

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ANDREW BURGESS,

Plaintiff,

v.

CENTRAL BUCKS SCHOOL DISTRICT, ABRAM
M. LUCABAUGH, in his official and individual
capacity,

Defendants.

Civil Action No: 2:23-cv-1369-TJS

**PLAINTIFF’S BRIEF IN SUPPORT OF MOTION FOR
TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION AND
TO COMPEL PRODUCTION OF PREVIOUS STATEMENT**

Plaintiff Andrew Burgess seeks emergency relief to block an April 21 Gag Order by Defendant Central Bucks School District (“CBSD” or “the District”) that is preventing him from publicly discussing issues that go to the heart of this lawsuit: the District’s handling of LGBTQ+ related issues and its ongoing retaliation against Burgess for his advocacy on behalf of LGBTQ+ students.

On April 11, 2023, Burgess sued CBSD and its superintendent Abram M. Lucabaugh for retaliating against him for his advocacy on behalf of LGBTQ+ students, in violation of Burgess’s rights under the First Amendment and Title IX of the Education Amendments of 1972. Ex. 1 (Decl. of Andrew Burgess) ¶ 4 (“Burgess Decl.”). In his Complaint, Burgess explained that the retaliation was ongoing and expressed his fear that “CBSD may even attempt to place blame for the poor treatment of LGBTQ+ students on him.” Complaint, pg. 4 (ECF No. 1); Burgess Decl. ¶ 5. Nine days later, the District did just that, by way of a public presentation and 151-page internal investigation report by outside counsel that demonized Burgess and recommended his

suspension—citing and twisting cherry-picked excerpts from the transcript of counsel’s compelled interview of an unrepresented Burgess. The day after the public presentation and public release of the report, CBSD took an action affecting the terms and conditions of Burgess’s employment and, in further violation of his First Amendment rights, directed him in writing to “keep *everything* (including, but not limited to the allegations, and all details thereof, the facts relating to this matter, the people involved, this process, the results of this process, witness names) fully confidential.” Burgess Decl. ¶¶ 11-12 (quoting April 21, 2023, Letter from CBSD to Burgess, ¶ 3.b. (the “Gag Order”)) (emphasis added). Thus, after publicly vilifying Burgess, CBSD imposed the Gag Order on him—and made clear that violating it could subject him to “discipline, including discharge.” *Id.*

Burgess now seeks a temporary restraining order and preliminary injunction prohibiting the District from enforcing this Gag Order against him. The First Amendment does not tolerate such a prior restraint on Burgess’s speech. He must be permitted immediately to address and respond to—both in and out of court—CBSD’s retaliatory conduct and allegations against him to set the record straight and allow the public to accurately judge the actions of CBSD.

Burgess also seeks an order compelling CBSD to provide the transcript of his January 12, 2023, interview by CBSD’s counsel, which CBSD cited extensively in the public presentation and report. Rule 26(b)(3)(C) entitles Burgess to a copy of the transcript “on request,” as it is a “previous statement” of his. Despite repeated requests by Burgess, CBSD still has not provided it. Burgess intends to amend his complaint and needs to review the transcript to do so fully and accurately.

RELEVANT FACTUAL BACKGROUND¹

On April 20, 2023, CBSD held a special, public board meeting to present the results of an internal “investigation” into four complaints filed against CBSD with the United States Department of Education, Office for Civil Rights (“OCR”). Burgess Decl. ¶ 6. One of those complaints was filed by Burgess, alleging that CBSD suspended him on May 6, 2022, in retaliation for providing the parent of a District LGBTQ+ student with information about OCR and filing an OCR complaint alleging discrimination by the District against that student. *Id.* That retaliatory suspension also is one component of the continuing retaliatory conduct that is the basis for Burgess’s lawsuit. *Id.* ¶¶ 4-5.

