



FOUNDATION
AGAINST
INTOLERANCE
& RACISM

June 17, 2022

Julie Chambers
President, Board of Trustees
Hamilton Southeastern Schools
jchambers@hse.k12.in.us

Sent via email

Dear Ms. Chambers:

I am an attorney at the Foundation Against Intolerance & Racism (FAIR), a nonpartisan, nonprofit organization dedicated to advancing civil rights and liberties, and promoting a common culture based on fairness, understanding, and humanity. We have nearly 100 chapters and tens of thousands of members nationwide, including in Indiana. Our website, fairforall.org, can give you a fuller sense of our identity and activities.

We write in response to an [incident report](#) submitted to FAIR on June 9 through our transparency website, fairtransparency.org. The incident states, in pertinent part:

On June 8th, 2022, Hamilton Southeastern Schools Board of Trustees voted to amend its K-12 Student Handbook in various parts. Most alarmingly, the Board voted to add "microaggressions" to the list of behaviors that "may result in the student being suspended, expelled, or excluded from the regular school day." The amended policy states: "Microaggressions can be defined as everyday, subtle, intentional or unintentional interactions or behaviors that communicate some sort of bias toward historically marginalized groups. While Hamilton Southeastern High School understands those individuals communicating a microaggression might not intend to express bias, the school recognizes the responsibility to educate students on the reality of bias perceptions. Issues regarding microaggressions may be addressed through restorative conversations led by school administration, teachers, and/or guidance counselors rather than punitive measures." Interestingly, the next change that follows in the Handbook is deletion of the following rule: "Students are expected to walk, not run, in the school building." The document offers as the reason for the deletion of this rule: "While this rule may be viewed as a safety concern, skipping, or running in the hallway could be developmentally appropriate for elementary school age students."

Upon further investigation, FAIR became aware of a graphic that was purportedly used in Hamilton Southeastern ("HSE") teacher training event and which provides several examples of "microaggressions." The examples include some clearly discriminatory statements, but also several arguably innocuous statements such as, "You speak good English," "You are so articulate," and "Men and women have equal opportunities for achievement." *Sticks & Stones: Understanding Implicit Bias, Microaggressions, &*

Stereotypes, adapted from Sue, Derald Wing, *Microaggressions in Everyday Life: Race, Gender and Sexual Orientation*, Wiley & Sons (2010). When a school system implements a speech and expression policy that is vague and overly broad and also promotes training materials that categorize ambiguous phrases as “microaggressions,” they are at significant risk of chilling speech. Additionally, when such policies are vague and have discriminatory application among students of differing races, skin colors, or national origins, additional constitutional issues are raised.

As an advocate for pro-human anti-racism, FAIR respects educators who undertake efforts towards positive change and greater fairness. Such efforts, however, must be consistent with constitutional rights protections. We are concerned that the microaggression policy referenced in the report (the “Microaggression Policy”) will lead to free speech rights violations of HSE students.

Perhaps the most stringently protected constitutional right enjoyed by minor children is the right to free speech and expression under the First Amendment. 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). Furthermore, the First Amendment also prohibits public schools from compelling students to affirm ideas contrary to their sincerely-held religious beliefs. 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.”). Finally, and perhaps most instructive as to HSE’s Microaggression Policy is the well-settled principle that a constitutionally-valid reason must exist in order for a public school to restrict a student’s right to freedom of expression. *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 511 (1969) (Public school could not legally prohibit students from wearing black armbands in protest of Vietnam hostilities because doing so “neither interrupted school activities nor sought to intrude in the school affairs or the lives of others.”). When implementing disciplinary measures for students’ speech, actions, or expression, public schools must carefully guard students’ Constitutional protections. That the school’s intention in adopting the policy centers on educating its students about potential biases is of no consequence.

