ALLIANCE DEFENDING FREEDOM
FOR FAITH. FOR JUSTICE.

February 11, 2025

Via U.S. Mail & Electronic Mail
Mr. Steven N. Blivess
Chief Legal Counsel
Frederick County Public Schools
191 South East Street
Frederick, Maryland 21701
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Re: Unconstitutional Title IX Investigation of Frederick County Board of Education Member Colt Black

Dear Mr. Blivess,

As you know, the Frederick County Board of Education (the Board) has launched a Title IX investigation against Board of Education member Colt Black for comments he made during an open meeting of the Board on January 8, 2025. We write to insist that FCPS immediately halt the investigation against Mr. Black as it represents unconstitutional retaliation against Mr. Black for exercising his First Amendment rights.

As introduction, Alliance Defending Freedom is an alliance-building, nonprofit legal organization that advocates for the right of people to live out their faith and speak freely. Since 2011, we have represented parties in 15 victories at the Supreme Court.[1] In 2018, *Empirical SCOTUS* ranked us first among "the top performing firms" litigating First Amendment cases.[2] ADF's Center for Academic Freedom is committed to protecting freedom of speech and association for students and faculty

[1] *See, e.g.*, *303 Creative, LLC v. Elenis*, 143 S. Ct. 2298 (2023); *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021); *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021); *March for Life Educ. & Def. Fund v. California*, 141 S. Ct. 192 (2020); *Thompson v. Hebdon*, 140 S. Ct. 348 (2019); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n,* 138 S. Ct. 1719 (2018); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (victories for S. Nazarene Univ. and Geneva Coll.); *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011).

[2] Adam Feldman, *Supreme Court All-Stars 2013–2017*, EMPIRICAL SCOTUS (Sept. 13, 2018), https://bit.ly/2pm2NXn (last visited July 28, 2023).

so that everyone can freely participate in the marketplace of ideas without fear of censorship. Since 2006, the Center has represented clients in over 430 litigation victories for First Amendment freedoms on public university campuses nationwide.[3] But today, we write in the hopes that this matter can be resolved quickly and amicably.

FACTUAL BACKGROUND

On January 8, 2025, the Board held an open meeting. One of the items addressed at that meeting was Board Policy 443, *Creating Welcoming and Affirming Schools for Transgender and Gender Nonconforming Students* (Policy 443).[4] During that meeting, Board members and members of the Frederick County community voiced their support or criticism of Policy 443. During the portion of the meeting designated for Board member comments, Mr. Black acknowledged the differing viewpoints of every individual who had spoken and, echoing the views of other community members, respectfully expressed his concerns about the First Amendment implications of Policy 443. Specifically, Mr. Black noted how Policy 443 compels the speech of Frederick County Public Schools (FCPS) staff and students by forcing them to use the pronouns requested by students experiencing gender confusion and to participate in and affirm students' gender transitions, a policy which violates the Free Speech rights of students and staff. After Mr. Black concluded his remarks, other Board members made their own comments, and the Board moved on to consider other matters. Upon information and belief, no Board member or other individual present at the meeting objected to Mr. Black's comments at the time.

On January 11, the Frederick County Democratic Central Committee issued a public statement[5] labeling Mr. Black's comments as "hate speech" and calling for members of the community to submit "FCPS Discrimination and Harassment form[s]" to complain to the Board via its Title IX Sexual Harassment Policy (Title IX Policy),[6] This is a clear effort to silence Mr. Black because of his viewpoint. Indeed, the FCDCC declared that Black's comments "ha[d] no place in the FCPS Board of Education mission."

On January 15, Mr. Black received a letter from your office informing him that the Board had received "20 complaints" alleging that Mr. Black's "comments [] made during the January 8, 2025 meeting ... violated Title IX." The letter also stated that the Board, apparently caving to the political pressure, had determined to conduct an

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[3] Alliance Defending Freedom, *Who We Are*, https://bit.ly/3JbKFbb (last visited February 3, 2023).

