



October 27, 2014

**VIA EMAIL & FIRST CLASS MAIL**

Dr. Mike Looney, Superintendent  
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**RE: Policy 4.406: Acceptable Use, Media Release, and Internet Safety  
Procedures and Guideline**

Dear Superintendent Looney and Members of the Board:

I am writing to you on behalf of the American Civil Liberties Union of Tennessee (ACLU-TN) and the Electronic Frontier Foundation (EFF) to express our concern regarding Williamson County Board of Education Policy 4.406p—the Acceptable Use, Media Release, and Internet Safety Procedures and Guidelines (the “Policy”). We were contacted by a concerned parent of Williamson County Schools (“WCS”), and after a careful review of the Policy, ACLU-TN and EFF urge WCS to immediately suspend the Policy. As currently written, the Policy infringes on students’ fundamental constitutional rights.

Of particular concern are (i) the social media guidelines applicable to students when engaged in off-campus speech; (ii) the “Bring Your Own Technology” guidelines, pursuant to which students are required to consent to suspicionless searches of their electronic devices “at any time” for any “school-related purpose”; and (iii) the network security and email guidelines, pursuant to which all data and communications of network users are subject to suspicionless monitoring.

While the Policy may be the product of a well-intentioned effort to ensure student safety and network security, and to ensure that classrooms are not disrupted, the Policy goes too far and, as written, violates students’ constitutional rights. It (a) functions as a prior restraint on speech, allowing school officials to censor student speech in and out of school, and (b) permits officials to conduct suspicionless searches of (i) any electronic devices that students bring to school and (ii) all data and communications stored or transmitted on the WCS network.

In so doing, the guidelines overstep the school district's authority and impermissibly burden the First and Fourth Amendment rights of WCS students. As the United States Supreme Court famously held in the landmark case *Tinker v. Des Moines Independent Community School District*, students do not "shed their constitutional rights . . . at the schoolhouse gate." 393 U.S. 503, 506 (1969).

The Policy demonstrates a fundamental misunderstanding of the constitutional rights of WCS students. Requiring students to sign an agreement waiving constitutional protections in order to participate in fundamental school activities is not permissible. We ask that the Williamson County Board of Education (the "Board") take immediate action to correct this misunderstanding and modify the Policy to comply with the First and Fourth Amendment rights of WCS students.

### **Factual Background**

ACLU-TN and EFF were contacted by the parent of a student at Williamson County Schools. The Policy was sent home with the student, and our client had immediate concerns that the Policy violated the Constitution. As a result of his refusal to sign the Policy on his child's behalf, his child was denied the opportunity to participate in classroom activities using the school's computers. Not wanting his daughter to be excluded from meaningful educational experiences, our client ultimately signed the Policy, although his concerns remain.

### **Legal Analysis**

#### **A. The Policy Impermissibly Infringes On Students' First Amendment Rights Through Regulating Students' *Off-Campus* Speech.**

Section 5 of the Policy, entitled "Social Media Use," provides that "[s]tudents participating in *any* social media site are not permitted to post photographs of other students or WCS employees without permission from a teacher." *See* Policy, p. 3 (emphasis added). Section 5 further provides that "[p]ersonal social media use, *including use outside the school day*, has the potential to result in disruption in the classroom" and "[s]tudents are subject to consequences for *inappropriate, unauthorized, and illegal* use of social media." *See id.* (emphasis added).

On their face, these guidelines apply to virtually *all* online communication by WCS students (including adults), regardless of whether the speech occurs on or off campus. The guidelines reach beyond constitutionally unprotected and unlawful behavior and proscribe extremely broad (and vague) classes of speech—

namely, all “inappropriate” and “unauthorized” social media speech, and any posts involving photographs of any other WCS student or employee, regardless of who took the photograph or where it was taken. In so doing, the Policy violates clearly established First Amendment rights of WCS students.

Forty-five years ago, in *Tinker v. Des Moines*, the United States Supreme Court held that the First Amendment protects the free speech rights of students and teachers. 393 U.S. at 506. Indeed, three years later, the high court stated that the “vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” *Healy v. James*, 408 U.S. 169, 180 (1972). In *Tinker*, the Supreme Court held that “to justify prohibition of a particular expression of opinion,” school officials must demonstrate that “the forbidden conduct would *materially and substantially interfere* with the requirements of appropriate discipline in the operation of the school.” 393 U.S. at 509 (emphasis added) (quotation marks omitted).

