



December 5, 2013

Superintendent David McDeavitt
Allegheny-Clarion Valley School District
PO Box 100
Foxburg, PA 16036-0100

Re: Students' First Amendment Rights in Allegheny-Clarion Valley School District

Dear Superintendent McDeavitt:

Earlier this year, the Third Circuit Court of Appeals, which has jurisdiction over the states of Pennsylvania, New Jersey, and Delaware, ruled in *K.A. v. Pocono Mountain School District* that several Pocono Mountain School District policies governing student expression were unconstitutional.¹ Specifically, the court held the school district's policy prohibiting the distribution of material that is not "directly related to school district activities or [does not] contribute significantly to district instructional programs" was unconstitutional.² It likewise upheld the lower court's ruling that the school district's policy prohibiting "the use of students and staff members for ... promoting nonschool events [or] organizations," "[ran] afoul of the protections for the personal speech of students provided by the First Amendment."³

It has come to our attention that the Allegheny-Clarion Valley School District (the "District") maintains policies similar to those that were struck down by the courts above because they violated the First Amendment rights of students. In particular, District Policy 913 prohibits "the use of students ... for advertising or promoting nonschool organizations." Policy 913 also restricts the distribution of material that (1) is not "directly related to school district activities or contributes significantly to district instructional programs," (2) is not "relevant to community welfare," (3) is from a "partisan, sectarian or political organization or any type," or (5) is "not in the best interest of the students." Furthermore, District Policy 220 prohibits the distribution of materials that "seek to establish the supremacy of a particular religious denomination, sect, or point of view." We write to inform you that, as a result of the rulings in *K.A. v. Pocono Mountain School District* and other cases, these policies are unconstitutional. We ask that you take immediate steps to revise these policies to remedy the violation of students' First Amendment Rights.

By way of introduction, Alliance Defending Freedom is an alliance-building, non-profit legal organization that advocates for the right of people to freely live out their faith. Alliance Defending Freedom served as lead counsel for the student in *K.A. v. Pocono Mountain School District*, and we remain committed to ensuring that students are free to exercise their First

¹ *K.A. v. Pocono Mountain Sch. Dist.*, 710 F.3d 99 (3d Cir. 2013).

² *Id.* at 113.

³ *K.A. v. Pocono Mountain Sch. Dist.*, 2011 WL 5008358, at *2, *5 (M.D. Pa. 2011).

Amendment rights to speak, associate, and learn on an equal basis with other members of their learning community.

The Scope of Students' Constitutional Rights

The Supreme Court has made it clear that students “do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁴ This is an issue that has been litigated multiple times at the Supreme Court, in this Circuit, and in courts across the nation. And the consistent result in these cases is the same: schools may not restrict student expression at school absent specified circumstances.

The “*Tinker* analysis”—named after the Supreme Court case that set the general rule for regulating student speech in schools—declares that while in school, a student “may express his opinions, even on controversial subjects ..., if he does so without ‘materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school’ and without colliding with the rights of others.”⁵ While the Court has carved out narrow exceptions for the prohibition of lewd, vulgar, or indecent speech,⁶ speech that is school-sponsored,⁷ and speech that encourages illegal drug use,⁸ it has unmistakably held that “[s]peech falling outside of these categories ... may be regulated only if it would substantially disrupt school operations or interfere with the right of others,” and to regulate anything more violates students’ First Amendment rights.⁹ Furthermore, as the Third Circuit held in *K.A. v. Pocono Mountain School District*, these freedoms of speech and expression are shared by all students regardless of age.¹⁰

Policies Prohibiting the Use of Students to Promote Non-School Events

It is common for students to advocate on behalf of causes and organizations, and the First Amendment protects their right to do so. When a student engages in expression at school — whether speaking with a classmate or handing out written invitations to a non-school event — “the burden is on school authorities to meet *Tinker*’s requirements to abridge student First Amendment rights.”¹¹ The District’s Policy 913 tramples upon students First Amendment rights because it prohibits “the use of students ... for advertising or promoting nonschool organizations.”

The Third Circuit has held that a variety of written materials — including ones created entirely by third-parties — are the personal expression of students when the student chooses to

⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

⁵ *K.A. v. PMSD*, 710 F.3d at 106 (quoting *Tinker*, 393 U.S. at 513).

