May 25, 2023

The Honorable Catherine E. Lhamon
Assistant Secretary
Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: OCR Resolution Agreement with Forsyth County Public Schools
Complaint No. 04-22-1281

Dear Assistant Secretary Lhamon:

The Defense of Freedom Institute for Policy Studies ("DFI") is a national nonprofit organization dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker and to protecting the civil and constitutional rights of Americans at school and work. DFI envisions a republic where freedom, opportunity, creativity, and innovation flourish in our schools and workplaces. Our organization is composed of former U.S. Department of Education ("Department") appointees who are experts in education law and policy, in particular the areas described below.

On May 19, 2023, the Department's Office for Civil Rights ("OCR") issued a letter ("Resolution Letter") to Forsyth County Schools ("FCPS" or "District") in Georgia informing the District of OCR's "concern" that certain communications regarding the removal of sexually explicit books from libraries and resource centers of the District's schools may have created a hostile environment requiring action by the District under federal civil rights laws.[1] Due to this concern, OCR will now require the District to implement a resolution agreement ("Agreement")[2] that goes far beyond the

[1] Letter from Jana L. Erickson, Program Manager, Office for Civil Rights, U.S. Department of Education, to Dr. Jeff Bearden, Superintendent, Forsyth County Schools, Re: OCR Complaint No. 04-22-1281, May 19, 2023, 1, 6, *available at* https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/04221281-a.pdf (hereinafter "Resolution Letter").

[2] Resolution Agreement, Forsyth County Schools, Complaint No. 04-22-1281, May 19, 2023, *available at* https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/04221281-b.pdf (hereinafter "Agreement").

agency's authority under federal civil rights law and the statute that established the Department. The Agreement requires the District to "provide a global perspective" and "promote diversity" through its library catalogue and to conduct a comprehensive "climate survey" on racial and sexual harassment.

In the Agreement, the Department clearly seeks to blunt the input of parents in school library decisions and actually implies that this parental involvement caused a "hostile environment" in the first place. DFI is extremely concerned that this Agreement represents nothing less than a new, nationwide template that OCR will use to intimidate parents in their efforts to prevent their children from gaining access to sexually explicit material in school libraries.

Due to the strong federalism concerns arising from the Agreement, which calls for the Department to exercise control or influence over the District's curriculum and selection or content of library resources, as well as the complete dearth of facts giving rise to any violation by FCPS of the statutory authorities administered by OCR, DFI calls on OCR to terminate the Agreement and conclude its investigation. The Department must limit itself to its statutory role as an administrative enforcer of federal civil rights law, *not* act as the nation's arbiter of educational policy and library curation decisions that the Constitution and federal law reserve for state and local officials.

Factual Background

According to OCR's Resolution Letter, the District began receiving complaints about sexually explicit material in its school libraries in the latter half of 2021.[3] On January 12, 2022, the District Media Committee convened a meeting in which it considered and rejected various requests that the District offer parents the option of giving permission to their children to check out library books with lesbian, gay, bisexual, or transgender content or sexual content, shelve such books separately, or place special stickers on them to signal their content.[4] It also issued a statement indicating that the District's libraries "provide resources that reflect all students within each school community" and advising parents to speak directly to their children about any books that do not reflect their family's "values and/or beliefs."[5]

On January 21, 2022, the District's Superintendent informed the school board that he had granted the Chief Technology and Information Officer ("CTIO") authority to remove "obviously sexually explicit or pornographic" books from school libraries.[6] Three days later, according to the Resolution Letter, the CTIO made clear in a message to District principals "that the Superintendent

---

[3] Resolution Letter, *supra*, at 4.
[4] *Id.*
[5] *Id.*
[6] *Id.*

had authorized removal of sexually explicit books, making clear that *books had not been reviewed for LGBTQI+ content or moral dilemma issues, just sexual explicitness*."[7] The same day, the CTIO sent the principals a list of nine books to be pulled from the shelves of all school libraries.[8]

We enclose as an appendix to this letter a list of seven of these nine books removed from the District's school libraries, along with brief descriptions of their graphic sexual content.

