



# 2021 Legislative Session Equity, Inclusion, and Free Speech

## Preliminary Guidance

### Introduction

Governor Reynolds signed several pieces of legislation into law that created new substantive requirements concerning equity and inclusion, as well as student free speech for elementary and secondary schools. This guidance is structured around the following bills:

- [House File 744: Student Free Speech](#),
- [House File 802: Parameters for Racism and Sexism Training](#),
- [House File 847: Education Practices](#), and
- [House File 868: Education Appropriations](#).

### House File 744: Student Free Speech

#### Who is governed by this law?

[House File \(HF\) 744](#) governs public school districts and public institutions of higher education. Nonpublic schools and institutions of higher education are not covered. *Note:* The Iowa Department of Education (Department) will prepare separate guidance for community colleges.

#### When is this law effective?

HF 744 takes effect on July 1, 2021.

#### What does this law require?

HF 744 does several major things:

- It requires school districts to “protect the intellectual freedom of the school district’s students and practitioners and ... establish and publicize policies that protect students and faculty from discrimination based on speech” (HF 744 § 5, adding new Iowa Code § 279.73).
- It creates protections to enforce the required intellectual freedom policy. Individuals who file a complaint under the required intellectual freedom are protected against retaliation. If the complainant is an employee of the district, the complaint is subject to Iowa’s whistleblower statutes ([Iowa Code § 70A.29](#)).
- It provides for enforcement of the school district’s intellectual freedom policy, including termination of the employee and referral of the employee to the Iowa Board of Educational Examiners (BOEE).
  - Note: HF 744 also provides that the BOEE may deny or revoke a license if they find “by a preponderance of evidence” that the licensee “knowingly and intentionally discriminated” in violation of a district’s intellectual freedom policy (HF 744 § 4, adding new Iowa Code § 272.2(14)“e”).
- It makes changes to Iowa Code [section 280.22](#) (“Student exercise of free expression”). HF 744 requires that a school district’s written publications code must contain the content of Iowa Code section 280.22. It also makes a technical change to improve readability.

- It provides the following protections to public school employees or officials from termination, nonrenewal, or other retaliatory action:

For acting to protect a student for engaging in conduct authorized under this section, or refusing to infringe upon student conduct that is protected by this section, the first amendment to the Constitution of the United States, or Article I, section 7, of the Constitution of the State of Iowa. (HF 744 § 7, adding new Iowa Code § 280.22(6A))

## What does “intellectual freedom” mean in this context?

“Intellectual freedom” or “academic freedom” is, as a concept, inextricably linked to the First Amendment’s Free Speech Clause (although the concepts are not synonymous). According to Justice William Brennan:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” The classroom is peculiarly the “marketplace of ideas.” The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth “out of a multitude of tongues, [rather] than through any kind of authoritative selection.” (*Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589, 603 (1967) [citations omitted])

Students and school employees must be permitted to enjoy the full breadth of the First Amendment’s guarantee, regardless of the particular viewpoint expressed. However, certain speech is not protected under HF 744 because such speech is not protected by the First Amendment or is antithetical to academic or extracurricular pursuits. The following is a non-exhaustive list of speech that is subject to regulation:

- Speech that would “materially and substantially interfere” with the operation of the school (*Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 509 (1969)). A “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint” is not sufficient disruption that would justify a restriction on student speech (*Tinker v. Des Moines Independent Community School District*, 1969).
- Speech encouraging the commission of a crime or the violation of school rules (*Morse v. Frederick*, 551 U.S. 393 (2007)).
- Bullying and harassment under [Iowa Code section 280.28](#).
- Harassment under state or federal civil rights laws.
- Obscenity or crude speech (*Bethel School District v. Fraser*, 478 U.S. 675 (1986)).
- Other speech that harms members of the school community (e.g., libel, slander, invasion of privacy).
- Plagiarism or other academic misconduct.
- Speech that violates the property rights of others (e.g., copyright infringement, disclosure of trade secrets, software piracy).
- Speech that is a crime, such as:
  - “Disorderly conduct” under [Iowa Code section 723.4](#),
  - “Extortion” under [Iowa Code section 711.4](#),
  - A “false report” under [Iowa Code section 718.6](#),
  - “Hazing” under [Iowa Code section 708.10](#), or
  - A “threat of terrorism” under [Iowa Code section 708A.5](#).
- Speech that is not responsive to the academic assignment, such as:
  - A teacher gives an assignment to “describe the current scientific consensus on climate change.” The student states that climate change is a “hoax,” and any warming is attributable to natural causes (e.g., solar cycles). Although the answer is well-written, the student receives a low mark. Because the student’s answer is not responsive to the assignment, the low mark would not be a violation of HF 744.
  - A teacher gives an assignment to “describe your personal view on climate change.” The student states that climate change is a hoax, and any warming is attributable to natural causes (e.g.,

solar cycles). Although the answer is well-written, the student receives a low mark. Because the student's answer is responsive to the assignment, the low mark would appear to be a violation of HF 744 in the absence of other facts.

