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CAN'T WE JUST TEACH?
RESPONDING TO ANTI-LGBT AND ANTI-CRT EFFORTS

Minnesota Association of School Administrators Great Start Cohort
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I. INTRODUCTION. Race, sexual orientation, and gender identity have emerged as hot-button issues in schools across the country and right here in Minnesota. There is a growing demand for schools to proactively advance diversity, equity, and inclusion ("DEI") initiatives. In some places, schools' anti-discrimination efforts and DEI initiatives are met with significant opposition, putting schools in the middle of divisive debates.

This speech will provide background knowledge on federal and state anti-discrimination laws, as well as a legal perspective on common issues surrounding DEI efforts, such as government speech, community opposition, handling complaints about employees, as well as curriculum and library book challenges.

II. ANTI-DISCRIMINATION LAWS

A. State and Federal Laws Protect Students from Discrimination in Education.

1. **Federal Law.** The Civil Rights Act of 1964 provides prohibitions against discrimination on the basis of certain traits. For instance, Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal funding or other federal financial assistance. This prohibition therefore extends to all school districts receiving funds from federal programs.

2. **State Law.** State law provides students with broader protections against discrimination than federal law. The Minnesota Human Rights Act specifically provides:

> It is an unfair discriminatory practice to discriminate in any manner in the full utilization of or benefit from any educational institution, or the services rendered thereby to any person because of race, color, creed, religion, national origin, sex, age, marital status, status with regard to public assistance, sexual orientation, or disability, or to fail to ensure physical and program access for disabled persons.
>
> Minn. Stat. § 363A.13.

3. **What Do These Protections Mean for Minnesota Schools?** All Minnesota schools are prohibited from discriminating against students because of race, sexual orientation, or gender identity. What it means not to discriminate against a student on the basis of sexual orientation or gender identity, in particular, continues to evolve.

B. In Practice: LGBTQ Student Rights and Avoiding Discrimination.

When it comes to serving LGBTQ students, there are three big topics that have emerged in the last few years that districts need to understand in order to honor these students' rights and avoid unlawful discrimination. These issues pertain to student privacy, use of restrooms and locker rooms, and use of students' names, pronouns, and gender markers.

1. **Sharing Information About Student Sexual Orientation or Gender Identity.**

a. State and federal law limits what schools may share publicly about students. *See* Minnesota Government Data Practices Act ("MGDPA"), Minn. Stat. Chap. 13, and the federal Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.

b. Schools may not reveal any private educational data about a student to another person unless permitted by law or authorized by student or parent.

    i. Private educational data includes a student's sexual orientation, that a student is transgender, is in the process of determining gender, which bathroom or locker room a student uses, and any other specific information about a student.

    ii. The Minnesota Government Data Practices Act, Minn. Stat. § 13, and the federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, *do* permit a school to share this type of information with staff who need it to perform their job responsibilities, such as a physical education teacher who might otherwise prohibit a student from using a certain locker room. Disclosure should not be made to staff who do not have a need to know the information.

    iii. Some transgender students and their parents may *want* to share information with the student's classmates, which schools can allow if appropriate.

c. **Parent Inquiries.** Some parents may ask schools questions regarding other students' gender identities and their use of particular restrooms or locker rooms.

    i. Schools should inform the inquiring parent that the school may not share private educational data about other students.

    ii. The school may provide the parent with information about how it divides its restrooms and locker rooms. For instance, a school could share that it separates restrooms and locker rooms by gender and, as informed by law,

allows students to use the restroom and locker room that aligns with their gender identity.

iii. A school also may share in broad terms how it responds to transgender students' requests to use particular restrooms or locker rooms.

2. **Restrooms and Locker Rooms.**

a. In recent years, federal and state courts have confronted the question of whether transgender students have the right to use restrooms or locker rooms that align with their gender identity.

i. Federal courts have considered the question under constitutional law and are split on the answer:

. *G.G. ex rel. Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020) (holding that Title IX and the Equal Protection Clause of the U.S. Constitution protect transgender students from school bathroom policies that prohibit them from affirming their gender).

