



May 26, 2022

Stella Pekarsky, Chair
Fairfax County Public School Board

Scott Braband, Superintendent
Fairfax County Public Schools

Sent via email

Dear Ms. Pekarsky and Mr. Braband:

The Foundation Against Intolerance & Racism (FAIR) is a nonpartisan organization dedicated to advancing civil rights and liberties and promoting a common culture based on fairness, understanding, and humanity. We have more than 100 chapters and tens of thousands of members nationwide, including in Virginia. Our website, fairforall.org, can give you a fuller sense of our identity and activities.

We write in response to an incident report regarding Fairfax County Public Schools (FCPS) submitted to FAIR on May 23, 2022 through our transparency website, fairtransparency.org. The report states that the FCPS Board of Education is considering several amendments to its Student Rights and Responsibilities Booklet at the Board meeting tonight. Among the amendments being considered is a proposed change to the Leveled Responses to Student Behavior table (the “Table”), which outlines various potential student behaviors and their related disciplinary consequences. Most notably, the definition of “Discriminatory Harassment” would be amended, in part, to include “outing related to gender identification” (the “Proposal”). The Booklet categorizes Discriminatory Harassment as a “Behavior of a Safety Concern which creates unsafe conditions for students, staff, and/or visitors to the school,” and allows more severe disciplinary measures, including out-of-school suspension periods of up to ten days and even expulsion.

Section BSC8 a-d(6) of the Table lists: “Discriminatory Harassment: Harassment based on a person's (a) race, color, national origin, (b) religion, (c) disability, or (d) any other legally protected category to include outing related to gender identification...” (emphasis added) Discriminatory Harassment is defined in the Booklet to include “verbal, electronic, or physical action that denigrates or shows hostility toward an individual because of their age, race, color, religion, national origin, marital status, disability, or any other legally protected class.” The Booklet clarifies that “[s]uch harassment may create an intimidating, hostile, or offensive student environment.” Furthermore, the Booklet defines “outing,” in relevant part, as the “act of disclosing an LGBTQIA+ person’s...gender identity without the person’s consent.”

The Booklet clearly states at the outset, as part of additional proposed language, that “all students have...the right to a school and classroom environment that affirms the identity of all students and is responsive, caring, and inclusive.” A later section of the Booklet also provides that “[s]tudents may exercise the right to freedom of expression through speech, assembly, petition, and other lawful means...”

We agree that the above-mentioned student rights are of the highest importance. We fear that if the proposed addition of the phrase, “to include outing related to gender identification and immigration status,” is approved, FCPS will encounter scenarios wherein it is impossible to honor potentially conflicting rights of students.

There are examples of such conflicting rights scenarios currently in the news in the K-12 education setting. For example, in the Kiel Area School District in Wisconsin, where the school district is facing the threat of litigation after instituting a complaint and investigation of middle school-age students for violating a District policy for refusing to use another student’s chosen pronouns. On the one hand, the District argues that the alleged offenders were harassing another student when they refused to call the student by their chosen pronouns. On the other hand, the alleged offenders argue they were simply exercising their free speech rights which protect them from being compelled to parrot government speech. It is simple to imagine a similar situation arising in FCPS if the proposed language is adopted.

The “free expression” and “anti-discriminatory harassment” provisions of the Booklet are derived from Federal protections: the First Amendment and the Civil Rights Act, respectively. When efforts to advance one set of rights potentially leads to infringement of another set of rights, schools are left in an untenable situation.

The First Amendment denies states and their agencies (including public schools) the power to require adherence to any particular set of ideological beliefs. *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (public school students cannot be required to recite the Pledge of Allegiance). For example, pronoun selection is based on the ideological beliefs that pronouns refer to gender and not sex, that gender is independent of sex, and that gender (or sex) is a matter of personal choice. The First Amendment prohibits a public school from compelling a student to ascribe to such beliefs. In the words of Justice Jackson, “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *Barnette*, 319 U.S. at 642. Furthermore, the First Amendment also prohibits public schools from compelling students to affirm ideas contrary to their sincerely-held religious beliefs, with no ability to opt out. *See Hurley v. Irish-American Gay, Lesbian, & Bisexual Grp.*, 515 U.S. 557, 573 (1995); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (“A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts.”). Public schools must carefully adhere to these Federal protections when implementing disciplinary measures for students.

Under the Education Amendments of 1972, public school students have the right to receive their compulsory education in a setting that is free from hostility and discrimination based on their sex. Title IX provides that “no person shall, on the basis of sex,...be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance.” Although not explicitly required by Federal statute or regulation, many public schools currently interpret the word “sex” to include gender identity, which appears to be the case in FCPS’s policies as well. Schools are free to implement policies that provide

greater breadth of protection than what is required by law. However, any policy that might lead to infringement of a student's rights naturally exposes the school district to the threat of litigation. Therefore, it is crucial for FCPS to carefully consider the outcomes that may arise from approval of the Proposal. If Student A does not believe that one's pronouns can be chosen or different from one's biological sex, and therefore refuses to refer to Student B according to Student B's chosen pronouns, and this results in "outing" Student B, the Proposal would allow FCPS to stringently discipline Student A. On the basis of that discipline, Student A could claim that his First Amendment rights were violated by the FCPS.

We urge FCPS to reconsider its Proposal.

Very truly yours,



Leigh Ann O'Neill
Staff Attorney
Foundation Against Intolerance & Racism

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