



Massachusetts

April 25, 2024

Via Email

David Pearlman, Chair
Brookline School Committee
333 Washington Street
Brookline, MA 02445
david_pearlman@psbma.org

Re: Proposed Hate Speech Prevention Policy

Dear Chair Pearlman and Members of the Brookline School Committee:

We write on behalf of the American Civil Liberties Union of Massachusetts (“ACLU of MA”). As a leading civil rights and civil liberties organization, the ACLU of MA supports and works to advance equality, diversity and inclusion. We applaud the Committee’s desire to create a safe and supportive learning environment for all students. However, we also believe that the proposed Hate Speech Prevention Policy dated April 9, 2024 (“the Proposed Policy”), while well-intentioned, raises serious legal and constitutional concerns.

The Proposed Policy

We will not restate the entire proposal here (a copy of attached), but instead will highlight key provisions that give rise to particular legal issues.

The Proposed Policy begins by establishing its purpose is to create “a school environment where speech or expression that denigrates a person or persons on the basis of (alleged) membership in a social group identified by attributes such as race, ethnicity, gender, sexual orientation, religion, age, physical or mental disability, and others, is not tolerated.”¹ It then declares: “This policy applies to all persons employed by, attending, or otherwise affiliated with the Public Schools of Brookline, including volunteers, interns, and partnering organizations.” It sweepingly declares that: “Hate

¹ The Educational Exceptions section strongly suggests that it any display of certain items, including the confederate flag, is per se not “permissible” unless part of a teacher led classroom discussion, regardless of whether the display results in any disturbance or inequality of the educational experience. This is in spite of case law making clear that the display of this symbol cannot be deemed per se disruptive. See, e.g., *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426, 436 (4th Cir. 2013) (“prohibiting students from having the Confederate flag at school is not automatically constitutional”).

speech, whether explicit or implicit, plain or subtle, intentional or unintentional, is a pejorative communication, in speech, gesture, illustration, writing and/or any form of electronic communication that, at its root, expresses prejudice or hate on the basis of ethnicity, race, religion, nationality, sexual orientation, gender identity, disability, or other like grouping. Such expression does not necessarily result in unequal treatment based on protected class, may be a singular instance and might be expressed in a non-threatening manner.”

Under “Vigilance” the Proposed Policy then mandates that anyone in the school community who hears anyone utter something that might qualify as “hate speech” has an obligation to report it, setting up a system in which members of the school community are ordered to report on their classmates’ and colleagues’ speech, which will lead to a mandatory investigative process in which the alleged speaker must cooperate, per the “Investigation” section.

Legal Analysis

“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,” *Shelton v. Tucker*, 364 U.S. 479, 487 (1960), because public schools are “nurseries of democracy.” *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021). Through learning to formulate and express their own views, students learn to think for themselves and to experience firsthand the fundamental precept that “in our constitutional constellation . . . no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). By being exposed to ideas they may not hear at home and viewpoints with which they may disagree—and even be offended by—students learn the values of being open to new ideas and of tolerating a diverse range of views and are better prepared to participate in a democratic society. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2431 (2022) (referencing “a long constitutional tradition in which learning how to tolerate diverse expressive activities has always been ‘part of learning how to live in a pluralistic society’”).

Under Massachusetts law, schools may restrict student speech only if it causes “disruption or disorder within the school,” or constitutes bullying as defined by state statute. *See Pyle v. Sch. Comm. of South Hadley*, 423 Mass. 283, 286-87 (1996) (construing student speech statute, G.L. c. 71, § 82, and noting that this law provides even greater protections for student speech than does the First Amendment); *Doe v.*

Hopkinton Pub. Schs., 19 F.4th 493, 511-12 (1st Cir. 2021) (construing anti-bullying statute, G.L. c. 71, § 37O).²

Here, the Proposed Policy fails to incorporate any of the critical protections for student speech enshrined in state and federal law. Moreover, the proposed policy attempts to police speech beyond that which causes a disruption or constitutes bullying under Massachusetts law. It would lead to investigatory and ultimately disciplinary actions, for instance, threatening to discipline for a “singular instance” of a “non-threatening,” “implicit,” “unintentional,” “pejorative communication” that “at its root, expresses prejudice or hate” on the basis of certain enumerated protected characteristics.