*Tinker* involved only *on-campus*<sup>1</sup> speech. Although courts are divided as to whether *Tinker*'s substantial disruption test governs students' *off-campus* speech,<sup>2</sup> it is undisputed that a school cannot restrict *non-disruptive* off-campus speech.<sup>3</sup> Indeed, when “school officials venture[] out of the school yard and into

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<sup>1</sup> For purposes of this letter, the phrase “on-campus” speech refers to speech communicated at school or at a school-sponsored event.

<sup>2</sup> See *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 619 (5th Cir. 2004) (noting that some courts have applied the *Tinker* standard in evaluating off-campus student speech later brought on-campus by persons other than the speaker, while other courts have found that off-campus speech is entitled to full First Amendment protection even when it makes its way onto school grounds without the assistance of the speaker); see also *J.S. ex rel. Snyder v. Blue Mountain School Dist.*, 650 F.3d 915, 937 (3d Cir. 2011) (J. Smith, concurring) (collecting cases).

<sup>3</sup> See *Morse v. Frederick*, 551 U.S. 393, 405 (2007) (“Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected.”) (citing *Cohen v. California* 403 U.S. 15 (1971) (holding that the State may not make a simple public display of a four-letter expletive a criminal offense)); *id.* at 434 (Stevens, J., joined by Souter and Ginsburg, JJ., dissenting) (pointing out without objection that speech promoting illegal drug use, even if punishable when expressed at a public school, would “unquestionably” be protected if uttered elsewhere); see also *Saxe v. State College Area School Dist.*, 240 F.3d 200, 216 n. 11 (3d Cir. 2001) (noting that if the school’s anti-harassment policy were interpreted to apply off-campus, it “would raise additional constitutional questions”); *Nuxoll v. Indian Prarie School Dis.*, 523 F.3d 668, 674 (7th Cir. 2008) (school rule prohibiting derogatory comments “probably would not wash if it were extended to students when they [were] outside of the school, where students who would be hurt by the remarks could avoid exposure to them”).

the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena.” *Thomas v. Bd. Of Educ., Granville Central School Dist.*, 607 F.2d 1043, 1050 (2nd Cir. 1979).

The Board’s Policy violates the First Amendment by creating an impermissible prior restraint on WCS students’ off-campus speech—even speech that does not materially and substantially disrupt the functioning of WCS classrooms. See *Layshock ex rel. Layshock v. Hermitage School Dist.*, 650 F.3d 205, 216–19 (3d. Cir. 2011) (holding that a school district did not have authority to punish a student for the off-campus creation of a lewd and offensive fake Myspace profile of his principal); see also *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870, 885 (1997) (holding that the Internet is a free speech zone and striking down the 1996 Communications Decency Act, which sought to control indecent communications on line). Through conditioning WCS students’ ability to participate in classroom activities involving computers or the Internet on their submission to such a policy, WCS violates clearly established constitutional law.

The Policy also gives school officials unfettered discretion to determine if students’ off-campus speech is “inappropriate” or “unauthorized” and thus subject to sanction. See *Forsynth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992) (holding unconstitutional an “ordinance [that] contains more than the possibility of censorship through uncontrolled discretion”). The Policy’s exceedingly broad prohibitions run afoul of vagueness and overbreadth doctrines, which ensure that regulations of speech are “carefully drawn or . . . authoritatively construed to punish only unprotected speech” and not “susceptible of application to protected expression.” *Gooding v. Wilson*, 405 U.S. 518, 522 (1972); see also *Reno*, 521 U.S. at 871–72 (1997) (“The vagueness of [a content-based speech regulation] raises special First Amendment concerns because of its obvious chilling effect on free speech.”).

It is immaterial that the Policy restricts speech solely as a condition of participation in the school’s computer and Internet program. As the Supreme Court has made clear, “the Government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.” *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2328 (2013). Moreover, here, denial of participation in WCS’s computer and Internet program does not merely deny students a benefit, it denies them an equivalent education—to which they are unquestionably entitled. Indeed, experiences at school involving computers and the Internet are, in this modern world, fundamental to a complete education.

**B. The Policy Impermissibly Infringes On Students' Fourth Amendment Rights To Be Free From Unreasonable Searches And Seizures.**

**1. The Policy subjects *all* students to suspicionless searches of their BYOT devices without any rationale that justifies such a considerable intrusion.**

Section 4 of the Policy, entitled “Student Participation in Bring Your Own Technology (BYOT) Program,” provides that “[t]he school district may collect and examine any device at any time for the purpose of enforcing the terms of this agreement, investigating student discipline issues, or for any other school-related purpose.” *See* Policy, p. 2.

