



February 1, 2021

H. Neil Matkin, Ed.D.
District President
Collin College
3452 Spur 399
Collin Higher Education Center
Room 406
McKinney, Texas 75069

Sent via Electronic Mail (nmatkin@collin.edu)

Dear President Matkin:

FIRE¹ is disappointed to again have cause for concern for the state of freedom of expression at Collin College, a public institution bound by the First Amendment. The College's continued efforts to police the extramural speech of its faculty—most recently through the issuance of a “Level 1 warning” to Professor Lora Burnett—are an unacceptable abridgment of the rights of every faculty member at Collin College.

I. Collin College Issues “Level 1 warning” to Burnett for Tweet

In August of 2020, you opined that the COVID-19 pandemic had been “blown utterly out of proportion across our nation.”² You argued that residents of Collin County were “over one hundred times more likely” to die from a motor vehicle accident than from the Coronavirus, asking anyone with “better numbers, please enlighten me[.]”³ According to the Texas Department of State Health Services, there were 82 recorded deaths from COVID-19 in Collin

¹ As you will recall from prior correspondence, the Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

² Emma Pettit, *‘One of Us’: A President’s Message Stuns Faculty After Their Colleague Dies of Covid-19*, CHRON. OF HIGHER ED., Nov. 23, 2020, <https://www.chronicle.com/article/one-of-us-a-presidents-message-stuns-faculty-after-their-colleague-dies-of-covid-19>; Email from Neil Matkin, President, Collin Coll., to Faculty (Aug. 18, 2020, 1:49 PM) (on file with author).

³ *Id.*

County on August 1, 2020,⁴ in contrast to the 51 total fatalities from motor vehicle accidents in Collin County in all of 2019.⁵ As of today, there have been 539 COVID-19 fatalities reported in Collin County.⁶

On January 13, 2021, Prof. Lora Burnett shared, on her personal Twitter account, a link to the obituary of Professor Ralph Gregory Hendrickson, adding: “Another @collincollege professor has died of COVID.”⁷ Before doing so, Burnett checked Hendrickson’s “RateMyProfessor” page, which included a December 15, 2020, review posted by a student and listed Hendrickson as teaching at Collin College.⁸

On January 19, Burnett received a “Level 1 warning” signed by Rosalind Lewis, a human resources consultant at Collin College, and Daphne Babcock, Collin College’s Dean of Academic Affairs and Workforce.⁹ The written warning, a copy of which is enclosed, faulted Burnett’s tweet as “not accurate,” alleging that Hendrickson was a “former employee of the college and not a Collin College professor.”¹⁰ The warning argued that “had [Burnett] first verified the accuracy of the information, [she] would have learned that Mr. Hendrickson is not a Collin College professor and, in fact, has not taught at the college for several years.”¹¹

The written warning instructs Burnett “to verify objective facts included in your publicly posted statements,” citing a Collin College policy described as requiring faculty members “to strive for accuracy when speaking or writing as private citizens.”¹²

⁴ TEX. DEPT. OF STATE HEALTH SVCS., FATALITIES OVER TIME BY COUNTY, *available at* <https://dshs.texas.gov/coronavirus/TexasCOVID19DailyCountyFatalityCountData.xlsx>.

⁵ TEX. DEPT. OF TRANSPORTATION, FATAL CRASHES AND FATALITIES BY COUNTY AND ROAD TYPE 16 (Apr. 15, 2020), *available at* https://ftp.txdot.gov/pub/txdot-info/trf/crash_statistics/2019/12.pdf. The odds you cited represent an apples-to-oranges comparison, contrasting the *lifetime* odds of dying in a motor vehicle accident with the per-capita number of deaths as the pandemic continued. Press Release, *For the First Time, We’re More Likely to Die from Accidental Opioid Overdose Than Motor Vehicle Crash*, NAT’L SAFETY COUNCIL, Jan. 14, 2019, <https://www.nsc.org/in-the-newsroom/for-the-first-time-were-more-likely-to-die-from-accidental-opioid-overdose-than-motor-vehicle-crash> (origin of the “one in 103” motor vehicle statistic).

⁶ TEX. DEPT. OF STATE HEALTH SVCS., *COVID-19 In Texas (Dashboard)*, <https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9cafc8b83> (last visited Jan. 27, 2021).

⁷ L.D. Burnett (@ldburnett), TWITTER (Jan. 13, 2021, 2:36 PM), <https://twitter.com/LDBurnett/status/1349455408960860162> (linking to Winscott Rd. Funeral Home & Cremation Svcs., *Ralph Gregory Hendrickson*, <https://www.winscottfuneral.com/obituary/ralph-hendrickson> (last visited Jan. 20, 2021)).

