



August 20, 2025

School Board
Montgomery County Public Schools
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Dear School Board Members:

The Foundation for Individual Rights and Expression (FIRE) is concerned by Montgomery County Public Schools' "Hate Speech Policy." As a nonpartisan nonprofit that defends free 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 violate the Constitution. FIRE thus calls on the School Board to repeal or amend the policy.

Our concerns arise from Section 7-3.4 of the MCPS Policy Manual, which defines "hate speech" as "any ... expression that threatens, abuses, bullies, disparages, or intimidates individuals or groups based on ethnicity, nationality, race, religion, gender, gender identity, sexual orientation, disability, or any other characteristic protected by law" and "strictly prohibits hate speech on any school property, during school-sponsored activities, and in any other place or context that substantially disrupts the school environment."¹ It further provides reporting and investigation procedures along with possible disciplinary actions—up to and including expulsion and mandatory counseling. Together, these provisions leave the policy with 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.² 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

¹ MCPS Policy Manual Section 7-3.4, "Hate Speech Policy" (enclosed).

² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

regulate their speech, students are entitled to freedom of expression of their views.”³ Because the “Hate Speech Policy” reaches beyond the school’s limited authority without a specific and constitutionally valid justification, it violates the First Amendment.

Under the longstanding *Tinker* framework, school officials generally cannot restrict speech without evidence it “materially and substantially” disrupts the school or invades “the rights of others.”⁴ This is a “demanding standard”⁵ that requires more than “undifferentiated fear or apprehension of disturbance.”⁶ *Tinker* thus clearly limits schools in restricting student speech.

Yet MCPS purports to maintain a categorical ban on “hate speech” on school property and during school-sponsored activities—even absent substantial disruption. Superintendent Bernard F. Bragan, Jr., Ed.D., confirmed this categorical approach during the January 21, 2025, School Board meeting, explaining that the policy’s “substantially disrupts” language is intended to broaden school authority to restrict *off-campus* expression, not to limit discipline for on-campus speech.⁷ *Tinker* prohibits such an approach, as it forbids schools from restricting student expression at school absent a substantial disruption.

Of course, schools may prohibit genuinely threatening, intimidating, or otherwise disruptive speech,⁸ but that a student’s opinion may be seen as “disparaging” or offensive cannot by itself constitute substantial disruption or an invasion of others’ rights,⁹ as there is no “generalized ‘hurt feelings’ defense” to a public school’s restriction of student speech.¹⁰ Public schools lack

³ *Id.* at 511.

⁴ See *id.* at 512–13. As recently noted in *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 187 (2021), the Supreme Court has otherwise created “three specific categories of student speech that schools may regulate in certain circumstances,” specifically: (1) “‘indecent,’ ‘lewd,’ or ‘vulgar’ speech uttered during a school assembly on school grounds,” *id.* (citing *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986)); (2) “speech, uttered during a class trip, that promotes ‘illegal drug use,’” *id.* (citing *Morse v. Frederick*, 551 U.S. 393 (2007)); and (3) “speech that others may reasonably perceive as ‘bearing the imprimatur of the school,’ such as that appearing in a school-sponsored newspaper,” *id.* at 188 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)). None of these cover what is banned under the school’s “Hate Speech Policy,” so *Tinker* provides the only applicable standard here.

⁵ *Mahanoy*, 594 U.S. at 193.

⁶ *Tinker*, 393 U.S. at 508.

⁷ Montgomery Cnty. Pub. Schs. in Va., *January 21, 2025 MCPS School Board Meeting*, at 3:10:52, YOUTUBE, <https://www.youtube.com/live/v9VaZNcEfu8?t=11452s>. (Superintendent Bragan explaining that MCPS “strictly prohibits hate speech on any school property, during school-sponsored activities,” and, separately, “in any other place or context that substantially disrupts the school,” which allows the school “a broader scope” for something that “carries over into Christiansburg High School but didn’t happen there. That’s why that’s in there. . . . So, it’s not really to limit what happens in the school.” (emphasis added)); see also *id.* at 3:11:55 (Superintendent Bragan agreeing with schoolboard member Linwood Hudson that “‘substantially disrupts’ does not impact school property, ‘cause you’re already saying that’s prohibited on school property. Period. . . . Everything else outside of school property and sponsored activities is where the ‘substantially disrupts’ comes in.”).

