maintained “clearly fuel[s] racism which isn’t needed in our schools.” *Id.*

107. In an August 25, 2022 email, one lawyer directly wrote to the DOE explaining that Defendants were not complying with the law based on Defendants’ view that the DOE cannot independently investigate educators who may have broken their obligations under the Amendments. *See Ex. 64 (Depo. Ex. 48)*.

108. On June 8, 2023, one member of the DOE’s State Board of Education, which has the power to issue sanctions under RSA 193:40, IV, made clear his view—with several other Board members agreeing—that DEI “teaching methodologies ... [are] extremely divisive ideologies that ... are counter towards students’ productivity and counter towards their success” and are “destructive,” as well as “degrad[e] our American excellence,” “degrad[e] Western society,” and have an “inherent Communist belief baked into” them.⁵⁹ This same Board member, in a February 27, 2023 op-ed, attacked the “wokeness” of DEI instruction, and complained about the pushing of “woke indoctrination onto students,” “devout wokedivists,” and “woke demands.”⁶⁰

VI. Defendants’ Lack of Clear Policies and Failure to Explicitly Say What the Amendments Mean

109. Both Defendant Commissioner Edelblut and Attorney Fenton admitted at deposition that there are no criteria to further understand the phrases “taught, instructed, inculcated or compelled to express belief in, or support for” under RSA 193:40, I beyond the July 2021

⁵⁹ *See* June 8, 2023 N.H. State Board of Education Meeting (starting at 3:24:00-3:28:14), <https://vimeo.com/836403362>.

⁶⁰ Ryan Terrell, *Paying teachers well should be a priority*, Union Leader (Feb. 27, 2023), https://www.unionleader.com/opinion/op-eds/ryan-terrell-paying-teachers-well-should-be-a-priority/article_af0cbb8e-663e-568e-a5e1-caf0a5d11a2e.html.

FAQs.⁶¹ This includes no policies or procedures about whether the Amendments include a scienter requirement. There is no definition for what qualifies as “teaching” or “instructing.” Nor have DOE employees received training concerning implementation of the Amendments, which would include training on whether the Amendments contain a scienter requirement. *See Ex. 48 (Depo. Ex. 57)* (DOE Int. Resp. No. 4).

110. The educator presentations conducted by the DOE referencing the Amendments have not explained what the Amendments’ banned concepts mean aside from reciting their terms. These presentations make no reference to the Amendments having a mental state requirement. *See Ex. 50 (Depo. Ex. 3)*, at DOE-05665 (in presentation for superintendents and administrators focusing on the DOE’s role with districts in evaluating misconduct, referencing Amendments on one slide without stating what they mean); *Ex. 51 (Depo. Ex. 7)*, at DOE-10079-10081 (in presentation addressing the Code of Conduct for credentialed educators, referencing the Amendments’ terms); *Ex. 44 (Depo. Ex. 24)*, at DOE-09669-9671 (same); *see also* Fenton Depo. 118:6-119:15 (explaining audiences for presentations). The Amendments were added to these presentations because “[t]here was a great amount of concern when this was first put into place,” and there “was a perception of murkiness.” *See* Farrell Depo. 47:22-49:4.

111. Similarly, the HRC did not conduct any trainings regarding the Amendments’ meaning, including whether they contain a scienter requirement.⁶² The HRC has no internal policy

⁶¹ *See* Fenton Depo. 111:4-114:7 (“Q. So beyond the FAQ that’s the attachment to Exhibit 9, is there any other criteria that you’re aware of that the Department uses in determining what ‘teach, instruct, inculcate, or compel to express a belief in’ means? A. To the best of my knowledge, no.”); Edelblut Depo. 150:17-153:4 (“Q. So is there written criteria that the Department has that defines what it means to teach, instruct, inculcate or compel to express belief in or support for something? A. I would need to make reference to other people in the agency to get a more specific response to that question. Q. We have done that, in fairness, but I just want to ask you are you aware of any written criteria that defines those terms on page 00006 of Exhibit 1, lines 24 to 25 [the terms in RSA 193:40, I stating “shall be taught, instructed, inculcated or compelled to express a belief in, or support for”]? A. So I’m not familiar with them.”)

⁶² *See* Malachi Depo. 48:23-49:8 (“Q Have you or members of the Commission conducted any trainings on those provisions, public trainings? A. No.”).

or guidelines as to what it means to “teach, advocate, instruct, or train” any employee or student on any of the banned concepts under RSA 354-A:31.⁶³ The only guidance the HRC has as to whether any particular educational materials violate the Amendments are the materials “issued by the Attorney General’s office in his opinion and our FAQ on the statutes.” Cohen Depo. 114:13-19.

112. The DOJ has “no memorandum or other written material that explains a procedure specific to evaluating and responding to complaints filed pursuant to the amendments specifically,” nor has it provided “training to any employees concerning how to implement the amendments.” See Ex. 46 (DOJ Int. Resp. Nos. 3, 4) see also Ex. 52 (in a November 24, 2021 email, the Attorney General’s Office indicated to DEI trainer James McKim that “I did speak to the General and it is my understanding we will not be doing a training in the immediate future on how to interpret the statute. When that changes, I will be sure to reach out to you.”).

113. DOE Investigator Richard Farrell also stated at deposition that he had “no idea” what a teacher cannot teach under the fourth banned concept. See Farrell Depo. 144:23-145:13, 204:7-207:19 (while aiming to later clean up this telling testimony with the assistance of counsel, he acknowledged that he is not “aware of any book that is prohibited from being taught in New Hampshire public schools under subsection D of the law”).

114. When asked at deposition about whether the *teaching* of specific books would be covered under RSA 193:40, Commissioner Edelblut directed Plaintiffs—and educators who may have specific questions—solely to the text of the Amendments and Defendants’ July 2021 FAQs:

⁶³ See Malachi Depo. 75:3-78:2 (Q...So my question is does the Human Rights Commission have any internal policy or guidance as to what the terms mean, ‘teach, advocate, instruct or train’ under that statute? A. No.”); 69:18-70:3 (“Q. Have there been any writings issued by either you or the Commissioners to staff about whether to accept allegations of discrimination under the challenged law from the Department of Education? A. Could you be more specific on the writings? Q. Sure. By writing, what I mean are any directive, policies, or guidance. A. No.”).

Q. So if a teacher has questions about whether specific instruction is covered by the law, they could come to the Department [of Education] and work through individual circumstances that may be unclear to them; is that still something that could occur today?

A. Correct, and the guidance that we would provide them today would be in the form of a Q & A guidance and questionnaire as well as reference to the statute.

Q. Is that the only guidance that they would be provided to a teacher if they were confused, the Q & A from July 2021 and the statute? Is that all you'd give them?

MR. KENISON-MARVIN: Objection. Vague and scope.

A. And I believe pending this lawsuit that that would be the extent of the guidance that we would provide to them.

See Edelblut Depo. 166:13-169:7; see also *id.* 158:17-160:6; 162:23-164:14.

115. Commissioner Edelblut testified that “content is not the subject of the purported HB 2 or 193:40”⁶⁴ and that whether a violation exists would depend on “context.”⁶⁵

116. As to whether a quotation from Dr. Ibram X. Kendi’s 2019 book *How to Be an Antiracist* directly implicating affirmative action (*see Ex. 54 (Depo. Ex. 50)*) was covered under the Amendments, the Commissioner restated the Amendments’ provisions and referred these questions back to educators and the HRC.⁶⁶ Despite quoting and condemning the book in his June

⁶⁴ See, e.g., Edelblut Depo. 62:10-63:3 (“Q. The question is simply this. Have you ever formed an opinion as to whether any content read aloud from a book by a teacher in a classroom rises to the level of concern with respect to HB 2? A. So with all due respect, *content is not the subject of the purported HB 2 or 193:40*. The activities, as I understand the law, you know, no pupil in any public school in this state shall be taught, instructed, inculcated, or compelled to express belief in or support for one or more of the following. So an educator could use a wide variety of content that doesn’t then violate A, B, C or D.”) (emphasis added).

⁶⁵ See, e.g., Edelblut Depo. 75:21-76:2 (stating need for “context”), 154:1-158:16 (in the context of Dr. Kendi’s quotation Commissioner Edelblut cited for why the Amendments were needed, stating: “So to your question, I think it would depend upon the context of the instruction. The content itself of Exhibit 50, again, content being neutral, it’s what you do with that content.”).

