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Pennridge School District
Board of Education and Policy Committee
1200 N. 5th Street
Perkasie, PA 18944

Dear School Board Members,

Education Law Center (ELC) provides this letter in response to concerns brought to our attention by parents in Pennridge School District (District) regarding several proposed policies which will be discussed at today's Policy Committee meeting. These polices include: (1) Student Expression/Dissemination of Materials (Policy 220); (2) Advocacy Activities (Policy 321); (3) Resource Materials (Policy 109); Curriculum Review by Parent/Guardians and Students (Policy 105.1) and (4) School Discipline (Policy 218).

Taken together, these policies do little to add to parents' existing rights to supervise their children's education while trampling on students' and teachers' First Amendment rights and creating new bureaucratic burdens on teachers that will impede rather than support student learning.

We urge the Committee to reject each of the proposed policies in their current form. For the reasons discussed herein, the proposed policies impermissibly violate students' First Amendment rights to receive information and ideas and exercise freedom of expression and are contrary to governing caselaw.

Proposed Policy 220, Student Expression/Dissemination of Materials, is Patently Unconstitutional

The U.S. Supreme Court has long held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[1] As the Court most recently explained in addressing this core tenet in *Mahanoy Area School District v B.L.,* schools have an interest in protecting a student's "unpopular expression" as "America's public schools are the nurseries of democracy."[2] Protection of students' rights to free speech is essential to educating children because schools must equip students with the skills and training they need to meaningful engage in our democratic system, make informed decisions as critical thinkers, and learn to value the free exchange of ideas which is central to our system of government and maintaining our democratic society.

[1] *Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 505, 506 (1969).
[2] *B.L. v. Mahanoy Area Sch. Dist.*, 141 S.Ct. 2038, 2046 (2021) (upholding First Amendment rights of students to express themselves while off campus and finding that *Tinker* 'substantial disruption' test did not apply to such speech); *see also C1.G v. Siegfried et al.*, 38 F.4th 1270, 1278 (10th Cir. 2022) (holding that a student's expulsion for off-campus antisemitic speech violated the First Amendment).

Prohibitions against free speech in schools are narrowly tailored to protect the First Amendment rights of students while recognizing the unique circumstances of school and school-supervised events. A school's authority to regulate speech focuses on expression that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[3] Students retain their First Amendment rights to share ideas and express themselves in school ***unless*** such expression: creates, or could reasonably create a *serious physical disturbance* at school; threatens *immediate and significant harm* to the school or community; encourages *unlawful* activity; contains lewd, vulgar, or profane language; or would violate someone else's rights.[4] School *officials* may not prohibit students from engaging in speech out of an "urgent wish to avoid the controversy which might result from the expression"[5] nor censor peaceful expression solely because other students may have a hostile reaction.[6] District actions that target certain speech or have the effect of stifling or discouraging speech or expression, such as expressing themselves openly in ways consistent with a student's gender identity, violates the First Amendment rights of students.[7]

In this case, proposed Policy 220 is patently unconstitutional because it is overly broad and contravenes the well-established right of students to disseminate materials in school.[8] The policy expressly states that "non-school materials – defined as not part of "district-sponsored" activities -- "[m]ay not occur during school hours or at school-sponsored events" and "[m]ay not be done inside any district facility or on district transportation." Non-school materials is broadly defined to include: "any printed, technological or written materials, regardless of form, source, or authorship, that are not prepared as part of the curricular or extracurricular program of the district, including but not limited to fliers, invitations, announcements, pamphlets, posters, online discussion areas and digital bulletin boards, personal websites and the like." Accordingly, as written, the Policy is so expansive that it would prohibit students from sharing a flyer regarding a non-school event including a political meeting or communications regarding social and community events. It would also impermissibly ban students from wearing a button in support of any issue or cause.[9]

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[3] *Tinker*, 393 U.S. at 513.

[4] *Tinker*, 393 U.S. at 513 (holding school officials can limit speech if they can show speech would be disruptive or interfere with rights of other students); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 675 (1986) (holding schools may categorically prohibit profane language); 22 PA. CODE § 12.9(b) (2005); *Sypniewski v. Warren Hills Reg'l Bd. Of Ed.*, 307 F.3d 243, 253 (3d Cir. 2002) (requiring a school demonstrate a "well-founded" expectation of disruption or interference with the rights of others before restricting student expression); *Circle Sch. v. Pappert*, 381 F.3d 172, 174 (3d Cir. 2004).

