April 4, 2024

Via Email

Wrentham School Committee
120 Taunton Street
Wrentham, MA 02093
schoolcommittee@wrenthamschools.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 on matters of public concern, which we understand will be debated at the April 9 School Committee meeting. We urge the School Committee to promptly reject this overbroad, vague and censorious policy, which would unconstitutionally suppress expression clearly protected by the U.S. and Massachusetts Constitutions and is inconsistent with fundamental nondiscrimination and educational values.

The Proposal

The proposed policy would prohibit any school employee from the "display or dissemination of [their] views on … [any] political, partisan, or social policy issues," while on school property. The proposal makes clear that "[t]his prohibition includes advocacy through the use of "pamphlets, stickers, pins, buttons, insignias, flags, banners, posters, signs, photographs, or other similar materials." This means that items a teacher, lunch aide or administrator wears, carries or displays on their desk could trigger sanction. To compound the problem, "social policy issues" is broadly and vaguely defined to mean all "topics of national, state, or local interest, over which the public is deeply divided and are often intensely 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 which are the subject to intense partisan advocacy or debate."

Legal Issues

This letter does not purport to address all the issues with the proposed policy but will bring to your attention what we believe are its most glaring and foundational flaws. First, regardless of the policy's assertion that "school district facilities are not public forums for the display or dissemination of an employee's views" the U.S. Supreme

Court has made very clear that neither school employees nor students shed their free expression rights when they enter onto school property. *Kennedy v. Bremerton Sch. Dist.,* 597 U.S. 507, 527 (2022); *Tinker v. Des Moines Indep. Comm. School Dist.,* 393 U.S. 503, 506 (1969). And non-disruptive, non-coercive employee expression in one's personal capacity on school property about a matter of public concern – including what one may choose to wear or display in a classroom – is entitled to robust constitutional protection. *Kennedy*, 597 U.S. at 529-31.[1] The proposal cannot survive constitutional scrutiny. As written, the policy would bar employees from simply wearing a button saying "Black Lives Matter" or "Blue Lives Matter" or a pin or scarf showing an LBGTQ Pride Flag – for no legitimate, compelling or overriding governmental reason. *See, e.g.*, *Bruce v. Worcester Reg'l Transit Auth.*, 34 F.4th 129 (1st Cir. 2022). Indeed, depriving students of exposure to different personal views on political and social issues of the day is *contrary* to providing them with a well-rounded educational experience.[2]

Second, the definition of "social policy issues" is written so as to ensure that only topics on which there is near universal consensus can be the subject of employee expression. But the First Amendment to the United States Constitution, as well as Article 16 of the Massachusetts Declaration of Rights, forbid such restrictions. Time and again, the courts have made clear that 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"). The proposal, built on this troubling definition, would try to enforce orthodoxy and would violate both the First Amendment to the United States Constitution and Article 16.

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[1] There will often be questions about whether particular expression is or is not in one's personal capacity, particularly when such expression occurs in the workplace. Similarly, there may be questions of whether personal capacity expression can nevertheless be restrained because it interferes with performance of the mission of the organization or one's job duties. But as the *Kennedy* decision and the cases on which it relies reflect, resolutions of those questions are highly fact dependent and require case-by-case factual analysis; policies that assume that all expression in the workplace is subject to employer restriction are overbroad. The proposal is flawed in part because it categorically bars expression that could not be restricted under a more specific, case-by-case, fact-based analysis required by constitutional law.

[2] Under existing law, employees cannot engage in campaigning at school on electoral matters, so provisions of the proposed policy directed at such conduct are unnecessary. *See* Advisory State Ethics Commission Advisory 11-1: Public Employee Political Activity, https://www.mass.gov/advisory/state-ethics-commission-advisory-11-1-public-employee-political-activity.

Third, this and similar proposals will have the effect of silencing articulation of support for students belonging to historically marginalized groups. Indeed, it seemingly would prevent a school guidance counselor from expressing support to a student who asks questions about how to handle issues of their gender fluidity at school or explaining to a student who is being bullied based on their race about reasons why that might be happening. It therefore will almost certainly have discriminatory impacts 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.

