

Comments on Senate Bill 33
AN ACT relative to the regulation of public school materials.
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Submitted by
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Dear Members of the House Education Policy and Administration Committee:

Please accept my comments on SB 33. I urge a NO vote on this bill. My conclusions are summarized below followed by a brief discussion of my analysis of the three questions I pose.

1. This bill extends the passage of HB 542 AN ACT relative to exceptions for objectionable material in public school course. The bill is codified in NH Rev Stat § 186:11(IX-c). This legislation provides a process for a parent/guardian who objects to course material can seek alternative materials to be used for their child. This legislation provides a remedy specific to a student. Any agreed upon accommodation is made at the “parents’ expense. This legislation does not change the use of specific materials for all students. HB 33 uses a parent’s complaint to affect the education of all students who would otherwise be exposed to and learn from those materials

–Why is this legislation not sufficient?

–What evidence is there of its insufficiency that supports new legislation?

2. This bill is vague lacking appropriate definitions. It does not provide reasonable interpretation and implementation of the four standards of review.

–How are these standards related to harm?

–“Offensive” as a standard is vague allowing for unbridled administrative discretion. I am not sure that there is a right not to be offended. What will this look like? Does the principal and school board if the complaint gets to that level accept any statement that a person was offended by a curricular handout or, book, or lesson, therefore the offending material must be pulled from all students who may not be offended? Is mere offense the standard for removal? Is there a level of offensive that the complainant must demonstrate before for the complaint to be actionable?

3. The implementation of posting all materials is more than just a burden; it is likely unworkable. The bill requires sweeps in all possible instructional materials and interactions into its ambit.

–How can this be done in a timely manner if the stated reason for the legislation, according to the prime sponsor, is to allow parents to research each and every material and person who may be involved in instructional materials?

–Can a teacher keep up with posting all materials that may be added during the day or that occurs during a teachable moment given the dynamics and crush of the classroom?

1. Is this Bill needed?

Legislation that mandates action typically are intended to solve a public problem. In 2012, the legislature passed HB 542 AN ACT relative to exceptions for objectionable material in public

school courses codified into RSA § 186:11(IX-c), <https://law.justia.com/codes/new-hampshire/2023/title-xv/chapter-186/section-186-11/>. Why is this legislation allowing parental concerns to be addressed in adequate, thus moving from an individual basis to a school, possibly school district wide basis affecting all students. For example, if a parent complains that the adopted reading series is offensive, will that reading series be pulled from use even if there are parents, possibly many, that support the reading series?

This is a broadly based “remedy” for an unstated harm that has the potential for a broadly based impact. We have gone from “objectionable” to “harmful” from an individual remedy to a potential whole school remedy.

2. Does this Bill provide clear directions for those who must implement the mandate?

For example, the Bill states in pertinent parts, 189:74-a Prohibition of Materials Harmful to Minors in Schools.

- The operative word is “Harmful.” Does the language of the bill define what constitutes harm?

- Are the sections of the intended legislation directed to resolve a specific harm? There is no clear definition of what constitutes harm? The standards for assessing harm are not connected to a stated definition of harm. Consequently, the Bill is vague. The support for my position follows.

- (a) Complaints be submitted in writing to the principal of the school where the student is enrolled, contain a reasonably detailed description of the material that is alleged to be harmful to minors, and propose an action to be taken by the school district relative to the material.
- (c) The school principal or designee determine whether the material that is the subject of the complaint is harmful to minors, age-inappropriate, or otherwise offensive or inappropriate for use in the child’s school or for use in the context in which the material is being used.
 - There is no requirement for the complainant to demonstrate how the material meets the standards?
 - What are the workable definitions of the four standards upon which the principal can ground the analysis of the objectionable material? Must the principal who must investigate the complaint intuit or find out how the disputed material is in violation of the standards? Typically, the complainant carries the onus of demonstrating the violation. A clear definition of what is expected or prohibited facilitates the reasonable development of materials that comport with the law.
 - Is “offense” a sufficiently precise word that can lead to removing instructional materials for all students? Individuals are offended for a variety of personal reasons. Should each individual have what is essentially a veto over the curriculum because of their personal beliefs and sensibilities. Furthermore, the requirement that instruction not offend each family’s’ values is a power over what is taught through restricting what cannot be taught. The foot is placed on the break.

The list of topics that are covered in the public schools up through the senior year in high school is extensive providing a rich landscape of concerns over what values will prevail that parents may legitimately hold. Guns, violence, gay marriage, racial equality, justice, and evolution are just a few areas in which parents may be offended.

How do teachers navigate this environment of heightened tensions? For example, a sixth-grade teacher in Idaho was forced to remove her classroom posters, “Everyone Is Welcome Here” and “in this room everyone is welcome, important, accepted, respected, encouraged, valued, equal” because they were considered controversial.

<https://www.today.com/parents/teacher-remove-everyone-is-welcome-here-sign-rcna196282>. The term offensive separated from the other standards focusing more on a clash of values than on a clash of content

The Supreme Court of New Hampshire in a 1897 case wrote, “[T]he power of each parent to decide the question of what studies the scholars should pursue, or what exercises they should perform, would be a power of disorganizing the school, and practically rendering it substantially useless.”