The potential for unconstitutional discipline under HSE’s Microaggression Policy is extraordinary and may result from several statements and expressions, the freedom of which to make are rights fundamentally held by students in public schools. Will students be suspended for referring to a classmate by incorrect pronouns? For announcing that they believe all humans are created equally? For complimenting a classmate for a job well done on an assignment? Or for wearing a shirt that says “Black Lives Matter” or “Blue Lives Matter”? The myriad of potential pitfalls under this new policy is practically endless.

This uncertainty about exactly what speech qualifies as a microaggression also likely renders HSE’s Microaggression Policy unconstitutionally vague. Due process requires that people—including students—be given fair notice of what conduct is prohibited. See *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (“[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates

the first essential of due process of law”); *FCC v. Fox*, 567 U.S. 239 (2012) (FCC restrictions on broadcasting indecent material were unconstitutionally vague because it failed to give fair notice of what material was prohibited.”). HSE’s Microaggression Policy does not provide a clear standard for separating a prohibited microaggression from permissible statements, which leaves students unclear as to what they can and cannot say. This uncertainty will also chill students’ constitutionally protected speech as they will be forced to avoid making innocuous and protected statements that might be misinterpreted as microaggressions.

Additionally, if the Microaggression Policy only protects certain groups of students on the basis of their skin color or race, it also may violate Title VI of the Civil Rights Act and the Equal Protection clause of the Fourteenth Amendment. Instruction that attempts to remedy prejudice should not itself further prejudice or disregard the civil rights or individuality of others. The Equal Protection clause of the Fourteenth Amendment prohibits state entities (including public schools) from treating individuals differently or stereotyping them because of their skin color. *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948); *Shaw v. Hunt*, 517 U.S. 899, 908 (1996). “Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.” *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). Such distinctions and stereotypes are presumptively invalid and will be upheld only upon extraordinary justification. *Personnel Admin. v. Feeney*, 442 U.S. 256, 272 (1979); see *Fisher v. University of Texas*, 570 U.S. 297, 310 (2013) (courts will strictly scrutinize state programs that utilize racial classifications). Similarly, Title VI of the Civil Rights Act (which is derived from Equal Protection) prohibits federally funded programs from discriminating or creating hostile environments based on skin color. 42 U.S.C. § 2000d, d-4a(2); *Tolbert v. Queens College*, 242 F.3d 58, 69-70 (2d Cir. 2001).

While perhaps well-intentioned, the HSE Microaggression Policy is not the appropriate measure for teaching students about acceptance, kindness, or open-mindedness. HSE’s HSE21 Instructional Framework states that:

“HSE Schools is committed to providing each student with learning experiences that are deep and relevant, and which encourage the development of his/her unique identity.”

We strongly agree with the premise of this framework, and FAIR would encourage HSE to make the dignity of each individual a priority while still respecting students’ and teachers’ diverse backgrounds and beliefs. Staff and students should have the tools they need to develop a cultural conscience of respect without making racial categorization, gender, ethnicity or any other identity category the focal point of interactions. Instead, it is the exposure to a broad range of perspectives and beliefs that is essential to enabling students to form their own conclusions and productively engage with diverse ideas. We believe the Microaggression Policy will ultimately hinder students in their ability to recognize one another’s common humanity. The same handbook amendment establishing the Microaggression Policy also recognized the ability of HSE students to choose whether to walk or run in the hallways; we only ask that HSE extend this same respect for students’ autonomy and maturity to their free expression as well. Accordingly, we urge HSE to reconsider this policy.

We would like to give the Hamilton Southeastern Schools Board of Trustees an opportunity to respond. Please let us know within the next five business days if you intend to do so.

Very truly yours,

A handwritten signature in black ink, appearing to read "L. O'Neill". The signature is fluid and cursive, with the first name "L." and the last name "O'Neill" clearly distinguishable.

Leigh Ann O'Neill

Staff Attorney

Foundation Against Intolerance & Racism

cc: sdonsbach@hse.k12.in.us, jpritchett@hse.k12.in.us, bboyer@hse.k12.in.us, mfullhart@hse.k12.in.us, sparksreese@hse.k12.in.us, sthomas@hse.k12.in.us