The Resolution Letter notes that attendees at a school board meeting on February 15, 2022, expressed various views on the removal of the sexually explicit books from library shelves, with most parent comments focused on the removal of additional books that were sexually explicit.[9] Some students, on the other hand, communicated their impressions—in contrast with all of the District's communications on the matter, as discussed in the Resolution Letter—that the purpose of the book removal was to silence authors and characters of certain races, sexual orientations, or gender identities.[10]

The District appointed a "summer review committee," including teachers, media specialists, and parents, to review eight of the nine books that had been selected for removal from school libraries to determine whether they should remain in school libraries despite their explicit sexual content.[11] Based on their review, in early August, the District Media Committee voted to return seven of these eight sexually explicit books to school libraries.[12] The District's schools placed these books in their original locations.[13] According to the Resolution Letter, "Other than comments at board meetings, District witnesses identified no other complaints from students, parents, staff or others about the book removal."[14]

Based on its receipt of a complaint that the District discriminated against students on the basis of sex, race, color, and national origin, OCR launched an investigation of the District under Title IX of the Education Amendments of 1972 ("Title IX"), which prohibits discrimination on the basis of sex in educational programs and activities receiving federal financial assistance, as well as Title VI of the Civil Rights Act of 1964 ("Title VI"), which prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance from the

---

[7] *Id.* at 5 (emphasis added).
[8] *Id.*
[9] *Id.*
[10] *Id.* at 5–6.
[11] *Id.* at 6.
[12] *Id.*
[13] *Id.*
[14] *Id.*

Department.[15] Although FCPS had already returned seven of the eight books to library shelves prior to the conclusion of this investigation, the District "expressed an interest in resolving the complaint with a resolution agreement pursuant to Section 302 of [OCR's] *Case Processing Manual*."[16] OCR then issued its Resolution Letter and Agreement on the matter.

In the Resolution Letter, the Department acknowledges that the District Media Committee explicitly rejected suggestions that it treat books differently based on their authors' or characters' race, sexual orientation, or gender identity; that the District based its review process for continued inclusion in school libraries *solely* on their sexually explicit content; and that the District even allowed for the return of these sexually explicit books to school libraries after review.[17] Still, OCR expressed its concerns that "a hostile environment *may have arisen* that the District needed to ameliorate."[18] It based these concerns on communications at board meetings that "conveyed the impression that books were being screened to exclude diverse authors and characters, including people who are LGBTQI+ and authors who are not white, leading to increased fears and *possibly* harassment."[19] OCR's analysis does not appear to be based on any statements made by the District or its employees, but rather are based on the District's removal of sexually explicit books in response to parents' expression of viewpoints at school board meetings regarding which books are appropriate for inclusion in school libraries and which are not.[20]

In the face of these facts and due to a baseless "concern" about the *possibility* of a race and sex-based "hostile environment" that arose due to the District's book review process, the Resolution Letter states that OCR determined that it should enter a resolution agreement with the District to ensure that the District complies with Title IX and Title VI.[21]

The Agreement requires the District to do the following:

- Post an OCR-approved statement directed to the District's middle and high school students explaining "the parameters of the District's review of books removed from District [libraries] in January 2022, including notice that the review focused on sexually explicit content, and the District did not remove any

[15] *Id.* at 1.
[16] *Id.* at 2.
[17] *Id.* at 4–6.
[18] *Id.* at 7.
[19] *Id.* at 7 (emphasis added).
[20] *Id.*
[21] *Id.*

book based on the sex, gender, gender identity, sexual orientation, race, national origin or color of the book's author or characters";[22]

- Include in the above statement "notice that the District strives to provide a *global perspective* and *promote diversity* by including in school libraries materials about and by authors and illustrators of all cultures and that the District's book review criteria for library books includes evaluating whether books *promote diversity* by including materials about and by authors and illustrators of all cultures";[23]

- Post an "acknowledgement that the environment surrounding removal of books may have impacted students" and notice regarding how "any student who feels impacted by the environment surrounding the removal of books" can receive supportive measures or file a complaint with regard to the discrimination or harassment;[24]

- Administer "a school climate survey at the District's middle and high schools" to address "the prevalence of harassment based on sex, race, color or national origin in the District's middle and high schools"; "the willingness to report incidents of harassment to each middle and high school's personnel"; "the perception of each middle and high school's handling of reports and complaints of harassment"; and "suggestions for reducing incidents of harassment at each middle and high school and improving those schools' responses to reports and complaints of harassment";[25] and

