Cornell Law School

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Batavia City Schools Board of Education
260 State Street
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Dear Board Members:

We are writing on behalf of the Cornell Law School First Amendment Clinic to comment on the proposed recommendations Superintendent Anibal Soler made at your October 19, 2020 Board of Education meeting in connection with drafting a Board public expression policy. The Clinic regularly represents local journalists and news outlets throughout New York that would be impacted by the implementation of a number of these recommendations at your Board meetings or at meetings in other local communities that may going forward look to your policy as a model.

We understand that the proposed policy recommendations were made by Superintendent Soler in response to your Board President's desire to increase the public's access to the Board. We appreciate that you are taking steps to allow community members to voice their concerns at meetings. However, certain of these provisions, if enacted, could be found by a court to violate the First Amendment. Thus, we request that you consider revising or removing certain provisions.

First, we recommend that the following language be revised or removed from page 4, paragraph 2: "The Board cannot and will not permit public discussions involving individual district personnel or students." This provision deters members of the public from exercising their right to comment on or criticize the performance of public officials at Board of Education meetings. This right to comment is protected even when the comments are "vehement, caustic, and sometimes unpleasantly sharp."[1] For example, a court struck down a Virginia school board policy prohibiting "attacks or accusations regarding the honesty, character, integrity or other like personal attributes of any identified individual" because it violated the First Amendment.[2] The above language in the proposed recommendations, like the Virginia school board policy, impermissibly "deters individuals from speaking out on an issue of public importance[.]"[3]

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[1] *Shulman v. Hunderfund,* 12 N.Y.3d 143, 147 (2009) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).
[2] *Bach v. School Bd. of Va. Beach*, 139 F. Supp. 2d 738, 741, 743 (E.D. Va. 2001).
[3] *Id.* at 743.

Second, we recommend that the Board remove the following language from page two, paragraph five: "Obscene language, libelous statements, threats of violence, statements advocating racial, religious, or other forms of prejudice will not be tolerated." These restrictions as currently written are overly broad and impermissibly vague. First, it is a basic tenet of First Amendment jurisprudence that speech cannot be restrained in anticipation of libel.[4] Rather, the appropriate remedy for an alleged libel is a civil suit for money damages. Second, the quoted language as a whole, and in particular "other forms of prejudice," is impermissibly vague and provides too much discretion to the Board to restrain certain viewpoints. Further, because these terms are not well defined and left to the determination of the Board President, there would likely be a chilling effect on public speech at Board meetings.[5]

Third, we recommend changing the proposed procedure for public comment. The proposed policy states on page 2 that "[p]ersons wishing to address the Board shall advise the Board President prior to the scheduled starting time of the meeting." The policy requires that the request be submitted in writing via a form, which includes the speaker's name, address, organization, and the topic to be discussed. This requirement runs afoul of the state Committee on Open Government's admonition that "a person cannot be required to identify her/himself as a condition precedent to attending a meeting, speaking during a meeting, or otherwise communicating in relation to a meeting."[6] Further, should the Board choose to continue using the form, we would encourage the Board to strike guideline number four, which grants the Board President too much discretion regarding what topics are "generally appropriate." This pre-clearance requirement may facilitate viewpoint discrimination and constitute an unlawful prior restraint. Providing the Board President or any elected official wide-ranging veto power over the appropriateness of topics for public comment risks substantial infringement of the public's First Amendment rights.

Finally, to the extent that the Board President's related suggestions at the October 5, 2020 Board meeting are also still under consideration, we would like to raise two concerns. First, if the Board chooses to accept questions in advance, then the Board should either post all questions in a publicly accessible location or read all questions aloud at the Board meeting. The Board should steer clear of selectively choosing which questions it will read aloud at meetings because this could trigger First Amendment viewpoint discrimination concerns. Second, the selection of questions and pre-writing of answers could potentially raise Open Meetings Law concerns. New York's Open Meetings Law dictates that "public business be performed in an

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[4] *See, e.g., Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931) ("[I]t has been generally, if not universally, considered that it is the chief purpose of the [First Amendment's] guaranty to prevent previous restraints upon publication."); *Page v. Oath Inc.,* No. 17 CIV. 6990 (LGS), 2018 WL 1474620, at *1 (S.D.N.Y. Mar. 26, 2018), *aff'd sub nom. Page v. United States Agency for Glob. Media*, 797 F. App'x 550 (2d Cir. 2019) (holding that request to enjoin defendant from "using his name to continue the spread of discriminatory, libelous, slanderous, misleading and false information about him" was "a classic example of a prior restraint, which is both offensive to the First Amendment and contrary to the public interest").

[5] *See, e.g., Keyishian v. Bd. of Regents of Univ. of State of N. Y.,* 385 U.S. 589, 604 (1967) ("When one must guess what conduct or utterance may [result in consequences], one necessarily will 'steer far wider of the unlawful zone.'").

[6] Comm on Open Gov't Advisory Opinion OML-AO-5607 (Feb. 22, 2019), https://docs.dos.ny.gov/coog/otext/o5607.htm.

open and public manner."[7] Thus, the Board should take care to avoid discussion of matters of public concern in contravention of the Open Meetings Law. Additionally, the Board must ensure that members of the public who submit questions to the Board are treated in the same manner.[8] This could be accomplished by reading all questions aloud at a meeting or otherwise making such questions available to the public to ensure members of the public are treated equally.

Once again, we would like to express our appreciation of the Board's efforts to increase transparency and public participation at Board meetings. By incorporating the recommendations that we have outlined above, we believe that the Board's goals in implementing this policy can be met without the risk of violating the First Amendment and New York's Open Meetings Law.

If you wish to discuss the matter further, please feel free to contact us. Thank you for your attention and the courtesy of a reply prior to implementing the policy.

Sincerely,

CORNELL LAW SCHOOL
FIRST AMENDMENT CLINIC

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[7] N.Y. Pub. Off. Law § 100.
[8] *See* Comm on Open Gov't Advisory Opinion OML-AO-5607 (Feb. 22, 2019), https://docs.dos.ny.gov/coog/otext/o5607.htm.