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September 13, 2024

Via Electronic Mail Only

Jose A. Gonzales, Hearing Officer
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Re: *Alyssa Esquivel's Closing Statement // In the Matter of the Dismissal of Alyssa Esquivel*

Dear Mr. Gonzales:

I provide herein the Closing Statement of Respondent Alyssa Esquivel ("Ms. Esquivel") following the hearing *In the Matter of the Dismissal of Alyssa Esquivel* on July 24, 2024.

I. INTRODUCTION

The present matter implicates both Ms. Esquivel's First Amendment right to express herself and her due process right to be free from arbitrary school discipline. The testimony taken at the July 24, 2024, hearing confirmed that the San Gabriel Unified School District ("District") removed Ms. Esquivel from her position in violation of her First Amendment expression and that, regardless, her conduct did not violate any school policies. Rather, Ms. Esquivel was punished for voicing an unpopular and disfavored view and, to justify her removal, her superiors used inapplicable school policies as a pretext for her removal.

First, the evidence demonstrates that the District retaliated against Ms. Esquivel for her First Amendment expression. Ms. Esquivel has demonstrated that her speech was constitutionally protected. There is no question that Ms. Esquivel suffered an adverse action as she was removed from her position. And finally, Ms. Esquivel has shown that her expression was a causal factor in her removal—as she was known to be an excellent American Sign Language ("ASL") interpreter.

Second, even if her expression was not protected under the First Amendment, Ms. Esquivel's removal violates the fundamental principles of fairness because she did not violate any school district policies. Ms. Esquivel is under a "for cause" contract, meaning that there must be

good cause for her termination. The evidence clearly demonstrates that, regardless of the reasons given by the District, Ms. Esquivel was removed because the District claimed her expression violated school district policy. Because it did not violate any policy, her removal was arbitrary and lacked cause.

II. CLOSING ARGUMENT

A. Ms. Esquivel Has Proven A Retaliation Claim Because Her Expression Is Protected Under The First Amendment

The First Amendment exists to foster an environment of free and unhindered debate on matters of public importance. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 (1968). Generally, an individual may bring a First Amendment retaliation claim by demonstrating: (1) she engaged in constitutionally protected speech; (2) an adverse action was taken against her; and (3) the adverse action arose because of the protected expression. *Id.*

1. Ms. Esquivel's expression was constitutionally protected because it involved a matter of public concern and was made in her private capacity

Because the government has more authority as an employer over an employee than as a sovereign over its citizen, there are additional elements that must be met to demonstrate a public employee's expression is protected. A public employee's speech is protected if: (1) she spoke on a matter of public concern and (2) she spoke as a private citizen. *Dodge v. Evergreen Schl. Dist. #114*, 56 F.4th 767 (9th Cir. 2022).¹ If the employee can establish these elements, the burden shifts to the employer to demonstrate that the balance of interests justified the adverse employment action. *Id.* at 776–77.

In the present matter, the District does not contest that Ms. Esquivel's speech was on a matter of public concern. Dist. Br., p. 4. The District only contests whether Ms. Esquivel's speech was private.

To determine if expression is private, the arbiter must consider: (1) whether the speech was made within the scope and content of the plaintiff's job responsibilities and (2) whether the expression "owes its existence" to the individual's position. *Garcetti v. Ceballos*, 547 U.S. 410, 411 (2006). Three cases clearly demonstrate that Ms. Esquivel's speech was private—*Kennedy*, *Johnson*, and *Dodge*.

In *Kennedy v. Bremerton School District*, the Supreme Court considered whether a football coach's prayer after a game was private speech. 597 U.S. 507 (2022). The prayer took place *while*

¹ While courts use the same test, the order in which the factors are considered at times varies. Compare *Dodge v. Evergreen Schl. Dist. #114*, 56 F.4th 767 (9th Cir. 2022) (weighing the school's interest in prohibiting the speech at the last step of the analysis), with *Myers v City of Centerville*, 41 F.4th 746 (6th Cir. 2022) (weighing the school's interest after considering if the speech was on a matter of concern and in a private capacity).

the coach was on duty, on school property, and in view of students—many of whom came to join him. In holding that the speech was private, the Supreme Court found it relevant that:

- the prayer was not “ordinarily within the scope” of his coaching duties;
- the prayer was not done in accordance with a government policy;
- the prayer was not intended to convey a government-created message; and
- the prayer did not fulfill any of the typical duties required by a coach, such as instructing players, encouraging better play, or discussing strategy.

