



THE FAMILY
POLICY COUNCIL
OF WEST VIRGINIA

Legislative Testimony of

Jeremiah G. Dys, Esq.,

President and General Counsel

The Family Policy Council of West Virginia

Prepared by Jeremiah G. Dys, Esq.,

For the Joint Committee on Education, Subcommittee C

November 27, 2012

Legislative Testimony

Delegate Poling, Senator Plymale, Delegate Craig, Senator Laird, members of the committee, thank you for your invitation to speak to the important issue of harassment in our public schools. I am grateful to be able to join you in the effort to establish a system of rules that will apply equally and fairly to all students, while combatting the growing problem of harassment and bullying.

This morning, I want to help you evaluate the current standards against bullying and harassment according to the important principles found in the First Amendment, especially how our current law works against the important principles of the freedom of speech and religious liberty for both students and teachers. Then, I hope we might launch a dialog with you that will end by ensuring that the rules governing harassment at schools will apply equally and fairly to all West Virginia students.

Before I explain how the current law and regulations unfairly censor important First Amendment freedoms, allow a very brief history to help us understand why we are discussing this today.

In 2011, the West Virginia Legislature considered and passed House Bill 3225. Several members asked my input on this bill and I agreed with them that the bill was well-intentioned and looked to solve a growing loophole in our laws on harassment, namely what we have come to understand as, "cyberbullying."

After House Bill 3225 passed and was signed into law, the West Virginia Department of Education engaged in rulemaking for the purpose of enacting that new section of code, along with other changes. The result was Proposed Policy 4373 which is understood, in part, through its title, "Expected Behavior in Safe and Supportive Schools."

Officials with the West Virginia Department of Education consulted with various “stakeholders” in developing this new policy. Social workers and teachers unions were among them, as were guidance counselors and even a same-sex advocacy organization and the ACLU.

To the best of my knowledge, few – if any – First Amendment advocates were invited to help shape this new policy. Nor were there a great number of parents invited to the position of “stakeholder” in developing this new policy.

About a year ago at this time, the public comment period for this new regulation was closing. Hundreds of comments poured into the West Virginia Board of Education, yet, oddly, several hundred of the comments from parents and citizens who expressed their concern about how Proposed Policy 4373 could affect student and teacher First Amendment freedoms were, in the main, dismissed as not germane to the proposal.

Soon thereafter, the West Virginia Board of Education adopted Proposed Policy 4373 and the same went into effect this past July as a part of 126 C.S.R. 99.

During the 2012 Legislative Session, several members expressed concern that the new policy not only went beyond its legislative scope, but could unfairly limit student and teacher religious speech. As a service to them, we drafted Senate Bill 446 that amended West Virginia Code §18-2C-2 in a manner that would more fully align West Virginia law with the First Amendment.

Senate Bill 446 passed the Senate Committees on Education and the Judiciary, but, just three days before cross over day, the bill was pulled from the floor by the Senate Majority Whip, as I understand it, at the request of the Senate President.

Since several senators had been strong advocates of the measure and other members of the House of Delegates had wanted additional discussion on the matter, members requested a study of this issue and, so, here we are today discussing it more fully.

We are concerned that, absent some necessary legislative alterations to the current law, West Virginia Code §18-2C-2 and Section 2, 126 C.S.R. 99 may unfairly apply to students and teachers and work contrary to the First Amendment to the Constitution.

Schools are not permitted to censor speech simply because someone subjectively defines such speech to be, “offensive” or determines it to be outside the “boundaries of socially appropriate behavior.”

In introducing the new regulations on harassment, the West Virginia Department of Education says that, QUOTE “[s]chools may limit vulgar or offensive speech inconsistent with the school’s responsibility for teaching students the boundaries of socially appropriate behavior.” UNQUOTE See Section 2, 126 C.S.R. 99. This, then, is perhaps our strongest objection to these new regulations and most readily demonstrates the potential for inequitable application of this new law, especially against the First Amendment freedoms of both students and teachers.

Without defining it, the West Virginia Department of Education – and anyone in their employ – has assumed the right to censor speech. Granted, the Department has qualified that only vulgar or offensive speech is to be censored and limited, but it has failed to advance any guidance as to what constitutes, “offensive speech.”

If you are a fan of fried chicken, you may recall that this summer millions of Americans flocked to Chick-fil-A to demonstrate their support for marriage as the union of one man and one woman. Their chief operating officer has been excoriated and deemed a bigot, why? Because some found his spoken belief that marriage is the loving and lifelong union between one man and one woman to be offensive speech.

Around that same time, an organization – one that, in fact, had been deemed a stakeholder in the development of Proposed Policy 4373 – sent a letter to President Clements of West Virginia University. In it, they demanded that WVU’s Chick-fil-A be removed from campus. In support, it cited Chick-fil-A’s financial backing of such “bigoted and homophobic” groups as the Fellow-

ship of Christian Athletes. How long before this same organization seeks the limiting of speech by such an organization at your local high school?

