FIRE
Foundation for Individual Rights and Expression

November 18, 2024

Board of Education
Baraboo School District
423 Linn Street
Baraboo, Wisconsin 53913

Sent via U.S. Mail and Electronic Mail (board@barabooschools.net)

Dear Board Members:

The Foundation for Individual Rights and Expression (FIRE) is concerned by Baraboo Board of Education's proposed "Anti-Hate Speech" policy. As a nonpartisan nonprofit dedicated to defending freedom of speech, FIRE is committed to ensuring public schools do not infringe the First Amendment rights of students or staff. We understand public schools have a legitimate interest in promoting a safe and discrimination-free learning environment—but in doing so, they may not maintain unconstitutionally vague and overbroad policies. FIRE thus calls on the Board to reject the "Anti-Hate Speech" policy or revise it to comport with the First Amendment.

Our concerns arise out of proposed Board policy 114, "Anti-Hate Speech," which states in relevant part that: "Hate speech is not protected speech. The District will not tolerate any form of hate speech, and will consistently and vigorously seek to eliminate it." [1] The policy further provides that:

> Hate speech is any form of communication that attacks, threatens, degrades, or insults a person or group based on their race, color, national origin, ancestry, creed, age, gender, disability, sexual orientation, gender variance, or any other group. It includes, but is not limited to:
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> 1. Language, gestures, or other actions such as using racial slurs;
> 2. Displaying, writing, or wearing items; or
> 3. Communications on social media or other technology.[2]

[1] Baraboo School District, Policy 114 (Draft in Development) (enclosed).

[2] *Id.*

The policy additionally specifies that "slurs" are impermissible even if read from a text with no ill intent, as "we don't get to arbitrarily decide when they are hurtful or offensive" and the "idea of 'a pass' to say a slur because it is in a text, ignores the systemic pass that insulates some identities from degradation, which in return, reinforces the privilege of those groups."[3]

Despite the policy's categorical statement that "[h]ate speech is not protected speech" and its apparent blanket ban on "any form of hate speech," the policy later appears to contradict this language by suggesting hate speech is prohibited only when it produces specific outcomes. For example, the policy states no student, on or off school property, "shall engage in hate speech" that "endangers the property, health, or safety of others, that causes a substantial disruption to the educational environment, or that collides with the rights of others." Employees may not "engage in hate speech while engaged in the performance of their job duties" *or* "while off-duty" if it "causes a substantial disruption to the educational environment and/or impairs the employee's ability to perform their job duties effectively."[4] In any event, the policy suffers from constitutional shortcomings in multiple respects.

I. The "Hate Speech" Policy Violates Students' First Amendment Rights

It is well-established that public school students do not shed their First Amendment rights at the schoolhouse gate.[5] As the Supreme Court recently reaffirmed, "America's public schools are the nurseries of democracy."[6] They accordingly maintain an interest in *protecting* students' freedom to express themselves, and that "protection must include the protection of unpopular ideas, for popular ideas have less need for protection."[7] While public school administrators may restrict student speech in limited situations for certain limited purposes, they "do not possess absolute authority over their students," so "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."[8]

In the seminal student speech case *Tinker v. Des Moines*, the Supreme Court held the First Amendment protected public school students' right to wear black armbands to school to protest the Vietnam War.[9] The Court made clear school officials cannot restrict student speech absent evidence it "would materially and substantially disrupt the work and discipline of the

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[3] *Id.* Other reasons cited for the blanket ban on reading a "slur" aloud are that it "denies the experiences, perspectives, and consequences for people who have had to live with the impacts of language beyond school" and "can affect the ability to learn by invoking stereotypes and stereotype threats." *Id.*

[4] *Id.*

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

[6] *Mahanoy Area School District v. B.L*, 594 U.S. 180, 190 (2021).

[7] *Id.*

[8] *Tinker*, 393 U.S. at 511.

[9] *Id.* at 513–14.

school" or "inva[de] the rights of others."[10] Substantial disruption is a "demanding standard,"[11] one that requires more than "undifferentiated fear or apprehension of disturbance."[12]

The mere fact that a student's opinion may offend others cannot constitute substantial disruption or an invasion of others' rights,[13] as there is no "generalized 'hurt feelings' defense" to a public school's restriction of student speech.[14] Public schools lack authority to restrict speech out of "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[15] As the Supreme Court explained:

> Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.[16]

The "Anti-Hate Speech" policy is thus unconstitutional because it prohibits significantly more speech than that which causes substantial disruption to the school environment or invades the rights of others.[17] For example, the policy states Baraboo School District "will not tolerate any form of hate speech," which includes any speech that, in the subjective judgment of school officials, "attacks, threatens, degrades, or insults a person or group" based on a protected characteristic like race, national origin, or gender, even though such speech is not *per se* disruptive.