⁸ For instance, “true threats,” *i.e.*, statements 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,” are constitutionally unprotected. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

⁹ *Tinker*, 393 U.S. at 508.

¹⁰ *N.J. v. Sonnadend*, 37 F.4th 412, 426 (7th Cir. 2022).

authority to restrict speech out of “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”¹¹ 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.¹²

Despite these constitutional limits, the “hate speech” policy plausibly allows school authorities to punish a wide range of non-disruptive core political expression—for example, support for or opposition to Israel’s actions in Gaza—if it is alleged to “disparage” others based on protected characteristics. *Some* such speech may be punishable under *Tinker*, but proper application of the *Tinker* standard requires school officials to consider the facts and context of each situation individually to determine whether the speech is substantially disruptive or invades the rights of others.¹³ A school may not label some opinions as per se disruptive.

Furthermore, as to off-campus student speech, the Supreme Court has made clear a school’s authority is even more limited. The Court recently held that “the leeway the First Amendment grants to schools in light of their special characteristics is diminished” for off-campus speech.¹⁴ Such speech, the Court noted, “will normally fall within the zone of parental, rather than school-related, responsibility.”¹⁵ And where political or religious expression is involved, a school “will have a heavy burden to justify intervention.”¹⁶ Accordingly, a school must take care when applying *Tinker*’s substantial disruption standard to off-campus speech, particularly for political or religious expression—which, as illustrated herein, expression captured by the Hate Speech Policy could easily reach.

That leads into another problem beyond the policy falling short of the *Tinker* standard, which is that it is unconstitutionally vague. What qualifies as “disparaging” of an individual or group,

¹¹ *Tinker*, 393 U.S. at 509.

¹² *Id.* at 508–09.

¹³ *Tinker* also makes clear that speech does not invade others’ rights simply because it provokes offense or discomfort. *Id.* Instead, that prong focuses on active conduct interfering with another student’s right not to be targeted with harassing conduct. *See, e.g., Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 203, 217 (3d Cir. 2001) (school district policy barring speech that “creates an intimidating, hostile or offensive environment” satisfied neither *Tinker*’s substantial disruption standard nor its “invasion of the rights of others” prong, as it required no “threshold showing of severity or pervasiveness” and “could conceivably be applied to cover any speech about some enumerated personal characteristics the content of which offends someone”). In *Davis v. Monroe County Board of Education*, the Supreme Court explained that conduct—including expression—can be actionable discriminatory harassment in an educational setting only if it is (1) unwelcome, (2) discriminatory based on gender or another protected status, and (3) “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.” 526 U.S. 629, 650 (1999).

¹⁴ *Mahanoy*, 594 U.S. at 190.

¹⁵ *Id.* at 189.

¹⁶ *Id.* at 190.

for instance, is often debatable and contested. For example, some argue allowing transgender athletes to compete in women's or girls' sports degrades women and girls,¹⁷ while others view opposition to such participation as transphobic.¹⁸ Similarly, calls for tighter immigration controls at the U.S.-Mexico border are sometimes labeled racist or xenophobic.¹⁹

In light of this subjectivity, people “of common intelligence must necessarily guess” whether the “Hate Speech Policy” covers examples such as these, and if so, when and in what circumstances, rendering it unconstitutionally vague.²⁰ It is also unconstitutionally vague insofar as the Constitution requires speech regulations to “provide explicit standards for those who apply them” to prevent “arbitrary and discriminatory enforcement.”²¹ This “need for specificity is especially important where,” as here, “the regulation at issue is a content-based regulation of speech,” as vagueness has an “obvious chilling effect on free speech.”²² The policy's vagueness is especially troubling in the off-campus context, as students are left without fair notice of what they may say not only at school but also at home or online.

For all these reasons, the Board must revisit its “Hate Speech” policy to comport with the sharp constitutional limits on public schools' authority to restrict student speech.

II. The “Hate Speech” Policy Violates Staff Members’ First Amendment Rights

The “Hate Speech” policy also violates the First Amendment insofar as it reaches staff speech outside classroom teaching or otherwise uttered as part of their job duties.²³ Although school districts have broad discretion to control employees' speech when they perform official duties like classroom teaching, staff members retain First Amendment rights.²⁴ This is true even if employees are on school property, such as during a lunch break or at a school board meeting.²⁵

¹⁷ 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>.

