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VIA REGULAR MAIL AND EMAIL (gorrow@soulefirm.com)

Diane M. Gorrow, Esq.
Soule, Leslie, Kidder, Sayward & Loughman, PLLC
220 Main Street
Salem, NH 03079

Re: Timberlane Regional School Board Rules

Dear Attorney Gorrow:

I am writing on behalf of the New Hampshire Civil Liberties Union ("NHCLU") with respect to certain School Board Rules approved on March 20, 2014 by the Timberlane Regional School Board by a vote of 7 to 2, especially the following:

- Rule 7: All decisions made by the Board will be supported by all board members regardless of how a member voted. Efforts to undermine a decision will not be tolerated.

- Rule 8: All communication to the press will be provided by the Chair. Board members contacted by the press will not comment and direct the press to contact the Chair.[1]

Presumably, though it is not outlined in the School Board Rules, violation of these provisions may result in removal from leadership or committee posts or public censure by the Board. While such provisions may be motivated by worthy goals pursuant to the Board's rulemaking authority under RSA 21-N:9, II(b), they violate the right to freedom of speech under the First Amendment of the United States Constitution and Article 22 of the New Hampshire Constitution.[2] Rules 7 and 8 must be immediately repealed.

Rule 8 constitutes an unconstitutional restriction on the ability of Board members to engage in speech to the press that is clearly of public concern—namely, political speech that is "an integral component to the operation of the system of government established by our Constitution." *Doyle v. Com'r, N.H. Dep't. of Resources & Economic Dev.*, 163 N.H. 215, 226 (2012); *see also State v. Chong*, 121 N.H. 860, 862 (1981) ("Prior restraints are inherently suspect because they threaten the fundamental right to free speech."). This speech is not only protected, but it is entitled to the greatest protection within the framework of the First Amendment as speech by elected officials that addresses public policy. *See Bond v. Floyd*, 385 U.S. 116, 135-36 (1966).

[1] I understand that you represent the Timberlane Regional School Board. Please let me know immediately if I am mistaken.

[2] Other problems arise as well, such the vagueness of terms such as "undermine." (Rule 7); *see also State v. Gatchell*, 150 N.H. 642, 643 (2004) ("A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement."). This letter highlights examples without necessarily exhausting every constitutional issue raised by these Rules.

There is no compelling governmental interest that could possibly justify such a substantial intrusion on First Amendment rights. Chairwoman Steenson was recently quoted in the *Eagle Tribune* as stating that Rule 8 is necessary because "we want to send out a unified voice as a board." Board member Michael Mascola similarly stated that Rule 8 is a "great idea because it presents harmony of sending a unified message." Thus, the Board's "compelling governmental interest" in promulgating Rule 8 appears to be to—under the guise of creating a "united front"—suppress the public speech of Board members who disagree with Board decisions and who are inclined to express a view to the press that is inconsistent with the views held by a majority of the Board's members. This is classic unlawful viewpoint discrimination. *See Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); *see also Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 828 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional."); *Opinion of Justices*, 128 N.H. 46, 50 (1986) ("Part I, article 22 ... of the State Constitution, like the first amendment to the Federal Constitution, means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.") (internal quotations omitted).

Board members are independently elected, not public employees hired by the Board. Board members are tasked by the voters to exercise independent judgment. They are not required to remain silent or defer to the majority of the Board if they, in exercising this independent judgment, disagree with the Board's policies. They should be (and are) able to speak their mind, especially through the media which enables political ideas to reach the largest number of constituents. It can hardly be disputed that commenting to the press is a quintessential activity of an elected official. While the justification for these Rules seems to be the Board's concern with internal disagreements being aired publicly, it is the spirit of public political disagreement among our elected officials that is the very cornerstone of a functioning democracy. *See Burson v. Freeman*, 504 U.S. 191, 196 (1992) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. For speech concerning public affairs is more than self-expression; it is the essence of self-government."). Of course, if the Chair disagrees with statements made by a Board member to the press or believes a Board member has publicly conveyed incorrect information, the Chair can similarly engage in public speech (i) expressing his or her differing viewpoint, (ii) express the perspective of the majority of the Board, and/or (iii) convey that the statements do not reflect the views of the majority of the Board.

