

October 19, 2021



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<p>VIA EMAIL ONLY:</p> <p>DOEBoards@state.sd.us Board of Education Content Standards Jacqueline Sly- President Becky Guffin - Vice President Phyllis Heineman - Member Terry Nebelsick - Member Linda Olsen - Member Julie Westra - Member Steve Willard - Member</p>	<p>VIA FAX ONLY: (605) 773-4711</p> <p>South Dakota Governor Kristi Noem 500 E. Capital Pierre, SD 57501</p>
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RE: Removal of Oceti Sakowin Essential Understandings and Native American Topics from the Draft South Dakota Department of Education Content Standards and Convening of Second Revision Committee

Dear Governor Noem and Board of Education Content Standards Members,

Please accept this letter as the American Civil Liberties Union of South Dakota's (ACLU) opposition to the South Dakota Department of Education's (DOE) unilateral removal of a significant number of Oceti Sakowin Essential Understandings (OSEU) and Native American topics from the draft South Dakota Education Content Standards (content standards). The ACLU supports additional OSEU and Native American topic recommendations by the second revision committee to supplement the previous recommendations. The original recommendations were crafted by the first revision committee comprised of highly educated, competent, and interested stake-holders. The DOE and second revision committee should adopt all OSEU and Native American topics recommended previously by the first revision committee.

The second revision committee convened should recommend additional OSEU and Native American topics to the state standards to supplement those previously recommended. The first committee's recommendations should serve as a floor and not a ceiling to any new recommendations by the second revision committee. Anything less than the previously recommended OSEU and Native American topics may result in a violation of federal law, the South Dakota state Constitution and the U.S. Constitution.

The first standards revision committee's recommendations to include several OSEU and Native American topics in the content standards benefit all South Dakota students. The recommendations also provide equal opportunity for Indigenous students to feel welcome, respected and encouraged to receive an education equal to what white students receive within South Dakota's public-



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school system. The first committee's recommendations further the Indigenous perspective, culture, history and inherent right of all Indigenous persons in the state of South Dakota to be represented within the educational system accurately and meaningfully.

Convening a second content standards revision committee¹ to start the revision process over again will not correct the constitutional violations created by the DOE's past actions unless the second committee includes the same amount or more OSEU and Native American topics in their revisions to the content standards. The DOE's previous unilateral removal of the OSEU and Native American topics was both contrary to and in disregard of the first revision committee's educated recommendations. This likely violates federal Equal Protection and First Amendment provisions of the United States Constitution. It also likely violates Article VIII, Section 1 of the South Dakota Constitution which guarantees its citizens, including Indigenous students, the right to schools that are "equally open to all," and requires the DOE to "adopt all suitable means to secure to the people the advantages and opportunities of education." The "suitable means to secure to" Indigenous students and their families "equal advantages and opportunities of education" includes the teaching of OSEU and Native American topics, culture, history and heritage, frequently, regularly and accurately in the public schools of South Dakota.² If the second committee omits all of the OSEU and Native American topics previously recommended, that also will likely violate the South Dakota Constitution, the Equal Protection Clause and First Amendment to the U.S. Constitution.

The removal of recommended OSEU and Native American topics from the content standards (1) deprives students of their right to receive information and ideas; (2) racially discriminates or has the effect of racially discriminating

¹ <https://www.argusleader.com/story/news/education/2021/10/01/new-social-studies-standards-review-process-relaunches-kristi-noem-announces-department-of-education/5951809001/>

² According to Sara Pierce, a director of education equity at the West River nonprofit advocacy group NDN Collective, who became a Bush Foundation Fellow in spring 2019 studying cultural safety,

South Dakota has a long way to go when it comes to creating more culturally safe school environments. Historically the educational system was used as a weapon against the Oceti Sakowin. One step in the right direction would be to create school environments where Native American students can be unapologetically Indigenous. In other words, the state's schools need to do a better job of creating an environment where Native American students can celebrate and be proud of who they are. We've never really recognized collectively, the genocide of indigenous peoples here. There's a lot of historical trauma in that.

<https://www.argusleader.com/story/news/education/2019/11/22/native-american-students-left-behind-south-dakota-education-system/4269896002/>

against Oceti Sakowin in South Dakota; and (3) censors information provided to students based on race.