[4] Frederick County Board of Education Policy 443, *Creating Welcoming and Affirming Schools for Transgender and Gender Nonconforming Students*, https://bit.ly/4jPB0IW.

[5] Frederick County Democratic Central Committee, *Public Statement*, Facebook (Jan. 11, 2025, 1:02 PM), https://perma.cc/A7ER-T4GF.

[6] Frederick County Board of Education Policy 116, *Title IX Sexual Harassment*, https://bit.ly/42KTO67.

investigation into whether Mr. Black's comments violated the Title IX Policy, which prohibits "sexual harassment" based on, among other things, an individual's sexual orientation, gender identity, and/or sex.[7] The letter described the "[a]lleged [h]arassment" as "[i]nappropriate comments" made during the January 8 meeting.

The letter also noted that "the Board" had retained outside counsel to run the investigation. Under Board policy, however, a vote of the Board is required to approve funding for such a purpose. Upon information and belief, no vote ever took place. When Mr. Black and his fellow Board members questioned Board President Rae Gallagher about the procedural violation, Ms. Gallagher could point to no policy or precedent that permits the unilateral approval of funding to retain an attorney.

On January 30, Mr. Mareco Edwards, the attorney improperly retained by Ms. Gallagher and your office, emailed Mr. Black with a "formal notification that an investigation is underway regarding [his] comments made during the January 8, 2025, FCPS Board of Education meeting." Mr. Edwards' email instructed Mr. Black that "as part of th[e] investigation," he is "required to participate in an interview with the assigned investigator."

LEGAL ANALYSIS

Mr. Black's public comments do not violate Title IX.

These facts do not amount to a Title IX violation as a matter of law. The Supreme Court has held that in order for conduct to be actionable under Title IX, the harassment must be "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[8] Mr. Black's comments were neither severe, pervasive, nor objectively offensive. He merely expressed his concerns about Policy 443, concerns which were also expressed at the meeting by other Board members and members of the community. As a duly-elected Board member, it is Mr. Black's duty to comment on a policy up for review. And it cannot be maintained that a single comment denied any individual access to an FCPS educational opportunity or benefit. Mere disagreement cannot be said to deprive the complainants of "access to an educational opportunity or benefit," particularly those who weren't even at the January 8 meeting. Indeed, the FCDCC's statement called for Title IX complaints from community members "whether or not [they] were present at the meeting."[9] Further, no individuals were, in fact, denied access to any educational benefit as a result of Mr. Black's comments. As a lone member of the Board, Mr. Black has no authority to deny any such benefit regardless. Finally, as a Board member, Mr. Black enjoys legislative privilege. It is well-settled that members of local legislative bodies "generally may not be compelled to answer for or defend, in

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7 *Id.*, Sec. B(18) at 7.

8 *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

9 FCDCC Public Statement.

a non-legislative governmental forum, what they say or do in the legislative process."[10]

Therefore, Mr. Black's comments fail to satisfy the legal definition of harassment. The investigation is thus nothing more than the product of a political vendetta that violates Mr. Black's free speech rights. If the Board determines that Mr. Black's speech somehow violated the Title IX Policy, then the application of the Policy is unconstitutional.

The Board's investigation of Mr. Black violates the First Amendment.

As you are well aware, content-based speech regulations are "presumptively unconstitutional."[11] That is because "[a]ny" content-based restriction "completely undercut[s]" our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[12] "[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[13] Indeed, "the core principles of the First Amendment 'acquire a special significance ... where the free and unfettered interplay of competing views is essential to [an] institution's educational mission.'"[14]

But here, the Board, as a result of Ms. Gallagher's unilateral actions, has violated Mr. Black's First Amendment rights by launching a baseless investigation into his expression of protected speech that (A) represents clear viewpoint discrimination against Mr. Black's political views and (B) chills his speech by threatening punishment. Thus, the investigation should be immediately terminated.

