FIRE
Foundation for Individual Rights and Expression

September 11, 2023

Dr. Kelly Coker
Chair, Duval County School Board
1701 Prudential Drive
6th Floor | Room 642
Jacksonville, FL 32207

Sent via U.S. Mail and Electronic Mail (cokerk@duvalschools.org)

Dear Chair Coker:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,[1] is concerned by the Duval County School Board's restriction of public comments criticizing a board member's organizational affiliations and those organizations' influence on school district policy. The comments were relevant to matters before the board and fully protected by the First Amendment, which does not permit the board to ban "personal attacks" or "attacks on organizations." For that and the reasons that follow, FIRE calls on the board to amend its rules to comply with the First Amendment, and to respect its constituents' right to speak freely and criticize government officials.

I. Duval County School Board Bars Commenters from Criticizing Board Member's Affiliation with Advocacy Organizations

Duval County School Board policy sets aside a portion of each board meeting for public comment.[2] The policy directs speakers to "avoid the use of profane or vulgar language or personal attacks."[3] The board also reads the following script at meetings: "You are asked to follow expectations for civil discourse and to avoid personal attacks or profane or vulgar language. The chairperson in conjunction with the Office of General Counsel reserves the right to conclude a speaker's privilege to address the school board if rules regarding civil discourse are violated."[4]

[1] You can learn more about FIRE's mission and activities at thefire.org.

[2] DUVAL CNTY. SCH. BD. POLICY MANUAL, POLICY NO. 2.26(1)(k), https://bit.ly/44KjjS8 [https://perma.cc/N3QF-AGPQ]. The narrative in this letter reflects our understanding of the pertinent facts, but we appreciate that you may have more information and invite you to share it with us.

[3] DUVAL CNTY. SCH. BD. POLICY MANUAL, POLICY NO. 2.26(6)(c)(11).

[4] *July 12, 2023 - Policy Handbook Meeting*, DUVAL CNTY. PUB. SCHS., https://vimeo.com/user189120931.

At the July 10, 2023, school board meeting, selection of a board member for the Florida School Boards Association ("FSBA") Advocacy Committee was a discussion item on the agenda.[5] Katie Gainer Hathaway and Mandy Rubin are parents of students attending Duval County Public Schools ("DCPS") and members of the advocacy organization Public School Defenders. During the public comment period, Hathaway expressed concern that "a current board member, who is an active member of Moms for Liberty, is slated to serve as an alternate on the Florida School Boards Association's Advocacy Committee for Duval schools."[6] Hathaway was referring to April Carney, the board member representing District 2, though she did not mention Carney by name. Hathaway continued, "The Southern Poverty Law Center has deemed Moms for Liberty an extremist—," at which point you interrupted her and said, "We're not going to attack organizations and people. This is civil discourse." The board's Chief Legal Counsel, J. Ray Poole, then said, "The board chair has the ability to govern comments from the public for the purposes of civil discourse and decorum, so we would ask that there not be attacks on organizations." You added, "We really try to maintain civil discourse here. We have children that watch this."

Hathaway continued to criticize Moms for Liberty, and when she mentioned Carney's position as Vice President of the Florida Conservative Coalition of School Board Members ("FCCSBM"), you again interrupted and told her to refrain from "attacking other organizations." Hathaway explained that she brought up the organization because "it was founded to counter the Florida School Boards Association, which [Carney] is going to be serving on." She said Carney's associations and comments to the press about the FSBA were a "huge red flag and a massive conflict of interest" that she believed would prevent Carney from effectively advocating for Duval County Public Schools or serving in the interest of the board. Hathaway urged the board to select another member as the alternate.

