IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

PARENTS DEFENDING EDUCATION,

Plaintiff,

v.

WELLESLEY PUBLIC SCHOOLS, et al.,

Defendants.

Case No. 1:21-cv-11709

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Nearly seven decades of Supreme Court precedent make two things clear: Public schools cannot segregate students by race, and students do not abandon their First Amendment rights at the schoolhouse gate. Yet Wellesley Public Schools ("WPS") is openly violating both of these principles.

First, under the guise of "racial equity," WPS has adopted a policy of segregating students by race. Specifically, WPS sponsors and organizes racial "affinity group" meetings that are open to some students but closed to others, based solely on the races and ethnicities of the students involved. This racial segregation policy violates the Fourteenth Amendment and Title VI of the Civil Rights Act.

Second, WPS has adopted a policy of punishing student speech that is "biased," which includes speech that is "offensive," has an "impact" on others, "treats another person differently," or "demonstrates conscious or unconscious bias." This speech code violates the First and Fourteenth Amendments and the Massachusetts Students' Freedom of Expression Law.

Parents Defending Education ("PDE") seeks a preliminary injunction to protect students' rights to be free of racial discrimination and their First Amendment rights to freedom of expression.

BACKGROUND

I. WPS's Racial Segregation Through Affinity Groups

A. Racial Segregation and the Rise of Racial Affinity Groups

The Supreme Court long ago declared that racial segregation "has no place" in the "field of public education." *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 495 (1954). That is because racial segregation is "inherently unequal," *id.*, and "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people," *Rice v. Cayetano*, 528 U.S. 495, 517 (2000). But racial segregation is more than unconstitutional. It is "'immoral, . . . inherently wrong, and destructive of democratic society.'" *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring in the judgment) (quoting *A Bickel,* The Morality of Consent 133 (1975). Treating

students "solely as members of a racial group is fundamentally at cross-purposes" with the goal "that students see fellow students as individuals rather than solely as members of a racial group." *Parents Involved in Cmty. Sch. v. Seattle School Dist. No. 1*, 551 U.S. 701, 733 (2007) (plurality). Racial segregation "demea[ns] the dignity and worth of a person" and teaches children to judge others by their "ancestry instead of by [their] own merit and essential qualities." *Rice*, 528 U.S. at 517. Simply put, segregating children by the color of their skin "scars the soul of both the segregated and the segregator" and has "always been evil." Martin Luther King, Jr., *Desegregation and the Future* (Dec. 15, 1956).

Despite our nation's long battle against racial segregation, some schools have reintroduced racial segregation in the classroom for the "benign" purpose of "diversity, inclusion, and belonging." One new and growing approach is the "racial affinity group." A racial affinity group is commonly defined as "a group of people sharing a common race who gather with the intention of finding connection, support, and inspiration." Ex. Q.[1] Racial affinity groups, by definition, exclude individuals of certain racial groups. Separating students into same-race groups is essential, proponents believe, because students "benefit from interactions with people who share common identities or experiences" and the presence of students of other races prevents students from "shar[ing] freely and without inhibition about their experiences." Ex. B. Students are often divided into affinity groups like "Black/African heritage," "Latinx," "Asian," and "white." Ex. B. "White affinity groups" are typically "geared toward anti-racist work" and teaching white students to address their "shame, guilt, or sadness." Ex. B. Because racial affinity groups divide children by race, these groups foster racial division and do far more harm than good.

[1] "Ex." refers to exhibits attached to the declaration of Patrick Strawbridge and Nicole Neily.

