

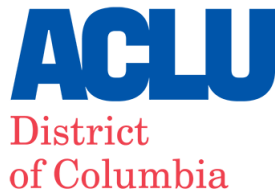
April 20, 2020

D. Scott Barash, General Counsel
District of Columbia Public Schools
1200 First Street NE
Washington, DC 20002
Sent via email: scott.barash@dc.gov

**Re: Constitutional concerns with the DCPS Student
Technology Responsible Use Agreement**

Dear Mr. Barash:

Parents of DCPS students (ranging from elementary to high school grades) have contacted the ACLU of the District of Columbia (ACLU-DC) to express concerns about how the DCPS Student Technology Responsible Use Agreement School Year 2019-20 (“Use Agreement”) might chill their children’s online speech and subject them to discipline for constitutionally protected speech. After reviewing the policy, I am writing to identify a number of constitutional and related concerns that the ACLU-DC has with the Use Agreement in the hope that these might be addressed. Given the current remote-learning mandate of DCPS, combined with the Mayor’s stay-at-home order, provisions governing students’ technology are likely to apply to most if not all of students’ in-school communications and (given the expansiveness of the Use Agreement) to students’ out-of-school communications as well.



915 15th St. NW, 2nd Floor
Washington, D.C. 20005
(202) 457-0800
acludc.org

The ACLU-DC’s concerns with the Use Agreement can be grouped into four categories:

- A. Provisions that reach beyond the school environment to prohibit lawful out-of-school speech that will not cause disruption inside school.
- B. Provisions that impose vague, overbroad, or viewpoint-discriminatory restrictions on student communications.
- C. A provision about online impersonation that prohibits protected, nondisruptive speech.
- D. A provision that compels student speech.

Each of these categories is discussed further below after a general outline of the legal principles that apply to student speech. (For comprehensiveness, I note that the ACLU-DC also has concerns regarding the search policy for students' private personal media accounts and devices, but given the current remote learning environment, we have no information that this provision is being enforced at the present time.)

Although our legal concern with the provisions we discuss here sounds in the First Amendment and associated doctrines (such as vagueness), our policy concerns include not only the chilling of student speech but also the possibility that discipline based on the highly subjective standards of the Use Agreement will fall on disadvantaged students most heavily—particularly students of color and students with disabilities. See Amir Whitaker et al., ACLU, *Cops and No Counselors: How the Lack of School Mental Health Staff Is Harming Students* 5 (2019) (“Students with disabilities were arrested at a rate 2.9 times that of students without disabilities.”); Harold Jordan, ACLU of Pa., *Beyond Zero Tolerance: Discipline and Policing in Pennsylvania Public Schools* 12 (2015) (finding “[b]lack students have the greatest likelihood of receiving out-of-school suspensions and expulsions” and “[s]tudents with disabilities are almost twice as likely to receive [out of school suspensions]”); Maithreyi Gopalan & Ashlyn Aiko Nelson, *Understanding the Racial Discipline Gap in Schools*, 5 AERA OPEN 1, 1 (2019) (“There is ample evidence that students of color disproportionately experience adverse disciplinary actions in school[.]”); Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26 PSYCHOL. SCI. 617, 622-23 (2015) (“[R]acial disparities in discipline can occur even when Black and White students behave in the same manner [T]eacher responses may even help to drive racial differences in student behavior.”).

I. General Principles

As you know, speech that would be protected by the First Amendment if it were uttered by adults is also protected when it is uttered by students, unless it “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.” *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969). Regarding the “material disruption” standard, the Court in *Tinker* explained that “undifferentiated fear or apprehension of disturbance” does not suffice to overcome a student’s right to freedom of expression. *Id.* at 508. Further, school officials must show that the regulation or prohibition of student speech is justified by something more than “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Id.* at 509. Regarding the “invasion of the rights of others” standard, courts of appeals have recognized that “it is certainly not enough that the speech is merely offensive to some listener.” *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (Alito, J.); accord *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 328 (2d Cir. 2006) (observing “*Tinker* would have no real effect” if schools could prohibit merely offensive speech); *Chandler v. McMinnville*

Sch. Dist., 978 F.2d 524, 530 (9th Cir. 1992) (holding that the possibility that speech “could be interpreted as insulting [or] disrespectful” is insufficient on its own to limit students’ speech)

