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September 1, 2017

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Dr. Joie L. Green, Superintendent
Mahanoy Area School District
1 Golden Bear Drive
Mahanoy City, PA 17948

BY EMAIL TO jgreen@mabears.net

RE: Discipline of B[redacted] L[redacted] for Out-of-School Speech

Dear Dr. Green:

We represent B[redacted] L[redacted]. We understand that Ms. L[redacted] has been kicked off the junior varsity cheerleading team because of Ms. L[redacted]'s out-of-school, private online speech that the cheerleading coach felt was "demeaning" to her and to the school. This punishment violates the United States Constitution and Pennsylvania law. We respectfully request that you immediately reinstate Ms. L[redacted] to the squad.

***Factual Background***

As you are aware, Ms. L[redacted] was punished for a social media post she created in Snapchat (a "Snap") with the text "fuck school fuck softball fuck cheer fuck everything." She created the Snap on the weekend, off campus, at a time when she was not participating in cheerleading or any school activity. The Snap did not mention the School District, any particular sports team, or any person. She shared the Snap only with her friends. It was not accessible to the general public.

The Mahanoy Area High School Cheerleading Rules purport to allow school officials to punish students for disparaging cheerleading online at any time. Specifically, the Rules state that "[t]here will be no toleration of any negative information regarding cheerleading, cheerleaders, or coaches placed on the internet." The Rules further state that they may be enforced "at the coaches' discretions and rules may be subject to change."

## ***Legal Framework***

Punishing Ms. L[redacted] for disparaging cheerleading in a non-public social media post violates the First Amendment to the U.S. Constitution and also exceeds the District's statutory authority.

Her punishment is unconstitutional for several reasons. First, it is questionable whether the District may *ever* punish a student for off-campus speech. But assuming school districts do have some authority to punish out-of-school speech, that power would be limited to situations where the off-campus speech caused substantial, material disruption within the school, which Ms. L[redacted]'s speech did not. Second, the cheerleading rule prohibiting the posting of "negative information" online is viewpoint-discriminatory. Third, the rule is vague, overbroad, and leaves far too much discretion to decisionmakers to make subjective decisions about what is "negative."

## ***Ms. L[redacted]'s Punishment Is Inconsistent with* Tinker.**

Students do not shed their constitutional rights to freedom of speech at the schoolhouse gate. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969). The First Amendment limits the government's power to punish a student for her speech. *Id.* at 506–09. Generally, public schools may not punish in-school speech unless the speech creates a risk of substantial, material disruption to school activities—a high bar. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 509 (1969). It is an open question whether school officials may ever punish a student for out-of-school speech without violating the First Amendment. *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 926 n.3 (3d Cir. 2011) (en banc); *see also B.H. v. Easton Area Sch. Dist.*, 725 F.3d 293, 303 n.9 (3d Cir. 2013) (en banc) ("We have not yet decided whether *Tinker* is limited to on-campus speech."). But assuming schools do have some authority to punish students for their out-of-school conduct (which is debatable), it is clear that the *Tinker* standard would apply. *J.S.,* 650 F.3d at 928–33; *see also id.* at 927 (acknowledging that "*Tinker* sets the general rule for regulating school speech"). Although there is a narrow exception to *Tinker* that allows schools to punish students for lewd speech and profanity,[1] the Supreme Court and Third Circuit have both made clear that schools have no power to punish lewd or profane *out-of-school* speech. *Morse v. Frederick*, 551 U.S. 393, 405 (2007) (observing that "[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected."); *J.S.,* 650 F.3d at 932 (noting that "*Fraser* does not apply to off-campus speech" and holding that *Fraser* did not justify a school's punishment for "profane language outside the school, during

[1] *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

non-school hours."). Punishing students for off-campus speech that has not caused a substantial disruption at school has never been allowed by either the Supreme Court or the Third Circuit. *J.S.*, 650 F.3d at 933.

The cheerleading rules allow school officials to censor far more speech than is permissible under *Tinker* and its progeny. The non-disparagement rule prohibiting the posting of "negative information" online appears to apply at all times, whether or not the student is in school or at a school function. It also appears to apply whether or not the online content is available to the general public or to a more limited audience. On its face, the rule would seem to apply even to private diaries maintained online. Under similar circumstances, courts have concluded that social media posts created off-campus cannot reasonably be expected to cause a substantial, material disruption to school activities. *See J.S.*, 650 F.3d at 929 (holding that an online parody profile of the principal created outside of school "could not 'reasonably have led school authorities to forecast substantial disruption of or material interference with school activities,'" despite the "unfortunate humiliation" it caused the principal) (quoting *Tinker*, 393 U.S. at 514); *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 209 (3d Cir. 2011) (en banc) (holding that a school violated the First Amendment by punishing a student for out-of-school, online speech the principal deemed "degrading," "demeaning," "demoralizing," and "shocking").

Indeed, the non-disparagement rule was applied to punish Ms. L[redacted] even though it is difficult to imagine how her out-of-school speech could have been expected to cause substantial, material disruption within the school. She created the post off campus, on her own time, when she was not representing the school or participating in any school activity. Access to Ms. L[redacted]'s social media post was limited to her Snapchat friends. And she did not name the School District, her school, her team, or any coach or teammates in the post. Punishing Ms. L[redacted] under these circumstances is inconsistent with the limitations on school authority set forth in *Tinker* and subsequent cases. *See J.S.*, 650 F.3d at 928–29; *Layshock*, 650 F.3d at 219.