B. WPS's Racial Affinity Group Policy

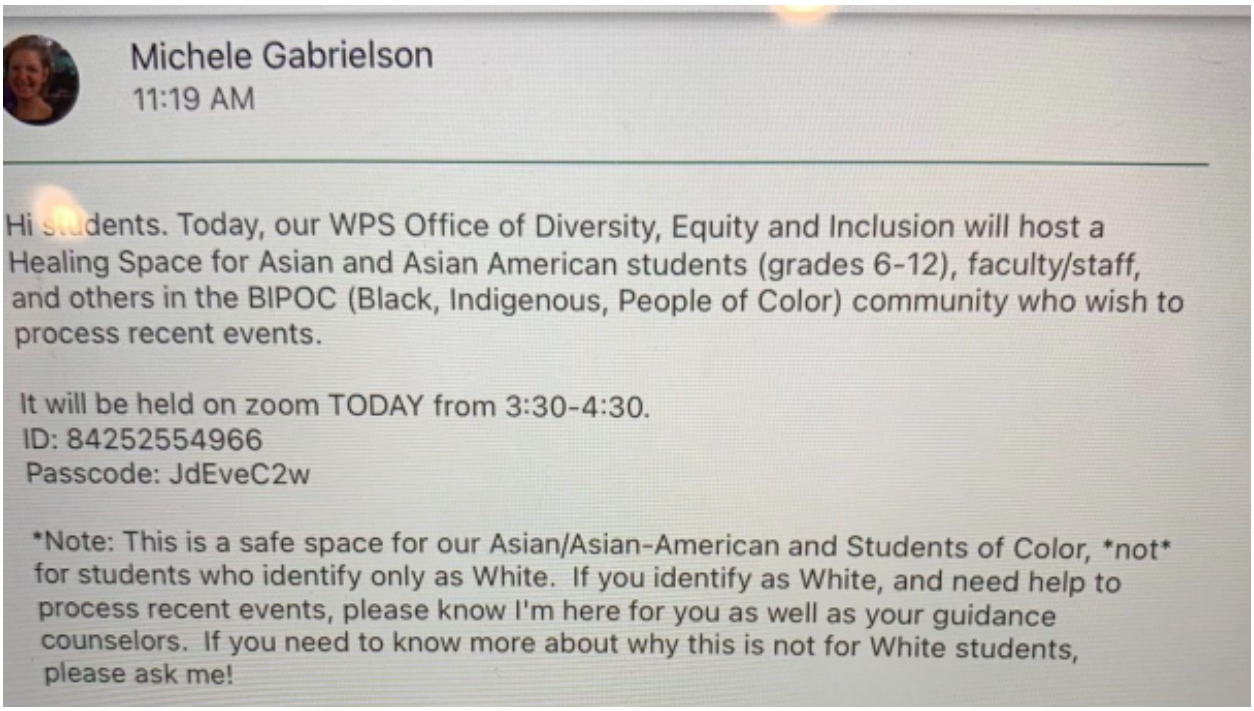
In 2020, WPS released a "diversity, equity and inclusion" plan, entitled "WPS Equity Strategic Plan: 2020-2025 School Years." Ex. A. In the plan, WPS announced its "commitments and ensuing goals" to, among other things, "pursue[] justice for . . . historically marginalized communities," "continuously examine systems of privilege and bias," "work collectively to disrupt and dismantle inequity in all its forms," and achieve "racial equity." Ex. A at 2, 4. As part of this initiative, WPS announced that it would start promoting and sponsoring "affinity spaces for students with shared identity" in order to "nurture and affirm positive racial identity development." Ex. A at 6-7.

Under this new policy (the "Racial Affinity Group Policy"), WPS began promoting and sponsoring racial "affinity groups" and "affinity spaces." By definition and design, the Racial Affinity Group Policy is exclusionary. According to WPS, a racial affinity group is an "opportunity for people within an identity group to openly share their experiences without risk of feeling like they will offend someone from another group, and *without another group's voices*." Ex. EE (emphasis added).

WPS began implementing its Racial Affinity Group Policy during the 2020-2021 school year. On January 25, 2021, the Director of Diversity, Equity, and Inclusion for WPS (Charmaine Curry), emailed the principals of Wellesley Middle School and Wellesley High School (Mark Ito and Jamie Chisum, respectively) to announce an "affinity group" event specifically for "our Black and Brown students." Ex. C. Curry asked Ito and Chisum to share information about the event with teachers and staff and to invite only "Black and Brown" students. Ex. C; *see* Ex. D. Curry later emailed information about the event to "WPS Students and Alumni of Color," describing the event as a "listening space for Black and Brown students and alumni." Ex. E. WPS did not invite students or parents who did not identify as "black or brown." *See* Parent A Decl. ¶10; Parent B Decl. ¶10; Parent C Decl. ¶7. This event was held on February 10, 2021. Ex. E.

Shortly thereafter, WPS began planning another racial affinity group meeting. Between March 3, 2021 and March 15, 2021, Director Curry emailed more than two dozen WPS teachers and administrators to "loop [them] into some planning" for a second racial affinity group session that would be "specifically for Asian American students," Ex. F, and to "invite [them] to join" the event, Ex. G. One Wellesley Middle School teacher told Curry that she was "very excited that the district will have a space for Asian and Asian American students and families," that Principal Ito had already "emailed the faculty" about the event, and that she would "continue to encourage other staff to share with their Asian and Asian American students." Ex. H. When another Wellesley Middle School teacher emailed Curry to ask her whether "students and/or families" had already been invited to the event "directly," or whether faculty "need[ed] to tell them about it," Curry replied that she hadn't been able to invite only the Asian and Asian American students because she didn't "have access to student/parent emails disaggregated by demographic data to really hone in." Ex. I; *see also* Ex. J.

On March 18, following a tragic shooting killing Asian women in Atlanta, WPS announced that it would be rescheduling the Asian affinity group meeting for later that day. Ex. U. The event would offer a "healing session . . . for our Asian and Asian American students and faculty this afternoon." Ex. U. WPS administrators and teachers repeatedly instructed that the affinity group meeting was *not* for white students. For example, one Wellesley Middle School teacher sent a message to the students in her class notifying them about the event and instructing white students *not* to attend:



Michele Gabrielson
11:19 AM

Hi students. Today, our WPS Office of Diversity, Equity and Inclusion will host a Healing Space for Asian and Asian American students (grades 6-12), faculty/staff, and others in the BIPOC (Black, Indigenous, People of Color) community who wish to process recent events.