Kidder v. Chellis, 59 N.H. 473, 476 (1879).

In addition, the Supreme Court cautioned against using the personal preferences as a guide for public action.

McCullum v. Board of Education, 333 U.S. 203, 235 ((1948) (Jackson, J, concurring) ([A]plaintiff [may] demand that the courts compel the schools to sift out of their teaching everything inconsistent with its doctrines. If we are to eliminate everything that is objectionable to any [person] or is inconsistent with any of their doctrines, we will leave the public schools in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant lawsuits.).

–What standard will be used to judge offensive materials? What about parents who are not offended by the materials? This allows for the application of discriminatory enforcement. Whose values are offended and how are they to be weighted.

- The vagueness of this language violates the requirement of substantive due process. While this bill does not overtly provide an avenue for adverse employment actions aimed at educators and does not specifically set a path for court action does not mean that legislative actions can be devoid of due process protections.

Vague rules, regulations, and laws promulgated by government are subject to the restrictions of the Due Process Clause. Specifically, they must not be vague. See *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) writing the vagueness doctrine addresses "[a] fundamental principle in our legal system ... that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."

3. Is the implementation of this bill clear and workable?

- Section I. For purposes of this section, “material” shall mean any printed matter, visual presentation, web-based content, live performance, or sound recording, including, but not limited to, books, magazines, motion picture films or videos, pamphlets, phonographic records, pictures, drawings, photographs, figures, statues, plays, dances, or other representations that are provided by the school district or by school employees, volunteers, guests, or speakers.
- Section II. No later than November 1, 2026, each local school board shall adopt a policy describing the materials that are authorized to be used by, circulated to, and/or accessed by, students in the local school district. The policy shall be posted on the district website.
- The reach of the curricular materials (I.) is extensive, In a hearing (2.18. 25) an exchange Senator Avard (the prime sponsor) stated that the intent was to include school assemblies even though it is not listed in I. (see above). This seems to support the idea that other unnamed materials will be subject to the bill. Lesson plans and teacher instruction which includes but is not limited to how the teacher approaches the lesson materials, what verbal advance organizers are used to start instruction? Is the use of the black/white board materials or other modes for spontaneous explanations and the use of student responses that are accessed by students subject to I, and posted by II? All of these are accessed by students through written materials, blackboard materials What other, materials not specifically stated in the bill but germane to the flow of instruction and the questions that students ask are unstated like school assemblies?

–Does a teacher violate the law if during instruction, the teacher pulls materials from her files that she or he had not planned on using but a teachable moment arises in which the material would be helpful?

–Does the law anticipate that teachers and teaching be scripted beforehand and that the teacher must strictly follow it or potentially run afoul of the law?

The teacher who meticulously plans lessons knows that once the students in the classroom are interacting with the materials, the plan may have to be set aside or revised while instructing. Teaching in classes filled with students is dynamic requiring flexibility and adaptability not inflexibly following a script of previously posted materials. Having taught in the upper elementary classrooms and in graduate level courses, I plan but know I must be ready to adjust to where the students, what is working, and whether there is prior knowledge that has to be developed before moving forward

with the plan. This often involves bringing in new materials and under this bill would I be in violation because I did not post the additions? Must I post every conceivable discussion topic or, in my case, every court case (my areas of study are education law and labor relations) so as to not run afoul of this law?

- Section II is problematic for educators. Section I is broad sweeping in large instructional strategies. First, it is confining and unrelated to the realities of teaching if all materials, writ large, are to be uploaded on the school's website, ostensibly before instruction begins.

- How much in advance of instruction must materials be posted? Are they updated every day, throughout the day?

- Is a substitute teacher a material that must be posted? Substitute teachers often bring their materials to the classroom. Must those materials be posted as well?

- Are tests and quizzes materials? What about the use of checks for understanding that are used before transition points? There is no cutout for them listed in "I."

- What if they were not posted? Have I placed myself in employment jeopardy? Is it better not to be flexible and respond to the needs of my students as we engage the material? Is the straight and narrow path stated on the post my only safe space?

“If teachers must fear retaliation for every utterance, they will fear teaching.”
Ward v. Hickey, 996 F.2d 448, 453 (1st Cir. 1993).

Parents have the right to criticize the important curricular decisions and educators need to provide reasonable and effective means for hearing and responding to their concerns. We must keep the public in the public schools. However, the laws, rules and regulations must be reasonable and must balance various interests. Does SB 33's regulations of harmful materials advance those concerns or does it sow the seeds for potential discord because it is vague and its reach exceeds the realities of teachers and schools.?

“Schools cannot be expected to accommodate the personal moral or religious concerns of every parent. Such an obligation would not only contravene the educational mission of the public schools, but would also be impossible to satisfy.”
Fields v. Palmdale School District, 427 F.3d 1197, 1206 (9th Cir. 2005).

I urge a NO vote on this bill.

(This is a personal statement and is not intended as a statement of the position or views of former employers, individuals, or institutions.)