

VIA E-MAIL

March 5, 2018

Jonathan M. Busch
Nicholas Celso
Busch Law Group
450 Main Street
Metuchen, New Jersey 08840

RE: Freedom of Speech in Schools

Dear Mr. Busch & Mr. Celso:

As I have discussed with Mr. Celso, the ACLU of New Jersey is aware that Sayreville Public Schools plans to suspend students who engage in political protest by walking out of school by characterizing such conduct as “failure to follow administrative direction” or “continued and willful disobedience.” Walking out of school is conduct that usually amounts to cutting class (if students remain on the grounds) or leaving school without authorization, neither of which result in suspension for a first offense. Applying the district’s code of conduct in a way that punishes student conduct more harshly because of their political purpose is unconstitutionally impermissible, and the ACLU of New Jersey stands ready to intervene on behalf of students facing these consequences.

Students, as you know, do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). In circumstances where students are expressing their views about matters at the forefront of our national political discourse, schools should be especially mindful of their roles in educating young people as citizens, and should not “strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.” *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). The ACLU of New Jersey [recently called on](#) school administrators to support student efforts to engage in issues of the day, to encourage civic participation, and to refrain from discipline. The New Jersey School Boards Association also [issued guidance](#) that offers alternatives to discipline, including building an education event around the nationwide walkout planned for March 14.

As I understand it, the district has taken the position that because school administrators have reminded students of their obligations under the code of conduct, they may now discipline them for failing to heed those reminders. This raises serious concerns. First, the district’s approach would result in students who engage in conduct associated with political speech – in this case, well-publicized conduct – receiving a harsher punishment than a student who walks out for a reason unknown to the administration. *See Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 770 (9th Cir. 2006) (explaining that a school official is liable for First Amendment retaliation if students would not have been similarly punished if they had not engaged in the protected speech); *see also Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). The district’s rationale has been clear: they don’t want students participating in walkouts. With this purpose, if the district deviates from its code of conduct’s discipline matrix, or when administrators target a



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particular group of students to violate additional provisions of the code, the district will engage in unlawful retaliation against students.

Second, using the “failure to follow administrative direction” provision to increase the penalty of an existing violation provides administrators with unchecked discretion to increase penalties for any violation. Under this approach, there is nothing keeping an administrator from reminding students of various code violations and then increasing their penalties with a charge of “failure to follow administrative direction” for violating an existing provision of the code. This violates students’ rights to due process and allows for the code to be used in ways that discriminate. Worse still, academic literature suggests that code of conduct provisions related to defiance are more frequently used against students of color and students with disabilities. *See, e.g.,* Russell J. Skiba and Natasha T. Williams, *Are Black Kids Worse? Myths and Facts About Racial Differences in Behavior* (The Equity Project at Indiana University, March 2014), pages 2-5 at http://www.indiana.edu/~atlantic/wp-content/uploads/2014/03/African-American-Differential-Behavior_031214.pdf.

We encourage the district to rethink its plan to increase its penalties and suspend students from school who participate in walkouts. At a time when students are confronting fears over their personal safety in school, schools should explore how to foster a supportive environment instead of a punitive one. Other New Jersey school districts confronting similar circumstances have coordinated with students to ensure their safety, and declined to discipline them. For example, North Brunswick’s approach “is not to suspend students or keeping them from protesting but to engage with them.” Carly Sitrin, *NJ Teens Protest Gun Violence: Teachable Moment or Disciplinary Problem?*, NJ Spotlight, Feb. 28, 2018, <http://www.njspotlight.com/stories/18/02/28/nj-teens-protest-against-gun-violence-teachable-moment-or-disciplinary-problem/>.

Moments like these are important opportunities for students to learn about civic engagement and put their education into practice. As the Supreme Court has explained, public schools are the mechanism by which we prepare “individuals for participation as citizens” and preserve “the values on which our society rests.” *Ambach v. Norwick*, 441 U.S. 68, 76 (1979).

Given that students are planning to take part in the nationwide walkout on March 14, 2018, please advise me by March 7 whether the school district will continue with its plan to discipline participants for “failure to follow administrative direction” or “continued and willful disobedience.” Thank you for your attention to this matter.

Sincerely,


Jeanne LoCicero
Deputy Legal Director

cc: Kevin Ciak, Sayreville Board of Education President (via kevin.ciak@sayrevillek12.net)
Richard R. Labbe, Superintendent (via Richard.Labbe@sayrevillek12.net)