The Proposed Policy fails to include a requirement that the speech at issue cause disruption or disorder, per G.L. c. 71, § 82, in order to be subject to investigation. Nor is there a requirement that speech rise to the level of bullying as defined by G.L. c. 71, § 37O, including because the statutory definition of bullying requires “repeated” expressions or gestures, “directed at a victim” — whereas the Proposed Policy mandates investigation for “singular instance[s]” of speech even when such speech is not directed at a particular target. The Massachusetts anti-bullying statute also specifies that the speech at issue must have at least one enumerated harmful or disruptive effect either on other students or on the functioning of the school³ — yet, the Proposed Policy has no such requirement. By saying that covered hate speech does *not* have to result in unequal treatment, the Proposed Policy seemingly eschews reliance on G.L. c. 76, § 5, which requires an equal educational experience.

The application of these sweeping edicts to employee speech also is problematic. As the Supreme Court has made clear, school employees have free speech rights at school when speaking in their personal capacity on matters of public concern. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 527 (2022).

Compounding these issues, the Proposed Policy is rife with vagueness, which is a particular problem when free expression is at issue because of its chilling effect on free speech. “It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408

² The anti-bullying law, G.L. c. 71, § 37O, defines “bullying” as “the repeated use by one or more students or by a member of a school staff . . . of a written, verbal or electronic expression or a physical act or gesture or any combination thereof, directed at a victim that: (i) causes physical or emotional harm to the victim or damage to the victim’s property; (ii) places the victim in reasonable fear of harm to himself or of damage to his property; (iii) creates a hostile environment at school for the victim; (iv) infringes on the rights of the victim at school; or (v) materially and substantially disrupts the education process or the orderly operation of a school.”

³ See *id.*, subsections (i) through (v).

U.S. 104, 108 (1972). A regulation must make clear to an ordinary person what behavior is allowed and what is prohibited, and it must contain standards to prevent discriminatory enforcement. *United States v. Williams*, 553 U.S. 285, 304 (2008). The prohibition on vagueness applies with particular force where speech rights are implicated.⁴

It would be hard in a single letter to articulate the myriad ways in which the Proposed Policy is too vague. But, for example, what does it mean to be “affiliated” with the schools (which dictates to whom and when the policy would apply)? Does the Policy apply to parents and school sports fans, as well as employees and students? Does it apply only to things said on school grounds or extend to off-campus expression? Does it apply only to speech about school issues or not? Is it intended to apply to speech in the personal capacities of whomever is covered? The answer to these and similar questions fundamentally matter, as there are constitutional limits on the scope of schools’ powers. See, e.g., *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 594 U.S. 180, 188-90 (2021). And as the vagueness case law establishes, policies that restrict speech must have clear standards to put people on notice and to cabin the exercise of discretion by those enforcing the rules.

The Proposed Policy also fails to define what qualifies as “prejudice” or “hate” and what standards will be applied to determine the meaning of those terms. Under the Proposed Policy, would it be deemed denigrating and thus prejudicial or hateful to white people to discuss the realities of slavery and the Jim Crow Era? How about discussing the historical treatment of Native Peoples in this country? Certainly, many across this country are clamoring to shut down the teaching of honest history using such arguments.⁵ It would be alarming if Brookline leaders unintentionally were to create an opportunity for similar efforts to take root here by adopting this Proposed Policy.