It will be held on zoom TODAY from 3:30-4:30.
ID: 84252554966
Passcode: JdEveC2w

*Note: This is a safe space for our Asian/Asian-American and Students of Color, *not* for students who identify only as White. If you identify as White, and need help to process recent events, please know I'm here for you as well as your guidance counselors. If you need to know more about why this is not for White students, please ask me!

Ex. DD. Other middle school teachers sent similar emails to their students. *See* Ex. FF. Later that day, a white Wellesley High School teacher received a Zoom link for the event, which was called "Healing Space for Asian and Asian American Community." Ex. K. When the teacher asked Curry if she could attend, Curry responded that the white teacher *could not attend* because "we want to hold the space for the Asian and Asian American students and faculty/staff. I hope this makes sense." Ex. K.

The day after the event, several WPS parents contacted WPS teachers and administrators, expressing outrage that WPS had excluded students from school-sponsored events based on their race. Ex. AA. In response to these complaints and others, WPS issued a district-wide statement vigorously defending its Racial Affinity Group Policy. WPS acknowledged that it had held an affinity group only "for Asian and Asian American students in grades 6-12." Ex. M. Yet WPS said that it would continue to "unequivocally affirm the importance of 'affinity spaces,' where members of historically-marginalized groups can come together in a spirit of mutual support and understanding of shared experiences." Ex. M. WPS also promised to continue creating racial affinity groups because

"[h]osting affinity spaces is part of a long-term, evidence-based district strategy that amplifies student and faculty voices on various issues, and enhances their sense of belonging." Ex. M.

Despite WPS's commitment to using affinity groups to support "historically marginalized" groups, the policy appears to apply only to certain minority groups. When parents asked WPS whether it intended to create affinity groups for Jewish students, a "historically marginalized" people, in the wake of public acts of antisemitic violence of discrimination, WPS refused to create such a group. Parent D Decl. ¶9; Parent E Decl. ¶9.

The Racial Affinity Group Policy is emblematic of WPS's approach to issues of race in general. This summer, for example, an official WPS twitter account linked to an article suggesting schools start thinking about *exclusion*, not inclusion, for diversity initiatives. Ex. N. Quoting the article, WPS tweeted: "This is on point. 'Does inclusion mean including everyone? What about those who have no desire to dismantle systems of oppression and bring equity and social justice to their school system? What if we can't just all get along?' Great questions to ponder for #equity." Ex. N. Similarly, WPS instructs its faculty and staff to beware of "white fragility," which it defines as "the counterproductive reactions white people have when their assumptions about race are challenged, which serves to maintain racial inequality. White fragility is characterized by emotions such as anger, fear, guilt, and by behaviors including arguing, crying, silence, or walking away from the stress inducing situation." Ex. O at 6; *see also* Ex P (encouraging parents to have "conversation starters" with their children on topics such as "White Fragility" and "The Myth of Racial Colorblindness"). WPS's policies also are playing out in classrooms. For example, in spring 2021, WPS sponsored a presentation at Wellesley High School that told students that "police started the violence" during the summer 2020 protests, that supporting law enforcement groups like "Blue Lives Matter" was "associated with white supremacy, far-right nationalism, and racism," and that such support "could be harmful to … BIPOC" students. Ex. GG at 3, 5. The presentation also warned students not to say "all lives matter" or "blue lives

matter" because these sayings were a "racist direct push-back against the Black Lives Matter movement" and were not "innocent term[s] that celebrate[] the worth of all humanity." Ex. GG.

WPS has no plans to end the Racial Affinity Group Policy. Ex. A; Ex. W at 3. Indeed, WPS has promised to *expand* the program by creating racial affinity groups for the "parent/caregiver community." Ex. A at 7.

II. WPS's Restrictions on "Biased" Speech

A. Public School Students and the First Amendment

Public-school students have First Amendment rights, and those rights do not disappear "at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Because "America's public schools are the nurseries of democracy," students must be free to express their opinions, even if their views are "unpopular." *Mahanoy Area Sch. Dist. v. B.L. by and through Levy*, 141 S. Ct. 2038, 2046 (2021). Protecting unpopular speech in public schools "ensur[es] that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'" *Id.* "School-age children are compelled by law to attend school, but while there lawfully, they enjoy the right to free personal intercommunication with other students, so long as their communication does not substantially or materially disrupt the operation of the classroom or impinge upon the rights of others." *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 111, 123 (D. Mass. 2003).