The public meeting included an approximately two-hour oral and PowerPoint presentation by a lawyer from the law firm retained by CBSD to conduct the internal investigation. Burgess Decl. ¶¶ 7-8. CBSD then publicly released a 151-page report regarding the investigation. *Id.* CBSD also posted a video recording of the presentation and a copy of the PowerPoint on its website, along with the report itself. *Id.*² Both the presentation and report relied heavily on selections from the transcript of the lawyer’s compelled interview of an unrepresented Burgess—a transcript that the District has yet to provide to Burgess despite multiple requests. *Id.* ¶ 10. The presentation and report excoriated Burgess and made false allegations that Burgess, among other things, (1) “manipulated” students to report instances of bullying to OCR rather than CBSD administration; and (2) did so in order to serve his “ulterior motive” of enlisting a federal agency to pressure the school board to change its anti-LGBTQ+ policies. Burgess Decl. ¶ 9 (citing the April 20, 2023

¹ Plaintiff incorporates by reference the factual allegations in his Complaint (ECF No. 1), which detail the retaliation allegations preceding the instant Gag Order.

² Available at: <https://www.cbsd.org/Page/66459> (last visited, April 28, 2023).

“Internal Investigation Report as Requested by Central Bucks School District” (“CBSD Report”) at 5, 13-14, 59, 62). The presentation and report recommended that CBSD suspend Burgess without pay and concluded that “Mr. Burgess has demonstrated that he currently should not be entrusted with the care or education of children.” *Id.* (citing CBSD Report 13-14). The presentation and report garnered substantial media attention, much of which focused on the District’s false allegations against Burgess.³

Immediately after publicly making these allegations against Burgess, CBSD gagged him and threatened to discharge him if he responded to or spoke about any of what was said about him because, under the District’s unilateral edict, “everything” is “confidential.” *See* Burgess Decl. ¶ 12. Specifically, the day after the presentation, CBSD took action affecting the terms and conditions of Burgess’s employment and instructed Burgess in writing as follows:

b. You must keep everything (including, but not limited to the allegations, and all details thereof, the facts relating to this matter, the people involved, this process, the results of this process, witness names) fully confidential and you must not disclose any confidential information unless you have a legal or constitutional right to make the disclosure and only to the limits that the disclosure is protected by law. For example, you have the right to discuss this with your attorney, but he or she must keep this confidential to the same extent that you have the duty to keep this confidential. Another example

³*See, e.g.,* Reagan Reese, *Middle School Teacher Hid Complaints, Colluded With ACLU To Smear District As Anti-Gay, Report Finds*, Daily Caller, April 21, 2023 (available at: <https://dailycaller.com/2023/04/21/middle-school-teacher-hid-complaints-colluded-aclu-smear-district-anti-gay/>); Todd Shepherd, *Report: Central Bucks teacher stifled reports of student bullying to politically harm conservative board majority*, Broad + Liberty, April 21, 2023 (available at: <https://broadandliberty.com/2023/04/21/report-central-bucks-teacher-stifled-reports-of-student-bullying-to-politically-harm-conservative-board-majority/>); Maddie Hanna, *Duane Morris found Central Bucks didn’t discriminate against LGBTQ students. Here’s what happens next.*, The Philadelphia Inquirer, April 21, 2023 (available at: <https://www.inquirer.com/news/central-bucks-duane-morris-lgbtq-investigation-aclu-20230421.html>); Jo Ciavaglia, *Central Bucks investigation into alleged LGBTQ student discrimination is out. What it says*, Bucks Country Courier Times, April 21, 2023 (available at: <https://www.phillyburbs.com/story/news/local/2023/04/21/central-bucks-investigation-finds-no-lgbtq-discrimination-but-others-raise-questsome-question-report/70133852007/>).

you do have a legal right to discuss this with your union. If you or your attorney believe it is necessary to contact anyone to assist you in your defense of the allegations against you, you are directed to work through our attorney to arrange a reasonable plan to maintain the confidential nature of this process.

...

Warning: If you fail or refuse to comply with any of these directives, or if you violate any work rule or requirement, you may be subject to discipline, including discharge.

Id. (quoting Letter from CBSD to A. Burgess (April 21, 2023)).