⁶⁶ See Edelblut Depo. 149:18-150:16 (acknowledging that he had not read Dr. Kendi’s book); 155:8-156:14, 157:7-160:2 (“Q...If a teacher taught, instructed or inculcated students along the lines of what’s been underlined on Exhibit 50 that you also quote in your OpEd on Exhibit 4, would that fit any of the four concepts that are listed at the bottom of page 6 and go on to the beginning of 07? MR. KENISON-MARVIN: I’ll make the same objection. Vagueness. Legal contention and compound. And it represents the nature of the first elements of the statute. You can answer. A. So I think that it would be most clear in the mind of an educator to determine whether or not in teaching the text that you refer to in Exhibit 50 if they are teaching that, one, a group in this list of things is inherently superior, that one

2021 op-ed justifying the need for the Amendments, the Commissioner admitted at deposition that he never read the book. *See* Edelblut Depo. 149:18-150:16.

117. At deposition, the Commissioner would not say whether teaching Tiffany Jewell's 2020 *This Book is Anti-racist* would violate the Amendments, notwithstanding having attached a chapter of this book to his April 15, 2022 op-ed (*see Ex. 40 (Depo. Ex. 14)*, at PL00742-745) and citing the same book in his July 8, 2021 remarks before the State Board of Education for the purpose of referencing the Amendments and rebutting the claim of "people [who] will say like, well, this doesn't happen in New Hampshire," *see Ex. 56*. At deposition, he said that would depend on if the text of the Amendments was violated.⁶⁷

118. The Commissioner testified that educators are the ones who are best left to determine what constitutes "teaching," "instruction," or "inculcation" under the Amendments.⁶⁸

group is inherently racist, that one group receives adverse treatment or should receive adverse treatment and should be discriminated against or receive adverse treatment solely because of those characteristics or that they cannot and should not attempt to treat others without regard to those items. So those are the four salient questions that I think an educator would ask relative to any content. Am I teaching that the inherent superiority, the inherently racist, the adverse treatment, and to not attempt to treat others without regard to.""; "Q. Even with that, if an educator still had a question and thought it was maybe a little bit less clear than you seem to think it is, could they come to you for advice with respect to how to comply with HB 2? A. So right now we're in the midst of a lawsuit with HB 2. So most of the questions that we would have would probably end up as a question for perhaps the Human Rights Commission to answer."); 167:9-169:4 ("Q. So you wouldn't answer if they had a follow up question, is Dr. Kendi's book, if I teach it, is that covered under the statute, you wouldn't be able to answer that question? MR. KENISON-MARVIN: Objection. Vague. A. So I would, and I would answer that question for the educator principally by looking at the Q & A but principally coming back to RSA [193]:40, and I would say are you teaching, inculcating, or are you compelling to express a belief in or support for any one or more of the following; that one's immutable characteristics are inherently superior, that an individual by virtue of these immutable characteristics is inherently racist, sexist or oppressive or that an individual should be discriminated against because of these immutable characteristics and that people cannot and should not attempt to treat others without regard to these immutable characteristics, and I believe in that conversation with an educator given the highly educated state and status of our educators that they would be able to understand that and apply that to their pedagogy.").

⁶⁷ *See* Edelblut Depo. 171:7-172:10 ("Q. Given that you referenced that text during the July 8, 2021, Board of Education meeting, if I taught that chapter, if I'm a middle school teacher in Exeter, would I be violating HB 2? MR. KENISON-MARVIN: Objection. A. So that would depend on whether you are teaching, instructing, inculcating or compelling to express a belief in or support for any one or more of the following. That one's age, sex, gender identity, sexual orientation, et cetera, are inherently superior to other, that they are inherently racist, that they receive adverse treatment solely or partly because of or that they cannot or should not attempt to treat others without regard to these immutable characteristics.").

⁶⁸ *See* Edelblut Depo. 66:3-5, 75:7-20 ("Q.... You would have no problem with a teacher putting forward Mr. Kendi's book and focusing on that paragraph. [Vagueness objection]. A. So the teacher themselves would be in the best position to know if they are teaching, instructing, inculcating or compelling to express a belief in or support for any

119. Commissioner Edelblut also added that the DOE has no adjudicatory authority under the Amendments and RSA 193:40, instead deferring to the HRC and indicating that the HRC would have to first make a finding of discrimination under the Amendments before DOE involvement.⁶⁹ DOE Investigator Farrell referred similar questions about whether teaching specific texts would be covered to the school district's counsel and to DOE Attorney Diana Fenton.⁷⁰ And Attorney Fenton referred these questions to the HRC.⁷¹

one or more of the following, as I've repeated, that one's age, you know or this immutable characteristic is inherently superior to another one. The teacher themselves have clarity of the action that they are doing at that time. I have a hypothetical construct that is really limited."), 171:23-172:10 ("Q. Besides reading that statue though, you can't tell me whether if I taught that I'm violating the law, right? A. I would have to see how it's being used in this context. When you say 'if I taught that,' there is not a content standard. There is an activity standard. So I would have to see it in this context, and again, *I think that the best person to know if they're violating these statutes really are the individuals who are actually doing the teaching.*") (emphasis added).

⁶⁹ See Edelblut Depo. 65:8-10 (stating that the "adjudication of that [whether a teacher could teach that affirmative action is a wonderful thing] is something that would be made by the Human Rights Commission"), 67:10-11 ("My response is not to adjudicate whether or not they are violations of the particular law"), 67:23 ("So my responsibility is not to adjudicate [HB2]"), 70:5-15 ("I don't have adjudicatory responsibility" for HB2), 153:16-20 ("So I will start with the fact that it's not my job, it's not within the purview of my responsibility to adjudicate whether or not certain actions by an educator would be some type of an action under 193:40."), 159:16-160:2 ("Even with that, if an educator still had a question and thought it was maybe a little bit less clear than you seem to think it is, could they come to you for advice with respect to how to comply with HB 2? A. So right now we're in the midst of a lawsuit with HB 2. So most of the questions that we would have would probably end up as a question for perhaps the Human Rights Commission to answer.").

⁷⁰ See Farrell Depo. 149:8-150:19 ("Q. If I'm a teacher, and I want to sign a book, and I'm unsure if it's covered under HB 2, could I call the Department of Education and get an answer as to whether a book is covered or not? A. I don't know the answer. I know I have never taken such a call."; acknowledging that, "besides inviting that superintendent to reach out to his district counsel, [his] other likely response would be to talk to [Farrell's] supervisor [Diana Fenton]"), 166:7-167:3 ("Q. Okay. If I were a teacher, though, and I read Commissioner Edelblut's op-ed, and I read the book *How to Be an Antiracist*, and I thought I would want to include it in a high school class, how would I get an answer as to whether that book is covered or not? A. Well, I think I would begin at the local level. Q. Okay. A. I would go to my principal or my department head, principal, curriculum director, superintendent, and the local elected school board. I think it's important to note that New Hampshire is a local-control state, and I would think that that would be my first series of steps. Q. And if I were a teacher and I couldn't get that answer from my superintendent [as to whether *How to be an Antiracist* by Ibram X. Kendi is covered under the Amendments], could I get that answer from the Department of Education as to whether or not this particular book is covered under HB 2? A. I think that that question would ultimately go to Diana Fenton.").

⁷¹ See Fenton Depo. 105:10-106:2 (in response to the question of, "[i]f an educator reached out to you with individual circumstances that they thought was unclear, and they reached out to try to obtain clear guidance from the Department [of Education], would they currently get it?," stating in part that these "matters falling with HB 2 are to be handled by the Human Rights Commission," and, "[i]f anything, I would refer that individual to ... the frequently asked questions created by the Attorney General's office"); see also *Ex. 60 (Depo. Ex. 10)* (in responding to a superintendent's question of whether "is there somebody at the DOE who can speak with a teacher and principal ... about what she can say or not say regarding issues that might pertain to divisive topics," DOE Attorney Fenton stating in part that "divisive topics is handled by the Human Rights commission").

120. When Plaintiffs asked HRC Assistant Director Cohen questions about what specific books would be covered under RSA 354-A:29-24 if taught, she did not answer directly, stating that it is a “complicated question because you have to look at the context of things” and that “I could not give a teacher or complainant legal advice on whether them teaching that would make a charge or not.” Cohen Depo. 93:7-23, 94:1-19. Instead, she “would suggest that the educator read the law, read the [July 2021] FAQs that are available as well as the [September 2021] opinion issued by the Attorney General's office.” *See id.* 95:21-96:8. And if there are further questions, Assistant Director Cohen testified that “I would suggest they contact their legal counsel for legal advice.” *See* Cohen Depo. 96:9-17; *see id.* 94:21-22, 95:12-20. Commissioner Edelblut similarly told at least one superintendent that he should ask his district’s counsel if he had questions under the Amendments. *See Ex. 57*, DOE 856-57 (“[i]f you have questions about the material, I would encourage you to reach out to your district’s legal counsel”).

