DISTRICT OF COLUMBIA
PUBLIC SCHOOLS
Office of the General Counsel

BY E-MAIL

May 7, 2020

Mr. Scott Michelman
ACLU Foundation of the District of Columbia
915 15th St, NW
Washington, DC 20005

Dear Mr. Michelman:

Thank you for your letter, dated April 20, 2020, advising District of Columbia Public Schools (DCPS) of several concerns regarding the DCPS Student Technology Responsible Use Agreement (Agreement) raised by DCPS parents to the ACLU-DC of the District of Columbia (ACLU-DC). In your letter, the ACLU-DC expressed concern that certain provisions of the Agreement, if interpreted and implemented in certain manners, would violate First Amendment jurisprudence guarding against government regulation of protected speech. Concerns were divided into four categories: (A) provisions that allegedly reach beyond the school environment to prohibit lawful out-of-school speech that will not cause disruption inside school; (B) provisions that allegedly impose vague, overbroad, or viewpoint-discriminatory restrictions on student communications; (C) a provision about online impersonation that allegedly prohibits protected, non-disruptive speech; and (D) a provision that allegedly compels student speech. The ACLU-DC requested certain changes to the Agreement and stated that DCPS' failure to address these issues may result in legal action.

DCPS will address your specific concerns in turn below, but as a general matter the ACLU-DC's concerns appear to stem in large part from the portion of the Agreement that states that should students not follow the rules as described in the Agreement, the student "may face consequences under DCPS discipline rules and policies, including Chapter 25." While DCPS acknowledges the ACLU-DC's assertion that some DCPS parents are concerned that the Agreement "might chill their children's online speech and subject them to discipline for constitutionally protected speech," the ACLU-DC does not allege that DCPS has actually engaged in any constitutionally improper disciplinary action. Therefore, as of this time, neither the ACLU-DC nor any concerned parent has standing to bring an action against DCPS regarding the ACLU-DC's claims. There is no allegation that any individual has suffered an "injury in fact" as required under settled standing doctrine established in *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992). While the ACLU-DC alleges that certain provisions of the Agreement are "overbroad" or "vague," standing to challenge governmental policies for being overbroad require the plaintiff to have at least suffered a "credible threat of prosecution." A subjective assertion that the policy may "chill" a plaintiff's First Amendment speech, without any evidence of such threat or actual injury in fact, is insufficient to confer standing on a litigant bringing a pre-enforcement challenge to a policy allegedly infringing on the freedom of speech. *American Library Ass'n v. Barr*, 956 F.2d 1178. Moreover, the Agreement is clear that any disciplinary consequences would be those consequences under Chapter 25. DCPS commonly refers to the regulations promulgated in the DCMR under 5-B DCMR § 2500 *et. seq.* as "Chapter 25;" references to such are included in various DCPS policies. Chapter 25 explicitly limits the grounds for disciplinary action to the infractions enumerated in 5-B DCMR § 2502, none of

which are solely related to a student's protected speech. DCPS teachers and staff are trained on the proper grounds for disciplinary action.

Although no student has suffered an injury in fact as a result of the Agreement and no student has faced a credible threat of unconstitutional disciplinary action under the Agreement, DCPS appreciates the opportunity to review the Agreement in light of the concerns raised by the ACLU-DC, particularly where certain requirements may be unclear or may have the appearance of sanctioning impermissible restrictions on constitutionally protected speech.

ACLU-DC Concern A

The ACLU-DC's first concern is that imposing disciplinary consequences based on a strict interpretation of certain Agreement provisions would violate the First Amendment which, with a few narrow exceptions, allows regulation of student speech only where it causes or may be reasonably forecasted to cause material and substantial interference with or disruption of school operations, or where it impinges on the rights of other students. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969). The ACLU-DC characterizes its concern as related to restrictions on "out-of-school" speech, and cites a number of decisions where schools were found to have improperly disciplined students for engaging in expression off of school grounds *and on their own computer devices*.

