UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
No. 24-CV-380

C.M., *a minor, through his parents*, LEAH MCGHEE *and* CHAD MCGHEE, Plaintiff, v. DAVIDSON COUNTY BOARD OF EDUCATION; *and* ERIC R. ANDERSON, *in his individual capacity*, Defendants.	**OPENING BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** **ORAL ARGUMENT REQUESTED PURSUANT TO LR 65.1(b)**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

PRELIMINARY STATEMENT

C.M. is a 16-year-old former student at Central Davidson High School (the "School"). A few weeks ago in April, while catching up on a vocabulary lesson in English class, C.M. asked his teacher whether a reference to "aliens" during class discussion referred to "space aliens or illegal aliens who need green cards." The School equated C.M.'s question with a vile racial slur and suspended him for three days, out of school, without the opportunity to appeal. When C.M.'s mother turned to the Davidson County Board of Education (the "Board")—since the School purported to enforce Board policy in suspending her son—the Board ignored her.

The Board based its decision to uphold C.M.'s School suspension on policy that the word "aliens" is associated with "racially" insensitive speech. But the policy has no basis in fact or law. "Aliens" can be traced back over 225 years to laws that Congress passed in 1798 concerning *white European immigrants*, not racial minorities. And to this day, courts including this Court use the term as a benign legal phrase in judicial opinions.

The Board violated C.M.'s rights in at least two ways.

First, the School's Assistant Principal deprived C.M. of his First Amendment free-speech rights when he enforced Board policy and suspended C.M, who simply asked his teacher a question in class that was factual and

nonthreatening. C.M.'s question did not interfere with the School's work or collide with other students' rights.

Second, the Board deprived C.M. of his Fourteenth Amendment due process rights when it denied him notice and a hearing related to his suspension. C.M. has a protected liberty interest in his reputation, and a property interest in education under North Carolina law. But the Board failed to give him notice of what words were prohibited in class because its policy on "racially insensitive" speech is unduly vague.

The Board's constitutional deprivations injured C.M. and are continuous and ongoing. The suspension documents placed in his School record falsely declare that his comment was "racially" motivated and insensitive. Therefore, a preliminary injunction is warranted to restore the parties to their positions before C.M.'s suspension from School. C.M. respectfully requests that the Court issue a preliminary injunction on or before **August 1, 2024**.

STATEMENT OF THE FACTS

The Board's Student Handbook

The Board issues a Student Handbook to all students. *See* Complaint ("Compl."), ECF No. 1 at ¶ 14; Student Handbook, ECF No. 1-1.

None of the illustrative conduct in the Student Handbook sections on "Disruption" and "Civility" could reasonably lead a student to think that using the words "alien," "illegal alien," or "green cards" in class would be "disruptive behavior;" would be considered profane, obscene, fighting, or abusive words; or cause substantial disruption to or interfere with the School's work. *See* ECF No. 1-1 at 18, 24-25.

And the Student Handbook's section on "Student Records (Policy 6.14)" states: "Parents/eligible students have the right to request a correction to records." *Id*. at 34. It further provides: "If the parents/eligible students do not feel the school's response is adequate, a formal hearing may be requested." *Id*. It also notes that student records may be disseminated to various third parties in compliance with federal law, including: "School officials with legitimate educational interest;" "Other schools to which a student is transferring;" and "Appropriate parties offering financial aid to a student." *Id*. at 35.

C.M.'s Question to His English Teacher

On April 9, 2024, C.M.'s English teacher, Ms. Haley Hill, gave him permission to go to the restroom during class. *See* Declaration of C.M. ("C.M. Decl."), ¶ 3. While away, C.M. missed part of Hill's vocabulary lesson. *Id*. Upon his return, the word "aliens" was used during class discussion. *Id*. C.M.

raised his hand and asked Hill whether the reference to aliens referred to "space aliens or illegal aliens who need green cards." *Id.* Hill responded and said, "Watch your mouth [C.M.]." *Id.* ¶ 4.

R., a Hispanic student in C.M.'s class, with whom C.M. has a good relationship, joked that he was going to "kick [C.M.]'s ass." *Id.* Class otherwise proceeded as normal until, later in class, another student began discussing *R.'s threatening comment* to C.M., causing Ms. Hill to call administration. *Id.* ¶ 5.