Later in the public comment period, Rubin expressed her "strong disagreement to having Board Member from District 2 selected as an alternate to the advocacy committee." She added:

> As an active Moms for Liberty member and current VP of the Conservative Coalition of School Board Members, I don't think she can possibly be expected to show up as a true advocate for all Duval County schoolchildren. These are highly partisan groups that stand in direct opposition of the values and aims of the FSBA. On that note, I would like to express my deepest dismay and concern that yet more time is being wasted in attempting to harm and ostracize our LGBTQ+ students through the enforcement of the bathroom policy. . . . It has to be noted that these shameful policies are being put forward because of the fearmongering of the anti-government extremist group Moms for Liberty and their member who is on this board and an author of this policy—

---

[5] DUVAL CNTY. PUB. SCHS., MEETING AGENDA - JULY 10, 2023, REGULAR BOARD MEETING, https://duvalcosb.portal.civicclerk.com/event/2721/files.

[6] *July 10, 2023 - Regular Board Meeting*, DUVAL CNTY. PUB. SCHS., https://vimeo.com/844004972.

At that point, you interjected, "Again, as a reminder, we're not going to have the attacks."

Notably, the board has on multiple occasions freely allowed other commenters to criticize outside organizations or make comments that some might consider profane, vulgar, or inappropriate for children to hear. Here are just some examples:

- "I applaud the board's removal of JASMYN as an outside group that has a say in our children's education. The idea that the school board hires advisor groups that promote homosexuality is beyond my understanding."[7]
- "Introducing the notion of a sex life to children is just as irresponsible as letting a child play with matches. . . . The district hasn't learned its lesson from associating with the porn-affirming organization known as JASMYN."[8]
- "The solution for encouraging abstinence is not through some survey questions to 10-year-olds like, 'How old were you when you had sexual intercourse for the first time?' followed by 'With how many people have you had sexual intercourse?' . . . If someone tells you not to think of something, for example, 'don't think about sexual intercourse,' the mind automatically invokes the image of sexual intercourse."[9]
- "Students should never be forced to explore sex toys."[10]
- "My point is [the Jacksonville Public Education Fund] offers free classes to teachers who return by taking the content back into the classroom, get thousands of dollars as perk money. That is a backdoor for content we do not want. . . . Also JPAF has once said black males are being targeted for discipline and crime and now the grand jury is saying we're not reporting on those reports and that crime."[11]
- "On the surface Read USA appears to be a great program. Providing children with books is a great idea if those books are in compliance with Florida's obscenity and child abuse laws and Parental Rights in Education Law. CCDF would like a comprehensive list of those books that Read USA provides with zero substitutions."[12]
- "The campaign to sign kids up for Hazel Health is relentless and prioritized in the district. Hazel Health collaborates with Nicklaus Children's Hospital to provide telehealth for more than 500,000 kids, K-12 students in Florida including Duval. Nicklaus Hospital states that its children gender variant program is dedicated to fulfilling the psychological, educational, and medical needs of gender-variant children

---

[7] *December 6, 2022 - Board Meeting*, DUVAL CNTY. PUB. SCHS., https://duvalschools.viebit.com/player.php?hash=fUeXxud5Q0B8. JASMYN is a nonprofit whose mission is to "support LGBTQIA+ teens & young adults." *See* jasmyn.org.

[8] *February 7, 2023 – School Board Meeting*, DUVAL CNTY. PUB. SCHS., https://vimeo.com/user189120931.

[9] *Id.*

[10] *November 1, 2022 - Monthly Board Meeting*, DUVAL CNTY. PUB. SCHS., https://duvalschools.viebit.com/player.php?hash=PMlQNyN9t5So.

[11] *October 10, 2022 - Board Meeting*, DUVAL CNTY. PUB. SCHS., https://duvalschools.viebit.com/player.php?hash=AKtjKnpKrw5U.

[12] *Id.*

and families. They provide gender-affirming care. This district should not be partnering with a hospital and program that mutilates, abuses, and lies to kids."[13]

- "ETR HealthSmart on your agenda is being offered to elementary, middle, and high school students. They obviously have an agenda of their own. They already put it in writing that they are here to defy Florida law. We cannot allow ourselves to contribute our tax dollars to this awful organization."[14]

II. The Duval County School Board's Restrictions on Public Comment Violate the First Amendment

By restricting Hathaway's and Rubin's criticism of a board member and organizations with which she is affiliated—and by otherwise selectively prohibiting "profane or vulgar language or personal attacks"—the board inhibits the "free flow of ideas and opinions on matters of public interest and concern" that lies at "the heart of the First Amendment,"[15] and in doing so exceeds the constitutional limit on the board's authority.

