



September 25, 2020

President Naomi DeWinter
Muscatine Community College
152 Colorado Street
Muscatine, Iowa 52761

URGENT

Sent via Electronic Mail (ndewinter@eicc.edu)

Dear President DeWinter:

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.

FIRE is concerned by the threat to freedom of expression and academic freedom at Muscatine Community College (MCC), an institution within the Eastern Iowa Community College District (EICC), posed by the administration's unilateral cancellation of the virtual fall play—citing public health—after concerns were raised about its content. While the college may take reasonable steps to prevent the spread of disease on campus in light of the COVID-19 pandemic, citing public health in cancelling a *virtual* theatre production after the dean of instruction raised concerns about the script's content is naked pretext to censorship, violating MCC and EICC's obligations under the First Amendment. FIRE calls upon MCC and EICC to immediately reinstate its support for the fall play and allow the theatre director to move forward with directing a virtual production of "Dog Sees God: Confessions of a Teenage Blockhead."

I. After Privately Expressing Concerns Over Virtual Play's Content, Administrators Cancel It Citing Public Health Concerns

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us. Please find enclosed an executed waiver authorizing you to share information with FIRE. However, if the facts here are substantially accurate, MCC must immediately end its censorship of the theatre program by supporting a virtual production of "Dog Sees God."

A. EICC initially denied Alyssa Oltmanns's request for reasonable accommodations under the Americans with Disabilities Act (ADA), but revised its decision.

Alyssa Oltmanns is MCC's theatre director and a faculty member in the English and theatre departments. On April 28, after receiving word from her doctor that she should continue to work from home throughout the COVID-19 pandemic because of an asthma diagnosis, Oltmanns requested that MCC provide her an accommodation to allow her to continue to work from home and teach virtually if MCC returned to in-classroom instruction. Following this request, Oltmanns entered into a series of negotiations with MCC and EICC administrators. After Oltmanns presented information to administrators on the logistics of how she would successfully teach her courses and direct a virtual fall play from home, the college granted her an accommodation on July 16.¹

This accommodation allowed Oltmanns to take advantage of the live online or online teaching modalities for the fall semester.² EICC laid out the following expectations regarding this accommodation:³

- English and theatre theory classes will be offered live online and/or online with the ability to work from home. Full student engagement is expected with virtual office hours, small group sessions, and active participation. Students will be allowed to work from home or from campus.
- A fall play performance is expected, preferred on campus but virtual, if not possible due to community health concerns. The type of play is up to the director with final approval from Dr. Pickard, Dean of Instruction. We will consult with CDC and local public health officials to make a final decision about the play location.

B. MCC administrator abused ADA accommodations letter to usurp authority over content of the fall play.

In early September, having begun instruction using the live online and online modalities, per her ADA accommodation, Oltmanns began planning MCC's fall play. She selected the show "Dog Sees God: Confessions of a Teenage Blockhead," a "twist to the well-known Peanuts comic strip that re-imagines the beloved children's characters as high schoolers dealing with

¹ Letter from Deborah Sullivan, Director of Human Resources, EICC to Oltmanns, July 16, 2020 (on file with author).

² *Id.*

³ *Id.* (emphasis in original).

all the trials and trauma, angst and acne, hormones and hickies that come with being teenagers.”⁴

“Dog Sees God” has been noted for its controversial material, as the show deals with subjects familiar to teenagers, including drug use, sexuality and LGBTQ+ issues, and suicide.⁵

Jeremy Pickard, MCC Dean of Instruction, wrote to Oltmanns on September 4 to inform her that she was not permitted to continue with the production of “Dog Sees God.”⁶

Per the accommodation letter that was sent to you by Ms. Sullivan, the fall play needs to have final approval from the Dean of Instruction. The “Dog Sees God” play you are advertising has not been approved as a play at MCC. Please select another play and have it approved.

