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September 9, 2026

Via email: kroos@wispearl.com

Kenneth A. Roos
Wisler Pearlstine, LLP
469 Norristown Road, Suite 110
Blue Bell, PA 19422

Re: Lower Merion Board of School Directors in-person meeting ban

Dear Mr. Roos:

We are writing in regard to letters dated August 4, 2026, that you sent on behalf of the Lower Merion School District ("LMSD" or "School District") informing Rebecca Foscolo and David Smyth that they are prohibited from entering any in-person public meetings of the Lower Merion Board of School Directors ("Board") through the close of the 2026-2027 school year. Imposing such a categorical ban on their in-person attendance at public Board meetings violates their free-speech and due-process rights. Likewise, Board Policy 006 Civility ("Policy") and Administrative Regulation R006 Civility ("Regulation"), both cited in and included with the August 4 letters, violate the same rights by being unconstitutionally vague, impermissibly discretionary, and overly broad. Accordingly, we request that you immediately

i. Rescind the ban and allow Ms. Foscolo and Mr. Smyth to enter school property for public events and any other purposes on the same terms as other community members and parents with children who attend LMSD schools, and

ii. Begin the process of amending Board Policy 006 Civility and Administrative Regulation R006 Civility to cure them of their constitutional deficiencies or rescinding both.

I. Categorically Banning Ms. Foscolo and Mr. Smyth violate their Free Speech and Due Process Rights.

First, barring Ms. Foscolo and Mr. Smyth from school board meetings violates their First Amendment right to comment at those meetings. The School District creates a limited public forum for speech when hosting school board meetings and other functions to discuss school governance. *See Galena v. Leone*, 638 F.3d 186, 198–99 (3d Cir. 2011) (holding that a county council meeting was a limited public forum because "the meeting was held for the limited purpose of governing Erie

County and discussing topics related to that governance."); *Barna v. Bd. of Sch. Directors of the Panther Valley Sch. Dist.*, 143 F. Supp. 3d 205, 213 (M.D. Pa. 2015)[1] (holding that school district created a limited public forum by its public school board meetings). The government may regulate speech in limited public fora only if those regulations are viewpoint-neutral and reasonable in light of the purpose served by the forum. *Galena*, 638 F.3d at 198.

Categorical exclusion of individuals from limited public fora, such as school board meetings, is an unreasonable restriction on speech in violation of the First Amendment because it is not narrowly tailored to serve an important governmental interest and does not leave open ample alternatives. *See Barna*, 143 F. Supp. 3d at 216 (concluding that a school district's ban prohibiting the plaintiff from attending public school board meetings and from entering school district property violated his free speech rights); *Cyr v. Addison Rutland Supervisory Union*, 60 F. Supp. 3d 536, 548–50 (D. Vt. 2014) ("A categorical ban of a single individual from open school board meetings, however, is not narrowly tailored and does not leave open ample alternative channels of communication."); *Stevens v. School City of Hobart*, No 2:13-CV0336, 2015 WL 4870789, at *14 (N.D. Ind. Aug. 6, 2015) (holding an outright ban from school property imposed upon the plaintiff to be insufficiently tailored to grant the defendants' summary judgment motion); *Brown v. City of Jacksonville*, 3:06-cv-122, 2006 WL 385085, at *6 (M.D. Fla. 2006) (preliminarily enjoining a city council's 3-month ban of the plaintiff from public city council meetings because the Court "found no case authorizing a time, place and manner restriction that limits such a length of time for a single disruptive incident"). Though "maintenance of the public order is a legitimate objective, its pursuit does not license the government to deprive an individual of a constitutional right irrespective of the circumstances." *United States v. Marcavage*, 609 F.3d 264, 291 (3d Cir. 2010). "[A] categorical ban on speech is not tailored at all, as it entirely forecloses a means of communication." *Cyr*, 60 F. Supp. 3d at 548. The School District's categorical ban of Ms. Foscolo and Mr. Smyth all public in-person Board meetings through the close of the 2026-2027 school year is an unreasonable restriction of their speech. Even if the ban serves the School District's interest in maintaining order—and it does not—it is not narrowly tailored to that interest. *See id.* at 548-49 (noting other ways the school district could have tailored its speech restriction on speech).

