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June 6, 2016

VIA EMAIL and FIRST-CLASS MAIL

Mr. John A. Torrente, Esq.
Solicitor, Neshaminy School District
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Re: *The Playwickian*

Dear Mr. Torrente:

Our firm represents Timothy Cho, the Editor-In-Chief of *The Playwickian*, the student newspaper at Neshaminy High School (“NHS”). We write to you in your capacity as Solicitor for the Neshaminy School District to protest the actions taken by NHS administration with regard to Mr. Cho.

In mid-April, *The Playwickian*’s Editorial Board held a meeting to discuss a news article submitted by Jess McClelland reporting on the NHS “Mr. Redskin” event (the “Article”). At that meeting, the Editorial Board, by majority vote, determined that the news article should be published online and in print with limited redactions to remove the word “Redskin” from the news article. Ms. McClelland complained to the Administration about the redaction and the Administration ordered that the news article be published without the redaction. However, given the vote of the Editorial Board and its established policy, *see Why we won’t publish the R-word*, THE PLAYWICKIAN (Oct. 23, 2013), <http://playwickian.com/unsigned-editorial-why-we-wont-publish-the-r-word/> (the “October 23 Editorial”), the Editorial Board refused to be compelled to publish this offensive word and subsequently uploaded the Article, as redacted, to the website.

It is our understanding that the Administration then removed the Article from the newspaper’s website and punished Mr. Cho by locking him out as an Administrator of the website. We further understand that the Administration later uploaded the unredacted Article to the website with the word “Redskin” intact.

The Administration’s actions violate Mr. Cho’s federal and state constitutional rights, as well as his rights under Pennsylvania law. *See, e.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943);

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Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974); U.S. CONST. amend. I; PA. CONST. art. 1, § 7; 22 Pa. Code § 12.9(g). They even violate the Neshaminy School District's own policies. NSD Revised Policy 600 ("Revised Policy" or "Policy").

We therefore ask that the Administration carefully consider what is written here and reverse course, for several independent reasons.

First, the Administration's actions conflict with the District's own policy.¹ See Revised Policy 600. That Policy clearly precludes a student from insisting that this word, or any other, appear in a news article: "No student has the right to insert any particular word or phrase *in any news article* published by the 'newspaper' if rejected by the editorial board, advisor or principal." *Id.* at 2:25-27 (emphasis added). Thus, the Administration's action was improper even under the Policy.

Moreover, the Policy itself dictates that "no student editor shall be disciplined for editing or editorial decisions, including the deletion of the word 'Redskin' from any article or editorial or for objecting to its use in any advertisement." Policy, Rules of Construction, par. c.1.² The punishment of Mr. Cho, by blocking his access to the website, therefore violates the District's own Policy.

Second, pursuant to the Pennsylvania Code, student editors are "as free as editors of other newspapers to report the news and to editorialize." 22 Pa. Code § 12.9(g)(1). Although school officials are permitted by the Code to review the paper before publication, their review of the students' expression of opinions is strictly limited. Officials cannot "censor or restrict material simply because it is critical of the school or its administration" and are authorized only to "remove obscene or libelous material and edit other material that would cause a substantial disruption or interference with school activities." *Id.* § 12.9(g)(2), (3). It would therefore be a

¹ As we have previously explained in our correspondence arising out of the debate about the decision of the Editorial Board in 2013 to remove references to the word "Redskin" from the newspaper, even the Revised Policy is constitutionally infirm. In addition, as we have also explained in the past, the Policy on its face violates 22 Pa. Code § 12.9, as it impermissibly narrows the rights granted under the Code. Indeed, the Revised Policy is in fact little more than an incoherent patchwork of inconsistent and illegitimate attempts to defend the forced use of a vulgarity, while at the same time unsuccessfully attempting to immunize the District by paying lip-service to the rights of students to be free of such compulsion.

² Moreover, although this section of the Policy also attempts to alter reality by noting that the word Redskins "shall not be construed as a racial or ethnic slur," that is only the case, by its own terms "when referring to the School District mascot *and* when used to express the writer's viewpoint about the term." Revised Policy at 9:31-34 (emphases added). Even if the Article is deemed to refer to the School's mascot, it does not express a view about that term. Rather, it is merely using it to report on the "Mr. Redskin" event.

