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July 26, 2013

Mr. Tyrone E. Winfrey
Education Achievement Authority of Michigan
Chief of Staff
300 River Place, Ste. 3600
Detroit, MI 48207

HAND DELIVERED

Dr. John Covington
Education Achievement Authority of Michigan
Chancellor
300 River Place, Ste. 3600
Detroit, MI 48207

Re: Brooke Harris

Dear Hearing Officer Winfrey and EAA Chancellor Covington:

The ACLU of Michigan submits this letter in support of Ms. Brooke Harris to supplement the information presented at Ms. Harris's pre-termination hearing on July 15, 2013. We have serious concerns that Ms. Harris has been, and continues to be, unconstitutionally retaliated against for speaking out on a matter of public concern, namely conditions at schools managed by the Education Achievement Authority ("EAA").

Based on the information provided to us, the allegation levied against Ms. Harris that she "directly encouraged" a student walkout on June 13, 2013 at Mumford High School ("Mumford") in Detroit is unsubstantiated. On June 13, Ms. Harris was over five hundred miles from Detroit at a conference in New York City. It appears, however, that Mumford principal K.C. Wilbourn immediately blamed Ms. Harris for the walkout and forced Ms. Harris to go on leave that same day, without even asking her if she was involved. From our reports, EAA Investigator Urrond Williams then conducted an investigation of the incident that neglected to include any questioning of the students who walked out about their motivation for leaving school. Instead, both Principal Wilbourn and Investigator Williams used second and third-hand hearsay information from students who did not participate in the walkout to reach their conclusions that Ms. Harris was responsible. The aforementioned actions, combined with Investigator Williams's decision to selectively present, and turn over, only those student statements that cast suspicion on Ms. Harris, despite obtaining more statements, suggest that the walkout investigation was not conducted in good faith, and aimed from the outset at implicating Ms. Harris.

Such an unreasonable investigatory process shortly after Ms. Harris's public criticism of the EAA during the EAA Board meeting on May 9, 2013, is strong evidence that both the

investigation of Ms. Harris and resulting pre-termination hearing are unlawful retaliation against Ms. Harris for exercising her First Amendment rights. Unless there is credible, firsthand knowledge of Ms. Harris's involvement in the walkout of which we are unaware, we ask that you find the allegation against Ms. Harris to be unsubstantiated and recommend her immediate reinstatement.

Summary of Relevant Facts

According to our investigation, from August 2012 until placed on leave in June 2013, Ms. Harris taught five periods of tenth grade English, a journalism class, and a seminar at Mumford, a school under EAA management in Detroit. Ms. Harris also served as the faculty advisor for an extracurricular student club at Mumford, the Social Justice League ("SJL"). The SJL is a student-run organization. As the SJL's faculty advisor, Ms. Harris is present for most SJL meetings. However, Ms. Harris does not set the agenda for those meetings nor dictate to SJL members what topics should be discussed or what events should be planned. Rather, Ms. Harris serves primarily in an administrative capacity (i.e., finding space for meetings and obtaining necessary supplies).

As its name suggests, the students involved in SJL are concerned with issues of social justice. One issue raised by students at SJL meetings involved improving educational quality at Mumford. Specific concerns of the SJL students included lack of books, overcrowded classes, receiving instruction from the online platform "Buzz" rather than teachers, and students being suspended for petty reasons, such as not having proper identification.

Per their usual protocol when addressing other issues, SJL students discussed different methods of raising awareness about the existing education standards at Mumford to facilitate the improvement process. Ultimately, the SJL students decided to create and distribute flyers listing their concerns and possible remedies, and to send a letter to the Michigan House Education Committee.

On June 13, 2013, while Ms. Harris was in New York to attend a conference, 8-12 students left Mumford after C lunch chanting expletives about the EAA. The reason behind the students' departure from school remains unknown. To our knowledge, none of the students who walked out were members of SJL (or students in any of Ms. Harris's classes). Nor were the students who walked out questioned about the reason behind their departure from school or disciplined for their participation.¹ Additionally, none of the walkout participants provided statements that were presented as evidence during Ms. Harris's pre-termination hearing.

As a result, the notion that Ms. Harris had any involvement with that event is speculative at best.

Outside of school, and on her personal time, Ms. Harris has exercised her First Amendment right to publicly voice concerns about the poor educational conditions she has witnessed at Mumford. Among her concerns is the fact that some of her classes have as many as 61 students, the emphasis on online learning rather than classroom education with a teacher, and the number of special education students per class exceeding the maximum allowed by law.

¹ If such students have provided information about the reason for the walkout, that information has not been provided to Ms. Harris nor was it presented at the hearing.

In November 2012, Ms. Harris testified before the Michigan House Education Committee about these conditions. Ms. Harris then attended a community-sponsored “EAA teach-in” on December 5, 2012 at 6:00 pm. This event was attended by many Detroit residents, including some Mumford students. Both Ms. Harris and a Mumford student spoke at this event. Subsequently, Ms. Harris was written up for informing students about the EAA teach-in. However, Ms. Harris did not encourage students to either attend or speak at this event.