. *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 817 (11th Cir. 2022) (holding that Title IX and the Equal Protection Clause of the U.S. Constitution do not protect transgender students from school bathroom policies that prohibit them from using bathrooms consistent with their gender identity).

ii. Minnesota courts have evaluated the question under the Minnesota Human Rights Act (MHRA) and held that students have the right to use the locker room that aligns with their gender identity. *See N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553 (Minn. App. 2020).

b. Because Minnesota school districts must abide by the MHRA, districts should allow students to choose a restroom or locker room that aligns with their gender identity. Districts may also allow any student to use a gender-neutral or single-user facility. That said, a school must not require them to do so. Requiring a student to use a gender-neutral facility denies the

student's identity as either male or female and "otherizes" them.

c. When a student or parent expresses that the student's gender identity differs from the sex given at birth, the district might consider having the school's administration meet with the family and determine how the district can support the student's needs. That includes which bathroom and locker room is most appropriate for the student to use.

    i. Generally, parental consent or support is not required for students in older grades

d. There may be times when a district hears from non-transgender students or their parents who are uncomfortable sharing a restroom or locker room because of the simultaneous use by a transgender or transitioning student.

    i. In addition to sharing with the concerned student or parent information about how the school's restrooms and locker rooms are divided, districts may further share whatever privacy protections they have in place for users of a school's restrooms, such as individual locking stall doors.

    ii. If a school has a single-occupancy, unisex restroom available, it could also allow any students to use it for any reason.

    iii. Often these concerns are raised because of the speculative possibility that a student may see another's genitals. Students can be reminded of appropriate conduct in restrooms and encouraged to report inappropriate behavior, including entering another's private space to look at their genitals.

e. In terms of locker rooms, districts may share that a student uncomfortable with using a locker room change in a single-occupancy, unisex restroom, or in an individual, locking bathroom stall in a restroom that aligns with the student's gender identity.

3. **Pronouns, Names, and Gender Markers.**

a. The use of students' preferred names, pronouns, and gender markers is another emerging topic. Transgender students may wish for the district's information systems to identify them by their preferred name, pronouns, or gender identity, rather than their legal identity.

i. Currently, schools must use a student's legal name and sex assigned at birth for MARSS Reports.

ii. Other school records, including transcripts, diplomas, IEPs, Honors or Awards, Yearbooks, School IDs, and programs for athletics or performing arts can and should reflect a student's preferred name.

b. If the parent of a transgender student requests changes to the student's name or gender on unofficial student records or elsewhere in the district's information systems, the school should grant the request to avoid legal liability.

i. First, using a student's legal name in the district's systems when a student uses a preferred name in the classroom may result in inadvertent disclosure of data related to the student's transgender status to unauthorized individuals. For example, when a teacher takes attendance and calls a student by a traditionally male name, and that student's peers know them by a traditionally female name, the teacher's use of the student's legal name inadvertently outs the student as transgender.

ii. Second, if a district uses a cisgender student's preferred name in its systems – say, a nickname – rather than the student's legal name, the refusal to use the transgender student's preferred name may give rise to a claim of discrimination.

C. Racial Affinity Groups. In an attempt to provide supportive communities and space for underrepresented students, some schools have approved the creation of affinity groups based on race, such as a Black Student Union.

1. Such groups may face legal challenges, but are generally permissible so long as they do not exclude all individuals who are not the identified race.

2. Individuals who are openly hostile to a group's purpose or who actively promote antagonistic views may be excluded from the group. This would include students promoting white supremacy or using derogatory terms to refer to group members.

III. DIVERSITY, EQUITY, AND INCLUSION (DEI) INITIATIVES

A. Development of DEI Initiatives. In addition to ensuring they are meeting their legal obligation not to discriminate against students on the basis of protected classes, many schools are also advancing diversity, equity, and inclusion (DEI) initiatives, embracing topics of race, sexual orientation, and gender identity. While DEI initiatives may be welcomed in some areas, schools in other areas may receive pushback from parents or community members.

B. Critical Race Theory. Schools have likely noticed that opponents have begun grouping any type of racially centered discussion into the category of "Critical Race Theory," or CRT.

1. **What is the Definition of "Critical Race Theory?"** CRT is a legal theory that originally examined the ways in which race and racial discrimination is embedded in legal and societal institutions.