Despite these well-established rights, schools often seek to stamp out controversial student expression. Speech codes are the tried-and-true method of suppressing unpopular student speech. They prohibit expression that would otherwise be constitutionally protected. Ex. L at 10. Speech codes punish students for undesirable categories of speech such as "harassment," "bullying," "hate speech," and "incivility." Because these policies impose vague, overbroad, content-based (and sometimes viewpoint-based) restrictions on speech, federal courts regularly strike them down. *Id.* at 10, 24; *see also*

Speech First v. Fenves, 979 F.3d 319, 338-39 n.17 (5th Cir. 2020) (collecting "a consistent line of cases that have uniformly found campus speech codes unconstitutionally overbroad or vague").

In addition to speech codes, some schools are increasingly turning to a new, innovative way to deter disfavored speech—so-called "bias response teams." Bias response teams have a deeply troubling track record. Living up to their Orwellian name, bias-response teams encourage students to monitor their peers' speech and report incidents of "bias" to school officials (often anonymously). "Bias" is defined incredibly broadly and covers wide swaths of protected speech; in fact, speech is often labeled "biased" based solely on the listener's subjective reaction to it. Students have been reported to bias-response teams for writing a satirical article about "safe spaces," tweeting "#BlackLivesMatter," chalking "Build the Wall" on a sidewalk, and expressing support for Donald Trump. Ex. BB at 15-18. Bias-response teams inevitably monitor protected expression and lead to "a surveillance state" where "students and faculty must guard their every utterance for fear of being reported to and investigated by the administration." Ex. BB at 28.

B. WPS's Biased Speech Policy

WPS recently adopted a new policy prohibiting students from committing "bias incidents." Ex. R (the "Biased Speech Policy"). Under the policy, WPS defines a "bias incident" to be "conduct, speech or expression" that "has an impact but may not involve criminal action" and "demonstrates conscious or unconscious bias that targets individuals or groups that are part of a federally protected class (i.e., race, ethnicity, national origin, sex, gender identity or expression, sexual orientation, religion, or disability)." Ex. R at 1. A "bias incident" also occurs when "someone treats another person differently or makes an offensive comment because of their membership in a protected group, such as their race, ethnicity, gender, sexual orientation, religion, or disability." Ex. R at 1.

WPS encourages students and parents to be "proactive," Ex. JJ, and "report incidents of … any concerning pattern of biased behavior" to school authorities, Ex. R at 1. Complaints about

"biased" speech can be filed through an intake form on the WPS website, Ex. HH, and "may be made anonymously," Ex. R at 2. Complainants can report bias incidents based on a wide variety of topics: "Age; Ancestry; Color; Disability status; Genetic information; Gender identity; Marital status; Parental [s]tatus; Political affiliation; Race; Religion; Sex; Sexual Orientation; Veteran status; [or] Other." Ex. HH at 3. Multiple types of speech can qualify as a bias incident, including "Comment in Class," "Comment in Person," "Comment in Writing or on Internet," "Comment via Email/Text," and "Comment via Phone/Voicemail." Ex. HH at 4.

When WPS receives a complaint of biased behavior, the complaint is "promptly investigated by a designated official at each school." Ex. R at 2. Once investigating officials complete their investigation, they fill out a "WPS Bias Investigation Summary Form" outlining their conclusions and explaining whether disciplinary action and/or corrective or remedial actions will be taken. Ex. II at 3. If WPS finds that a student committed a "bias incident," its response "will typically involve the following: Discipline for the person responsible, Remedial or supportive actions to assist those directly impacted, [and/or] Corrective action or education steps for the individual and potentially the school community to ensure that similar events do not happen in the future." Ex. R at 2. WPS also "document[s]" and preserves "any" complaint alleging a bias incident and "review[s] such data periodically to analyze it for patterns of behavior." Ex. R at 2.

WPS is "proactive about" preventing "incidents of bias" and "works with students and staff at all levels of [its] organization to prevent and address all forms of bias." Ex. JJ. To that end, WPS requires "each employee" to complete a "mandatory training" on how to recognize biased incidents. Ex. CC; *see also* Ex. Z. The assessment trains teachers to identify "bias incidents" and "equity violations," such as "microaggressions." Ex. Z at 3-4. WPS defines "microaggressions" as "everyday slights that communicate hostility towards a group," are "a threat to inclusion in the classroom and the

workplace," and "[c]an be committed without intent." Ex. Z at 3. "All employees" have an "obligation to report a bias incident against a student." Ex. Z at 4.

WPS's definition of "biased" speech is broad enough to include everyday expressions. Students who use words like "normal" and "regular" to "refer to one person or way of life as opposed to another" also engage in "biased" speech because they "perpetuate[] hegemony." Ex. X at 3. And using words like "forefathers, mankind, and businessman" exhibits bias because the words "deny the contributions (even the existence) of females." Ex. X at 3. WPS enforces the Biased Speech Policy on- and off-campus because "there is no place for bias-based speech anywhere." Ex. KK.

