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JOHN W. WHITEHEAD
Founder and President

May 13, 2022

By Electronic Mail

Board of Trustees and Superintendent
Carroll Independent School District
2400 North Carroll Ave.
Southlake, TX 76092

Re: Non-Disparagement Clause in Employment Contracts

Dear Trustees and Superintendent:

As a civil liberties organization that works to ensure that the nation’s public schools remain nurseries of democracy, The Rutherford Institute¹ is concerned about reported attempts by the Carroll Independent School District to restrict the First Amendment rights of its employees. Specifically, it has come to our attention that the District has included a non-disparagement clause in its employment contracts that would require employees to “agree to not disparage, criticize, or defame the District, and its employees or officials, to the media.”²

As the following legal analysis suggests, the courts would likely find such a restriction on speech by a public school to be in violation of the First Amendment. Because the non-disparagement clause only prohibits criticism of the District, its officials, and employees—but does not prohibit employees from praising or commending the District and its officials—it would likely be considered impermissible viewpoint discrimination which is prohibited by the First Amendment. Therefore, we urge you to reconsider this ill-advised course of action in order to better respect the rights of your employees and ensure that your policies align with the spirit and the letter of the Constitution.

Teachers do not shed their constitutional rights at the schoolhouse gate.

Content-based restrictions on speech “are presumptively unconstitutional,”³ and “[g]overnment discrimination among viewpoints—or the regulation of speech based on the

¹ The Rutherford Institute is a nonprofit civil liberties organization which seeks to protect individuals’ constitutional rights and educate the public about threats to their freedoms.

² Mike Hixenbaugh, “Teachers in Southlake, Texas, asked to sign ‘non-disparagement’ agreements,” NBC News (Apr. 28, 2022), <https://www.nbcnews.com/news/us-news/southlake-texas-teachers-non-disparagement-agreements-rcna26480>.

³ *Nat’l Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

specific motivating ideology or the opinion or perspective of the speaker—is a more blatant and egregious form of content discrimination.”⁴

Thus, “the First Amendment prohibits government officials from subjecting an individual to retaliatory actions for engaging in protected speech.”⁵ This protection applies to government employees, and specifically public school teachers, as well because they cannot “constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work.”⁶

In *Pickering*, the U.S. Supreme Court clearly established that “a teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.”⁷ Therefore, the School Board violated Pickering’s rights to freedom of speech when it terminated his employment as a teacher “for sending a letter to a local newspaper . . . that was critical of . . . the Board and the district superintendent.”⁸

Non-disparagement policies by government employers have been found unconstitutional.

Non-disparagement policies by government employers have also been found unconstitutional. For example, in *Liverman v. City of Petersburg*, the Fourth Circuit Court of Appeals held that a police department’s social networking policy, which prohibited employees from making negative comments online about the department and staff, was unconstitutional and that disciplinary measures taken pursuant to that policy against officers who expressed criticism on social media about department practices were impermissible and not protected by qualified immunity.⁹ While the police department sought to avoid divisiveness, the court explained that “the speculative ills targeted by the social networking policy are not sufficient to justify such sweeping restrictions on officers’ freedom to debate matters of public concern.”¹⁰ Similarly or even more so, the sweeping scope of your District’s non-disparagement clause is unjustified.

The right to publicly criticize a government body is firmly grounded in the First Amendment.

Whether the individual is a teacher, parent, student or member of the community, the right to publicly criticize a government body is firmly grounded in the First Amendment.

As the U.S. Supreme Court has recognized, even students have a constitutional right to publicly criticize their schools. For example, in 2021, the Supreme Court held that a public high school’s disciplinary action against a 14-year-old student for publicly criticizing the school

⁴ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015) (internal quotation marks omitted).

⁵ *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019).

⁶ *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968).

⁷ *Id.* at 574.

⁸ *Id.* at 564-65.

⁹ *Liverman v. City of Petersburg*, 844 F.3d 400 (4th Cir. 2016).

¹⁰ *Id.* at 408-09.

violated the student's First Amendment rights.¹¹ As the Court explained in its ruling in *Mahanoy Area Sch. Dist. v. B.L.*: "For the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."¹²

Schools cannot censor criticism merely to avoid discomfort.

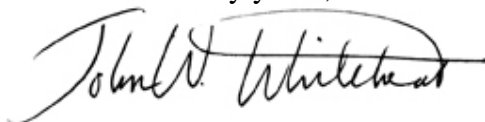
It appears that the Carroll Independent School District is seeking to avoid discomfort and unpleasantness by censoring critical viewpoints through its non-disparagement clause. The non-disparagement clause also seeks to hide concerns and prevent the public from learning about them. However, District employees should be free to widely inform the public, and especially parents, through the media about concerning issues particularly involving how their children are being treated and educated so that the public can express their desires to their elected officials on the Board and make informed decisions when voting for trustees to represent them.

Further, as a public body entrusted with the care and education of America's children, the Carroll Independent School District has a responsibility to teach by example what it means to have a government that operates with transparency and accountability to its citizens. However, silencing and threatening teachers and other District employees through a non-disparagement clause in their employment contracts sends a message to students that they have no rights to free speech and will be punished for speaking out against the government.

As the Supreme Court recognized in *Mahanoy*, "America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the 'marketplace of ideas.' . . . That protection must include the protection of unpopular ideas."¹³

It is our hope that you will remove the non-disparagement clause from your employment contracts in the interest of ensuring that the schools remain robust forums for learning about and exercising freedom.

Sincerely yours,

A handwritten signature in black ink that reads "John W. Whitehead". The signature is written in a cursive style with a long horizontal flourish extending to the right.

John W. Whitehead
President

¹¹ *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021).

¹² *Id.* at 2048 (quoting *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503, 509 (1969)).

¹³ *Id.* at 2046.