The School District's ban forecloses an important means of communicating information; courts have held that electronic or written communications are not acceptable alternatives to physical presence at meetings of a school board or city council. *See Cyr*, 60 F. Supp. 3d at 549 (noting that telephonic participation at a school board meeting "would have substantially diminished [plaintiff's] ability to communicate not only with the school board, but with community members"); *Brown*, 2006 WL 385085, at *4 (concluding that e-mails or letters delivered to the city council are not ample alternatives to in-person deliverance); *accord Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) (noting that there are "particular qualities inherent in sustained, face-to-face debate, discussion and questioning"). Moreover, "physical participation in open school board meetings is a form of local governance," so prohibiting individuals from being "present at such meetings to communicate directly with elected officials" violates their First Amendment right of free expression. *Cyr*, 60 F. Supp. 3d at 550; *cf. Flynn v. Big Spring Sch. Dist.*, No. 1:22-CV-00961, 2024 WL 4244832, at *9 (M.D. Pa. Sept. 19, 2024)

[1] *Aff'd in part, vacated in part on other grounds*, *remanded sub nom. Barna v. Bd. of Sch. Directors of Panther Valley Sch. Dist.*, 877 F.3d 136 (3d Cir. 2017).

(denying summary judgment as to a First Amendment right to petition claim based on a school district's decision to ban plaintiffs from school board meetings). Additionally, the School District's unilateral ban deprives Ms. Foscolo and Mr. Smyth of their "liberty interest 'to remain in a public place of [their] choice'" without any due process. *Kennedy v. City Of Cincinnati*, 595 F.3d 327, 336 (6th Cir. 2010) (city police officer violated individual's liberty interest in remaining in public places of his choice by banning him from all city recreational property without due process of law) (quoting *City of Chicago v. Morales*, 527 U.S. 41, 54 (1999)).

To determine whether the School District's deprivation of these rights complied with due process, a court must balance the three factors identified in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See Cyr*, 60 F. Supp. at 551 (applying the *Mathews* test to a school district's decision to ban the plaintiff from its property via a no trespass letter). These factors are:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. Here, the School District's ban implicates the constitutional right to free expression and the liberty interest to enter and remain on government property that is open to the public. There is a high risk of erroneous deprivation because the School District's ban was not "issued to pursuant to any protocol," did not "set out a process to contest the ban," and did not provide Ms. Foscolo and Mr. Smyth with "a meaningful opportunity to contest" the ban. *Cyr*, 60 F. Supp. 3d at 551. Allowing LMSD officials such broad discretion to ban members of the public from in-person Board meetings is contrary to the ideal of fundamental fairness protected by the Fourteenth Amendment. The government interest in maintaining ordered meetings "is not so overwhelming, taxing, or immediate that the [School District] did not have time to set out reasons for their decision and provide … an opportunity to be heard." *Id.* at 552.

II. LMSD's Policy and Regulation on Civility are unconstitutionally vague, impermissibly discretionary, and overly broad, and thus violate the First and Fourteenth Amendments.

Board Policy 006 Civility and Administrative Regulation R006 employ vague language, are overbroad such that they proscribe protected free expression, and grant LMSD officials unbridled discretion. Government policy that "'authorizes arbitrary enforcement'" or "'does not allow a person of ordinary intelligence to determine what conduct it prohibits'" may be invalidated for being unconstitutionally vague. *Hewlette-Bullard on behalf of J.H-B. v. Pocono Mountain Sch. Dist.*, 522 F. Supp. 3d 78, 98–99 (M.D. Pa. 2021) (quoting *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 935 (3d Cir. 2011)); *see also Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991) ("The question is not whether discriminatory enforcement occurred here, and [the Court] assume[s] it did not, but whether the [government rule] is so imprecise that discriminatory enforcement is a real possibility."). "Under the First Amendment's overbreadth doctrine," a policy that "inhibits the exercise of First Amendment rights" is overly broad, and subjects government agencies to legal liability "'if the impermissible applications of

the law are substantial.'" *Hewlette-Bullard*, 522 F. Supp. 3d at 96 (quoting *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999)). A government policy could also be "substantially overbroad" if the policy gives officials "standardless discretion to punish particular forms of slightly or moderately disruptive speech." *R.L. v. Cent. York Sch. Dist.*, 183 F. Supp. 3d 625, 645-46 (M.D. Pa. 2016).

Through the Policy and Regulation, LMSD aims to curtail, manage, punish, and otherwise regulate individuals who speak or act in ways the School District believes are "incivil," but the rules they prescribe are vague in what they require of LMSD officials and community members. The Policy was "designed to promote an environment in which all members of the school community will be treated with respect" or "civility," and the Regulation is meant to "implement[] Board Policy No. 006 'Civility'" by "identifying and defining 'incivility,'" "suggesting strategies for dealing with 'incivility,'" and "establishing a complaint procedure to address" incidents of incivility. The Policy states, and the Regulation echoes, LMSD's "position that rude, abusive, or intolerant behavior erodes education" and that such behavior "*shall* be addressed when it occurs," but it fails to explain what constitutes "rude, abusive, or intolerant behavior" and how such behavior will be addressed. Policy 006 (emphasis added); *see also* Regulation R006. The Regulation also fails to relay concrete rules or even a workable procedure since it only "*suggest[s]* strategies," stating that "complaints *should* be raised" or that an LMSD "employee *may* seek" administrator intervention when a community member is uncivil toward them. (emphasis added). The vagueness of the Policy and Regulation means LMSD community members have no notice as to what conduct *may* result in negative consequences. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1077–78 (1991) ("The void-for-vagueness doctrine is concerned with [an individual]'s right to fair notice and adequate warning that [their] conduct runs afoul of the law."); *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1137-38 (3d Cir. 1992) (analyzing whether a "reasonable, ordinary person using his common sense and general knowledge" in assessing vagueness claim, without inquiring as to challenger's understanding).