Several general principles of First Amendment law also guide the analysis of student speech restrictions. First, the fact that speech occurs online does not diminish the constitutional protection it is afforded. See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (describing “cyberspace” as one of today’s “essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire,” analogous to a traditional public forum); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997) (“[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.”). Second, when a speech restriction that might be valid in part limits a “substantial” amount of protected speech, courts will strike it down as overbroad. See, e.g., *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002). Third, a speech restriction is impermissibly vague if it “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18 (2010). Fourth, the First Amendment prohibits government speech rules that restrict speech based on viewpoint, including “ideas that offend.” *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019). Finally, outside of class assignments, a school may not compel individuals to engage in particular speech. *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Courts have applied each of these general principles in evaluating the lawfulness of restrictions on student speech. For instance, courts have struck down disciplinary actions against students for their online speech. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 920 (3d Cir. 2011) (en banc); *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 207 (3d Cir. 2011) (en banc); *Burge ex rel. Burge v. Colton Sch. Dist.* 53, 100 F. Supp. 3d 1057, 1060, 1064 (D. Or. 2015). In an opinion by then-Judge Alito, the Third Circuit struck down a set of student speech restrictions as overbroad where they swept in much “core” political speech that did “not pose a realistic threat of substantial disruption.” *Saxe*, 240 F.3d at 217. Other decisions have applied both vagueness and overbreadth principles to student speech codes. See *Doe v. Cavanaugh*, 2020 WL 571677, at *3 (D. Mass. Feb. 5, 2020); *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp. 2d 698, 703 (W.D. Penn. 2003). Courts have likewise enforced the prohibition against viewpoint discrimination regarding non-curricular student speech where the speech is not disruptive. See *Morgan v. Swanson*, 659 F.3d 359, 409 (5th Cir. 2011) (en banc) (opinion of Elrod, J., for a majority on this point) (“[V]iewpoint discrimination against private, student-to-student, non-disruptive speech is forbidden by the First Amendment.”); *Prince v. Jacoby*, 303 F.3d 1074, 1091 (9th Cir. 2002) (striking down a high school’s policy because the “restriction on access to facilities is based purely on the [group’s] religious viewpoint”); see also *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 35 (10th Cir.

2013) (observing that schools may not “exercise editorial control over the content of Plaintiff’s private expression ... on the basis of their viewpoint”). Finally, the Supreme Court’s seminal decision in *Barnette* about the right not to speak was itself about a law compelling *student* speech.

II. The Use Agreement

Under the principles discussed, several provisions of the Use Agreement are constitutionally problematic.

A. Provisions that reach beyond the school environment to prohibit lawful out-of-school speech that will not cause disruption inside school.

Although most of the Use Agreement pertains to speech using the DCPS network or its devices, two provisions explicitly regulate students’ speech outside of school. These read:

- (i) “I will not ... make discriminatory or derogatory remarks about others online while ... out of school;” and
- (ii) “I will not use social media, messaging apps, group chats, and other websites outside of school in a way that negatively impacts my school community.”

Use Agreement, page 2 (under first of five headings on that page).

These are constitutionally problematic because they regulate student speech entirely outside of school without a showing of substantial disruptiveness to the school environment. *See J.S.*, 650 F.3d at 920, 931; *Layshock*, 650 F.3d at 207; *Burge*, 100 F. Supp. 3d at 1060, 1064. Just because a remark is “derogatory” or even “discriminatory” does not make it disruptive, much less substantially disruptive, to the school environment, especially if it occurs out of school. Without requiring a showing of substantial disruption, provision (i), above, is dramatically overbroad. “Derogatory” remarks about “others” could be any negative comments about anyone in the world—a relative, a neighbor, a celebrity, or a politician. The subject of the “derogatory” remark might have no connection to the school community, and it is possible that no members of the school community would ever read the remark or care if they did. Likewise, provision (i) contains no requirement that “discriminatory” remarks relate to the school in any way. Even more troubling, such “derogatory” or “discriminatory” remarks could include non-disruptive “core” political speech. *See Saxe*, 240 F.3d at 217 (Alito, J.). In this era of polarized politics, it would not be surprising to read a student message that was “derogatory” of national or local political figures such as President Trump or Mayor Bowser. Opining that “President Trump is a white-supremacist liar” or “Mayor Bowser’s support for Michael

Bloomberg shows that she condones police racism” would be both derogatory and convey an important political message. DCPS cannot ban such pure political speech absent some reasonably foreseeable, material disruption at school.

The fact that DCPS has grouped its rule not to “make discriminatory or derogatory remarks about others online while ... out of school” with the prohibition of the same types of remarks “in school” and with a separate requirement not to “bully or harass other people by sending, sharing or posting hateful or harassing messages” does not save the out-of-school speech ban. On the contrary, “The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter.” *Ashcroft*, 535 U.S. at 255. Indeed, the “in school” ban is likewise overbroad because of the absence of a disruptiveness criterion (see section B, below). And the ban on bullying and harassing shows that DCPS has the tools to address speech that does reach inside the school—such as the bullying of the speaker’s fellow-students—without resorting to excessive speech bans that reach core political speech.

