August 12, 2024

Middletown Board of Education
311 Hunting Hill Ave.
Middletown, Connecticut 06457

Sent via U.S. Mail and Electronic Mail (boemembers@mpsct.org)

Dear Middletown Board of Education members:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech, is concerned by Middletown Public Schools' "Civility/Respectful Communications and Actions" policy. Because the policy's broad speech restrictions violate the First Amendment, FIRE calls on the Board to amend its policy.

The policy prohibits "disruptive communications and/or actions" that:

1) interfere, disrupt or undermine the effective operation of the school district;
2) are used to engage in harassing, defamatory, obscene, abusive, discriminatory or threatening or similarly inappropriate communications;
3) create a hostile environment;
4) breach confidentiality obligations of school district employees; or
5) violate the law, board policies and/or other school rules and regulation.[1]

In doing so, it includes the following non-exhaustive list of examples of "Disruptive Communications/Actions":

- Using loud and/or offensive language (for example, swearing or display of temper).
- Invading another person's space by moving close to the individual in an aggressive manner.
- Threatening to do physical harm to a teacher, school administrator, school employee, student or member of the community.
- Damaging, destroying or threatening to destroy or damage school property.
- Harassing, defamatory, obscene, abusive, discriminatory or threatening verbal, written or electronic communications.

[1] *Civility/Respectful Communications and Actions (Policy 1260)*, MIDDLETOWN BOE POLICIES (2022), https://drive.google.com/file/d/1WCsZyFJSsZ67FxBDdJy-wmuVyvoxSYnw/view.

- Any other behavior which disrupts the orderly operation of the school, a school activity, or any other activity by the school district.[2]

The term "discriminatory" is not defined, but another section of the policy instructs that the Board expects everyone to communicate "in a manner that promotes respect for the dignity and worth of all individuals, regardless of race, religion, color, national origin, sex, sexual orientation, marital status, age, disability, pregnancy, gender identity or expression, socio-economic status, or role within the school community."

The policy has several constitutional flaws, which its broad applicability—to students, staff, and members of the public during daily school operations, extracurricular school events, and any events on school property—serves only to amplify.

I. The Policy Violates Students' First Amendment Rights

The policy's ban on "discriminatory" communications, which appears to cover any statements deemed disrespectful on the basis of any of listed protected class, and its ban on "loud and/or offensive language," violate students' First Amendment rights, which, as is well-established, are not shed at the schoolhouse gate.[3] The Supreme Court set the relevant standard in 1969's *Tinker v. Des Moines*, holding the First Amendment protected public school students' right to wear black armbands to school to protest the Vietnam War.[4] *Tinker* made clear school officials cannot restrict student speech based on speculative, "undifferentiated fear" that it will cause disruption or discomfort among the student body.[5] Rather, it requires actual evidence the speech will "materially and substantially disrupt the work and discipline of the school."[6]

The First Amendment makes no categorical exception for expression others deem discriminatory, hateful, or offensive.[7] In *R.A.V. v. City of St. Paul*, for example, the Supreme Court invalidated an ordinance that prohibited placing on any property symbols that "arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[8] The prohibition of disparaging communications—even an evenhanded prohibition—is viewpoint discriminatory,[9] and thus a "particularly egregious" First Amendment violation.[10] "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit expression of an idea simply because society finds the idea itself offensive or disagreeable."[11]

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[2] *Id.*

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

[4] *Id.* at 514.

[5] *Id.* at 511.

[6] *Id.* at 513; *see also Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 37 (10th Cir. 2013) (forecast of substantial disruption must rest on "concrete threat" of substantial disruption).

[7] *Matal v. Tam*, 582 U.S. 218, 246 (2017).

[8] *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

[9] *Matal*, 582 U.S. at 243 ("Giving offense is a viewpoint.").

[10] *Vidal v. Elster*, 602 U.S. 286, 293 (2024).

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

While *some* speech that school officials deem "discriminatory," "offensive," or "loud" might substantially disrupt the school environment, Middletown Public Schools bans *all* such speech regardless of whether it causes or is likely to cause substantial disruption.[12] Its flat, preemptive ban is a far cry from the *Tinker* requirement. Moreover, the ban on communications that "interfere, disrupt or undermine the effective operation of the school district" improperly departs from the Supreme Court's requirement that speech *substantially* disrupt the school's operation to be punishable.