C.M.'s question about "aliens" was not racially motivated or targeted at anyone—including Ms. Hill, R., or any of his classmates. *Id.* ¶¶ 9-11. Nor could C.M.'s question reasonably be viewed as obscene, fighting words, abusive words, or promoting illegal drug use. *Id.* He did not intend—and could not reasonably foresee—that his question would cause substantial disruption to class. *Id.*

Rather, C.M. simply asked his teacher a question about a word—"alien"—which he did not introduce into the class discussion, and which is regularly reported in the news and is found in the dictionary without any reference to race. Compl. ¶ 26. It is C.M.'s understanding that anyone from another country, who is not a U.S. citizen and wishes to be a lawful

permanent U.S. resident, must obtain a green card, regardless of the person's race. *Id.*

The Assistant Principal Meets with C.M. and R.

Following English class, C.M. and R. met with Defendant Eric R. Anderson, the School's Assistant Principal, in his office. C.M. Decl. ¶ 6. Both students immediately made clear that neither was offended by the other's comments, and that their interaction in class was not a big deal. *Id.* Anderson met with both students separately, starting with R. *Id.*

When Anderson spoke to C.M., Anderson told C.M. that R. was "upset," "crying," and "offended" due to C.M.'s question. *Id.* ¶ 7. C.M. did not believe this because R. had not appeared upset. *Id.* R. later confided in C.M. that he was not "crying," nor was he "upset" or "offended" by C.M.'s question. *Id.* R. said, "If anyone is racist, it is [Mr. Anderson] since he asked me why my Spanish grade is so low"— apparently referring to R.'s ethnicity. *Id.*

The School Suspends C.M.

That day, Anderson issued a written Suspension Notification and suspended C.M. for three days out of school for "making a racially insensitive remark that caused a class disturbance." *Id.* ¶ 8; Suspension Notification, ECF No. 1-2. C.M. later learned that R. received only a brief in-school

suspension when he said he was going to "kick [C.M.]'s ass," despite R.'s comment being the impetus for Hill to call administration. C.M. Decl. ¶ 8.

The Suspension Notification stated that C.M. violated Board Policy "6.11 Using/Making racially motivated comment which disrupts class." ECF No. 1-2 at 3. It said: "[C.M.] made a racially insensitive comment, in class today, about an alien 'needing a green card.'" *Id*. at 4. And it warned: "There shall be no right to an appeal of the principal's decision to impose a short term suspension (10 days or less) to the Superintendent or Board of Education." *Id*. at 3.

Recorded Meeting Between C.M.'s Parents and Defendant Anderson

Later, C.M.'s parents—Leah and Chad McGhee—met with Anderson. *See* Declaration of Leah McGhee ("L. McGhee Decl."), ¶ 8. Ms. McGhee's recording of that meeting, which lasted approximately a half hour, is submitted as Exhibit 2 to her Declaration. *Id*. n. 2.

Anderson told C.M.'s parents that it would have been more "respectful" for C.M. to refer to "those people" who "need a green card" rather than "aliens." L. McGhee Decl. ¶ 9; Exhibit 2 Recording at 0:38. Anderson also seemed to blame Ms. Hill for any purported disruption, saying that she has "struggled" with classroom management as a result of "being so young and being a female." Exhibit 2 Recording at 15:50. Anderson further explained

that it is the School and Board's practice and custom since August of 2023 to mete out "harsh" punishment "[a]nytime there is something said that's racially insensitive" and that reversing C.M.'s suspension would be "unfair to the 15 other kids who have served [suspension] for saying the n word or anything else under the sun that's racially charged that creates a disruption in the classroom." *Id*. at 5:00, 12:30.

Recalling his initial meeting with R., Anderson said that R. first told him that this was not a big deal. L. McGhee Decl. ¶ 11. But Anderson corrected R., saying, "No sir. Those words do make a big deal out of this—the way they were said and their meaning." Exhibit 2 Recording at 3:20. When C.M.'s parents asked Anderson whether he believed their son intentionally said something racist, he said no, but that C.M. "needs to be careful with things that he says." *Id*. at 6:00. He later repeated that he does not think that C.M. is racist. *Id*. at 8:25. He also said that C.M has been a "great kid" who has "done a great job with everything." *Id*. at 13:35.

The Board Upholds the Suspension

After meeting with Anderson, C.M.'s parents attempted to appeal the decision through other School and Board officials, seeking to remove from his record the suspension, any unexcused absences resulting from the suspension, and any reference to C.M.'s comment being "racially" motivated

or insensitive in violation of Board Policy 6.11, but they refused to do so. *See* L. McGhee Decl. ¶¶ 22-25.