Id. at 529-30. The Supreme Court summarized its finding, “Simply put: Mr. Kennedy’s prayers did not ‘ow[e their] existence’ to Mr. Kennedy’s responsibilities as a public employee.” *Id.* at 530. The Supreme Court was persuaded that the speech was private even though Coach Kennedy was on duty at the time. The Supreme Court concluded by warning school’s against using “excessively broad job descriptions” as a weapon to threaten free speech. *Id.* at 530-31.

Here, Ms. Esquivel is a sign language special education instructional aide. Her job duties are to provide ASL interpreting services for a single student. Trans. 17:1-18:25, 34:13-15, 118:1-120:11. Like the prayer in *Kennedy*, Ms. Esquivel’s expression (pictures and words on her personal belongings) is not within the scope or context of her interpreting responsibilities. Neither her backpack nor water bottle owed their existence to her job. They were her personal accessories used to carry her personal belongings. Ms. Esquivel testified that she placed her items in the back of the class while she was on duty. Trans. 128:13-20. The District has failed to demonstrate that either item was “within the scope” of *providing interpreting services*, that the expression was enabled because of a school policy (such that it could reasonably be attributed to the District), that either item was intended to convey a message on behalf of the school, or that the items “fulfill[ed] any of the typical duties” required of an ASL interpreter. In fact, Mr. Perry testified he was *never* contacted by a student or parent about her expression. Trans. 103:5-10.

The District also relies on *Johnson v. Poway Unified School District*, in which the Court held that a teacher’s religious posters that he hung in the school’s classroom were public speech. 658 F.3d 954 (9th Cir. 2011).² However, *Johnson* dealt with a materially different issue than the issues in this matter. The Court laid forth the issue in *Johnson* as follows:

We consider whether a public school district infringes the First Amendment liberties of one of its teachers when it orders him not to use his public position as a pulpit from which to preach his own views on the role of God in our Nation’s history to the captive students in his mathematics classroom.

² Ms. Esquivel further notes that *Johnson* was published prior to the Supreme Court’s decision in *Kennedy*; as such, to the extent that they conflict, *Kennedy* controls.

Id. at 957. In *Johnson*, the Court noted that the teacher’s ability to hang posters on the school’s classroom’s walls *owed directly to his employment* as a teacher. An ordinary citizen could not have decorated classroom walls. *Id.* at 968. Furthermore, a poster on a school wall is obviously a part of school curriculum. Whereas, personal items, by definition, are not. The Court also noted that “[e]xpression is a teacher’s stock in trade, the commodity she sells to her employer in exchange for a salary.” *Id.* (citation omitted). As such, it was clear that when the teacher plaintiff was teaching class and supervising students, he acted as an employee, and was doing so when he was “espousing God” through the posters in his classroom. *Id.* at 967.

Unlike the teacher in *Johnson*, Ms. Esquivel is not using resources provided by the school to express her personal beliefs. Ms. Esquivel did not bring her backpack or place a sticker on her water bottle *because* of her employment as an ASL aid. Her backpack and water bottle were not an integrated part of the learning environment or curriculum in the same way educational posters on a classroom wall are. There is no evidence that Ms. Esquivel’s assigned student was even able to view the backpack while she was communicating with him.

Furthermore, Ms. Esquivel *is not a teacher*. The Court in *Johnson* noted that teachers have a special place of trust and authority over students and their expression is central to their job. Students associate a teacher’s teaching with the message of the school. As an ASL aid, Ms. Esquivel does not stand in an analogous position—her duties do not require her to provide any substantive information to her student. Rather, her job is to interpretate verbatim what is being taught or discussed in a classroom.

Finally, the District tries to differentiate *Dodge v. Evergreen School District #114*, in which a school district retaliated against an employee for wearing a “MAGA” hat. 56 F.4th 767. The District ignores the Court’s analysis that the message on the hat was not within the scope of the teacher employee’s job responsibilities. The District focuses on the fact that the hat was worn to a teacher’s only event. Yet, this was not a determinative factor. The Court stated that the relevant factor was whether the speech “was reasonably viewed by students and parents as officially promoted by the school.” *Id.* at 778.³

Here, a parent or student is not reasonably likely to think that a sticker or patch or name on an ASL aide’s personal items represent the school’s speech. The school admits that, despite bringing the items to school, no parent or student ever complained about Ms. Esquivel’s items. In *Dodge*, the hat at issue was worn to an event before the start of the year. *Id.* at 772. The Court could only speculate as to how it would have been viewed by parents. *Id.* 783. Here, there is no