A. The board's prohibitions on "personal attacks" and "attacks on organizations" unconstitutionally target speech based on viewpoint.

The First Amendment protects Duval County parents and citizens when they speak during public comment periods at school board meetings.[16] A board meeting is, at a minimum, a limited public forum, which means the board may restrict the content of commenters' speech only when those restrictions are viewpoint-neutral *and* reasonable in light of the forum's purpose.[17] The board may, for example, limit the amount of time reserved for each public comment, or limit public comment to matters relevant to DCPS. In no case, however, may officials prohibit speech based on the viewpoint it expresses.

"Viewpoint discrimination is censorship in its purest form," and government action "that discriminates among viewpoints threatens the continued vitality of free speech."[18] The Supreme Court has made clear that even a speech restriction that "evenhandedly prohibits

---

[13] *Id.*

[14] *August 2, 2022 - Regular Board Meeting*, DUVAL CNTY. PUB. SCHS., https://duvalschools.viebit.com/player.php?hash=Neala8GRoA9P. ETR is a "non-profit organization committed to improving health outcomes and advancing health equity for youth, families, and communities." *See* ETR, https://www.etr.og.

[15] *Hustler Magazine, Inc. v. Falwell*, 485 U. S. 46, 50 (1988).

[16] *See, e.g.*, *City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Emp. Rels. Comm'n*, 429 U.S. 167, 174–76 (1976) (recognizing the public's right to speak at school board meetings "when the board sits in public meetings to conduct public business and hear the views of citizens.").

[17] *See Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995); *Barrett v. Walker Cnty. Sch. Dist.*, 872 F.3d 1209, 1224 (11th Cir. 2017) (holding public comment sessions of the board of education's meetings and planning sessions are limited public fora). Whatever type of public forum is created by the Duval County School Board's public comment periods, it is well-established that viewpoint discrimination is impermissible in *any* forum. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 60–62 (1983).

[18] *Bible Believers v. Wayne Cnty., Mich.*, 805 F.3d 228, 248 (6th Cir. 2015) (*en banc*) (cleaned up).

disparagement of all groups" is viewpoint discriminatory because whether speech is disparaging or derogatory requires the government to consider the viewpoint expressed.[19]

The First Amendment also makes no exception for speech that others subjectively find offensive or objectionable.[20] This core principle applies with special force to speech critical of the government, which must be viewed "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[21]

The U.S. Court of Appeals for the Eleventh Circuit—whose decisions bind the Duval County School Board—has emphasized that government bodies cannot silence public commenters based on disapproval of their views, notwithstanding the government's authority to intervene if commenters engage in disruptive conduct, such as failing to heed warnings not to raise irrelevant topics.[22] In *Mama Bears of Forsyth County v. McCall*, the U.S. District Court for the Northern District of Georgia enjoined a school board policy that required public commenters to "conduct themselves in a respectful manner" because it "impermissibly targets speech unfavorable to or critical of the Board while permitting other positive, praiseworthy, and complimentary speech."[23]

---

[19] *Matal v. Tam*, 582 U.S. 218, 243 (2017); *see also Iancu v. Brunetti*, 139 S. Ct. 2294, 2300 (2019) (holding that determinations of whether something is "immoral" or "scandalous" is viewpoint-based because it "distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation.").

[20] *E.g.*, *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

[21] *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see also Snyder v. Phelps*, 562 U.S. 443, 452 (2011) ("[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.").