The Board's investigation represents clear viewpoint discrimination against inarguably protected speech.

"It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."[15] Nor may it engage in viewpoint discrimination, which is "an egregious form of content discrimination."[16] When the government targets not only the topic discussed but also "particular views taken by

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10 *State v. Holton*, 193 Md. App. 322, 367–68 (2010) ("It is clear … local legislators, are not subject to civil liability or criminal prosecution in any State court for their legislative speech or conduct.").

11 *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

12 *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972).

13 *Healy v. James*, 408 U.S. 169, 180 (1972) (quoting *Shelton v. Tucker*, 364 U.S. 479. 487 (1960)).

14 *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1016 (N.D. Cal. 2007) (quoting *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 863 (E.D. Mich. 1989)).

15 *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995).

16 *Id.* at 829.

speakers on a subject," it violates free speech rights "all the more blatant[ly]."[17] The government has no role in regulating speech when the "specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[18]

The evidence demonstrates that the Board launched the investigation because of the "message expressed."[19] Other members of the community and the Board spoke in favor of Policy 443 and expressed views on sex and gender opposed to Mr. Black's views. The Board did not respond by restraining that speech. But when Mr. Black had the temerity to defend his views on the very same subject, the Board, caving to pressure from Mr. Black's political opponents, responded by launching an investigation against him. The Board has thus targeted the "particular views" taken by Mr. Black "on a subject."[20] It is a "bedrock" First Amendment principle that the "government may not prohibit the expression of an idea simply because" some "find[] the idea itself offensive or disagreeable."[21] Otherwise, "[b]ecause some people take umbrage at a great many ideas, very soon no one would be able to say much of anything at all."[22]

Content and viewpoint discrimination must survive strict scrutiny.[23] That is, the government bears the burden of proving its discrimination is "necessary to serve compelling governmental interests by the least restrictive means available."[24] The Board cannot meet this exacting standard.

"A viewpoint-based restriction of private speech rarely, if ever, will withstand strict scrutiny review."[25] Indeed, the Board has no compelling interest in discriminating based on Mr. Black's respectful, protected speech. A general interest in combatting harassment or acts of discrimination comes nowhere near that exceptionally high bar.[26]

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17 *Id.*
18 *Id.*
19 *Reed*, 576 U.S. at 163.
20 *Rosenberger*, 515 U.S. at 829.
21 *Texas v. Johnson*, 491 U.S. 397, 414 (1989).
22 *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 711 (9th Cir. 2010).
23 *Reed*, 576 U.S. at 163–64.
24 *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 648 (4th Cir.1995) (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992)).
25 *Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 616 n.4 (4th Cir. 2002) (citing *R.A.V.*, 505 U.S. at 395–96).
26 *See Davis*, 526 U.S. at 633 (1999) (to be actionable, harassment must be "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit").

What's more, "[t]here is no 'categorical harassment' exception to the First Amendment's free speech clause."[27] "'Where pure expression is involved,'" anti-harassment law "'steers into the territory of the First Amendment.'"[28] Here, Mr. Black's speech was neither "severe," "pervasive," nor "objectively offensive." Mr. Black merely expressed his concern that Policy 443 violated the First Amendment rights of FCPS students and staff, and he did so in a civil and respectful manner. As noted above, mere disagreement cannot be said to deprive the complainants of "access to an educational opportunity or benefit." Therefore, Defendants lack any compelling interest to justify its investigation into Mr. Black's political speech.

The Board's investigation of Mr. Black and its implicit threat of punishment chills speech.

