

August 16, 2022

Re: ACLU of SD Urges Opposition to Proposed Rule 24:43:14:02

Dear Members of the South Dakota Board of Education Standards,

I write to you today on behalf of the American Civil Liberties Union of South Dakota to urge your opposition to Proposed Rule 24:43:14:02.



P.O. Box 1170  
Sioux Falls, SD 57101  
aclusd.org

The ACLU of South Dakota opposes this rule for a variety of reasons. The proposed rule is vague and vulnerable to subjective interpretations that will chill speech and robust discussion in classrooms, it restricts the First Amendment rights of educators and students alike, and will harm all South Dakota students – especially students of color. All students – including students of color – deserve an inclusive education that acknowledges the role of racism in U.S. history. By preventing discussion of topics that the government deems “inherently divisive,” this proposed rule will exclude the experiences and viewpoints of Black, Indigenous, and other people of color as well as other marginalized communities.

### **1. The Proposed Language is Too Vague and Subjective**

This rule purports to protect students from political indoctrination; instead, it imposes censorship in classrooms by vaguely forbidding content standards that are based in subjective criteria. This lack of clarity opens the doors for a wide range of interpretations that could be used to chill free speech and academic freedom, discouraging open and honest discussions about systemic racism in classrooms and in school communities.

It is not clear how broadly the language in this proposed rule can be interpreted. For example, what does it mean *in practice* for an educator to “direct or compel a student to personally affirm, adopt, or adhere to” the listed ideas when they are authority figures in their classrooms who need to talk about topics that are considered controversial subjects in American history and current society? Interpretations and criteria for interpreting this language could vary widely from school to school. This could lead to significant restrictions on how educators choose to approach their lessons and have far-reaching consequences on our children’s education.

Further, the proposed rule forbids the adoption of academic content standards that “promote ‘inherently divisive concepts’ meaning concepts that advance ideas in violation of the Civil Rights Act of 1964, *including but not limited to*” (emphasis added) six specific concepts. However, the phrasing “not limited to” casts a wide and unclear net that may capture a variety of undefined speech and subject matter. Such vagueness will cast a pallor over all content and speech that may be considered “divisive” and put educators and Members of the Board themselves in the untenable position of trying to guess what ideas are considered “inherently divisive” by the government.

### **2. The Proposed Rule Runs Afoul of Students and Educators First Amendment Rights**

The ability to discuss and debate ideas freely without fear of censorship, even those ideas that some may find uncomfortable, is a crucial part of our democracy. These types of vague restrictions could have serious consequences that affect free speech. The first amendment protects the right to share ideas, including the right of listeners to receive information and knowledge. The proposed rule infringes on the First Amendment rights of students and educators because educators will likely self-censor when discussing controversial topics to protect themselves from baseless accusations of political indoctrination.

### **3. The Proposed Rule is Harmful to Students of Color**



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Putting vague restrictions on discussion about race and racism like this is harmful to all students – but particularly for Black, Indigenous, and other students of color. For Black, Indigenous, and other students of color, the ability to talk and learn about the experiences and viewpoints of people of color and America’s legacy of racism is critical to feeling connected and like equality is valued in their school communities. This can help foster a feeling of belonging within the education system, support the growth and development of their identities, and can lead to greater academic success. Conversely, stifling these conversations risks alienating students of color and can get in the way of their education. It risks maintaining or creating education environments that are inequitable and unwelcoming to students of color.

Researchers and educators recognize<sup>1</sup> that a school-wide approach involving education and training is necessary to combat harassment and bullying on the basis of race and gender. Laws restricting open and honest conversations about race jeopardize this important work. Research indicates that general anti-bullying policies and programs are not nearly as effective at combating bias-based bullying as policies and programs that explicitly name protected characteristics, such as race/ethnicity, gender, sexual orientation, religion, etc.

Furthermore, although the rule itself claims to prohibit the advancement of ideas in violation of the Civil Rights Act of 1964, the proposed divisive concepts language of the rule may actually violate the Civil Rights Act of 1964 because it will likely have a discriminatory impact or effect on Indigenous students specifically, who have federally recognized unique culturally - related educational needs that the state is obligated to meet under the Every Student Succeeds Act and other regulations. The Civil Rights Act of 1964 does not necessarily require intent to discriminate against Indigenous students, LGBTQ and Two Spirit students, or students of color, to bring a successful claim against the South Dakota Department of Education.

### **4. The Proposed Language Further Politicizes the Content Standards Process**

This proposed rule is one thread in a pattern of attacks on education equity in the state of South Dakota. First and foremost, it is being put forth to bring the content standards into compliance with Executive Order 2022-02, which was issued by Governor Kristi Noem after House Bill 1337 failed to pass in the Senate Education Committee with almost identical language. It is clear that this Executive Order was meant to circumvent the

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<sup>1</sup> <https://www.apa.org/advocacy/interpersonal-violence/bullying-school-climate>

legislative process and adopting this rule risks setting dangerous precedent that the Governor can enact rejected legislation through extreme executive action.

Despite claims that “political indoctrination has no place in our classrooms,” the executive order from which this proposed rule stems only serves to further politicize education in South Dakota. From the unprecedented decision to reject proposed social studies standards and reappoint a new committee in 2021 – a move which original workgroup members called the “present-day erasure of Native Americans” – to multiple pieces of legislation in 2022 attempting to censor classroom discussions, it is clear that some South Dakota government officials are attempting to silence ideas and elements of history that they find controversial or undesirable. While the burden of this attempt will fall on all South Dakota students, its impact will have the most harm on Indigenous and other students of color.



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### **Conclusion**

Education is a tool of empowerment put to its highest use when teachers and students are given the full scope of their Constitutional rights to engage in comprehensive, meaningful, and sometimes difficult conversations. Let's keep censorship out of South Dakota classrooms. For these reasons, the ACLU of South Dakota urges you to reject the unnecessary proposed rule 24:43:14:02.

Sincerely,

A handwritten signature in black ink that reads "Jett Jonelis".

Jett Jonelis  
Advocacy Manager  
ACLU of South Dakota  
[jjonelis@aclu.org](mailto:jjonelis@aclu.org)