The constitutional concerns continue with the Regulation's overly broad definition of "Incivility" and the large amount of discretion it affords LMSD officials. The Regulation's definition of "Incivility" is unconstitutionally overbroad because it explicitly includes "offensive or obscene language," which is clearly protected by First Amendment. *See Banks v. Harrison*, No. CV 3:15-0693, 2016 WL 4502434, at *9 (M.D. Pa. Aug. 29, 2016) (holding that cursing at law enforcement "constitute[s] speech protected by the First Amendment") (citing *Clifton v. Borough of Eddystone*, 824 F.Supp.2d 617, 627-28 (E.D. Pa. 2011)); *City of Houston v. Hill*, 482 U.S. 451, 461 (1987)); *see also Scarpa v. Pawlowski, et al.*, ACLU of Pennsylvania (last updated May 12, 2010), https://www.aclupa.org/cases/scarpa-v-pawlowski-et-al/. A critical danger of such standardless and overbroad laws is their "potential for becoming a means of suppressing a particular point of view." *Forsyth Cnty.*, 505 U.S. at 130-31; *see City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988) ("[U]nbridled discretion in the hands of a government official . . . may result in censorship."); *Amalgamated Transit Union Loc.*, 39 F.4th at 108–09 (noting that overly discretionary standards create a danger of improper application). This concern is exacerbated by the Regulation's permissive language, which gives LMSD officials an extraordinary amount of discretion in whether or how they follow up with an instance of perceived "Incivility." *See Nittany Outdoor Advert., LLC v. Coll. Twp.*, 22 F. Supp.

3d 392, 411 (M.D. Pa. 2014)[2] ("Where '[n]othing in the law or its application prevents the [government] official from encouraging some views and discouraging others,' the 'First Amendment prohibits the vesting of such unbridled discretion in a government official.'") (quoting *Forsyth Cnty., v. Nationalist Movement*, 505 U.S. 123, 133 (1992)).

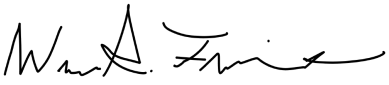
The August 4th letters state that Ms. Foscolo and Mr. Smyth were banned because the School District believes they violated the Policy and Regulation by intentionally disrupting or impeding the board meetings that took place on June 15 or August 3. Though Ms. Foscolo and Mr. Smyth maintain nothing they did during either meeting was unlawful, their conduct has no bearing on this analysis because the Policy and Regulation are facially unconstitutional. *See Forsyth County v. Nationalist Movement,* 505 U.S. 123, 129 (1992) (explaining that government regulations may be subject to facial challenges even if their application in the case under consideration may not be constitutionally objectionable); *City of Houston v. Hill*, 482 U.S. 451, 459 (1987) (explaining that courts may invalidate a regulation for overbreadth or for vagueness even if it is possible the statute may be applied lawfully in some circumstances). The Policy and Regulation's vague language, unbridled discretion for LMSD officials, and overly broad proscriptions are incompatible with the freedoms guaranteed for the First and Fourteenth Amendments.

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We are writing to advise you that the School District's categorical ban on Ms. Foscolo and Mr. Smyth from School Property violates their First and Fourteenth Amendment rights. This is an especially important time for parents and community members to advocate for their preferred policies at in-person Board meetings. There are three Board meetings on September 14, one on September 22, another on September 24, and *another* on September 28. This month is a busy one for the Board and would be an active time for our clients, but for LMSD's unconstitutional ban.

Please confirm by 12pm on September 11 that Ms. Foscolo and Mr. Smyth will be permitted to attend public in-person Board and that you will amend the Policy and Regulation. We intend to take further steps to protect their rights if we do not receive this confirmation. Please contact Solomon Furious Worlds at sfworlds@aclupa.org or (856) 409-0442 if you have any questions.

Sincerely,



Solomon Furious Worlds
Staff Attorney

Brynne Madway
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[2] *On reconsideration in part*, No. 4:12-CV-00672, 2014 WL 12740630 (M.D. Pa. July 22, 2014)