- Develop a plan based on the school climate survey "to improve the climate at each middle and high school identified as having climate concerns" to be approved by OCR prior to implementation.[26]

Legal Standards

Title IX provides that, with exceptions not at issue here, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to

---

[22] Resolution Agreement, *supra*, at 1.
[23] *Id.* (emphases added).
[24] *Id.*
[25] *Id.* at 3.
[26] *Id.* at 4.

discrimination under any education program or activity receiving Federal financial assistance."[27] The U.S. Supreme Court has concluded that failure by an educational institution to address peer-on-peer harassment on the basis of sex can support a suit for monetary damages under Title IX, but only when the institution "exercises substantial control over both the harasser and the context in which the known harassment occurs"[28] and when the institution is "deliberately indifferent to sexual harassment, of which [it has] actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."[29]

The Department's current regulations providing for the administrative enforcement of Title IX largely track the Supreme Court's standard for determining liability for monetary damages. The regulations at § 106.44 require a "recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States" to "respond promptly in a manner that is not deliberately indifferent."[30] At § 106.30(a), the Department defines "sexual harassment" to include "[u]nwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity."[31] In line with the Supreme Court's requirement, the regulation defines "education program or activity" as including "locations, events, or circumstances over which the recipient exercised substantial control over *both the respondent and the context in which the sexual harassment occurs* . . . ."[32] Only when a recipient of federal funds has actual knowledge of such harassment does § 106.44 require that the recipient offer "supportive measures" to a complainant "designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party."[33]

Despite the fact that Title IX (discrimination on the basis of sex) and Title VI (discrimination on the basis of race, color, or national origin) operate in the same way—prohibiting institutions that receive federal funds from discriminating on the bases listed in the statute—OCR diverges from its Title IX administrative enforcement in enforcing Title VI by applying a less-exacting standard

---

[27] 20 U.S.C. § 1681(a).

[28] *Davis v. Monroe County Bd. Of Educ.*, 526 U.S. 629, 645 (1999); *see id.* at 644–645 ("The statute's plain language confines the scope of prohibited conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs.").

[29] *Id.* at 650.

[30] 34 C.F.R. § 106.44.

[31] *Id.* at § 106.30(a).

[32] *Id.* at § 106.44 (emphasis added).

[33] *Id.* at §§ 106.44, 106.30(a).

to complaints under the latter.[34] The Department effectively imports its Title VI "hostile environment" analysis from the standard the Supreme Court applies to claims for monetary damages in the Title VII employment context, where it has held that harassment is only actionable if it is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[35]

OCR sets out its approach to Title VI harassment as follows: "To establish a violation of Title VI under the hostile environment theory, OCR must find that: (1) a hostile environment based on race, color, or national origin existed; (2) the recipient had actual or constructive notice of a hostile environment based on race, color, or national origin; and (3) the recipient failed to respond adequately to redress the hostile environment based on race, color, or national origin."[36] Such harassment "creates a hostile environment when the conduct is sufficiently severe, persistent, or pervasive so as to interfere with or limit an individual's ability to participate in or benefit from a recipient's program."[37] Importantly, according to OCR, "[t]he harassment must in most cases consist of more than casual or isolated incidents to establish a Title VI violation," and whether "harassment" creates a hostile environment "must be determined from the totality of the circumstances" and is based on the perspective of a reasonable person of the complainant's race, color, or national origin.[38]

Although overlooked by the Department in the Agreement, OCR's authority must be construed in light of the statute that established the Department and through which the Department's offices derive their powers—the Department of Education Organization Act of 1979 ("DEOA"). That law prohibits the Secretary and other officers of the Department from exercising direction, supervision, or control over curriculum, as well as over the selection and content of library resources, textbooks, and other instructional materials.[39]

Framed as a rule of construction, the prohibition states:

---

[34] *See* https://crsreports.congress.gov/product/pdf/R/R45665 at 20 n.158 ("Racial harassment involves allegations of 'intimidation or abusive behavior toward a student based on race,' whether by a peer or teacher, 'that creates a hostile environment by interfering with or denying a student's participation in or receipt of benefits, services, or opportunities in the institution's program.'" (quoting U.S. Dep't of Educ., Office for Civil Rights to Superintendent, Platteville Public Schools, at 2 (Nov. 20, 2013)).