Under South Dakota Codified Law § 1-54-12, the Department of Education “shall consult with the Indian Education Advisory Council within the Department of Tribal Relations to develop and review the Oceti Sakowin Essential Understandings. The consultation process shall align with the standards revision cycle established by the Board of Education Standards pursuant to § 13-3-48.” S.D.C.L. § 1-54-12. The Revised Social Studies Standards “are standards to be implemented at all levels K–12... School districts determine...how standards are taught... The state is responsible for standards (i.e., *what* is taught.)”³



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While S.D.C.L. § 1-54-12 does not mandate the teaching of OSEU in curriculum or state standards, the first standards revision committee’s recommendations were made by subject matter experts in the field of education. The first committee’s expertise, opinions and recommendations are the minimum education students should receive on OSEU and Native American topics. The DOE failed to refute in any legal, factual or logical manner why these recommendations should not be followed.

Further, the DOE has failed to justify why there is any need to now disregard all of the committee’s recommendations and convene an entirely new committee to start the process again. The removal of OSEU and Native American topics, and the decision to convene a second revisions committee entirely and disregard all recommendations of the first committee are without any substantial or reasonable basis. Both decisions are constitutionally suspect.

There is no dispute that the first standards revision committee’s recommendations included multiple OSEU and Native American topics. Some of the OSEU that were entirely removed from the revised draft social studies standards include:

- In kindergarten history, students will read or listen to Oceti Sakowin Oyate stories, such as Iktomi stories and historical lore stories. This standard was revised to state that students will understand there are different people and cultural groups that make up South Dakota’s communities. This revision removed entirely the required standard to receive Oceti Sakowin Oyate stories through printed or audible materials.
- In first grade history, students will discuss the Oceti Sakowin Oyate creation story, including the correct chronological order of the story.

³ <https://doe.sd.gov/contentstandards/documents/SS-StandardsProposed.pdf> (emphasis added.)



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This standard was revised to identify celebrations and traditions various cultural groups bring to South Dakota communities. This revision removed entirely the required standard to receive information to discuss the Oceti Sakowin Oyate creation story.

- In second grade history, discussing the culture of the Oceti Sakowin Oyate before European interactions was changed to “using multiple sources, investigate the impact South Dakotans, including Indigenous Native Americans, had on United States and South Dakota history.” This revision removed entirely the required standard discussion of the Oceti Sakowin Oyate culture prior to settlements in South Dakota.
- Standards for fourth grade history were changed entirely in one section, from explaining how the Oceti Sakowin was affected by “westward expansion, to the creation of the reservation system, and the U.S. assimilation policies and programs,” to describing the “influences of various cultures on South Dakota communities.” This changes an explanation of how the Oceti Sakowin was affected by historical actions of the U.S. in a lesson plan to a description of various cultures not even requiring Oceti Sakowin to be included at all.

The above list is not exhaustive of the Native American topics or OSEU removed from the revised content standards as a whole by the DOE. This list also does not include all DOE targeted removals of OSEU and Native American topics from the revised social studies content standards. However, this abbreviated list illustrates how the removal of OSEU and Native American topics from the revised standards, in application to students entitled to receive this information through curriculum that must be based on these standards, materially deprives students of information and ideas based on a racial topic, Oceti Sakowin and Native Americans.

The DOE’s removal of recommended OSEU and Native American topics in the draft education standards likely violates the Equal Protection Clause of the Fourteenth Amendment. The government violates the Equal Protection Clause if discrimination was a “motivating factor” behind an action, even if it was not the sole purpose for the state’s decision.⁴ When examining whether a decision was motivated by discriminatory intent, a court will look broadly at the “totality of the relevant facts” beginning with whether the decision causes a racially discriminatory impact.⁵ A court will also consider “the historical background, the sequence of events leading up to the challenged decisions, the departures from the normal procedural sequence, the substantive departures

⁴ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *see also Pers. Adm’r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (an act violates equal protection if the legislators acted “at least in part ‘because of,’ not merely ‘in spite of,’ [the] adverse effects upon an identifiable group.”).

⁵ *Clients’ Council v. Pierce*, 711 F.2d 1406, 1409 (8th Cir. 1983).

from the norm, and the alternatives that were available.”⁶ Additionally, a court will study the “legislative or administrative history” of an action, especially “contemporary statements by members of the decision making body, minutes of its meetings, or reports.”⁷

Under this legal framework, the DOE’s unilateral decision to remove over a dozen references that directly impart OSEU⁸ and Native American topics—as well as any other decisions made by the State of South Dakota to limit references to Indigenous history and culture in the future—will be closely examined by a federal court when considering whether the state’s education standards violate the Equal Protection Clause. This examination will also include the recent decision to entirely disregard all recommendations of the first revisions committee after the DOE received wide-spread protest and criticism of its OSEU and Native American topic removals. The decision to convene a second committee to prepare new revised content standards is also something a reviewing court will closely scrutinize.