¹⁸ 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>.

¹⁹ 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>.

²⁰ See *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

²¹ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

²² *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 266 (3d Cir. 2002).

²³ The policy states that the “MCPS Human Resources department will investigate claims of hate speech used by MCPS employees.”

²⁴ See *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) (“A government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment.”).

²⁵ 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,

To justify restricting employee speech off the job, the government 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.”²⁶ When government employees speak “on their own time on topics unrelated to their employment,” the speech is protected “absent some governmental justification ‘far stronger than mere speculation’” even if the speech does not touch a matter of public concern.²⁷ In either case, mere disapproval of an employee’s viewpoint cannot justify discipline.²⁸

The District may consider factors like whether speech “impedes the performance of the speaker’s duties or interferes with the regular operation” of the school. But it must balance these factors against the employee’s strong interest in speaking, particularly on matters of public importance, while off the clock.²⁹

MCPS cannot categorically satisfy this balancing test by a rule that limits speech as strictly as the “Hate Speech” policy does. 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. The policy thus requires amendment in these respects as well.

III. Conclusion

For the foregoing reasons, FIRE urges the Montgomery County Public School Board to rescind or revise its “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 September 3, 2025.

Sincerely,



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Encl.

and emphasizing that public schools may not “treat[] everything teachers and coaches say in the workplace as government speech subject to government control”).

²⁶ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

²⁷ *San Diego v. Roe*, 543 U.S. at 80 (quoting *United States v. Treasury Employees*, 513 U.S. 454, 476 (1995)).

²⁸ *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.”).

²⁹ *Id.* at 388.



Book	Section 7: Students
Section	Article 3: Code of Student Conduct
Title	Hate Speech Policy
Code	7-3.4
Status	Active
Legal	Code of Virginia, Sec. 22.1-78
Adopted	January 21, 2025
Last Revised	January 21, 2025
Last Reviewed	January 21, 2025

Montgomery County Public Schools Hate Speech Policy

Introduction

Montgomery County Public Schools (MCPS) in Virginia is committed to providing a safe and inclusive learning environment for students, staff, and visitors. The district recognizes that hate speech in all its forms undermines the educational mission, disrupts the learning environment, can leave a traumatic impact on targeted individuals, and harms the school community. This policy outlines the definitions, procedures, and disciplinary actions related to hate speech used by anyone within MCPS.

The Montgomery County Public Schools Hate Speech Policy aims to proactively foster an environment where everyone feels safe and included.

Definition

1. As used in the Policy, “hate speech” means any form of expression that threatens, abuses, bullies, disparages, or intimidates individuals or groups based on ethnicity, nationality, race, religion, gender, gender identity, sexual orientation, disability, or any other characteristic protected by law.

Policy Statement

MCPS strictly prohibits hate speech on any school property, during school-sponsored activities, and in any other place or context that substantially disrupts the school environment. The district is committed to promoting respect, diversity, and inclusion and will take immediate action to address and remediate incidents of hate speech.

Reporting Procedures

1. **Reporting by Students:** Students who believe they have been subjected to or have witnessed hate speech should report the incident to a teacher, school counselor, or administrator as soon as possible. No student shall be punished for failing to report any hate speech incident.
2. **Reporting by Staff:** Staff members who witness hate speech or are informed of such must report the incident to the principal or designated school administrator immediately. Failure to do so shall result in disciplinary action as outlined in school policy.

3. **Anonymous Reporting:** MCPS provides an anonymous reporting system for students and staff to report hate speech without fear of retaliation.
4. **Reporting by Parents:** Parents of an MCPS student who believes they have been subjected to or have witnessed hate speech should report the incident to a teacher, school counselor, or administrator as soon as possible.