[35] *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (cleaned up).

[36] Resolution Letter, *supra*, at 3.

[37] *Id.*

[38] *Id.*

[39] 20 U.S.C. § 3403(b).

> No provision of a program administered by the Secretary or by any other officer of the Department shall be construed to authorize the Secretary or any such officer to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, over any accrediting agency or association, or *over the selection or content of library resources, textbooks, or other instructional materials* by any educational institution or school system, except to the extent authorized by law.[40]

In Finding 4 of the DEOA, Congress recognized that primary authority for education policy continued with state and local governments: "[I]n our Federal system, the primary public responsibility for education is reserved respectively to the States and the local school systems and other instrumentalities of the States."[41]

In its establishment of the Department, Congress explicitly set out its intent with respect to maintaining control by state and local officials over their education systems:

> It is the intention of the Congress in the establishment of the Department to protect the rights of State and local governments and public and private educational institutions in the areas of educational policies and administration of programs and to strengthen and improve control of such governments and institutions over their own educational programs and policies. The establishment of the Department of Education shall not increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States and the local school systems and other instrumentalities of the States.[42]

Even in 1965, well before the establishment of the Department, Congress established strict limits on federal involvement in elementary and secondary education, including in the Elementary and Secondary Education Act ("ESEA") a rule of construction limiting federal officials' discretion with regard to school curricula:

> Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's *curriculum, program of instruction*, or allocation of State and local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.[43]

---

[40] *Id.* (emphasis added).
[41] 20 U.S.C. § 3401(4).
[42] 20 U.S.C. § 3403(a).
[43] 20 U.S.C. § 7907(a) (emphasis added).

The strong limitations Congress enacted in these laws provide no leeway for OCR or any other federal agency to limit state or local government discretion to choose library materials, curricula, or programs of instruction at elementary or secondary schools by conditioning the institutions' receipt of federal funding on the use or exclusion of certain materials, particularly where, as here, the Department concedes in the Resolution Letter the lack of any factual nexus giving rise to a hostile environment based on sex, race, color, or national origin.

Analysis

The vague "concern" cited by OCR in its truncated analysis of the facts at issue in the District's book review is not based on any instances of harassment, much less the imposition of a "hostile environment" that could be viewed by a reasonable person as limiting or denying a student's equal access to educational programs or activities, that could justify the onerous Agreement it imposes on the District. If parents' discussion with a school board regarding what books should or should not be on school library shelves, and a District's careful review of such requests, are sufficient to constitute discrimination occurring in the District's education programs or activities, then we have entered a bold new era of OCR enforcement where the agency gets to define "discrimination" as whatever policy the current administration opposes. This is not what Congress had in mind when it established the Department or passed the landmark civil rights laws on which the underlying complaint in this matter is based.

OCR recognizes in its analysis that, at every turn, FCPS made clear that the book review process was focused on determining whether books were too sexually explicit to remain on school library shelves:

> OCR recognizes the District Media Committee rejected suggestions to handle challenged books in ways that it believed would target certain groups of students and that the District posted a statement on media centers' websites that they "provide resources that reflect all students within each school community" and that "If you come across a book that does not match your family's values and/or beliefs, and you would prefer that your child does not check that book out, please discuss it with your child." OCR also recognizes the District limited its book screening process to sexually explicit material.[44]

Yet, "communications at board meetings" not attributed to any employee of the District supposedly "conveyed the impression that books were being screened to exclude diverse authors

[44] Resolution Letter, *supra*, at 6.

and characters."[45] Because some students expressed the inaccurate belief, in spite of the District's clear communications on the subject, that the District was considering excluding material from the library due to the identity of the authors or characters they contained, "OCR is concerned a hostile environment may have arisen that the District needed to ameliorate."[46] Based on the controlling legal authorities, such a concern does not give rise to the finding of a hostile environment in an educational program or activity.

OCR's Resolution Letter attempts to deflect scrutiny of its slipshod analysis by failing to specify the statute—Title IX or Title VI—under which the supposed discriminatory treatment occurred. The problem is that OCR fails to show that *any* discrimination occurred in this matter, so these statutes necessarily cannot form the basis for any resolution agreement, much less the expansive one OCR now imposes on the District.

