August 25, 2022

Via E-Comments

Administrative Law Judge James R. Mortenson
Office of Administrative Hearings
600 North Robert Street
P.O. Box 64620
Saint Paul, MN 55166-0620

Re: In re Proposed Amendments to Rules Governing Teacher Licensure and Permissions; the Standards of Effective Practice; and Teachers of Health, Physical Education, Developmental Adapted Physical Education, Parent and Family Education, Adult Basic Education, and American Indian Language, History, and Culture; Minnesota Rules, Chapter 8710; Proposed Repeal of Minnesota Rules, parts 8710.0400 and 8710.0550; Revisor's ID Number 4615

OAH Docket Number 5-9021-36362

Dear Judge Mortenson:

My name is Douglas Seaton, and I am the President and founder of the Upper Midwest Law Center ("UMLC"), a 501(c)(3) non-profit public-interest law firm which advocates for liberty and the rule of law.

UMLC has successfully litigated a number of civil rights and constitutional cases arising from violations of the rights of Minnesotans, including our recent victory in the Minnesota Supreme Court against the City of Minneapolis' failure to fund an adequate police force. We also successfully defended against Governor Walz' motion to dismiss our lawsuit against the state's discrimination against Minnesota's houses of worship during the COVID-19 lockdowns, shuttering them while big-box stores were allowed to remain open. Because of our victory there, our clients obtained a settlement with Governor Walz forbidding discrimination between big-box stores and houses of worship. Prior to founding UMLC and my experience litigating high-profile constitutional and civil rights cases at UMLC, I practiced private and public sector labor law, civil rights law, and discrimination law.

I also write from the perspective of a Ph.D in history and former teacher, including my experience teaching diversity principles and minority history, as part of a multi-varied team, to high school teachers in Minnesota and Wisconsin. I believe in the importance of the teaching profession and the importance of true diversity—of background, perspective, and ideals as well as of race, sex, and ethnicity.

Teacher competency and qualifications are crucially important to advancing the Minnesota Constitution's promise of a free, adequate public education for all. And I also write based on my personal experiences in combating real race discrimination. As the former president of Princeton University's Students for a Democratic Society chapter, I marched against segregated housing in Newark, New Jersey, and I sat-in to protest investments in the South African apartheid regime by Princeton University. I earned bruises when physically attacked for standing up for my belief in equality under the law, but it is important to stand against those who seek to divide using race as their tool, whatever their race.

With that as brief background, I write jointly with my colleague, James Dickey, to provide comments on several portions of the above-titled proposed rules, which suffer substantial constitutional defects. In short, and as detailed further below, the proposed rules are invalid under state and federal law, are thus unreasonable, and should not be approved. *See* Minn. Stat. §§ 14.05, Subd. 1; Minn. Stat. § 14.45; Minn. Stat. § 14.15, Subd. 4; Minn. Stat. § 14.50.

I. Compelled Speech in the Form of Ideological Litmus Tests for Public Employment Are Unconstitutional.

In short, the proposed rules compel teachers seeking a license to agree with or speak agreement with the government's ideological and religious position, contrary to their beliefs. In other words, the proposed rules impose an ideological litmus test on those who wish to serve Minnesota's public-school children as teachers. This "compelled speech" violates the most basic provisions of our U.S. Constitution's First Amendment. The Supreme Court has put it bluntly:

> [P]rominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed….Jefferson denounced compelled support for such beliefs as "sinful and tyrannical[."]

Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2471 (2018).

Citing *Janus*, the Eighth Circuit Court of Appeals has held that forcing videographers—private sector employees—to make videos celebrating same-sex marriage via the Minnesota Human Rights Act violates the "cardinal constitutional command" against compelled speech. *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 753 (8th Cir. 2019).

II. Government Licensors Cannot Impose Unconstitutional Conditions or Demand the Sacrifice of the Free Exercise of Religion as the Price for Becoming a Public School Teachers, or for Training Those Teachers.

Public employees cannot be forced to trade their constitutional rights for the benefit of public employment: "[The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 2697 (1972).

Further, because expression on "public issues has always rested on the highest rung of the hierarchy of First Amendment values,…mandating that [individuals] affirmatively espouse the government's position on a contested public issue where the differences are both real and substantive" runs afoul of the unconstitutional conditions doctrine. *All. for Open Soc'y Int'l, Inc. v. United States Agency for Int'l Dev.*, 651 F.3d 218, 236 (2d Cir. 2011). This is especially true where the government "compels [individuals] to voice the government's viewpoint and to do so as if it were their own." *Id.* at 237.

It is certainly true that public teachers can be required to teach from a standard curriculum that contains ideas with which they do not agree. "Only the school board has ultimate responsibility for what goes on in the classroom, legitimately giving it a say over what teachers may (or may not) teach in the classroom." *Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 340 (6th Cir. 2010). It is therefore true that a school district could require a teacher to teach history, for example, that the teacher believes is inaccurate.