Ms. Harris was written up again for scheduling a non-school personnel guest to attend a SJL meeting on March 15, 2013. Although Ms. Harris was purportedly written up for not following the school’s guest policy, that policy had only been circulated to Ms. Harris and other Mumford faculty on the morning of March 15, 2013. Within thirty minutes of receiving the policy, Ms. Harris submitted a request for approval of her guest using the protocol outlined in the new policy. Ms. Harris did not receive an answer to her request. When the guest arrived at the school that afternoon he was not allowed to enter. Although the guest did not attend the SJL meeting, Ms. Harris was still disciplined for the guest’s appearance on school grounds.

On May 9, 2013, Ms. Harris voiced her concerns about Mumford to the EAA Board. Ms. Harris was then accused of “directly encouraging” a student walkout at Mumford on June 13, despite being in New York at the time.

Ms. Harris was not involved in the student walkout that occurred at Mumford on June 13, 2013 and expressly denies “directly encouraging” the walkout, as alleged in the Notice of Pre-Termination Hearing.

Legal Standard

The United States Supreme Court has long held that a public school teacher “may [not] constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work” *Pickering v. Bd. of Educ. of Twp. High Sch. Dist.* 205, 391 U.S. 563, 568 (1968). Speech involving “the appropriate educational program to be implemented” at a particular school is “undoubtedly” a matter of public interest or concern. *Leary v. Daeschner*, 228 F.3d 729, 737 (6th Cir. 2000). Similarly, “[t]he right of an American citizen to criticize public officials and policies and to advocate peacefully ideas for change is ‘the central meaning of the First Amendment.’” *Glasson v. City of Louisville*, 518 F.2d 899, 904 (6th Cir. 1975) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 259, 273 (1964)) (acknowledging right of citizen to display the word “murderer” on placard in reference to then-President Richard Nixon).

Before a public employer can restrict a teacher’s First Amendment speech right, it must satisfy a stringent standard and demonstrate that its interest in functioning efficiently outweighs the teacher’s right to speak. *See Pickering*, 391 U.S. at 568; *Hughes v. Region VII Area Agency on Aging*, 542 F.3d 169, 180 (6th Cir. 2008). Where, as here, a teacher’s criticism of her employer occurred outside the scope of her official duties and neither impeded the teacher’s performance of classroom duties or interfered with school operations, the teacher’s First Amendment right to speak prevails. *Pickering*, 391 U.S. at 572-573; *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006). Thus, regardless whether a public employer such as the EAA disagrees with, or is angered by, the teacher’s statements, the employer may not use those statements as the

basis for any adverse action against the teacher “that would likely chill a person of ordinary firmness from continuing to engage in that activity,” including termination. *Leary*, 228 F.3d at 737. To put it simply, “public employers cannot silence their employees simply because they disapprove of their speech.” *Taylor v. Keith*, 338 F.3d 639, 643 (6th Cir. 2003). To do so is retaliation, a First Amendment violation that may entitle the public employee to monetary damages and/or attorney’s fees.

An adverse employment action that occurs within temporal proximity to protected speech can evidence an underlying retaliatory motive. *See, e.g., Dye v. Office of the Racing Comm’n*, 702 F.3d 286, 305-306 (6th Cir. 2012). Likewise, a decision to terminate an employee based on weak or incredible evidence may be used to demonstrate that the employer acted with a retaliatory purpose. A plurality of the Supreme Court has stated:

We think employer decisionmaking will not be unduly burdened by having courts look to the facts as the employer *reasonably* found them to be. It may be unreasonable, for example, for the employer to come to a conclusion based on no evidence at all. Likewise, it may be unreasonable for an employer to act based on extremely weak evidence when strong evidence is clearly available – if, for instance, an employee is accused of writing an improper letter to the editor, and instead of just reading the letter, the employer decides what it said based on unreliable hearsay.

Waters v. Churchill, 511 U.S. 661, 677 (1994) (plurality).

Courts around the country have also found that the acts of initiating an investigation and recommending disciplinary action against an employee can support a retaliation claim when the investigation or recommendation is unwarranted and/or made in bad faith. *See, e.g., Anemone v. Metro. Transp. Auth.*, 410 F. Supp. 2d 255, 266-67 (S.D. NY 2006); *Miller v. Kennard*, 74 F. Supp. 2d 1050, 1060-61 (D. Utah 1999); *Pattee v. Georgia Ports Auth.*, 477 F. Supp. 2d 1253, 1264 (S.D. Ga. 2006).

