



January 25, 2021

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Gerald Thornton, Sr.
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Dear Superintendent Ray, Mr. Thorton, and Mr. Walker:

The Liberty Justice Center is a national, nonprofit, nonpartisan, public interest law firm that specializes in First Amendment issues. We write on behalf of our client, Barton Thorne, the principal of Cordova High School. Shelby County Schools (SCS) violated Mr. Thorne's First Amendment and contractual rights by placing him on administrative leave for teaching his students classic American principles on free speech and democratic self-government.

In order to rectify its violation of our client's rights, SCS should immediately reinstate Mr. Thorne, remove this administrative leave from his personnel record, and publicly apologize for subjecting him to this process. SCS should also issue a statement recognizing the importance of teaching students about free speech. We ask that SCS respond to this letter by 5 p.m. on Wednesday, January 27, if it wishes to initiate confidential settlement discussions; otherwise, we reserve the right to make this letter public or file litigation.

Mr. Thorne's statements were in line with the content of resources recommended by SCS and other generally accepted civics curricula.

Mr. Thorne's comments in no way violate his responsibilities to the District under his contract. Mr. Thorne's statement was a balanced, educational presentation of well-established American ideals about free speech and a free marketplace of ideas. It was a responsible, mainstream, appropriate communication of important concepts to his high school students.

In fact, Mr. Thorne's statements were in line with the guidance given by SCS's Superintendent. In a recent video posted on his Twitter page, Dr. Ray said, "Like you, I struggle while watching the rioting on Capitol Hill this week. As our students witnessed this unrest, each of us needs to seize this as a teachable moment about the importance of civility and democracy."ⁱ Certainly concepts like free speech, the free marketplace of ideas, and corporate citizenship are at the heart of our democratic order, and were timely as the nation reacted to January 6 and its aftermath.

Additionally, an email from Dr. Ray directed SCS staff to certain resources to discuss January 6 and its aftermath.ⁱⁱ The SCS Social Studies team's resources guideⁱⁱⁱ directed staff to, among other resources, C-Span

Classroom’s Constitution Clips, the free speech section of which includes a tape of “Panelists discuss[ing] the issue of free speech and governments having the power to shut down social platforms such as Facebook.”^{iv} The SCS Social Studies guide further refers teachers to the National Constitution Center’s Interactive Constitution. The NCC’s lesson plan for the First Amendment’s free speech clause challenges teachers to explore with their students, “why is it important to protect speech, even if that speech is unpopular?”^v In order to create a situation to which students can relate, the NCC lesson plan encourages teachers to structure a debate between students about the importance of free speech on social media.

In addition, Dr. Ray’s email further recommends that educators look to resources from the New York City Department of Education. The NYC DOE guide directs educators to the NYC “Civics for All” curriculum. The “Civics for All” curriculum’s high school manual encourages teachers to address “Civil Liberties include[ing] freedom of speech and association.”^{vi} In particular, the manual’s “thematic context for teachers” note directs them to Justice Holmes’ “powerful dissenting opinion in *Abrams v. United States* (1919).” There, Justice Holmes writes, “when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.” *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). In other words, the “marketplace of ideas” that Mr. Thorne discussed in his speech is directly drawn from a teaching resource that the Superintendent recommended as appropriate for helping students think thru January 6 and its aftermath.

In fact, Mr. Thorne’s statement featured messages similar to those in common teaching resources on the First Amendment and American democracy. *See, e.g.*, Melissa Wantz, *Social Media, the Classroom and the First Amendment* (Knight Foundation & the Newseum Institute’s First Amendment Center)^{vii} at 25; “The First Amendment: What’s Fair in a Free Country?” (EDSITEment! from the National Endowment for the Humanities); “Lesson Plan: Is your Speech Free?”^{viii} (California Curricula for K-12 Civics Education); “Lesson 5: ‘Freedom of Speech...Always Protected?’ (Grades 8-12),”^{ix} U.S. Capitol Historical Society; Greg Timmons, “The dilemma of protecting free speech – Lesson Plan,”^x PBS Newshour (Nov. 5, 2010); “‘Marketplace Of Ideas’ Concept Defined,”^{xi} Annenberg Classroom at the Univ. of Pennsylvania.