However, while teachers may be compelled to speak in class related to established curricula by those responsible for creating them, they cannot be forced to give up their beliefs or rights in order to get a teaching job. Teachers are still private citizens, and in that capacity they retain their First Amendment rights as private citizens. *Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006). While under Minnesota law, local school boards can adopt curricula, the PELSB cannot force its view of society or its religious expression on teachers as a condition of them becoming teachers.

The Minnesota Constitution's protection against government action which limits the free exercise of religion is even stronger than the federal First Amendment counterpart: "Only the government's interest in peace or safety or against acts of licentiousness will excuse an imposition on religious freedom under the Minnesota Constitution." *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990). The PELSB has no such interest here.[1]

Finally on this point, students also have a fundamental right not to be forced to agree with a particular political or religious viewpoint: "But no legitimate pedagogical interest is served by forcing students to agree with a particular political viewpoint, or by punishing those who refuse. That would offend the First Amendment—as both our court and other circuits across the country have repeatedly recognized." *Oliver v. Arnold*, 19 F.4th 843, 845 (5th Cir. 2021). The corollary is that students have a right to teachers with diversity of opinion and ideology on matters of public concern, and the PELSB cannot force teachers into its mold.

And relatedly, the PELSB cannot place conditions on offering a teacher-training program required for teacher licensure which would deny colleges with particular religious beliefs from inculcating that message as part of their training. Religious colleges and universities have broad First Amendment rights to expressive association, grounded in the Free Exercise Clause. *E.g., Billard v. Charlotte Catholic High Sch.*, No. 3:17-cv-00011, 2021 U.S. Dist. LEXIS 167418, at *78

[1] The proposed rules here would also fail the traditional *Employment Division v. Smith* test as well, as the deprivations here would impact both free exercise of religion and freedom of speech, known as the "hybrid rights" situation. *Emp't Div. v. Smith*, 494 U.S. 872, 881, 110 S. Ct. 1595, 1601 (1990).

(W.D.N.C. Sep. 3, 2021) ("Defendants are engaged in expressive activities as the school actively seeks to instill Catholic teachings, including on marriage, in its students."). In addition, the Supreme Court has held these rights to an even higher status than non-religious expressive rights. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189, 132 S. Ct. 694, 706 (2012). Requiring colleges with established religious beliefs to forgo those beliefs in order to train students to become Minnesota public school teachers would violate their First Amendment rights.

III. The Establishment Clause Forbids Establishing State-Approved Religious Beliefs.

The proposed rules also give rise to grave Establishment Clause concerns. It is well established that the Establishment Clause's prohibition on the establishment of religion extends to beliefs beyond traditional religious beliefs. In fact, the Establishment Clause applies with equal force to a "religion of secularism." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225, 83 S. Ct. 1560, 1573 (1963) ("We agree of course that the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'").

The proposed rules replace potential licensees' religious beliefs with the drafters' religious beliefs grounded in a postmodern secularism which is characterized by its adherents' "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God" of traditional monotheistic religions. *United States v. Seeger*, 380 U.S. 163, 176, 85 S. Ct. 850, 859 (1965). As former Attorney General William Barr recently noted, "Now we see the affirmative indoctrination of children with a secular belief system and worldview that is a substitute for religion and is antithetical to the beliefs and values of traditional God-centered religion."[2]

As discussed below, the requirement that potential licensees affirm minor children's gender identity as different from their biological sex is both anathema to traditional orthodox theistic religion and a secular-religious belief of its own. It elevates personal affirmation above even biological reality, and simultaneously denies others the right to exercise their contrary traditional beliefs.

IV. Application to the Proposed Rules.

The proposed rules, specifically Proposed Standard of Competency 2, 4, and 8, which would amend Minn. R. 8710.2000, compel teachers to say what they do not believe, against their right to believe and say otherwise.

Standard 2 requires teachers to "foster[] an environment that ensures student identities, such as…gender identity…are historically and socially contextualized, affirmed, and incorporated into a learning environment where students are empowered to learn and contribute as their whole selves." Ex. D, SONAR, p. 68; Ex. M1, Aug. 16 Rule Draft, 20.15-19. The requirement to "ensure" that students' "gender identity" is "affirmed" requires a potential licensee to agree with and teach,

[2] https://adflegal.org/william-barr-interview.

not simply non-discrimination against or toleration of a minor student's claimed gender identity inconsistent with biological sex, but to promote this claim as legitimate and morally acceptable. This requirement is directly contrary to the orthodox Judeo-Christian worldview, as one example from traditional religion. In Chapter 1 of the Book of Genesis of the Old Testament of the Bible and the Torah, for example, it states: "So God created mankind in his own image, in the image of God he created them; male and female he created them." Genesis 1:27 (NIV).

By inclusion of the new proposed Standard 2, the PELSB has made it impossible for those practicing orthodox Christianity and Judaism, as just two examples, to freely exercise their religion and simultaneously hold a teaching license. It makes it impossible for those colleges who seek to teach students how to teach to also maintain a distinctly orthodox Christian message on this key tenet of orthodox Christianity. It compels potential licensees to speak the PELSB's chosen beliefs as an established creed and live them out in order to have a job. It establishes the PELSB's view of human sexuality and gender as orthodoxy despite sincere opposition based on biological reality and traditional orthodox theistic beliefs. In short, proposed Standard 2, which requires affirmation of a minor child's claimed gender identity which deviates from that child's biological sex, violates the First Amendment in many ways.