- Speech by participants or spectators at an athletic event that would be considered unsportsmanlike conduct, taunting, or another similar infraction.

## House File 802: Parameters for Racism and Sexism Training

### Who is governed by this law?

In relevant part, [HF 802](#) governs public school districts and public institutions of higher education. Nonpublic schools and institutions of higher education are not covered. *Note:* The Department will prepare separate guidance for community colleges.

### When is this law effective?

HF 802 takes effect on July 1, 2021.

### What does this law require?

This law requires school districts to do several important things:

1. The superintendent must ensure “any curriculum or mandatory staff or student training provided by an employee of the school district or by a contractor hired by the school district does not teach, advocate, encourage, promote, or act upon specific stereotyping and scapegoating toward others on the basis of demographic group membership or identity” (HF 802 § 3, adding new Iowa Code § 279.74(2)).
  - New section 279.74(2) also contains the following exception: “This subsection shall not be construed as preventing an employee or contractor who teaches any curriculum or who provides mandatory training from responding to questions regarding specific defined concepts raised by participants in the training.”
    - *Notes:*
      - This language does not make direct reference to the term “specific defined concepts,” which appears elsewhere in HF 802; school districts are advised to assume that the term is included by implication.
      - This language applies to a curriculum or staff or student training that is specific to diversity, equity, and inclusion. This language shall not be construed to prohibit these discussions anywhere in the school, such as in the course of a broader academic discussion (see below).
2. School district “diversity and inclusion efforts shall discourage students of the school district from discriminating against another by political ideology or any characteristic protected under the federal Civil Rights Act of 1964, Pub. L. No. 88-352, as amended, and applicable state law” (HF 802 § 3, adding new Iowa Code § 279.74(3)).
3. HF 802 requires a school district to “prohibit its employees from discriminating against students or employees by political ideology or any characteristic protected under the federal Civil Rights Act of 1964, Pub. L. No. 88-352, as amended, and applicable state law” (HF 802 § 3).

### May school districts continue to offer diversity, equity, and inclusion training to their employees?

Yes, subject to the terms of HF 802. HF 802 specifically provides, “Each school district may continue training that fosters a workplace and learning environment that is respectful of all employees and students” (HF 802 § 3, adding new Iowa Code § 279.74(2)).

## What are the characteristics protected under the Civil Rights Act of 1964?

The Civil Rights Act, as amended, protects individuals from discrimination based on race, color, religion, sex, and national origin. Apply the prohibition against sex discrimination to include discrimination based on sexual orientation or gender identity (see *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)). Assume that provision also includes discrimination based on disability (see the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213).

## What are characteristics protected by state law?

Two state statutes are applicable here:

1. Iowa's Civil Rights Act prohibits school districts from discrimination based on "race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability" (Iowa Code § 216.9(1)).
2. Iowa Code section 280.28 (Iowa's law against bullying and harassment in schools) protects from bullying and harassment based on "age, color, creed, national origin, race, religion, marital status, sex, sexual orientation, gender identity, physical attributes, physical or mental ability or disability, ancestry, political party preference, political belief, socioeconomic status, or familial status" (Iowa Code § 280.28(2)"c").

## What does "race or sex scapegoating" mean?

According to HF 802, "race or sex scapegoating" means:

Assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex, or claiming that, consciously or unconsciously, and by virtue of persons' race or sex, members of any race are inherently racist or are inherently inclined to oppress others, or that members of a sex are inherently sexist or inclined to oppress others. (HF 802 § 3, adding new Iowa Code § 279.74(1)"a" and incorporating new Iowa Code § 261H.7(1)"a" by reference).

Discussions of bias and oppression are still permitted (see the following What does HF 802 not do? section); however, what is not permitted is stating that a particular race or sex is inherently biased or oppressive.

## What does "race or sex stereotyping" mean?

According to HF 802, "race or sex stereotyping" means "ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of the individual's race or sex" (HF 802 § 3, adding new Iowa Code § 279.74(1)"b" and incorporating new Iowa Code § 261H.7(1)"b" by reference).

