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September 9, 2013

Sent via email and USPS

Cheryl F. Kloczko
Superintendent
355 Migeon Avenue
Torrington, CT 06790

Re: Student-Athlete Agreement

Dear Ms. Kloczko:

We are writing at the urging of the Torrington High School Commission for Student Rights to request that the Board of Education for the Torrington Public Schools reject the proposed draft Student-Athlete Agreement and related policy (together "draft policy"). The school will violate the First Amendment rights of its student athletes if it adopts the draft policy. Student athletes cannot be cut or suspended from public school teams, or threatened to be cut or suspended, for expressive activities unless their expression is likely to cause material and substantial disruption to the school or to the team. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969). If adopted, the draft policy will become an unconstitutional invitation for coaches and administrators to violate the First Amendment rights of student athletes by disciplining them for speech that does not satisfy Tinker's threshold.

Restrictions on student athlete speech, like those on student speech in general, are governed by the principles set forth in Tinker. Student athlete speech may not be censored unless the speech has the demonstrable potential to seriously disrupt the educational process or unless it falls into one of the very few narrow exceptions to protected speech. See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (school-sponsored speech); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (vulgar speech); Morse v. Frederick, 551 U.S. 393 (2007) (speech that undermines the school's mission). When discipline of student athletes has run afoul of these First Amendment principles, courts have allowed the affected student athletes to bring civil rights actions against the school officials. Where the discipline of student athletes has been upheld by courts, the speech being disciplined had the demonstrable potential to seriously disrupt the educational process.

The draft policy would permit a coach to discipline a student athlete for the kind of report at issue in Seamons v. Snow, 206 F.3d 1021, 1030 (10th Cir. 2000), found by the court to be protected speech under Tinker. There, a student athlete had allegedly been disciplined for reporting to authorities an assault on him by teammates that the coach had ignored. Id. at 1023. The court held that the student athlete properly stated a claim that his report of the assault was entitled to First Amendment protection and that school officials violated clearly established law, so that officials were not entitled to dismissal based on qualified immunity. Id at 1030-31. Pinard v. Clatskanie School Dist. 6J, 467 F.3d 755, 766 (9th Cir. 2006) echoed and confirmed that discipline for student athlete speech is unconstitutional unless the speech at issue is likely to cause a material and substantial disruption at school.

Courts have upheld discipline meted out to student athletes only when it has been consistent with these First Amendment principles. In Wildman ex. rel. Wildman v. Marshalltown Sch. Dist., 249 F.3d 768, 770 (8th Cir. 2001), the student athlete had distributed a letter to teammates that used profanity and called for insubordination to the coach. In Lowery v. Euverard, 497 F.3d 584, 585-86 (6th Cir. 2007), cert. denied 555 U.S. 825 (2008), the student athletes there had openly called the coach's authority into question with a petition. In both cases, the courts found that the speech was potentially disruptive and that preventing the student athletes from participating on their respective teams was discipline that met the Tinker test. See Wildman, 249 F.3d at 771; Lowery, 497 F.3d at 596.

The following are specific examples of the draft policy's unconstitutional invitation to censor student speech: athletes must "accept and respect the decisions of the coaches to be in the best interests of the team and THS"; must "[d]iscuss any issues with [their] coach in private"; must not display "inappropriate" messages, nor use "offensive language" nor "belittle any coaches, teammates, official (sic) and opposing players/teams," on social media; and must not engage in "behavior which casts an adverse reflection on our athletic program and/or school." The "Hazing/Bullying" section of the draft policy explicitly interdicts speech that is *not* disruptive. But see J.C. ex. rel. R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp 2d 1094 (C.D. Cal. 2010). These prohibitions and others in the draft policy would penalize or chill athletes engaging, or wishing to engage, in a wide range of speech activities that are clearly protected. Some aspects of the policy are flagrantly viewpoint discriminatory and thereby further run afoul of the First Amendment: for example, students can publicly "display . . . positive mannerisms," i.e., say that the school is great, but cannot publicly

criticize or "cast an adverse reflection" on the school.

Thus, a temperate, non-disruptive complaint to a principal, teacher or parent about a coach who unconscionably bullies his players could be construed as violating the strictures about addressing such complaints only to the coach "in private." Venting similar complaints via social media could be construed in addition as "inappropriate" or "belittling;" and polite disagreement with a coach could be construed as not "accept[ing] or respect[ing]" the coach's decisions as being "in the best interests of the team and THS", even when the disagreement is expressed to the coach "in private" as a separate provision of the policy requires. Likewise, a student athlete risks discipline for asserting, via social media, his honest belief that an opposing team he had faced that day had engaged in unfair or dishonest tactics. Further, and most preposterously of all, if a student athlete complains, in whatever forum, about a school policy or practice that has nothing to do with sports -- say, that certain of its courses are poorly taught - under the literal wording of the policy, the athlete could be disciplined for "behavior which casts an adverse reflection on [the] school".

While some specific parts of the draft policy may be unobjectionable, the school needs to be prepared to face First Amendment claims by student athletes if it adopts the draft policy. In event of litigation, the school district, if unsuccessful, could be liable for damages and attorneys' fees. In addition, implicated school officials could forfeit their qualified immunity and become personally liable, for damages and attorneys' fees, if they violate clearly established constitutional rules of which they ought to know. See e.g., Doninger v. Niehoff, 642 F.3d 334 (2d Cir. 2011), cert. denied, 132 S. Ct. 499 (U.S. 2011). They could also be assessed punitive damages if a court were to find that they act with "reckless or callous indifference" to these rules. Smith v. Wade, 461 U.S. 30, 56 (1983). The municipality itself under Monell v. Dep't. of Soc. Servs. of City of N. Y., 436 U.S. 658 (1978) may well be held liable for free speech violations if this draft policy is adopted and applied to student athletes. See Monell, 436 U.S. at 690.

In Lodi, California, when faced with a challenge to a policy similar to the draft policy, the school there apparently has suspended its proposed policy rather than run the risk of engaging in censorship of student athletes and giving them causes of action against the school and municipality.[1] We suggest Torrington adopt

[1]http://www.splc.org/news/newsflash.asp?id=2602&utm_source=Calif.+school+district+now+considering+three+potential+social+media+guidelines&utm_campaign=email&utm_medium=email.

a similar strategy and abandon the draft policy before it causes the violation of the civil rights of its student athletes.

Sincerely,

Sandra J. Staub
Legal Director

Martin B. Margulies
Cooperating Attorney

Cc: Kenneth Traub, Chairman, via email
Fiona Cappabianca, Vice Chairman, via email
Ellen Hoehne, Secretary, via email
Paul Cavagnero, via email
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