The Board's decision to investigate Mr. Black because of his protected speech constitutes an injury under the First Amendment. The Supreme Court has recognized that "constitutional violations [can] arise from the deterrent, or 'chilling,' effect of governmental regulations."[29] "[T]he threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" may cause self-censorship in violation of the First Amendment just as acutely as a direct bar on speech.[30] Thus, individuals suffer an injury to their First Amendment rights even when the government has simply "chilled" the right to engage in free speech and expression.[31]

A Title IX investigation premised on political speech would "deter 'a person of ordinary firmness' from the exercise of First Amendment rights."[32] A government policy presents a First Amendment injury when a speaker (1) has an "intention to engage in a course of conduct arguably affected with a constitutional interest," (2) his intended future conduct is "arguably ... proscribed by [the policy in question]," and (3) "the threat of future enforcement of the [challenged policies] is substantial."[33] Mr. Black wishes to engage in robust debate on a timely and controversial political topic. Because his views do not mirror those of his political opponents, Mr. Black has been warned that his speech may run afoul of the Title IX Policy. Finally, the Title IX Policy calls for "disciplinary sanctions" against individuals found responsible for violations up to and including "dismissal."[34] Indeed, any reasonable individual would

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27 *Univ. of Md. Students for Just. in Palestine v. Bd. of Regents of Univ. Sys. of Md.*, 2024 WL 4361863, at *9 (D. Md. Oct. 1, 2024) (quoting *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3rd Cir. 2001)).

28 *Saxe*, 240 F.3d at 206 (quoting *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596 (5th Cir.1995)).

29 *Laird v. Tatum*, 408 U.S. 1, 11 (1972).

30 *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).

31 *See, e.g., Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013).

32 *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005).

33 *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161–64 (2014).

34 FCPS Regulation 116-01, *Title IX Sex-Based Harassment*, Sec. VII(F)(2) at 19. https://bit.ly/4b1dHb5.

"refrain from exposing themselves to sanctions under the policy, instead making a sufficient showing of self-censorship," thus establishing a "chilling effect on their free expression that is objectively reasonable."[35] In applying these principles, several federal courts of appeals have determined that policies which call for investigations and threaten punishment have a "chilling effect" on speech. *See, e.g., Speech First, Inc. v. Cartwright,* 32 F.4th 1110, 1124 (C.A.11 2022); *Speech First, Inc. v. Fenves*, 979 F.3d 319, 338 (C.A.5 2020); and *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 765 (C.A.6 2019). Thus Mr. Black's First Amendment rights have been chilled, his speech deterred, by the prospect of adverse application of the Title IX Policy.

Additionally, the investigation itself is entirely unnecessary. Mr. Black's comments were recorded. The Board knows exactly what he said and the context of the remarks. There is simply nothing to investigate and no reason to interrogate Mr. Black about what he said. The only possible reason to subject Mr. Black to an interrogation is to intimidate him and punish him for engaging in protected speech. The First Amendment prohibits the government from retaliating against individuals for engaging in protected speech.

DEMAND

In light of these constitutional violations, we ask that the Board immediately halt the politically partisan investigation against Mr. Black. Meanwhile, we ask that the Board take immediate steps to preserve any and all documents connected with, discussing, or relevant to the incidents described here (including but not limited to any emails, complaints, etc., relating to Mr. Black, and all records of any Title IX investigations into Board members, FCPS staff, or students the last five years).

Our client seeks to resolve this matter quickly and amicably so that he can once again focus entirely on representing the parents and students of Frederick County. But he also insists that the Board respect his constitutional rights. We hope FCPS shares his desire and will quickly respect his rights by dismissing the investigation. We hope to hear from you by the close of business on February 14, 2025. Otherwise, we will advise our client of other ways to vindicate his constitutional rights.

Respectfully Submitted,

s/*Tyson C. Langhofer*

Tyson C. Langhofer
Senior Counsel
ALLIANCE DEFENDING FREEDOM
Counsel for Colt Black

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35 *Abbott v. Pastides*, 900 F.3d 160, 176 (4th Cir. 2018) (internal quotation marks omitted).

cc (via electronic mail):

- Mr. Craig Trainor, Acting Director of the Office for Civil Rights, U.S. Department of Education. craig.trainor@ed.gov.
- Mr. Matthew C. Ray, Legal Counsel, ADF Center for Academic Freedom, mray@ADFlegal.org.
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