Beginning with Title IX, OCR can point to nothing under that statute or its implementing regulations that comes even close to prohibiting the conduct of District employees on this matter.[47] Clearly, the District's decision to remove books from the shelves of its schools while it conducted a review of their sexually explicit material that resulted in the vast majority of the books being returned to its libraries does not constitute "harassment" under any definition, much less under the high bar set by OCR's regulatory formulation of "[u]nwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity."[48]

OCR's attempt to base its concerns on statements of parents at board meetings expressing concerns about students' access to books with certain messages or characters likewise falls well short of the

---

[45] *Id.* at 6–7.

[46] *Id.* at 7.

[47] OCR's "concerns" appear to be based on a claimed "hostile environment" with respect to students on the basis of their sexual orientation or gender identity. As DFI has communicated to the Department in the context of two ongoing Title IX rulemakings, when Congress legislated to prohibit discrimination on the basis of "sex," it granted the agency no authority to prohibit discrimination on the basis of sexual orientation or gender identity. *See* https://dfipolicy.org/wp-content/uploads/2022/09/DFI-Public-Submission-on-Title-IX-NPRM-website-9-12-22.pdf and https://dfipolicy.org/wp-content/uploads/2023/05/DFI-Public-Submission-on-Title-IX-Athletics-NPRM-05.15.2023.pdf. As discussed below, even if one accepts OCR's apparent overreach in the present case to define "sex" as including these concepts—to which we strongly object—OCR still offers no basis on which it could make a finding of sex discrimination under the statute and implementing regulations.

[48] 34 C.F.R. § 106.44.

mark and raises serious constitutional questions about the free speech implications of OCR's characterization of parental contributions to school policy discussions to be outlawed under Title IX (or any other statute). First and foremost, OCR does not and cannot point to any "harassment"—especially harassment that is "so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity"—committed by third parties participating in any school board meeting. And according to its own regulations implementing Title IX, OCR has no jurisdiction over such third-party communications, since it only requires educational institutions to act when harassment occurs in "locations, events, or circumstances over which the recipient exercised substantial control over *both the respondent and the context in which the sexual harassment occurs . . . .*"[49] The District maintained no control over what parents, or anyone else other than District officials, said at school board meetings. In short, Title IX does not prohibit either the actions of the District or of parents who communicated their concerns about books at school board meetings.

Though it does not say so in its Resolution Letter, OCR might be purporting to rely on the lower bar set out in its regulations implementing Title VI with regard to discrimination on the basis of race, color, or national origin for its authority to impose the onerous provisions of its Agreement on the District. But, again, the District can point to no evidence that there was any harassment under Title VI, much less the creation of a "hostile environment" within the District's education programs or activities.

It is difficult to fathom how the temporary removal of eight books based on their sexually explicit content, followed by a review that resulted in the return of seven of these books to school libraries, could possibly give rise to a claim that the school discriminated on the basis of race, color, or national origin. OCR sets out no evidence that any discriminatory conduct occurred that could have given rise to a "hostile environment" under Title VI. In fact, it points to some evidence that the opposite was the case, acknowledging that the review committee appointed by the District to determine whether it should return the books to school libraries in light of their sexually explicit content "included persons of color."[50] Nothing in OCR's analysis of the District's actions could lead a reasonable observer to come to the conclusion that the District's removal of the books was simply a pretext to discriminate against authors or characters from racial minorities.

The sole basis on which OCR seems to rest its concerns about the failure of the District to address discrimination under Title VI is that, at the February 15 school board meeting, "some parents made negative comments about diversity and inclusion or critical race theory."[51] It should suffice to say that parental objections to inclusion of such controversial concepts as "diversity, equity, and

---

[49] 34 C.F.R. § 106.44 (emphasis added).

[50] Resolution Letter, *supra*, at 6.