Unsurprisingly, the Biased Speech Policy's overbroad, vague restrictions on student speech have been weaponized by certain students to punish classmates who express unpopular views. For example, a middle-school student who is the child of one of PDE's members stopped speaking in class entirely after watching other students repeatedly report their classmates to WPS authorities for engaging in "biased" speech when they shared their political beliefs. Parent A Decl. ¶18; Parent B Decl. ¶18. The student was, in their own words, "shamed into silence" by the policy because "if you're not in full agreement with what the teachers and most students think, you get a target on your back." Parent A Decl. ¶18; Parent B Decl. ¶18. After watching the student lose "all self-confidence and self-esteem" over the course of the 2020-2021 school year due to the Biased Speech Policy, the student's parents decided to withdraw from Wellesley schools altogether and to incur the cost of private school instead. Parent A Decl. ¶19; Parent B Decl. ¶19.

WPS's promotion of certain viewpoints and censorship of others is well known. In recent years, WPS administrators have publicly expressed support for student body protests about contentious political issues and intimidated students who chose not to participate. Ex. Y; Parent C. Decl. ¶¶22-23; Parent D Decl. ¶¶14-15; Parent E Decl. ¶¶14-15; Neily Decl. ¶8.

III. PDE and This Litigation

PDE is a nationwide, grassroots membership organization whose mission is to prevent the politicization of K-12 education, including government attempts to force students into divisive identity groups and to silence students who express opposing views. Neily Decl. ¶3. PDE furthers this mission through network and coalition building, disclosure of harmful school policies, advocacy, and, if necessary, litigation. Neily Decl. ¶3. PDE has members who either send their children to Wellesley public schools or are enrolled in Wellesley public schools, including Parents A-E. Neily Decl. ¶4-5.

PDE's members have been harmed by the Racial Affinity Group Policy. Parent A Decl. ¶¶5-13; Parent B Decl. ¶¶5-13; Parent C Decl. ¶¶5-12; Parent D Decl. ¶¶5-10; Parent E Decl. ¶¶5-10; Neily Decl. ¶6. Because of their race, the children of Parents A-E have been denied the opportunity to attend, to participate in, and to learn from all school-sponsored events. Parent A Decl. ¶¶ 6, 10, 13; Parent B Decl. ¶¶ 6, 10, 13; Parent C Decl. ¶¶6-7, 11. The policy sends a message to these children that they are unwelcome because of their race. Parent A Decl. ¶7; Parent B Decl. ¶7; Parent C Decl. ¶8. And it causes Wellesley teachers, staff, and students to identify and categorize one another based on the ethnicities of the families they were born into, rather than the people they've become. Parent A Decl. ¶8; Parent B Decl. ¶8; Parent C Decl. ¶¶8, 10.

PDE's members also have been harmed by the Biased Speech Policy. Parent A Decl. ¶¶14-21; Parent B Decl. ¶¶14-21; Parent C Decl. ¶¶13-24; Parent D Decl.¶ ¶12-13; Parent E Decl. ¶¶12-13. The children of PDE members have strong opinions about many of the most hotly debated topics of the day, including abortion, affirmative action, allowing biological males who identify as female to compete in women's sports, and the Black Lives Matter organization. Parent A Decl. ¶20; Parent B Decl. ¶20; Parent C Decl. ¶15. But they remain silent about these beliefs in class and on social media because they fear that they will be punished under the Biased Speech Policy if they do. Parent A Decl. ¶¶17-21; Parent B Decl. ¶¶17-21; Parent C Decl. ¶¶15-17.

ARGUMENT

PDE is entitled to a preliminary injunction if it shows that it "'is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest.'" *Voice of the Arab World, Inc. v. MDTV Med. News Now, Inc.*, 645 F.3d 26, 32 (1st Cir. 2011). PDE satisfies all four requirements.

I. PDE is likely to prevail on the merits.

A. The Racial Affinity Group Policy is unconstitutional and violates federal law.

1. The Racial Affinity Group Policy violates the Equal Protection Clause.

The Equal Protection Clause prohibits the government from "deny[ing] to any person the equal protection of the laws." The "central mandate" of equal protection is "racial neutrality" by the government. *Miller v. Johnson*, 515 U.S. 900, 904 (1995). "Whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229-30 (2000). "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people, and therefore are contrary to our traditions and hence constitutionally suspect." *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2419 (2013) (cleaned up).

"[A]ll racial classifications . . . must be analyzed by a reviewing court under strict scrutiny." *Adarand*, 515 U.S. at 227. This is true "even for so-called 'benign' racial classifications." *Johnson v. California*, 543 U.S. 499, 505 (2005). Strict scrutiny is a "searching examination, and it is the government that bears the burden to prove that the reasons for any racial classification are clearly identified and unquestionably legitimate." *Fisher*, 133 S. Ct. at 2419 (cleaned up). Under strict scrutiny, "the government has the burden of proving that racial classifications are 'narrowly tailored measures that further compelling governmental interests.'" *Johnson*, 543 U.S. at 505.

