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**MEMORANDUM**

Date: February 9, 2021  
To: Lee County Board of Education  
From: Jimmy L. Love, Sr., Board Attorney

The Lee County Board of Education has asked for a review of whether a member of the board, Sherry Lynn Womack, violated any board rules or policies by her attendance at a rally in Washington, D.C. on January 6, 2021. The rally was followed by an attack on the United States Capitol, but Ms. Womack reports that she was not part of the events at the Capitol. At some point during the day, Ms. Womack spoke to a newspaper reporter and identified herself as a member of the Board. As noted below, I conclude that the evidence presented does not show that Ms. Womack violated school board policies.

**SCOPE OF REVIEW**

I have reviewed the following information:

- Social media posts from Ms. Womack's Facebook page;
- Portal of FBI-Capitol Violence
- An article from USA Today about the events of January 6;
- A January 13 article in the News & Observer concerning the Board's vote to request this review, including an embedded local television (ABC 11) report.
- Summary of Ms. Womack's account.
- Conduct rules for Board members in the Board's policy manual, including Policy 2120 (Code of Ethics for School Board Members) and Policy 2220 (Official School Spokesperson).

**FACTS**

Ms. Womack attended the January 6 political rally hosted by President Trump. Ms. Womack reports that she did not take part in the subsequent attack on the United States Capitol.

In a live update article about the day's events, USA Today published excerpts from an interview with Ms. Womack as follows:

Sherry Lynn Womack (sic), a member of the Lee County Board of Education in North Carolina, said she traveled to Washington to demand better election security and stronger

voter ID laws. She cited what she believes are “suspicious” videos of ballot counting in Georgia.

“I’m not one of those conspiracy theorists,” she said. “But these are legitimate questions that need to be asked.”

After the Board of Education received comments critical of Ms. Womack’s involvement in the rally, ABC News 11 interviewed Ms. Womack. Ms. Womack made the following comments about the violence following the rally:

“I mean it’s shameful, it’s disgusting. I have never seen anything like that before, particularly at any kind of Trump event.

### **ANALYSIS**

#### 1. Ms. Womack’s Statements Did not Violate Policy 2120

The Code of Ethics for School Board Members (Policy 2120) sets the following standard for conduct of a board member outside of the member’s board duties:

“In accordance with this code, each member of the board shall commit to the following: . . . take no private action that will compromise the board or administration . . . .”

The policy does not define the term “private action”. An initial question is whether the prohibition against “private action” applies to conduct alone or can be read to include speech. In any event, the policy should not be interpreted to prohibit speech by a board member that is protected by the First Amendment.

Content or viewpoint-based restrictions on the speech of elected officials and candidates for office are generally subject to strict scrutiny. Republican Party of Minn. v. White, 536 U.S. 765 (2002). Under strict scrutiny, regulations on an elected official’s speech must be “narrowly tailored to address a compelling government interest.” Jenevein v. Willing, 493 F.3d 551, 558 (5<sup>th</sup> Cir. 2007).

A regulation that limits unpopular or controversial opinions would be considered content or viewpoint-based and would be extremely unlikely to survive strict scrutiny if challenged. Even inflammatory speech made to a crowd that responds violently is protected by the First Amendment unless the speech is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” Brandenburg v. Ohio, 395 U.S. 444, 448 (1969). Therefore, Policy 2120 should not be interpreted to prevent members of the board from expressing unpopular or controversial opinions.

Based on the above, the prohibition on private action that will compromise the board should not apply to Ms. Womack's quoted statements.

2. Ms. Womack's Statements Did not Violate Policy 2220

Because Ms. Womack did not represent her opinions as those of the Lee County Board of Education, she did not violate the Policy 2220, Official School Spokesperson. The policy states in part:

The official spokespersons of the school district shall be the chairperson of the board or designee and the superintendent or the superintendent's designees. Any person speaking in an official capacity shall conduct his or her assignment from the standpoint of the best interests of the board, the school district or the community, not as a representative of his or her own personal ideas or feelings.

Ms. Womack identified herself as a member of the school board but she did not claim that she was stating the position of the Board of Education or speaking on behalf of the Board of Education. The policy does not limit a Board member from identifying herself as such when offering public commentary.

**BOARD RESPONSE TO A MEMBER'S STATEMENTS**

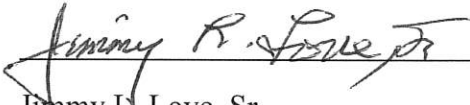
It is not clear that a symbolic gesture such as censure of a board member would amount to government action that would sustain a claim for a First Amendment violation. For example, in Blair v. Bethel Sch. Dist., the board removed Blair from his position as vice president of the board after he made negative comments about the superintendent, 608 F.3d 540 (9<sup>th</sup> Cir. 2010). The appellate court held that Blair's removal did not violate his First Amendment rights because, among other things, it did not stifle his speech. On the other hand, in Wilson v. Houston Community College System, a community college board of trustees censured a trustee for public comments he had made that were critical of the board. 955 F.3d 490 (5<sup>th</sup> Circ. 2020). The appellate court held that the trustee's claims against the board could proceed on a theory that the board had unconstitutionally retaliated against him for exercising his free speech rights.

As an alternative to censure, which may raise First Amendment concerns, the Board could consider adopting a resolution that states its official position on the events at the Capitol or related matters. Such action would almost certainly be considered "government speech" that would be within the prerogative of the board and would not give rise to a First Amendment retaliation claim. See Pleasant Grove City v. Sumnum, 555 U.S. 460 (2009).

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**CONCLUSION**

Based on the facts and reasons stated above, Ms. Womack's reported and recorded statements concerning the events in Washington, D.C., on January 6, 2021, did not violate Board of Education policies that regulate the conduct of its members.

  
Jimmy L. Love, Sr.  
Board Attorney