121. Lawyers who regularly represent school districts have concluded that the Amendments are ambiguous. For example, attorneys at the law firm Drummond Woodsum—who represent many school districts throughout New Hampshire—have conducted trainings for educators on behalf of their education institution clients. The attorneys’ materials explained the Amendments’ ambiguity. For example, these lawyers highlighted as a “*gray area*” the following: (i) “[p]rograms that involve discussion of power structures or power imbalances in society”; and (ii) “programs that involve advocating for ... [a]ffirmative action to promote equity, [r]eparations for past wrongs, [and] [w]hite privilege.” *See Ex. 87* (Drummond Woodsum August 5, 2021 Presentation). These lawyers also added that a “gray area” includes “[d]iscussions regarding power structures in present-day society,” and “[d]iscussions of cultural sensitivity.” *Id.* These lawyers further explained that: (i) “The state guidance [issued on July 21, 2021], while helpful,

does not fully resolve many of the concerns caused by the use of imprecise or vague language in the new law;” (ii) “The law is difficult to understand, often relying on double-negative sentence construction and undefined terms, which will have a chilling effect on otherwise lawful academic discussions”; and (iii) “One of the biggest compliance issues is how to appropriately monitor and control classroom discussions while lawfully regulating student speech.” *Id.*

122. Plaintiff NEA-NH has counsel on staff routinely representing educators in Code of Conduct matters. They similarly conveyed their view that the Amendments “contain[] ambiguity requiring clarification.” *See Ex. 42 (Depo. Ex. 11).*

123. Neither Commissioner Edelblut, DOE Attorney Fenton, DOE Investigator Farrell, nor Assistant HRC Director Cohen could cite at deposition any example of instruction occurring in New Hampshire before the Amendments were enacted on June 25, 2021 that would be barred under the Amendments’ terms.⁷²

VII. Complaints Under, and Defendants’ Enforcement of, the Amendments

124. After the issuance of the DOJ’s September 7, 2021 opinion, HRC Director Malachi emailed to the DOE the intake questionnaire used by HRC under the Amendments. *See Ex. 47 (Depo. Ex. 58)* (HRC Int. Resp. No. 7).

⁷² *See* Edelblut Depo. 174:2-8 (“Q. Can you identify, Commissioner, an incident of instruction that occurred in New Hampshire before HB 2 that would violate HB 2 had it been in effect at the time the instruction occurred? MR. KENISON-MARVIN: Objection. Vague. Calls for legal contention. A. I’m not familiar with any.”); Fenton Depo. 172:23-173:9 (“Q. How about specific books? Are there books that you know of that were—could have previously been taught and now cannot be taught because of HB 2? MR. KENISON-MARVIN: Same objection. You can answer. THE WITNESS: I’m not aware of any exact books, no. BY MR. KAHNE: Q. Any material at all? Instructional material? MR. KENISON-MARVIN: Same objections. THE WITNESS: No, I am not aware of any books or instructional material.”); Farrell Depo. 170:20-24 (“Q. So based on your communications with Commissioner Edelblut, are you aware of any instruction that previously occurred in New Hampshire before HB 2 that now could not occur in New Hampshire? A. I don’t know of any.”); *see also id.* 169:12-18 (stating that he did not believe there have been direct conversations within the DOE “about instruction that had occurred in New Hampshire that would be banned by HB 2”); Cohen Depo. 35:15-23 (“Q. Sure. I guess what I’m trying to figure out is could you identify, are you aware of any instruction that occurred by an educator in New Hampshire before the enactment of the amendments that would have violated the amendments had the amendments been in effect during that time of instruction? MR. KENISON-MARVIN: Same objections. A. No.”).

125. Commissioner Edelblut and the DOE, on or about November 10, 2021, published a website and press release inviting members of the public to file complaints against teachers under the Amendments. *See Ex. 88 (Depo. Ex. 21)* (website as of Nov. 10, 2021); *Ex. 89 (Depo. Ex. 25)* (Nov. 10, 2021 DOE Press Release). The DOE website contains the HRC intake questionnaire that can be sent directly to the HRC.

126. DOE Attorney Fenton testified, in part, that, because “there was so much information that was coming into the Department of Education, which, again, may or may not have fallen within the purview of [the Amendments],” the DOE “wanted to provide a resource, for lack of a better term, by which individuals could directly file those complaints with the Human Rights Commission.” *See* Fenton Depo. 160:13-161:2.

127. The DOE’s November 2021 website initially (and before it was later deleted) included the email address of a DOE employee, Kate Walker, who could field inquiries directly. *See Ex. 88 (Depo. Ex. 21)* (website as of Nov. 10, 2021); *see also* Fenton Depo. 167:3-7 (noting removal of Kate Walker’s name from the website; while not knowing why Ms. Walker’s name was removed, Ms. Walker had expressed some hesitation about having her name on the website).

128. The DOE initially included a DOE employee as a person to field complaints even though Defendants’ July 21, 2021 FAQs said that complaints should be sent to the HRC or the New Hampshire Office of the Attorney General. *See Exs. 41 (Depo. Ex. 9), 44 (Depo. Ex. 24), 45 (Depo. Ex. 55)*.

129. The DOE established and advertised this website even though, to the best of Plaintiffs’ knowledge, the DOE has not established a similar, specific website for violations of

other provisions of the Law Against Discrimination at RSA 354-A:27-28 or RSA 193:38-39 that were added in 2019 to apply to public schools.⁷³

130. As of August 10, 2023, the DOE’s complaint website⁷⁴ does not mention the Attorney General’s September 7, 2021 opinion purporting to interpret the Amendments’ provisions.

131. In response to the DOE’s complaint website announced on November 10, 2021, the group “Moms for Liberty NH” published a tweet on November 12, 2021. The tweet stated the following:



⁷³ See Department of Education, Complaints and Concerns, <https://www.education.nh.gov/who-we-are/commissioner/complaints-and-concerns>; see also RSA 354-A:27-28 (added in 2019, and stating, in part, that “[n]o person shall be excluded from participation in, denied the benefits of, or be subjected to discrimination in public schools because of their age, sex, gender identity, sexual orientation, race, color, marital status, familial status, disability, religion or national origin, all as defined in this chapter”); RSA 193:38-39 (added in 2019, and stating, in part, that “[n]o person shall be excluded from participation in, denied the benefits of, or be subjected to discrimination in public schools because of their age, sex, gender identity, sexual orientation, race, color, marital status, familial status, disability, religion, or national origin, all as defined in RSA 354-A”).

⁷⁴ See Department of Education, *Right to Freedom from Discrimination in Public Workplaces and Education*, <https://www.education.nh.gov/who-we-are/deputy-commissioner/office-of-governance/right-to-freedom-from-discrimination>.

132. One educator, in a November 15, 2021 email to the DOE responding to this development, raised grave concerns about these tactics. The educator feared that “people will be rushing to report educators for even broaching the topics of racism, sexism, or other forms of discrimination along the lines of a McCarthy-era witch hunt.” Ex. 73.

133. The DOE was aware of this bounty after it was published, as Moms for Liberty directly emailed Commissioner Edelblut on November 15, 2021 notifying him of the bounty. *See Ex. 90 (Depo. Ex. 41)* (Mom’s for Liberty email to Commissioner Edelblut); *see also Ex. 72 (Depo. Ex. 22)* (DOE internal email about bounty). DOE Attorney Diana Fenton found the bounty “very upsetting.” *See Fenton Depo. 164:18-20*.

134. The Northwood GOP told Commissioner Edelblut on November 21, 2021 that his “new website addition for parents to report concerns is exactly what NH parents needed!” *See Ex. 59 (Depo. Exs. 37, 52)*.

135. After the Amendments’ enactment, the HRC similarly posted on its website an intake questionnaire form for potential violations under the Amendments. *See Exs. 49 (Depo. Ex. 60), 91 (Depo. Ex. 61)*. The form originally had a line asking complainants whether they had filed a “complaint[] with another entity,” including the “Court,” “NH DOE,” or “Other.” *See Ex. 34 (Depo. Ex. 72)* (December 2021 questionnaire containing line). The HRC, at some point, deleted this line from the questionnaire form. *See Ex. 49 (Depo. Ex. 60)* (current questionnaire not containing line). Assistant HRC Director Cohen testified that she supposes that there was public confusion about where to file a complaint shortly after the passage of the Amendments. *See Cohen Depo. 107:7-17*

A. Department of Education Complaints and Investigations Under the Amendments, and the Commissioner’s April 15, 2022 Op-ed Highlighting Some of These Complaints

136. The DOE, including the Commissioner himself, received complaints after the Amendments were enacted and took action. As detailed below, the Commissioner has forwarded complaints to his staff tasked with enforcing the Code of Conduct.