Here, WPS has a policy and custom (the "Racial Affinity Group Policy") of segregating students by race through "affinity groups." Under this Policy, WPS creates affinity groups where only students of certain races are invited to and allowed to join and participate in the group's activities. Put differently, certain Wellesley students (including the children of PDE's members) are prohibited from participating in certain school activities because of their race and ethnicity. WPS is acting pursuant to a "policy" or "custom" within the meaning of Section 1983 because, *inter alia*, (1) the Racial Affinity Group Policy is an express policy that, when enforced, causes a constitutional deprivation, (2) separating students by race in WPS schools is a widespread practice that is permanent and well settled,; and (3) the Racial Affinity Group Policy was caused by individuals with final policy making authority. *Supra* 3-7; *see Doe v. City of Worcester*, 2012 WL 13191288, at *8 n.16 (D. Mass. Feb. 24, 2012) (cleaned up).

Because WPS uses racial classifications and treats students differently based on their race, the school district's actions and policies are subject to strict scrutiny. *Johnson*, 543 U.S. at 505. WPS cannot clear this hurdle. First, WPS cannot show a compelling interest for its Racial Affinity Group Policy because racial segregation *never* serves a compelling interest. WPS believes that racial affinity groups create spaces "where members of historically-marginalized groups can come together in a spirit of mutual support and understanding of shared experiences." Ex. M. But a "generalized assertion that there has been past discrimination" cannot serve as a compelling interest for present racial classifications. *J.A. Croson Co.*, 488 U.S. at 498.

Second, the Racial Affinity Group Policy is not narrowly tailored. There is no evidence that WPS ever "considered methods other than explicit racial classifications to achieve [its] stated goals." *Parents Involved in Cmty. Sch.*, 551 U.S. at 704. Nor can WPS show "the most exact connection between [its] justification and classification." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986). Simply put,

any supposed benefits that exist from racial affinity groups can be accomplished without the "odious," *Rice*, 528 U.S. at 517, and "highly suspect tool," *J.A. Croson Co.*, 488 U.S. at 493, of racial classifications.

2. The Racial Affinity Group Policy violates Title VI of the Civil Rights Act.

For similar reasons, PDE is likely to prevail on its Title VI claims. Title VI provides that no person "shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. §2000d. Because WPS receives federal financial assistance, Ex. V at 25, it is subject to Title VI's prohibitions, *see* 42 U.S.C. §2000d-4a.

Through its Racial Affinity Group Policy, WPS has caused and will continue to cause students (including the children of PDE's members) to be "excluded from participation in, be denied the benefits of, [and] be subjected to discrimination under" programs and activities "on the ground of race, color, or national origin." 42 U.S.C. §2000d. In addition, because WPS is violating the Equal Protection Clause of the Fourteenth Amendment, WPS is also violating Title VI. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 185 (1st Cir. 2020) ("Title VI's protections are coextensive with the Equal Protection Clause of the Fourteenth Amendment.").

B. The Biased Speech Policy is unconstitutional and violates Massachusetts law.

1. The Biased Speech Policy is an unconstitutional content-based and viewpoint-based regulation of speech.

"If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victim's Bd.*, 502 U.S. 105, 118 (1991). "Content-based regulations" are "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Accordingly, "any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest." *Pleasant*

Grove City v. Summum, 555 U.S. 460, 469 (2009); *see, e.g., Westfield High School L.I.F.E. Club*, 249 F. Supp. 2d at 123 (school policy allowing only "responsible" speech was a content-based regulation subject to strict scrutiny). In addition, "the First Amendment's hostility to content-based regulation extends" to "restrictions on particular viewpoints." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015). Viewpoint discrimination is flatly prohibited. *See Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019); *Mahanoy*, 141 S. Ct. at 2046 (schools cannot "suppress speech simply because it is unpopular").

Here, WPS has adopted a policy (the "Biased Speech Policy") that disciplines students for the content and viewpoint of their speech. Specifically, the Policy prohibits "speech or expression" that "demonstrates conscious or unconscious bias that targets individuals or groups" based on certain personal characteristics like race, ethnicity, or gender. Ex. R at 1. The Policy also prohibits speech or expression that "treats another person differently" or amounts to an "offensive comment" about issues like "race, ethnicity, gender, sexual orientation, religion, or disability." Ex. R at 1. This is a classic content-based and viewpoint-based regulation of speech. *See, e.g., Saxe v. State College Area School District*, 240 F.3d 200, 206 (3d Cir. 2001) (bans on "'harassment'" covering speech impose "'content-based'" and often "'viewpoint-discriminatory'" restrictions on that speech). WPS has no compelling interest in suppressing this type of student speech, and, even if it did, WPS's restrictions are not narrowly tailored to further that interest. *See Mahanoy*, 141 S. Ct. at 2046; *see also Westfield High School L.I.F.E. Club*, 249 F. Supp. 2d at 123 (school district's policy allowing only "responsible speech" not justified by students' desire "to be free from 'offensive' material").