This provision subjects students to searches of any BYOT devices brought to school, at any time and for any “school-related” purpose, regardless of whether the school official conducting the search has reasonable suspicion that the search will turn up evidence of wrong-doing. Through subjecting students to suspicionless—and limitless—searches of their BYOT devices for essentially any purpose and without any rationale that justifies such a considerable intrusion, the Policy impermissibly infringes on WCS students’ Fourth Amendment rights.

The United States Supreme Court held in *New Jersey v. T.L.O.* that the Fourth Amendment’s “prohibition on unreasonable searches and seizures applies to searches conducted by public school officials.” 469 U.S. 325, 333 (1985). The Court held that for searches by school officials, “a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause.”<sup>4</sup> *Id.* at 341. The Court thus applied “a standard of reasonable suspicion to determine the legality of a school administrator’s search of a student.” *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 370 (2009) (citing *T.L.O.*, 469 U.S. at 342, 345). According to the Court, “[u]nder ordinary circumstances, a search of a student by a teacher or other school official will be ‘justified at its inception’ when there are reasonable grounds for suspecting that the search will

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<sup>4</sup> Although the Fourth Amendment “right of the people to be secure in their persons . . . against unreasonable searches and seizures” generally requires a law enforcement officer to have probable cause for conducting a search, in *T.L.O.*, the Court recognized that “[t]he school setting . . . requires some modification of the level of suspicion of illicit activity needed to justify a search.” 469 U.S. 325, 340 (1985).

turn up evidence that the student has violated or is violating either the law or the rules of the school.” *T.L.O.*, 469 U.S. at 341–42.

Since *T.L.O.*, the Supreme Court has established that suspicionless school searches may be justified where the “special need” of deterring drug use makes “the warrant and probable-cause requirement impracticable.” *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (upholding a school district’s policy of subjecting student athletes to random, suspicionless drug tests); *see also Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002) (holding that schools could conduct random, suspicionless drug tests of any student who participated in competitive extracurricular activities so long as participation was conditioned on consent to such drug testing). In both *Vernonia* and *Earls*, the Court balanced three factors: (1) the scope of the students’ legitimate expectation of privacy; (2) the nature of the intrusion; and (3) the need for, and the effectiveness of, the intrusion in furthering a governmental interest. *Vernonia*, 515 U.S. at 664–65; *Earls*, 536 U.S. at 830–37. And in both cases, the Court found that the searches were narrowly tailored and conducted for a compelling purpose—deterring drug use by students involved in certain extracurricular activities. *See Vernonia*, 515 U.S. at 661, 662 (noting that the drug-testing policy was directed “narrowly to drug use by student athletes” and stating, “[t]hat the nature of the concern [detering student drug use] is important—indeed, perhaps compelling—can hardly be doubted”); *Earls*, 536 U.S. at 834 (relying on the “limited uses to which the [drug] test results are put” in concluding that the tests did not significantly burden students’ privacy and finding that “the national drug epidemic makes the war against drugs a pressing concern in every school”).

WCS’s Policy goes far beyond *Vernonia* and *Earls* and fails to meet constitutional scrutiny for a number of reasons. First, nothing in the policy limits the scope or purpose of searches of students’ BYOT devices. Instead, the Policy permits a search of any BYOT device at any time for any “school-related” purpose, whether or not the interest underlying the search is important or compelling. The Policy also places no limits on the type of data that can be extracted from the device during the search or how the data can be used. Subjecting students to such “full-scale, suspicionless searches eliminates virtually all of their privacy,” and the Policy here does so without any rationale “that would justify so considerable an intrusion.” *See Doe v. Little Rock Sch. Dist.*, 380 F.3d 349, 352–53 (8th Cir. 2004) (holding that a school district’s policy of conducting random, suspicionless searches of students’ belongings violated the Fourth Amendment). Moreover, through employing purposefully vague language (*i.e.*, “school-related”) and through failing to put limits on the scope of BYOT searches, the Policy invites the arbitrary and abusive use of such searches.

Second, the authorized searches are highly intrusive—*i.e.*, searches of a student’s electronic devices, including “smart” cell phones, which contain a significant amount of data about the student and, quite likely, the students’ family. *See Riley v. California*, 134 S. Ct. 2473, 2488–89 (2014) (“Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. . . . The term ‘cell phone’ is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone.”).