In the days that followed, counsel for Burgess repeatedly asked counsel for CBSD to either (1) provide assurances that CBSD would not enforce this Gag Order against Burgess; or (2) provide legal support for imposing such a prior restraint on him. Ex. 2 (Letter from Witold J. Walczak, Esq. et al., to Jeffrey P. Garton, Esq. (April 23, 2023), sent via email to Jeffrey P. Garton, Esq. and Sharon O'Donnell Esq.); Ex. 3 (E-mail chain between Witold J. Walczak, Esq., Jeffrey P. Garton, Esq., and Sharon O'Donnell Esq. (April 24-25, 2023)). Counsel for the District did neither. *See* Ex. 2; Ex. 3. Counsel for Burgess also repeatedly requested a copy of the transcript of Burgess's interview, just as Burgess had been doing through his union for several months. *See* Ex. 2; Ex. 3; Ex. 5 (E-mail from Witold J. Walczak, Esq. to Jeffrey P. Garton, Esq. (April 17, 2023, 12:40pm ET)); Ex. 5 (E-mail from Witold J. Walczak, Esq. to Michael J. Rinaldi, Esq. (April 17, 2023, 3:14pm ET)); Burgess Decl. ¶ 3. Counsel for the District still has not provided it.

Burgess wishes to respond—both in and out of court—to the allegations that CBSD publicly made against him and the retaliatory acts that CBSD continues to take against him for his LGBTQ+ advocacy. Burgess Decl. ¶ 13. This will allow the public to accurately evaluate the actions of CBSD, and its handling of LGBTQ+ issues. *Id.* But Burgess is afraid that if he speaks publicly about any of these topics, CBSD will seek to use the Gag Order as a basis to subject him to discipline, including discharge. *Id.* The Gag Order also restrains counsel's ability to advance

this case, as counsel may not amend the Complaint to include additional relevant information without risking Burgess's employment.

ARGUMENT

A. A Temporary Restraining Order and Preliminary Injunction Should Be Issued to Enjoin CBSD from Enforcing Its Gag Order Against Burgess.

Four factors determine whether a temporary restraining order or preliminary injunction is appropriate:

(1) whether the movant has a reasonable probability of success on the merits; (2) whether the movant will be irreparably harmed by denying the injunction; (3) whether there will be greater harm to the nonmoving party if the injunction is granted; and (4) whether granting the injunction is in the public interest.

B.H. v. Easton Area Sch. Dist., 725 F.3d 293, 302 (3d Cir. 2013) (en banc) (discussing four factors in preliminary injunction analysis); *see also Fres-co Sys. USA, Inc. v. Hawkins*, NO. 16-4246, 2016 WL 9306081, at *1 n.1 (E.D. Pa. Aug. 26, 2016) (“The standard for issuing a temporary restraining order is the same as that for ordering a preliminary injunction.”). The movant ordinarily must establish the first two factors, after which “the court then determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief.” *Amalgamated Transit Union Local 85 v. Port Auth. of Allegheny Cty.*, 39 F.4th 95, 103 (3d Cir. 2022). “But ‘[i]n First Amendment cases the initial burden is flipped. The government bears the burden of proving that the law is constitutional; thus, the plaintiff must be deemed likely to prevail if the government fails to show the constitutionality of the law.’” *Id.* (alteration in original) (quoting *Greater Phila. Chamber of Com. v. City of Phila.*, 949 F.3d 116, 133 (3d Cir. 2020)).

Burgess meets the standard for issuance of a temporary restraining order and a preliminary injunction. First, Burgess has a reasonable probability of success on the merits because CBSD has no justification for imposing the Gag Order on Burgess's speech regarding a matter that CBSD

itself has made public and that is of undeniable concern to the public. Second, Burgess will be irreparably harmed by a denial of injunctive relief because he will be unable to address and respond to the District's retaliatory conduct and allegations against him without fear of discipline or discharge. Third, granting the injunction will not cause CBSD any harm; a government agency cannot vilify a public employee and then gag him from responding. And finally, ensuring that public employees' free-speech rights are protected, and that the public is able to hear from them about matters of public concern, is in the public interest. Accordingly, the Court should grant Burgess's motion for a temporary restraining order and/or preliminary injunction in this case.