## What are HF 802's "specific defined concepts"?

HF 802 added a new Iowa Code section 261H.7(1)"c," which contains the list of specific defined concepts, and which is incorporated by reference in new section 279.74(1)"c". Those concepts are as follows:

- (1) That one race or sex is inherently superior to another race or sex.
- (2) That the United States of America and the state of Iowa are fundamentally or systemically racist or sexist.
- (3) That an individual, solely because of the individual's race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.
- (4) That an individual should be discriminated against or receive adverse treatment solely or partly because of the individual's race or sex.
- (5) That members of one race or sex cannot and should not attempt to treat others without respect to race or sex.
- (6) That an individual's moral character is necessarily determined by the individual's race or sex.

(7) That an individual, by virtue of the individual's race or sex, bears responsibility for actions committed in the past by other members of the same race or sex.

(8) That any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of that individual's race or sex.

(9) That meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race.

(10) Any other form of race or sex scapegoating or any other form of race or sex stereotyping. (HF 802 § 2, adding new Iowa Code § 261H.7(1)"c")

While most of these concepts are self-explanatory, a few deserve additional attention:

- (2) That the United States of America and the state of Iowa are fundamentally or systemically racist or sexist. It would not implicate this concept to mention actual or purported racist or sexist policies implemented by the United States or the State of Iowa, so long as the United States or the state of Iowa are not described as "fundamentally or systemically racist or sexist."
- (7) That an individual, by virtue of the individual's race or sex, bears responsibility for actions committed in the past by other members of the same race or sex. This provision does not bar discussions of how to redress the effects of past discrimination. This section is implicated only if individuals are asked to bear responsibility, based on their race or sex, for past discrimination that they did not commit.
- (10) Any other form of race or sex scapegoating or any other form of race or sex stereotyping. This provision is implicated only if an individual is expected to "feel discomfort, guilt, anguish, or any other form of psychological distress on account of that individual's race or sex." The emotions of "discomfort, guilt, [or] anguish" may be rational responses to discussions of oppression. This section does not require elimination of emotional discussions; what it does require is that trainings or curricula not assign blame or imply individuals ought to feel pain based on their race or sex.

## What does HF 802 not do?

The drafters of HF 802 included several explanations and limitations:

1. School districts are specifically allowed to continue diversity, equity, and inclusion training for students and staff. A district remains able to promote "racial, cultural, ethnic, intellectual, or academic diversity or inclusiveness, provided such efforts are consistent with the provisions of this section, chapter 216, and other applicable law" (HF 802 § 3, adding new Iowa Code § 279.74(4)"b").
2. HF 802 is to be construed consistent with the First Amendment. HF 802 provides that it shall not be construed to:

Inhibit or violate the first amendment rights of students or faculty, or undermine a school district's duty to protect to the fullest degree intellectual freedom and free expression. The intellectual vitality of students and faculty shall not be infringed under this section. (HF 802 § 3, adding new Iowa Code § 279.74(4)"a")

This provision should also be read consistently with Article I, section 7, of the Constitution of the State of Iowa, and [HF 744's protection of intellectual freedom](#) (see the previous section).

3. HF 802 provides that specified concepts may be included "as part of a larger course of academic instruction" (HF 802 § 3, adding new Iowa Code § 279.74(4)"c"). Later in section 3, HF 802 provides it shall not be construed to prohibit "the use of curriculum that teaches the topics of sexism, slavery, racial oppression, racial segregation, or racial discrimination, including topics relating to the enactment and enforcement of laws resulting in sexism, racial oppression, segregation, and discrimination" (HF 802 § 3, adding new Iowa Code § 279.74(4)"f"). HF 802 allows a robust discussion of the causes and consequences of racism, sexism, and oppression.



## Are there other provisions of HF 802?

HF 802 allows state or federal courts to require “training or remedial action containing discussions of specific defined concepts as a remedial action due to a finding of discrimination, including discrimination based on race or sex” (HF 802 § 3, adding new Iowa Code § 279.74(4)”e”).

Further, HF 802 does not create “any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the state of Iowa, its departments, agencies, or entities, its officers, employees, or agents, or any other person” (HF 802 § 3, adding new Iowa Code § 279.74(4)”d”).

