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MEETING NOTICE

POSTED IN ACCORDANCE WITH THE PROVISIONS OF MGL 30A § 20 Act relative to extending certain COVID-19 measures adopted during the state of emergency

Marblehead School Committee Policy Subcommittee
Name of Board or Committee

Zoom Conference: https://marbleheadschools-org.zoom.us/j/99314605512?pwd=vMxuBjr7RSpRmfZDrLcNoXWdsWqRq0.1
Meeting ID: **993 1460 5512**
Password: **178023**
Dial in Phone #: +1 646 931 3860 US

Friday	**March**	**7**	**2025**	**11:30AM**
Day of Week	Month	Date	Year	Time

Agenda or Topics to be discussed listed below (That the chair reasonably anticipates will be discussed)

I. Call to Order
II. Public Comment
III. Discussion: draft Flag and Banner policy
IV. School Committee Operating Protocols

Adjournment

THIS AGENDA IS SUBJECT TO CHANGE

Chairperson: Jennifer Schaeffner
Posted by: Jennifer Schaeffner
Date: 3/3/25

DRAFT POLICY IMDB

IMDB – Policy Regarding Display of Flags, Banners, and Symbolic Displays

The Marblehead School Committee, as the governing and policy-making body of the Marblehead Public Schools, has the sole authority to determine that flags, banners, and similar symbolic displays on school district property reflect the mission, vision, and values of the school district and constitute the school district's government speech. The Committee has therefore adopted this Policy which is subject to the following rules.

1. Flags that have official legal status – the United States flag, the Massachusetts State flag, and the POW/MIA flag – shall be displayed on school district property;
2. In addition, flags, banners, and similar symbolic displays that reflect the school district's mission, vision, and values shall be displayed at such times and locations on school district property as determined by the School Committee
3. The School Committee will not accept any third party requests.

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March 3, 2025

Via Email

Jennifer Schaeffner, Chair
Marblehead School Committee
9 Widger Road
Marblehead, MA 01945

RE: Policy – Display of Flags/Banners

Dear Chair Schaeffner:

You have asked for an analysis that can be publicly released regarding the decision in *Shurtleff v. City of Boston*, 596 US 243 (2022) and how it applies in the school setting regarding the display of flags and banners.

Succinctly stated, *Shurtleff* held that the City of Boston's routine allowance of the display of various flags communicating a number of viewpoints on the City Hall Plaza was not "government speech" that would immunize the City from compliance with the First Amendment when it rejected a request to display a religious flag. As is customary with Supreme Court decisions, *Shurtleff* laid out general principles to be developed in specific contexts by the lower federal courts. One such question left open is *Shurtleff*'s application in schools.

Thus far there appears to be one relevant case that has been decided at the appellate level in the federal system. The analysis in this memorandum must be read in light of the fact that as of now there is very limited judicial guidance.

In *Cajune v. Indep. Sch. Dist. 194*, 105 F.4th 1070 (8th Cir. 2024), a lawsuit was filed against a school district alleging a violation of the First Amendment by persons seeking to display "All Lives Matter" and "Blue Lives Matter" posters in a school. The school district had granted teachers' requests to display "Black Lives Matters" posters in the school after reviewing drafts and making a few revisions. The plaintiffs' request was refused and the lawsuit followed. After the trial court dismissed the First Amendment claims for failure to state a claim based on *Shurtleff*, the plaintiffs appealed on multiple grounds. As to the First Amendment claims the

Court of Appeals held that the plaintiffs had stated a valid claim and reversed the judgment of dismissal. The court applied the three-part test adopted in *Shurtleff* to determine whether the posters were "government speech" of the school district such that it could deny the plaintiffs' request without First Amendment liability.

First, regarding the "history of posting messages on school walls", the court found that the district "had not previously allowed private individuals to display a poster series" similar to this. *Id.* at 1079. It rejected the trial court's analysis that the posters were "government speech" on the grounds that the school district had "'reviewed, authorized, and provided the posters to support staff [and students].'" *Id.* at 1080. The court pointed out that "private actors", including teachers, students, and families, were "involve[d]" "in the design and adoption" of the posters. *Id.* at 1080.

Second, regarding the "public's likely perception as to who—the government or a private person—is speaking" the court noted that teachers were given discretion to display the posters and to do so in their classrooms – both factors suggesting that this was "private speech". *Id.* at 1080. It rejected as insignificant the fact that "the posters contain the District's logo, slogan, website link, and a statement that '[t]his poster is aligned to School Board policy and an unwavering commitment to our Black students, staff[,] and community members.'" *Id.* at 1081. The court ruled, applying Supreme Court precedent, that the posters cannot be "government speech solely on the basis that the District affixed its seal of approval on them". *Id.* at 1081.

Finally, regarding the third factor – "the extent to which the government has actively shaped or controlled the expression" – the court held that this factor, too, had not been satisfied by the school district. Among the relevant facts were that "the idea of the Inclusive Poster Series originated with private persons, including 'staff and families' in the District". *Id.* at 1081. The court ruled that "the mere existence of a review process with approval authority is insufficient by itself to transform private speech into government speech", noting that "the District maintained a passive role in the design of the posters" because it made only limited changes and had gotten input from "an 'equity group,' 'students,' 'staff,' and 'other advisory committees.'" *Id.* at 1081-1082.

The *Cajune* decision is not binding law in the District of Massachusetts or in the First Circuit. In addition, it was decided at an early stage of the lawsuit when inferences must be drawn in favor of the plaintiffs based on their allegations. Nonetheless, nothing in its analysis

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can be said to clearly conflict with the general principles stated in *Shurtleff.* Pending further development of the law in this area, it should be assumed that what is "government speech" in the school district likely would be limited to speech determined and designed by the policy-making body, the School Committee, and the Superintendent acting at the Committee's direction.

Teachers, students, and families are "private persons" in this context and cannot determine "government speech". Their involvement in the adoption of flags or banners could compromise the district's "government speech" immunity from having to comply with the First Amendment. That, in turn, could subject the school district to potential First Amendment liability for denying a request to display flags or banners which may be at odds with the district's values or best interests. Obviously, the merits of any such claim would be highly dependent on the specific facts.

Given the current state of the law in this area, unless a flag or banner clearly meets the "government speech" test the safest course is to display flags that have official legal status – the United States flag, the Massachusetts flag, and the POW/MIA flag.

As an ancillary matter, it is important to keep in mind that G.L. c. 264, § 8 actually imposes a fine for "display[ing] the flag or emblem of a foreign country" on the outside of a school building. The statute has no exceptions for schools.

Very truly yours,

John Foskett

John Foskett

JF:ham

cc: Thomas H. Costello, Esq.