New Hampshire House Education Policy and Administration
February 2, 2026
RE: HB1792

Dear Chairperson Noble and members of the House Education Policy and Administration committee,

We write on behalf of the ACLU of New Hampshire to raise another larger red flag that HB1792 is yet again another vague, broad, and unconstitutional bill that claims to purports to prohibit the teaching of certain pedagogies in public schools, including but not limited to "critical race theory, LGBTQ+ ideologies, identity based ideologies, and Marxist analyses." HB1792 is unconstitutionally vague like the two prior attempts by the legislature to censor what can be taught in classrooms in 2021 and 2025, and the other bill being heard today, HB1778. We urge the legislature to break the cycle of passing similar bills over and over again.

HB1792 not only promotes censorship and would likely cost taxpayers a ton of money but also is flatly incomprehensible.

We urge you to review our testimony on HB1778 because much like the bills of 2021 and 2025, these are two more similar bills with similar problems inviting similar legal headaches.

I. The Legal History of These Bills – New Hampshire Federal Courts Have Repeatedly Declared Unconstitutional Efforts Similar to HB1792.

New Hampshire has already, on two prior occasions, sought to censor what can be taught in schools. Both efforts were declared unconstitutional.

First, in 2021, New Hampshire enacted through the budget the so-called "divisive" or "banned concepts" law that sought to discourage public school teachers from teaching and talking about four topics implicating race, gender, sexual orientation, disability, and gender identity in the classroom.

In May 2024, the U.S. District Court for the District of New Hampshire (Barbadoro, J.) found that the law violated the Fourteenth Amendment, concluding the law was so unclear and vague that it failed to provide necessary guidance to educators about what they could and could not include in their courses and that it invited arbitrary and discriminatory enforcement—up to and including the loss of teaching licenses through the Educator Code of Conduct.

The Court stated in its order that the "prohibitions against teaching banned concepts are unconstitutionally vague," and that the law contains "viewpoint-based restrictions on speech that do not provide either fair warning to educators of what they prohibit or sufficient standards for law

enforcement to prevent arbitrary and discriminatory enforcement." The Court concluded further, "All told, the banned concepts speak only obliquely about the speech that they target and, in doing so, fail to provide teachers with much-needed clarity as to how the Amendments apply to the very topics that they were meant to address. This lack of clarity sows confusion and leaves significant gaps that can only be filled in by those charged with enforcing the Amendments, thereby inviting arbitrary enforcement."

This decision can be found here: https://www.aclu-nh.org/app/uploads/2024/05/courtorder-bannedconcepts.pdf.[1] Other courts have reached similar conclusions in various contexts.[2]

Second, the New Hampshire legislature tried again in 2025 when it enacted a new law through the budget, effective July 1, 2025, that sought to ban diversity, equity, and inclusion programs pertaining to race, gender, sexual orientation, gender identity, and disability in New Hampshire schools (including both K-12 public schools as well as both public and private colleges and universities) and public entities (like police departments and libraries). This law fared no better.

On October 2, 2025, the U.S. District Court for the District of New Hampshire (McCafferty, J.) issued a preliminary injunction blocking this law for almost all public school districts. The Court held that the plaintiffs are likely to succeed on their claims that the law violates due process and is contradicted by federal disability civil rights laws. The Court explained: "The breadth of the anti-DEI laws' prohibition is startling. The definition of 'DEI' contained therein is so far-reaching that it prohibits long-accepted—even legally required—teaching and administrative practices. It is hard to imagine how schools could continue to operate at even a basic level if the laws' prohibitions were enforced to their full extent."

This decision can be found here: https://www.aclu-nh.org/app/uploads/2025/10/PI-Order.pdf. This decision was not appealed to the First Circuit Court of Appeals, and litigation is ongoing.

II. Repeating History – HB1792 Creates the Same Constitutional Problems.

HB1792 is just as constitutionally problematic as these two prior laws were declared unconstitutional, and HB1778 also being heard today.

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[1] The State appealed this decision to the First Circuit Court of Appeals, which heard oral argument in April 2025. No decision has yet been rendered.

[2] *See, e.g., Honeyfund.com, Inc. v. Desantis*, 622 F. Supp. 3d 1159, 1182 (N.D. Fla. 2022) (in addressing regulation on private employers, stating: "Concept 4 is even worse, bordering on unintelligible. Under that provision, employers cannot endorse the view that '[m]embers of one race, color, sex, or national origin cannot and should not attempt to treat others without respect to race, color, sex, or national origin.'"), *aff'd on other grounds*, 94 F.4th 1272 (11th Cir. 2024) (enjoining law on First Amendment grounds); *Pernell v. Fla. Bd. of Governors*, 641 F. Supp. 3d 1218, 1281 (N.D. Fla. 2022) (in addressing regulation on colleges and universities, stating: "For example, concept four is mired in obscurity, bordering on the unintelligible. Under that provision, educators cannot endorse the view that '[m]embers of one race, color, sex, or national origin cannot and should not attempt to treat others without respect to race, color, sex, or national origin.'"), *appeal filed and stay of injunction denied*, Nos. 22-13992-J, 22-13994-J, 2023 WL 2543659 (11th Cir. Mar. 16, 2023).

