FIRE
Foundation for Individual Rights and Expression

January 11, 2024

Deb Olson, President, School Board
Mitchell School District 17-2
821 North Capital
Mitchell, South Dakota 57301

Sent via U.S. Mail and Electronic Mail (adolson@mitchelltelecom.net)

Dear President Olson:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,[1] is concerned by Mitchell School District 17-2's "hate speech" policy, which violates the First Amendment by banning ill-defined categories of speech on school property. We understand public schools have a legitimate interest in promoting an inclusive learning environment, but in doing so, the District may not maintain vague and overbroad policies that infringe students' or school visitors' constitutional rights. FIRE calls on the District to rescind or revise the policy to comply with the First Amendment.

Our concerns arise out of the District Board of Education's approval of Policy 121, "Hate Speech on School Property,"[2] which states in part that:

> The District finds that racial epithets and slurs as to color, nation [*sic*] origin, sex, disability, or religion create a disturbance in, and interference to, the educational environment, which outweigh any legitimate educational purpose. The Mitchell School District denounces and prohibits the use of racial epithets and slurs, regardless and irrespective of context, user, audience, target, intent, or lack thereof, purpose or lack thereof, bias or lack thereof, or means of communication. Any words or language that would have an offensive meaning if it [*sic*] was used by a member of a

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

[2] Mitchell School District 17-2, Minutes of the Annual Meeting, July 24, 2023, https://core-docs.s3.amazonaws.com/documents/asset/uploaded_file/2788/MSD/3328849/Minutes_-_Annual_Meeting_July_24_2023.pdf [https://perma.cc/3NMM-HKE3]. This letter presents our understanding of the pertinent facts, but we appreciate you may have more information and invite you to share it with us.

> certain race, color, national origin, sex, disability, or religion is prohibited regardless of the of the [*sic*] user.[3]

The policy applies to all "staff, students, visitors, parents, and guardians" on District property and during District-sponsored activities, and to off-campus speech if it "causes a substantial disruption to the educational process or the orderly operation of a school." It further instructs that anyone "who believes they have been a victim of hate speech should report the situation to a school administrator or staff member." Violators "shall be subject to sanctions commensurate with the offense as determined by the Superintendent or his/her designee."

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.[4] As the Supreme Court recently reaffirmed, "America's public schools are the nurseries of democracy."[5] They accordingly maintain an interest in *protecting* students' freedom to express themselves, especially when that expression is unpopular.[6] While public school administrators may restrict student speech in limited situations for certain limited purposes, they "do not possess absolute authority over their students . . . . In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."[7] The District's overbroad "hate speech" policy flouts these principles.

The District justifies the policy with an asserted finding that "racial epithets and slurs as to color, nation origin, sex, disability, or religion create a disturbance in, and interference to, the educational environment, which outweigh any legitimate educational purpose," without any evidence that that is necessarily so in every case. This broad, unsupportable assertion cannot satisfy the relevant constitutional standard for banning disruptive speech.

The Supreme Court established the relevant standard in 1969's *Tinker v. Des Moines*, holding that the First Amendment protected public school students' right to wear black armbands to school to protest the Vietnam War.[8] The Court made clear that school officials cannot restrict student speech based on speculative, "undifferentiated fear" that it will cause disruption or discomfort among the student body.[9] Rather, *Tinker* requires actual evidence that that speech would "materially and substantially disrupt the work and discipline of the school."[10] Furthermore, because that inquiry requires evidence, it cannot be made in a context-free

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[3] MITCHELL SCHOOL DISTRICT 17-2, POLICY 121 HATE SPEECH ON SCHOOL PROPERTY, https://core-docs.s3.amazonaws.com/documents/asset/uploaded_file/2788/MSD/3326612/121.pdf [https://perma.cc/4A9U-96L5].

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

[5] *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021).

[6] *Id.*

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

[8] *Id.* at 514.

[9] *Id.* at 511.

[10] *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).

vacuum. The District must apply the test to the facts, not replace all inquiry with unconstitutional *ipse dixit*.