2. **How has the term CRT been used?** In practice, it has become a buzzword encompassing any curriculum that discusses race, racism, social justice, and diversity and inclusion. Parents across the nation have objected to teaching such topics for a variety of reasons, including claims that it values racial group identity over unity, that discussions in which the white race is characterized as the oppressor make white students feel bad, and explicit conversations about race highlight differences students would not otherwise experience.

C. DEI Initiatives Present Legal Questions. Just like any other initiative that a school might engage in, or any other communication that a school might make, DEI initiatives and associated messaging are subject to challenge and present certain legal questions. In general, such messages are "government speech" and not subject to legal challenge.

IV. GOVERNMENT SPEECH

A. What Is "Government Speech"? "Government speech" is speech that is adopted and controlled by a governmental entity, including a public school district. In determining whether speech is "government speech," courts consider: (1) whether the governmental entity established the message; and (2) whether the governmental entity exercises control over the content and dissemination of the message. The government exercises control over the message when it exercises "final approval authority" over the message. *See Johanns v. Livestock Marketing Assn.*, 544 US 550 (2005).

B. What is the Government Speech Doctrine? The government speech doctrine is a relatively new concept created by the U.S. Supreme Court. This doctrine recognizes that the Free Speech Clause generally does not restrict a governmental entity from saying what it wants, with a few restrictions. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009). The Supreme Court has determined that when the government speaks, it intends to convey a governmental message, and its speech is exempt from scrutiny under the First Amendment.

C. Restrictions on Government Speech. Government speech may not violate the U.S. Constitution or state or federal law.

1. **Establishment Clause.** A school district may not adopt government speech that promotes or endorses a particular religion. It may adopt government speech that promotes generally positive values such as honesty, kindness, and sharing, without adopting explicitly religious messaging regarding such values.

2. **Political Messaging.** A school district may not say what it wants about referenda and ballot questions because Minnesota law prohibits school districts from advocating for or against a referendum and limits government speech, including the use of public resources, to providing factual information about referenda.

D. Is Government Speech "Compelled Speech"? A common objection to the government speech doctrine is that such speech constitutes "compelled speech." "Compelled speech" cases involve situations in which the government has allegedly required an individual to personally express a message with which the individual disagrees. *See Johanns v. Livestock Marketing Association*, 544 U.S. 550, 557 (2005). The U.S. Supreme Court has held that, as a general rule, the government may support its own policies and spend government funds for speech and other expression to advocate and

defend those policies. *Id.* As such, compelled funding of "government speech" (such as through taxes or targeted assessments) does not, by itself, raise First Amendment concerns or constitute compelled speech. *Id.* A court outside of our jurisdiction recently held that school-sponsored student walk-outs in support of gun control did not constitute compelled speech.

1. *Burwell v. Portland Sch. Dist. No. 1J by & through Portland Sch. Bd.*, No. 20-35499, 2021 WL 2071980 (9th Cir. May 24, 2021) (unpublished).

    a. **Facts.** In response to the shooting at Marjory Stoneman Douglas High School in Parkland, Florida, a Portland School District began to support gun-control policies. The District decided to support nationwide school "walkouts" intended to promote such policies. The District organized and promoted walkouts at Portland schools using paid staff time, and provided school resources such as poster board. The walkouts occurred during a special "protest period" that the District created, and students were expected to participate in these demonstrations unless they affirmatively opted out. Students who opted out were not punished by the School District, but they experienced bullying and social ostracism from their peers. The School District took no action in response to parents' complaints about the bullying.

    b. **Legal claims.** Parents who are strong proponents of the Second Amendment sued the Portland School District alleging that it violated the First Amendment. First, Plaintiffs contended that the school district misused public funds to support pro-gun-control political advocacy, thereby compelling them (in their capacity as local taxpayers) to subsidize speech with which they disagreed. Second, Plaintiffs contended that the school district compelled students to speak in support of its preferred message on gun control, including by participating in demonstrations.

    c. **Holding on compelled subsidy claim.** The court did not issue a decision on the merits of the subsidized speech claim due to a procedural defect (lack of standing).

    d. **Holding on compelled speech claim**. The Ninth Circuit Court of Appeals affirmed the lower court's decision to dismiss the compelled speech claim because the Complaint did not allege

any specific regulatory, proscriptive, or compulsory actions attributable to the school district. Further, the school district permitted students to opt out of participating in the demonstration without official repercussions. To the extent that the District encouraged students to voluntarily participate in the protests, it engaged in teaching by persuasion and example, which the Court stated does not support a compelled-speech claim. The Court also held that in the context of free speech, any alleged peer pressure to participate in the protests likewise did not constitute government compulsion.

