



May 28, 2021

Dr. Lucia Sebastian  
Interim Assistant Superintendent  
Human Resources and Talent Development  
Loudoun County Public Schools  
via email: lucia.sebastian@lcps.org

Re: *Unconstitutional retaliation against Mr. Byron Cross*

Dear Dr. Sebastian:

We represent Byron [Tanner] Cross, a Leesburg Elementary Physical Education teacher, regarding Loudoun County Public School's unconstitutional suspension in retaliation for his speech at Tuesday's school board meeting.

By way of introduction, ADF's Center for Academic Freedom is dedicated to ensuring freedom of speech and association for students and teachers so that everyone can freely participate in the marketplace of ideas without fear of government censorship. We have a track record of success.<sup>1</sup>

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<sup>1</sup> Alliance Defending Freedom has consistently achieved successful results for its clients before the United States Supreme Court, including 12 victories before the highest court in the last 10 years. *See, e.g., Uzuogbunam v. Preczewski*, 141 S. Ct. 792 (2021) (student free speech); *March for Life Educ. & Def. Fund v. California*, 141 S. Ct. 192 (2020); *Thompson v. Hebdon*, 140 S. Ct. 348 (2019) (overturning ruling upholding a law limiting political contributions); *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018) (upholding ADF's client's free speech rights against the State of California); *Masterpiece Cakeshop, LTD. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (upholding ADF's client's First Amendment rights); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (upholding ADF's client's First Amendment rights); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (representing Geneva College and Southern Nazarene University in consolidated cases) (upholding ADF's clients' First Amendment rights); *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015) (unanimously upholding ADF's client's free-speech rights); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (representing Conestoga Wood Specialties Corp. in consolidated case) (striking down federal burdens on ADF's client's free-exercise rights); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (upholding a legislative prayer policy promulgated by a town represented by ADF); *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (upholding a state's tuition tax credit program defended by a faith-based tuition organization represented by ADF).

### Factual Background

Mr. Cross has been employed by Loudoun County Public Schools for eight years, the last three as a physical education teacher at Leesburg Elementary. He has always received exemplary evaluations. On Tuesday evening, May 25, Mr. Cross spoke during public comment time at a Loudoun County School Board meeting expressing his opposition to adopting proposed policies 8040 and 8350.

Less than 48 hours later, you suspended Mr. Cross, banned him from campus, and began an investigation for potential “disruption.” When he inquired as to the basis of the allegations, you refused to provide any details other than to refer to the letter which did not provide any specifics.

### Analysis

The First Amendment prohibits retaliation against public employees for speaking on matters of public concern. “[A] teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.” *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 574 (1968).

Mr. Cross’s expression during public comment time at an open school board meeting was undoubtedly expression in his private capacity on a matter of public concern. *Id.* (teachers’ public expression regarding school board actions is protected speech); *Janus v. Am. Fed’n of State, Cnty. & Mun. Emps.*, 138 S. Ct. 2448, 2476 (2018) (listing examples of matters of public concern); *see also, Meriwether v. Hartop*, 992 F.3d 492, 506-07 (6th Cir. 2021) (teachers’ use of pronouns is protected speech on a matter of public concern).

Immediately suspending an employee and launching an investigation for engaging in First Amendment-protected expression, creates an atmosphere of fear and is intended to send a message to Mr. Cross and other teachers that they must toe the line or face the consequences. *Cf. Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005) (“plaintiff suffers adverse action if the defendant’s allegedly retaliatory conduct would likely deter ‘a person of ordinary firmness’ from the exercise of First Amendment rights); *Mosunic v. Nestle Prepared Foods Co.*, No. 15-cv-380, 2017 WL 3531465, at \*27 n.3 (D.R.I. Aug. 16, 2017) (“Suspension, regardless of whether it is paid, is adverse to the employee in and of itself. It is punitive in nature and at a minimum becomes part of one’s permanent employment record, affecting one’s ability for advancement, or to find other future employment, or gaining valuable job experience.”).

The First Amendment does not countenance such retaliation.

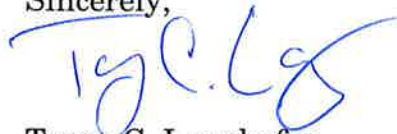
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**Conclusion**

We demand that you immediately (1) rescind the suspension, (2) reinstate Mr. Cross so that he can return to class on Tuesday, June 1, (3) remove the suspension letter from his file, and (4) refrain from any future retaliation against protected speech.

Please respond by 5:00 p.m. TODAY, Friday May 28. Absent the complete revocation of this suspension, Mr. Cross will be forced to pursue other legal options to safeguard his rights.

Sincerely,



Tyson C. Langhofer  
Senior Counsel