Likewise, the removal of the recommended OSEU and Native American topics from the content standards likely violates the First Amendment by restricting students’ rights to receive information and ideas related to these particular topics of Oceti Sakowin studies and Native American topics unique to South Dakota. The First Amendment protects the right to receive information, irrespective of others’ views of how useful the information is to the person receiving it.⁹ ¹⁰ “This right to receive information and ideas ... is fundamental to our free society.”¹¹

When government actors seek to restrict student’s rights to receive information, they are required to show “that a substantial and reasonable governmental interest exists for interfering with the students’ right to receive information.”¹² Actions taken by government actors to limit or restrict students’ rights to receive information and ideas are constitutionally suspect if the government cannot meet this standard. The First Amendment is violated when a government actor removes books from a school library,¹³ or a movie



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⁶ *Id.*

⁷ *Mensie v. City of Little Rock*, 917 F.3d 685, 689 (8th Cir. 2019).

⁸ <https://www.argusleader.com/story/news/education/2021/08/10/departments-education-standards-draft-removes-native-american-topics-lakota-nakota-oceti-sakowin/5540521001/>

⁹ *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S. Ct. 1243, 1247, 22 L. Ed. 2d 542 (1969) (cleaned up).

¹⁰ See, Executive Order 2021-11 and the Preface of the Revised Social Studies Standards concerning secular beliefs reflective of political parties’ ideologies which may contravene South Dakota Constitutional provision VIII, §16. <https://sdsos.gov/general-information/executive-actions/executive-orders/assets/2021-11.pdf> <https://doe.sd.gov/contentstandards/documents/SS-StandardsProposed.pdf> pages 1, 4.

¹¹ *Id.*

¹² *Pratt v. Indep. Sch. Dist. No. 831*, 670 F.2d 771, 779 (8th Cir.1982).

¹³ *Id.*

from school curriculum,¹⁴ without a substantial and reasonable reason to do so. Further, prohibiting courses or subjects that are racially motivated “threatens to chill the teaching of ethnic studies courses that may offer great value to students,” and violates the First Amendment if it does so “without furthering the legitimate pedagogical purpose.”¹⁵ Here, it is difficult to envision any credible argument by the DOE or Governor Kristi Noem beyond wanting to advance secular viewpoints, that would serve a substantial and reasonable governmental interest to deprive students of being taught OSEU and Native American topics in public schools.



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Conclusion

We hope this letter has given you a firm understanding of the possible constitutional violations that may result from the permanent removal of OSEU and Native American topics from the South Dakota Department of Education Content Standards and the decision to assemble a second committee to recommend entirely new revisions to the content standards. Litigation challenging the removal of the previously recommended OSEU and Native American topics could be potentially avoided by:

- (1) the DOE adopting all recommendations of the first content standards revision committee for OSEU and Native American topics before convening the second revisions committee;
- (2) ensuring the second standards revision committee recommendations include all prior OSEU and Native American topics from the first standards revision committee; and
- (3) ensuring the second standards revision committee recommends more OSEU and Native American topics in the revised content standards. Again, the previously recommended OSEU and Native American topics should serve as a minimum to what the next committee recommends in the revised content standards to avoid constitutional violations.

The ACLU supports the protection of students’ First Amendment right to receive information as part of their education, including education on Oceti Sakowin culture, heritage and history specifically through the inclusion of OSEU, as well as access to other Native American topics. In conjunction with this effort, the ACLU seeks to preserve the Equal Protection rights of all South Dakotans and its Indigenous students, citizens and teachers under both the State Constitution and U.S. Constitution. The Indigenous culture, history, rights and perspective should be advanced, preserved, celebrated and taught accurately in South Dakota schools and within our South Dakota communities.

We urge the Department of Education Content Standards Board to adopt all revisions previously recommended regarding OSEU and Native American

¹⁴ *Id.* at 777.

¹⁵ *Arce v. Douglas*, 793 F.3d 968, 981 (9th Cir. 2015).

topics within the content standards. We urge the DOE and Governor Kristi Noem to direct the second standard revisions committee to recommend all OSEU and Native American topics previously recommended by the first revision committee. Further, we urge the DOE and Governor Kristi Noem to direct the second revisions committee to recommend more OSEU and Native American topics than previously recommended. This will further Indigenous Justice in the state of South Dakota. Thank you.



Sincerely,

A handwritten signature in black ink, appearing to read "S. Amiotte".

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Stephanie R. Amiotte, Legal Director
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cc: Tiffany Sanderson, Secretary of the SD Dept. of Educ.
tiffany.sanderson@state.sd.us

*Sent from South Dakota – the ancestral land of Yanktonai, Cheyenne, Mnicoujou,
and Očeti Šakówiŋ*