About a year ago at this time, a first grade student in West Virginia was given an assignment that would be published in the county newspaper. The teacher had already written two words on a blank piece of paper. The assignment was to finish the sentence with whatever the student wished to include on the paper. The two words were, "Christmas means:_____." One little boy, carefully penned the thoughtful answer that he had been taught at home and at church. He wrote, "Christmas Means: Jesus' birthday."

A day or so later, he received his wide-ruled paper back from his teacher. On the face of the assignment over the words he had written, "Jesus' birthday," were 3 black lines. His teacher informed him that his simple answer was a violation of the separation of church and state. One teacher deemed the simple words of a first grader's assignment to be "offensive speech" and took it upon herself to censor it.

More recently, students at Sissonville High School asked a pastor to lead a public invocation prior to the high school's football game. That pastor received a letter from the Freedom From Religion Foundation threatening him and his congregation with litigation should he go through with it. A similar letter was sent to the Kanawha County Schools and its superintendent. Superintendent Duerring, I am told, simply told the local principal to, "Shut it down." A pastor's speech – speech students had personally invited – was limited by the West Virginia public schools.

These are just three examples that we know about where West Virginians and students are having their first freedoms deemed to be offensive and unfairly censored. And this is just as this new regulation is coming into force, before programs, curricula, and in-school seminars are put in place to encourage schools to further limit offensive speech in the name of tolerance.

Rules governing harassment in West Virginia's schools can be applied unequally and unfairly, today, because the West Virginia Department of Education has made "offensive speech" a subjective term and given themselves the authority to limit what the First Amendment protects.

Without a dispassionate, objective standard, student speech may be limited by the subjective determination of an employee of the Department of Education. And, notice what I am saying: student *speech* can be limited. West Virginia's rules on harassment open with a commitment to limiting offensive *speech*, not offensive punches or offensive shoving or offensive gestures. The Department has set its censoring authority on the *speech* of students.

West Virginia laws should apply equally and fairly to all students and work toward increasing speech, not limiting such speech at the discretion of a subjective opinion. Speech is merely an articulation of belief. How long before belief is subjected to censoring within the public schools too? Who will determine whether one person's belief is acceptable and another's is offensive?

A year ago, in another committee meeting, the ACLU of West Virginia gave its full-throated endorsement to Proposed Policy 4373. In endorsing this new speech code, they said that religious intolerance is rightly censored by schools. Who determines whether a student's religious expression is tolerant enough? If our student who had his Christmas assignment deemed a violation of the separation of church and state in the first grade, what happens when, in the eighth grade, he finishes the story of the Grace of Christ toward his friend who is struggling with unwanted feelings of same-sex attraction? Will the ACLU of WV deem the same to be religious intolerance that the Department of Education is under an obligation to limit as offensive speech?

The problem with the new regulation is that it subjects a student's comment, a passing reference in the halls, or a belief respectfully expressed in a classroom discussion to censoring by the schools. In First Amendment language, the new law has a chilling effect on speech.

Instead, West Virginia law should apply equally and fairly to all students. Schools should punish harassing behavior and speech that causes a material disruption to the school. Schools should be permitted to prohibit such harassing behavior that is severe and so continuous that it pervades the school environment and prevents students from accessing their education.

At the same time, the laws of West Virginia ought to expressly encourage a broad range of speech and expression. We share the Department's commitment to protecting every student from harassment while at school. Where we part with the Department is when it takes the authority to limit speech rather than permit more of it.

On this point, and with this I conclude and will be happy to take your questions, the word, "university" is helpful. Yes, I realize that we are discussing issues related to primary and secondary schools, but the principle behind the university is the same as it is for any school. As you likely know, the word, "university" is a compound word derived from the words, "unity" and "diversity."

For centuries, the ideal has been that universities would be those places of higher learning wherein a diverse set of students would find unity in the pursuit of the knowledge of truth. For that to be realized, there must be a diversity of thought, diversity of background, diversity of speech, diversity of religious perspective, and a diversity of persons. Out of that diversity, the unity is found. Though there may be great differences – differences that may often offend one another – students are said to find unity in their common pursuit of the knowledge of truth.

Currently, West Virginia law seeks unity, but expressly limits the diversity that may be permissibly brought to the pursuit of the knowledge of truth. That is unfair to our students and goes against the very fiber of our national heritage where we intend to value more speech, not less, as we seek to be one nation out of many.

Toward that pursuit of the knowledge of truth, of finding unity amidst the diversity, I am happy to serve you. Whether it is by answering your questions now or privately later, it is my hope

that, together, we can create equitable legislation for the 2013 legislative session that will encourage student expression while equally and fairly protecting students from harassment while at school.

Thank you and I am happy to answer any questions and dialog with you further.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jeremiah G. Dys". The signature is fluid and cursive, with a long horizontal stroke at the end.

Jeremiah G. Dys, Esq.,
President and General Counsel