UNITED STATES COMMISSION ON CIVIL RIGHTS

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October 30, 2020

Brenda Sheridan
Chair
Loudoun County School Board
Administration Building 21000 Education Court
Ashburn, VA 20148

Dear Ms. Sheridan:

We write as three members of the U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole, regarding efforts to implement "equity" in Loudoun County Schools.

We will address two facets of this equity initiative. First, the "Systemic Equity Assessment" report Loudoun County commissioned from The Equity Collaborative. Second, the new "rules for professional conduct" which are being considered by the school board.

As part of the "Systemic Equity Assessment," The Equity Collaborative conducted "African-American and Latinx Parents Focus Groups," "African-American and Latinx Teacher/Staff Focus Groups," and "Student Focus Groups."[1] The "Student Focus Groups" were "mostly but not exclusively students of color". There was no focus group for parents who were not "African-American and Latinx". This is remarkable, given that over 2/3 of the students in Loudoun County Public Schools are white or Asian.[2] Surely their parents should have had the opportunity to express their views on the district's "equity" initiative, which will undoubtedly affect their children. It is also interesting that white students were mostly excluded from the "Student Focus Groups."

Even apart from the substance of these focus groups, the fact that they were only open to parents of preferred races (and that white students' participation in the focus groups was severely limited) likely violated the law.

Loudoun County Public Schools is subject to the requirements of Title VI of the Civil Rights Act of 1964, which provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to

[1] The Equity Collaborative, *Systemic Equity Assessment: A Picture of Racial Equity Challenges and Opportunities in Loudoun County School District* [hereinafter "Equity Assessment"], June 6, 2019, at 5, https://www.lcps.org/cms/lib/VA01000195/Centricity/domain/60/equity_initiative_documents/LCPS_Equity_Report_FINALReport12_2_19.pdf.
[2] "Enrollment by Ethnicity/Race (2020-2012)," LCPS Dashboards, https://dashboards.lcps.org/extensions/Dashboards/SchoolProfiles.html.

> discrimination under any program or activity receiving Federal financial assistance.[3]

As noted above, white and Asian parents were excluded from participation in the parents focus groups. This problem would still exist if there were separate "White and Asian Parents Focus Groups" from which African-American and Hispanic parents were excluded. The government is not allowed to order people into separate racial groups. Nor is it permissible for the government to make decisions that will affect students of all races while deliberately excluding some parents from the decision-making process because of their race. Imagine that the races were reversed, and that LCPS held "White and Asian Parents Focus Groups," but provided no opportunity for black and Hispanic parents to provide input. It is obvious that this would be wrong and racially discriminatory.

Although it has been many decades since courts have had to routinely addresses cases involving segregation, it remains the case that racial segregation is illegal. As the Fourth Circuit (within whose jurisdiction Loudoun County falls) has written:

> [T]he District Judge asked whether it was 'discrimination per se merely because a hospital has deemed fit to place white patients in one ward, Negro patients in another ward?' We answer that it is. Any distinction made on the basis of race in a publicly-supported institution is a patent violation of the law, not to be tolerated by a court that is controlled by the Constitution of the United States. This is not to say that there must be a racial mixture of a certain percentage in each room and ward. Our holding is simply that race cannot be a factor in the admission, assignment, classification, or treatment of patients in an institution like this, which is state-supported and receives federal funds. Room assignments may be made with due regard to sex, age, type of illness, or other relevant factors, but racial distinctions are impermissible, since the law forbids the treatment of individuals differently or separately because of their race, color, or national origin [citations omitted].[4]

This holding from the Fourth Circuit makes it clear that holding racially-segregated focus groups is impermissible. The circumstances surrounding the equity focus groups are even more egregious than if the focus groups were "merely" segregated on the basis of race, as there were ***no*** focus groups available to white and Asian parents.

An additional (though far from the sole) concern regarding the "Equity Assessment" pertains to "Recruitment and Hiring Practices." One recommendation from an unidentified "school leader" was "If you look at people's resumes – they have masters and doctorates. Hire them if they are Black!"[5] If Loudoun County hires teachers and administrators because of their race (which is

[3] 42 U.S.C. §2000d.
[4] Cypress v. Newport News General and Nonsectarian Hospital Ass'n, 375 F.2d 648, 656-657 (4th Cir. 1967).
[5] Equity Assessment at 20.

exactly what is contemplated here), Loudoun County is discriminating on the basis of race in violation of Title VII. The same is true if Loudoun County hires based on a characteristic (such as being bilingual) because that characteristic is associated with particular races or national origins. In that case, Loudoun County is using a supposed job qualification as a pretext for racial discrimination.

We understand from news reports that the proposed new rules on professional conduct are being redrafted.[6] We are particularly concerned about section B, which provides in part:

> As outlined in the Superintendent's Statement on Equity, Loudoun County Public Schools reject racist and other racially motivated behavior and language, recognizing that it encourages discrimination, hatred, oppression, and violence. Employees are expected to support the school division's commitment to action-oriented equity practices through the performance of their job duties, as the District engages in the disruption and dismantling of white supremacy, systemic racism, and language and actions motivated by race, religion, country of origin, gender identity, sexual orientation, and/or ability. Behavior that will not be tolerated includes but is not limited to:
>
> Harassing or discriminatory comments or conduct including speech or other telephone, electronic, or social media communication that . . . can reasonably be interpreted as discriminatory, racially or ethnically derogatory, defamatory***, or as undermining the views, positions, goals, policies or public statements of the Loudoun County School Board or its Superintendent when such comments or conduct create the reasonable apprehension of a disruption or disrupt the operations or efficiency of LCPS. . . .***
>
> ***Any comments or action that are not in alignment with the school division's commitment to action-oriented equity practices, and which impact an individual's ability to perform their job responsibilities or create a breach in the trust bestowed upon them as an employee of the school division.*** This includes on-campus and off-campus speech, social media posts, and any other telephonic or electronic communication. . . .
>
> Nothing in this policy or any other policy shall be interpreted as abridging an employee's First Amendment right to engage in protected speech, however, based upon an individualized inquiry, speech, including but not limited to via social media, on matters of public concern may be outweighed by the school division's interest in the following:

[6] "Loudoun County public schools backing off anti-free speech policy after parent, union pushback," West Nova News, Oct. 8, 2020, https://westnovanews.com/stories/557020024-loudoun-county-public-schools-backing-off-anti-free-speech-policy-after-parent-union-pushback.

1. Maintaining efficiency of the school system;
2. Preventing disruption or a reasonable apprehension of a disruption of the learning and working environment;
3. Maintaining public trust and confidence at all times;
4. Fostering close personal relationships among and between staff and parents;
5. Promoting internal LCPS and external community harmony and peace;
6. Establishing and maintaining a tranquil learning and working environment.
7. Achieving consistent application of the Board's and Superintendent's stated mission, goals, policies and directives, including protected class equity, racial equity, and the goal to root out systemic racism.

A few questions about this draft rule:

- What evidence exists that "white supremacy" is present in LCPS? *Actual evidence*, not hearsay from focus groups about alleged nooses in trees and racial slurs written in snow.
- What evidence exists that "systemic racism" is present in LCPS? Again, *actual evidence*, not mere disparities and not mere anecdotes from focus groups.
- What constitutes "disruption or a reasonable apprehension of a disruption of the learning and working environment"? Does any statement that a parent, student, or fellow employee might disagree with fall under "reasonable apprehension of a disruption"?

The draft rule suggests that anyone who says a discouraging word – even in his private life – about the equity initiative is in danger of losing his job.

The draft rule states that the policy shall not be interpreted as abridging an employee's First Amendment rights, and then proceeds to do just that.

Public employees maintain their First Amendment right to comment on matters of public concern, including matters that touch upon their employment. For example, the Supreme Court said in *Pickering v. Board of Education* that teachers are free to write letters to the editor opposing a tax increase supported by the school board and criticizing the school board's administration of funds.[7] Much like the tax increase in *Pickering*, the Superintendent's Equity Initiative, the existence (or not) of systemic racism, and efforts within LCPS to correct racial disparities are matters of public concern. Even if a teacher wishes to criticize the Superintendent and the LCPS School Board's for their embrace of critical race theory, the First Amendment guarantees his right to do so. "This Court has indicated . . . that statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors."[8]

[7] Pickering v. Bd. of Ed. of Tp. High Sch. Dist. 205, Will Cty, Ill., 391 U.S. 563 (1968).
[8] *Id.* at 574.

Nor is the decision in *Pickering* an outlier. "It is well settled that 'a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.'"[9] Public employers have the authority to direct how an employee speaks as an employee within the scope of his employment. Public employers do not have the authority to direct an employee's speech on matters of public concern when he is speaking as a citizen.[10] If an employee (on his own social media page) expresses his disagreement with the Superintendent's assertion that LCPS is rife with systemic racism and white supremacy, his opinion is protected by the First Amendment. In fact, his opinion is valuable to the community and should not be suppressed. As the Court stated in *Pickering* and reiterated in *Ceballos*, teachers are in the best position to inform the community about the operation and administration of schools.[11]

Lastly, we draw your attention to the fact that *Pickering* is 52 years old, and is only one in a long line of cases protecting the First Amendment rights of public employees. As a unanimous Court stated in 2014:

> [T]he mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee – rather than citizen – speech. . . . our precedents dating back to *Pickering* have recognized that speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment.[12]

Why is this important? Because in general, the doctrine of qualified immunity shields public officials from civil suit for actions they took as part of their duties.[13] However, public officials are *not* entitled to qualified immunity if the actions they took violated a clearly established constitutional or statutory right.[14] The First Amendment right of public employees to speak on matters of public concern was recognized in *Pickering* and has been reiterated since. Disciplining or firing an employee for speaking as a citizen on matters of public concern – in this case, "equity," "systemic racism," "white supremacy," and so on – is a clear First Amendment violation. In order for a right to be clearly established, it is not necessary that the exact same action have been taken in the past.[15] In this instance, threatening to discipline employees for contradicting LCPS's race initiatives is very similar to disciplining Mr. Pickering for criticizing the school board's administration of funds. Reasonable officials would be aware of the First Amendment rights of public employees. Hence, members of the school board (and

[9] Garcetti v. Ceballos, 547 U.S. 410, 413 (2006), *quoting* Connick v. Myers, 461 U.S. 138, 142 (1983).
[10] *Id.* at 416, 419-420.
[11] *Id.* at 419-420.
[12] Lane v. Franks, 573 U.S. 228, 240 (2014).
[13] Reichle v. Howards, 566 U.S. 658, 664 (2012).
[14] *Id.*
[15] Anderson v. Creighton, 483 U.D. 635, 640 (1987).

Superintendent Williams) may not be entitled to qualified immunity, and could be found personally liable for violating the First Amendment rights of LCPS employees.

Sincerely,

Peter Kirsanow
Commissioner

J. Christian Adams
Commissioner

Stephen Gilchrist
Commissioner