⁸ RATEMYPROFESSORS.COM, *Ralph Hendrickson*, <https://www.ratemyprofessors.com/ShowRatings.jsp?tid=985420> (last visited Jan. 20, 2021).

⁹ Employee Discipline Form, CWID 110776350 (Jan. 19, 2021) (on file with author).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

II. Burnett’s Tweet is Protected by the First Amendment

The First Amendment and Collin College policy protect the right of faculty members to speak as private citizens on matters of public concern. That right extends breathing room to speech critical of government entities and their officials, who may not punish citizens for speech those officials believe to be wrong.

A. *The First Amendment Limits Collin College’s Authority to Police Extramural Expression*

It has long been settled law that the First Amendment is binding on public colleges like Collin College.¹³ Accordingly, the decisions and actions of a public college—including the maintenance of policies implicating student and faculty expression—must be consistent with the First Amendment.¹⁴

Faculty at public colleges do not “relinquish First Amendment rights to comment on matters of public interest by virtue of government employment.”¹⁵ A government employer cannot penalize an employee for speaking as a private citizen on a matter of public concern unless it demonstrates that its interests “as an employer, in promoting the efficiency of the public services it performs through its employees” outweighs the interest of the employee, “as a citizen, in commenting upon matters of public concern[.]”¹⁶

Collin College’s own policies recognize the importance of these interests, expressly promising that faculty members “are citizens, and, therefore, possess the rights of citizens to speak freely outside the classroom on matters of public concern and to participate in lawful political activities.”¹⁷ That policy also guarantees that “[p]rior restraint or sanctions will not be imposed upon faculty members in the exercise of their rights as citizens or duties as teachers.”¹⁸

There can be no doubt that Burnett’s tweets are speech as a private citizen, as Collin College does not employ its faculty to post on their personal social media pages.¹⁹ Likewise, the tweet

¹³ *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”) (internal citation omitted).

¹⁴ *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

¹⁵ *Connick v. Myers*, 461 U.S. 138, 140 (1983).

¹⁶ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

¹⁷ COLLIN COLL., EMPLOYEE RIGHTS AND PRIVILEGES: EMPLOYEE EXPRESSION AND USE OF COLLEGE FACILITIES (Aug. 12, 2020), [https://pol.tasb.org/Policy/Download/304?filename=DGC\(LOCAL\).pdf](https://pol.tasb.org/Policy/Download/304?filename=DGC(LOCAL).pdf).

¹⁸ *Id.*

¹⁹ *See, e.g., Higbee v. Eastern Michigan University*, No. 18-13761, 2019 U.S. Dist. LEXIS 109394, at *14 (E.D. Mich. July 1, 2019) (commenting on Facebook about the university’s response to racial incidents “would not appear to be within a history professor’s official duties”).

relates to a matter of public concern,²⁰ responding to your comments in August downplaying the impact of the COVID-19 pandemic, and the impact of the pandemic generally in Collin County.

B. Collin College May Not Discipline Burnett for her Tweet

The policy cited by Collin College as justifying disciplinary action against Burnett is not enforceable in this—if any—context.

First, to the extent that Collin College believes this language to authorize its administrators to police every public sentence written or uttered by a faculty member for accuracy, that language exceeds the college’s authority under the First Amendment. There is no “general exception” to the First Amendment for “false statements.”²¹ Even knowingly false statements are generally protected, and the government’s interest in “truthful discourse” does not “give government a broad censorial power” over false statements.²²

As the United States Supreme Court explained in its seminal decision in *New York Times v. Sullivan*, the First Amendment allows members of the public to make mistakes in order to facilitate speech:

That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the “breathing space” that they “need . . . to survive[.]”²³

This breathing space provides citizens with the assurance that they can contribute to public debate without fear that their government will punish them if they err in their facts or opinions. If, for example, Burnett had tweeted the same COVID-19 argument you offered in August, it would not have been difficult to characterize it as inaccurate. That argument, conflating the lifetime rate of dying from a motor vehicle accident with the earlier stages of an exponentially-growing pandemic, arguably ignored “better numbers” from the State of Texas, which demonstrated that annual COVID-19 deaths had already exceeded the annual rate of motor vehicle deaths in Collin County. Yet it would have been outrageous if the College had sought to punish her under the guise that making this argument was erroneous or—in relying on others to find “better numbers” and not checking official government sources—evidenced a failure to “strive for accuracy.” More speech, not punishment, is how public debate is driven.

²⁰ “Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community[.]” *Snyder v. Phelps*, 562 U.S. 443, 453 (2011).

