



November 3, 2020

Grumpy Farmer
President, Board of Education
1220 Apple Park Place
Brandon, MS 39042
via email: grumpy.farmer@rcsd.ms

Re: *Unconstitutional Discrimination Against Political Messages*

Dear Mr. Farmer,

This letter is regarding the viewpoint discriminatory enforcement of Northwest Rankin High's dress code policy to prohibit our client from wearing facemask reading "Trump -2020- Keep America Great!" while others are allowed to continue to wear expressive masks. The First Amendment protects the rights of all students to express themselves and students may not be discriminated against simply because their message may be unpopular with some.

Alliance Defending Freedom represents Mr. David Ferguson, a Junior at Northwest Rankin High. By way of introduction, ADF's Center for Academic Freedom is dedicated to ensuring freedom of speech and association for students and teachers so that everyone can freely participate in the marketplace of ideas without fear of government censorship. We have a track record of success.¹

¹ Alliance Defending Freedom has consistently achieved successful results for its clients before the United States Supreme Court, including nine victories before the highest court in the last nine years. See, e.g., *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018) (upholding ADF's client's free speech rights against the State of California); *Masterpiece Cakeshop, LTD. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (upholding ADF's client's First Amendment rights); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (upholding ADF's client's First Amendment rights); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (representing Geneva College and Southern Nazarene University in consolidated cases) (upholding ADF's clients' First Amendment rights); *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015) (unanimously upholding ADF's client's free-speech rights); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (representing Conestoga Wood Specialties Corp. in consolidated case) (striking down federal burdens on ADF's client's free-exercise rights); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (upholding a legislative prayer policy promulgated by a town represented by ADF); *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (upholding a state's tuition tax credit program defended by a faith-based tuition organization represented by ADF).

On behalf of our client we request that you immediately permit him to resume wearing his Trump facemask, revise the policy to prohibit further discrimination, and provide training to your staff regarding students' First Amendment freedoms.

Factual Background

On or about September 30, 2020, Mr. David Ferguson was approached in the hall by assistant principal Lewis Bradford. Mr. Bradford informed Mr. Ferguson that he must remove his Trump facemask because it was “political” and provided him with a plain mask that he wore the rest of the day. Mr. Ferguson respectfully complied to avoid discipline. Mr. Ferguson wants to continue to wear, but has not worn, his Trump facemask since this incident for fear of being punished under the School’s Dress Code for students.



Apparently, other students and teachers are allowed to wear facemasks and other clothing with political messages without reprimand—including messages supporting Biden, BLM, and Rainbow masks.

Contrary to what Mr. Ferguson was told, the Dress Code does not appear to prohibit him from wearing a Trump mask. JCDB Dress Code for students only prohibits clothing and masks “with suggestive, obscene, disruptive, or vulgar designs, pictures, symbols, slogans or statements that cause a disruption to or detract from the educational process.” However, it appears the policy gives too much discretion to administrators to censor viewpoints such as Mr. Ferguson’s while permitting other opposing viewpoints.

Analysis

The application of this policy to prohibit Mr. Ferguson from wearing a Trump facemask violates long-standing First Amendment principles. It is well settled that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”² This is because American public schools prepare students to be citizens. “It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.”³ This, of course, includes “tolerance of divergent political and religious views, even when the views expressed may be unpopular.”⁴

To that end, schools may prohibit “vulgar speech and lewd conduct,”⁵ or speech that is reasonably likely to “materially and substantially disrupt the work and discipline of the school.”⁶ But, “[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.”⁷ Thus, a school cannot prohibit speech based on “undifferentiated fear or apprehension of disturbance” or the “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”⁸

This is particularly true when it comes to viewpoint discrimination. “It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.”⁹ Nor may the government engage in viewpoint discrimination, which is “an egregious form of content discrimination.”¹⁰ “Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional.”¹¹ By specifically targeting certain “political expression” while also permitting other political expression, the school has engaged in content and viewpoint discrimination in violation of the First Amendment. This ban on masks with messages supporting Trump is an unconstitutional prior restraint. Moreover, the policy grants too much discretion to administrators to discriminate based on the content of student’s expression.

To avoid impermissibly discriminating based on the content or viewpoint of speech, a school must do more than just avoid discriminatory enforcement. It must

² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

³ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986).

⁴ *Id.*

⁵ *Id.* at 685.

⁶ *Tinker*, 393 U.S. at 513.

⁷ *Id.* at 511.

⁸ *Id.* at 508.

⁹ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995).

¹⁰ *Id.* at 829.

¹¹ *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015).

also restrain the discretion of the responsible school officials through “narrow, objective, and definite standards.”¹² The policy here fails to do so.

All students, regardless of their political viewpoints, should be free to express themselves through civil discourse in the marketplace of ideas. It ill serves the next generation to silence them by telling them that their viewpoints in support of the re-election of the sitting president are not permissible in public.

Conclusion

Based on the foregoing, it is requested that you 1) respond today to confirm that my client will no longer be prohibited from wearing his Trump facemask or clothing with other similar political messages, 2) revise Policy JCDB to expressly prohibit school staff from engaging in viewpoint discrimination in the future, and 3) provide training for school administrators regarding the First Amendment as it relates to student speech.

Sincerely,



Caleb Dalton
Legal Counsel
ADF Center for Academic Freedom

cc: P. Sharkey Burke Jr.
Anderson, Crawley & Burke, PLLC
sburke@acblaw.com

Dr. Sue Townsend
Superintendent of Education
stownsend@rcsd.ms

Benjamin Stein, Principal Northwest Rankin High
bstein@rcsd.ms

Freddie Harrell, Board Attorney
fred@harrellrester.com

¹² *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992).