Standard 4(F) requires the teacher to "feature" and "highlight" resources that "offer diverse perspectives on…gender, sexual identity." Ex. D, SONAR p. 75; Ex. M1, Aug. 16 Rule Draft, 22.16-19. This suffers from a similar problem to "affirmation" above, as it requires teachers to promote viewpoints to which they may have a religious objection, and it requires schools training teachers to instruct those potential licensees that they must feature resources that offer perspectives on issues which contradict the school's mission.

Standard 8 related to "Racial Consciousness and Reflection" likewise fails constitutional muster. It requires teachers to agree with—or at minimum acknowledge the "truth" of—hotly disputed matters of public concern unrelated to effective teaching. The SONAR declares the standard necessary to "redesign and rebuild systems that are anti-racist and culturally affirming with policy and practice decisions centering on the development of students of color and American Indian students to achieve racially equitable outcomes." Ex. D, SONAR, p. 85. While it is not totally clear what this means, "equitable outcomes" strongly implies equal results regardless of performance or achievement, simply because of a student's race.

The standard also requires that potential licensees "have a foundational understanding of how race and racism are embedded in our institutions and everyday life," even if they do not agree or acknowledge that to be so. Ex. D, SONAR p. 85. In context here, "understanding" undoubtedly implies agreement that something exists, consistent with one of the common definitions of the term "understand": "to accept as a fact or truth or regard as plausible without utter certainty."[3]

The standard also requires the same "understanding" of "racial formation, processes of racialization, and intersectionality," as well as "the impact of the intersection of race and ethnicity with other forms of difference, including class, gender, sexuality, religion, national origin, immigration status, language, ability, and age." Ex. D, SONAR p. 86-87; Ex. M1, Aug. 16 Rule

[3] https://www.merriam-webster.com/dictionary/understand.

Draft, 26-27. These concepts are widely recognized as key concepts of critical race theory, a view of American institutions which attacks them as irredeemably racist and imbued with White supremacy, and divides people into identity groups while claiming that identity groups are merely a social construct.[4] The legitimacy of these concepts is a divisive matter, to say the least, and the PELSB is forcing potential educators to agree that they are, in fact, part of American life, when many would vehemently disagree.[5]

The standard likewise requires potential licensees to "understand[] how ethnocentrism, eurocentrism, deficit-based teaching, and white supremacy undermine pedagogical equity." Proposed Standard 8(C). Again, when asked to "understand" how a concept achieves a result, one is forced to agree that the concept does, in fact, achieve the claimed result. This again forces potential educators to agree with disputed concepts against their own perceptions and beliefs about the world. This is compelled speech, and it requires potential educators to give up their free speech rights to become educators in Minnesota's public schools. The United States and Minnesota Constitutions protect teachers from having to make that choice.

The Administrative Law Judge Should Not Allow the Rules to Be Adopted

Sadly, the PELSB's cold response to one commenter's concerns in the pre-hearing comment period reveals the PELSB's total lack of concern about educators whose consciences might not allow them to agree with the PELSB's particular ideology and secular-religious beliefs. The PELSB impugns the motives of those who have honest objections to these standards as simply "uncomfortable being prepared to serve all students":

> Educators who are uncomfortable being prepared to serve all students always have the option to serve more select groups in private school settings where meeting the requirements for licensure in the state are not required.

Exhibit L, Response to Prehearing Comments, p. 6. This is false, sad, and cynical comment reveals the PELSB's intent to marginalize educators and potential educators who disagree with its apparent views on gender identity, equal justice under law, and the legitimacy of American institutions. This would inherently have a depressive effect on the pool of teachers available to teach in Minnesota public schools, despite a current shortage. It is irresponsible and shows intentional disregard for educators' individual rights and the beliefs of a clear majority of Minnesotans.

But contrary to the PELSB, courts actually do uphold the rights of public employees and would-be public employees against this sort of oppressive behavior. We ask the Administrative Law Judge to not approve the proposed rules, and at minimum, not to approve Standards 2 and 8 as

[4] https://www.britannica.com/topic/critical-race-theory/Basic-tenets-of-critical-race-theory.
[5] Hart Research Associates, American Federation of Teachers May 2022 poll, available at https://www.documentcloud.org/documents/22086577-education-poll. The May 2022 poll shows that only 19% of American believe that more should be taught in school about "racial issues and the role of race in America," p. 5, and only 11% believe that more should be taught in school about "sexual preference and gender identity," p. 5.

written. Without conscience protection rights in these Rules, they are unconstitutional and will almost certainly be struck down by a court.

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In addition to the foregoing comments, UMLC reserves the right to submit further comments and replies to the comments of other parties through the close of the hearing record and rebuttal period, and to proceed with any applicable appeals or challenges to any forthcoming decision of the ALJ.

Respectfully,

Douglas Seaton, Esq., Ph.D,
President and Founder of UMLC

cc: James V.F. Dickey, Esq.