[22] *See Jones v. Heyman*, 888 F.2d 1328, 1332 (11th Cir. 1989) (mayor's expulsion of plaintiff from city commission meeting did not violate First Amendment where "mayor's actions resulted not from disapproval of [plaintiff's] message but from [plaintiff's] disruptive conduct and failure to adhere to the agenda item under discussion"). Limiting comment only to relevant topics is constitutionally permissible only when the government body does not fully open the public comment period but rather has viewpoint-neutral rules restricting the forum to relevant comments. *See, e.g.*, *Cleveland v. City of Cocoa Beach*, No. 6:02-cv-1294-Orl-22KRS, 2003 U.S. Dist. LEXIS 28054 (M.D. Fla. Nov. 21, 2003) (by expressly inviting public to make "relevant comments" at city commission meetings, commission established limited public forum where it could limit off-topic remarks).

[23] No. 2:22-CV-142-RWS, 2022 U.S. Dist. LEXIS 234538, at *20–21 (N.D. Ga. Nov. 16, 2022). FIRE recognizes that the U.S. District Court for the Middle District of Florida recently dismissed claims that a school board's restrictions on "personally directed," "obscene," and "abusive" comments are unconstitutional. *Moms for Liberty v. Brevard Pub. Sch.*, No. 6:21-cv-1849-RBD-DAB, 2023 U.S. Dist. LEXIS 41334 (M.D. Fla. Feb. 13, 2023). That case, however, is currently before the Eleventh Circuit, on an appeal in which FIRE and the Manhattan Institute filed an *amicus curiae* brief explaining that the district court's decision is erroneous and inconsistent with binding Supreme Court precedent. *See* Brief of Amici Curiae Foundation for Individual Rights and Expression and Manhattan Institute as Amici Curiae in Support of Plaintiffs-Appellants, *Moms for Liberty — Brevard County, Florida v. Brevard Public Schools*, No. 23-10656 (4th Cir. filed Apr. 17, 2023). https://www.thefire.org/research-learn/fire-and-manhattan-institute-amicus-brief-support-plaintiffs-appellants-and-reversal. Moreover, Duval County's policy is not identical to the one at issue in *Moms for Liberty*, in any event. The terms "personal attacks" and "attacks on organizations" in Duval's policy are

Like the unconstitutional restriction in *Mama Bears of Forsyth County*, the Duval County School Board's prohibitions on "personal attacks" and comments that "attack organizations" selectively target speech based on viewpoint. The board may not silence comments that "attack" organizations or individuals while giving commenters free rein to praise or neutrally comment on organizations or people.[24]

Hathaway's and Rubin's criticism of Carney's affiliation with Moms for Liberty and the FCCSBM bore directly on an agenda item at the relevant meeting: selection of a board member as an alternate on the FSBA Advocacy Committee. Hathaway and Rubin attempted to express their opinion that Carney's affiliations created conflicts of interest and made her unfit to serve on the FSBA Advocacy Committee. Duval County citizens "must be able to provide their feedback and critiques, even if some people, Board members included, find that distasteful, irritating, or unfair."[25]

Not only is the board's prohibition on "attacks" facially viewpoint-discriminatory, its selective enforcement of it discriminates based on viewpoint as applied. Review of previous board meetings shows the board did not interrupt or reprimand commenters who criticized organizations such as JASMYN, Read USA, and the Jacksonville Public Education Fund. To be clear, these comments were also constitutionally protected, and the board was right to allow them. But it must show equal forbearance to Hathaway, Rubin, and other commenters who wish to lodge relevant criticisms against board members or outside organizations.

B. The board's "personal attack" and "profane or vulgar language" prohibitions are overbroad.

In addition to being viewpoint-discriminatory, policy language banning "personal attacks" and "attacks on organizations" is unconstitutionally overbroad and unreasonable in light of the purpose served by the public comment period. So, too, for its flat ban on "profane or vulgar language."

