

January 19, 2023

Via email to Alucabaugh@cbsd.org

Dr. Abram M. Lucabaugh, Superintendent
Central Bucks School District
20 Welden Dr.
Doylestown, PA 18901



Re: Student political expression

Dear Superintendent Lucabaugh:

Students in the Central Bucks School District, notably at CB West High School, plan to distribute political fliers in school tomorrow to promote an after-school rally to support LGBTQ+ students in the District. We write to you because several building principals mishandled similar student political activity last week, in some cases unconstitutionally restricting First-Amendment-protected activities.

In a 2021 case handled by this office, the U.S. Supreme Court reaffirmed its landmark holding that “students do not ‘shed their constitutional rights to freedom of speech or expression,’ even ‘at the school house gate.’” *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038, 2044–45 (2021) (quoting *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969)). The Court has held that students have a First Amendment right to express themselves in school unless their speech “materially disrupts classwork or involves substantial disorder or invasion of the rights of others,” 393 U.S. at 513; is indecent, lewd, or vulgar, *see Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986); promotes “illegal drug use,” *see Morse v. Frederick*, 551 U.S. 393, 409 (2007); or may reasonably be perceived as “bear[ing] the imprimatur of the school,” such as that appearing in a school-sponsored newspaper, *see Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

During last week’s protest, one building principal advised students that they could not distribute pieces of paper criticizing the School Board’s consideration of Policy 321, restricting classroom displays, because it was “political speech.” That position is legally backwards. The First Amendment “affords the broadest protection” to political expression. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346-47, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995). Indeed, “speech on public issues occupies the ‘highest rung of the hierarchy of First Amendment values’ and is entitled to special protection.”

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Snyder v. Phelps, 562 U.S. 443 (2011). Nor does the fact that the students were *distributing* a political message, as opposed to wearing one or uttering it, change the analysis. See *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 113–14 (3d Cir. 2013) (student distribution of materials governed by *Tinker* standard).

Nor do we think that the two-day advance-notice requirement in CB Policy 220 can be constitutionally applied to prevent tomorrow’s distribution. Pre-approval or pre-clearance of expression is a form of prior restraint, the least tolerable form of censorship. See, e.g., *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976) (“prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights”). See also, *Quarterman v. Byrd*, 453 F.2d 54, 60 (4th Cir. 1971) (school’s pre-clearance policy violates First Amendment). The District is now on notice of the proposed distribution, allowing it to take steps it views as necessary, while honoring the students’ First Amendment rights.

We expect students to hand out fliers before school and in the hallways and lunchrooms during non-instructional time. They do not intend to disrupt classes, but merely to communicate a political message. This is plainly in-school expression protected by the First Amendment. We trust that this letter provides the District with ample notice, both of the impending student political activity tomorrow and their constitutional right to engage in it. Please do not hesitate to contact me if you have any questions or concerns. I can be reached at 412-681-7736 x 321, or vwalczak@aclupa.org.

Respectfully,

A handwritten signature in blue ink, appearing to read "Witold J. Walczak".

Witold J. Walczak
Legal Director

cc: Jeffrey P. Garton, Solicitor (by email, jgarton@begleycarlin.com)