137. For example, a parent complained in an August 27, 2021 email to Commissioner Edelblut that his “sons have been informed by high school teachers that they are inherently racist and sexist because they are white males I do hope this Bill makes a difference.” The Commissioner responded that day: “If you could share with me the names of those educators (if the incident happened after 6/29/2021, the effective date of the statute) I would be happy to look into it.” *See Ex. 66; see also Ex. 67* (in October 21, 2021 email from Commissioner Edelblut to a superintendent, Commissioner Edelblut indicating that he tried to call the superintendent with respect to a person’s September 23, 2021 email to that superintendent where that person stated, in part, that “[e]xamples of discriminatory ideas [under the Amendments],” include “[w]hite privilege,” “[w]hite guilt,” and “[e]quity”).

138. Additional DOE complaints referencing the Amendments are detailed below. Some of these complaints led the DOE to engage in varying degrees of inquiries, including using other potential violations (especially under RSA 186:11, IX-c and RSA 186:11, IX-d) to investigate or elevate these complaints to superintendents:

- a. *Good Kind of Trouble* Complaint: In August 2021, a 2019 book by Lisa Moore Ramée entitled *A Good Kind of Trouble*—which was written by a woman of color for 8-12-year-old readers about a 12-year-old girl of color in a predominantly White school—was the subject of a DEI/“critical race theory” complaint where the book was part of a “read along” in a fourth-grade class in approximately May or June 2021, before the Amendments were enacted. The parent claimed that the read along violated her child’s civil rights, and noted that she “will work as hard as [she] can to get DEI/CRT out of [the district].” The superintendent, the teacher, and Commissioner Edelblut were copied on

the complaint. *See Ex. 69 (Depo. Ex. 19)*. Portions of this book are attached to the declaration of Plaintiff Andres Mejia. *See Ex. 15*, Mejia Decl. ¶ 16.

In response, the Commissioner spoke to the parent, called the superintendent in August 2021 (*see Ex. 69 (Depo. Ex. 19)*), personally read the book in October 2021 after asking DOE Attorney Fenton to obtain it, and met with the superintendent in October 2021 so he could convey “there was a parent who was concerned about the content of this book.” *Exs. 92 (Depo. Ex. 33), 93 (Depo. Ex. 38)*; *see also* Edelblut Depo. 26:1-4, 28:17-18, 30:19-33:1, 55:18-56:16 (“So I would assume as the superintendent they would want to know if they have a parent who is upset about something happening in their instructional environment so I’m trying to bring that to their attention.”), 57:6-58:15. Commissioner Edelblut testified at deposition that he recalled thinking that the book was poorly written. *Id.* 31:13-19.

In an October 1, 2021 email to various school district and DOE officials (as well as Commissioner Edelblut), the parent conveyed her understanding that the Commissioner “informed [her] that anything that contains **equity and inclusion** or sexual content, parents must be given a 2-week notice.” *See Ex. 94*, DOE-07022 (emphasis in original). The parent likely was referring to RSA 186:11, IX-c, which requires districts to have a policy allowing an exception to specific course material based on the parent’s determination that the material is objectionable, and which requires not less than two weeks advance notice for instruction of human sexuality or human sexual education.

This parent also sent an email to Defendant Commissioner Edelblut on October 7, 2021 stating that the “so-called professionals that are allowing this in school need to be disciplined!” The parent complained that the “book has an underlying tone that white people and police officers are against black people all the way down to how white people look at a black person.” Further, she objected to certain so-called “gender books” being read. The parent concluded by asking Commissioner Edelblut, in part, “[w]hat disciplinary action will result?,” and “[h]ow do we proceed? Do I need to get a lawyer?” *See Ex. 95*, PL00560-61.

- b. Zinn Complaint: On September 3, 2021, a woman shared with Commissioner Edelblut and legislators a May 24, 2021 email that had been sent by a parent, who then had a third-grade student in the school system, to the school district’s superintendent. The May 24, 2021 email from the parent complained about a teacher, prior to Columbus Day, reading from Howard Zinn’s 1980 book *A People’s History of the United States* “emphasizing the Marxist activist’s condemnation of Christopher Columbus.” *See Ex. 96 (Depo. Ex. 16)*. The parent also complained of statements like “White people cause racism” that were alleged to have been heard over the year. The complaint stated, in part, that “[t]he indoctrination has to stop” and that “CRT is already in our schools, whatever name it uses, and it starts early in our kids’ education.” *Id.*

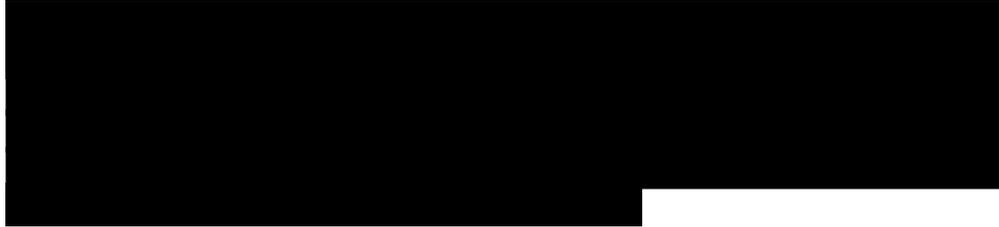
Commissioner Edelblut forwarded the email on September 3, 2021 to DOE Attorney Diana Fenton stating that “we need to look into this,” and that “[t]he events happened prior to the anti-discrimination law [the Amendments], but— if true—certainly would be considered unprofessional.” *Id.* On September 7, 2021, Attorney Fenton responded to the Commissioner, stating “Thank you— we will look into it.” *Id.* On September 3, 2021, Commissioner Edelblut wrote to the complainant stating that, “[i]f I open an inquiry on the referenced educators, would this woman [the parent] be willing to provide testimony to our investigator?” *See Ex. 97 (Depo. Ex. 17).*

At deposition, Attorney Fenton could not recall if she had conversations with the complainant who shared the email or what exact step she took. Fenton Depo. 129:6-7, 20-25. However, she testified that, generally, her “typical process would be to have Richard Farrell call the superintendent and find out more information about the underlying issue.” *See* Fenton Depo. 129:12-19. She added that, generally, before a determination is made as to whether this would be a code of conduct issue, there would “still be outreach to the superintendent, potentially to the complainant.” *See* Fenton Depo. 130:10-12.

[REDACTED]

[REDACTED]

[REDACTED]



- d. White Like Me Complaint: On December 13, 2021, a parent emailed Commissioner Edelblut directly complaining about a 2013 film entitled “White Like Me: Race, Racism & White Privilege in America; featuring Tim Wise” being shown to eighth graders in a school district. The parent said that “[t]he film should not be shown at all, as it is clearly CRT, and in direct violation of NH Bill ‘HB 2 Sections 297 and 298, Right to Freedom from Discrimination in Public Workplaces and Education.’” See Ex. 68 (Depo. Ex. 15). This email apparently followed a conversation that the parent had with Commissioner Edelblut.

Commissioner Edelblut forwarded the complaint to DOE Attorney Diana Fenton, stating that this part of the email was for then DOE Attorney Christopher Bond. *Id.* DOE Attorney Diana Fenton and DOE Investigator Richard Farrell could not recall if the DOE took any action with respect to the film (Mr. Farrell testified that his interactions with the district were focused on other aspects of the parent’s complaint and not the Amendments). Fenton Depo. 125:21-126:9; Farrell Depo. 161:2-5, 161:17-162:11.

However, it does appear that either the DOE or Commissioner Edelblut directly elevated this complaint concerning the Amendments directly to the attention of the district’s superintendent, who perceived the Amendments as being implicated. In response, the superintendent told the Commissioner the following: “Out of context, and given the title of the film, it would be easy to assume that the use of the film ... would be inappropriate to show in the classroom given the recently passed legislation in NH. However, when put into real teaching and learning context, I don’t believe that to be the case in this situation.” See Ex. 57, DOE857 (emphasis added). The Commissioner responded, stating that “I want to clarify that I was simply passing along a parent concern that had come to my attention.” While stating that the HRC or Superior Court adjudicates violations of the Amendments and that the DOE does not have a role, the Commissioner stated that he “simply wanted to alert you to a parent complaint.” He added that “[i]f you have questions about the material, I would encourage you to reach out to your district’s counsel.” See Ex. 57, DOE857.

Demonstrating the scope of the Commissioner’s enforcement authority, the Commissioner concluded the email by stating that the superintendent “might want to consider whether your district’s ‘opt-out’ policy under RSA 186:11, IV-c is applicable to this parent concern.” *Id.*⁷⁵

- e. “No Left Turn” Complaint: On February 7, 2022, Michael Breen of the group “No Left Turn in Education” wrote to the DOE with “evidence of probable widespread violation of the Education Codes of Conduct.” *See Ex. 100 (Depo. Ex. 26)*. The letter complained that multiple New Hampshire educators promised “to openly violate any such prohibitions that might become law.” The letter went on to state that, “[o]f the sixty-two individuals who asserted they were New Hampshire educators, 35 were confirmed as such by the N.H. Department of Education.” *Id.*; *see also Ex. 101 (Depo. Ex. 27)* (DOE receiving No Left Turn press release). The letter added that this was “more than enough for” the State Board of Education to act and open an investigation into the signatories because “[t]he Educator Code of Conduct itself states that ‘the department [of education] shall undertake an investigation’ of an educator if the department merely ‘has reason to suspect’ that the educator knowingly failed to report a violation of the Codes.” *See Ex. 100 (Depo. Ex. 26)* (emphasis in original).

