SENT VIA ELECTRONIC MAIL

November 21, 2022

Richland School District Board of Directors
6972 Keene Road
West Richland, Washington 99353

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Washington

PO Box 2728
Seattle, WA 98111
(206) 624-2184
aclu-wa.org

Sherri Nichols
Board President

Michele Storms
Executive Director

La Rond Baker
Legal Director

Taryn Darling
John Midgley
Nancy Talner
Senior Staff Attorneys

Jazmyn Clark
Staff Attorney

Tracie Hooper Wells
Paralegal

Re: November 22, 2022 School Board Meeting Agenda Item 4.2: Policy No. 2331- Controversial Issues

Dear Directors:

We are reaching out to you because we've been contacted by concerned constituents of the Richland School District (the "District") regarding Policy No. 2331- Controversial Issues, an agenda item for the November 22, 2022 District Board meeting. We write to express the significant concerns that are raised by this proposed policy.

Policy No. 2331 defines "controversial issues" as:

> 1. Evoking strong feelings and views.
> 2. Effect[ing] the social, cultural, economic and environmental context in which people live.
> 3. Deal[ing] with questions of value and belief, and can divide opinion between individuals, communities and wider society.
> 4. Are usually complicated, with no clear "answers" because they are issues on which people often hold strong views based on their own experiences, interests, values and personal context.
> 5. Includ[ing] a wide range of topics such as human rights, gender justice, migration and climate change.

Policy No. 2331 also directs educators, parents, and guardians to contact the principal to voice any potential concerns regarding the appropriateness of an issue.

As written, Policy No. 2331 is overly vague, and its lack of objective standards could result in viewpoint discrimination. As you know, the First Amendment right of free speech extends to public schools. In the landmark Supreme Court case, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969), the Court held that students and teachers "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." In addition, the Supreme Court has also extended protections to individuals' rights in public education settings through the 14th Amendment in the seminal case, *West Virginia State Board of*

Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), holding that, "[t]he Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights." 319 U.S., at 637.

The problem posed by this proposed Policy relates to its lack of objective standards and vague language. "Courts have… been reluctant to accept policies based on subjective or overly general criteria." *Hopper v. City of Pasco*, 241 F.3d 1067 (9th Cir. 2001). "Standards for inclusion and exclusion…must be unambiguous or definite." *Gregoire v. Centennial School District*, 907 F.2d 1366 (3d Cir. 1990). Absent objective standards, government officials may use their discretion to interpret the policy as a pretext for censorship. *See Board of Educ. v. Mergens*, 496 U.S. 226, 244–45, 110 S. Ct. 2356, 110 L. Ed. 2d 191 (1990) (holding that generalized definition of permissible content poses risk of arbitrary application); *Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834, 845–46 (6th Cir. 2000) (holding that "broad discretion [given] to city officials [raises] possibility of discriminatory application of the policy based on viewpoint"); *Cinevision Corp. v. City of Burbank*, 745 F.2d at 560 (9th Cir. 1984) (holding that vague standard has "potential for abuse"); *Gregoire*, 907 F.2d at 1374–75 (holding that "virtually unlimited discretion" granted to city officials raises danger of arbitrary application). *See also City of Lakewood v. Plain Dealer Publ. Co.*, 486 U.S. 750, 758–59, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988) (holding that absence of express standards in licensing context raises dual threat of biased administration of policy and self-censorship by licensees). Therefore, "the more subjective the standard used, the more likely that the category will not meet the requirements of the [F]irst [A]mendment." *Cinevision*, 745 F.2d at 575.

The Ninth Circuit's decision in *Hopper v. City of Pasco* provides a helpful example of how subjective standards, like those contained in Policy No. 2331, raise First Amendment concerns. In *Hopper*, the City of Pasco created a program to exhibit art in its city hall. 241 F.3d at 1070. The program did not have a pre-screening process and there was no policy or guidelines regarding the type of art that could be put on display. *Id.* at 1071. Instead, Pasco implemented a "policy of non-controversy [which] became no policy at all because it was not consistently enforced and because it lacked any definite standards." *Id.* at 1078. Of importance, the court noted that "despite its stated policy of avoiding 'controversial art,' Pasco never established criteria by which to assess whether or not a work would fall within the policy. Instead, application of the policy was left entirely to the discretion of city administrators." *Id.* at 1079. Analogous to *Hopper*, Policy No. 2331, which seeks to establish a non-controversy policy, does not detail any

definite standards in defining what constitutes a controversial issue, instead relying on vague descriptions, including “a wide range of topics” “effect[ing] the social, cultural, economic and environmental context in which people live” and which “deal with questions of value and belief” “with no clear ‘answers.’” In addition, identical to *Hopper*, there exists no established criteria by which to assess whether or not an issue is “controversial” and the application of this policy is left entirely to the discretion of an administrator, specifically, the principal. Not only is this Policy intrinsically flawed, its enforcement, which is contingent upon the subjective reaction of educators, parents, and guardians, as perceived by the principal, creates "censorship by public opinion” and “only adds to the risk of constitutional impropriety.” *Texas v. Johnson,* 491 U.S. 397, 408–409, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989).

Without any definite, objective standards, this policy invites erratic and arbitrary application, potential for abuse, squelching of the constitutional guarantee of free speech, and runs the risk of censorship and viewpoint discrimination.

We hope this letter has given you a firm understanding of the issues relating to this proposed Policy and are happy to discuss this matter with you to address any questions you may have about the above.

Sincerely,

/s/ Jazmyn Clark
Jazmyn Clark
Staff Attorney
American Civil Liberties Union of Washington
PO Box 2728, Seattle, WA 98111
jclark@aclu-wa.org

/s/ Roxana Gomez
Roxana Gomez
Youth Policy Manager
American Civil Liberties Union of Washington
PO Box 2728, Seattle, WA 98111
rgomez@aclu-wa.org

cc (via email): Dr. Shelley Redinger, Galt Pettett