⁶ *Id.* at 107; see also *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 927 (3d Cir. 2011) (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683, 685 (1986)).

⁷ *K.A. v. PMSD*, 710 F.3d at 107; see also *Blue Mountain Sch. Dist.*, 650 F.3d at 927 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)).

⁸ *K.A. v. PMSD*, 710 F.3d at 107; see also *Blue Mountain Sch. Dist.*, 650 F.3d at 927 (citing *Morse*, 551 U.S. at 408).

⁹ *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001).

¹⁰ *K.A. v. PMSD*, 710 F.3d at 111 (“the *Tinker* test has the requisite flexibility to accommodate the age-related ... concerns of elementary school students”).

¹¹ *Blue Mountain Sch. Dist.*, 650 F.3d at 928.

bring them to school to hand out to their classmates.¹² Speech is personal, even if the material by which it is conveyed was created by a third party, “if it is voluntary and not dictated by any individual or group.”¹³ The student in *K.A.* wanted to distribute a church-created flyer about a religious event to some of her friends and classmates, and the Third Circuit upheld her right to do so. The *Tinker* students were passionate about their opposition to Vietnam, and the Supreme Court confirmed their right to advocate it at school.¹⁴ Like the students in these cases, students in your district must also have the right to promote non-school events at school. The ban on students distributing flyers promoting non-school organizations and events is unconstitutional, and must be removed from your policies.

Policies Prohibiting Materials That Are Religious, Seek to Establish the Supremacy of a Particular Religious Sect, Denomination, or Point of View, or Promote or Denigrate a Religion

The Supreme Court has definitively held that religious expression — whether spoken, written¹⁵, or symbolic¹⁶ — is protected by the First Amendment.¹⁷ “[S]peech discussing otherwise permissible subjects cannot be excluded ... on the ground that the subject is discussed from a religious viewpoint.”¹⁸ Policies nearly identical to the District’s, which prohibits speech that “[p]romotes or denigrates a particular religion or religious practice” or “seek[s] to establish the supremacy of a particular religious denomination, sect, or point of view” and demands that “District schools shall not be used to ... disseminate literature ... of partisan, sectarian or political organizations of any type” have been struck down as unconstitutional for being facially content and viewpoint-based restrictions.¹⁹ Policies like these “attempt[] to restrict what effectively amounts to all religious speech, which is clearly not permissible under the First Amendment.”²⁰ In *K.A.*, the Pocono Mountain School District had a similar policy in place, but it quickly abandoned the policy shortly after the lawsuit was filed against the school district.

Policies Only Allowing Materials That Are of Educational Value, Promote Student Interest, or Are in the Best Interest of Students

The Supreme Court has held that the right to free expression includes the right to distribute literature within the confines of the *Tinker* analysis.²¹ The District’s Policy 913 that

¹² *K.A. v. Pocono Mountain Sch. Dist.*, 710 F.3d at 111.

¹³ *K.A. v. Pocono Mountain Sch. Dist.*, 2011 WL 5008358, at *4 (quoting *Slotterback v. Interboro Sch. Dist.*, 766 F.Supp. 280, 290 n.9 (E.D. Pa. 1991)); see also *Gilio ex rel. J.G. v. Sch. Bd. of Hillsborough Cnty., Fla.*, 905 F. Supp. 2d 1262, 1270 (M.D. Fla. 2012) (holding that invitations to an Easter Egg hunt were an elementary student’s personal speech despite “[t]he fact that J.G.’s mother and his church were organizing the Easter egg hunt”).

¹⁴ *Tinker*, 393 U.S. at 514.

¹⁵ *Gregoire v. Centennial Sch. Dist.*, 907 F.3d 1366, 1382 (3d Cir. 1990).

¹⁶ *Tinker*, 393 U.S. at 505-06.

¹⁷ *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

¹⁸ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001); see also *Johnston-Loehner v. O’Brien*, 859 F.Supp. 575, 579 (M.D. Fla. 1994) (striking down a policy that allowed school officials to screen out religious materials: “It is also beyond dispute that the restraint is based on content, for only after reviewing content does the school decide whether particular materials may be distributed”).

¹⁹ *Miller v. Penn Manor Sch. Dist.*, 588 F.Supp.2d 606, 628 (E.D. Pa. 2008).