³ The District’s pre-hearing brief quotes dicta from *Dodge* that the government can categorically prohibit political speech, however this is not binding for several reasons. First, the statement is dicta and is not necessary to the holding of the case. Second, to the extent that it conflicts with *Kennedy* it must be disregarded. Third, the proper analysis requires the court to weigh the interests of the respective interest of the parties. In the present matter, the District has provided no argument that such a categorical prohibition weighs in its favor. Finally, the dicta contradict established caselaw such as *Tinker* which held that political statements made in school are protected. *Tinker v. Des Moines*, 393 U.S. 503, 508 (1969).

need for speculation, as Ms. Esquivel brought the items to school for an extended amount of time without issue.

Because Ms. Esquivel spoke in her private capacity on a matter of public concern, the burden shifts to the District to demonstrate the restriction serves its interest “in promoting the efficiency of the public services it performs through its employees.” *Pickering*, 391 U.S. at 568. The District has failed to meet its burden. As discussed above, no students or parents took issue with Ms. Esquivel’s expression or attributed it to the school.

Mr. Abdul-Qawi stated the only disruption was “the fact if we are discussing it, then that keeps Ms. Esquivel from being able to provide the services she would normally provide.” Trans. 58:1-4. Her inability to provide her services was due, in part, to her other co-workers’ outbursts and the District’s punishment of Ms. Esquivel. The District claims that Ms. Esquivel’s punishment created a disruption, and it has an interest in preventing such disruption. Trans. 41:16-24. However, it is a bedrock principle that a heckler’s veto is not a valid basis for a restriction. *Tinker*, 393 U.S. at 508. One cannot create a disruption to ensure the speech of another is not protected. *See Bible Believers v. Wayne Cnty.*, 805 F.3d 228 (6th Cir. 2005) (“When a peaceful speaker, whose message is constitutionally protected, is confronted by a hostile crowd, the state may not silence the speaker as an expedient alternative to containing or snuffing out the lawless behavior of the rioting individuals.”).

2. *The District’s removal of Ms. Esquivel from her position constitutes an adverse action*

To determine if an action was adverse, the “reasonably likely to deter” test controls. *Dodge*, 56 F.4th at 778. A plaintiff must prove that employer’s action was “reasonably likely to deter them from engaging in constitutionally protected speech.” *Id.* (citations omitted). There is no question that placing an employee on indefinite administrative leave and then subsequently unpaid leave is an adverse action that is reasonably likely to deter a reasonable person from engaging in expression. The District clearly attempted to deter Ms. Esquivel by eliminating her ability to engage in any expression on district facilities.

3. *Ms. Esquivel was removed solely because of her expression and subsequent refusal to self-sensor*

To the extent the District argues Ms. Esquivel was not removed from her position because of her expression, the District’s argument misconstrues the facts of the case. The expression at issue must only be a motivating factor in the adverse action. Here, while the District provided six reasons for Ms. Esquivel’s termination, each reason is the direct result of Ms. Esquivel’s expression or her refusal to bow to the school’s threats of reprisal if she would not self-sensor.

There is no genuine question that, absent Ms. Esquivel’s refusal to self-sensor, she would not have been removed from position or threatened with termination of employment. Each of the alleged reasons for her removal is because Ms. Esquivel refused the administration’s improper orders to self-sensor her expression. Both Mr. Abdul-Qawi and Mr. Perry testified she was removed for her “political” expression. Trans. 41:2-24; 86:16-20; 106:2-25; 107:7. As noted

above, Mr. Abdul-Qawi testified Ms. Esquivel was otherwise an excellent employee. Trans. 47:14-19. The District's brief also states that Ms. Esquivel was insubordinate because she "continued to bring items to school which bore political messaging" and that she was insubordinate for correctly stating she had a right to bring her backpack and water bottle to school. Dist. Br., pp. 2, 5. Each allegation is directly the result of Ms. Esquivel's expression and her refusal to be silenced, thus, the District's argument that she was not removed due to her speech is disingenuous.

First Amendment rights would cease to exist for public employees because any employer could justify their decision to punish an employee for "insubordination" when that employee refuses to give up their First Amendment rights. Rather, the substantive reason for an employee's termination controls, not the employer's label. In this case, there is no question that Ms. Esquivel was punished for her protected expression.