II. The Policy Violates Parents' and Visitors' First Amendment Rights

Middletown Public Schools has even less justification for applying its civility policy to parents and visitors over whom it exercises no supervisory authority. As previously noted, the First Amendment makes no exception for "offensive" or "discriminatory" speech. *Tinker*'s limited allowance for censoring student speech cannot extend to adults, including parents and visitors. School authorities could not, for example, prohibit a community member speaking during the public comment period of a school board meeting from using disfavored language simply because the board deems it offensive or predicts it will cause disruption.

Even if "offensive" language is limited to profanity, the civility policy still infringes on protected speech, as swearing generally receives constitutional protection. For instance, the First Amendment protects the right to wear a jacket bearing the words "Fuck the Draft" inside a courthouse where children are present.[13] One reason the Supreme Court concluded as much is that communication involves not only "precise, detached explication" of ideas but also "inexpressible emotions."[14] The Court noted that "words are often chosen as much for their emotive as their cognitive force."[15] But even apart from any emotional embellishment, using swear words can be necessary for a comprehensible discussion about the words themselves, as may happen if a parent wishes to complain about language in a library or curricular book at a schoolboard meeting.

Restrictions on parents using "profane" language in school board meetings have already led to unfavorable litigation for the offending school board. As an example, after Atlanta area parents read passages of books they considered inappropriate at a school board meeting, the board punished them for their comments.[16] In subsequent litigation, the parents and school board stipulated that the ban on "profane" comments would prevent parents from quoting passages of the books to which they objected.[17] In holding that the parents were substantially likely to succeed in facially challenging the board's ban on "profane" comments, the court noted that

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[12] For example, a student might mention "Slut Walk," a protest movement that combats sexual violence, or refer to the "Washington Redskins," the former name of the professional football team now known as the Washington Commanders. While some might consider either remark "offensive" or "discriminatory," that alone would not justify student discipline.

[13] *Cohen v. California*, 403 U.S. 15 (1971).

[14] *Id.* at 26.

[15] *Id.*

[16] *Mama Bears of Forsyth Cnty. v. McCall*, 642 F.Supp. 3d 1338, 1344–46 (N.D. Ga. 2022).

[17] *Id.* at 1347.

"courts have generally held that outright prohibitions on profane language or profanity are not allowed."[18] The court contrasted unconstitutional outright bans with constitutional bans on comments that are "actually disruptive" of the meeting.[19]

Middletown Public Schools cannot constitutionally apply the same rules and standards to parents and community members as it does to children. Whatever pedagogical concerns exist with students, they do not extend to adults at a schoolboard meeting.

III. The Policy Violates Staff Members' First Amendment Rights

The flat bans on "discriminatory" communications and "loud and/or offensive language" also unduly restrict the free speech of staff. Schools may have broad authority to control employees' speech when they perform official duties like classroom teaching, but staff retain the right to speak as citizens on matters of public concern when not performing those duties, even when on school property (such as on a lunch break or while commenting at school board meetings).[20] To justify restricting such speech, a school must show its interest "in promoting the efficiency of the public services it performs" outweighs "the interests of the [employee], as a citizen, in commenting upon matters of public concern."[21]

Middletown Public Schools must therefore show, at minimum, that speech "impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise."[22] Mere disapproval of the employee's viewpoint is insufficient.[23] Middletown Public Schools may not simply assume that "loud," "offensive," or "discriminatory" language so impairs the operation of the school as to outweigh the employee's right to speak as a citizen on matters of public concern.

IV. The Policy Is Unconstitutionally Vague

The civility policy's vague terminology also violates the First Amendment by leaving too much discretion to school officials rather than providing "explicit standards" that prevent them from

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[18] *Id.* at 1355 (citing as examples *Acosta v. City of Costa Mesa*, 718 F.3d 800, 813 (9th Cir. 2013) ("§ 2-61 prohibits the making of 'personal, impertinent, profane, insolent or slanderous remarks.' That, without limitation, is an unconstitutional prohibition on speech"); *Kalman v. Cortes*, 723 F.Supp. 2d 766, 798–99 (E.D. Pa. 2010) (holding that a restriction on "'profanity,' without more, is not a valid reason for suppressing speech").

[19] *Id.* at 1356.