Prior to the submission of this letter, Commissioner Edelblut, on December 28, 2021, informed Mr. Breen how to find information online concerning New Hampshire educators. *See Ex. 74 (Depo. Ex. 43)*.

Some superintendents reached out to the DOE in response to this letter because they were concerned. Farrell Depo. 77:21-78:4. In response to a February 9, 2022 email from an interim superintendent asking whether the district should investigate, DOE Investigator Richard Farrell stated on February 14, 2022 that—after consulting with the Attorney General’s Office—the DOE had no interest in the allegations because the “signatures (if confirmed) were affixed to the ‘pledge’ prior to HB2 becoming law.” *See Ex. 102 (Depo. Ex. 28)*.

- f. Human Relations Materials Complaint: On April 4, 2022, M.P. emailed Commissioner Edelblut various attachments and wrote: “A Human Relations teacher at [a] High School gave these worksheets out to students. Is this allowed?” The worksheets, among other things, addressed “diversity bingo,”

⁷⁵ RSA 186:11, IX-c requires 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” *See* RSA 186:11, IX-c.

as well as racial, gender, disability, religious, sexual orientation, and other identities. *See Ex. 103 (Depo. Ex. 18).*

The next day, Commissioner Edelblut forwarded this email and attachments to DOE Attorney Diana Fenton, who then forwarded the email and attachments to DOE Investigator Richard Farrell with the text “[c]an you look into this?” *Id.* Mr. Farrell then forwarded the attachments to the district’s superintendent.

On April 7, 2022, the superintendent wrote Mr. Farrell, stating that “[w]e have had the opportunity to review the material that you’d sent and have the following information for you in response to the inquiry.” He explained that “the activities identified are from the Human Relations Course at [the district’s high school],” and that the district has concluded that the attachments “do fall within the scope of the course.” He noted that the syllabus included parental notification and an invitation for parents to review class assignments. He added that he was told that all parents submitted acknowledgments, and that no complaints had been received.

Mr. Farrell testified that he “talked a couple times” with the superintendent, “provided [the material] to him, talked to him about it, got additional information ... and then we met and discussed the matter with Attorney Fenton.” Farrell Depo. 123:1-7. Mr. Farrell engaged in this inquiry even though “he didn’t do anything with the material in terms of educator misconduct.” *Id.* He testified that he was not looking at whether the worksheets implicated the Amendments, and rather guessed that the focus instead was on whether the opt-in rules for nonacademic surveys were followed at RSA 186:11, IX-d, *see* Farrell Depo. 102:2-3, 105:24-106:15, 108:22-109:22, 123:8-22.⁷⁶ However, the superintendent apparently assumed that the Amendments were implicated, adding in his April 7, 2022 email that “[w]e have also reviewed this material through the lens of the new *Divisive Concepts law*, and find that the subject of these activities do not apply.” *See Ex. 103 (Depo. Ex. 18)* (emphasis added); Farrell Depo. 123:1-7 (acknowledging that he spoke with the Superintendent a couple times, provided the worksheets to him, got additional information, and then discussed it with Attorney Fenton). Mr. Farrell forwarded the Superintendent’s email to other DOE staff, including the Commissioner. The Commissioner responded, stating: “Can we discuss in our next meeting? Looking at the ‘opt out/in’ content, I would say that the content

⁷⁶ It is not entirely clear that these worksheets even constitute “a non-academic survey or questionnaire” on their face under RSA 186:11, IX-d. In any event, Mr. Farrell acknowledged at deposition that violation of the opt-in law with respect to nonacademic surveys at RSA 186:11, IX-d can be considered a violation of the Educator Code of Conduct. *See* Farrell Depo. 110:12-18, 111:22-112:7. However, there does not appear to be an explicit statute deeming a violation of RSA 186:11, IX-d as a violation of the Educator Code of Conduct, which demonstrates the breadth of how the DOE perceives its authority. *See* Farrell Depo. 130:12-132:2 (“Q. Which—which provision of the code [of conduct] would that [the statutory requirement that there be a parental notification and opt-in] violate? MR. KENISON-MARVIN: Objection. Legal conclusion. THE WITNESS: Well, again, you’d have to ask my superior that. I just—my bottom line is that I’ve been told if there is a question about opting into a nonacademic survey, we will investigate it as a possible code of conduct violation.”). Unlike RSA 186:11, IX-d, RSA 193:40, IV makes explicit reference to the Educator Code of Conduct.

of the materials may not match the relatively benign syllabus.” Ms. Fenton responded that “Yes, we need to discuss at our next ed misconduct meeting in further detail.” *Id.*

While this complaint triggered inquiries to the Superintendent, DOE Attorney Fenton testified that, “[t]o the best of my knowledge, sitting here today, this matter would not have prompted an investigation to have been opened, nor would it have been a violation of the code of conduct” Fenton Depo. 142:16-20.

One week later, on April 15, 2022, Commissioner Edelblut cited these documents in an op-ed in which he argued that educators were overstepping and that “biases are beginning to seep into our own institutions.” *See Ex. 40 (Depo. Ex. 14)*, at PL00696-700 (attaching Human Relations Course syllabus), PL00736-737 (attaching worksheets). [REDACTED]

g. “Actively Unwoke” DEI Complaint: [REDACTED]

[REDACTED] K.B.’s complaint also became the subject of an online article (*Ex. 27 (Depo. Ex. 65)*) and a series of tweets (*Ex. 29 (Depo. Ex. 67)*). There, she not only attacked DEI training as violating the Amendments (including the second banned concept), but also the fact that the district’s Racial Unity Project apparently worked with English teachers about ways to re-teach Harper Lee’s 1960 book *To Kill a Mockingbird* “through the lens of underrepresented characters,” which will “serve[] as an entry point into critical conversations about race and equity.” *See Ex. 29 (Depo. Ex. 67)*, at PL00629; *Ex. 27 (Depo. Ex. 65)*, at 10 of 19.

On August 24, 2022, DOE Investigator Farrell, in part, responded that “Commissioner Edelblut has forwarded your inquiry directly to Ahni Malachi (HRC) on 19 August 2022 for her review.” *See Ex. 105 (Depo. Ex. 29)*. Commissioner Edelblut could not remember whether he forwarded this inquiry to the HRC, *see* Edelblut Depo. 132:9-16, but DOE Investigator Farrell testified that, “[i]f I wrote that he did, then he did.” *See* Farrell Depo. 88:16-24 (noting that “Commissioner does what the commissioner wants to do. I’m not his boss.”). HRC Assistant Director Cohen also testified that the HRC has “received referrals from the Department of Education,” but “[g]enerally we ask that the referring agency tell the person to contact us directly.” Cohen Depo. 102:14-103:1.

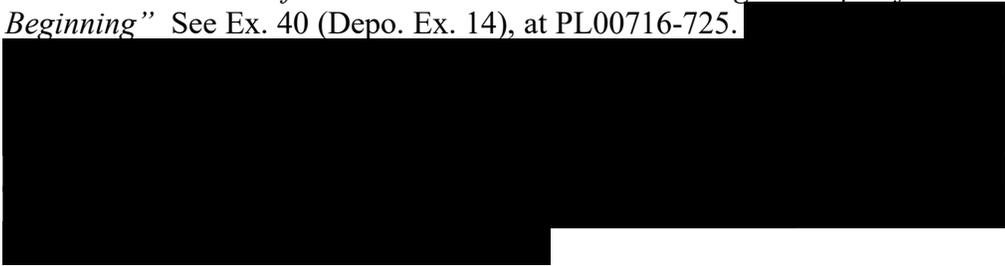
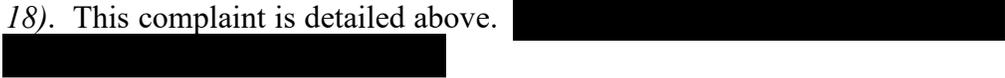
- h. *This Book is Anti-racist Complaint*: On September 1, 2022, a parent complained about a book entitled *This Book is Anti-racist* that was apparently accessible on the school district's Sora application—an application that gives students one-tap access to ebooks, audiobooks, Read-Alongs, magazines and other materials on electronic devices. The parent complained that the book is “blatantly racist” and “direct[s] kids to redistribute wealth from those who earned it, giving it to those who didn't.” The parent stated that the “book openly denies any and all racism exists against whites,” and that, “[a]s a person who has experienced white racism, I KNOW this is untrue.” She added that “[i]t violates the law put into place to protect against this exact thing, racism,” and that students “have a right to educational materials that aren't racist or sexually educational.” She explained that she wants “to protect students by way of following our laws,” and that the Sora application and its “Sexist and racist curriculum violates our laws.” She asked Commissioner Edelblut “to investigate and keep sex Ed and racist texts and teachings, out of our schools, per the law.” See Ex. 106 (Depo. Ex. 39) (emphasis added).