Similarly, Rule 7's prohibition of "[e]fforts to undermine a [Board] decision" (and apparently speech not in "support" of a Board decision) regulates speech purely based on its viewpoint or content. This too violates free speech rights without any compelling, legally-cognizable justification. *See Leventhal v. Vista Unified School Dist.*, 973 F. Supp. 951, 960 (S.D. Cal. 1997) (rule prohibiting criticism of district employees was "classic form of viewpoint discrimination"); *Baca v. Moreno Valley Unified School Dist.*, 936 F. Supp. 719, 730 (C.D. Cal. 1996) (policy invalid because it allowed "laudatory and neutral" statements while prohibiting "negatively critical" statements on "District employees' conduct or performance"). Again, dissent and critique are essential components of democratic government. Some might view a Board member's public disagreement with Board decisions as "undermining" those decisions. But such speech is essential to a free society. "Criticism of government is at the very center of the

constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

The basic problem with Rules 7 and 8 is that they ignore the bedrock principal that an elected official enjoys the same free speech rights as any other citizen. Indeed, individuals do not surrender their free speech rights when they become elected officials, and the government may not impose greater speech restrictions on elected officials than it could impose on members of the general public. *Bond*, 385 U.S. at 132-33 (overturning state legislature's refusal to seat elected member because of opposition to his viewpoint); *Wrzeski v. City of Madison*, 558 F. Supp. 664, 667 (D. Wis. 1983) ("Legislators enjoy the same First Amendment protections as any other members of our society."). Moreover, "[d]ebate over public issues, including the qualifications and performance of public officials (such as a school superintendent), lies at the heart of the First Amendment," which specifically protects "the ability to question and challenge the fitness of the administrative leader of a school district." *Leventhal,* 973 F. Supp. at 958; *see also Bach v. School Bd. of City of Virginia Beach*, 139 F. Supp. 2d 738, 743 (E.D. Va. 2001) (First Amendment "protects the ability to question the fitness of the community leaders, including the administrative leaders in a school system"). Thus, the courts have rejected any attempt to curtail the right of elected officials to comment on issues, including the qualifications, integrity, and job performance of other officials. *See Kucinich v. Forbes*, 432 F. Supp. 1101 (D. Ohio 1977); *see also, e.g., Vacca v. Barletta*, 753 F. Supp. 400 (D. Mass. 1990) (school committee chair violated First Amendment by removing member from meeting for content of speech).

These Rules also imperil the open debate necessary for the public to evaluate its elected officials. As the U.S. Supreme Court has noted:

> The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy. The central commitment of the First Amendment ... is that 'debate on public issues should be uninhibited, robust, and wide-open.' ... Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected ....

Bond, 385 U.S. at 135-137. This principle applies with particular force to school districts. "The public entrusts school boards with the education of its children, and the schools play a critical role in the social, ethical, and civic development of those students." *Leventhal*, 973 F. Supp. at 960-61. Comments to the press on these important issues should not (and cannot) be barred. Doing so deprives the public of one of the most accessible forums to learn about these important issues and the particular viewpoints of their elected Board members. Without full and candid communication of Board members' positions on these important issues to the press, the public cannot properly exercise its right to monitor their performance and hold them accountable at the ballot box.

Accordingly, the NHCLU requests that the School Board, by April 3, 2014, immediately repeal Rules 7 and 8 in order to conform to the constitutional guarantees of freedom of speech and the public's right to remain fully informed of the positions of its elected officials. If this repeal does not occur, we will act accordingly. We do not believe it is a productive use of anyone's time or of taxpayers' money for the District to defend such patently unconstitutional rules. Please feel free to

call or e-mail me if you have any questions or would like to discuss these issues. Thank you for your attention to this matter.

Very truly yours,

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