Investigation Procedures

1. **Initial Review:** Upon receiving a report of hate speech, the principal or designated administrator will conduct an initial review to determine whether the reported speech is hate speech as defined in this policy and the report's credibility.
2. **Formal Investigation:** If the initial review indicates a potential violation of this policy, the principal or designated administrator will conduct a formal investigation. This may include interviews with the involved parties and witnesses and a review of any relevant evidence (e.g., written statements, digital communications).
3. **Confidentiality:** The investigation will be conducted in a manner that respects the privacy of all parties involved to the fullest extent possible.
4. **Determination:** If the formal investigation determines that a student violated this policy, that student shall be subject to discipline as described below.
5. **Appeal Process:** When disagreement exists with the outcome of the investigation, an appeal can be brought before a three-member appeal committee established by the superintendent for said purpose. A final appeal can be brought before the superintendent.

Disciplinary Actions

MCPS employs a progressive discipline approach to address hate speech policy violations. The following outlines possible disciplinary actions, which may be adjusted based on the severity of the behavior. These disciplinary actions shall be administered according to the procedures in School Board Policy 7-3.1 (Code of Student Conduct) and Policy 7-3.2 (Student Suspension/Expulsion), as applicable.

First Offense

- **Elementary School:**
 - Verbal warning and explanation of the hate speech policy and documentation of the incident.
 - Restorative practices, such as mediation or conflict resolution, or other means to educate and improve behavior.
 - Parental notification and a meeting with the student, parents/guardians, and school counselor.
- **Middle and High School:**
 - Written warning and explanation of the hate speech policy.
 - Restorative practices, such as mediation or conflict resolution, or other means to educate and improve behavior.
 - Parental notification and a meeting with the student, parents/guardians, and school counselor.
 - Possible detention or in-school suspension (1-3 days).

Second Offense

- **Elementary School:**
 - Written warning and documentation of the incident.
 - Restorative practices, such as mediation or conflict resolution, or other means to educate and improve behavior.
 - Parental notification and a meeting with the student, parents/guardians, and school counselor.
- **Middle and High School:**
 - Written warning and documentation of the incident.
 - Restorative practices, such as mediation or conflict resolution, or other means to educate and improve behavior.
 - Parental notification and a meeting with the student, parents/guardians, and school counselor.
 - In-school suspension (3-5 days).
 - Development of a behavior intervention plan.

Third Offense

- **Elementary School:**
 - Written warning and documentation of the incident.
 - Restorative practices, such as mediation or conflict resolution, or other means to educate and improve behavior.
 - Parental notification and a meeting with the student, parents/guardians, and school counselor.
 - Development of a behavior intervention plan.

- Possible out-of-school suspension (up to 3 days).
- **Middle and High School:**
 - Written warning and documentation of the incident.
 - Restorative practices, such as mediation or conflict resolution, or other means to educate and improve behavior.
 - Parental notification and a meeting with the student, parents/guardians, and school counselor.
 - In-school suspension (5-10 days).
 - Review and revise the behavior intervention plan.
 - Possible out-of-school suspension (up to 10 days).

Severe or Repeated Offenses

For severe or repeated violations, the following actions may be taken:

- Long-term suspension (more than ten days).
- Expulsion.
- Referral to law enforcement if the behavior constitutes a criminal offense.
- Additional interventions include mandatory counseling or participation in a diversity and inclusion program.

Support for Affected Students

MCPS is committed to supporting students affected by hate speech. Measures that will be taken to assist these students include, but are not limited to the following:

- Providing increased access to counseling services.
- Increasing academic support to ensure their educational progress is not hindered.
- Offering safe spaces where they can discuss their experiences and receive support in a safe environment.

Hate Speech Involving Employees:

The MCPS Human Resources department will investigate claims of hate speech used by MCPS employees.

Education and Training

MCPS will provide ongoing education and training for students, staff, and parents on the following topics:

- Understanding and recognizing hate speech.
- The importance of diversity, equity, and inclusion.
- Strategies for preventing and responding to hate speech.
- The impact of hate speech on individuals and the school community.
- Understanding racial trauma and supporting students who are individually impacted by hate speech.

Policy Review

The MCPS administration will review this policy annually to ensure its effectiveness and make any necessary revisions. During the review process, input from students, staff, parents, and community members will be considered.

Conclusion

Montgomery County Public Schools is dedicated to fostering a learning environment free from hate speech and discrimination. By adhering to this policy, the district aims to cultivate a community of respect, inclusivity, and mutual understanding for all students.