The Agreement clearly applies only to "DCPS computers and other DCPS technology," as stated in its opening paragraph. Regardless of whether one considers speech expressed on a DCPS-owned device to be "in-school" or "off-school," DCPS believes that *Tinker* would likely apply equally to "off-school" speech as it would to "in-school" speech, at least where the speech in question is expressed via the internet. One case that the ACLU-DC cites acknowledges that "it is well-established that *Tinker's* 'schoolhouse gate' is not constructed solely of the bricks and mortar surrounding the school." *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205. Moreover, courts have noted that "the pervasive and omnipresent nature of the Internet has obfuscated the on-campus/off-campus distinction." *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379. Indeed, in the absence of guidance from the Supreme Court, numerous circuit courts have concluded that *Tinker* can be applied to off-campus speech where the speech involves online publication, as the nature of the internet is such that the speech no longer remains within the boundary of the physical space where it originated and it is reasonably foreseeable that the speech will reach the school. *See, e.g., Wynar v. Douglas Cty. Sch. Dist*., 728 F.3d 1062 (9th Cir. 2013); *S.J.W. ex. rel. Wilson v. Lee's Summit Sch. Dist.,* 696 F. 3d 771 (8th Cir. 2012); *Kowalski v. Berkeley Cty. Schs*., 652 F.3d 565; *Doninger v. Niehoff,* 527 F.3d 41 (2d Cir. 2008); *Boucher v. Bd. of the Sch. Dist. of Greenfield*, 134 F.3d 821 (7th Cir. 1998).

Thus, DCPS believes the Agreement would be unconstitutionally applied only where a student receives discipline or a credible threat of discipline for engaging in speech that does not cause a material and substantial disruption of school operations or impinge on other students' rights. In addition, DCPS notes its ability to regulate speech under judicially carved-out exceptions to *Tinker*, including where speech in question is vulgar or lewd (*see Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, (1986)) or where it occurs in

school-sponsored expressive activities and the restrictions are reasonably related to legitimate pedagogical concerns (*see Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)).

The ACLU-DC cites two provisions of the Agreement giving DCPS the potential to discipline students for speech while using DCPS devices or on the DCPS network that is protected under the First Amendment:

> (i): I will not…make discriminatory or derogatory remarks about others online while…out of school.
>
> (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.

The ACLU-DC argues that the provisions are "especially problematic" because they regulate student speech "entirely outside of school." DCPS takes issue with this statement on two accounts. First, the Agreement is clear that it applies only to conduct while using DCPS devices or the DCPS network. Second, there is nothing "especially problematic" about such regulation; as stated above, many circuit courts have found that the *Tinker* standard applies to online expression regardless of the expressing individual's location. DCPS acknowledges that terms and phrases such as "discriminatory," "derogatory," and "negatively impact" can be subjective; however, these provisions of the Agreement cannot be separated from the statement that such actions are only punishable where they otherwise violate the regulations at 5-B DCMR § 2502. In addition, DCPS believes the ACLU-DC's assertion that the above provisions are "viewpoint-discriminatory" is without merit when considered in connection with the applicable disciplinary regulations. All disciplinary grounds related to student speech are permitted regulations in that they constitute either substantial disruption to school operations or impinge on the rights of others (including threats, communicating slurs based on actual or perceived protected classes, academic dishonesty, etc.).

Accordingly, DCPS does not agree that the cited provisions unconstitutionally regulate speech. However, in consideration of the concerns raised by parents and its desire to improve the clarity of its policies, DCPS will take this opportunity to clarify the Agreement. DCPS will modify provision (i) to read as follows: "I will not bully, harass, intimidate, or threaten other people by sending, sharing or posting hateful, harassing, derogatory, or discriminatory messages." This modification clarifies that the prohibited conduct is the use of the DCPS device or network to engage in bullying, harassment, intimidation, or threats. Speech that results in such prohibited conduct may be regulated, because it would impinge on the rights of others, not to mention potentially cause substantial disruption to school operations. DCPS will delete provision (ii), as its concerns are addressed by the modified provision (i).