For example, Ms. McGhee sent emails on April 12, 2024, to Board Chairman Beck and Board member Nick Jarvis attaching a copy of the Suspension Notification and requesting reversal of her son's suspension. *See id*. ¶ 25 & n. 3, Exhibit 3; ECF No. 1-3. Rather than reply to her emails, Beck and another Board member mounted an attack against Ms. McGhee's character by sharing with local community leaders her mugshot from a 2010 arrest, and slandering her and C.M. with additional false accusations. L. McGhee Decl. ¶¶ 26-28, 30.[1]

The Board's Authority over the School and Board Policy 6.11

The Board has control and authority over all public schools in Davidson County. Compl. ¶ 45; *see* Board Policy 1.1.[2] The Board has final policymaking authority over the School's short-term suspension of students for less than ten days. Board Policy 6.11.2 ¶ B. Under North Carolina law, the Board is required to provide C.M. with a "sound basic education." *Id.* 1.1 ¶ 1; *Leandro*

[1] As referenced in her Declaration, Ms. McGhee has publicly shared her inspiring redemption story since her arrest 14 years ago. *See id*. ¶ 29.

[2] All cited board policies are found on the School's website, and current as of this filing. *See* ECF No. 1 at ¶ 44; *available* at https://www.davidson.k12.nc.us/apps/pages/index.jsp?uREC_ID=917649&type=d&pREC_ID=1257087. ECF No. 1 at ¶ 44, n. 5.

v. State, 488 S.E. 2d 249, 255 (N.C. 1997) (state constitution "guarantee[s] every child of this state an opportunity to receive a sound basic education in [the] public schools").

This control includes authority over all matters pertaining to the School in accordance with state law. Board Policy 1.1. Board Policy 6.11 does not provide notice that students are prohibited from using the words "alien," "illegal alien," or "green cards" in class. ECF No. 1-4. Nor does it state that the use of such words by a student in class is considered racially insensitive or abusive. *See id*. The Board also covenants to not "limit a student's right to express his or her thoughts and opinions at reasonable times and places, consistent with the protections of the First Amendment." Student Handbook, ECF No. 1-1 at 25.

C.M.'s Words Were Factual and Nonthreatening

C.M.'s use of the phrases "illegal aliens" and "green cards" was factual and nonthreatening, consistent with their use in both state and federal law. Compl. ¶ 47.

Federal law has used the word "alien" for more than 225 years. Gregory Fehlings, *Storm on the Constitution: The First Deportation Law*, 10 Tulsa J. Comp. & Int'l L. 63 (2002). "An undeclared war with France led Congress to pass the Alien Act of 1798 which for the first time authorized the federal

government to deport aliens." *Id*. A set of laws Congress passed during this time were collectively known as the "Alien and Sedition Acts." *Id*. at 69. "Congress barred the naturalization of aliens of a country at war with the United States, and it commanded all *white immigrants* to register with the government." *Id*. (emphasis added).

The current U.S. Immigration and Naturalization Act defines "alien" to "mean[] any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). And the North Carolina General Assembly enacted an entire chapter devoted exclusively to "aliens," Chapter 64, Article I, entitled, "Various Provisions Related to Aliens." *See* N.C. Gen. Stat. §§ 64-1 to -24.

Prominent jurists with diverse cultural and ethnic backgrounds have used the same words in their written opinions that C.M. used in class. Compl. ¶ 54.

For example, Judge James Ho of the Fifth Circuit Court of Appeals, who immigrated to the United States from Taiwan as a child, has written: "There's no need to be offended by the word 'alien.' It's a centuries-old legal term found in countless judicial decisions." *Khan v. Garland*, 69 F. 4th 265, 271-72 (5th Cir. 2023) (Ho, J., concurring); Compl. ¶ 55.

One of those "countless judicial decisions" that Judge Ho referenced was written by the late Supreme Court Justice Thurgood Marshall. He began

a majority opinion as follows: "In this case, we must determine whether an *alien* who is prosecuted under 8 U.S.C. § 1326 for *illegal* entry following deportation may assert in that criminal proceeding the invalidity of the underlying deportation order." *United States v. Mendoza-Lopez*, 481 U.S. 828, 830 (1987) (emphasis added).