Because Ms. Esquivel's expression is constitutionally protected, a board's policy cannot infringe it. However, regardless of whether it is protected, Ms. Esquivel's conduct did not violate any of the board's policies.

B. Ms. Esquivel Did Not Violate Any Of The Board Policies

Disturbingly, the District appear to argue that they do not have to demonstrate Ms. Esquivel violated an actual board policy to justify her termination and the loss of her livelihood. During direct examination, Ms. Esquivel's counsel and Mr. Perry had the following colloquy:

Ms. Esquivel's Counsel: So is it your understanding that where a policy doesn't cover a specific circumstance but is closely related, that as long as that's applied consistently, that that's reasonable – a reasonable implementation of that policy in your mind?

Mr. Perry: Yes.

Trans. 114:22-25-115:1-3. Due process requires that a policy be clearly defined such that individuals are given notice of what conduct is proscribed. *See Connally v. Gen. Const. Co.*, 269 U.S. 385, 391(1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."). When reading a policy, a reasonable person is only put on notice of actual conduct proscribed by a statute. The District's argument that a reasonable person must guess what conduct an administrator will punish – not because it is prohibited – but because it is "closely related" to prohibited conduct violates the basic concepts of fairness and due process. The District bears the burden of prove that Ms. Esquivel violated the *actual* policies.

Because Ms. Esquivel's conduct is not proscribed by any of the board policies she is alleged to have violated, her removal should be reversed.⁴ The District's opening brief alleges that Ms. Esquivel violated Board Policies 4219.25 subsections (1), (4), (9), and (10). Dist. Br., pp. 9-10; Mr. Perry alleged Ms. Esquivel "possibly" violated subsection (6), (Trans. 106:17-107:1-3) and that she also violated subsections (4), (9), and (10) (Trans. 85:21-25; 86:1-14).⁵ Ms. Esquivel addresses each alleged violation in turn.

1. Ms. Esquivel did not urge the passage or defeat of any candidate

Subsection (1) and (4) prohibit "urg[ing] the passage of any . . . candidate." Subsection (1) proscribes using district funds, services, supplies or equipment for such purposes, and subsection (4) proscribes using district time for such purposes.

The District alleges that "displaying" "Trump" on personal items is a violation of both subsections. *See* RX 1-2; Trans. 31:12: – 33:25, 39:25-40:1-11, 53:16-24, 56:24-57:8, 61:19-62:12, 70:1-76:25, 86:1-89:25, 106:1-5. This argument has several flaws. First, the District ignores the fact that the backpack and water bottle are Ms. Esquivel's personal belongings. Accordingly, the District's allegation she violated subsection (1) is patently frivolous.⁵ Likewise, the District has failed to present any evidence that Ms. Esquivel *used* any district time. There is no evidence that Ms. Esquivel ever discussed politics or elections during instructional time.

Second, the District does not provide any reasoning to support its claim that having the name or likeness of "Trump" on a personal item equates to "urging" his election as president. The District alleges that "displaying" her backpack was sufficient. However, "urge" is defined as "to present, advocate, or demand earnestly or pressingly." Urge, Meriam-Webster, <https://www.merriam-webster.com/dictionary/urge>. Even taking the District's allegations as true, having a sticker on a water bottle (which was covered in stickers) or a backpack with his name cannot reasonably be construed as "urging" the election of Mr. Trump.

Third, the policies do allow individuals to present viewpoints on political candidates. *See* Board Policy 4219.25(9). Accordingly, "urging" is prohibited but "presenting" is not. The District fails to explain how having a sticker on a water bottle or name on a backpack is closer to "urging" the election of a candidate than it is "presenting" a viewpoint, namely that the candidate is the individual's preferred option.

⁴ As noted above, if Ms. Esquivel did not violate any school policies, then *each* of the six reasons for her termination fail. If the orders were not lawful, then she was not required to obey them. Ms. Esquivel was not cavalier about not following the orders; as she testified, she took her own time and effort to talk to a lawyer to determine if she had in fact violated any of the alleged policies. She only continued to express herself after the lawyer advised her she had not.

⁵ The lack of any reasonable argument that Ms. Esquivel used school goods demonstrates the pretextual nature of the District's claims and raise's suspicions about the District's good faith in removing Ms. Esquivel from her position.

2. *Ms. Esquivel did not post or distribute campaign materials on district property*

Subsection (6) prohibits “post[ing] or distribut[ing] campaign materials on district property.” Again, the District’s allegations suffer definitional shortcomings. The District takes issue with the fact that Ms. Esquivel would not hide her backpack from students during class hours and, instead, would set her personal belongings in the back of class.