That the Biased Speech Policy regulates public school students is of no moment. Under *Tinker*, schools may restrict student speech only in limited circumstances. The school has the burden of proving that "(1) actual 'disturbances or disorders on the school premises in fact occurred'; (2) 'the record demonstrates facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities'; or (3) the speech invades the rights of others."

Norris, 969 F.3d at 25 (quoting *Tinker*, 393 U.S. at 513-14) (alterations omitted). WPS can make none of those showings here. WPS especially has no justification for punishing "biased" speech *off campus*, where the school has little authority to regulate student speech. *Mahanoy*, 141 S. Ct. at 2046. Because the Biased Speech Policy is an attempt to "suppress speech simply because it is unpopular," *Norris*, 969 F.3d at 25 (quoting *Tinker*, 393 U.S. at 508), the policy violates the First Amendment.

2. The Biased Speech Policy is unconstitutionally overbroad.

The First Amendment prohibits schools from adopting regulations of students that are "so broad as to chill the exercise of free speech and expression." *Dambrot v. Cent. Michigan Univ.*, 55 F.3d 1177, 1182 (6th Cir. 1995). "Because First Amendment freedoms need breathing space to survive," the government "may regulate in the area only with narrow specificity." *Gooding v. Wilson*, 405 U.S. 518, 522 (1972). Schools must carefully craft their regulations "to punish only unprotected speech and not be susceptible of application to protected expression." *Id.*

The Biased Speech Policy is unconstitutionally overbroad. By its terms, the policy applies to protected speech. And virtually any opinion or political belief—as well as any use of humor, satire, or parody—could be perceived as "offensive," having an "impact" on others, "treat[ing] another person differently," or "demonstrat[ing] conscious or unconscious bias that targets individuals or groups." Ex. R at 1. The Biased Speech Policy also does not differentiate between "on campus" and "off campus" speech, *see id.; see also* Ex. KK (stating that Wellesley High School had "moved forward with consequences" for student's "biased-based" social media post), even though WPS's ability to punish off-campus speech is extremely limited, *see Mahanoy*, 141 S. Ct. at 2046. Courts regularly find these types of far-reaching school policies to be unconstitutionally overbroad. *See, e.g., Saxe*, 240 F.3d at 215-16 (high school speech policy punishing "harassment" was overbroad because it "prohibit[ed] a substantial amount of non-vulgar, non-sponsored student speech"); *Flaherty v. Keystone Oaks School Dist.*, 247 F. Supp. 2d 698, 701-02 (W.D. Penn. 2003) (speech policy prohibiting "abusive," "inappropriate,"

and "offen[sive]" language was overbroad); *see also Doe by Next Friend Doe v. Cavanaugh*, 437 F. Supp. 3d 111, 117 (D. Mass. 2020) (identifying "multiple cases that have found school policies governing areas such as harassment and abuse to be overbroad").

3. The Biased Speech Policy is unconstitutionally vague.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A government policy is unconstitutionally vague when it "either forbids or requires the doing of an act in terms so vague that [individuals] of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). A policy is also unconstitutionally vague when it has no "explicit standards for those who apply them" and thus "impermissibly delegates basic policy matters to [officials] for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 109. This principle of clarity is especially demanding when First Amendment freedoms are at stake. If the challenged law "interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). "Certainty is all the more essential when vagueness might induce individuals to forego their rights of speech, press, and association for fear of violating an unclear law." *Scull v. Va. ex rel. Comm. on Law Reform & Racial Activities*, 359 U.S. 344, 353 (1959).

The Biased Speech Policy is void for vagueness because it gives students no guidance about what speech is permitted and what speech isn't. The policy doesn't specify what constitutes "offensive" speech, speech that has an "impact" on others, speech that "treats another person differently," or speech that "demonstrates conscious or unconscious bias that targets individuals or groups. Ex. R at 1. This absence of a clear standard also creates a serious risk that school officials will enforce the policy in an arbitrary manner, determining on an "ad hoc and subjective basis" what speech is "biased"

and deserves punishment and what speech is acceptable. *Grayned*, 408 U.S. at 109; *see also Coates v. City of Cincinnati*, 402 U.S. 611, 614-15 (1971); *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1310 (8th Cir. 1997); *Westfield High School L.I.F.E. Club*, 249 F. Supp. 2d at 127 (speech policy allowing only "responsible" speech unconstitutionally vague because it "reserves a measure of judgment and discretion to whatever school administrator a student happens to turn for advice on the matter").