The second out-of-school provision is problematic in a related but distinct way: it pairs overbreadth with vagueness. The defining feature of speech proscribed by provision (ii) is that it “negatively impacts [the student’s] school community.” That description is completely inadequate to provide students with notice of what speech is prohibited, and it is also overbroad. Does criticism of a teacher’s presentation style or grading practices “negatively impact” the “school community” by diminishing her standing in the eyes of other students? Would criticism of the District’s handling of the coronavirus “negatively impact” the “school community” by lowering morale? How about a profanity-laden rant about the President’s or Mayor’s shortcomings (see examples above and add expletives)—which might “negatively impact” the “school community” by giving its students a reputation for foul mouths?

School administrators might see these examples—and a countless more—in a variety of ways. To the extent administrators deemed the speech to be prohibited, the “negatively impact” provision would be overbroad, and once again impinge on core political speech, which *outside of school* may include as many f-bombs as the speaker cares to drop. See *Cohen v. California*, 403 U.S. 15 (1971). Even to the extent administrators would deem borderline cases not to violate the Use Agreement, the total unpredictability of such judgments would lead students to self-censor. Such unpredictability is the hallmark of an impermissibly vague rule. See *Flaherty*, 247 F. Supp. 2d at 704 (student handbook was unconstitutionally vague where it used the terms “abuse, offend, harassment and inappropriate” but did not define the terms “in any significant manner”); *Cavanaugh*, 2020 WL 571677, at *3 (school’s definition of bullying was unconstitutionally vague because it could apply to speech that caused only “emotional harm” where “the term ‘emotional harm’ is undefined, thus inviting subjective and arbitrary enforcement”).

Finally, both provisions (i) and (ii) are viewpoint-discriminatory because they prohibit negative messages (messages that “disparage” or that “negatively impact” the “school community”) but not positive ones. The Supreme Court has twice in last three years held that favoring positive messages over negative ones is viewpoint discrimination. *See Iancu*, 139 S. Ct. at 2299 (discussing and applying *Matal v. Tam*, 137 S. Ct. 1744 (2017)). Put another way, the maxim, “If you don’t have anything nice to say, don’t say anything at all” may be an appealing principle of etiquette, but it is not constitutional as a restriction on speech, including student speech.

B. Provisions that impose vague, overbroad, or viewpoint-discriminatory restrictions on student communications.

Even provisions that regulate only students’ use of the DCPS network and its devices (i.e., that do not reach private speech on private devices) cannot impose restrictions that are vague, overbroad, or viewpoint-discriminatory. Four provisions do so—provision (i), discussed in the previous section, to the extent it applies in school—and these three others:

- (iii) “I will not search for, retrieve, save, circulate or display hate-based, offensive or sexually-explicit material.”
- (iv) “I will be respectful of my peers by not writing anything or posting images that may be mean or hurtful to or about another person online or in my course work.”
- (v) “I will not create, display or transmit any images, sounds, or messages, or other material that could create an atmosphere of harassment of hate.”

Use Agreement 1 (first item under final heading on the page) & 2 (under first of five headings on that page).

The same problems of viewpoint discrimination, vagueness, and overbreadth, discussed in the previous section, arise again with respect to these provisions. All four provisions prohibit negative but not positive speech. All four provisions use terms or phrases that are quite subjective—such as the previously-discussed “disparage” as well as “offensive” or “may be mean or hurtful” or “could create atmosphere of harassment”—such that it is impossible for a student to know what speech is prohibited. And all four prohibit speech regardless whether it would disrupt the school environment, including a wide range of “core” political and other protected speech such as the examples in the previous section. The qualifiers “may be” and “could” in provisions (iv) and (v) compound both their overbreadth and their vagueness. And provision (iii)’s “offensive[ness]” criterion is quintessentially one that depends on the eye of the beholder: as the Supreme Court observed, in striking down a criminal conviction for “offensive conduct” that disturbed the peace, “one man’s vulgarity is another’s lyric.” *Cohen*, 403 U.S. at 25. Another troubling aspect of

provision (iii) is that it prohibits “sexually-explicit material,” which might well apply to educational material—and even material assigned by DCPS.*

An additional example demonstrates how these provisions could, in addition to trenching on freedom of speech, work *against* the harassment-free environment they purport to foster: What if a student who has been victimized by racial harassment wishes to raise awareness and seek community support by sharing a photo of the racial slur that someone scrawled on her locker? Her speech would violate provisions (iii), (iv), and (v), as it would entail “circulat[ing] ... hate-based ... material,” as well as “posting images that may be ... hurtful to ... another person” and “transmitting an[] image ... that could create an atmosphere of harassment of hate.”