E. School Districts May Advance Certain Views Without Opening the Forum. Although the government speech doctrine is still evolving, federal courts outside our jurisdiction have applied the doctrine to school districts. When a school district expresses a view, it does not open a public forum for private speakers to express their opposing views. In other words, a school district may exclude viewpoints that are contrary to the district's viewpoint and may decide who speaks on its behalf.

1. *Shurtleff v. City of Boston, Massachusetts*, 142 S. Ct. 1583 (2022).

a. **Facts.** This case involved a request to raise a religious flag outside of Boston City Hall. There were three flagpoles in a plaza outside of Boston City Hall. Boston flies the American flag on one of them, the Massachusetts flag on another, and the city flag on the third. Since at least 2005, Boston allowed groups to hold flag-raising ceremonies on the plaza. Participants could raise a flag of their choosing in place of the city flag and fly it for the duration of an event, typically for a few hours. Over the years, Boston allowed 50 unique flags to be flown on the third flagpole. Most of these flags were from other countries, but some were associated with groups or causes, such as the Pride Flag. The dispute in the case arose when an organization called "Camp Constitution" wanted to hold a flag-raising event to honor the "civic and social contributions of the Christian community." As part of this event, the group wanted to raise what it called the "Christian flag." Boston did not allow the group to raise the flag due to Establishment Clause concerns with flying a religious flag.

b. **Holding.** The Court considered whether Boston's flag-raising program was government speech. Under the government

speech doctrine, the government can choose what message it wants to communicate without having to allow competing viewpoints. In contrast, the government cannot engage in viewpoint discrimination when it is regulating speech by others.

1. The court reaffirmed the notion that the government has the right to speak and that the check and balance on government speech is through elections. However, the court noted that the boundary between government speech and private expression blurs when the government invites citizens to participate in a program.

2. Ultimately, the evidence in the case showed that Boston had previously given minimal review to previous requests. The employee who handled applications testified in a deposition that he had never previously asked to review a flag or requested changes to a flag in connection with approval for a flag-raising ceremony. He also testified that he had usually not even seen flags before events. There was also no record of other requests being denied. These were critical facts in the case because they showed that Boston did not control the flag-raising ceremonies in a way that would establish the messages on the flags reflected city-approved views or values.

3. Because the court concluded the flag-raising ceremonies were not government speech, the court concluded that Boston engaged in unlawful viewpoint discrimination by singling out the religious flag and not allowing it to be hoisted over city hall.

c. **Implications.** The government speech doctrine can still be used to justify displaying a particular message in a school as the school district's expression of its views without having to allow an opportunity for others to display competing messages. However, there must be meaningful involvement by the school district in the selection or crafting of the message. If schools open up areas for expression and allow for the display of messages or imagery by individual students or staff, religious content cannot be disallowed simply because it is religious in nature.

2. *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000).

a. **Facts.** The School Board of the Los Angeles Unified School District passed a resolution designating June as a time to focus on gay and lesbian awareness. Consistent with that resolution, the school district issued a memorandum to staff stating that the District would provide posters and materials in support of Gay and Lesbian Awareness Month. The District issued a memorandum recognizing "that some of the materials can be controversial in nature" and explaining that the purpose of the posters was "to aid in the elimination of hate and the creation of a safe school environment for all students." With the principal's permission, high school staff members created a bulletin board inside the school building on which staff could post materials related to Gay and Lesbian Awareness Month in addition to the materials provided by the district office. The principal had ultimate authority over the content of the bulletin boards. The following are examples of the materials that were posted: a poster titled "The Civil Rights Movement;" a poster titled "Diversity is Beautiful;" a poster on name-calling; a poster titled "What is a Family;" a bar/pie chart reflecting statistics on hate crimes; a paper on "The Rainbow Flag;" and a paper explaining the gay and lesbian symbols.