Fourth, the proposal would seemingly deprive employees of the right to wear religious garb or insignia that may be controversial to some, in blatant violation of the Free Exercise Clause of the First Amendment, Amendment Article 46 of the Massachusetts Constitution, and state and federal statutes. But as the Supreme Court has already made clear, such expression of faith cannot be banned without a very compelling interest that is not presented here. *Kennedy*, 597 U.S. at 531 (employees cannot be sanctioned for wearing religious garb or engaging in private religious exercise even if visible to students).

Fifth, the policy is too vague, which is a particular legal problem when connected to free expression because such vagueness creates a chilling effect. “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 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. *Id.*; *see also 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.’”).

The proposal’s vagueness comes in many forms but is most obvious in the definition of “social policy issues” where there is no way for individual employees to know what issues the administration would think are or not sufficiently controversial to be covered. There are no standards to guide enforcement of its terms which can lead to arbitrary and discriminatory interpretations. By what standard is someone supposed

to determine if an issue is or is not one on which "the public is deeply divided" and are the "source of conflicting opinions on grounds of what is perceived as morally correct or incorrect"? Is it acceptable to discuss such issues if the dispute is based on *economic* but not moral grounds?[3] And who decides and how what the dispute is based on? In addition, the provision saying the policy does not prohibit instruction and study "when directly relevant to curriculum and appropriate to classroom studies …, provided that such instruction is presented in an unbiased fashion and presents an even-handed treatment of all sides of the topic in question" is fraught with vagueness. For instance, what does it mean to be "directly" relevant to the curriculum and what does it mean to present an "even-handed treatment of all sides of a topic in question"? In teaching about the history of slavery in this country, must a teacher give equal time to the fringe notion that slavery was good for those who were enslaved because it taught them skills? Given the diversity of views in this country, some grounded in hard facts and some not, how could an instructor ever know what are "all sides" of a particular topic and must they present "sides" that are not educationally well-grounded? Vagueness also arises because of the lack of limiting definition of what it means to "advocate." Does it, for instance, prohibit a teacher or counselor from even answering a student's question about a potentially controversial topic? The combination of overbreadth and vagueness of this policy alone renders it clearly unlawful.

Finally, given the chilling effect the policy would have on school employee expression, this policy would invariably impinge on *students'* rights to receive information. It thus would also violate students' rights to free expression. As the U.S. Supreme Court has recognized, students' freedom of speech incorporates a right to receive information and ideas, which "is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom." *Bd. of Educ., Island Trees Free School Dist. v. Pico*, 457 U.S. 853, 866-67 (1982) (plurality opinion). In the words of the Court, "just as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members." *Id.* at 868.[4]

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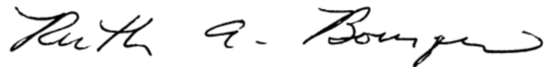
[3] In this way and others the proposal is a content-based restriction on (non-partisan) political speech that cannot satisfy the strict scrutiny that our state constitution demands. *Barron v. Kolenda,* 491 Mass. 408, 420 (2023). Indeed, by apparently allowing teachers to wear pins displaying the U.S. Flag, the flag of any state or the U.S. Military (per the second provision about what is not prohibited) but not a pin saying "War is Wrong" or "All are Welcome Here," the policy clearly engages in content-based discrimination that cannot be justified under Article 16.

[4] Article 16 has been held on multiple occasions to provide even greater protection than the First Amendment, *see, e.g. Barron*, 491 Mass. at 420, so we have little doubt that it too would be construed to protect student rights to receive information, including from conversations with their teachers and other staff at school.

For these reasons and more, we urge you to immediately and emphatically reject any version of the policy. Grounded in the flawed notions that only expression with which everyone agrees will be tolerated in Wrentham schools and that students must be protected from exposure to a diverse range of views, the proposed 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*, 597 U.S. at 538.

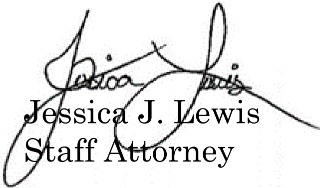
We thank you in advance for taking our input into account. If you would like further information on our views, you may contact us at rbourquin@aclum.org or 617-482-3170 extension 348.

Sincerely,



Ruth A. Bourquin
Senior & Managing Attorney

Rachel E. Davidson
Free Expression Staff Attorney



Jessica J. Lewis
Staff Attorney