²¹ *United States v. Alvarez*, 567 U.S. 709, 718–23 (2012).

²² *Id.*

²³ *New York Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

Second, even assuming the policy were not merely aspirational, but enforceable, and that the College's assertion is itself accurate, Burnett would not be in violation of the policy. The policy's language encourages faculty to "strive" for accuracy, implicitly recognizing that the First Amendment affords breathing room to make mistakes or hold the "wrong" opinion.

Burnett did, in fact, make efforts to ascertain the veracity of her tweet, checking the deceased's RateMyProfessors page, which listed him as teaching at Collin College and which included a recent student review of his teaching. Likewise, had she searched Google for references to Hendrickson on Collin College's website, she would have located a roster of "Associate Faculty" listing Hendrickson's name.²⁴ The purported requirement that faculty "strive" for accuracy does not require that they solicit comment from college administrators to confirm the accuracy of publicly-available information before engaging in extramural expression.

Third, Burnett's tweet is substantially true. Even if Hendrickson had, as Collin College alleges, "not taught at the college for several years," it is still true that he was "[a]nother [Collin College] professor [who] has died of COVID." Collin College is aggrieved that Burnett's tweet did not conform to administrators' preference by including the word "former."

C. *Collin College's Course of Conduct is Retaliatory*

FIRE remains concerned by the course of conduct undertaken by Collin College's administration in response to Burnett's extramural speech. The First Amendment bars not only termination or non-renewal premised on protected expression, but any "adverse government action against an individual in retaliation for the exercise of protected speech activities" which "would chill a person of ordinary firmness from continuing to engage in that activity[.]"²⁵ This standard may be satisfied by a government employer's reprimand,²⁶ "unwarranted disciplinary investigation,"²⁷ or "threat of disciplinary action,"²⁸ particularly where that response is expressly premised on the employee's speech.

²⁴ COLLIN COLL., *Collin College Associate Faculty*, <https://www.collin.edu/departments/politicalscience/Associate%20Faculty%205.pdf> (last visited Jan. 22, 2021).

²⁵ *Keenan v. Tejada*, 290 F.3d 252, 258 (5th Cir. 2002).

²⁶ *See, e.g., Mote v. Walthall*, 902 F.3d 500, 503 (5th Cir. 2018) (qualified immunity denied where police officers who served as board members of an unrecognized union "began getting written reprimands [for] petty violations, such as having a dirty squad car and failing to notify communications about off-duty assignments"); *Kirby v. City of Elizabeth City*, 388 F.3d 440, 449 (4th Cir. 2004); *Downing v. W. Haven Bd. of Ed.*, 162 F. Supp. 2d 19, 29 (D. Conn. 2001) ("an express or constructive discharge or demotion; a failure to promote; a reprimand or warning; a reference in a personnel file, or the like" may satisfy the ordinary firmness test). As the United States Court of Appeals for the Third Circuit explained, even where action, including a "written reprimand," does not "rise to the level of an adverse employment action," it may nevertheless "support a prima facie case of First Amendment retaliation" where it "is sufficient to deter a person of ordinary firmness from exercising free speech rights[.]" *Mieczkowski v. York City Sch. Dist.*, 414 F. App'x 441, 449 (3d Cir. 2011).

²⁷ *Coszalter v. City of Salem*, 320 F.3d 968, 976 (9th Cir. 2003).

²⁸ *Id.*

We think you will agree that the College’s “Level 1 warning” is not a trivial response. At Collin College, written warnings have substantial implications. The College’s “Faculty Recommendation for Termination of Employment Form” classifies a “Level 1 Warning” as a form of “Disciplinary Action” qualifying a faculty member for termination.²⁹ If not terminated, faculty who have “reprimands” or other “documented conferences” concerning their conduct are prioritized for dismissal in the event of a “financial exigency”—a distinct possibility given the budgetary consequences to institutions of higher education in light of the COVID-19 pandemic.³⁰ A “Level 2 warning,” which could be issued whenever any of Burnett’s extramural statements are deemed inaccurate by Collin College administrators, would disqualify Burnett from a salary increase for at least one year.³¹

Stripped of any other context, Collin College’s “Level 1 warning” to Burnett is, standing alone, sufficient to deter a reasonable person from continuing to exercise their First Amendment rights. In light of the College’s past responses to Burnett’s extramural speech,³² the “Level 1 warning” is an obvious escalation of its frivolous invocations of inapplicable policies to punish Burnett due to her protected speech. While criticism alone does not violate the First Amendment, formal warnings about a professor’s public speech are intended to restrict, not criticize, that speech. Moreover, the College has now coupled public criticism with—after privately pledging that the “execution” of its “personnel policies will not be played out in a public manner”—two formal warnings, a response to FIRE suggesting that the College intends to refuse to renew Burnett’s contract, and efforts to hide public records concerning lawmakers’ inquiries about Burnett’s political views.³³

In that context, the College’s formal “Level 1 warning” over a tweet makes clear that its administration will penalize Burnett’s expression whenever it objects to the content of her speech or believes her to be in error. The notion that a faculty member may receive a formal written warning or other disciplinary consequences each time she tweets something administrators subjectively believe to fall short of “striving” for accuracy is inimical to the college environment, contrary to Collin College policy, and unconstitutional.