b. **Plaintiff's conduct.** Robert Downs, a teacher in the high school, objected to the recognition of Gay and Lesbian Awareness Month and created his own bulletin board across the hall from his classroom titled "Testing Tolerance." In response to postings on other Gay and Lesbian Awareness bulletin boards within the school, Downs created a competing bulletin board titled "Redefining the Family." Included among the materials posted by Downs were a portion of the Declaration of Independence, newspaper articles, various school district memoranda, and several excerpts, including statements that "60% of Americans hold the belief that homosexuality is immoral: that "most mainline religions in America … condemn homosexual behavior."

c. **District's response.** The principal ordered Downs to remove his materials for two reasons. First, the principal found the materials to be inconsistent with the purposes of the Gay and

Lesbian Awareness month and the district's efforts to support diversity. Second, members of the school community found the materials were "disrespectful," "offensive," "upsetting," "objectionable," and "derogatory." The District's legal counsel informed Downs that the bulletin boards were not "free speech zones" and he did not have the right to post materials of his choice. Downs then filed a lawsuit alleging violation of the First Amendment.

d. **Holding.** The Ninth Circuit Court of Appeals held that a public school board may decide not only to talk about gay and lesbian awareness and tolerance in general, but also to advocate such tolerance, if it so decides, and to restrict contrary speech from its employees at school. The court further held that because the government itself was speaking, the school district's regulation of speech does not need to be viewpoint neutral.

3. **The Paradox.** In general, the government may not restrict speech simply because it disagrees with a particular viewpoint. At the same time, if the government characterizes such a restriction as being the government's own expression or speech, it is exempt from constitutional scrutiny.

F. What is the Process of Adopting Government Speech? In order to gain the protection of being exempt from scrutiny under the First Amendment, school districts should adopt government speech by resolution from the elected school board and explicitly state that it is government speech.

1. **Could a school district adopt "black lives matter" or similar ideas as government speech? If so, what does that allow the district to do?** Yes, some Minnesota school districts have adopted "black lives matter" or similar statements as part of their equity mission. School districts should be careful, however, to distinguish between the copyrighted "Black Lives Matter" group and the concept that black lives matter.

The difference between adopting a message as government speech versus allowing employees to post about or wear clothing with any message they choose is that if the speech is "government speech," then the school controls the message that it wants to send. This means a school district does not have to allow employees or visitors to post or wear any messages that do not fall within the board-approved government speech.

2. **Resolution Language.** Equity resolutions adopting government speech should contain the following basic elements:

   a. A general statement about the school district's DEI mission.

   b. Findings that there are underserved and/or minority students enrolled in the District who are disadvantaged because of their status.

   c. A statement about the school board's commitment to tackling DEI issues within the district.

   d. A statement that identifies the specific intent of the resolution – whether it be to adopt the message like "Black lives matter" or something more broadly related to DEI.

   e. A statement that adopts the particular message, i.e. "Black Lives Matter," "All Are Welcome Here,", or "Stop Asian Hate."

   f. Explicitly state that the resolution is government speech.

B. **Proceed with Caution.** The two federal cases cited above are outside of our jurisdiction and would only be persuasive authority to a Minnesota court. Minnesota courts have not yet issued their own opinions on the bounds of government speech. A federal district court in Minnesota recently heard a case against ISD 194 (Lakeville) involving the district's display of "black lives matter" posters and subsequent refusal of a request to display posters stating "blue lives matter" or "all lives matter." *Cajune v. Indep. Sch. Dist. 194*, No. CV 21-1812 ADM/BRT, 2022 WL 179517, at *1 (D. Minn. Jan. 19, 2022). The court has not yet rendered a decision on the merits of the claims. Accordingly, the limits of the government speech doctrine are still being formed in the courts in our jurisdiction.

V. COMMUNITY OPPOSITION

A. While most staff members, students, parents, and community members support diversity, equity, and inclusion initiatives, some districts face a vocal minority in opposition to these efforts. This opposition can be seen at chaotic and disruptive school board meetings and in e-mails from parents to school staff, social media communications, and other interactions.

B. General advice.

2. Be transparent and honest with parents and community residents about the district's DEI efforts or policies and be sure to include key and diverse stakeholders in discussions around the adoption and implementation of these efforts and policies.