But even more, HB1792 is simply incomprehensible, and the unanswered questions it presents are almost too numerous to mention.

- At the outset, the bill purports to prevent educators from "engaging in the pedagogy, praxis, or inculcation of critical theories or related practices that promote division, dialectical world-views, critical consciousness, or anti-constitutional indoctrination." None of these terms are defined, let alone defined with any specificity that would cabin the discretion of the law's enforcers.
- HB1792 simply lists out topics that would be included in this prohibition, though the list itself does not provide broader limitations on the bill's prohibitions. See Nat'l Educ. Ass'n-New Hampshire v. NH AG, 25-cv-293-LM, 2025 U.S. Dist. LEXIS 195238, *44 (D.N.H. Oct. 2, 2025) ("Use of the phrase 'including but not limited to' indicates legislative intent for these specified categories to constitute illustrative examples of 'activities' that are 'related' to DEI.") (McCafferty, J.).
- Even the topics listed out as examples of what is included in this prohibition are unclear:
    - What does it mean for an educator to teach that "American societal structures, including the U.S. Constitution or legal system, are … designed to perpetuate oppression based on race, gender, sexual orientation, or other identity categories"?
    - Would this prevent any teaching that the United States Constitution permitted slavery based on race—undoubtedly "oppression based on race"—when it was ratified in 1788?
    - And what does it mean to "[i]mplement[] culturally relevant or responsive pedagogy that prioritizes identity-based division over individual merit or shared American values"?
    - What, in fact, is an "American value" that is "shared," as opposed to one that is not "shared"?
    - And what is "[u]sing dialectical analysis to frame history or current events primarily as class, racial, or identity-based conflicts intended to foster division rather than resolution"?
    - Can an educator even discuss racial injustice that is a part of American history under this provision and, if so, how?
- HB 1792 bans "[c]ompelling students to adopt 'critical consciousness' by requiring them to identify personal or societal 'oppressors' and 'oppressed' through lenses derived from Marxist analysis, intersectionality, or critical race theory." But "critical race theory" ("CRT") is undefined in the bill leaving educators to guess what it means.
- And the bill's prohibition of CRT, while expressly allowing educators to condemn CRT as a "Marxian theor[y] contrary to American tradition, law, and ethics" only highlights how this bill is designed to discriminate against viewpoints and promote some views over others.
    - Even setting that aside, would this bill's example of prohibiting the identification of "societal oppressors" even allow a discussion of whether white people in the South oppressed Black people?

Likewise, HB1792's exceptions are also incomprehensible.

- For example, the bill states that "[f]actual, neutral instruction on historical events or figures" are not prohibited. Like the term "objective" addressed by other courts , the terms "factual"

or "neutral" fail to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, and this lack of clarity can be weaponized.

- Where is the line between non-prohibited instruction on "factual, neutral instruction on historical events or figures" and prohibited instruction "using dialectical analysis to frame history or current events primarily as class, racial, or identity-based conflicts intended to foster division rather than resolution." This line is virtually impossible to draw.
- Where is the line between non-prohibited instruction on "factual, neural instruction on historical events or figures" and prohibited historical instruction on how the U.S. Constitution was "designed to perpetuate oppression based on race," which it did in allowing slavery when it was ratified in 1788? This too is unclear.

III. The Money Wasted – Fiscal Note Acknowledges Costs of This Legislation.

Lastly, this Committee should be mindful of the fiscal costs of this legislation that are not allocated in this bill. Again, so many red flags.

The New Hampshire Department of Justice ("NHDOJ") says: "The Department of Justice states that while the number of potential cases cannot be estimated, it anticipates that additional capacity would likely be required to meet increased legal advisory and investigatory demands. At this time, the Department estimates the need for at least one additional full-time attorney, with potential need for further support depending on case volume. The estimated total cost of one new attorney position is $137,000 in FY 2027, $138,000 in FY 2028, and $140,000 in FY 2029. This bill provides neither authorization nor appropriation for new personnel."

For these reasons, HB1792 should be voted inexpedient to legislate. We urge you to reconsider moving this bill forward and redirect state money to other legislative efforts.

Respectfully submitted,

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