



207 East Buffalo Street, Ste 325  
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aclu-wi.org

## Wisconsin

March 25, 2022

James Sebert  
Superintendent  
School District of Waukesha  
222 Maple Ave.  
Waukesha, WI 53186  
*via email at jsebert@waukesha.k12.wi.us*

Re: Records Request Related to Ban on Controversial Signage

Dear Supt. Sebert:

The ACLU submits this Open Records request, pursuant to Wis. Stat. § 19.35, as part of an investigation into new policies and practices in the School District of Waukesha, namely the District’s ban on “political/controversial” signs, posters, flags, and other displays. We are seeking to assess whether these policies and practices violate constitutional rights and other civil rights of students and teachers and create a hostile environment for some groups of students.

### **I. District’s Ban on Expression of “Controversial/ Political” Topics**

It has been reported that, starting in July 2021, the District abandoned several efforts to improve diversity, equity, and inclusion (DEI) in its schools.<sup>1</sup> The District banned classroom displays deemed “political” or “controversial,” as defined by Board Policy 2240- “Controversial Issues in the Classroom,” “and past practice related to other controversial issues, relating to political stances, religious issues, and other non-curricular content.”<sup>2</sup> According to reports from community members, what displays are deemed controversial/political has changed and expanded over time and now includes Pride flags, Safe Space

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<sup>1</sup> See e.g. Alec Johnson, *The Waukesha School District has banned teachers from displaying signs on ‘controversial issues,’ like Black Lives Matter and Thin Blue Line*, MILWAUKEE JOURNAL SENTINEL, Sept. 28, 2021, <https://www.jsonline.com/story/communities/waukesha/news/waukesha/2021/09/28/wisconsin-school-district-bans-blm-thin-blue-line-signs-classrooms/5820434001/> and <https://wisconsinexaminer.com/2022/01/10/signs-supporting-many-student-groups-taken-down-at-waukesha-schools/>.

<sup>2</sup> Letter from Dr. James Sebert, Superintendent of Schools, and Dr. Joseph Koch, Deputy Superintendent, to School District of Waukesha Educators (Aug. 20, 2021) (available at, <https://drive.google.com/file/d/1Hg7pyzj9PZI9et1xlKxjQi0K7wTrSYCs/view>).

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signs, and even the District’s own Nondiscrimination Policy 2260.

There are indications that this policy is not being applied consistently. Community members have reported that, at least in some schools, along with the displays mentioned above, Gay-Straight Alliance locker signs are also banned, but football team locker signs are allowed, as are Students for Life lobby signs, a “Thin Blue Line” sign, and a poster of Ronald Reagan. Additionally, it is our understanding that a student has been allowed to distribute political campaign materials while another student was reprimanded for distributing DEI materials.

Additionally, the District removed DEI content from websites, canceled DEI trainings and consulting, and disbanded the District Equity Leadership Team. At least one school apparently advised yearbook staff not to use “they/them” pronouns and that parent approval would be required for freshmen, sophomores, and juniors to use names or pronouns other than those in their official records.

Since the District instituted these changes, an increased number of LGBTQ students have faced bullying and harassment.<sup>3</sup>

## II. Potential Violations of Civil Rights Protections and Other Laws

The District’s alleged policies and practices may violate due process and free speech guarantees of the Constitution as well as anti-discrimination laws. The policy may violate due process because the terms “political” and “controversial” are so vague that they give unbridled discretion to administrators to pick and choose which messages to ban and which to permit. The Supreme Court recently struck down a Minnesota ban on “political” dress at polling places because “political” was too vague.<sup>4</sup> The Court reasoned, “Under a literal reading of those definitions [of “political”], a button or T-shirt merely imploring

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<sup>3</sup> Faulk, Terrance, Waukesha Students Say School Districts Ban on LGBTQ and BLM Signs Perpetuates Bullying, MILWAUKEE INDEPENDENT, Nov. 13, 2021, <https://www.milwaukeeindependent.com/syndicated/waukesha-students-say-school-districts-ban-lgbtq-blm-signs-perpetuates-bullying/>.

<sup>4</sup> *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1888, 201 L. Ed. 2d 201 (2018).

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others to ‘Vote!’ could qualify.”<sup>5</sup> Other courts have ruled similarly.<sup>6</sup> As in all of these cases, the District’s policy raises more questions than it answers. Could students or teachers post signs that say, “Support Our Troops” or “Believe Women”? “Political” and “controversial” are so vague that the policy could easily be applied inequitably, inconsistently, and discriminatorily.

If the ban were enforced mostly or entirely against messages in support of DEI, it could also violate the First Amendment. The First Amendment prohibits schools from banning student speech based on the viewpoint of the speech, unless the speech causes a substantial disruption.<sup>7</sup> Allowing a pro-life student group sign, a “Thin Blue Line” sign, a poster of Ronald Reagan, and football team locker signs while banning Pride flags, Black Lives Matter signs, and GSA locker signs may amount to viewpoint discrimination, in violation of the First Amendment.