3. When responding to parents, focus on students. Equity work is meant to create school communities where every student knows they are respected, valued, and welcomed.

4. Be respectful and diplomatic. Take the time to explain the district's position and offer resources where individuals may find more information about the district's DEI efforts and the process the district undertook before implementing those efforts to ensure they were appropriate for the school community. Clarify any misunderstandings that parents may have.

5. Designate a point person to respond to opposition. Some districts have designated equity coordinators that fulfill these responsibilities. If the district does not have a designated individual, it could consider designating someone who is willing and educated on DEI topics to handle responding to community opposition.

VI. COMPLAINTS ABOUT EMPLOYEES FOR SHARING THEIR OPINIONS OR BELIEFS

A. School Employees Should Not Share Their Personal Views on Controversial Topics. While in the presence of students at school, in a school vehicle, or at a school sponsored event or activity, school employees should be careful not to share their personal views, opinions, or beliefs on religion, political issues, and other controversial topics, which can include DEI-related topics. There are several reasons for this general rule.

1. Most school employees hold a position of trust and authority over students. Additionally, students are a captive audience in a deferential environment. As a result, school employees can significantly impact the views, opinions, and beliefs of students or make students uncomfortable when sharing opinions, particularly when the employee's opinion seems to personally oppose the student or the student's beliefs.

2. Parents and students may perceive that the school district approves or endorses any message conveyed by teachers while in the presence of students, leaving it to the district to have to answer for the individual views of each employee.

Employees sometimes try to skirt this general rule by using sarcastic comments, partisan humor, pointed "rhetorical" questions, or references to dubious "news" stories circulating online. Similar to a situation in which a teacher directly shares his or her personal opinions, this type of conduct can be divisive and undermine the educational environment because it makes students who have a different view feel pressure to agree or be outsiders.

B. Controversial Topics are Not Completely Off-Limits. Teachers may teach *about* religions, politics, and other divisive issues, but in doing so they should refrain from disclosing their personal views, opinions, and beliefs, and they should provide a balanced presentation of the facts, issues, and opposing views. Teachers should remain viewpoint neutral when teaching about such topics. Moreover, teachers may allow and encourage students to engage in civil discussions in class on political issues, religious issues, or controversial issues, if those issues relate directly to the approved curriculum for the class and to the subject matter being taught during that particular class period.

C. Controversy May Lead to Complaints. Students commonly share what they learn and discuss in class with their parents, peers, or trusted adults, which can lead to complaints about employees who may have crossed the line. Complaints have increased with teachers taking more class time to discuss issues related to diversity, systemic racism, social justice movements, current events, etc. Here are steps for addressing complaints:

1. **Document the complaint.** Obtain any statements, the names of any potential witnesses, and any other relevant information provided by the complainant (e.g., documents, photographs, texts, etc.).

2. **Determine Whether an Investigation is Necessary.** To determine whether an investigation is necessary, consider the following:

    a. Does the alleged behavior violate the law or a school district policy? Was it reasonably part of approved district curriculum? How does it correspond with any government speech approved by the school board?

    b. Is an investigation required by the school district's policy?

c. Does the conduct involve a pattern of prohibited behavior?

d. Could the conduct result in liability for the school district?

3. **Act promptly.** If the school district decides to investigate, a delay can result in lost evidence or provide the subject of the investigation with an opportunity to construct a "story." A delay in investigating can also send a signal to the complainant that the district is not taking the complaint or the problem seriously.

4. **Review District Policies and Collective Bargaining Agreements.** Review applicable policies and collective bargaining agreements and follow required steps for investigating the type of complaint that was made (e.g., timelines, reporting requirements, etc.). Make sure to involve necessary and appropriate parties, such as human resources and/or the employee's supervisor.

5. **Consider how the teacher's alleged conduct aligns with the district's DEI efforts.** Do the allegations suggest that the employee acted in a manner that is inconsistent with the district's DEI initiatives or its board-approved stance on a particular issue? Did the teacher directly violate directives received as part of DEI training and/or did the teacher's actions or statements demonstrate that the employee was not properly attentive to such trainings?