## How will the Department monitor compliance with HF 802?

As with any other requirement for school districts, the Department will apply its ordinary monitoring and support procedures. Since section 2 requires each district’s superintendent to ensure compliance, anticipate that the Department will add this to the required list of annual assurances and select districts for additional monitoring based on the Department’s Differentiated Accountability framework.

## Will the Department issue rules regarding HF 802?

The Department is determining whether rules are required.

## House File 847: Education Practices

[HF 847](#) contains an amendment to Iowa Code section 280.5.

## Who is governed by this law?

In relevant part, HF 847 governs public school districts. Nonpublic schools are not covered.

## When is this law effective?

This portion of HF 847 takes effect on July 1, 2021.

## What does this law require?

HF 847 adds the following requirement to Iowa Code section 280.5:

The board of directors of each public school district shall administer the pledge of allegiance in grades one through twelve each school day. Each classroom in which the pledge of allegiance is recited pursuant to this subsection shall display the United States flag during the recitation. A student shall not be compelled against the student’s objections or those of the student’s parent or guardian to recite the pledge. (HF 847 § 27, adding new Iowa Code § 280.5(2))

If either a parent or a student objects to saying the pledge of allegiance, the student shall not be required to say it (see *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); the United States Constitution forbids public schools from compelling recitation of the Pledge of Allegiance or saluting the flag).

## What happens if a student’s schedule allows or requires the student to be away from school during the recitation of the pledge? Does the school need to revise the student’s schedule?

If a student’s schedule conflicts with being present during the recitation of the pledge (e.g., off campus work experience), the student’s schedule takes precedence.

# House File 868: Education Appropriations

The 2021 education appropriations bill ([HF 868](#)) contains several provisions related to diversity, equity, and inclusion.

## Who is governed by this law?

HF 868 governs public school districts. Nonpublic schools are not covered.

## When is this law effective?

HF 868 takes effect on July 1, 2021.

## What does this law require?

HF 868:

1. Requires the director of the Department to develop three products:

NEW SUBSECTION. 63. Develop and make available on the department's internet site general *guidance for parents, guardians, and community members who have concerns about school districts or their governing boards.*

NEW SUBSECTION. 64. Develop and distribute to school districts *standards of practice for equity coordinators* employed by school districts. To provide consistency in training statewide, the director shall also develop and distribute to school districts a *training program on free speech under the first amendment which shall be used by school districts to provide training pursuant to section 279.75.* (HF 868 § 27, adding new Iowa Code § 256.9(63)-(64)) [emphasis added]

2. Allows electors of a school district to place an item on the agenda of the next school board meeting, including concerns about curriculum (HF 868 § 31, adding new Iowa Code § 279.8B). "If the proposal relates to curriculum, the school district may halt use of the subject instructional materials until the school board holds the board meeting at which the proposal is presented and discussed" (HF 868 § 31, adding new Iowa Code § 279.8B).
  - o *Notes:*
    - The decision to halt the use of instructional materials is discretionary, not mandatory. This decision is committed to the sound discretion of the school board and school administration.
    - Section 279.8B is not a vehicle to challenge employment decisions or work assignments of district staff. Those decisions are separately governed by other provisions of Chapter 279.
3. Added the following text to Iowa Code section 279.66 ("Discipline and personal conduct standards"):

The board of directors of a school district shall include or reference in the student handbook guidance published pursuant to section 256.9, subsection 63, by the department of education for parents, guardians, and community members who have concerns about school districts or their governing boards. (HF 868 § 32, adding new Iowa Code § 279.66(2))

4. Added the following training requirement for school district equity coordinators:

The board of directors of a school district shall provide training on free speech under the first amendment to the Constitution of the United States developed and distributed pursuant to section 256.9, subsection 64, annually to any equity coordinator employed by the school district. (HF 868 § 33, adding new Iowa Code § 279.75)

While the Department is still developing the training, it is important to acknowledge the difficult work that equity coordinators do. Balancing competing rights claims is complex and emotional work, but it is absolutely essential to maintaining a vibrant, healthy school community. No student should be bullied or harassed because of their belief. However, the First Amendment

cannot be used to excuse speech that effectively deprives a classmate of access to an education (see discussion, previous, of HF 744). “There is no constitutional right to be a bully” (*Sypniewski v. Warren Hills Region Board of Education*, 307 F.3d 243, 264 (3rd Cir. 2002)).

## Questions and Additional Guidance

If you have questions, please contact your [school improvement consultant](#). If they are unable to assist you, they will connect you with the appropriate person. For additional guidance and information, please visit the Department’s [Equity Education](#) webpage.