⁴ *United States v. Williams*, 553 U.S. 285, 304 (2008); see also *Reno v. Am. C.L. Union*, 521 U.S. 844, 872-3, 117 S. Ct. 2329, 2344, 138 L. Ed. 2d 874 (1997) (“the vagueness of such a [content-based] raises special First Amendment concerns because of its obvious chilling effect on free speech.”); *Frese v. Formella*, 53 F.4th 1, 6 (1st Cir. 2022), cert. denied, 144 S. Ct. 72, 217 L. Ed. 2d 11 (2023) (“To prevent the chilling of constitutionally protected speech, we apply a ‘heightened standard’ in cases involving the First Amendment and ‘require[] a greater degree of specificity’ in a statute that restricts speech.”); *Vill. Of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982) (“[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.”); *Commonwealth v. Abramms*, 66 Mass. App. Ct. 576, 581 (2006) (“An additional principle to be noted is that [w]here a statute’s literal scope . . . is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts.”).

⁵ Right-Wing Campaign to Block Teaching for Social Justice (March 31, 2023), <https://www.zinnedproject.org/news/gop-campaign-to-block-teaching-for-social-justice/>.

Similarly, what will be deemed “pejorative”? Would the Proposed Policy deem it as “pejorative” to those who are non-binary for a student to wear a T-shirt saying “there are only two genders,” regardless of how the U.S. Court of Appeals for the First Circuit decides a pending case about the extent to which and under what circumstances such student expression is constitutionally protected? Would it be deemed “pejorative” for a student of color to wear a T-shirt saying: “Down with White Privilege: I Can’t Breathe”?

Further, what are the standards to guide a determination as to whether speech “at its root” expresses prejudice or hate? Such standards are woefully lacking in the Proposed Policy.

For all these reasons, the sweeping breadth and vagueness of the Proposed Policy renders it unconstitutional and unintentionally may empower those seeking to undermine efforts to advance diversity, equity, and inclusion.

We understand that some Members of the Committee have asserted that the Proposed Policy is intended to be educational rather than punitive. However, the Policy *mandates* that all speech that purportedly violates the policy be reported for investigation,⁶ and “investigated thoroughly in accordance with existing bullying reporting procedures (Section J).”⁷ The policy further requires that all members of the school community cooperate with the school’s investigations.⁸ Section J,⁹ whose investigation procedures the Proposed Policy incorporates, provides that schools may take “disciplinary action,” which “may include loss of extracurricular privileges, suspension and/or removal from school in the case of students; and administrative leave and termination in the case of staff.” Thus, the Proposed Policy subjects students to a mandatory investigation at the very least, and also appears to subject them to possible discipline. And by its own terms, the Proposed Policy states that speech deemed to fall within its broad and vague terms “will not be tolerated” which certainly will lead to adverse consequences and chill protected expression.

⁶ Proposed Policy, p.2 ¶ 4.

⁷ *Id.* ¶ 5.

⁸ *Id.*

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<https://www.brookline.k12.ma.us/site/handlers/filedownload.ashx?moduleinstanceid=3732&dataid=6198&FileName=PSB%20Bullying%20Prevention%20Policy%20Voted%203.16.17.pdf>.

A mandatory investigation is, in itself, a substantial burden on student speech,¹⁰ as cases concerning mandatory participation in the Pledge of Allegiance establish.¹¹ And to the extent that these investigations may indeed lead to actual discipline or other adverse consequences for student speech that is not proscribable under G.L. c. 71, § 82 or G.L. c. 71, § 37O or our constitutions, or for adult speech that is protected by the federal and state constitutions, such discipline would be unlawful.

Finally, although we recognize that good intentions motivate the proposal, it seems highly doubtful that subjecting students and others in the school community to a mandatory reporting and investigation regime is the most productive way to educate them about the values of tolerance or to collect reliable data. Far better in terms of education would be forums and small discussions where thoughtful feedback can be given about why certain expressions may be hurtful or harmful. Indeed, a system that requires mandatory reporting and investigation of every single utterance that may fall within the Proposed Policy is inconsistent with the goal of teaching children “how to tolerate speech ... of all kinds [which] is ‘part of learning how to live in a pluralistic society,’ a trait of character essential to ‘a tolerant citizenry.’” *Kennedy*, 597 U.S. at 538.