[20] *See Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2411 (2022) (holding district violated high school coach's First Amendment rights when it fired him for praying at midfield post-game during a lull in his coaching duties, and emphasizing that public schools may not "treat[] everything teachers and coaches say in the workplace as government speech subject to government control").

[21] *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

[22] *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

[23] *Id.* at 384 ("Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.").

engaging in "arbitrary and discriminatory enforcement."[24] Although the policy offers examples for some terms (e.g., "swearing or display of temper" is an example of "loud and/or offensive language), it is still unconstitutionally vague.

This is so, for example, because what constitutes "loud" or "offensive" language is inherently contextual and subjective. After all, what is loud in a library would not be at a football game. Whether language is offensive can depend on the intent behind the speech, the identity of the speaker and listener, and other factors. The "need for specificity is especially important" where, as with a ban on "offensive language," a regulation is a content-based, because vagueness has an "obvious chilling effect on free speech."[25] The fact that public officials "cannot make principled distinctions" between offensive and inoffensive speech is exactly why the First Amendment strips them of authority to ban "offensive" speech.[26]

Similarly, what counts as "discriminatory" is unclear, subjective, and can potentially intrude on protected political expression. For instance, some hail affirmative action policies as means to advance racial equity,[27] while others argue it is racist.[28] Some argue transgender athletes competing in women's sports is a civil rights issue and threatens women and girls,[29] while others argue excluding transgender athletes is transphobic.[30]

The policy's vagueness is exacerbated by its seemingly equal application to everyone on school property. By its own terms, the policy applies equally to adults at a school board meeting as to schoolchildren addressing a teacher, with only the discretion of whoever is enforcing the rules allowing for different treatment. The policy contains no standards to differentiate an upset parent raising her voice to criticize policies during a school board meeting public comment period from an angry middle schooler criticizing his teacher after class. A school official could plausibly label either person's comments as "loud," as involving "offensive language," or as showing a "display of temper." Parents and visitors have no way of knowing the standard to

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[24] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

[25] *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 266 (3d Cir. 2002).

[26] *Cohen*, 403 U.S. at 25.

[27] *See, e.g., Affirmative Action in Education Matters for Equity, Opportunity, and the Nation's Progress*, NAACP, https://naacp.org/resources/affirmative-action-education-matters; Connor Maxwell and Sara Garcia, *5 Reasons to Support Affirmative Action in College Admissions*, CTR. FOR AM. PROGRESS (Oct. 1, 2019), https://www.americanprogress.org/article/5-reasons-support-affirmative-action-college-admissions/.

[28] *See, e.g.,* John Stossel, *Affirmative Action is Racist and Therefore Wrong*, REASON (July 12, 2023), https://reason.com/2023/07/12/affirmative-action-is-racist-and-therefore-wrong/; Wai Wah Chin, *Reparations are the new affirmative action — and even more racist and divisive*, N.Y. POST (Jan. 28, 2024), https://nypost.com/2024/01/28/news/reparations-are-the-new-affirmative-action-and-even-more-racist-and-divisive/.

[29] *See, e.g.,* Riley Gaines, *Riley Gaines: Trans athletes make women's sports a civil rights issue*, N.Y. POST (June 2, 2024), https://nypost.com/2024/06/02/opinion/trans-athletes-make-womens-sports-a-civil-rights-issue/.

[30] *See, e.g.,* Derrick Clifton, *Anti-Trans Sports Bills Aren't Just Transphobic — They're Racist, Too*, THEM (Mar. 31, 2021), https://www.them.us/story/anti-trans-sports-bills-transphobic-racist; Alex Cooper, *Caitlyn Jenner Says Florida Gov.'s Transphobia Is Just 'Common Sense'*, ADVOCATE (Mar. 25, 2022), https://www.advocate.com/news/2022/3/25/caitlyn-jenner-says-florida-govs-transphobia-just-common-sense.

which they will be held. Such vagueness and excessively broad enforcement discretion is precisely what the First Amendment forbids.

V. Conclusion

To comply with the Constitution, Middletown Public Schools must revise its civility policy. It should clearly and narrowly focus on communications that cause actual disruption, and it should not extend standards applicable to minors to adults. It is possible for a policy to respect First Amendment rights while also fostering a civil and respectful community in which to educate students. Middletown Public Schools can accomplish these twin goals without extensive policy changes, and FIRE would be pleased to assist with that endeavor free of charge.

We respectfully request a substantive response no later than August 26, 2024.

Sincerely,

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