In response, Commissioner Edelblut said, “[i]f you can give me a call to discuss the below, that would be helpful,” apparently referencing his cell phone number. He then forwarded the email chain to DOE Investigator Richard Farrell the next day to take any action he deemed appropriate. *Id.*; Edelblut Depo. 39:12-13.

Though the complaint appears to have referenced the Amendments, Commissioner Edelblut testified that he did not go through the exercise of evaluating whether the content mentioned by the complainant would violate the Amendments. Instead, the DOE viewed the complaint as creating questions of how does a “student access it [the Sora application]” and “what are the protections that are afforded relative to this application.” Edelblut Depo. 48:11-14. He stated that “there was concern that when a student is outside of the school environment and outside of the school's either devices or firewall that there may be an opportunity for that student to use a third party device to use their log-in to access the app and access material that may be developmentally inappropriate for those students.” Edelblut Depo. 49:1-8. In other words, concerns about a book apparently under the Amendments led the DOE to engage in an investigation of the Sora application at this district out of a concern that students may be accessing books that are “developmentally inappropriate.” This culminated in “a number of conversations,” including with the superintendent and library so controls were in place. Edelblut Depo. 49:10-22.

139. On April 15, 2022, Commissioner Edelblut published an op-ed entitled “Education's Sacred Trust.” See Ex. 40 (Depo. Ex. 14). This op-ed argued, among other things, that “[r]ecent experiences in New Hampshire show that some of these biases are beginning to seep into our own institutions.” This op-ed also attached a document containing examples that, in his

view, “exemplifies actual instructional material from New Hampshire schools that parents have identified as conflicting with their values.” *See Ex. 40 (Depo. Ex. 14)*. Many of these attachments directly implicated the Amendments, including some of the complaints that the DOE itself had directly received under the new law:

- a. The Book Stamped: Printouts of Jason Reynolds/Dr. Ibram X. Kendi’s 2020 book for individuals ages 12 and older entitled *Stamped: Racism, Antiracism, and You: A REMIX of the National Book Award-winning “Stamped from the Beginning”*. *See Ex. 40 (Depo. Ex. 14)*, at PL00716-725. 
- b. Human Relations Materials Complaint: An April 4, 2022 complaint to the DOE from M.P. concerning diversity materials provided in a Human Relations course that, in response to inquiries from the DOE, led to the superintendent to “review[] this material through the lens of the new Divisive Concepts law.” *See Ex. 40 (Depo. Ex. 14)*, at PL00696-700, 736-737; *see also Ex. 103 (Depo. Ex. 18)*. This complaint is detailed above. 
- c. This Book is Antiracist: Chapter 10 of the 2020 book *This Book is Anti-Racist* by Tiffany Jewell. *See Ex. 40 (Depo. Ex. 14)*, at PL00742-745. Commissioner Edelblut also cited this specific chapter in his July 8, 2021 remarks before the Board of Education where he referenced the Amendments and argued that this book rebuts the claim of “people [who] will say like, well, this doesn’t happen in New Hampshire.” *See Ex. 56* (Transcript of July 8, 2021 remarks). A district’s purchase of this book was used by a person, in January 2022 written testimony, to argue why the legislature should not repeal the Amendments. *See Ex. 107*, BAN00690, 694. Indeed, boxes of this book were bought by one district, but were then set aside by the district particularly because of concerns about the Amendments. Some community members in that district cited this book in public meetings as evidence of why DEI work should not occur in schools. *See Ex. 15*, Mejia Decl. ¶ 16.
- d. Exploring Whiteness Course Summary: A course summary of a class entitled “Exploring Whiteness and becoming an Anti-Racist Activist.” *See Ex. 40 (Depo. Ex. 14)*, at PL00749-58. This is the same summary submitted by a parent to the legislature in support for why HB544 was necessary. *See Ex. 108 (Depo. Ex. 49)* (from HB544 legislative history at Docket No. 43-1); Edelblut Depo. 139:1-7 (agreeing that “the syllabus on Exhibit 49 that Mr. Richards

submitted to the House Executive Department’s Administration Committee is the same document that you received from Mr. Richards, a portion of which you attached as Topic Ten to Exhibit 14”). The course was apparently an “elective class that students signed up for in a specials week that they have.” Edelblut Depo. 174:19-20.

B. Human Rights Commission Complaints Under the Amendments

140. Since the enactment of the Amendments on June 25, 2021, there have been approximately [REDACTED] allegations of discrimination submitted to the HRC in various forms complaining that specific educators and school districts were violating the Amendments. The HRC has deemed one these complaints as presenting a *prima facie* claim of discrimination under RSA ch. 354-A and, as a result, has formally docketed the complaint [REDACTED] [REDACTED] See Ex. 47 (Depo. Ex. 58) (HRC Int. Resp. No. 6) (“The HRC Defendants can confirm that the HRC has docketed one complaint made under the amendments.”), Resp. No. No. 5 (“At the time of this response, no complaint brought under the amendments has been fully adjudicated by the HRC.”). The remaining complaints are either pending review, have not been responded to or resulted in agency action for various reasons, or have been denied as presenting a *prima facie* claim. These complaints are detailed below:

a.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

77

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

78

[REDACTED]



⁸⁰ *Things Fall Apart – Thug Notes: Summary and Analysis*,
https://www.youtube.com/watch?v=0_xtOMiW0ys&list=PLghL9V9QTN0hRGuj-cajzmO_WvTrFnAlq&index=16.
⁸¹ <https://www.youtube.com/@WisecrackEDU/about>.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

141. With respect to complaints made under the Amendments specifically, the HRC Director is always involved in the docketing decision where an inquiry is made as to whether the complaint reaches the *prima facie* threshold of discrimination. Cohen Depo. 23:1-7.

142. The HRC has no obligation to notify the DOE if the HRC decides to docket a complaint under the Amendments or if the HRC concludes that there has been a violation under the Amendments.⁸²

143. The HRC has refused to publicly release to the public (and teachers) information concerning the substance of complaints in which the HRC has determined there is no *prima facie* claim. See Ex. 61; see RSA 354-A:21, II(a) (“the commission may publish the facts in the case of any complaint which has been dismissed, and the terms of conciliation when the complaint has been so disposed of”).

VIII. Confusion as to Who Enforces RSA 193:40, and the Amendments’ Impact on Extracurricular Speech

144. Two HRC witnesses testified that the HRC has no enforcement authority over RSA 193:40, explaining that the entity that enforces RSA 193:40 would be the state department that enforces that section of state law (which, here, would be the DOE). HRC Director Malachi testified as follows:

Q. Okay. I’m just going to direct your attention back to Exhibit 1, and page PL 006 starting at line 23. It goes on to page 7, line 15. So this is the statute RSA 193:40, and when you see that language just let me know.

A. I’m sorry. Line 23 through?

Q. I’m sorry. Line 23 to the next page, line 19, and it’s RSA 193:40 on Exhibit 1.

A. I see it.

Q. Okay. Do you have any authority in enforcing that statute?

MR. KENISON-MARVIN: Objection. Legal contention. You can answer.

A. The [Human Rights] Commission does not have jurisdiction over 193:40.

⁸² See Cohen Depo. 115:11-17 (“Q. Does the HRC have any obligation to notify the Department of Education when there’s been a docketed complaint? A. No. Q. How about when there’s been a finding of probable cause for discrimination? A. No.”).

Q. So if someone brought a claim to the Human Rights Commission under RSA 193:40, your view is you would have no jurisdiction to adjudicate it; is that correct?

MR. KENISON-MARVIN: Same objection.

A. The Commission has jurisdiction over 354-A.

Q. And RSA 193:40 is not within RSA 354-A so is it fair to say in your view you do not believe the Commission has jurisdiction to hear a claim under RSA 193:40?

MR. KENISON-MARVIN: Same objection.

A. As I sit here today it would be my understanding that the Commission only has authority over 354-A.

Q. Do you know sitting here today who would have jurisdiction over a complaint made exclusively under 193:40?

MR. KENISON-MARVIN: Same objection.