The theatre director at MCC traditionally selects the scripts for production, and never before has the script selection needed approval from an administrator. Oltmanns has previously directed four plays at MCC without administrative intervention. As Oltmanns wrote to Pickard, he had previously “said [he] would never censor” the play selection.⁷

Although Oltmanns asked Pickard multiple times to outline his concerns with “Dog Sees God,”⁸ Pickard refused to outline his concerns via email, and saying he would only explain in person.⁹ Pickard and Oltmanns had previously discussed “Dog Sees God” in May 2019, when Oltmanns’s Acting 2 class performed selected scenes from the script at a faculty luncheon. After this performance, Pickard had expressed concerns that the script included cursing and the beloved character Snoopy dying. At the time, Oltmanns had been considering using the script for an upcoming play. However, after hearing Pickard’s concerns, she decided to postpone those plans. As a brand new faculty member in the 2018–19 school year, Oltmanns worried that selecting a play about which administrators had concerns would put her job at risk.

When Oltmanns selected “Dog Sees God” for this year’s fall play and Pickard refused to explain his concerns, Oltmanns hoped to resolve the situation diplomatically. She therefore reached out to the playwright, Bert Royal, about the script.¹⁰ Royal sent Oltmanns a revised

⁴ *Dog Sees God: Confessions of a Teenage Blockhead*, The Bartell, <http://bartelltheatre.org/2019/dog-sees-god-confessions-of-a-teenage-blockhead> (last visited Sept. 24, 2020).

⁵ Kathy Cichon, ‘*God Sees Dog*’ shows *Peanuts*-like characters in new light, Chicago Tribune, Jan. 3, 2019, <https://www.chicagotribune.com/suburbs/ct-abn-ent-vero-voce-0111-story.html>.

⁶ Email from Pickard to Oltmanns, Sept. 4, 2020, 8:45 AM (on file with author).

⁷ Email from Oltmanns to Pickard, Sept. 4, 2020, 8:58 AM (on file with author).

⁸ *Id.*; email from Oltmanns to Pickard, Sept. 4, 2020, 9:51 AM (on file with author); email from Oltmanns to Pickard, Sept. 5, 2020, 10:30 AM (on file with author).

⁹ Email from Pickard to Oltmanns, Sept. 6, 2020, 11:04 AM (on file with author).

¹⁰ Email from Oltmanns to Pickard, Sept. 10, 2020, 1:31 PM (on file with author).

version of the script that omitted some of the more controversial content.¹¹ During Oltmanns's conversations with Royal, he had indicated that "he is willing to see that ["Dog Sees God"] gets staged at MCC" and was interested in attending the first read-through of the play.¹² Oltmanns forwarded the revised script to Pickard, asking that he take note of any aspect he found concerning.¹³

On September 15, after hearing nothing from MCC or EICC administrators for five days, Oltmanns was informed that you had chosen to suspend the fall play.¹⁴ In announcing this decision, you cited public health concerns related to the COVID-19 pandemic and MCC's inability to support a virtual production.¹⁵ MCC has previously hosted large virtual events, including graduation,¹⁶ and Oltmanns planned to produce the play as a recorded video rather than a live event.

Oltmanns is now producing "Dog Sees God" as a community production, in partnership with a local organization, Clock, Inc.

II. MCC's Cancellation of the Fall Play Is Inconsistent with its First Amendment Obligations

The fall play is an expressive activity protected by the First Amendment's guarantee of free speech, as well as the attendant right to academic freedom. As a public institution bound by the First Amendment, MCC cannot cancel the fall play due to concerns about its content.

A. As a public institution, MCC is bound by the First Amendment.

It has long been settled law that the First Amendment is binding on public colleges like MCC. *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); *see also DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) (on public campuses, "free speech is of critical importance because it is the lifeblood of academic freedom").

The Supreme Court of the United States has made clear that academic freedom is a "special concern of the First Amendment," explaining that "[o]ur nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Email from DeWinter to Oltmanns, Sept. 15, 2020, 5:08 PM (on file with author).