²⁰ *Id.*

²¹ *Gregoire*, 907 F.3d at 1382.

prohibits the distribution of any literature or material that “[i]s not in the best interest of the students, staff or schools, in the opinion of [a school official]” unconstitutionally restrains students’ First Amendment right to expression and is void-for-vagueness. Similar “standards,” such as those allowing only materials that are in the “best interest” of students, have been struck down because they “permit officials to regulate speech guided only by their own ideas of what constitutes the good of the community.”²² Moreover, the Policy is void-for-vagueness because it fails to provide the “narrow, objective, and definite standards” that the First Amendment requires, as has been explained above in more detail.²³

Policies Only Allowing Materials That Are Directly Related to School District Activities or that Contribute Significantly to District Instructional Programs

A ban on all student literature that does not contribute significantly to “instructional programs” has repeatedly been declared unconstitutional because it is a prior restraint on speech and inherently vague.²⁴ The District’s Policy 913 states that “[o]nly literature and materials directly related to school district activities or contribute significantly to district instructional programs may be disseminated to or through students and staff members.” Because the District’s Policy allows officials to determine what satisfies these terms without providing any guidelines or criteria to restrain its hand, it permits the District to disguise viewpoint discrimination in violation of the First Amendment.²⁵ In addition, this Policy creates a condition so vague that students are unable to determine whether their materials are permissible. The Third Circuit, which has repeatedly struck down policies similar to the District’s, has held that “[t]he definition of the groups falling within the ‘educational mission of the school’ is so vague that [the school] has virtually unlimited discretion in deciding which groups qualify and which do not.”²⁶ This ban violates students’ constitutional rights under *Tinker*.²⁷

Policies Only Allowing Materials That Are Relevant to Community Welfare

Finally, when a literature distribution policy requires that materials be relevant to “community welfare” but lacks any guidelines for determining what materials meet that standard, it is an unconstitutional prior restraint and is void-for-vagueness.²⁸ Students have a First Amendment right to distribute materials at school, and school officials have a limited ability to control that right. The District’s Policy 913 allows literature relevant to “community

²² *C.E.F. of S.C. v. Anderson Sch. Dist Five*, 470 F.3d 1062, 1070 (4th Cir. 2006).

²³ *Id.* at 1072.

²⁴ *Morse*, 551 U.S. at 423.

²⁵ *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 763-64 (1988) (“[W]ithout standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker.”); *Child Evangelism Fellowship of MD, Inc. v. Montgomery Cnty. Pub. Sch.*, 457 F.3d 376, 386 (4th Cir. 2006) (“The danger of such boundless discretion, therefore, is that the government may succeed in unconstitutionally suppressing particular protected speech by hiding the suppression from public scrutiny.”).

²⁶ *Gregoire*, 907 F.2d at 1374.

²⁷ *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir. 2001) (“Under *Tinker*, then, regulation of student speech is generally permissible only when the speech would substantially disrupt or interfere with the work of the school or the rights of other students.”).

²⁸ *M.B. ex rel. Martin v. Liverpool Cent. Sch. Dist.*, 487 F.Supp.2d 117, 143 (N.D.N.Y. 2007) (citing *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976)).

welfare” to be distributed only with a school official’s prior approval. The lack of guidelines in the approval process gives the District unbridled discretion to decide which student expression satisfies these unwritten standards, allowing the District to mask suppression of controversial speech.²⁹ Based solely on the content or viewpoint of the materials, a school official could conclude that invitations to a church event are not in the community welfare, while flyers for a sports league are. This virtually unlimited discretion is what the First Amendment stands against. This Policy must be amended to secure the speech rights of students guaranteed by the Constitution.

The District must take immediate steps to remedy the constitutional infirmities created by its policies governing student expression and literature distribution. Our attorneys are happy to work with the District to formulate policies that fully comply with the First Amendment. Consequently, if the District is serious about reforming its policies without the need for potential legal action, we ask that you provide **written confirmation by December 20, 2013 of the steps the District is taking to remove the offending provisions from its policies.**

Cordially,



David A. Cortman, Senior Counsel
Jeremy D. Tedesco, Senior Legal Counsel
J. Matthew Sharp, Legal Counsel
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²⁹ *C.E.F. of Md., Inc. v. Montgomery Cnty. Pub. Schs.*, 457 F.3d 376, 387 (4th Cir. 2006).