[5] *Tinker,* 393 U.S. at 510*; Gillman v. Sch. Bd. for Holmes Cnty*., 567 F. Supp. 2d 1359, 1374 (N.D. Fla. 2008) ("Political speech involving a controversial topic such as homosexuality is likely to spur some debate, argument and conflict…The nation's high school students, some of whom are of voting age, should not be foreclosed from that national dialogue.").

[6] *See Holloman v. Harland*, 370 F.3d 1252, 1275 (11th Cir. 2004) (concluding that school officials have the duty to address disruptive behavior, not prohibit the plaintiff's speech, because "allowing a school to curtail a student's freedom of expression based on such factors turns reason on its head"); *Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd Cnty., Ky*., 258 F. Supp. 2d 667, 691 (E.D. Ky. 2003) (even "protests" and "public uproar" could not justify restricting the rights of students who were not responsible for causing the disruption).

[7] *See e.g., Gillman v. Sch. Bd. for Holmes Cnty.*, 567 F. Supp. 2d 1359, 1370 (N.D. Fla. 2008) (a school district's censorship of T-shirts advocating fair treatment for LGBT people was unconstitutional).

[8] *Id. See also cases cited above.*

[9] *See e.g., Gillman*, 567 F. Supp. 2d at 1370 (a school district's censorship of T-shirts advocating fair treatment for LGBTQ people was unconstitutional).

Moreover, the term "dissemination" is broadly defined to encompass off-campus communications which are completely unrelated to school. Dissemination is defined as students "distributing or publicly displaying nonschool materials to others" not only on school property or during school-sponsored activities but through any manner of delivery including "at any time or location when creating or sending information using email, websites, online platforms, social media channels or other technological means that are owned, provided or sponsored by the school district." Accordingly, it prohibits the sharing of information between students who are both at home after school hours who are using their school emails to communicate regarding a social event. As the Supreme Court explained in *Mahanoy Area School District v B.L.,* "schools…rarely stand in *loco parentis*" and "off campus speech will normally fall within the zone of parental, rather than school related responsibility."[10] Specifically, the Court was careful to note that "courts must be more skeptical of a school's efforts to regulate off campus speech, for doing so may mean that student cannot engage in that speech at all."[11]

Here, proposed Policy 220 is overbroad, erases the First Amendment rights guaranteed to students, and contravenes governing caselaw. The policy is facially unconstitutional and must be rejected.

Policy 321, Advocacy Activities, is Unconstitutional Censorship

Although *Tinker* involved student speech, the Court wrote, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[12] The proposed policy is overbroad, impermissibly vague, and likely to trample on First Amendment rights of school employees and censor valuable classroom discussions of current events.

While courts have acknowledged that schools can regulate employee political speech for legitimate educational purposes, the proposed policy is far broader. First, it replaces the word "political" with a new undefined term "advocacy" and prohibits the use of "advocacy" in any context but expressly includes "religion, gender identity, social, political and geo-political matters." This could encompass exchanges between adults and could include, for example, allegations against the District of racial discrimination.[13]

Second, the policy directs that all staff must "remain neutral on advocacy-related matters during assigned work hours." The reference to "assigned work hours" applicable to all "administrative, professional and support employees" is similarly overbroad and would prohibit, for example, conversations between staff regarding advocacy to benefit students.

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[10] *B.L. v. Mahanoy Area Sch. Dist.*, 141 S.Ct. 2038, 2046 (2021).
[11] *Id.*
[12] *Tinker*, 393 U.S. at 513.
[13] *See e.g.*, *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979), (reinstating the First Amendment claim of a public school teacher in Mississippi who was discharged after complaining to her principal about racial discrimination); *see also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (ruling often applied to teachers which held that public school officials can regulate school-sponsored student speech as long as there is a legitimate educational purpose for their action).

Additionally, the overbroad and vague proposed changes will also likely serve to censor educators from facilitating critical lessons and discussions with students about historical events and discrimination, as well as current political and cultural concerns. This proposed policy undermines democratic discourse and deprives students of a true understanding of history and deeper learning opportunities. America's schools are vital for "prepar[ing] citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."[14] Students and teachers must be free "to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[15] The proposed policy's vague mandate for "balance" and "neutrality" in all instruction would also suggest overbroad requirements like a history teacher providing a Nazi's justification for the genocide of Jewish Americans, and the KKK member's support for lynchings. Instruction that devalues human beings based on their identity or certain characteristics – whether it is race, gender identity, or religion – in service of "balance" or "neutrality" has no value or purpose in our public schools and serves only to discriminate against historically marginalized students. The proposed policy completely stifles normal discussion about political issues that are integral to student learning but will have its most chilling effect on issues related to race, gender and sexual orientation and expression.