Opinions issued by the U.S. Supreme Court less than a month before C.M.'s suspension used the terms "green card" and "illegal aliens." *See Wilkinson v. Garland*, 144 S. Ct. 780, 785 (2024) (Sotomayor, J.) (using the term "green card" to refer to immigrants with "lawful permanent residence"); *id*. at 794 (Alito., J., dissenting, joined by Roberts, C.J. and Thomas, J.) (using the term "illegal aliens" consistent with the United States Code).

And this Court also uses the phrase "illegal aliens," noting "the absence of a better choice." *AT by HT v. Univ. of N.C.*, No. 1:16-CV-489, 2016 WL 10586289, at *1 n.1 (M.D.N.C. Jul. 7, 2016) (Eagles, J.).

Consequences of the Suspension

After C.M. served his suspension, he was not allowed to compete in the Senior night home track meet—the most important meet of the year. C.M. Decl. ¶ 12. The School's track coach said, "I have heard some things about you." *See id*.; Compl. ¶ 60. Upon returning to school, he was met by threats and bullying from students who had heard he was suspended for racism but

did not know the details. C.M. Decl. ¶ 15. On April 29, 2024, in response to threats and bullying from other students, and the hostility of the Board and administration, C.M.'s parents unenrolled him from School and enrolled him in a certified homeschool program away from Davidson County. L. McGhee Decl. ¶ 32.

But for Board Policy 6.11, and the manner in which it was enforced to wrongly label C.M.'s comment as racially motivated and insensitive, C.M. would still be enrolled as a student at the School. C.M. Decl. ¶¶ 21-22; Compl. ¶ 63. C.M.'s family is unable to adequately plan for the new school year, beginning in August, two months from now. L. McGhee Decl. ¶ 33. The family's options are to continue homeschooling C.M. in a program located in another part of the state or reenroll him at the School on or before August 1, 2024—before the first day on August 26, 2024—conditioned upon his name and record being cleared. *Id.* ¶¶ 33-35.

The School's charge that C.M.'s comment in class was racially motivated and insensitive has already damaged his standing with classmates, teachers, and coaches, and it will interfere with his opportunities for higher education, earning a track scholarship, and his future employment. C.M. Decl. ¶¶ 12-13, 15. C.M. hopes to earn a track scholarship one day to attend college. *Id.* ¶ 13. He is planning to take the SAT and ACT exams later

this year so he can apply to colleges as a senior. L. McGhee Decl. ¶ 35.

Absent an injunction, the Suspension Notification in C.M.'s record will be disseminated to those with a legitimate educational interest, colleges to which he applies, and those providing financial aid, scholarships, and loans for C.M. to access higher education. Student Handbook, ECF No. 1-1 at 35; Suspension Notification, ECF No. 1-2; L. McGhee Decl. ¶ 35. Sharing and disseminating this information will negatively affect C.M.'s standing with teachers and coaches at the School, as well as his chances to gain admission to colleges, earn a scholarship, or access financial aid. C.M. Decl. ¶ 23; L. McGhee Decl. ¶ 36.

QUESTIONS PRESENTED

1. Should the Court issue a preliminary injunction ordering the Board to reverse C.M.'s suspension for depriving him of his First Amendment free speech rights, given that his comment did not interfere with the School's work or collide with other students' rights?

2. Should the Court issue a preliminary injunction ordering the Board to reverse C.M.'s suspension for depriving him of his Fourteenth Amendment due process rights because no hearing was provided, and the Board's policy on "racially insensitive" speech is unduly vague?

LEGAL STANDARD

To obtain a preliminary injunction, a plaintiff must "establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor,

and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The third and fourth factors merge when the government is a party. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

Where the alleged irreparable harm is linked to a First Amendment claim, "[d]etermination of irreparable harm thus requires analysis of [a plaintiff]'s success on the merits." *Newsom ex rel. Newsom v. Albemarle Cnty. School Bd.*, 354 F.3d 249, 254-55 (4th Cir. 2003).

ARGUMENT

A. This Court should issue a preliminary injunction ordering the Board to reverse C.M.'s suspension and remove the Suspension Notification from his record.