1. Burgess Is Likely to Succeed on the Merits.

Burgess is likely to succeed on the merits of his challenge to CBSD's Gag Order because it prohibits his speech as a citizen about matters of public concern and CBSD has not met—and cannot meet—the demanding burden that the First Amendment imposes for such a prior restraint on speech.

The First Amendment imposes substantial limitations on the government's ability to restrict, in any manner, speech by government employees "as citizens" about "matters of public concern." *Amalgamated Transit Union*, 39 F.4th at 103. That is precisely the case here. Government employees speak "as citizens"—rather than as employees—unless they are speaking "pursuant to their official duties." *Id.* The speech that CBSD's Gag Order targets is not speech in which Burgess would engage "pursuant to [his] official duties." *Id.* Burgess wants to publicly address and respond to—both in and out of court—CBSD's retaliatory conduct and the allegations that CBSD aired publicly against him, to set the record straight and allow the public to accurately evaluate the actions of CBSD. *See supra* pp. 5-6. While the subject matter of such speech may relate to Burgess's job, engaging in such speech is *not* part of his job; this means that he wants to speak as a citizen. *See Flora v. Cty. of Luzerne*, 776 F.3d 169, 178-180 (3d Cir. 2015) (holding

that speech related to public-employee’s job is still citizen speech where it is not part of the employee’s ordinary job duties).

“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,’ or when it ‘is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.’” *Amalgamated Transit Union*, 39 F.4th at 103 (quoting *Snyder v. Phelps*, 562 U.S. 443, 453 (2011)). The speech that the Gag Order targets fits comfortably within this expansive definition because it relates to CBSD’s retaliation against Burgess for his efforts to address an important civil rights and discrimination problem in the School District affecting LGBTQ+ students. It cannot be disputed that civil rights violations and discrimination in school districts are a matter of concern to the public. *See, e.g., Connick v. Myers*, 461 U.S. 138, 146 (1983) (“[I]t is clear that . . . statements concerning the School District’s allegedly racially discriminatory policies involved a matter of public concern.” (citing *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979)); *Azzaro v. Cty. of Allegheny*, 110 F.3d 968, 978 (3d Cir. 1997) (“The harassment was a form of gender discrimination . . . [which] is as much a matter of public concern as racial discrimination”). Moreover, if that were not enough, the speech that the Gag Order targets relates to CBSD’s April 20 public response to Burgess’s efforts, made during a presentation at a public board meeting and in a 151-page public report that attracted substantial media attention and that CBSD posted to its public website. *See supra* pp. 3-4.

Because the Gag Order targets Burgess’s speech “as a citizen” about “matters of public concern,” the First Amendment requires CBSD to justify its speech restriction. Moreover, because the restriction here takes the form of a prior restraint—that is, an *ex ante* prohibition on future speech rather than *ex post* discipline for past speech—“the Government’s burden is greater” to

justify the restriction than it otherwise would have been. *Amalgamated Transit Union*, 39 F.4th at 104 (quoting *United States v. Nat'l Treasury Employees Union* (“NTEU”), 513 U.S. 454, 468 (1995)). In the prior-restraint context, courts consider “the ‘broad range of present and future expression’ that the rule chills and the interests of present and future speakers and audiences.” *Id.* at 104 (quoting *NTEU*, 513 U.S. at 468). And “[t]he government bears the burden of showing that the ‘necessary impact on the actual operation of the Government’ outweighs that interest.” *Id.* (quoting *NTEU*, 513 U.S. at 468). To satisfy this burden, CBSD “‘must make two showings: first, that it has identified ‘real, not merely conjectural’ harms; and second, that the ban as applied addresses these harms in a ‘direct and material way,’” *i.e.* that the ban is “narrowly tailored” to the harm identified. *Id.* at 105-06 (cleaned up) (quoting *Lodge No. 5 of Fraternal Ord. of Police ex rel. McNesby v. City of Phila.*, 763 F.3d 358, 370 (3d Cir. 2014) (in turn quoting *NTEU*, 513 U.S. at 475)).