First, no reasonable person would read “posting” and “distributing” as including storing personal belongings in the back of the classroom. Rather both words denote giving up possession and control of the item at issue to influence another. “Posting” denotes hanging an item, such as a flyer, somewhere for others to see. “Distributing” denotes giving away an item to another in order to influence them. Ms. Esquivel stated that she put her personal belongings where all the other employees put their belongings during class time. No reasonable person would state she “posted” or “distributed” her personal items during class time.

Second, neither of Ms. Esquivel’s items can reasonably be considered “campaign materials.” The District failed to even ask Ms. Esquivel when or where she got the items or the purpose for which she had them. Accordingly, the District has provided no basis for arguing that her items may reasonably be considered “campaign materials.”

3. *Ms. Esquivel did not present a viewpoint on a candidate in the classroom without giving equal time to the presentation of the opposing view*

BP 4219.25(9) prohibits employees from expressing viewpoints on candidates or ballot measures in the classroom without giving equal time to the presentation of opposing views. This provision belies any claim that the District categorically prohibits political activity. This provision permits political activity and expression provided there is equal time allotted for the presentation of opposing views.

The District presented no evidence supporting any claim that Ms. Esquivel violated this provision. Ms. Esquivel never discussed her political opinions with any student or employee. Even if she did, the District has presented no evidence that she did not give equal time to hear opposing views. If anything, other District employees made repeated disparaging statements about former-President Trump, thereby expressing their own political viewpoints. These District employees failed to give Ms. Esquivel any opportunity to share her own viewpoints. Other employees could likewise bring in their own personal goods with stickers expressing their views if they desired.

4. *Ms. Esquivel did not wear a button or article of clothing that expresses a political opinion on ballot measures or candidates during instructional time*

BP 4219.25(10) prohibits District employees from wearing a button or article of clothing that expresses a political opinion on ballot measures or candidate during instructional time. The items at issue in this matter are her personal backpack and water bottle, which are not pins or articles of clothing.

Mr. Perry admitted that Ms. Esquivel never wore a button. Trans. 109:9-12. Accordingly, the only issue is whether she wore an article of clothing that expressed a political opinion on a candidate. Mr. Perry further testified that he “viewed the backpack as clothing because you wear a backpack just like you wear everything else.” Trans. 110:9-11. He affirmed that a backpack was an article of clothing “because you wear it.” *Id.* He further stated a purse “could” be an article of clothing “if you’re wearing it.” *Id.* at 110:17-23.

First, no reasonable reading of the word “clothing” would encompass a backpack much less a water bottle. “Clothing” is defined as “items (as of cloth) designed to be worn to cover the body.” Clothing, Merriam-Webster, <https://www.merriam-webster.com/dictionary/clothing>. A backpack is designed to carry personal belongings, not to be worn to cover the body.

Second, the District’s reasoning that anything that is “worn” is an article of clothing would create tension in the statute. The statutory rule against surplusage cautions reading a policy in a way that renders part of it surplusage. *Barton v U.S. Att’y General*, (11th Cir. 2018) 904 F.3d 1294, 1300.) If “wearing” an item qualified it as an article of clothing, there would be no reason to explicitly prohibit buttons. Such a reading would cause surplusage because buttons are items that are worn.

Third, no reasonable person would define “clothing” as anything that is worn. Using the District’s logic, necklaces, contact lenses, and watches would all be considered articles of clothing. No reasonable person would define articles of clothing in this way. Under Mr. Perry’s logic, a shirt ceases to be an article of clothing when it is taken off. Mr. Perry’s failure to even attempt to formulate a coherent argument further underlines the lack of seriousness and good faith in the District’s position. The District has threatened Ms. Esquivel’s livelihood, and its inability to come up with a serious, informed, credible argument for their actions undermines their claims.

III. CONCLUSION

Ms. Esquivel has demonstrated that the District retaliated against her for expressing her First Amendment rights. Furthermore, regardless, Ms. Esquivel’s expression did not violate any of the school district’s policies and, as such, she was not required to follow the administration’s demands that she self-censor. Accordingly, Ms. Esquivel requests that she be reinstated to her position, receive back pay for the time she missed due to the District’s actions, and recover her attorneys’ fees.

Sincerely,

ADVOCATES FOR FAITH & FREEDOM



Julianne Fleischer
Legal Counsel