¹⁵ *Id.*

¹⁶ *2020 Commencement*, E. IOWA CMTY. COLLS., <https://www.eicc.edu/about-eicc/coronavirus/graduation2020.aspx> (last visited Sept. 24, 2020).

the teachers concerned.” *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). As the Court remarked in *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957):

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Because it is bound by the First Amendment, MCC may not curtail faculty members’ expression and academic freedom—including expression through theatre productions—due to objections with the content or viewpoint of that expression. *Gay & Lesbian Students Ass’n. v. Gohn*, 850 F.2d 361, 362 (8th Cir. 1988) (finding that as a public university, University of Arkansas at Fayetteville “is bound by the First Amendment to act without regard to the content of the ideas being expressed”).

B. Unilaterally cancelling a faculty-organized theatre performance because of disagreement with content is unconstitutional viewpoint discrimination.

In cancelling Oltmanns’s planned production of “Dog Sees God,” MCC has impermissibly interfered with a faculty member’s academic freedom, which is embraced by the First Amendment.

i. Directing a theatrical performance is expressive conduct and within Oltmanns’s academic pursuits.

The act of directing a theatrical performance—as well as acting in, producing, or otherwise participating in a performance—qualifies as expressive conduct encompassed and protected by the First Amendment.

The First Amendment “does not end at the spoken or written word.” *Texas v. Johnson*, 491 U.S. 397, 404 (1989). To the contrary, conduct “intend[ed] to convey a particularized message” likely to “be understood by those who viewed it” is expressive conduct, and while authorities may enforce content-neutral regulations that may incidentally impact expressive conduct, they cannot restrict the expressive conduct “because it has expressive elements” *Id.* at 404, 406. So, too, is conduct which falls within a traditionally-protected genre—such as theatre, paintings, and music—expressive conduct, even if it does not convey a “narrow, succinctly articulable message.” *Hurley v. Irish-American Gay, Lesbian & Bisexual Group* 515 U.S. 557, 569 (1995). This is what protects the act of saluting a flag (or refusing to do so) (*West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 633–34 (1943)), wearing black armbands to protest war (*Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 505–06 (1969)), raising a “seditious” red flag (*Stromberg v. California*, 283 U.S. 359, 369 (1931)), burning an American

flag (*Johnson*, 491 U.S. at 414), picketing or leafletting (*U.S. v. Grace*, 461 U.S. 171, 176 (1983)), and participating in a sit-in (*Brown v. Louisiana*, 383 U.S. 131, 383 (1966)).

Further, as theatre director, Oltmanns’s scholarly and academic pursuits include her direction of plays at MCC. Just as the First Amendment’s protection of academic freedom protects a professor’s right to display “insensitive” photographs in a public display set aside for his department,¹⁷ to use racially offensive language “germane to the classroom subject matter,”¹⁸ or a to select the readings relevant to her class, it also protects Oltmanns’s right to select and direct the script of her choice for the fall play.

ii. Academic freedom entails a right to confront and use offensive material.

Faculty enjoy a First Amendment right to discuss, view, teach, and perform a wide variety of materials germane to their pedagogy. This includes material, including theatrical scripts, that may shock or offend others—including administrators of their own institutions.

This is because the First Amendment does not exist to protect only non-controversial expression. Rather, it exists precisely to protect speech that some or even most members of a community may find controversial or offensive. The Supreme Court has explicitly held, in rulings spanning decades, that speech cannot be restricted simply because it offends others, on or off campus. See, e.g., *Johnson*, 491 U.S. at 414 (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); *Papish v. Bd. of Curators of the Univ. of Missouri*, 410 U.S. 667, 670 (1973) (“[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”)

The freedom to offend some listeners is the same freedom to move or excite others. As the Supreme Court observed in *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), speech “may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.” The Court reiterated this fundamental principle in *Snyder v. Phelps*, 562 U.S. 443, 461 (2011), proclaiming that “[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”

These holdings are directly applicable to Oltmanns’s choice of production for the fall play. Courts across the country have consistently found that the First Amendment protects public university faculty expression targeted for censorship due to subjective offense. “[T]he desire to maintain a sedate academic environment . . . [does not] justify limitations on a teacher’s freedom to express himself on political issues in vigorous, argumentative, unmeasured, and

¹⁷ *Burnham v. Ianni*, 119 F.3d 668, 671 (8th Cir. 1997).