Notably, the "hate speech" policy is not limited to epithets and slurs directed at a student in a malicious or threatening manner. Rather, it categorically prohibits epithets, slurs, and *any* "words or language that would have an offensive meaning" if used by someone with a certain group identity, even if the speaker has a different identity and regardless of intent or context. Yet intent and context are essential to determining whether speech would cause substantial disruption. Language is, after all, highly contextual, and the same words can have very different meanings and effects in different circumstances and when voiced by different speakers. The policy is thus overbroad.[11] Here are but some examples of speech that the policy would apparently prohibit:

- An LGBTQ student advocating for "queer" rights;[12]
- A student mentioning "Slut Walk," a protest movement that combats sexual violence;[13]
- 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";[14] and
- All terms for any race or gender, which would be offensive to someone if applied disparagingly.

The District has no basis for finding these uses of language—and all other hypothetical utterances of slurs, epithets, or language that might conceivably have a subjectively "offensive meaning" to some listeners in some contexts—would necessarily substantially disrupt schools in all circumstances.

II. <u>The "Hate Speech" Policy Violates Staff Members' First Amendment Rights</u>

The "hate speech" policy also unduly restricts the free speech of staff. The District 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

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[11] 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).

[12] 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.

[13] 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.

[14] 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.

commenting at school board meetings).[15] 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."[16]

The District therefore must show, at a 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."[17] Mere disapproval of the employee's viewpoint is insufficient.[18] The District may not simply assume without evidence that *any* hypothetical use by an employee of a slur, epithet, or language that could have an "offensive meaning"—an inscrutable restriction with no clear boundaries—so impairs the operation of the school as to outweigh the employee's right to speak as a citizen on matters of public concern.

III. The "Hate Speech" Policy Violates Parents' and Visitors' First Amendment Rights

The District has even less justification for applying the "hate speech" policy to visitors, parents, or guardians over whom the District exercises no supervisory authority. It 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 District deems it offensive or speculates that it might cause disruption. The First Amendment makes no categorical exception for expression others deem hateful or offensive.[19] 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."[20] In later holding the First Amendment protects protesters holding insulting signs outside soldiers' funerals, the Court reiterated the broad constitutional protection for expression, recognizing that "[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[21]

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[15] *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").

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

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

[18] *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.").

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

[20] *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *see also Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

[21] *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011). The "hate speech" policy even seems to reach the *off-campus speech* of individuals who are *not* students or staff, over whom the District has no authority to impose "sanctions"—even if such off-properly speech disrupts school activities. The only conceivable basis for punishing such speech would be if it fell into one of the few, narrowly defined First Amendment exceptions, *United States v. Stevens*, 559 U.S. 460, 468–69 (2010) (First Amendment protects all speech unless it falls into one of the "historic and traditional categories" of unprotected speech, like true threats, obscenity,

IV. The "Hate Speech" Policy Is Unconstitutionally Vague

In addition to the "hate speech" policy's striking overbreadth, it is unconstitutionally vague because people "of common intelligence must necessarily guess at its meaning."[22] Speech regulations must "provide explicit standards for those who apply them" to prevent "arbitrary and discriminatory enforcement."[23] 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."[24]

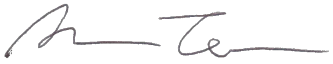
The boundaries of what constitutes an "epithet" or "slur" are far from clear. As noted, some think the word "crazy" is a slur, while many others consider it completely harmless, and it is unclear whether that word—and many other terms—falls within the policy. The policy muddies the waters further by banning "words or language that would have an offensive meaning if . . . used by a member of a certain race, color, national origin, sex, disability, or religion," as "offensive meaning" is vague and subjective. Offensive according to whom? The fact that public officials "cannot make principled distinctions" between offensive and inoffensive speech is exactly why the First Amendment strips them of the authority to ban "offensive" speech.[25]

V. Conclusion

For all the foregoing reasons, FIRE calls on Mitchell School District 17-2 to reform its "hate speech" policy so that it complies with the First Amendment. We would be pleased to assist with that endeavor—free of charge.

We respectfully request a substantive response no later than January 25, 2024.

Sincerely,



Aaron Terr
Director of Public Advocacy

Cc: Brittni Flood, Vice President
Deb Everson, Board Member
Terry Aslesen, Board Member
Shawn Ruml, Board Member
Theresa Kriese, Board Member
Dr. Joe Childs, Superintendent

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defamation, or incitement). And even there, it seems unlikely the District, rather than some other governmental unit, would be the appropriate body to pursue sanctions.

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

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

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

[25] *Cohen v. California*, 403 U.S. 15, 25 (1971).