The status quo is the "last uncontested status between the parties which preceded the controversy." *P&L Dev. LLC. v. Bionpharma Inc.*, 2018 U.S. Dist. LEXIS 240231 at *9 (M.D.N.C. Jan. 26, 2018) (Tilley, Jr., J.) (quoting *Pashby v. Delia*, 709 F. 3d 307, 320 (4th Cir. 2013)). "[A] preliminary injunction can [ ] act to restore, rather than merely preserve, the status quo, even when the nonmoving party has disturbed it." *Di Biase v. SPX Corp.*, 872 F.3d 224, 231 (4th Cir. 2017). Sometimes it is necessary "to require a party who has recently disturbed the status quo to reverse its actions." *Aggarao v. MOL Ship Mgmt. Co., Ltd.*, 675 F. 3d 355, 378 (4th Cir. 2012) (cleaned up).

That is precisely what this Court should do: order the Board "to reverse its actions" after it "disturbed the status quo" and wrongly upheld C.M.'s suspension. *See id.* Ordering the Board to reverse C.M.'s suspension and remove the Suspension Notification from his record protects him from future injury. The Suspension Notification that officials placed in his School record is a tainted document, which continues to grow and fester like a cancer threatening to cut off C.M.'s hopes and dreams. A preliminary injunction and reversal of the suspension would allow C.M.'s parents to comfortably reenroll him in School in August, and to ultimately apply to colleges, without the Board's false stench of racism tainting his reputation and record.

1. C.M. is likely to succeed on the merits of his claims.

a. The Board deprived C.M. of his free speech rights under the First Amendment when Assistant Principal Anderson executed and enforced Board Policy 6.11 and suspended C.M. from School.

C.M. is likely to succeed on the merits of his First Amendment claim because the Board unduly deprived him of his free speech rights. Compl. at 18-22.

The U.S. Supreme Court held 55 years ago that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). For "school officials to justify prohibition of a particular

expression of opinion, [they] must be able to show that [their] action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that aways accompany an unpopular viewpoint." *Id.* at 509.

Tinker's well-established "substantial-disruption test" requires officials to show that a student's speech "might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." *Id.* at 514. This means that, to justify suppression of a student's speech, officials must produce evidence showing that such speech materially interfered "with the schools' work" or collided "with the rights of other students." *Id.* at 508.

Since *Tinker*, the Supreme Court established three narrow exceptions whereby school officials may regulate student speech without satisfying the substantial disruption test: (1) when a student engages in sexually lewd, vulgar, indecent, and plainly offensive speech at a school assembly, *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); (2) where student speech appears to be school-sanctioned, as with student speech published in a school newspaper, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); and (3) when student speech may reasonably be viewed as promoting illegal drug use, *Morse v. Frederick*, 551 U.S. 393 (2007).

But unless one of the three exceptions expressly applies, courts "must continue to adhere to the *Tinker* test." *Hardwick v. Heyward*, 711 F.3d 426, 435 n.11 (4th Cir. 2013). Thus, *Tinker's* substantial-disruption test controls the analysis of this case because C.M.'s question did not fall within one of the three narrow exceptions. *See id.*

i. C.M.'s comment did not interfere with the School's work or collide with the rights of other students.

The School's punishment of C.M. was not permissible under *Tinker* because C.M.'s comment did not materially interfere "with the [School]'s work" or collide "with the rights of other students." *See Tinker*, 393 U.S. at 508; Suspension Notification, ECF No. 1-2; L. McGhee Decl., Exhibit 2 Recording.

First, C.M.'s comment did not interfere with the School's work. The Suspension Notification does not show that C.M.'s comment materially interfered with Ms. Hill's ability to discharge her duties to deliver a sound basic education to her students. *See* Board Policy 1.1 at ¶ 1; *Leandro*, 488 S.E. 2d at 255. The Suspension Notification does not mention Hill or other School officials. And it refers to C.M.'s comment in the singular ("comment" or "remark"). So the School suspended C.M. based on *one remark* in class—after which Hill told C.M. to watch his mouth, and he followed her instructions and did not say anything further.

Second, C.M.'s question did not collide with the rights of other students. The Suspension Notification does not reflect that C.M.'s question collided with other students' rights—including R.'s right—to receive a sound basic education. *See* Board Policy 1.1 ¶ 1; *Leandro*, 488 S.E. 2d at 255. Indeed, R. told Anderson that he did not consider C.M.'s remark to be a big deal. L. McGhee Decl. ¶ 11; Exhibit 2 Recording at 3:20.

ii. C.M.'s speech was factual and nonthreatening.

C.M.'s one question in Ms. Hill's English class—whether reference to a word in class discussion meant "space aliens or illegal aliens who need green cards"—was factual, nonthreatening speech. Compl. ¶¶ 47, 69.