Here, CBSD cannot identify real harm to the actual operation of the Government that it is seeking to prevent through the Gag Order—let alone demonstrate that the Gag Order would address any such harm in a direct and material, narrowly tailored way. Burgess’s counsel has repeatedly asked the District’s counsel to justify the Gag Order, but the District has declined to do so. *See supra* p. 5. Nor could it do so, because there is no legitimate justification for barring Burgess from publicly addressing and responding to CBSD’s retaliatory conduct and allegations against him. Revealing the truth to the public—about the retaliation, the allegations, or the discrimination that underlies them—is not a “harm” that CBSD may legitimately seek to prevent. *See Amalgamated Transit Union*, 39 F.4th at 105 (explaining that “[t]o demonstrate real, not merely conjectural harms, a government must . . . identify legitimate interests” (citation omitted)).

In addition, even if there were some discrete sub-set of speech on the matter that CBSD could legitimately prohibit, the Gag Order would still be wildly overbroad. Again, the requirement that a prior restraint on government-employee speech address the identified actual harm in a “direct and material way” amounts to a requirement that the restraint be “narrowly tailored” to that harm. *See Amalgamated Transit Union*, 39 F.4th at 106. The language of the Gag Order itself—instructing Burgess and his lawyers to keep “everything (including, but not limited to the allegations, and all details thereof, the facts relating to this matter, the people involved, this process, the results of this process, witness names) fully confidential”—makes plain that there is no such narrow tailoring here.

The vague language in the Gag Order that states that its confidentiality requirements apply “unless you have a legal or constitutional right to make the disclosure” does not change the fact that the Gag Order violates the First Amendment. Without defining the phrase, the Gag Order sets up the District as the arbiter of when Burgess has a “legal or constitutional right” to speak on the matter. And if Burgess (or one of his attorneys) guesses wrong about how CBSD would apply the carve-out, “discipline, including discharge” looms as the potential consequence. Indeed, in *Amalgamated Transit Union*, the Third Circuit recounted how a similarly vague carve-out from an employee-speech restriction cut against, rather than in favor of, the restriction’s constitutionality:

[In *Swartzwelder v. McNeilly*, 297 F.3d 228, (3d Cir. 2002)], we disapproved the vague standard applied by the government for approval of employee speech. That standard was whether the speech was “valid” in the judgment of an assistant city solicitor. *Swartzwelder*, 297 F.3d at 240. Specifically, we said that so discretionary a standard is “troubling” and “disturbing” because it “creates a danger of improper application,” particularly in the hands of a single government employee. *Id.*

39 F.4th at 108–09.

Because CBSD has not justified—and cannot justify—the prior restraint on Burgess’s speech, the Gag Order violates the First Amendment and Burgess is likely to prevail on the merits of his challenge.

2. The Remaining Preliminary Injunction Factors Weigh in Burgess’s Favor.

Burgess will be irreparably harmed absent a temporary restraining order or preliminary injunction. The District excoriated Burgess at a public meeting and in a publicly released 151-page report, publicly recommended suspension of Burgess without pay, and then ordered Burgess to remain silent under threat of discharge. *See supra*, pp. 3-5. Absent preliminary relief, CBSD will continue to deny Burgess his right to free speech. “When a government employer’s restrictions on employee speech tread on First Amendment interests, those restrictions work irreparable injury.” *Amalgamated Transit Union*, 39 F.4th at 108; *see also id.* at 107-108 (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

On the other hand, granting the injunction poses no potential harm to CBSD. After publicly making allegations against Burgess, the District has no legitimate interest as a government employer in preventing Burgess from informing the public about the reality that belies those allegations, the actions of the District, and the discriminatory context out of which they arose. A preliminary injunction will not harm the District because the government “suffers no legitimate harm from not enforcing an unconstitutional policy.” *Amalgamated Transit Union*, 39 F.4th at 109. The balance of hardships, therefore, favors granting a temporary restraining order and/or preliminary injunction.