¹⁸ *Hardy v. Jefferson Cmty. College*, 260 F.3d 671, 683 (6th Cir. 2001).

even distinctly unpleasant terms.” *Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 708–09 (9th Cir. 2010) (internal citation omitted). Although the themes of sexuality, drug use, and self-harm in “Dog Sees God” may offend some administrators—and potentially some audience members—they also open a conversation on campus about important issues of our day.

Academic freedom requires that plays like Oltmanns’s planned production of “Dog Sees God,” which are educational opportunities organized by a faculty member, be free from administrative interference.

iii. MCC’s treatment of Oltmanns demonstrates viewpoint discrimination.

MCC fundamentally abandons its First Amendment obligations to free expression and academic freedom when it acts to censor a faculty member’s expressive activity on the basis that administrators find its content objectionable or offensive. It is well established that public institutions of higher education cannot take action against faculty on the basis of viewpoints espoused by those individuals. When authorities target “not subject matter but particular views taken by speakers on a subject, the violation” of expressive rights “is all the more blatant.” *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). “Viewpoint discrimination is thus an egregious form” of censorship, and authorities “must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Id.*

The fact that Pickard barred Oltmanns from moving forward with a production of “Dog Sees God” because of unspecified concerns with its content demonstrates that the viewpoint and subject matter of the play motivated MCC administration’s decision to cancel it. While it is unclear whether it is the LGBTQ+ themes, the exploration of sexuality, or the depiction of teenage acne Pickard finds objectionable, Pickard’s reluctance to detail his concerns further casts suspicion on the legal propriety of his decision as an administrator of an institution bound by the First Amendment.

Further, the COVID-19 pandemic certainly justifies MCC and EICC taking steps to prevent the spread of disease on campus. For example, MCC almost certainly could call off all on-campus events, including any theatrical performances, to prevent large groups of people from gathering in close quarters. However, steps taken to promote public health must be carefully vetted to ensure they do not trample on faculty or student rights. And COVID-19 certainly may not be used as a pretextual excuse for denying a faculty member her rights to free expression and academic freedom, as it seems to have been used here, where Oltmanns had planned a virtual, not in-person, performance of “Dog Sees God.” Further, it stands to reason that posting the planned pre-recorded production of “Dog Sees God” online would be well-within MCC and EICC’s technological capabilities, especially given the college’s previous online events, including graduation.

Nor may an ADA accommodation be used as license for censorship. While Oltmanns's accommodation letter gave Pickard the authority to help determine what *modality* would be used to put on the fall play, it did not give Pickard license to make determinations about *content*. Utilizing the ADA accommodations concerning the form of the play as a vehicle to control its content is an abuse of those accommodations and unconstitutional censorship.

III. MCC and EICC Must Permit Oltmanns's Production of "Dog Sees God"

While Oltmanns has been able to secure community support to move forward with the virtual production of "Dog Sees God," she should not have had to seek this additional support to begin with. MCC and EICC must immediately lend its support to the production and commit to abstaining from censorship of faculty-organized theatrical productions in the future.

Given the urgent nature of this matter, we request receipt of a response to this letter no later than the close of business on Friday, October 2, 2020.

Sincerely,

A handwritten signature in black ink, appearing to read "Lindsie Rank".

Lindsie Rank

Program Officer, Individual Rights Defense Program

Cc:

Deborah Sullivan, EICC Director of Human Resources

Jeremy Pickard, MCC Dean of Instruction

Encl.

Authorization and Waiver for Release of Personal Information

I, Alyssa Marie Oltmanns, do hereby authorize Muscatine Community College/Eastern Iowa Community 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:

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Signature

9/25/2020

Date