According to the Fourth Circuit, "The First Amendment does not permit schools to prohibit students from engaging in [] factual, nonthreatening speech." *Starbuck v. Williamsburg James City County School Bd.,* 28 F.4th 529, 536-37 (4th Cir. 2022). "Schools cannot silence such student speech on the basis that it communicates controversial or upsetting ideas. To do so would be incompatible with the very purpose of public education." *Id*. at 536.

In *Starbuck*, a Virginia school had suspended a student two days out-of-school—the day after a mass shooting at a school in Parkland, Florida that made national headlines—because it claimed the student disturbed class by

speaking about details of the shooting he heard on the news. "No student within the conversation made any threat," and the conversation was factual; therefore, the First Amendment protected the student's speech. *Id*. at 531-32.

Likewise, C.M. "only engaged in a factual conversation" that was nonthreatening, and the "School[ ] cannot silence [his] speech on the basis that it communicate[d] controversial or upsetting ideas." *See id*. And C.M.'s factual and nonthreatening comment in class—about a word he had seen in the news—is less controversial than the student's protected speech in *Starbuck*. Indeed, even in that highly emotional time immediately after a national tragedy—unlike the normal day when C.M. asked his teacher one question—the Fourth Circuit held that the student's "First Amendment claim against the School Board" was valid because his remarks were factual and nonthreatening. *See Starbuck*, 28 F.4th at 537.

b. The Board deprived C.M. of his procedural due process rights under the Fourteenth Amendment by failing to provide a hearing and notice.

C.M. is likely to succeed on the merits of his claim that the Board deprived him of procedural due process by failing to provide him with a hearing and by failing to provide notice with its vague policy on "racially insensitive" speech. The failure to provide due process implicates two of C.M.'s protected interests: (1) a liberty interest in his good name and

reputation, and (2) a property interest in receiving a sound basic education from the Board guaranteed under North Carolina law.

C.M.'s Liberty Interest in His Reputation

Due process is required "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him." *Goss v. Lopez*, 419 U.S. 565, 574 (1975). A student has a liberty interest in his reputation because a stain on his record "could seriously damage [his] standing with [his] fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment." *Goss*, 419 U.S. at 575. To state a liberty interest claim under the Due Process Clause, a plaintiff must show that the charges against him: (1) placed a stigma on his reputation; (2) were made public; (3) were made in conjunction with the adverse action against him; and (4) were false. *Sciolino v. City of Newport News, Va.*, 480 F.3d 642, 646-47 (4th Cir. 2007).

The Board deprived C.M. of his liberty interest in his good name and reputation when School officials (1) stated in the Suspension Notification that his comment was "racially insensitive" and a "racially motivated comment which disrupts class;" (2) placed the Suspension Notification in his record making it available to be disseminated to third parties; and (3) made the stigmatizing charge of racism in conjunction with his actual suspension from

School, despite Anderson conceding that the charge of racism was false. Exhibit 2 Recording at 6:00, 8:25; *see Sciolino*, 480 F.3d at 646-47.

C.M. was entitled to a hearing "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). This means he was entitled to a name-clearing hearing before the Suspension Notification was placed in his record and made available to be disseminated to third parties. *See Sciolin*o, 480 F.3d at 653 & n.9; *see Harrell v. City of Gastonia*, 392 F. App'x 197, 205-06 (4th Cir. 2010) (per curiam).

C.M. was further entitled to notice from the Board as to what words he could say in class without having to guess. *See Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926); *see Baggett v. Bullitt*, 377 U.S. 360, 366 (1964). In the school context, rules and regulations must be clear and specific enough that a reasonable person would understand what is prohibited or permitted. *See, e.g., Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1967) (holding administrative rules of state university system were unconstitutionally vague).

The Board's policy on "racially insensitive" speech is unduly vague, and reasonable students at the School could not know they are prohibited from saying in class the words, "alien," illegal alien," or "green cards." Anderson's explanation to C.M.'s parents on what constitutes "racially insensitive"

speech at the School demonstrates why the policy is vague. Anderson said the School metes out harsh punishment "[a]nytime there is something said that's racially insensitive." Exhibit 2 Recording at 5:00. In other words, the policy is vague because "anytime" provides absolutely no framework or guidance to students as to language the School views as "racially insensitive."