A. I do not have expertise in 193 so whose RSA that belongs to would be the body that has authority over 193:40.

See Malachi Depo. 73:5-74:17; *see also id.* 12:18-20 (testifying that RSA 193:40 is “not the statute that I work with”). Similarly, HRC Assistant Director Sarah Burke Cohen testified that she was “not familiar with” RSA 193:40 and that the DOE appears to be the enforcer of its provisions.⁸³ This testimony from Director Malachi and Assistant Director Cohen is consistent with the fact that the HRC’s own intake questionnaire form and “charge of discrimination” form under the Amendments make no reference to RSA 193:40. *See Ex. 49 (Depo. Ex. 60)* (questionnaire); *Ex.*

⁸³ *See* Cohen Depo. 25:5-26:1 (“I can only testify as to 354-A. The remaining sections of 006 and 007 [at Exhibit 1, including RSA 193:40] are not the statute that I am familiar with.”; “Q. Okay. So I just want take make sure I understand your testimony that you’re prepared to, you’re prepared to talk about with respect to complaints in particular those made under 354-A:29 to 34. Correct? A. That is correct. Q. And that’s not the case with respect to RSA 193:40. Is that fair to say? A. That is correct. Q. And I just want to make sure I understand your testimony that is not a statute that you’re familiar with, correct? A. correct.”), 59:9-21 (“Q....With respect to on Exhibit 1, the amendments that have been challenged in this case, with respect to RSA 193:40 on the page Bates stamped 006 to 007, I believe your testimony earlier was you’re not familiar with that section; is that correct? A. Not familiar. Have I read it before, yes. Am I familiar with it, not particularly. Q. Is it the Department of Education that’s tasked with enforcing those provisions? MR. KENISON-MARVIN: Objection. Scope. Calls for legal conclusion. You can answer. A. It appears that is what RSA 193 does.”).

24 (*Depo. Ex. 62*). The “denial” letters sent by the HRC under the Amendments also make no reference to RSA 193:40. See *Exs. 34 (Depo. Ex. 72), 35 (Depo. Ex. 73)* (denial letters).

145. The DOE said the opposite at deposition, insisting that the agency tasked with finding violations of the Amendments and applying RSA 193:40 is the HRC.⁸⁴

146. It is also unclear whether the DOE can make direct referrals to the HRC for violations under RSA 193:40. Defendants have declined to produce documents relating to a purported agreement that was reached between the DOE and the DOJ on or about February 14, 2023 where “a procedural mechanism [was put] in place by which the Department of Education could transfer cases that could or could not fall within HB 2 ... to the Attorney General’s office for their review.” See Fenton Depo. 85:23-86:10; see also *Ex. 65 (Depo. Ex. 6)*, at PL806 (DOE Attorney Diana Fenton testifying before the House Judiciary Committee on March 8, 2023 that “we have since [late January 2023] worked with the AG’s office to come with an SOP as to how we transfer those cases to the Human Rights Commission and the AG’s office”). DOE Attorney Fenton answered “yes” when asked whether the agreement that was reached during that February 14, 2023 meeting has “been in effect since that meeting.” See Fenton Depo. 90:24-91:18. Despite the apparent agreement that is currently in place, Defendants have declined document requests that would help Plaintiffs and this Court learn more about this process. HRC was not invited to these meetings.

147. DOE Investigator Farrell testified what “extra-curricular” means at deposition:

Q. How would you define “extracurricular activities” [referenced in the July 2021 FAQs]?

⁸⁴ See Edelblut Depo. 65:8-10 (stating that the “adjudication of that [whether a teacher could teach that affirmative action is a wonderful thing] is something that would be made by the Human Rights Commission”), 67:10-11 (“My response is not to adjudicate whether or not they are violations of the particular law”), 67:23 (“So my responsibility is not to adjudicate [HB2]”), 70:5-15 (“I don’t have adjudicatory responsibility” for HB2), 153:16-20 (“So I will start with the fact that it’s not my job, it’s not within the purview of my responsibility to adjudicate whether or not certain actions by an educator would be some type of an action under 193:40.”).

- A. Extracurricular activities could be anything from sporting situations, coaching, dance, plays. . . . Anything that happens within the confines of the definition of the Safe Schools Act. So anything—if it’s defined as a safe school, the property of the Safe Schools, anything that happens within the confines of that Safe Schools Act would apply.

...

So, for example, under the Safe Schools Act, a teacher on a bus to and from a field trip, that’s Safe Schools. That’s covered. A teacher that’s becoming a coach and working as a coach, theater, drama. Anything within the curtilage or the extended portion of a school. It gets kind of creative because many hockey programs—for example, hockey rinks are not—they’re private facilities, but if a hockey team for a high school is playing and/or practicing on that facility, it becomes an extension of Safe Schools. So I would say the answer to that would be anything that falls within the curtilage of the Safe Schools definition.

See Farrell Depo. 174:23-177:3. He also testified that the Educator Code of Conduct can apply to educators or credential holders when they are off duty. See Farrell Depo. 197:22-198:1.

IX. The Chill of the Amendments on New Hampshire Educators

148. The Amendments have caused educators and administrators to self-censor with respect to instruction and trainings on race, gender, sexual orientation, and gender identity. Examples of this chill are detailed below.

149. Plaintiff Christina Philibotte, the Manchester School District’s Chief Diversity Officer, testified to the following: “Previously, in conducting DEI trainings before the Amendments and before I assumed the role of Chief Equity Officer for the Manchester School District, I would specifically use terms and concepts like ‘anti-racism’ and ‘anti-bias.’ Because of the Amendments and their penalties, I now rarely use terms and concepts focusing on ‘anti-racism’ in staff trainings—and have advised others to avoid them as well.” See *Ex. 13*, Philibotte Decl. ¶ 15. She added that: “I rarely use the term ‘anti-racism’ because of its connection to Ibram X. Kendi’s 2019 book *How to be an Antiracist*, which the Commissioner of Education cited as a reason why the Amendments are necessary.” See *id.* ¶ 17. Further, she “recommended that

teachers omit reciting during a ‘read aloud’ certain lines of text in Jewell Parker Rhodes’s 2018 book *Ghost Boys*—a book that follows the story of Jerome, a 12-year-old Black boy, who is shot and killed by a White police officer before coming back as a ghost.” *See id.* ¶ 19.

150. Plaintiff Andres Mejia, SAU16’s Director of Diversity, Equity, Inclusion, and Justice, has similarly testified to the following: “As a result of this uncertainty [surrounding the Amendments], instructional choices have been chilled in order to avoid enforcement consequences. Professional development around implicit bias, race, and racism has either been put on hold or modified in ways that prevent or dilute a full discussion of these concepts.” *See Ex. 15*, Mejia Decl. ¶ 13. He added: “[A middle school] has temporarily set aside Tiffany Jewell’s 2020 book entitled *This Book is Anti-Racist* and Beverly Daniel Tatum’s 2017 book *Why are All the Black Kids Sitting Together in the Cafeteria (Revised and Updated edition)* which were to be used by a teacher group for professional development. Boxes of these books were bought by the 2020-2021 principal of that middle school, but were then set aside by SAU16 in the Fall of 2021 after the enactment of the Amendments. These books remain in my office, and I have no ability to know whether they are covered under the Amendments because the Amendments are unclear. Tiffany Jewell’s book was especially set aside because some Exeter Region Cooperative School District community members cited this book in public meetings as evidence of why DEI work should not occur in schools.” *See id.* ¶ 16.

151. A former high school teacher who left her role at the end of the 2022 school year, testified that the Amendments were one of the reasons why she left the profession. She noted that, “[w]hile I was still teaching, even though I may not have been violating the Act, I had to change my teaching methods significantly out of fear that I would be accused of doing so.” For example, she “went from using assessments such as essay questions and open-ended short answer questions

to using only multiple-choice assessments.” Her concern was that in teaching World History—which includes units on different political movements and figures—“essay questions or short answer prompts would be misinterpreted as students believing that they had to agree with a certain position to score well on the assessment.” See *Ex. 14*, Given Decl. ¶¶ 6-7. In addition, she “significantly reduced open discussion and debate of ideas in [her] classroom out of fear that these discussions would be misinterpreted as teaching or inculcating one of the opinions or concept the students were arguing about.” *Id.* ¶ 8. For example, her “World History units cover Marxism, Stalinism, Naziism and other dictatorship regimes. Instead of allowing students to analyze and critique these dictatorships [she] lectured on the topic. It seemed to [her] that an open discussion where students may offer their own personal support for Marxism or Communist ideas or even Nazi ideas was too fraught for [her] to consider regardless of the tremendous amount students can learn while hearing their peers exhibit critical thinking skills.” *Id.* She also “could not accurately answer students’ questions because [she] did not feel comfortable making any commentary other than simply the historical context and facts relevant to their inquiry.” *Id.* ¶ 10. She “severely limited” her use of the “widely understood best practice” where a teacher applies “material to students’ own experiences and interests so that they can identify material and relate it to their own lives”—a practice that “is particularly important in social studies curriculums and historical courses where students can easily believe historical events only happened in the past.” See *id.* ¶ 12. She left the profession “out of frustration because of the frustrating conditions that public school teachers are subjected to,” like the Amendments. *Id.* ¶ 5.