Additionally, the Tennessee Social Studies Standards for high school students include several of the themes discussed by Mr. Thorne:

- “Describe the protections offered by the Bill of Rights and their changing interpretations within American society.
- “Compare and contrast American civil liberties and protections, as defined by the Bill of Rights, to those of other nations.
- “Examine factors that influence elections, such as political ideologies, media technologies, social media, societal movements, and other factors.”^{xii}

In other words, Mr. Thorne’s statement was a responsible, balanced, accurate presentation of fundamental American civic principles about free speech, civil discourse, and democratic self-government.

Mr. Thorne’s comments about corporate social responsibility and accountability are also in line with accepted teaching resources on these concepts. *See, e.g.*, “Corporate Social Responsibility,”^{xiii} TES Global; “Lesson



Plan: Ethical and Social Responsibility,”^{xiv} Univ. of North Texas; “Global Business Ethics and Social Responsibility,”^{xv} Wharton School at the Univ. of Pennsylvania.

Nothing in his message was irresponsible or untruthful. SCS Employee Handbook at 10 (Rev. Aug. 2020). *See* SCS BOE Policy 4002. Nothing in his message was obscene, profane, or discourteous. *Id.* at 16-17, 18. Nothing in it was harassing, discriminatory, or intimidating towards students or staff in his building. *Id.* Nothing in his message violated the Tennessee Code of Teacher Ethics (Tenn. Code Ann. 49-5-1003-1004). *Id.* at 10. Nothing in it was dangerous or disruptive. SCS BOE Policy 4012. Nothing in his remarks constituted incompetence or improper conduct. SCS BOE Policy 4018. Nothing in his message was inappropriate for high school students, who have a greater level of maturity than K-8 students and can handle more advanced and nuanced concepts. In short, nothing in his statement violated his obligations under his contract.

Moreover, nothing in the Handbook or Policy Manual put him on fair notice that this speech would be unacceptable. *See, e.g., Miller v. Penn Manor Sch. Dist.*, 588 F. Supp. 2d 606, 629 (E.D. Pa. 2008); *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp. 2d 698, 704 (W.D. Pa. 2003). Arbitrary enforcement of vague and overbroad contract provisions is not a fair or sufficient basis for discipline. *McGlone v. Cheek*, 534 F. App’x 293, 297 (6th Cir. 2013).

To discipline him for addressing a timely topic on the minds of students and staff in line with accepted teaching standards and using the same content as resources recommended by SCS is utterly unjustified based on the District’s own handbook and policy manual.

The District may be violating Mr. Thorne’s First Amendment rights by this action.

The First Amendment protects the rights of school district employees within their employment. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). The First Amendment’s free speech clause, along with the equal protection clause of the Fourteenth Amendment, includes a guarantee of equal treatment for ideas, *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995), and a promise that government employers will not retaliate against employees based on their viewpoints, *Miller v. Hull*, 878 F.2d 523, 532 n.13 (1st Cir. 1989).

SCS violates Mr. Thorne’s rights when it places him on administrative leave at the same time that it permits numerous other teachers and administrators to speak on timely public issues without facing discipline. Across SCS’s 6,000+ strong teacher and administrator workforce, educators are constantly addressing timely public issues within the context of the overall curriculum. *See, e.g., Dave Waters*, “Voting for our faith in democracy, not our fears,” Commercial Appeal (Nov. 2, 2018).^{xvi} They may also do so in a nonverbal way, with signs in their classrooms. Regardless, it is unequal treatment to permit teachers to address certain timely issues without repercussion while placing Mr. Thorne on leave for addressing a timely topic in this instance.

The District’s response is already disproportionate to its own discipline handbook.