While we applaud the Committee’s commitment to ensuring that Brookline Public Schools are free from discrimination, we urge the Committee to decline to adopt the Proposed Policy or other such sweeping and unlawful restrictions on speech by students and other community members, while continuing to fulfill its important obligations to enforce the Massachusetts anti-bullying law and educate students about the values of diversity and tolerance.

¹⁰ See, e.g., *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 765 (6th Cir. 2019) (finding a university’s response policy to bias incidents “acts by way of implicit threat of punishment and intimidation to quell speech” because it “initiates the formal investigative process, which itself is chilling even if it does not result in a finding of responsibility or criminality.”); *Opinions of the Justs. to the Governor*, 372 Mass. 874, 877, 363 N.E.2d 251, 253 (1977) (“Indirect discouragement of the exercise of First Amendment rights has been condemned”).

¹¹ See, e.g., *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (students have a right to choose not to stand or otherwise participate in the Pledge of Allegiance); *Rabideau v. Beekmantown Cent. Sch. Dist.*, 89 F. Supp. 2d 263, 267 (N.D.N.Y. 2000) (finding that school abridged student’s First Amendment rights in part by sending student to principal’s office to discuss refusal to stand); *Frain v. Baron*, 307 F. Supp. 27, 33-34 (E.D.N.Y. 1969) (enjoining school from treating any student who refuses to participate in the pledge differently from those who participate); *Doe v. Acton-Boxborough Reg’l Sch. Dist.*, 468 Mass. 64, 74-75, 8 N.E.3d 737 (2014) (allowing voluntary pledge statute where students are free to decline to recite “without free of punishment” because “significantly, no student who abstains from reciting the pledge, or any part of it, is required to articulate a reason for his or her choice to do so”); *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007 (9th Cir. 2010) (upholding school district voluntary pledge policy because no student will be disciplined for refusing to participate).

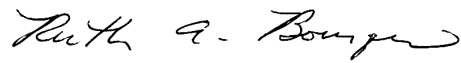
Page 7

Brookline School Committee – Proposed Hate Speech Policy

April 25, 2024

Please do not hesitate to contact ACLU of MA if you have any questions or would like to discuss these matters with us.

Sincerely,



Ruth A. Bourquin
Senior Managing Attorney



Rachel E. Davidson
Free Expression Staff Attorney

Cc: Betsy Fitzpatrick on behalf of the Committee via email at
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Hate Speech Prevention Policy

The Public Schools of Brookline (PSB) prioritizes a safe, inclusive environment where diversity is celebrated, and hate has no place. We endeavor to create a school environment where speech or expression that denigrates a person or persons on the basis of (alleged) membership in a social group identified by attributes such as race, ethnicity, gender, sexual orientation, religion, age, physical or mental disability, and others, is not tolerated. Further, PSB reinforces our dedication to creating a community where every individual feels respected and supported through collective action in the following manners: vigilance, investigation, education, and data reporting.

This policy applies to all persons employed by, attending, or otherwise affiliated with the Public Schools of Brookline, including volunteers, interns, and partnering organizations.

The hate speech prevention policy shall take effect immediately upon passage of this policy by the School Committee. The protocols and annual report provisions shall take effect at the start of the 2024-2025 school year.