[51] *Id.* at 5.

inclusion" and critical race theory in school library material are not tantamount to racial discrimination. Certainly, the raising of such concerns does not deny or limit anyone's participation in an educational program or activity, much less constitute "severe, persistent, or pervasive" discrimination. In fact, we are gravely concerned that OCR's apparent acceptance that these parental communications contributed to the creation of a "hostile environment" within the District's education program in violation of federal law violates the fundamental right of these parents to free expression under the First Amendment to the U.S. Constitution[52]—illustrating a disturbing policy within the Biden administration to intimidate parents from speaking at school board meetings in violation of their constitutional rights.[53]

Despite OCR's inability to point to a single discriminatory action committed by the District or any other individual or entity under federal civil rights law, OCR unlawfully and unjustly places the onus on the District to "ameliorate" students' concerns about the book review and imposes the resolution agreement on the District in light of this alleged inaction. But this is putting the cart before the horse. Neither Title IX nor Title VI imposes any obligation on educational institutions to address discrimination that never occurred. That is because OCR's authority to force action under these laws is based on their prohibition of discrimination. The law says nothing about schools' obligation to address the vague misconception on the part of an unspecified number of students that they are being marginalized by an action that, by its very terms, does not discriminate on the basis of sex, race, color, or national origin. If OCR now plans to force educational institutions receiving federal funds to "ameliorate" such misconceptions that did not result from actual incidents of discrimination, it is imposing a massive and costly duty on such institutions that has no basis in federal civil rights law. Although it may perhaps be good policy to allay such concerns by students, OCR is not a national school board and has no role under Title IX or Title VI to force an educational institution to do so in the absence of any discrimination.

Based solely on the concerns expressed by students and not on any concrete findings of discrimination, OCR now oversteps its authority by imposing the unlawful and burdensome Agreement on the District. In the first place, this Agreement is not at all tailored to any discrimination OCR might claim the District (or anyone else) committed. Specifically, in light of "concerns" generated via a complaint filed with OCR that the District somehow discriminated by reviewing books for sexually explicit content, OCR is requiring the District to conduct a "climate survey" of every one of its middle and high schools to determine the prevalence of any kind of harassment within the school system and perceptions about how it is addressed.[54] OCR offers no explanation regarding why such a sweeping fishing expedition is necessary in light of the fact that

---

[52] U.S. CONST. amend. I.

[53] *See* https://nsjonline.com/article/2021/10/us-attorney-general-directs-fbi-to-investigate-parents-protests-of-school-boards/.

[54] Agreement, *supra*, at 3.

it can point to no incidents of discrimination within the present matter. This is arbitrary and capricious action by OCR.

Even more insidiously, OCR's resolution agreement forces the District to issue a statement to all middle and high school students containing a "notice that the District strives to *provide a global perspective* and *promote diversity* by including in school libraries materials about and by authors and illustrators of all cultures and that the District's book review criteria for library books includes evaluating whether books *promote diversity* by including materials about and by authors and illustrators of all cultures."[55] OCR has no authority under any federal law, including Title IX and Title VI, to force a recipient of federal funds to make such a statement or carry out the policies that it establishes.

In fact, the Department's organizing statute, the DEOA, and other federal law prohibit OCR from requiring such a statement. The DEOA specifies that no provision of any program is to be construed to permit the Secretary of Education or other Department officials "to exercise any direction, supervision, or control over the curriculum, program of instruction, . . . or over the selection or content of library resources, textbooks, or other instructional materials by any educational institution or school system, except to the extent authorized by law."[56] On the contrary, the DEOA reserves to state and local school districts, in cooperation with local stakeholders in schools like students and parents, the authority to decide what books line their schools' shelves.[57] The ESEA similarly restricts OCR officials' authority to mandate a school's "curriculum" or "program of instruction."[58] OCR's blatant overreach requiring the District to implement the Department's preferred policy regarding the selection process for library books is breathtakingly illegal in light of these clear limitations of its authority. Nothing in federal civil rights law requires a school to provide a "global perspective" or promote the Department's ideas of what constitutes "diversity" in their school libraries, and the DEOA and ESEA affirmatively deny the Department the authority to implement such requirements.