4. The Biased Speech Policy violates the Massachusetts Students' Freedom of Expression Law

The Massachusetts Students' Freedom of Expression Law provides: "The right of students to freedom of expression in the public schools of the commonwealth shall not be abridged, provided that such right shall not cause any disruption or disorder within the school. Freedom of expression shall include without limitation, the rights and responsibilities of students, collectively and individually, (a) to express their views through speech and symbols, (b) to write, publish and disseminate their views, (c) to assemble peaceably on school property for the purpose of expressing their opinions." Mass. Gen. Laws ch. 71, §82. The act's "clear and unambiguous language protects the rights of secondary school students limited only by the requirement that any expression be non-disruptive within the school." *Pyle v. Sch. Comm. of S. Hadley*, 667 N.E.2d 869, 872 (Mass. 1996). Further, "[t]here is no room in the statute to construe an exception for arguably . . . offensive language absent a showing of disruption within the school." *Id.*; *see Westfield High Sch. L.I.F.E. Club*, 249 F. Supp. 2d at 111 ("The obvious purpose of the [Students' Freedom of Expression Law], to protect student speech, would be completely undermined . . . if 'any disruption or disorder' extended to include trivial or merely negative reactions to an unpopular viewpoint.").

WPS is violating the Massachusetts Students' Freedom of Expression Law because the Biased Speech Policy "abridge[s]" the free-speech rights of WPS students (including the children of PDE's members) and is not justified on the basis of future "disruption or disorder." Mass. Gen. Laws ch. 71, §82. Despite the state law's clear commands, the Biased Speech Policy prohibits a vast swath of student

speech merely because others deem it "biased." This prohibition on "biased" speech violates the Students' Freedom of Expression Law. *See Westfield High Sch. L.I.F.E. Club*, 249 F. Supp. 2d at 111 (finding that a speech policy allowing only "reasonable" speech likely violated the Students' Freedom of Expression Law because the policy "prohibited student speech without a reasonable forecast of any disruption or disorder" and "no disruption or disorder [had] actually occurred"); *Doe by Next Friend Doe v. Cavanaugh*, 437 F. Supp. 3d 111, 119-20 (D. Mass. 2020) (student had pled sufficient facts to show that school anti-bullying policy violated the Students' Freedom of Expression Law).

II. PDE satisfies the remaining preliminary-injunction criteria.

Because PDE is likely to prevail on its claims, the other criteria for a preliminary injunction are easily satisfied.

Irreparable Harm. The "deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Dorce v. Wolf*, 506 F. Supp. 3d 142, 145 (D. Mass. 2020) (quoting *C.G.B. v. Wolf*, 464 F. Supp. 3d 174, 217 (D.D.C. 2020)). Without an injunction, the children of PDE's members will continue to be segregated on the basis of race and denied their rights under the Equal Protection Clause and Title VI. Harms from racial segregation are irreparable. *See Coal. for Equity & Excellence in Maryland Higher Educ. v. Maryland Higher Educ. Comm'n,* 295 F. Supp. 3d 540, 557 (D. Md. 2017) ("'Irreparable injury comes from the maintenance of segregative policies[.]'"); *Hisp. Nat'l L. Enf't Ass'n NCR v. Prince George's Cty.*, 2021 WL 1575772, at *23 (D. Md. Apr. 21, 2021) ("Where the Court has found a likelihood of success on Plaintiffs' equal protection claim, the deprivation of such a constitutional right alone would constitute irreparable harm."). PDE's members also will be denied their First Amendment rights and their rights to free expression under Massachusetts law. This loss of freedom is also irreparable. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 669 F.3d 1, 10-11 (1st Cir. 2012) (same).

Balance of Harms and the Public Interest: The balance of the equities and the public interest factors "merge when the Government is the party opposing the preliminary injunction." *Nken v. Holder*, 556 U.S. 418, 435 (2009). These factors weigh in favor of injunctive relief because it is "'always in the public interest to prevent the violation of a party's constitutional rights.'" *Dorce*, 506 F. Supp. 3d at 145 (quoting *Melendres v.* Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012)); *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 191 (4th Cir. 2013) (same). Nor does WPS have any valid interest in engaging in racial segregation or in suppressing "biased" speech. *See, e.g., Westfield High School L.I.F.E. Club*, 249 F. Supp. 2d at 129.[2]

CONCLUSION

For the foregoing reasons, the Court should grant PDE's motion and preliminarily enjoin Defendants from enforcing the challenged policies during this litigation.

[2] The court should not require a bond. The First Circuit "has recognized an exception to the security bond requirement in Fed. R. Civ. P. 65(c) in 'suits to enforce important rights or public interests.'" *Westfield High School L.I.F.E. Club*, 249 F. Supp. 2d at 128 (quoting *Crowley v. Local No. 82, Furniture & Piano Moving*, 679 F.2d 978, 1000 (1st Cir. 1982)). Waiving the bond requirement is particularly appropriate here because PDE is likely to succeed on the merits and Defendants will incur no "harm, financial or otherwise" by an injunction that stops them from violating the Constitution. *Westfield High School L.I.F.E. Club*, 249 F. Supp. 2d at 128.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 22, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will automatically send e-mail notification to all counsel of record.

Because Defendants have not yet entered an appearance, I am also serving the foregoing by email and by certified mail, return receipt requested, at the address below:

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