6. **Understand the student context.** DEI efforts are usually meant to benefit students in minority groups by making them feel more welcomed and included in the educational setting. Understanding the impact of the employee's actions on students can be a key element of determining whether the conduct was wrongful and how best to address the conduct. Consider whether the complaint is about a situation where the employee simply reiterated the district's DEI-related stance or policy and/or whether the employee was expressing their own personal views regarding DEI topics. Also consider how the employee's comments or actions make students feel and impacted their educational experience and whether those feelings and impacts are objectively reasonable under the circumstances.

7. **Consider whether the teacher has engaged in any similar previous behavior.** Is this a pattern of conduct for the teacher? Has the teacher received previous coaching, directives, or discipline whereby they should know that their conduct or statements were improper and/or were likely to be viewed as improper by students or colleagues?

VII. "BOOK BANS"

A. Part of the nationwide backlash against "CRT" and LGBT inclusion has been coordinated efforts to remove books from curriculum and school libraries. According to the American Library Association, the top ten most challenged books in 2022 were:

Gender Queer: A Memoir by Maia Kobabe
All Boys Aren't Blue by George M. Johnson
The Bluest Eye by Toni Morrison
Flamer by Mike Curato
Looking for Alaska by John Green
The Perks of Being a Wallflower by Stephen Chbosky
Lawn Boy by Jonathan Evison
The Absolutely True Diary of a Part-Time Indian by Sherman Alexie
Out of Darkness by Ashley Hope Perez
A Court of Mist and Fury by Sarah J. Maas
Crank by Ellen Hopkins
Me and Earl and the Dying Girl by Jesse Andrews
This Book is Gay by Juno Dawson

B. **Curriculum Challenges.** Parents and community members may object to certain concepts or books being included as part of curriculum or required learning objectives.

2. Some districts have policies regarding adoption of curriculum and selection of textbooks that include criteria for selection and a procedure to challenge them. Some MSBA policies in the 600 series address this.

3. Typically, school districts will not incur legal liability based on a decision related to curriculum or textbooks.

C. **Availability of Books.** School boards do not have unfettered discretion to remove books from being offered in a school library. *Board of Education of Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853 (1982). While school boards generally have significant discretion in matters of curriculum, when considering what books are available to students, they have less. Students have a First Amendment right to access controversial viewpoints and boards cannot regulate books in a partisan or limited manner.

2. If a board is looking to remove books that contain LGBT characters (often for "obscene" or explicit sexual content), the board would also need to remove books with comparable sexual content involving heterosexual characters.

3. In general, boards should examine the overall value of the book rather than isolating specific phrases or paragraphs that have incited community outrage.

4. As with curriculum challenges, school districts are unlikely to incur legal liability based on having books available to students. However, a school district could face a First Amendment challenge over removing books.

VIII. REVIEW OF RECENT LEGISLATION. Just as parents and community members are pushing back against schools' non-discrimination initiatives, so too are legislatures, with varying success.

A. Minnesota

2. Minnesota legislators have introduced a bill to prohibit transgender males from using communal female restroom or locker room facilities in public schools. *See* Minnesota Senate File 934.

3. Additionally, legislators have introduced a bill titled the "Parental Rights Awareness Act" that, among other things, requires schools to adopt procedures for notifying a parent of significant changes to their student's health care services or monitoring of their mental, physical, or emotional health, and restricts classroom instruction on sexual orientation or gender identity. *See* Minnesota House File 3022.

4. Given Minnesota's current political landscape, these pieces of legislation are not likely to advance.

B. Outside of Minnesota

2. **Iowa.** Iowa recently passed a law prohibiting students from using a school bathroom or locker room that does not align with their sex at birth.

3. **Arkansas.** Arkansas recently passed a law restricting classroom instruction on gender identity and sexual orientation, and by executive

order, the state has banned critical race theory in classroom instruction.

4. **Kentucky.** Kentucky legislators overrode a veto from the governor to pass a law banning discussion of sexual orientation and gender identity in classrooms, prohibiting schools from requiring faculty to address students by their preferred name and pronoun if they do not match the students' sex at birth, and preventing students from using the bathroom that aligns with their gender identity.

C. More Legislation, More Lawsuits. These pieces of legislation represent just a sample of the bills introduced in Minnesota and other states on these topics. Of course, as states successfully pass bills like these into law, schools are sure to face increased litigation from plaintiffs challenging their educational practices.