For these reasons, Policy 321 should be rejected as written.

Proposed Policy 109 is Subjective, Vague, and Burdensome

Proposed Policy 109 references "resource materials" which is defined to include "reference books, classroom and school library collections, multimedia materials, maps, library books, library books, software, periodicals, and other instructional and professional development resource materials." Under the Policy, such resource materials "will be re-evaluated periodically in relationship to changes in curriculum content, new instructional techniques, and current needs of students and teachers." Infrequently used materials "should be retained if they make a unique contribution to the total collection" and criteria for "weeding any collection of resource materials includes, among other criteria, "value to the total collection." Policy 109.

The proposed policy is problematic for several reasons. First, it would require a wide range of supplemental materials – including instructional resource materials -- to be subject to re-evaluation and requires that the Superintendent or designee, after consultation with the professional staff, shall be responsible for the selection of "all" such resource materials. Second, it is unwieldy because it creates a stringent new review process which undermines the professional judgment of experienced librarians and staff. This process includes review sites to determine an appropriate age range and identify potential content concerns with the resources in addition to review by building principal and/or assistant superintendent prior to final recommendation of any resource. Most importantly, it references criteria which are impermissibly vague and subjective, lacking no definition at all including a determination of the "value" of the resource materials to the total collection and whether the material makes a "unique" contribution to the collection.

[14] *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).
[15] *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

The purpose of a school library is to help prepare young people for critical thinking and engagement in an "information-rich society" and to encourage students to "explore questions of personal and academic relevance."[16] The U.S. Supreme Court has held that "the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library" and "the Constitution protects the right to receive information and ideas."[17]

As the Supreme Court held in *Board of Education, Island Trees Union Free School District No. 26 et al. v. Pico*, 457 U.S. 853 (1982), the materials available in a school library – intended as a "place to test or expand upon ideas presented to [a student], in or out of the classroom" - are distinct from materials proscribed in the school's curriculum over which the Board has greater discretion.[18] The School Board in *Pico* had argued they must be allowed "unfettered discretion to 'transmit community values'" through the school but the Court maintained "that sweeping claim overlooks the unique role of the school library."[19] The Board "may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge"[20] by proscribing a narrow view of "community values" that limit the books available in a school library where the "opportunity at self-education and individual enrichment …is wholly optional."[21]

Proposed Policy 109 vague and subjective criteria – referencing its "value to the collection" permits the removal of resource materials based on a viewpoint that is disliked by the Administration The Proposed Policy's absence of a requirement to consider literary merit and whether the books at issue have received critical acclaim, and the record of the district's own library staff objecting to the Proposed Policies further suggest that the Policies are not tailored to be objective and identify "educational suitability" but instead seek to impermissibly enforce a particular viewpoint. This is against the law and discriminatory.[22]

The proposed review of resource materials district-wide is unduly burdensome and unnecessary and will take a significant amount of time from teachers, library staff, and administrators. It may also serve to open up administrators and educators to harassment and attack from individuals who seek to promote their own viewpoints instead of protecting an inclusive and diverse learning environment for students.

For all these reasons, we urge the Policy Committee to reject Proposed Policy 109 in its current form and instead pursue policies that will proactively protect students' rights consistent with the law and best practices identified by national and district library professionals.

Policy 105.1, Curriculum Review by Parents/Guardians and Students, is Unduly Burdensome on Educators

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[16] *See* AMERICAN ASSOC. OF SCHOOL LIBRARIANS, ROLE OF THE SCHOOL LIBRARY 1 (2019), https://www.ala.org/aasl/sites/ala.org.aasl/files/content/advocacy/statements/docs/AASL_Role_of_the_School_Library.pdf.
[17] *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 et al. v. Pico*, 457 U.S. 853, 866 (1982).
[18] *Pico*, 457 U.S. at 868-69.
[19] *Pico*, 457 U.S. at 869.
[20] *Pico*, 457 U.S. at 866.
[21] *Pico*, 457 U.S. at 869.
[22] *See Pico*, 457 U.S. at 874-75.

Policy 105.1, providing for curriculum review by parents/guardians and students, rightly describes a parent or guardian's entitlement to review public school curriculum. The District's policies already provide for these rights. Proposed revisions to Policy 105.1 appear to unnecessarily expand the burden on educators by requiring they catalog every single item of information that is shared to students in a continuously updated collection for immediate access by parents. Proposed revisions to Policy 105.1 also remove any limitation on the number of requests that can be made by parents, without even providing a reasonable limit for instances of bad faith or a pattern of harassing requests. The proposed policy makes these additional requirements on staff while also maintaining the same 10 day response period and removing the identification of any particular staff person responsible for receiving such requests.