Like the out-of-school speech provisions discussed above, these provisions impose impermissible restrictions on student speech. Moreover, given the pervasive use that students must make of the DCPS network and its devices in the current remote-learning conditions, these provisions are likely to exert a chilling effect on student expression on a daily, if not hourly, basis. All students will be at risk of punishment at the essentially unbounded discretion of administrators to deem particular searches, comments, or images inappropriate based on expansive and indefinite words and phrases. That state of affairs is intolerable under the First Amendment.

C. A provision about online impersonation that prohibits protected, nondisruptive speech.

The anti-impersonation provision reads:

- (vi) I will not pretend to be anyone else online. This means I will not send an email, create an account, or post any words, pictures, or sounds using someone else’s name or picture.

Use Agreement 2 (under second of five headings on that page).

The concern with this provision is, again, overbreadth, but of a different kind. This provision, read literally, prohibits several important categories of protected and non-disruptive speech: a student’s use of or experimentation with an alternative online identity that better reflects the student’s gender; a student’s use of untrue information to conceal the student’s age for self-protection (a safety measure that parents commonly encourage); and parody.

* See, e.g., DCPS, Student Sexual Health Curriculum Overview 1-2, *at* <https://dcps.dc.gov/sites/default/files/dc/sites/dcps/publication/attachments/Student%20Sexual%20Health%20Curriculum%20Overview.pdf> (listing a 4th grade unit called “Sexual and Reproductive Anatomy” and an 8th grade unit called “Using Condoms Effectively”).

I am sure it was not the intention of DCPS to prohibit these types of speech. Therefore, I hope DCPS would be glad to narrow the provision to prohibit only pretending to be *specific* other people with an intent to deceive the recipient of the communication.

D. A provision that compels student speech.

The Use Agreement provides:

- (vii) I will tell a teacher or staff member if I see bullying or anything hurtful or dangerous to another student online.

Use Agreement 2 (under first of five headings on that page).

As noted in the introductory section, the Supreme Court has held that students cannot be forced to speak. *Barnette*, 319 U.S at 642. (Of course, this does not apply to speech as part of class assignments.) Provision (vii) forces speech, on pain of discipline. It may be desirable to encourage student reporting of bullying, hurtful, or dangerous speech, but it is not constitutionally permissible to mandate it.

In addition to violating the basic constitutional freedom from compelled speech, this provision is likely to put students in difficult positions that could lead to social ostracism, retaliation, or anxiety about their reporting obligations. And, like many of the other provisions discussed in this letter, the duty it imposes is of uncertain scope, because of the vagueness of the term “hurtful.”

III. Next Steps

The easiest way to address the concerns we have identified is to excise from the Use Agreement provisions (i)-(v) and (vii)—those discussed in Parts II.A, II.B, and II.D of this letter—in their entirety, and to reword provision (vi) to make clear that it applies only where a student appropriates the identity of a another *specific* person with an intent to deceive (and thus that the provision excludes online activity that is parody, aimed at self-protection, or an expression of self-identity).

If you have alternative approaches in mind, I would be glad to discuss them with you.

Finally, and independently, the ACLU-DC and the parents who have contacted us are concerned by reports that some schools around the country engaging in remote teaching at this time are requiring students to use software that requires student data to be collected and retained by a private vendor, engages in web filtering, or includes surveillance functions such as communications and social media monitoring, keyword alerts, and web filtering functions (two examples of such platforms are

GoGuardian and Google classroom). We would appreciate it you could tell us whether the software used by DCPS contains any of these characteristics and if so whether DCPS has or will disable them and whether DCPS has informed students and parents of their existence.

Because the parents who have contacted us are very concerned about their children's freedom of speech, and some report their own and their children's increasing anxiety over the effects of the Use Agreement on their daily communications and susceptibility to discipline, I would appreciate a response by Thursday, April 30. If a satisfactory resolution cannot be reached, the parents are seriously considering legal action.

I look forward to your response.

Sincerely,

/s/ Scott Michelman

Scott Michelman

Legal Director

ACLU Foundation of the District of Columbia

cc: Karl Racine, Attorney General for the District of Columbia
Mary Beth Tinker, Board Member, ACLU of the District of Columbia
Every Student Every Day Coalition (c/o Nassim Moshiree)