For example, some may think a student expressing support for Israel's invasion of Gaza is insulting or degrading to Palestinians, while others may think speech accusing Israel of perpetrating a genocide or intentionally killing Palestinian is false and degrading to Israelis. The same is true of other hot-button political issues. Some may argue transgender athletes competing in women's or girls' sports is a civil rights issue and attacks or degrades women and girls,[18] while others may argue that excluding transgender athletes is transphobic.[19] Calls for

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[10] *Id.* at 513.

[11] *Mahanoy*, 594 U.S. at 193.

[12] *Tinker*, 393 U.S. at 508.

[13] *Id.*

[14] *N.J. v. Sonnabend*, 37 F.4th 412, 426 (7th Cir. 2022).

[15] *Tinker*, 393 U.S. at 509.

[16] *Id.* at 508–09.

[17] An overbroad regulation prohibits "a substantial amount of protected speech" relative to the regulation's "plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292 (2008).

[18] *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.

[19] *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*

tighter restrictions on immigration at the U.S.-Mexico border are often cast as racist or xenophobic.[20] But absent evidence of substantial disruption, students' expression of controversial political views like these is constitutionally protected.

Even "slurs" are not *per se* disruptive. Here are but some examples of speech that could violate a categorical ban on "slurs":

- An LGBTQ student advocating for "queer" rights;[21]
- A student mentioning "Slut Walk," a protest movement that combats sexual violence;[22]
- A student reading aloud Martin Luther King Jr.'s "Letter from Birmingham Jail," which contains racial slurs;
- A student referring to the "Washington Redskins," the former name of the football team now known as the Washington Commanders;
- A student describing a celebrity as "crazy."[23]

School officials may not declare by fiat that such uses of language are inherently disruptive or invade the rights of others but rather must apply the constitutional standard to the facts in each situation. Intent and context are always relevant. Language is, after all, highly contextual, and the same words can have very different meanings and effects in different circumstances.

The above examples also demonstrate another fatal flaw of the "Anti-Hate Speech" policy—it is unconstitutionally vague because people "of common intelligence must necessarily guess at its meaning."[24] Whether the above examples (and other uses) qualify as "insulting" or "degrading" under the policy depends on subjective and unpredictable judgments of school officials. That violates the constitutional requirement for speech regulations to "provide explicit standards

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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.

[20] *See, e.g.*, *'Cruel': Biden administration toughens asylum restrictions at US border*, AL JAZEERA (Sept. 30, 2024), https://www.aljazeera.com/news/2024/9/30/cruel-biden-administration-toughens-asylum-restrictions-at-us-border.

[21] The word "queer" has a long history as an epithet against members of the LGBTQ community. *See* Mollie Clark, *'Queer' history: A history of Queer*, NAT'L ARCHIVES (Feb. 9, 2021), https://blog.nationalarchives.gov.uk/queer-history-a-history-of-queer.

[22] Brett Brooks, *Survivors of sexual violence make a statement at 3rd Annual Slut Walk*, 25NEWS (May 14, 2023), https://www.25newsnow.com/2023/05/14/survivors-sexual-violence-make-statement-3rd-annual-slut-walk.

[23] Some argue the term "crazy" perpetuates mental health stigma or is sexist. *See* Rachel Ewing, *"That's Crazy": Why You Might Want to Rethink That Word in Your Vocabulary*, PENN MED. NEWS (Sept. 27, 2018), https://www.pennmedicine.org/news/news-blog/2018/september/that-crazy-why-you-might-want-to-rethink-that-word-in-your-vocabulary. The American Psychological Association recommends people avoid using the words "crazy" and "insane." *Inclusive Language Guide*, AM. PSYCH. ASS'N, https://www.apa.org/about/apa/equity-diversity-inclusion/language-guidelines.

[24] *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

for those who apply them" to prevent "arbitrary and discriminatory enforcement."[25] This "need for specificity is especially important where . . . the regulation at issue is a content-based regulation of speech," as vagueness has an "obvious chilling effect on free speech."[26]

As noted, the policy's statements that "[h]ate speech is not protected speech" and that the "District will not tolerate any form of hate speech" are reasonably interpreted as an absolute ban on what the policy defines as "hate speech." But even if the policy applied more narrowly to only student "hate speech" that "endangers the property, health, or safety of others, that causes a substantial disruption to the educational environment, or that collides with the rights of others," it would still raise constitutional issues.