Such a "policy" is seemingly enforced not by clear guiding principles, but by Anderson's idiosyncratic and, in this case, obviously incorrect perceptions of what might be a racially insensitive term. A Supreme Court dissenting opinion that is generally cited as an example of the unclear and arbitrary misuse of language is apt here because the School's policy is pure nonsense, hocus pocus, and "interpretive jiggery-pokery." *See King v. Burwell*, 576 U.S. 473, 506 (2015) (Scalia, J., dissenting, joined by Thomas, J. and Alito, J.). The School's circular reasoning inherent in its speech policy is unduly vague, completely subjective, and fails to provide students with fair warning and notice on words the School considers "racially insensitive."

C.M.'s Property Interest in a Sound Basic Education

The Board deprived C.M. of his property interest in a sound basic education guaranteed under North Carolina law with no opportunity for a meaningful hearing or to appeal the School's harsh decision and punishment.

North Carolina grants students a property interest by "guarantee[ing] every child of this state an opportunity to receive a sound basic education in public schools [overseen by the Board]." *Leandro*, 488 S.E. 2d at 255; Board Policy 1.1 at ¶ 1. And Courts have held that when a state provides a free public education, this creates a property interest that is protected by the Due Process Clause. *See Pegram v. Nelson,* 469 F. Supp. 1134, 1138 (M.D.N.C. Apr. 13, 1979) (citing *Goss,* 419 U.S. at 565). This property interest creates a procedural due process right in the disciplinary suspension setting, entitling a student to notice and some type of hearing before being suspended from school. *See id* at 1140.

The Supreme Court has identified three factors that should be considered in determining the type of due process required: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the state's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews*, 424 U.S. at 335.

Here, the first factor—the private interest at stake—weighs heavily in favor of maximum due process—because C.M.'s interest in receiving an

education is of the highest importance. *See id.*; *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (stating that "education is perhaps the most important function of state and local governments").

The second factor—the risk of an erroneous deprivation of C.M.'s property interest in education through the School's procedures—highlights the inadequacy of the School's (nonexistent) procedures to protect against an improper suspension. C.M. received no meaningful hearing before being suspended and no opportunity to appeal his suspension. Anderson served as prosecutor, judge, and jury. And despite later admitting to C.M.'s parents that he did not think C.M. was racist, Anderson *still* meted out harsh punishment for C.M.'s so-called "racially insensitive" comment.

The third factor—administrative burdens—favors increasing the current procedural protections. For example, requiring two officials to approve a suspension out of school or providing for an appeal would impose a *de minimis* burden. *See id.*

c. The Board is liable under *Monell*.

Monell v. Department of Social Services, 436 U.S. 658 (1978) authorizes C.M.'s lawsuit against the Board and establishes its liability. A government defendant's liability under *Monell* may arise in four ways:

> (1) through an express policy, such as a written ordinance or regulation; (2) through the decisions of a

> person with final policymaking authority; (3) through an omission, such as a failure to properly train officials; or (4) through a practice that is so persistent and widespread as to constitute a custom or usage with the force of law.

See Starbuck, 28 F.4th at 537 (citing *Lytle v. Doyle*, 326 F.3d 463, 471 (4th Cir. 2003)) (cleaned up). Here, liability may be shown in at least three ways.

First, the Board is liable to C.M. through its express policy set forth in his Suspension Notification, which declares that the School suspended him for violating Board Policy "6.11 Using/Making racially motivated comment which disrupts class." ECF No. 1-2 at 3.

Second, as the final policymaking authority over the School's short-term suspension of students for less than ten days (Board Policy 6.11.2 ¶ B), the Board upheld and ratified C.M.'s suspension by Board members' silence. Thus, the Board is "liable for *its own decision* to uphold the actions of [the School]." *Starbuck*, 28 F.4th at 534. Indeed, C.M.'s mother emailed Chairman Beck and Board member Jarvis, requesting reversal of her son's suspension and attaching the Suspension Notification. But Beck and Jarvis remained silent and did not respond, even though Board Policy 6.11 caused her son's injury. *See Franklin v. City of Charlotte*, 64 F.4th 519, 536 (4th Cir. 2023).