A regulation is overbroad if it "prohibits a substantial amount of protected speech . . . not only in an absolute sense, but also relative to the statute's plainly legitimate sweep."[26] The rules against "attacks" on individuals and organizations reach a vast amount of protected, non-disruptive speech, including Hathaway's and Rubin's criticism of Carney's affiliations with certain organizations and other relevant criticism of board members, policies, or actions. The rules are both overbroad and unreasonable for prohibiting a wide range of speech that is

---

remarkably similar to the "disparagement of . . . groups" restriction that the Supreme Court held viewpoint-discriminatory in *Matal*. 582 U.S. at 243. And regardless of the Duval County policy's facial validity, the board has not enforced it in a consistent, viewpoint-neutral manner, as discussed below.

[24] At the June 7, 2022, board meeting, for example, a commenter who called on parents to vote for Carney for the school board received no pushback from the board.

[25] *Mama Bears of Forsyth Cnty.*, 2022 U.S. Dist. LEXIS 234538 at *21.

[26] *United States v. Williams*, 553 U.S. 285, 292 (2008). The overbreadth doctrine "is predicated on the danger that an overly broad statute, if left in place, may cause persons whose expression is constitutionally protected to refrain from exercising their rights for fear" of violating the law. *Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989).

pertinent to school district matters—the very speech for which public comment periods are intended to provide a forum.[27] *Some* speech the board deems an "attack" could be subject to prohibition, but only if it falls into one of the few, narrowly defined categories of expression that receive no First Amendment protection, such as true threats.[28] At a July 12, 2023, Policy Handbook meeting, Board Member Darryl Willie acknowledged the board's overreach: "I don't think we can shut someone down every time we feel uncomfortable. I mean, that's what happens. We don't want the room to be uncomfortable so we're going to shut it down. . . . We need to give people room to say what they need to say."[29] Willie is correct.

The board's prohibition of "profane or vulgar language" is flawed in the same ways. Under this policy, a speaker could not even quote germane "profane or vulgar language" mentioned in a news report or uttered by a government official, rendering it overbroad. The policy could also reach previous comments about (1) a DCPS-affiliated organization "introducing the notion of a sex life to children" and being "porn-affirming"; (2) alleged questions in a student survey about "sexual intercourse"; and (3) students allegedly being "forced to explore sex toys." But these issues all concern DCPS and are fair game for public comment, making restrictions on them overbroad and unreasonable.

In the landmark case *Cohen v. California*, the Supreme Court overturned a disturbing-the-peace conviction for wearing a jacket emblazoned with "Fuck the Draft" in a public courthouse.[30] The Court held that "so long as the means are peaceful, the communication need not meet standards of acceptability."[31] As the district court said in *Mama Bears of Forsyth County* of a similar rule prohibiting "profane" statements in public comment sessions: "Had the Board qualified the language to restrict profane remarks or profanity *that was actually disruptive* of the Board's business, that might have been a different story. But it did not, and as written, it cannot stand."[32]

C. The board's prohibitions on "personal attacks" and "profane or vulgar language" are unconstitutionally vague.

Even setting aside the fatal flaws of viewpoint discrimination and overbreadth, the bans on "personal attacks," "attacks on organizations," and "profane or vulgar language" are unconstitutional for the independent reason that they both fail to give commenters reasonable

---

[27] *See, e.g.*, *Tyler v. City of Kingston*, 74 F.4th 57, 63 (2d Cir. 2023) ("In a limited public forum, the reasonableness analysis turns on the particular purpose and characteristics of the forum and the extent to which the restrictions on speech are reasonably related to maintaining the environment the government intended to create in that forum.") (cleaned up).

[28] *See United States v. Alvarez*, 567 U.S. 709, 717 (2012). A "true threat" is a statement through which "the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003).

[29] *July 12, 2023 - Policy Handbook Meeting*, *supra* note 4.

[30] 403 U.S. 15 (1971).

[31] *Id.* at 25. The Court also noted that if governments were allowed to "forbid particular words," they "might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." *Id.* at 26.