1. Definition: Hate speech, whether explicit or implicit, plain or subtle, intentional or unintentional, is a pejorative communication, in speech, gesture, illustration, writing and/or any form of electronic communication that, at its root, expresses prejudice or hate on the basis of ethnicity, race, religion, nationality, sexual orientation, gender identity, disability, or other like grouping. Such expression does not necessarily result in unequal treatment based on protected class, may be a singular instance and might be expressed in a non-threatening manner.
2. Examples:
 - Typical hate speech involves epithets, slurs, statements that promote bias and/or malicious stereotypes (for example: “Jews control the world” or use of the N-word)
 - Typical hate speech is intended to express and/or incite hatred on the basis of a person or persons’ membership in a protected class (for example: “I hate transsexuals”)
 - Hate speech may or may not include canards that propagate a sensationalized or hateful misrepresentation of the group’s membership (for example: Muslims or Arabs as terrorists)
 - Hate speech may or may not include nonverbal depictions and symbols, as well as drawings, photographs, graffiti, logos or other imagery made publicly visible (for example: the Nazi swastika or salute, or the Confederate Battle Flag)

3. Education Exceptions: Use of what would ordinarily be treated as hate speech is narrowly permissible in:
 - i. an instructional or remedial therapeutic setting for purposes of identifying material as hate speech and/or remedying its negative consequences, and;
or
 - ii. teacher-led discussions or assignments in which a statement, epithet, symbol, or gesture is studied within its context (e.g., contextually-appropriate academic settings) (e.g. swastikas in Buddhist art, Confederate flags in a Civil War social studies lesson).
4. Vigilance: The Public Schools of Brookline promote and encourage the consistent reporting of hate speech incidents, even if addressed in the classroom, as a means of prevention. The “mandated reporter” approach should be applied using a reporting mechanism explicitly identified by the District. In other words, if one becomes aware of any hate speech, it should be reported. This reporting mechanism will be made publicly available in PSB communications at least biannually. This reporting mechanism will be easily identifiable on the PSB website. This reporting mechanism will be posted publicly in each school administration building’s entranceway.
5. Investigation: The Public Schools of Brookline assert that all reports of hate speech using the aforementioned mechanism will be investigated thoroughly in accordance with existing bullying reporting procedures (Section J). Each member of the school community is responsible for cooperating with the PSB’s investigation of reports or complaints of violations of this Policy and with the PSB’s efforts to prevent, respond effectively to, and eliminate any such conduct.
6. Education: Annual training in preventing, identifying, responding to, and reporting hate speech will be provided for all school employees. Staff training for those responsible for investigating incidents of hate speech and oversight of this policy will include training to distinguish between acceptable speech and expression and hate speech. Age-appropriate, evidence-based instruction on hate speech prevention shall be incorporated into the curriculum for all pre-K to 12 students.
7. Data Reporting: All reported incidents will be logged in a District database. The District shall prepare annually a written catalog of reported hate speech incident data to the School Committee at least once by June 20 of each academic year. The data shall include, but not be limited to: (i) the number of reported allegations of hate speech aggregated by protected class and by school; (ii) the number and nature of substantiated incidents of hate speech aggregated by protected class and by school; (iii) the number of students disciplined for engaging in hate speech aggregated by protected class and by school; ; and (iv) any other pertinent information requested by members of the School Committee. The purpose of this annual report is to assist the district and School Committee in tracking hate speech incidents to better understand their scope and promulgate more effective procedures to ensure the safety and social-emotional well-being of our school communities.

Nothing in this policy shall be construed to limit the reporting requirements and protections against hate incidents already guaranteed under applicable state and federal law. The Massachusetts Anti-Bullying Law (G.L. c. 71, § 37O), Student Anti-Discrimination Act (G.L. c. 76 § 5), and Title VI of the federal Civil Rights Act require schools to take affirmative measures to prevent bias-related bullying and harassment by students, and to respond meaningfully when such misconduct occurs. Notably, a school district's obligation to protect a student from a hostile school environment extends beyond addressing hate incidents that occur on school grounds or during school-sponsored activities.¹

¹ Massachusetts Attorney General's Office Guidance on Schools' Legal Obligations to Prevent and Address Hate and Bias Incidents. 2019.

¹ Massachusetts Attorney General's Office Guidance on Schools' Legal Obligations to Prevent and Address Hate and Bias Incidents. 2019.