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twist of logic indeed to argue that the Code permits the forced publication of offensive terms. To the contrary, courts are uniform in holding that “other newspapers” are not required to publish what they deem to be offensive. *See, e.g., Tornillo*, 418 U.S. at 258 (holding that a newspaper is not merely “passive receptacle or conduit for news, comment, and advertising”).

Third, the actions of the Administration interfere with Mr. Cho’s constitutional right to free expression. “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker*, 393 U.S. at 506. Before protected student speech can be subjected to censorship, it must be shown to “materially disrupt[] classwork or involve[] substantial disorder or invasion of the rights of others.” *Id.* Silent expression, such as the Editorial Board’s policy *not to publish* the derogatory term, hardly constitutes the requisite “material disruption” or causes “substantial disorder.” *See, e.g., B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 322 (3d Cir. 2013) (quoting *Tinker*, 393 U.S. at 508) (“Given that Tinker’s black armband . . . was not a substantial disruption, neither is the ‘silent, passive expression’ of breast-cancer awareness” by the wearing of bracelets).

The Administration’s removal of the redacted Article and barring of Mr. Cho from his administrative privileges on *The Playwickian* website infringes Mr. Cho’s right to express his and the Editorial Board’s opinion on this matter. Moreover, in order to keep his privileges, he is compelled to publish speech that he, along with a majority of the Editorial Board, have concluded is offensive. *See, e.g., Barnette*, 319 U.S. at 642 (where a public school disciplined a student who refused to salute the flag, the court held, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . matters of opinion”). Even under the lowest standard of judicial review, the compelled adoption of a racial slur serves no legitimate pedagogical purpose and the Administration’s actions must be deemed to be unconstitutional.

Finally, the decision of the Administration to violate its own policy and to punish Mr. Cho for determining, in good conscience, that he and his colleagues on the Editorial Board would not publish a word they – and many, many others – consider to be a slur, is, we are certain, antithetical to the mission of “school officials and employees . . . to fulfill their role to awakening each child to cultural values.” Policy, 7:2-3; *see also* Principal’s Office/Overarching Student Expectations at NHS, *NHS*, <http://www.neshaminy.org/Page/786> (explaining that one of Neshaminy’s “overarching expectations” is to “[a]ccept and appreciate differences”).

Notably, not long after the Editorial Board first determined that it would no longer publish the word because it was highly offensive, the Eastern District of Virginia came to the same conclusion. *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439, 473 (E.D. Va. 2015). The court noted that “several dictionaries defin[e] ‘redskins’” as an “offensive or contemptuous” term. *Id.* (listing eleven dictionary references). The court further observed that scholarly, literary, and media sources repeatedly “contemplated the poor standing of the term.” *Id.* at 475-80 (listing twenty-seven different examples including, *e.g.*, “To Native Americans, ‘redskin’ is as offensive as . . . ‘wetback’ [is to Mexicans] . . . [G]ood intentions are no excuse for insulting

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the offspring of this land's original people." (emphasis added)). Finally, the court concluded that, more than forty years ago, an association of Native Americans had made clear that it had "always found the term . . . to be derogatory, offensive, and disparaging." *Id.* at 486 (emphasis added).

Indeed, to our knowledge, no high school administrator in any school district in the United States has ever ordered student editors of a school newspaper to publish a racial slur in its newspaper. Indeed, in every other instance we have found, it is the *school district* rather than the students attempting to block the use of such terms. *See, e.g., Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) ("[I]t is a highly appropriate function of public school education to prohibit the use [by students] of vulgar and offensive terms in public discourse." (emphasis added)). As the Editorial Board of *The Washington Post* has stated, "You would think young people engaging with an important social issue and standing up for something they believe in would be appreciated, even applauded" not punished. Editors at Neshaminy High School shouldn't be disciplined for not using the 'R-word.' Wash. Post, Sept. 23, 2014, https://www.washingtonpost.com/opinions/editors-at-neshaminy-high-school-shouldnt-be-disciplined-for-not-using-the-r-word/2014/09/23/a113ffee-4360-11e4-b47c-f5889e061e5f_story.html.

Neshaminy thus stands alone in its recalcitrance, and shamefully so.

We therefore request that the Article as edited, with redactions, be restored to *The Playwickian* website and that control of the website be returned to Mr. Cho for his remaining tenure as Editor-in-Chief.

Sincerely,

LEVINE SULLIVAN KOCH & SCHULZ, LLP

By: 

Gayle C. Sproul

cc: Timothy Cho (via email)

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Faculty Advisor, The Playwickian

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Principal, Neshaminy High School