

VIA EMAIL

December 20, 2023

Big Walnut Local Schools Board of Education
c/o Doug Crowl, President
110 Tippet Court
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Dougcrowl@bwls.net

RE: Big Walnut Local School District Flags and Displays Policy - 8805

Dear Members of the Big Walnut Local Schools Board of Education,

The ACLU of Ohio has recently become aware of Big Walnut Local School District Policy 8805, pertaining to “Flags and Displays,” which was included on the Board of Education’s meeting agenda on December 14. We write to express our grave concerns with this policy, which is unconstitutional in multiple respects, and to urge this School Board to repeal it. Should you fail to do so, we may be forced to take legal action.

At the outset, Policy 8805 is vague to the point of incoherence. For example, it contains no language specifying what expression the School Board does, or does not, purport to allow. It states merely that it “applies to displays affixed to the grounds” and other areas, and that it “applies to any electronic messaging ... on the district’s network[.]” That language is followed by a list of vague categories but contains little or no explanatory language on whether those categories are required, permitted, or prohibited, or under what circumstances.

Yet even if Policy 8805 were coherent enough to be enforced, it would be a brazen attack on students’ First Amendment rights to free expression. The Supreme Court has repeatedly held that free speech protections extend to “teachers and students,” neither of whom “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969). This bedrock principle of First Amendment jurisprudence ensures schools do not become grounds for authoritarian control over the future of our democracy.

Similarly, the First Amendment prohibits viewpoint discrimination. *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995). Public schools may prohibit private on-campus speech only insofar as it substantially interferes with or disrupts the educational environment or interferes with the rights of other students. *Tinker*, 393 U.S. at 509; accord *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038, 2044 (2021). Actual evidence or reasonable forecast of substantial disruption is required—“undifferentiated fear or apprehension of disturbance” is insufficient. *Tinker*, 393 U.S. at 508; *Mahanoy*, 141 S. Ct. at 2047.



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Policies banning certain flags or only allowing some flags to be displayed in public schools, absent any evidence of substantial disruption, are contrary to the First Amendment protections afforded to students within those schools. *Tinker*, 383 U.S. at 509; *see also Shurtleff v. City of Boston*, 596 U.S. 243, 256–59 (2022) (city engaged in unconstitutional viewpoint discrimination by prohibiting citizens from flying only certain flags on public flagpoles). Students have rights to convey messages that others deem controversial or offensive. *Sypniewski v. Warren Hills Reg’l Bd. Of Educ.*, 307 F.3d 243, 264–65 (3d Cir. 2002). A “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint” cannot justify the restriction of the display of flags deemed controversial. *Tinker*, 393 U.S. at 509.

Just as disturbingly, although the policy itself is impenetrably vague, the School Board’s intention in passing it is anything but. The School Board has been quite clear that its motive in introducing and/or passing this policy is to suppress particular viewpoints—specifically, the expressions that a handful of students and parents find personally offensive, including Pride flags or other particular messages. The School Board’s own members have openly admitted that their purpose was to disfavor some categories of speech:

- Board member Doug Crowl, in explaining the need for the resolution, said, “Let’s just say we have a child, who grew up in a household that’s very religious. Okay? You think that they’re not feeling condemned when they’re walking into a room?” When asked why someone would feel condemned by a flag, he responded, “because it doesn’t follow their beliefs,” but a minute indicated, “This resolution doesn’t say flag, the gay flag, or the pride, whatever you want to call it.”¹
- Board member Alice Nicks added, “...the people who have reached out to me would be very relieved to go into a classroom where it’s not in their face.”²
- Board member Doug Crowl, said, “This policy will give us the authority, since we don’t have one currently...to control the flags and displays in the classroom, so when someone wants to come up and start a Satan club, let’s say, as an example, they can do that as a student club, but their Satan flag isn’t gonna be there in the morning.”³
- Board member Alice Nicks said, “I would like to again remind everyone where this originated. Back in August, when parents came to me about their student being uncomfortable, not respected in the classroom where the flag was flying and I reached out to Mr. McLane, who very, very honestly said, we need a policy we need a policy. I cannot do anything without a policy.”⁴
- Board member Todd Smith, in condemning the resolution, said, “The resolution has been proposed because a teacher allegedly has a pride flag hanging in the classroom...The trouble is, they don’t want anyone else to know about the LGBTQ+ community either.

¹ Board member Doug Crowl, Big Walnut Local Schools Board of Education Meeting (Nov. 16, 2023).

² Board member Alice Nicks, Big Walnut Local Schools Board of Education Meeting (Nov. 16, 2023).

³ Board member Doug Crowl, Big Walnut Local Schools Board of Education Meeting (Dec. 14, 2023).

⁴ Board member Alice Nicks, Big Walnut Local Schools Board of Education Meeting (Dec. 14, 2023).

These individuals want to ban from public view any positive and/or encouraging reference to the LGBTQ+ community. Their biggest fear is that the people in this community, here, in Big Walnut, see members of the LGBTQ+ community as people who have the hopes, dreams, fears, loves and losses that we all have as humans. If they see that, then it's nearly impossible to subjugate them into a lesser class of being.”⁵

The School Board's stated discriminatory motives condemn this policy. Even if a government restriction is neutral on its face—which Policy 8805 is not—courts will not regard it as content-neutral ““when the purpose and justification for the law are content based[.]”” *Int'l Outdoor, Inc. v. City of Troy, Michigan*, 974 F.3d 690, 703 (6th Cir. 2020) (citing *Reed v. Town of Gilbert*, 576 U.S. 155, 166 (2015)); see also *City of Austin v. Reagan Nat'l Advertising, LLC*, 596 U.S. 61, 76 (2022) (“If there is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction, for instance, that restriction may be content based.”). Here, one need not look any further than the School Board's own meetings to understand that the motive behind Policy 8805 was to remove the display of a Pride flag from a classroom.

We urge the Big Walnut Local Schools Board of Education to repeal this unconstitutional policy. Please be advised that we will shortly be submitting a request for public records for further investigation. We look forward to your prompt action addressing this matter.

Sincerely,



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Members of the Big Walnut Local Schools Board of Education

⁵ Board member Todd Smith, Big Walnut Local Schools Board of Education Meeting (Nov. 16, 2023).