The District may also be violating the Equal Access Act<sup>8</sup> and Title IX<sup>9</sup>. The EAA requires schools to give all noncurricular groups equal access to school facilities.<sup>10</sup> This includes access to lockers for posting signs. Allowing noncurricular sports teams to post locker signs but not the GSA would violate the EAA.

Title IX prohibits discrimination based on sex, including discrimination based on gender identity. By assigning students pronouns for the yearbook instead

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<sup>5</sup> *Id.*

<sup>6</sup> See e.g. *Child Evangelism Fellowship v. Stafford School District*, 386 F.3d 514, 523 (3rd Cir. 2004) (noting that the terms “divisive” and “controversial” are “either incoherent or euphemisms for viewpoint-based religious discrimination”); see also *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1374 (3rd Cir. 1990) (striking down a school policy that allowed only student groups “consistent with the educational function and mission of the school or with a civic purpose” because “civic” was too vague.)

<sup>7</sup> *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

<sup>8</sup> 20 U.S.C. § 4071(a) (“It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.”)

<sup>9</sup> Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§1681 - 1688 (2018).

<sup>10</sup> *Bd. of Educ. of Westside Cmty. Sch. v. Mergens By & Through Mergens*, 496 U.S. 226, (1990).

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of allowing students to choose their pronouns, the District is stereotyping students based on traditional notions of masculinity and femininity.<sup>11</sup> For example, the District insists on “she/her” pronouns for Jane because the name “Jane” is traditionally feminine and Jane presents in a traditionally feminine way. However, Jane could identify as nonbinary or trans and prefer “they/them” or “he/him” pronouns.

The District’s duty to ensure equal protection and prevent discrimination against its students exists independently of its other duties and requires explicit efforts. Based on some reports, the removal of inclusive classroom signs, Pride flags, and GSA locker signs, forcing certain pronouns on students, abandoning institutional DEI efforts, and other actions described above, may have contributed to an increase in hostility and discrimination for some students.

### III. Open Records Request

This letter constitutes a request under Wisconsin’s public records law, Wis. Stat. § 19.35. The ACLU of Wisconsin seeks disclosure of any records<sup>12</sup> received, transmitted, collected and/or maintained by the School Board of Waukesha, the School District of Waukesha central office administration and administration at individual schools within the School District of Waukesha, including any employees, agents, officials, or contractors of central office administration and/or individual school administration,<sup>13</sup> which:

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<sup>11</sup> See Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 117, 32,637 (June 22, 2021) (available at <https://www.govinfo.gov/content/pkg/FR-2021-06-22/pdf/2021-13058.pdf>) (clarifying that Title IX prohibits discrimination against people based on their gender identity, including “discrimination against all students for not conforming to stereotypical notions of masculinity and femininity”).

<sup>12</sup> The term “records” as used herein includes all records or communications preserved in electronic or written form, including, but not limited to, emails, text messages, video conference recordings or transcripts, correspondence, documents, data, videotapes, audio tapes, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, technical specifications, training manuals, or studies.

<sup>13</sup> This request *includes* records collected and/or maintained by teachers who act as advisors/supervisors for student groups, including the Gay Straight Alliances, Black Student Unions, and yearbooks.

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1. evidences, describes, or discusses any aspect the District's methods, policies, and/or practices, from June 2021 to the present, regarding displays on issues deemed "controversial/ political," as defined by the District, including but not limited to classroom signs, locker signs, stickers, posters, and flags;
2. identifies curricular student groups;
3. identifies non-curricular student groups; and
4. evidences, reflects, describes, or discusses the criteria the District, and its schools, use to determine whether to categorize student groups as curricular or non-curricular.

Wisconsin law requires that requested documents be produced "as soon as practicable and without delay." Wis. Stat. § 19.35(4)(a).

The ACLU of Wisconsin Foundation is a non-profit organization whose mission is to defend and promote the civil liberties and civil rights of all residents of Wisconsin. Therefore, pursuant to Wis. Stat. § 19.35(3)(e), I request that you waive charges for production of these records. If you do not waive charges and there is a fee in excess of \$100 for production of these records, please advise me before proceeding.

If this request is denied, in whole or in part, we ask that you justify all deletions by reference to specific exemptions under Wisconsin's public records law. The ACLU expects the release of all segregable portions of otherwise exempt material.

If possible, please furnish all applicable records in electronic format to me at [cdonahoe@aclu-wi.org](mailto:cdonahoe@aclu-wi.org). If records are not available in electronic format, please send them to:

Chris Donahoe  
American Civil Liberties  
Union of Wisconsin Foundation  
207 E. Buffalo St., Ste 325  
Milwaukee, WI. 53202

## IV. Conclusion

We urge the District to end policies and practices that suppress freedom of expression, discriminate based on the content of expression or the speaker and



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that may contribute to a hostile environment for some students, including LGBTQ students. We also urge the District to immediately take measures to ensure that every school provides an environment where all students feel safe, welcome, and protected from harassment and bullying. Thank you for your prompt attention to this matter.

Sincerely,

A handwritten signature in blue ink that reads "Chris Donahoe".

Chris Donahoe  
Staff Attorney