First, it would not resolve the policy's vagueness. Second, the scope of the "endangerment" category is unclear and unconstitutional to the extent it reaches beyond speech that causes substantial disruption, invades others' rights, or falls in an unprotected category like true threats or incitement.[27] Third, even the narrower reading of the policy entails regulation of off-campus student speech with no nexus to the school. This last flaw is especially problematic because, as the Supreme Court recently explained, public schools "will rarely stand *in loco parentis*" with respect to student speech that occurs outside a school program or activity.[28] Courts "must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech *at all*."[29] Accordingly, schools have "a heavy burden to justify intervention" in these circumstances.[30]

This is illustrated by *C1.G v. Siegfried*, in which the U.S. Court of Appeals for the Tenth Circuit reversed dismissal of a student's First Amendment claim against his school district, which had expelled him for a Snapchat post of three classmates wearing wigs and hats in a thrift store, including one resembling a foreign military hat from World War II, with the caption, "Me and the boys bout to exterminate the Jews."[31] The court emphasized that the speech was not "directed toward the school or its students."[32] The school "cannot claim a reasonable forecast of substantial disruption to regulate . . . off-campus speech by simply invoking the words 'harass' and 'hate' when [the student's] speech does not constitute harassment and its hateful

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

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

[27] 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). "Incitement" refers to speech "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

[28] *Mahanoy*, 594 U.S. at 189.

[29] *Id.* at 189–90 (emphasis added).

[30] *Id.* at 190. Even before *Mahanoy* was decided, lower federal courts required that off-campus speech "bear[] a sufficient nexus to the school" to justify regulation by school authorities. *McNeil v. Sherwood Sch. Dist. 88J*, 918 F.3d 700, 707 (9th Cir. 2019); *see also Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565, 577 (4th Cir. 2011) (public schools cannot regulate off-campus student speech unless "such speech has a sufficient nexus with the school").

[31] 38 F.4th 1270, 1274 (10th Cir. 2022).

[32] *Id.* at 1279.

nature is not regulable in this context."[33] For this and all the reasons provided above, the Board must revisit its "Anti-Hate Speech"policy to comport with the sharp constitutional limits on public schools' authority to restrict student speech.

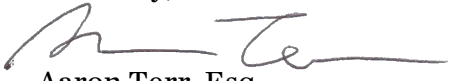
II. The "Anti-Hate Speech" Policy Would Violate Staff Members' First Amendment Rights

The proposed "Anti-Hate Speech" policy would also unconstitutionally restrict staff speech. The District has broad discretion to control employees' speech when they perform official duties like classroom teaching, but they retain the right to speak as citizens on matters of public concern when not performing those duties.[34] To justify restricting such speech, the District 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."[35] Mere disapproval of the employee's viewpoint is insufficient to impose discipline.[36] The District may consider factors like whether the speech "impedes the performance of the speaker's duties or interferes with the regular operation" of the school, but these factors must be balanced against the employee's strong interest in speaking on matters of public importance while off the clock.[37] The District cannot categorically satisfy this balancing test by a rule that limits speech as strictly as the "Anti-Hate Speech" policy would. The policy's "hate speech" definition is also unconstitutionally vague as to employee speech for the same reasons that is the case for students, as explained in the previous section.

III. Conclusion

For the foregoing reasons, FIRE calls on the Baraboo Board of Education to rescind or revise its proposed "Anti-Hate Speech" policy to ensure First Amendment compliance. We would be pleased to assist with that endeavor—free of charge. But we in any event request a substantive response no later than December 2, 2024.

Sincerely,



Aaron Terr, Esq.
Director of Public Advocacy

Encl.

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[33] *Id.*

[34] This is true even when employees are on school property (such as on a lunch break or while commenting at school board meetings). *See Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2411 (2022) (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").

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

[36] *Rankin v. McPherson*, 483 U.S. 378, 384 (1987). ("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.").

[37] *Id.* at 388.

Book	Policy Manual
Section	100 - Board Operations
Title	Anti-Hate Speech
Code	114
Status	Draft in Development

All learners should receive an educational experience that helps them reach their full potential, regardless of race, family income, language, background, personal characteristics, and ability. As a District, we must identify and address implicit personal and institutional bias that exists within our learning environment to help ensure that our learners have what they need to develop their potential. Our learning community is viewed as stronger for its greater diversity and prepares our students to live and work in a more diverse world.