Particularly in light of the concerns identified above with respect to the district's Proposed Policy 321 apparently seeking to censor any discussion of modern political issues and civil rights, the proposed changes to 105.1 serve only to open up hard-working educators to harassment and attack from individuals who seek to promote their own narrow viewpoints in our public schools instead of protecting an inclusive and diverse learning environment for students.

Policy 218 Raises Additional Concerns About the Safety and Rights of Children at Pennridge

Pennridge School District's revised Policy 218 on Student Discipline also raises clear constitutional concerns, is contrary to existing Pennsylvania law against corporeal punishment, and raises significant concerns for the safety and well-being of all schoolchildren, particularly those who are disproportionately subject to school discipline such as students with disabilities and Black and Brown students who the District is responsible to protect.

First, like other policies discussed in this letter, Policy 218 runs afoul of well-settled constitutional guarantees regarding First Amendment rights and caselaw regarding the limitations on schools to impose discipline for "off-campus conduct." School districts have only the powers granted them expressly or by necessary implication, and that these powers may not be exceeded "regardless how worthy the purported goal."[23] This principle applies to the area of school discipline.[24] In particular, a student's First Amendment rights to self-expression cannot be denied based on behavior that is "off campus" except in very limited circumstances.[25]

Pennridge's policy exceeds this limit by expressly stating that the Code of Student Conduct applies to off-campus conduct where the "proximity, timing or motive for the conduct in question or other factors pertaining to the conduct otherwise establish *a direct connection to attendance at school, to the school community, or to a school-sponsored activity*." Policy 218 (emphasis added). This provision is

[23] *Barth v. Sch. Dist. of Phila.*, 143 A.2d 909, 911 (Pa. 1958); *Giacomucci v. Se. Delco Sch. Dist.*, 742 A.2d 1165, 1174 (Pa. Commw. Ct. 1999). See 24 PA.C.S. § 5-510 (empowering school districts to regulate conduct of students "during such time as they are under the supervision of the board of school directors") and 24 PA.C.S. § 13-1317 ("during the time they are in attendance").

[24] *Hoke v. Elizabethtown Area Sch. Dist.*, 833 A.2d 304, 310 (Pa. Commw. Ct. 2003).

[25] *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 932 (3d. Cir. 2011); *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 217 (3d. Cir. 2011); *B.L. v. Mahanoy Area Sch. Dist.*, 141 S.Ct. 2038, 2045-46 (2021).

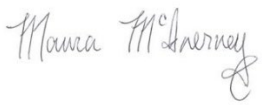
unconstitutionally overbroad and impermissibly expands the categories of behaviors for which schools can punish students to expressive conduct occurring off campus if it is connected to "attendance at school" or "school sponsored activities" at Pennridge. For example, a student could be punished for off campus conduct such as expressing exasperation that she needed to attend a school event using course language on a social media profile as was deemed off limits in *Mahanoy Area School District v. B.L.*[26]

Second, the Policy specifically applies to behavior "at any time while on school property" which contravenes governing caselaw whereby courts have recognized that conduct occurring on school property after school hours does not fall within the authority of schools.[27]

Finally, ELC has grave concerns about Policy 218's statement that "reasonable force may be used by teachers and school authorities to… quell a disturbance, obtain possession of weapons or other dangerous objects, for the purpose of self-defense, and for the protection of persons and property." Policy 218 permits the use of force in ways that are disallowed under Pennsylvania law and violates the rights of students with disabilities. While this provision tracks the language of 22 Pa. Code § 12.5, entitled "Corporal punishment," the policy does not define "reasonable force" and fails to address in any way the civil rights protections granted to students with disabilities.[28]

For all these reasons, we urge the Committee to reject each of these proposed policies in their current form and instead commit to policies that protect the rights of students, parents and educators without the harm described by the violations described herein. We are available to discuss these issues further.

Sincerely,



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[26] *See B.L. v. Mahanoy Area Sch. Dist.*, 141 S.Ct. 2038, 2046 (2021).
[27] *D.O.F. v. Lewisburg Area Sch. Dist.*, 868 A.2d 28, 35-36 (Pa. Commw. Ct. 2004) (post-*Hoke* case where student used marijuana on school property hours after a school concert ended on a Friday night and court held that being on school property does not necessarily constitute being "under school supervision.").
[28] *See e.g.*, Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (Section 504).