***Ms. L[redacted]'s Punishment Is a Form of Impermissible Viewpoint Discrimination.***

In fact, Ms. L[redacted] was punished not because she disrupted school activities (which she did not) but because she caused offense. The Supreme Court has made clear, however, that "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" is not a sufficient justification for punishing student speech. *Tinker*, 393 U.S. at 509; *J.S.*, 650 F.3d at 926.

Singling out certain *viewpoints* for censorship is almost invariably unconstitutional. *See, e.g., Pittsburgh League of Young Voters Educ. Fund v. Port Auth.*, 653 F.3d 290, 296 (3d Cir. 2011) (observing that "[v]iewpoint discrimination is anathema to free expression") (citing R.A.V. v. St. Paul, 505 U.S. 377, 382 (1992); *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). A rule that prohibits students from posting "negative information" but does not prohibit them from posting "positive information," is unquestionably a form of impermissible viewpoint discrimination. *See Matal v. Tam*, 137 S. Ct. 1744, 1763 (June 19, 2017) (reasoning that a ban on offensive speech constitutes viewpoint discrimination because "[g]iving offense is a viewpoint," and striking down federal law that prohibited registration of trademarks that disparage any group of people).

***The Cheerleading Rule Prohibiting Posting "Negative Information" Online Is Vague and Allows School Officials an Impermissible Amount of Discretion.***

A restriction on speech violates the First Amendment if it is so vague that government officials can enforce it in an arbitrary and discriminatory way. *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 233 F. Supp. 2d 647, 666 (D.N.J. 2002), *aff'd*, 386 F.3d 514 (3d Cir. 2004). A government policy restricting speech is unconstitutional when a public official's discretion is "not constrained by objective criteria" and instead gives the official room to make decisions based on "ambiguous and subjective reasons." *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998) (quoting *Desert Outdoor Advertising, Inc. v. City of Moreno Valley*, 103 F.3d 814, 818 (9th Cir. 1996)).

Deciding whether a statement is "negative" is likely to involve subjective value judgments. The anti-disparagement rule gives school officials broad. discretion to punish students for their online speech whether the "negative information" is an opinion that school officials disagree with, a parody that officials do not find funny, or a true statement of fact that school officials find inconvenient or critical. The First Amendment does not permit censorship pursuant to such a vague, broad, and subjective standard. *See J.S.*, 650 F.3d at 933 (cautioning that upholding punishment of students for out-of-school speech that school officials find offensive "would vest school officials with dangerously overbroad censorship discretion.").

***The Cheerleading Rule Exceeds the School District's Statutory Authority.***

Moreover, it is quite clear that the school district has no legal authority under the Pennsylvania Code to punish students for their out-of-school conduct. A school district's

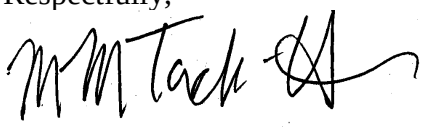
authority is limited to "such time as they are under the supervision of the board of school directors and teachers, including the time necessarily spent in coming to and returning from school." 24 Pa. Stat. Ann. § 5-510. The Commonwealth Court has interpreted this statute to mean that school districts may not discipline students for conduct that occurs off school grounds or outside of school hours. *See Hoke v. Elizabethtown Area Sch. Dist.*, 833 A.2d 304 (Pa. Commw. Ct. 2003), *appeal denied*, 847 A.2d 59 (Pa. 2004); *D.O.F. v. Lewisburg Area Sch. Dist.*, 868 A.2d 28 (Pa. Commw. Ct. 2004). In *D.O.F.*, the Court relied on *Hoke* and 24 P.S. § 5-510 to find that a student who smoked marijuana on a school playground at night was not under the supervision of the school district and therefore could not be punished by the school district for his misconduct. *D.O.F.*, 868 A.2d at 35-36. The Third Circuit has also recognized that Pennsylvania law limits a school's power to punish for out-of-school conduct. *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 929 n.5 (3d Cir. 2011) (holding in the alternative that 24 Pa. Stat. Ann. § 5-510 bars the punishment of a student for out-of-school speech).

***Conclusion***

In sum, the Mahanoy Area School District has violated—and is continuing to violate—Ms. L[redacted]'s rights by excluding her from cheerleading as punishment for her off-campus speech. Because this matter involves a restriction on free expression, which courts consider to be irreparable harm, we must ask that you respond quickly. **Please confirm, in writing, by 5 p.m. on Wednesday, September 6, 2017, that the School District will reinstate Ms. L[redacted] to the cheerleading squad.** If we do not hear from you by the appointed time, we will construe your silence as a refusal of this request and will proceed with appropriate and necessary legal action to vindicate our client's First Amendment rights.

We look forward to your anticipated cooperation.

Respectfully,



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CC: Jack Dean, Solicitor (by email to jgd@elliottgreenleaf.com)