Third, the Policy applies to *all* WCS students, not merely a subset of students who “voluntarily participate in school athletics” or competitive extracurricular activities. *See Vernonia*, 515 U.S. at 657; *Earls*, 536 U.S. at 831. Because the entire student body—including those over the age of 18—is subject to the Policy as a condition of participating in fundamental educational programming, it simply cannot be said that the students are “voluntarily” making a tradeoff between their right to privacy and the privilege of using computers or the Internet at school. *See Doe*, 380 F.3d at 354 (rejecting the argument that students had “made some voluntary tradeoff of some of their privacy interests in exchange for a benefit or privilege” where the entire student body was subject to the challenged search).

**2. The Policy subjects *all* students to suspicionless searches of their network data and communications without any rationale that justifies such a considerable intrusion.**

Section 6 of the Policy, entitled “Network Security,” provides that “[a]ll network users may be monitored at any time by authorized personnel for the purpose and inspection of compliance to these guidelines.” *See* Policy, p. 5. Furthermore, Section 13 of the Policy, entitled “E-mail,” provides that student e-mail accounts<sup>5</sup> “are filtered for content and monitored by authorized personnel.” *Id.* at p. 6.

These provisions subject students, at all times, to searches of their data and communications stored or transmitted on the WCS network—whether or not they are suspected of wrongdoing. Through subjecting students to suspicionless searches of their network data and communications, the network security and email guidelines—like the guideline regarding BYOT searches—impermissibly infringe on WCS students’ Fourth Amendment right to be free from unreasonable

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<sup>5</sup> The Policy indicates that WCS students in grades 3 through 12 will be issued e-mail accounts “for the purpose of completing school work.” *See* Policy, p. 6.

searches and seizures, in this case, unreasonable searches and seizures of their data and communications stored or transmitted on the WCS network.

WCS's Policy incorrectly presumes that students have no reasonable expectation of privacy to data and communications stored on or transmitted through WCS's network. Just as government employees using a government network, however, students do have a reasonable expectation of privacy in their network data and communications. See *United States v. Long*, 64 M.J. 57, 59–60 (C.A.A.F. 2006) (finding that a member of the Navy had a reasonable expectation of privacy in the emails she sent over the government's server notwithstanding a banner advising her that she had no legitimate expectation of privacy and that her use of the network was subject to monitoring); see also *People v. Wilkinson*, 20 Misc. 3d 414, 421 (N.Y. Co. Ct. 2008) (holding that police officers had legitimate and reasonable expectation of privacy in their police department computers). As such, the monitoring of such data and communications constitutes a search and must comply with the requirements of the Fourth Amendment.

As explained above, the Fourth Amendment permits suspicionless "special need" student searches only in limited circumstances. Here again, WCS's Policy goes far beyond the circumstances under which suspicionless student searches are justified. First, students have a strong privacy interest in the data and communications stored or transmitted on the WCS network. Indeed, such data and communications may contain sensitive and private information. Second, the Policy is not limited in scope or purpose, authorizing limitless searches of potentially sensitive and private information for essentially any reason. The Policy thus permits highly invasive searches without any rationale to justify such a considerable intrusion. Furthermore, the Policy applies to all students, not a mere subset of the student population who voluntarily participate in some specific extracurricular activity. The Policy therefore does not pass constitutional scrutiny.

### **Conclusion**

The Board's Policy fails to withstand the most basic First and Fourth Amendment scrutiny. The Policy oversteps the school district's authority, impedes on the constitutional rights of WCS students, and reveals a fundamental misunderstanding of students' rights. We ask that the Board act swiftly to modify the Policy—in addition to any other WCS policies in which the constitutionally



infirm provisions discussed above appear<sup>6</sup>—to comply with the constitutional rights of WCS students.

We appreciate your swift attention to resolving this matter. If you have any questions or would like more resources regarding the constitutional rights of students, please feel free to contact me directly at either (615) 320-7142 or [REDACTED] so that we can discuss a timely resolution of the issues addressed in this letter.

Sincerely,



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cc: P.J. Mezera, Board Chairman, [REDACTED]  
Dr. Beth Burgos, Board Vice-Chairman, [REDACTED]  
Kenneth Peterson, Board Member, [REDACTED]  
Dan Cash, Board Member, [REDACTED]  
Paul Bartholomew, Board Member, [REDACTED]  
Gary Anderson, Board Member, [REDACTED]

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<sup>6</sup> For example, the WCS Computer Guidelines include the unconstitutional network and e-mail monitoring provisions discussed in detail above.

Jay Galbreath, Board Member, [REDACTED]  
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