²⁹ COLLIN COLL., FACULTY RECOMMENDATION FOR TERMINATION OF EMPLOYMENT FORM (rev. July 2020), *available at* http://www.collin.edu/perf_mgmt/Faculty%20Recommendation%20for%20Termination_V7.23.2020.docx.

³⁰ COLLIN COLL., TERMINATION OF EMPLOYMENT, REDUCTION IN FORCE (DMC (LOCAL)) (Oct. 14, 2019), [https://pol.tasb.org/Policy/Download/304?filename=DMC\(LOCAL\).pdf](https://pol.tasb.org/Policy/Download/304?filename=DMC(LOCAL).pdf).

³¹ COLLIN COLL., EMPLOYEE PERFORMANCE EVALUATION (DLA (LOCAL)) (Nov. 7, 2019), [https://pol.tasb.org/Policy/Download/304?filename=DLA\(LOCAL\).pdf](https://pol.tasb.org/Policy/Download/304?filename=DLA(LOCAL).pdf).

³² Peter Bonilla, *Collin College’s Texas two-stepping on free speech continues*, FIRE, Oct. 23, 2020, <https://www.thefire.org/collin-colleges-texas-two-stepping-on-free-speech-continues>.

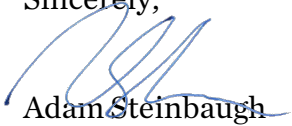
³³ Adam Steinbaugh, *On the shady side of the stone wall, Collin College continues to shield legislators’ communications over professor’s tweets about Vice President Pence*, FIRE, Dec. 4, 2020, <https://www.thefire.org/on-the-shady-side-of-the-stone-wall-collin-college-continues-to-shield-legislators-communications-over-professors-tweets-about-vice-president-pence>.

III. Conclusion

Because Burnett’s speech here is—as were her prior tweets and emails concerning national political affairs—protected by the First Amendment, FIRE calls on you to fulfill your duty under the Constitution and Collin College policy to “uphold vigorously the principles of academic freedom and to protect the faculty from . . . censorship[.]”³⁴

We respectfully request receipt of a response to this letter no later than the close of business on February 10, 2021.

Sincerely,



Adam Steinbaugh
Director, Individual Rights Defense Program

Encl.

³⁴ COLLIN COLL., EMPLOYEE RIGHTS AND PRIVILEGES: EMPLOYEE EXPRESSION AND USE OF COLLEGE FACILITIES (DGC (LOCAL)) (Aug. 12, 2020), [https://pol.tasb.org/Policy/Download/304?filename=DGC\(LOCAL\).pdf](https://pol.tasb.org/Policy/Download/304?filename=DGC(LOCAL).pdf).

Authorization and Waiver for Release of Personal Information

I, Lora Burnett, do hereby authorize Collin College (the "Institution") to release to the Foundation for Individual Rights in Education ("FIRE") any and all information concerning my employment, status, or relationship with the Institution. This authorization and waiver extends to the release of any personnel files, investigative records, disciplinary history, or other records that would otherwise be protected by privacy rights of any source, including those arising from contract, statute, or regulation. I also authorize the Institution to engage FIRE and its staff members in a full discussion of all information pertaining to my employment and performance, and, in so doing, to disclose to FIRE all relevant information and documentation.

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights in Education, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

If the Institution is located in the State of California, I request access to and a copy of all documents defined as my "personnel records" under Cal. Ed. Code § 87031 or Cal. Lab. Code § 1198.5, including without limitation: (1) a complete copy of any files kept in my name in any and all Institution or District offices; (2) any emails, notes, memoranda, video, audio, or other material maintained by any school employee in which I am personally identifiable; and (3) any and all phone, medical or other records in which I am personally identifiable.

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights in Education, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

I also hereby consent that FIRE may disclose information obtained as a result of this authorization and waiver, but only the information that I authorize.

DocuSigned by:
Lora Burnett
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Signature

2/1/2021
Date