The fact established in the Resolution Letter that the District "expressed an interest in resolving the complaint with a resolution agreement"[59] does nothing to remedy OCR's egregious overreach. No matter how willing the District is to pursue a "global perspective" or promote "diversity" on its schools' library shelves, OCR has no statutory authority to enter into such an agreement, to require the District to abide by it, or even to suggest to FCPS such a provision. Perhaps the District would like to make any bad publicity stemming from OCR's investigation and eventual resolution

---

[55] *Id.* at 1.
[56] 20 U.S.C. § 3403(b).
[57] 20 U.S.C. § 3403(a).
[58] 20 U.S.C. § 7907(a).
[59] Resolution Letter, *supra*, at 7.

of the case go away, but such a decision, which is in excess of OCR's statutory authority, saddles parents, students, and teachers of the District with vague provisions that OCR now claims the discretion to enforce. This resolution will also deter other school districts across the country that are grappling with this politically divisive issue from removing any books, no matter how explicit the sexual material they contain, from their shelves, lest they trigger the weight of OCR's enforcement authority.

No matter the District's willingness to promote the current administration's political agenda, the Department is not permitted to use OCR's settlement authority to circumvent federal law prohibiting the Department from regulating the content of local school bookshelves. That authority is reserved to state and local governments.

Conclusion

OCR has no power to decide what the nation's schools may or may not offer to students on library bookshelves. Yet, on the basis of an investigation that yielded no apparent evidence of discrimination on the basis of sex, race, color, or national origin, the federal agency claims just such an authority, which finds no basis in federal civil rights law and runs contrary to the legislation that established the Department. Even worse, the way in which OCR resolved this matter signals the agency's intention to treat parental input to their local school boards on the inclusion of books that contain graphic sexual content as discriminatory treatment that may violate Title IX or Title VI. OCR's action here places the agency far beyond where it is authorized to be under federal law and raises legitimate concerns that the Department is "weaponizing" OCR against parents' rights groups.

Section 503 of OCR's Case Processing Manual provides that "OCR may agree to modify . . . or terminate a resolution agreement when it learns that circumstances have arisen that substantially change, fully resolve, or render moot some or all of the compliance concerns that were addressed by the resolution agreement."[60] In light of the grave concerns expressed in this letter, OCR should exercise its authority under this section to terminate its resolution agreement with the District, based on the fact that it is now aware that the agreement goes well beyond its authority under federal law. By doing so, OCR would reverse its dangerous and unlawful overstep in this matter and provide notice to parents everywhere that they have every right to work with state and local officials to determine what their children learn and the material to which they are exposed at elementary and secondary schools.

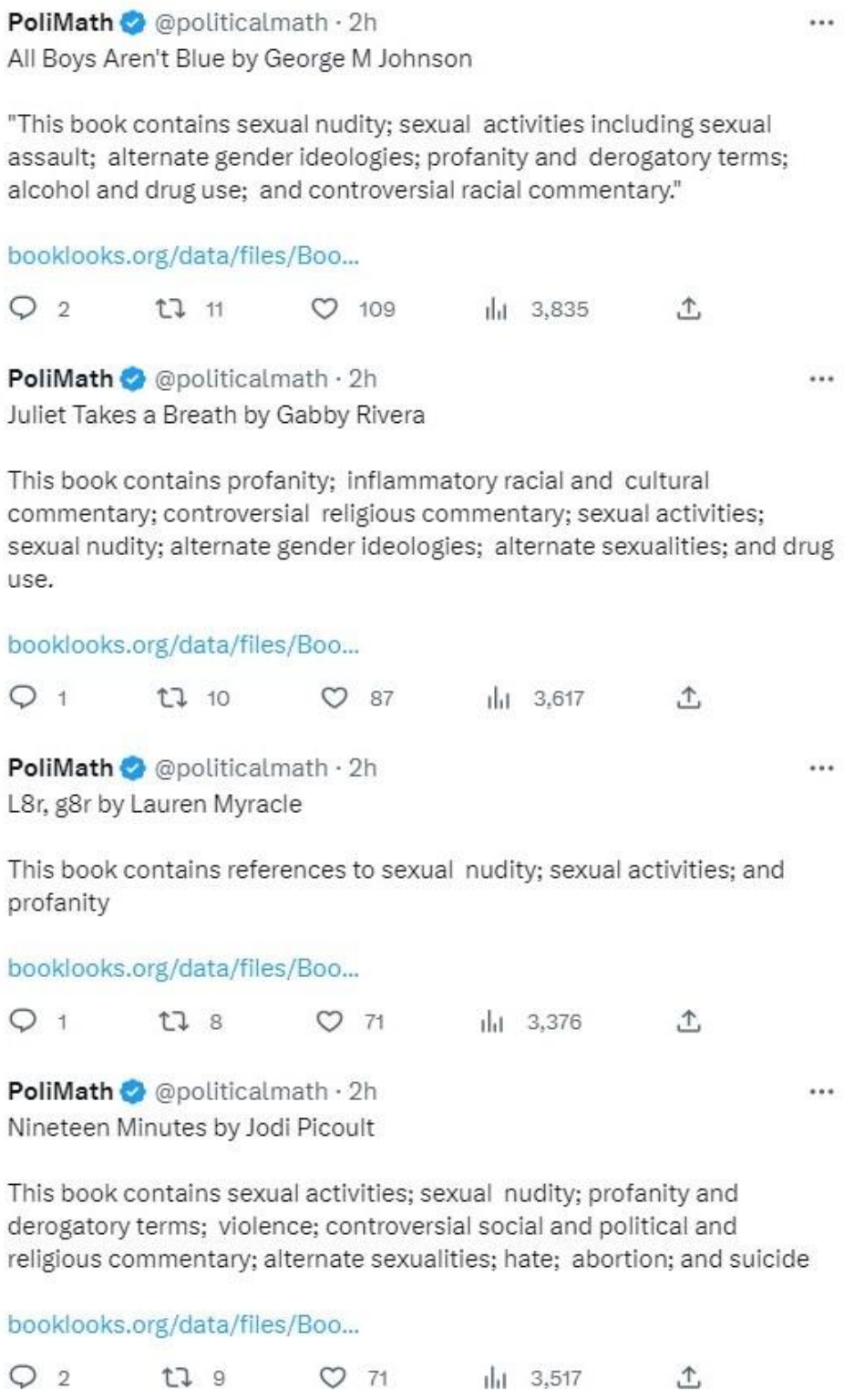
[60] https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf at 23.