Third, the Board has implemented a practice that is so persistent and widespread as to constitute a custom or usage with the force of law. Anderson

explained to C.M.'s parents that it is the School and Board's practice and custom since August of 2023 to mete out "harsh" punishment "[a]nytime there is something said that's racially insensitive." He said reversing C.M.'s suspension would be "unfair to the 15 other kids who have served [suspension] for saying the n word or anything else under the sun that's racially charged that creates a disruption in the classroom." In other words, according to Anderson, the Board's widespread and well-settled practice and custom that constitutes standard operating procedure is to equate the words, "alien," "illegal alien," and "green cards" with the n word.

2. An injunction protects C.M. from irreparable harm.

A preliminary injunction will protect C.M. from irreparable harm because, as the Supreme Court has explained, the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

But for Board Policy 6.11, and the manner in which it was enforced and applied against C.M. to wrongly label his comment as racially motivated and insensitive, C.M. would still be enrolled as a student at the School. The Board's unconstitutional policy on "racially insensitive" speech chills C.M.'s speech, restricts his participation in class discussion, obstructs his guaranteed right to receive a sound basic education under North Carolina

law, and permanently alters and limits his opportunities to attend college and earn a scholarship because of the Suspension Notification in his record.

3. The balance of equities tips in C.M.'s favor because an injunction upholding his constitutional rights is in the public interest.

Courts consider the third and fourth factors—the balance of equities and the public interest—together. *See Nken*, 556 U.S. at 435.

The balance of equities favors a preliminary injunction. The Board will suffer no harm if a preliminary injunction orders it to remove the Suspension Notification from C.M.'s record. But, absent an injunction, C.M. would suffer irreparable harm for a violation of his constitutional rights. And "upholding constitutional rights is in the public interest." *Legend Night Club v. Miller*, 637 F.3d 291, 302-03 (4th Cir. 2011).

B. The Court should waive the bond requirement under Rule 65(c).

Although Fed. R. Civ. P. 65(c) requires that security be posted when a court issues a preliminary injunction, district courts "retain[ ] the discretion to set the bond amount as it sees fit or waive the security requirement." *Pashby*, 709 F.3d at 332. Because the Board would not incur costs and money damages if it were wrongfully enjoined, this Court should exercise its discretion to waive the bond requirement. *See Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 (4th Cir. 1999).

CONCLUSION

C.M. requests a preliminary injunction on or before **August 1, 2024**, so his family may adequately plan for the new school year, ordering the Board to (a) reverse his suspension, (b) remove the Suspension Notification from his record, (c) remove unexcused absences from his record related to his suspension, (d) remove all references from his record that he used "racially" motivated, inappropriate, or insensitive language in class, and (e) enjoin the Board from enforcing its unduly vague speech policy as it and the School have applied it against C.M.

Dated: June 4, 2024

Respectfully submitted,

/s/ Troy D. Shelton
Troy D. Shelton
N.C. State Bar No. 48070
tshelton@dowlingfirm.com
Craig D. Schauer
N.C. State Bar No. 41571
cshelton@dowlingfirm.com
DOWLING PLLC
3801 Lake Boone Trail, Suite 260
Raleigh, North Carolina 27607
Telephone: (919) 529-3351

M.E. Buck Dougherty III*
Dean McGee*
James McQuaid*
LIBERTY JUSTICE CENTER
13341 W. U.S. Highway 290, Bldg. 2
Austin, Texas 78737
(512) 481-4400 - telephone
bdougherty@libertyjusticecenter.org
dmcgee@libertyjusticecenter.org
jmcquaid@libertyjusticecenter.org

* *Pro hac vice admission forthcoming*

Attorneys for Plaintiff C.M.

CERTIFICATE OF COMPLIANCE

Pursuant to LR 7.3(d), the undersigned certifies that the Plaintiff's Brief does not exceed 6,250 words and is in compliance with this Rule. The total word count is 6,126. The undersigned relied on the word count feature on the software utilized to draft this Brief, and the word count includes the body of the brief, headings, and footnotes. The word count does not include the caption, signature lines, certificate of service, and any cover page or index.

Respectfully submitted this the 4th day of June 2024.

/s/ Troy D. Shelton
Troy D. Shelton

CERTIFICATE OF SERVICE

I certify that the foregoing document was served on all Defendants by sending through the United States mail to the Defendants, addressed as follows:

Alan Beck
Chairman, Davidson County Board of Education
250 County School Road
Lexington, North Carolina 27292

Eric R. Anderson
2747 NC Hwy. 47
Lexington, NC 27292

The 4th day of June, 2024.

/s/ Troy D. Shelton
Troy D. Shelton