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August 28, 2014

VIA E-MAIL & FEDEX OVERNIGHT

John C. Mihos, Esq.
7 Franklin Street
Lynn, Massachusetts 01902

Re: Gordon College/Lynn Public School System

Dear John:

Thank you for speaking with me yesterday. As you know, Gordon College and the Lynn public schools have enjoyed a long, mutually-beneficial relationship. The College desires to preserve that close relationship by working with the Lynn School Committee to resolve any concerns that the Committee may have about the July 1, 2014 letter to President Obama, signed by (among others) Gordon College's president Dr. Michael Lindsay, addressing a proposed presidential Executive Order applicable to federal contractors.[1] To that end, as I stated on our call, the College has no interest in litigation with the School Committee, and I send this letter, at your request, in the hopes of avoiding such a scenario.

You asked me on the phone what programs exist between Gordon College and the Lynn public schools. This list is not intended to be exhaustive, but the principal programs include:

- The placement of Gordon College students as student-teachers in the Lynn public schools;

- Service by Gordon College students and staff as tutors and mentors to Lynn students and parents;

- Gordon College's provision of continuing education to Lynn public school teachers;

- Observation by Gordon College students of Lynn public school classrooms; and

[1] Gordon College is not a federal contractor and hence is not itself subject to the Executive Order in question. The letter was therefore not self-interested, but instead pure commentary on an issue of public import.

- A program, to be held on October 24, during which Gordon College is closing for the day and hosting a "fall celebration" for third-, fourth-, and fifth-graders in Lynn during which those students will attend class, go to lunch escorted by one of Gordon College's athletic teams, and attend a mock graduation at the end of the day.

I am not aware of any concerns being raised by the School Committee about the involvement of Gordon College and/or its students in these various programs prior to the July 1 letter. There is no evidence that Gordon College or its students misemployed their relationship with the Lynn public schools for forbidden or inappropriate purposes. To the contrary, the relationship between the city and Gordon College has only been expanding, with the planned October 24 event being the first of its kind.

Nonetheless, we understand that, as a direct response to the July 1 letter, some Committee members have called on the Lynn public schools to sever all ties with Gordon College. The motivation behind this proposed step is not in doubt: it is in direct retaliation against Gordon College for its president's public comment concerning the content of a proposed federal Executive Order. Charlie Gallo, for example, is quoted in the press as saying that, "[i]f Gordon College doesn't change its mind, I'm afraid [the Committee] will have to seek another school or college to partner with." Committee member John Ford is reported to have echoed this sentiment: "I think what [Gordon College] did was wrong. I think it is definitely something we will have to take a good, hard look at." Committee member Rick Stabbard is quoting as saying: "If you have those views, you shouldn't be playing in the public schools." And on and on; this is about as clean a case as one can find of government officials broadcasting their intent to retaliate against a private party for its speech on a matter of public import.

On the phone, you asked for cites to support our concern that the School Committee would violate Gordon College's constitutional rights should it sever or curtail its ties with the College in response to Dr. Lindsay's signature of the letter to President Obama. In brief, there can be no doubt that the July 1 letter is core First Amendment speech. *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011). The U.S. Supreme Court and federal appeals courts have repeatedly stated and affirmed that a government actor cannot retaliate against private citizens for their exercise of First Amendment rights (including free speech, associational, and religious rights). Any kind of retaliation is barred; examples of retaliation found to violate the First Amendment include, among others:

- filing criminal charges, *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014);
- firing, disciplining, or denying benefits to an employee, *Packish v. McMurtrie*, 697 F.2d 23 (1st Cir. 1983);
- denying or revoking a license, *Maloy v. Ballori-Lage*, 744 F.3d 250 (1st Cir. 2014); and

- as most relevant here, terminating a contract, refusing to enter into a contract, or ceasing work with a "regular provider of services," whether or not there is a contract, *Bd. of County Commr's v. Umbehr*, 518 U.S. 668 (1996); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996); *Garcia-Gonzalez v. Puig-Morales*, No. 12-2357, 2014 WL 3765709 (1st Cir. Aug. 1, 2014).

Surveying the body of case law, the lesson is clear: if a government takes action against a private party for the latter's speech on a matter of public import, the government violates the First Amendment. Indeed, even where a government actor has the ability to terminate or not renew an at-will relationship with a private party, the actor violates the First Amendment if it "would not have taken that action but for the [private party's] exercise of his protected free speech rights." *Umbehr*, 518 U.S. at 685–86.

Accordingly, it does not matter whether the School Committee had an obligation to establish any aspect of its relationship with Gordon College in the first instance. Under the precedent discussed above, having established the relationship, the School Committee cannot sever or scale it back in order to retaliate against Gordon College for Dr. Lindsay's speech. To allow a government body to do so would give it a tool to coerce private parties into agreement with the government body's politics, and at a minimum to silence dissent. Indeed, Mr. Gallo's suggestion that the threat to Gordon College is an effort to get the College to "change its mind," presumably by having Dr. Lindsay retract his public statement concerning the Executive Order, is precisely the type of coercion that the First Amendment was designed to prevent.

That is the law on First Amendment retaliation. In addition to the issue of retaliation, and as you agreed on our call, there could be an issue of unconstitutional viewpoint discrimination should the Committee sever or curtail ties with Gordon College and, as Mr. Gallo is quoted as suggesting, "seek another school or college to partner with." *See, e.g.*, *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995). Consistent with the First Amendment, government actors simply cannot pick and choose who to do business with based on a political or religious litmus test. *Child Evangelism Fellowship of Minn. v. Minneapolis Special Sch. Dist. No. 1*, 690 F.3d 996 (8th Cir. 2012); *Washington v. Gonyea*, 538 Fed. Appx. 23, 26 (2d Cir. 2013). Accordingly, even were it possible to get around the retaliation issue, the School Committee must know that it cannot banish Gordon College and its students and replace them with others more politically palatable to Committee members. Similarly, a decision by the Committee to terminate relations with a Christian college with traditional Christian views and replace it with a secular school or religious school with less traditional values could potentially constitute religious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. *Burlington N. R. Co. v. Ford*, 504 U.S. 648, 650 (1992); *United States v. Batchelder*, 442 U.S. 114, 125 & n.9 (1979); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Again, statements by Committee

members such as "[i]f you have those views, you shouldn't be playing in the public schools," are clean evidence of possible viewpoint discrimination.

Finally, I also would note that the rights of Gordon College's students are implicated here. A government actor cannot take adverse action against an employee or contractor based on the speech of another with whom that person shares an expressive association. *See Adler v. Pataki*, 185 F.3d 35 (2d Cir. 1999); *Behne v. Halstead*, No. 1:13–CV–0056, 2014 WL 1689950 (E.D. Pa. Apr. 29, 2014). Therefore, while I understand that both the Committee and Gordon College wish to avoid litigation, precipitous action by the Committee runs the risk of opening a Pandora's box involving third parties.

All that said, I want to reiterate that our goal here is not litigation. Gordon College cherishes its relationship with Lynn and wishes it to continue into the future. At the same time, Gordon College cherishes its First Amendment right to petition the federal government concerning matters of public import, without threat of retaliation or viewpoint discrimination by local governments. I have no doubt that School Committee members do not want to violate the constitutional rights of the City's private sector partners. It is our sincerest hope that, made aware of the applicable law, cooler heads will prevail.

Please do not hesitate to contact me today if you have any questions in advance of the Committee meeting.

Sincerely,

Kevin P. Martin

cc: Dr. Michael Lindsay