AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
Massachusetts

January 16, 2024

Via Email

Pembroke Massachusetts School Committee
72 Pilgrim Road
Pembroke, MA 02359
schoolcommittee@pembrokek12.org

Re: Proposed Policy to Restrict Protected Speech

Dear Members of the School Committee:

We write on behalf of the American Civil Liberties Union of Massachusetts ("ACLUM") about the proposed policy to restrict constitutionally protected speech by school employees and students on matters of public concern, which we understand will be debated at tonight's School Committee meeting. We urge the School Committee to categorically and immediately reject this censorious policy to avoid the need for litigation and, most importantly, to avoid suppression of expression clearly protected by the U.S. and Massachusetts Constitutions and fundamental nondiscrimination and educational values.

This letter will be relatively brief because we were informed only very recently that the proposed policy would be considered by the School Committee this evening (ironically perhaps, the day after the Martin Luther King Jr. holiday). By way of example and without purporting to be exhaustive as to the many ways in which this policy is unlawful, we bring to your attention its most glaring and foundational legal flaws.

First, as public comments by the primary proponent of the policy have laid bare, the proposed policy is motivated by a desire to silence expression in support of historically marginalized individuals and communities, particularly people of color and the LGBTQ+ community. It therefore discriminates on the basis of race, national origin, gender and gender identity or expression, in violation of both free speech principles and anti-discrimination principles enshrined in the equal protection clause of the federal constitution, federal anti-discrimination statutes, Article 1 of the Declaration of Rights, and G.L. c. 76, § 5.

Second, it would, among other things, prevent school employees from expressing any views at school on any "social policy issues" defined as any "topics of national, state or local interest over which the public is deeply divided and are often deeply personal or important to adherents, which are the source of conflicting opinions on the grounds of what is perceived as morally correct or incorrect, or are the subject of intense partisan advocacy or debate."

This definition is extremely vague in multiple respects, lacks standards to guide discretion in enforcement and to put people on notice of what exactly is being prohibited, and is unconstitutional for that reason alone. But what is obvious is that it is a content-based restriction on political expression that would be subject to and could not survive the strictest form of scrutiny under Article 16 of the Massachusetts Declaration of Rights. *Barron v. Kolenda*, 491 Mass. 408, 420 (2023) (government restrictions on political expression in any forum are subject to strict scrutiny under Article 16). Built on this definition, the proposed policy would prevent individual employees' expression in their personal capacities on matters of public concern and would do so without any overriding legitimate government interest in suppressing the particular expression at issue. *See, e.g.*, *Bruce v. Worcester Reg'l Transit Auth.*, 34 F.4th 129 (1st Cir. 2022). It therefore would violate both the First Amendment to the United States Constitution and Article 16.

Third, the proposed policy would prohibit personal expression on any such topics through a host of means, including the mere wearing of "pins," "buttons" or "insignia," *unless* the "jewelry or pins [ ] represent a part of [the speaker's] own identity or culture." In this way too, it therefore discriminates based on the race, national origin and/or gender or gender identity of the persons expressing their views, again in violation of equal protection principles under both state and federal law. This provision also intrudes on the rights of association of those who may not themselves be part of a particular community but wish to associate through their expression with those who are.

Fourth, the proposed policy would restrict students' speech rights protected not only by the state and federal constitutions but also the Massachusetts student free speech statute, G.L. c. 71, § 82. This impact is revealed in the provision that the policy would prevent students from wearing clothes, jewelry, pins or flags if they are deemed "inciteful, vulgar or disruptive to the learning environment." Putting aside that it is entirely unclear what the policy and its proponents would deem "inciteful" or "vulgar," our state student free expression statute does not allow suppression of student speech unless it causes "disruption or disorder within the school," thereby providing

more protection for student speech than does the First Amendment to the U.S. Constitution. *Pyle v. Sch. Comm. of S. Hadley*, 423 Mass. 283, 284, 286-86 (1996).

Moreover, the policy's fundamental premise that expression at school on issues on which there is public debate must be restricted even in the absence of actual and substantial disruption (which as a matter of law does not include the mere fact that some would prefer not to hear or see the expression at issue) is anathema in our free society. Free expression principles in our constitutions prevent public officials from casting a "pall of orthodoxy" in our schools. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *see also West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (efforts by political officials to regulate student speech in an effort to avoid conflict or compel "national unity" are unconstitutional because they "invade[ ] the sphere of intellect and spirit which is the purpose of the First Amendment"); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 511 (1969) (students and teachers retain constitutional rights to engage in non-disruptive expression at school on matters of political controversy and "state-operated schools may not be enclaves of totalitarianism").

For these reasons and more, we urge you to immediately and emphatically reject any version of the policy and direct that the subcommittee cease wasting time on its development. Grounded in the flawed notion that only expression with which everyone agrees will be tolerated in Pembroke schools, the policy is fundamentally illegal, anti-democratic and inconsistent with teaching our 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 v. Bremerton Sch. Dist.*, 597 U.S. 507, 538 (2022) (internal citations omitted).

If you would like further information on our views, you may contact us at rbourquin@aclum.org or 617-482-3170 extension 348.

Sincerely,

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Rachel E. Davidson
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