



October 12, 2020

VIA E-MAIL

Loudoun County School Board
School Administration Building
21000 Education Court
Ashburn, VA 20148

*Re: Human Resources & Talent Development Committee's Unconstitutional Proposed
Professional Conduct Policy No. 7560*

Dear Chair Sheridan and the Loudoun County School Board,

It has come to our attention that the Loudoun County School Board Human Resources & Talent Development Committee (the “Committee”) has recommended changes to the School Board’s Professional Conduct Policy. We understand that the School Board will vote on whether to adopt the proposed Policy on Tuesday, October 13, 2020. Adoption of such a flawed new Policy would be a mistake, and it would invite an immediate lawsuit to enjoin its enforcement. In its current form, the proposed Policy contains restrictions on teachers’ and other employees’ speech in violation of Section 12 of the Virginia Declaration of Rights and of the First Amendment to the United States Constitution. The New Civil Liberties Alliance (NCLA) submits this letter to urge the School Board members to consider carefully the ramifications of their votes.

I. The New Civil Liberties Alliance Statement of Interest

NCLA is a nonpartisan, nonprofit civil-rights organization and public-interest law firm devoted to protecting constitutional freedoms from administrative power. The “civil liberties” of the organization’s name include rights at least as old as the Virginia and U.S. Constitutions themselves, such as trial by jury, due process of law, the right to be tried in front of an impartial and independent judge, and the right to free expression without fear of censorship or reprisal. Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, state legislatures, and federal, state, and local administrative agencies, including local school boards, have trampled them for so long.

NCLA views the administrative state as an especially serious threat to civil liberties. No other current aspect of American law denies more rights to more Americans. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of

government—a type, in fact, that the Constitution was designed to prevent.¹ This unconstitutional administrative state within the Constitution’s United States is the focus of NCLA’s attention.

Even where NCLA has not yet brought a lawsuit to challenge an agency’s unconstitutional exercise of regulatory power or infringement of fundamental rights, it encourages agencies themselves to cease exercising unlawful power and infringing civil liberties. They should instead establish meaningful limitations on administrative rulemaking, adjudication, and enforcement. NCLA believes that agencies must ensure that they are not contradicting their statutory mandate when administering programs within their jurisdiction. Courts are not the only government bodies with the duty to attend to the law. Even more immediately, state and local agencies and agency heads have a duty to follow the law, not least by respecting the fundamental civil liberties of their employees. NCLA therefore advises that the Loudoun County School Board must carefully examine whether its proposed Policy would respect constitutionally protected rights.

II. The Proposed Professional Conduct Policy Bans Speech that Is Essential for Achieving the School Board’s Stated Goals

Last revised on April 26, 2016, the existing Professional Conduct Policy directs School Board teachers and other employees to maintain a high standard of personal and professional conduct.² The Committee has proposed to amend this Policy to clarify the standards by which School Board employees will be held to achieve “the highest standard of personal and professional conduct[.]”³ The draft Policy establishes expectations of professionalism, a commitment to equitable treatment, a recognition of appropriate employee-student boundaries, a duty to report unprofessionalism, and it prohibits retaliation against individuals who raise concerns regarding Policy violations.⁴ But it also categorically bans teachers’ and other employees’ speech as it relates to the following issues and School Board goals:

E. Protected Speech. Nothing in this policy or any other policy shall be interpreted as abridging an employee’s First Amendment right to engage in protected speech, **however**, based upon an individualized inquiry, **speech**, including but not limited to via social media, **on matters of public concern may be outweighed by the school division’s interest** in the following:

1. Maintaining efficiency of the school system;
2. Preventing disruption or a reasonable apprehension of a disruption of the learning and working environment;
3. Maintaining public trust and confidence at all times;
4. Fostering close personal relationships among and between staff and parents;
5. Promoting internal LCPS and external community harmony and peace; and

¹ See generally Philip Hamburger, *Is Administrative Law Unlawful?* (2014).

² Loudoun Cty. Sch. Bd., Prof'l Conduct Policy No. 7560 (rev. Apr. 26, 2016).

³ Loudoun Cty. Sch. Bd., Prof'l Conduct Policy No. 7560, Preamble (Draft Aug. 20, 2020).

⁴ *Id.* at A-D & F.

6. Establishing and maintaining a tranquil learning and working environment.
7. Achieving consistent application of the Board's and Superintendent's stated mission, goals, policies and directives, including protected class equity, racial equity, and the goal to root out systemic racism.⁵

The proposed Policy, therefore, prohibits teachers and employees from expressing their observations, opinions, and concerns regarding School Board policies. The proposed Policy itself states that it bans

speech ... [that] undermin[es] the views, positions, goals, policies or public statements of the Loudoun County School Board or its Superintendent when such comments or conduct create the reasonable apprehension of a disruption or disrupt the operations or efficiency of LCPS.⁶

As a practical matter, speech such as that banned by the proposed Policy is inherently disruptive to operations and efficiency, because the main purpose of such speech is to perpetuate or seek change in an existing circumstance. For instance, it is impossible to imagine how a Loudoun County educator could run for a seat on the School Board without running afoul of the prohibition against speech critical of the School Board, the Superintendent, or their policies. An educator's opinion regarding disfavored topics, or his or her campaign to unseat incumbent members of the school board, is inherently disruptive but protecting such expression is essential to ensuring a free exchange of information and ideas for the betterment of the school district's students.