[32] 2022 U.S. Dist. LEXIS 234538, at *36.

notice of what speech is prohibited and endow board members with excessive discretion to enforce the rules.[33] The board's inconsistent enforcement of the policy demonstrates the policy's vagueness, if not the board's desire to suppress disfavored viewpoints. When does a comment cross the line from merely critical to an "attack"? Making this determination is an unavoidably subjective exercise with no clear answer, resulting in "arbitrary and discriminatory enforcement."[34]

Additionally, much like the term "personal attacks," the undefined terms "profane" and "vulgar" capture a wide range of protected speech depending on the subjective judgment and biases of school board members enforcing them. As such, they fail to provide persons of ordinary intelligence reasonable notice of what speech is prohibited and give the board undue discretion to decide what may be said.

You and your fellow board members rightly acknowledged the problems with vague prohibitions during the Policy Handbook meeting.[35] Vice Chair Cindy Pearson noted, "I think it's hard to police what an attack is, what is not an attack," because that determination is "subjective." You questioned "who is going to determine the threshold of what a personal attack is because I have no background and training to do that, nor does anyone else in here I don't think. . . . So how are you going to police that?" Board Member Charlotte Joyce noted that something as mild as a commenter saying a board member failed to respond to the commenter's email could be perceived as a personal attack. And you astutely observed that a commenter could think they are not attacking others but simply "being matter of fact" when they say a board member belongs to an "organization that has been identified by so-and-so as being this, this, and this."

As the board's discussion shows, trying to police "personal attacks," "attacks on organizations," or "derogatory" terms creates not only constitutional problems, but public resentment arising from justified perceptions of unfairness and preferential treatment. Pearson expressed concern about groups complaining about selective or uneven enforcement: "If you stopped this person from saying this, why are you not stopping this group from saying this?" As Willie noted, "If we start to get into which terms on either side, you can talk about 'fascist,' 'racist,' you can talk about the 'groomer' side, that's been put out a couple times, so I don't know how we police all those terms." There is a simple solution—and it happily aligns with the First Amendment's requirements: Allow commenters the widest possible latitude to speak, intervening only when they exceed time limits, make physical threats or engage in other clearly unprotected speech, or otherwise disrupt the proceedings.[36]

---

[33] *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972); *see also Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1888 (2018) (speech restrictions must "articulate some sensible basis for distinguishing what may come in from what must stay out").

[34] *Grayned*, 408 U.S. at 108.

[35] *July 12, 2023 - Policy Handbook Meeting*, *supra* note 4.

[36] You also expressed concern about the school district facing liability for commenters' speech, but citizens participating in the public comment portion of board meetings speak only for themselves. The government is not liable for what private citizens say in a public forum. The board should, however, fear liability for

III. Conclusion

Public comment periods offer the citizenry opportunities to share candid feedback directly with their elected representatives. The First Amendment protects this vital democratic function, restraining school boards, city councils, and other government assemblies from censoring comments they do not want to hear. While the Duval County School Board has the authority to stop disruptive conduct, it cannot lawfully stretch the meaning of "disruptive" to cover sharply critical or even offensive speech. The board may *encourage* civility, but it may not censor or remove speakers based on subjective judgments that their remarks are insufficiently respectful.

FIRE therefore calls on the Duval County School Board to eliminate its prohibitions on "personal attacks," "attacks on organizations," and "profane or vulgar language," and to ensure Hathaway, Rubin, and others are free to comment at board meetings without facing unconstitutional censorship. FIRE would be pleased to work with the board to ensure its policies and practices comply with the First Amendment.

We respectfully request a substantive response to this letter no later than September 25, 2023.

Sincerely,

Aaron Terr
Director of Public Advocacy

Cc: April Carney, Board Member, District 2
Cindy Pearson, Vice Chair, District 3
Darryl Willie, Board Member, District 4
Warren A. Jones, Board Member, District 5
Charlotte Joyce, Board Member, District 6
Lori Hershey, Board Member, District 7
J. Ray Poole, Chief Legal Counsel

violating the First Amendment rights of public commenters by adopting and enforcing overbroad, vague, and/or viewpoint-discriminatory rules.