SCS responded to Mr. Thorne’s statements by placing him on immediate administrative leave. This is a vast overreaction under the District’s own policies. SCS’s handbook for progressive discipline states that administrative leave is appropriate for instances where “the employee may need to be removed from the work place before an investigation can be conducted,” and gives as examples “sexual harassment, disorderly conduct, or other situations where the employee presents a potential threat to other employees.”^{xvii} Mr. Thorne’s comments were pure speech on an educational topic, and in no way are comparable to sexual harassment or instances where students or staff may feel their physical safety is threatened.



For SCS to respond by placing him on administrative leave damages his professional reputation, sets back his career, and denies him the opportunity to live out his vocation as a principal and educator, all of which are compensable damages. *See Fedele v. Harris*, 18 F. Supp. 3d 309, 315 (E.D.N.Y. 2014); *Wasson v. Sonoma Cty. Junior Coll. Dist.*, No. C-97-2767 WHO, 1997 U.S. Dist. LEXIS 22451, at *23 (N.D. Cal. Dec. 5, 1997). *See also Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 71 (2006).

SCS should immediately reinstate Mr. Thorne, remove this administrative leave from his personnel record, and publicly apologize for suggesting his actions were inappropriate. The District should also issue a statement supporting free speech and the First Amendment so students and staff know the District recognizes and appreciates their rights and the importance of teaching about free speech in civics education.

We ask that SCS respond to this letter by 5 p.m. on Wednesday, January 27, if it wishes to enter into confidential settlement discussions; otherwise we reserve the right to make this letter public or file litigation.

Very truly yours,



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ⁱ Tweet by @SCSSuptRay, Jan. 8, 2021, <https://twitter.com/SCSSuptRay/status/1347706091858132994>.

ⁱⁱ <https://myemail.constantcontact.com/Superintendent-Update--Support-Resources-to-Address-U-S--Capitol-Breach.html?soid=1122913550969&aid=7GCBIYRg7zg>.

ⁱⁱⁱ <https://files.constantcontact.com/9720dd27501/f67dfba0-3ce0-413b-9608-4aac175596b0.pdf>, at 1.

^{iv} <https://www.c-span.org/classroom/document/?2178>.

^v https://constitutioncenter.org/media/const-files/Lesson_Plan_Freedom_of_Speech_8.pdf at 4.

^{vi} https://www.weteachnyc.org/media2016/filer_public/7b/e0/7be0c371-71d5-496f-9427-3d38f12d4881/c4a_9-12_part_1.pdf at 79. *See id.* at 86.

^{vii} <https://knightfoundation.org/wp-content/uploads/2011/12/classroomguide-final-12-13-111-1.pdf>.

^{viii} <https://edsitement.neh.gov/lesson-plans/first-amendment-whats-fair-free-country>.

^{ix} <https://uschs.org/educate/constitution-day/lesson-5-grades-8-12-freedom-of-speech-always-protected/>.

^x <https://www.pbs.org/newshour/extra/lessons-plans/the-dilemma-of-protecting-free-speech/>.

^{xi} https://www.annenbergclassroom.org/timeline_event/marketplace-ideas-concept-defined/.

^{xii} https://www.tn.gov/content/dam/tn/education/standards/ss/Social_Studies_Standards.pdf.

^{xiii} <https://www.tes.com/teaching-resource/corporate-social-responsibility-6313933>.

^{xiv} <https://www.txcte.org/resource/lesson-plan-ethical-and-social-responsibility>.

^{xv} https://kwhs.wharton.upenn.edu/lesson_plans/global-business-ethics-and-social-responsibility/.

^{xvi} <https://www.commercialappeal.com/story/news/columnists/david-waters/2018/11/01/voting-our-faith-democracy-not-our-fears-waters/1838813002/>.

^{xvii} “Guidelines for Progressive Discipline,” SCS Dept. of Labor & Employee Relations (Rev. Aug. 2017) at 5.