ACLU-DC Concern B

The ACLU-DC's second concern is that provisions (i) and (ii) above, as well as three other provisions of the Agreement, impose vague, overbroad, or viewpoint-discriminatory restrictions on speech. Courts are extremely hesitant to strike down statutes or policies for being overbroad, or in other words for prescribing conduct in a way that goes beyond what the Constitution allows. Indeed, courts use such a

doctrine as a last resort. *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243 (3rd Cir. 2002). Statutes and policies are only struck down as facially unconstitutional for overbreadth where there exist no reasonable limiting constructions that keep them constitutional. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200. For this reason, the *Sypniewski* court stated that "most cases alleging unconstitutional enforcement of a public school's disciplinary policies…are best addressed when and if they arise, rather than prophylactically through the disfavored mechanism of a facial challenge." *Sypniewski*, 307 F.3d at 259, citing *City of Chicago v. Morales,* 527 U.S. 41, 111, 144 L.Ed. 2d 67, 119 S. Ct. 1849 (1999). Finally, the Supreme Court has stated that "given [a] school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions." *Bethel,* 478 U.S. at 560. Where such heightened scrutiny of a policy's language is unnecessary, it is not found overbroad or vague where the language includes "terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *United States Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers,* 413 U.S. 548 (1973).

While DCPS reaffirms that at present, the ACLU-DC lacks standing to bring any challenge to the Agreement on any basis, including that of overbreadth or vagueness, DCPS will use this opportunity to ensure that no such challenge may be brought in the future. DCPS believes that modification of provision (i) in the manner depicted above resolves this concern. The words "bully," "harass," "threaten," and "intimidate" are terms that an ordinary person can understand and comply with and that relate to DCPS' need to impose discipline. Moreover, when used in connection with the aforementioned words, the meanings of the words "discriminatory" and "derogatory" are similarly plain. The other provisions cited by the ACLU-DC as being potentially vague and overbroad are as follows:

> (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 or hate."

With respect to provision (iii), DCPS acknowledges that the meaning of the word "offensive" is not readily apparent, and that confusion may exist with respect to what types of materials a student can display or search for. DCPS will replace the word "offensive" with the words "lewd, vulgar," so as to bring the provision in line with the types of speech regulable under *Bethel.* Regarding provisions (iv) and (v), DCPS believes that certain terms could render the provisions overbroad, and that words like "that may be mean" and "that could create" are vague in that they suggest disciplinary action for speech that only raises the possibility of harm. DCPS will remove provisions (iv) and (v) from the Agreement, as the modified provision (i) would appear to cover the necessary ground.

ACLU-DC Concern C

The ACLU-DC's third concern with the Agreement relates to one provision that, when read literally, could be viewed as prohibiting protected speech in a manner not intended by DCPS. The provision at question is (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."

DCPS did not draft this provision with the intention of stifling students' abilities to create parody or force them to reveal confidential information. Consequently, DCPS will modify the provision to read as follows: "I will not pretend to be any specific other person online with the intent to deceive. This means I will not send an email, create an account, or post any words, pictures, or sounds using someone else's account, name, or picture in order to make anyone believe I am that person." Modifying the provision in this manner retains the Agreement's ability to address academic dishonesty and other fraudulent activity while at the same time permit artistic expression and individual privacy.

ACLU-DC Concern D

The ACLU-DC's final concern is with the following provision: (vii) "I will tell a teacher or staff member if I see bullying or anything hurtful or dangerous to another student online." The ACLU-DC contends that including this provision compels students to speak. This provision can only be interpreted as compelling speech where reference to the disciplinary regulations of Chapter 25 is ignored. However, DCPS acknowledges that its inclusion in the section of the Agreement where it now lies puts it on equal footing as other requirements, and believes there are many situations where students may be uncomfortable reporting violations of DCPS policy.

DCPS will relocate this provision elsewhere in the Agreement in a manner that makes it clear that students are "encouraged" to report any such infractions, how and to whom they may report, that all reports are handled confidentially, and that retribution against them for making a report will not be tolerated in any manner, which is consistent with DCPS grievance response protocol.

Conclusion

It has always been DCPS' intent to operate in a manner consistent with the First Amendment. While the ACLU-DC overstates the threat of legal action against DCPS regarding certain provisions of the Agreement, overstates the degree to which DCPS is required to define policy terms with specificity, and ignores the Agreement's reference to the limits on disciplinary action contained in Chapter 25, DCPS acknowledges that the ACLU-DC has raised some salient points regarding potential constitutional deficiencies in the Agreement. DCPS appreciates the manner in which the concerns were raised, and treated the ACLU-DC letter as an opportunity to reexamine and modify some of the language in the manner described above. DCPS believes that it has adequately and appropriately addressed the ACLU-DC's concerns.

Sincerely,

D. Scott Barash

D. Scott Barash
General Counsel
DC Public Schools

cc: Karl Racine, DC Attorney General