Finally, “the public interest does not suffer by enforcing the First Amendment’s protection against restrictions on speech.” *Ctr. for Investigative Reporting v. Se. Pa. Transp. Auth.*, 975 F.3d

300, 317 (3d Cir. 2020). “There is a strong public interest in upholding the requirements of the First Amendment. And, if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff.” *Amalgamated Transit Union*, 39 F.4th at 109 (citation and internal quotation marks omitted).

B. The Court Should Compel CBSD to Produce a Copy of the Transcript of CBSD’s Counsel’s Interview of an Unrepresented Burgess Because the Transcript Is a Previous Statement that Burgess Is Entitled to Obtain on Request.

Rule 26(b)(3)(C) provides that “[a]ny party or other person may, on request and without the required showing, obtain the person’s own previous statement about the action or its subject matter.” A “previous statement” includes “a contemporaneous stenographic . . . recording . . . that recites substantially verbatim the person’s oral statement.” Fed. R. Civ. P. 26(b)(3)(C). The Rule further specifies that, “[i]f the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses.” *Id.* Moreover, the Advisory Committee Notes to the Rule make clear that the “on request” language means that a party is entitled to receive a copy of a previous statement simply by requesting it—and need not wait to do so through the formal Rule 34 document demand process. *See* Fed. R. Civ. P. 26, 2007 Advisory Committee Notes (“Amended Rule 26(b)(3) states that a party may obtain a copy of the party’s own previous statement ‘on request.’ Former Rule 26(b)(3) expressly made the request procedure available to a nonparty witness, but did not describe the procedure to be used by a party. This apparent gap is closed by adopting the request procedure, which ensures that a party need not invoke Rule 34 to obtain a copy of the party’s own statement.”).

Here, on January 12, 2023, counsel for CBSD interviewed Burgess and a court reporter made a contemporaneous stenographic recording of counsel’s questions and Burgess’s answers. Burgess Decl. ¶ 2. That interview was part of the internal investigation that CBSD hired counsel

to conduct—the results of which counsel presented at the April 20, 2023, public meeting and his law firm memorialized in the 151-page report that it authored. *See supra* pp. 3-4. Both the presentation and report relied heavily on out-of-context quotations from the transcript of the interview. *See supra* pp. 3-4. Burgess—through his union and his counsel—has repeatedly requested a copy of the full transcript of the interview but the District has still not provided it.⁴ *See supra* pp. 3-5. Burgess intends to amend his complaint and needs a copy of the transcript to be able to do so fully and accurately.

Therefore, pursuant to Rule 26(b)(3)(C), Burgess also now asks the Court to order CBSD to provide him with a copy of the January 12 transcript immediately.

CONCLUSION

For all these reasons, Plaintiff Andrew Burgess requests that the Court grant Plaintiff's Motion and enter an Order preliminarily enjoining CBSD from enforcing its Gag Order, and compelling production of the January 12, 2023, transcript.

May 1, 2023

Respectfully submitted,

LeVAN STAPLETON SEGAL COCHRAN LLC

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⁴ The District previously maintained that the interview transcript was “privileged” as part of an internal investigation conducted by counsel for CBSD. Burgess Decl. ¶ 3. Regardless of whether this privilege assertion was ever valid, the public presentation and report’s heavy reliance on excerpts from the interview transcript vitiate any claim of privilege now. Eighty-four selected pages out of the apparently 206-page transcript were publicly released as an attachment to the CBSD Report. Burgess Decl. ¶ 10.

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CERTIFICATE OF SERVICE

The foregoing document is being filed via the Court's ECF system, which will electronically serve all counsel of record via Notice of Electronic Case Filing, and make the document available for viewing and downloading from the ECF system.

Dated: May 1, 2023

s/ Eli Segal
Eli Segal

Counsel for Plaintiff