The District will provide a safe, secure, and respectful learning environment for all students in school buildings, on school grounds and school buses, and at school-sponsored activities. Hate speech has a harmful social, physical, psychological, and academic impact on our school community. Hate speech is not protected speech. The District will not tolerate any form of hate speech, and will consistently and vigorously seek to eliminate it.

All students, administrators, teachers, and staff share responsibility for our learning environment. The District expects that school staff will immediately intervene when observing any issues contrary to the policy, and promptly report any potential violations of this policy to a school administrator so that it can be properly addressed through appropriate educational and/or disciplinary actions.

Hate speech is any form of communication that attacks, threatens, degrades, or insults a person or group based on their race, color, national origin, ancestry, creed, age, gender, disability, sexual orientation, gender variance, or any other group. It includes, but is not limited to:

1. Language, gestures, or other actions such as using racial slurs;

2. Displaying, writing, or wearing items; or

3. Communications on social media or other technology.

Hate speech does not include educational materials or lessons that are used by the district or its staff in good faith. However, we, as a district, are choosing not to read aloud slurs in texts that we teach. By disallowing the usage of slurs, even when it comes to reading a text out loud, we are demonstrating to our students that words have power. As individuals, we don't get to arbitrarily decide when they are hurtful and offensive. Although textual integrity is important, we believe that:

1. The idea of "a pass" to say a slur because it is in a text, ignores the systemic pass that insulates some identities from degradation, which in return, reinforces the privilege of those groups.

2. Reading a slur denies the experiences, perspectives, and consequences for people who have had to live with the impacts of language beyond school.

3. There's a difference between "getting" to use a derogatory term and having to live with its dehumanizing effects.

4. Using a slur can affect the ability to learn by invoking stereotypes and stereotype threats.

In addition to not reading the word aloud, staff members are expected to acknowledge to students that while this word/phrase exists in this text and may be seen as having literary value, the words will not be read or spoken in class. The staff member should share with students why the words are not being shared referencing the reasons shared above. Staff members with questions/concerns about this position are encouraged to speak to building administrators and/or the literacy coordinator that services their building.

No student shall engage in hate speech while on school property, at a school-sponsored event, on school-provided transportation, or while under the supervision of a school authority that endangers the property, health, or safety of others, that causes a substantial disruption to the educational environment, or that collides with the rights of others.

Likewise, no student shall engage in hate speech while not on school property, or not under the supervision of a school authority, that endangers the property, health or safety of others at school, that causes a substantial disruption to the educational environment or that collides with the rights of others, including, but not limited to, bullying or harassment targeting particular individuals, or threats aimed at school staff or other students.

No employee shall engage in hate speech while engaged in the performance of their job duties while representing the District in an official capacity or while off-duty that causes a substantial disruption to the educational environment and/or impairs the employee's ability to perform their job duties effectively.

Retaliation against a victim, good faith reporter, or a witness of hate speech is prohibited. Any District employee or student who engages in retaliation shall be subject to discipline for that act in accordance with District policies and building procedures, up to and including a recommendation for expulsion or termination.

Any person violating this policy will be subject to disciplinary action as permitted by and consistent with applicable federal and state laws and regulations, the Employee Handbook, the applicable Student Handbook, the Co-curricular Handbook and/or other Board policies. If a violation of this policy is not found, the behavior may still be subject to other District policies, handbooks or procedures.

Anyone having knowledge of an action which they believe violates the above policy should report the incident as specified in the reporting procedures for Board Policy 113.

Legal Ref.:

Cross Ref.:
113 Nondiscrimination in District Programs, Activities and Operations
113-Rule(1) District Response to Alleged Sexual Harassment Under Title IX
113-Rule(2) Expectations for Employees to Report Discrimination and Harassment
113-Exhibit(1)Title IX Notice
113-Exhibit(2) Nondiscrimination Based on Disability
113-Exhibit(3) Nondiscrimination Based on Age
411 Student Nondiscrimination and Equal Educational Opportunities
411.1 Student Harassment Based on a Legally-Protected Status
443.71 Anti-Bullying and Anti-Harassment
511 Equal Opportunity Employment and Nondiscrimination
512 Harassment Based on a Legally-Protected Status
522.3 Workplace Violence, Threats, Intimidation, and Harassment