III. The Proposed Professional Conduct Policy Violates the Virginia and United States Constitutions by Imposing Content-Based Restrictions on Teachers' and Other Employees' Speech

The First Amendment prohibits the government from violating citizens' right to freedom of speech.⁷ The Fourteenth Amendment extends this prohibition to states and their subdivisions, including the School Board.⁸ Moreover, the Supreme Court has explained that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁹

⁵ *Id.* at E (emphasis added).

⁶ *Id.* at B(1)(b).

⁷ Va. Decl. of Rights, § 12.

⁸ See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000) (discussing the Establishment Clause).

⁹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

“Content-based regulations [of speech] are presumptively invalid.”¹⁰ The proposed Policy is presumptively invalid because it bans viewpoints that the School Board disfavors. The Supreme Court has explained that

[a]s a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based. In determining whether a regulation is content based or content neutral, we look to the purpose behind the regulation; typically, government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech.¹¹

The proposed Policy is definitively **not** content-neutral. Statements supporting the School Board are not prohibited; only viewpoints “undermining” School Board “positions, goals, policies or public statements” are banned.

The Virginia Constitution explains **why** freedom of speech must be protected from governmental intrusion:

That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances.¹²

“Freedom of speech is a right which the courts have zealously guarded and maintained.”¹³ Of course, this right may not be abused, so the proposed Policy’s prohibitions against bullying and threats of violence may be constitutional, if equally applied.¹⁴ But “[u]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression[.]”¹⁵ In rare circumstances, expression may be restricted if it “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.”¹⁶

No court has upheld speech restrictions to “[m]aintain[] efficiency of the school system[.]” “public trust and confidence[.]” or “a tranquil learning and working environment.”¹⁷ Nor has any court upheld speech restrictions to “[f]oster[] close personal relationships” or to promote

¹⁰ *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992). The proposed Policy does not fit into any of the exceptions for valid content-based speech restrictions. See, e.g., *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (defamation); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (fighting words).

¹¹ *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001) (internal quotations and citations omitted).

¹² Va. Decl. of Rights, § 12.

¹³ *Weston v. Commonwealth*, 195 Va. 175, 183 (1953).

¹⁴ See *id.* at 183.

¹⁵ *Grayned v. City of Rockford*, 408 U.S. 104, 117 (quoting *Tinker*, 393 U.S. at 508 (internal quotations omitted)).

¹⁶ *Id.* at 117-18 (quoting *Tinker*, 393 U.S. at 513 (internal quotations omitted)).

¹⁷ Loudoun Cty. Sch. Bd., Prof'l Conduct Policy No. 7560, E(1), (3) & (6).

“community harmony and peace[.]”¹⁸ Additionally, even where the School Board ostensibly seeks to prevent “disruption or a reasonable apprehension of a disruption in the learning and working environment[.]” and to “[a]chiev[e] consistent application of the Board’s ... policies and directives,” the Policy fails to take into account the context of the teachers’ or other employees’ expression.¹⁹ Since the Policy bans “on-campus and off-campus speech, social media posts, and any other telephonic or electronic communication[.]”²⁰ it reflects nothing more than “undifferentiated fear or apprehension of disturbance.” Thus, the Policy is an unconstitutionally overbroad and vague content-based prohibition on free speech because it is not limited to protecting classwork from material disruption, it bans truthful expression that could advance the School Board’s mission, and it offers no standard whereby an employee could discern which speech “undermines” School Board goals. For these reasons, among others, the Policy would not survive judicial scrutiny if the School Board were to adopt it in its current form.

IV. Conclusion

Prohibiting teachers from expressing their viewpoints regarding whether School Board policy has gone too far, or not far enough, effectively prohibits educational professionals from advocating for improved School Board policy or campaigning against you in School Board elections. Thus, the proposed Policy is a gross violation of Loudoun County school district’s employees’ civil liberties. Unless withdrawn or voted down, the proposed Professional Conduct Policy invites costly lawsuits that would hamper the School Board’s ability to provide high quality education to Loudoun County children.

If you have any questions, please feel free to contact me at mike.degrandis@ncla.legal.

Very truly yours,



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¹⁸ *Id.* at E(4)-(5) (emphasis added).

¹⁹ *Id.* at E(2) & (7).

²⁰ *Id.* at B(3).