Sincerely,

/s/ *Robert S. Eitel*
Robert S. Eitel
President
Defense of Freedom Institute for Policy Studies

/s/ *Paul F. Zimmerman*
Paul F. Zimmerman
Policy Counsel
Defense of Freedom Institute for Policy Studies

Appendix—Books Removed from Forsyth County School Libraries



PoliMath @politicalmath · 2h

All Boys Aren't Blue by George M Johnson

"This book contains sexual nudity; sexual activities including sexual assault; alternate gender ideologies; profanity and derogatory terms; alcohol and drug use; and controversial racial commentary."

booklooks.org/data/files/Boo...

2 11 109 3,835

PoliMath @politicalmath · 2h

Juliet Takes a Breath by Gabby Rivera

This book contains profanity; inflammatory racial and cultural commentary; controversial religious commentary; sexual activities; sexual nudity; alternate gender ideologies; alternate sexualities; and drug use.

booklooks.org/data/files/Boo...

1 10 87 3,617

PoliMath @politicalmath · 2h

L8r, g8r by Lauren Myracle

This book contains references to sexual nudity; sexual activities; and profanity

booklooks.org/data/files/Boo...

1 8 71 3,376

PoliMath @politicalmath · 2h

Nineteen Minutes by Jodi Picoult

This book contains sexual activities; sexual nudity; profanity and derogatory terms; violence; controversial social and political and religious commentary; alternate sexualities; hate; abortion; and suicide

booklooks.org/data/files/Boo...

2 9 71 3,517

PoliMath @politicalmath · 2h

Out of Darkness by Ashley Hope Perez

This book contains controversial racial commentary; derogatory terms and mild profanity; violence; explicit sexual nudity and explicit sexual activities including sexual assault and battery of a minor.

booklooks.org/data/files/Boo...

1 8 59 2,967

PoliMath @politicalmath · 2h

The Bluest Eye by Toni Morrison

This book contains profanity and derogatory terms; sexual activities including sexual assault and molestation; alcohol use; inflammatory racial and religious commentary and references.

booklooks.org/data/files/Boo...

1 8 59 2,916

PoliMath @politicalmath · 2h

The Infinite Moment of Us by Lauren Myracle

This book contains obscene sexual activities; sexual nudity; and profanity

booklooks.org/data/files/Boo...

2 9 58 3,651