Analysis

Brooke Harris has publicly expressed her view on certain EAA policies and the way in which those policies are implemented at Mumford on several occasions. Ms. Harris’s speech on secondary education, a matter of great public concern, is “entitled to the greatest constitutional protection.” *Glasson*, 518 F.2d at 904. Nonetheless, Ms. Harris was disciplined in December 2012 after attending and speaking at a community event on EAA policies and then wrongly accused of encouraging a student walkout in June 2013, one month after her May speech before the EAA board. Although the December 2012 reprisal Ms. Harris received is not directly at issue here, the short timeframes between her speech and disciplinary action provides strong evidence of retaliatory motive. *See, e.g., Dye*, 702 F.3d at 306.

Either Principal Wilbourn or EAA Investigator Williams could have asked any or all of the students who participated to explain why they walked out of school on June 13. Principal Wilbourn or Investigator Williams could also have obtained statements from those students and presented them at Ms. Harris’s July 15 pre-termination hearing. Instead, these officials unreasonably chose to rely on the uncorroborated statements of students who did not participate

in the walkout. Although various students who did not participate in the walkout purportedly told three teachers that Ms. Harris was involved, only one teacher statement, that of Jazmine Allen, identifies any students who were part of these discussions.² The statements from those students, Morris Jones and Demetrius Brown, fail to provide credible evidence of Ms. Harris's involvement and further demonstrate the unreasonableness of not questioning the walkout participants.

In Morris Jones's statement, neither Ms. Harris nor any other individual is credited with organizing or encouraging the walkout. Morris Jones's statement reads in full:

On June 13, 2013 I Morris Jones heard from students that it was a Walk Out of School Day to Protest that we shouldn't stay in school all year around. I was going to walk out until Ms. Allen my favorite teacher told me not to and have your own opinion at sometimes.

Demetrius Brown stated:

I was so happen to get on twitter last night and I was reading my home page and there was a few students talking about walking out of the school After C lunch at 12:30. Im not foreshore if its true About the teacher Ms. Harris having anything to do with it I just heard from A couple of my Associates.

Demetrius Brown's associates remain unidentified.

As evidenced by their statements, neither Morris Jones nor Demetrius Brown has any firsthand information that Ms. Harris was involved. This starkly contradicts the statement by Investigator Williams in his summary of the incident that "Every statement obtained from students and faculty at Mumford concluded with the understanding that Ms. Harris was directly involved in the planning of the student protest." Investigator Williams further states that Ms. Harris made planning statements "to students during her class period." However, of the nine student statements gathered by Investigator Williams and presented at the hearing, four were from students who were never students of Ms. Harris at Mumford, including Morris Jones and Demetrius Brown.³

Conclusion and Relief Requested

² Principal Willbourn's statement identifies another student, "Diamond." However, Diamond was not part of the walkout and did not provide one of the statements presented at the July 15 hearing.

³ This summary's credibility is further called into question due to the fact that it is dated June 17, 2013, yet references the due process Ms. Harris was allegedly given during her meeting with Human Resources on **June 19, 2013**. Further, Ms. Harris did not actually meet with Human Resources until June 20, 2013. Although Investigator Williams claims that Ms. Harris has "disobeyed directives" and "displayed an unwillingness to support the overall educational standards set forth by the Education Achievement Authority," he offers no specific examples of such conduct.

We understand that five student statements that directly implicated Ms. Harris were also presented at the hearing. However, as none of those students participated in the walkout, the value of that evidence is questionable. Further, although Ms. Harris has also been accused of urging SJL members to participate in a walkout, only one statement from an SJL member (Kennitha Savage) was presented at the hearing. Kennitha also did not participate in the June 13 walkout.

Unless the EAA has additional, credible evidence that it failed to provide Ms. Harris after the hearing, there does not appear to be sufficient information to conclude that Ms. Harris “directly encouraged” the student walkout on June 13. At the time of the walkout, Ms. Harris was attending a conference in New York. Further, no student that walked out has claimed that Ms. Harris organized or encouraged that event.

Ms. Harris has accepted a teaching position at another school for the 2013-2014 school year. Nonetheless, Ms. Harris would like to fulfill the terms of her existing employment contract and resume her teaching duties at Mumford for the remainder of the current school year. Because the investigation of the student walkout that occurred on June 13, 2013 was unreasonable and failed to yield any credible evidence of Ms. Harris’s involvement, we ask that you take the following steps:

1. Issue a finding that Ms. Harris was not involved in the June 13, 2013 walkout.
2. Immediately reinstate Ms. Harris to her teaching position at Mumford with full salary and benefits. Until Ms. Harris’s reinstatement, compensate her at the rate of her regular salary of \$250 per school day.
3. Because Ms. Harris was placed on ten days of paid leave on June 13, 2013 and has not yet received full compensation for those days, pay the outstanding balance of \$875.
4. Remove any negative information pertaining to the June 13, 2013 incident from Ms. Harris’s personnel file.

We are eager to have this matter resolved as soon as possible. Please do not hesitate to contact our office if you have any questions.

Very truly yours,

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cc: Brooke Harris
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