152. An AP English teacher at a high school testified that the Amendments have changed the way he teaches the 1899 book *Heart of Darkness* by Joseph Conrad and the 1987 book *Beloved* by Toni Morrison, as well as the 1899 poem *The White Man’s Burden* by Rudyard Kipling—a

poem that is thematically similar to *Heart of Darkness* and discusses colonialism, imperialism, and racism. *Ex. 12*, Keefe Decl. ¶¶ 9-16. Further, prior to the Amendments’ passage, he would use a technique when assigning books that asked students to “identify whether the legacy of slavery is evident in the modern world? Could they connect the characters’ stories to their own experiences or observations?” *Id.* ¶ 18. He feels “less comfortable placing these books in a contemporary framework and asking students, for example, if they think the Black Lives Matter movement could be considered a result of the destructive legacy of slavery or asking, ‘does the legacy of slavery continue and if so, how?’” *Id.* ¶ 19. Prior to the Amendments’ passage, he would also ask “students to draw on things they saw in the news, popular culture, or their own experiences and use these frameworks to inform their analysis.” *Id.* ¶ 15. He does this because “the state standards require students to be able to write about experiences” (both their own and others), understand different cultures and experiences other than their own, and critically examine the information they receive in the media every day. *Id.* Now, he is concerned about doing so. *Id.*

153. An eighth-grade social studies teacher in Cheshire County has also testified that, “[b]ecause our students learn early American history, including slavery, the Civil War, and Reconstruction, we determined that part of instruction would need to address the history of racism in America.” *Ex. 16*, O’Mara Decl. ¶ 8. Accordingly, after approval by the school board, 250 copies of Jason Reynolds/Dr. Ibram X. Kendi’s 2020 book for individuals ages 12 and older entitled *Stamped: Racism, Antiracism, and You: A REMIX of the National Book Award-winning “Stamped from the Beginning”* were purchased with the intent that all eight graders would read the book. The intent was that many subject areas would interweave this book into their curriculum. *Id.* ¶ 10. It was identified as age appropriate for the students, relevant to the course of study, and authored by credible and knowledgeable scholars. *Id.* ¶ 9. However—seemingly because of the

Amendments and Commissioner Edelblut’s June 13, 2021 Op-Ed in the *Union Leader* entitled “Teach Children About Racism, Not to be Racists” that named Dr. Ibram X. Kendi’s 2019 book *How to Be an Anti-Racist* as a text that “support[s] Critical Race Theory”—this educator “understood that our school administration had asked [educators] to set the project aside due to this uncertainty [over whether the book was covered under the Amendments due to the Commissioner’s statements] and that we should not make further plans for grade-wide engagement with *Stamped*.” *Id.* ¶ 19. Over the next school year, the planned grade-wide reading of *Stamped* was not implemented. The books sat on the shelf untouched. *Id.* ¶ 20.

154. Further, one educator was subjected to a DOE inquiry because a parent complained that the educator played two music videos created by two modern Black artists as part of a unit on the Harlem Renaissance. The teacher was told the context of the inquiry by the DOE was the Commissioner’s April 15, 2022 op-ed. See Ex. 11, O’Brien Decl. ¶¶ 7-9, 13-19.

155. AFT President and former reading and math intervention teacher testified that her colleagues have concerns about “what the ‘Divisive Concepts’ language would mean in practical terms for them.” Ex. 8, Howes Decl. ¶ 7. They have questions like: “How much can you explain about the conditions of slavery and its impact on our country before you would break the law?,” or whether they can “still assign a classic American novel ‘To Kill a Mockingbird.’” *Id.* ¶¶ 7-8. She laments the Amendments’ “black cloud over educators,” particularly because they have “chilled [AFT members’] ability to have open discussions in their classrooms and to teach and prepare our New Hampshire public school students to be critical thinkers.” *Id.* ¶¶ 16.

156. A former U.S. History teacher at Timberlane Regional High School testified about leaving the teaching profession due to the Amendments. Ex. 9, Dube Decl. ¶¶ 20-22. Recognizing the importance of “[a]llowing students to debate topics such as woman’s suffrage, affirmative

action, reparations and the criminal justice system,” he “encouraged [his] students to debate and learn, to inquire and analyze, and to learn from our history and compare it to our current world circumstances.” *Id.* ¶¶ 5-6. The Amendments’ passage “chilled” these important discussions in the classroom. *Id.* ¶ 11. After a political group in New Hampshire published his name for signing an online petition pledging to teach “honest history,” he was subjected to “online harassment, threats and obscenities.” *Id.* ¶¶ 12-14. He left the profession after the police department sent patrols to his home in light of these threats. *Id.* ¶¶ 17-18.

157. A transgender art educator in Nashua also resigned because they felt “disrespected, afraid, and targeted” after the Amendments’ passage. *Ex. 10*, Munz Decl. ¶ 17. They believed they were taking a risk “whenever [they] introduced [themselves] to students, staff, or community members saying, ‘Hi, my name is Mx. Munz. My pronouns are they/them.’” *Id.* ¶ 6. In the previous four years, and without incident, they handed out an ungraded, nonmandatory, ‘Welcome to Art!’ get-to-know-you form, asking students to indicate their pronouns. *Id.* ¶¶ 7-8. After the Amendments’ passage, a parent complained to the principal and posted her complaint on social media, threatening the educator professionally and personally. *Id.* ¶¶ 9-10. The educator’s teaching materials were also attached to Commissioner Edelblut’s April 15, 2022 op-ed *Education’s Sacred Trust*, with damaging accusations like, “activist educators who might be knowingly dismantling the foundations of a value system,” and “squander[ing] the credibility of the profession as a whole.” *Id.* ¶ 16; *see also Ex. 40 (Depo. Ex. 14)*, at PL00709-713. The op-ed and attachments effectively outed them as a trans educator. *See Ex. 10*, Munz Decl. ¶ 16. As a result, they resigned from the profession and continue to fear for their safety. *Id.* ¶ 19.

158. A ninth grade English and Journalism teacher at Nashua High School testified that “[t]he Divisive Concepts Law has impacted how [she] teach[es],” including “tak[ing] certain

articles and materials out of [her] curriculum.” *Ex. 18*, Merrill Decl. ¶ 2. She no longer shares articles that she previously used in connection with the book “To Kill a Mockingbird” to discuss systemic racism and “white privilege.” *Id.* She also refrains from showing videos like “White Like Me” because she “fear[s] that using these materials would be considered a violation of the Divisive Concepts Law.” *Id.* In her view, “[t]he law interferes with [educators’] ability to educate freely and hampers one of the most essential parts of a high school education—guiding students to be critical thinkers” *Id.* It has also led to the disbanding of a diversity and inclusion group comprised of both students and faculty. *See id.* ¶¶ 7-8. Last school year, the Gay-Straight Alliance⁸⁵ at Timberlane High School organized a school dance. Shortly thereafter, one of the district’s statement representatives went to the Timberlane School Board meeting and insisted that it was “not right” for the group to have a school-sponsored dance that was not open to everyone (despite the dance being open to all). In the representative’s view, the dance should not have taken place without a similar homecoming dance because if “you’re not gay, you’re not showing up” for fear of being ridiculed by other students. She insisted that the School Board “stop this from happening in the future.” Richman Decl. ¶ 9.

159. A high school World history teacher at Timberlane Regional High School describes feeling “reticent about teaching certain material in the classroom” after the Amendments were passed. *Ex. 17*, Richman Decl. ¶ 2. He is “nervous” and “guarded” when discussing topics like affirmative action, the Voting Rights Act, and the Equal Rights Amendment. *See id.* ¶ 4. As an example, he is uncertain whether he will teach about this election’s primaries during civics and economics classes, notwithstanding having taught about current events and the election process in

⁸⁵ “GSA” is a common abbreviated name for Gender and Sexuality Alliance or Gay-Straight Alliance—a club where students can meet to discuss, among other things, sexual orientation and gender identity in a safe and confidential setting.

prior years. *See id.* ¶ 11. He is “constantly worried that there will be a complaint about [his] teaching and that [he] will be subject to investigation, charges, or worse.” *See id.* ¶ 12. This fear extends to his work as a faculty advisor for Model UN. He is restrained about what he can say around students in their research for Model UN competitions, including about topics like the War in Ukraine. *See id.* ¶ 10. This will be his last year teaching at Timberlane Regional High School because he does not feel like he can teach honestly under current legislative and political circumstances. *See id.* ¶ 13.

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Respectfully Submitted,

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