May 19, 2017

VIA EMAIL Khaggart@fremont.net AND UPS NEXT DAY AIR

Superintendent Ken Haggart
Fremont Public Schools
450 E. Pine
Fremont, MI 49412

Dear Superintendent Haggart:

Our law office represents Pastor John Perkins of Bible Released Time, which conducts an off-campus released time religious instruction class with the parent's permission with some students who attend your school. It is our understanding that for now your school is refusing to release these students for these off-campus classes for the 2017-2018 school year based on objections from outside third party groups and a non-custodial parent. For the reasons set forth below, we believe the school's decision is unlawful and we respectfully request it to be reversed immediately.

The Legality of Religious Released Time Classes

First of all, some legal background about religious released time classes in Michigan is helpful. Michigan law expressly authorizes the release of public school students for attendance at released time religious instruction up to 2 class hours per week. MCL 380.1561(e)(d); see also Mich Admin Code R 340.71. Under state law, written permission of a parent or guardian is required for students to attend the classes. Mich Admin Code R 340.71. If a permission slip from a student's parent or guardian is provided, it is mandatory, not optional, for Michigan public schools to release students for released time religious instruction. Michigan regulations provide that:

> "The board of education or its duly authorized representative, upon written request of the parent, guardian or person having control or charge of any child or children, shall release from attendance at the public school any child or children to attend religious instruction classes not to exceed 2 hours (120 minutes) per week." (Underlining added). Mich Admin Code 340.71.

Furthermore, over fifty years ago, the United States Supreme Court upheld the constitutionality of religious released time classes just like these that Bible Released Time conducts. Zorach v Clauson, 343 US 306, 72 S.Ct. 679 (1952). What the U.S. Supreme Court said in approving the constitutionality of these types of religious released time classes is no less true today:

> "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people

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> and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe." Zorach, 343 US at 313-314.

The U.S. Supreme Court has repeatedly referred approvingly to its decision to uphold off-campus religious released time classes. Moreover, the Supreme Court's 1952 approval of released time classes is still being relied upon as valid. As recently as August of 2004, a high level federal court approved the same framework for religious released time classes that was approved by the US Supreme Court over fifty years earlier. Pierce v Sullivan west Central School District, 379 F3rd 56, 61 (2d Cir, 2004). Likewise, the Michigan Supreme Court has also concluded that off-campus religious released time classes are constitutional. In re Proposal C, 384 Mich 390, 432 (1971).

Another high level federal court commented as follows in approving of a religious released time program: "public school cooperation with the religious authorities in . . . the instant case is a largely passive and administratively wise response to a plentitude of parental assertions of the right to direct the upbringing and education of children under their control." Smith v Smith, 523 F2d 121, 122 (4th Cir, 1975) cert den 423 U.S. 1073 (1976).

It is also worth noting that a very diverse group of organizations, including the ACLU and the Christian Legal Society, have co-signed a "Joint Statement on Current Law on Religion in the Public Schools" which confirms that "schools have the discretion to dismiss students to off-premises religious instruction, provided the schools do not encourage or discourage participation or penalize those who do not attend." See attached excerpt (full version is available on the ACLU's website). However, as noted below, the case law is abundantly clear that it is lawful for public schools to hand out fliers for released time classes on the same equal access basis as it does for other community groups.

The Legality of School Distribution of Religious Community Group Fliers:

The law is now clear that if a public school hands out promotional fliers for private secular community groups, it is perfectly legal for the school to also hand out fliers for private religious community groups. In August of 2004, a high-level federal court ruled that if a public school hands out private secular community literature, it may also lawfully hand out materials advertising events sponsored by religious organizations.[1] In that case, the school handed out a flier from a church that invited students to attend an event that featured "Bible stories, crafts and

[1] Rusk v Crestview Local School District, 379 F3d 418 (6th Cir, 2004).

songs that celebrate God's love."[2] (underlining added). This ruling protects all Michigan schools and even applies to distribution of materials to elementary school students.[3] This ruling also makes clear that Fremont Public School's distribution of Bible Released Time's flier, as is, is perfectly legal, and as noted below, should be continued as part of the school's equal access program of handing out fliers for community groups. In the above-mentioned court ruling the court specifically concluded that if the public school "were to refuse to distribute fliers advertising religious activities while continuing to distribute fliers advertising other kinds of activities, students might conclude that the school disapproves of religion" and the court went on to quote from a US Supreme Court opinion noting that "'[I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.'"[4] It should also be noted that in January 2005, the Michigan Court of Appeals ruled that public school distribution of materials sponsored by religious organizations does not violate state law, where the school also distributes materials for private secular community groups, even if the distribution takes place in elementary schools.[5]

More importantly, at least three other high-level federal courts have ruled that if a public school hands out fliers advertising private secular community group literature, it violates the federal constitution for them to refuse to hand out fliers for religious community groups.[6] For example, in 2003 a high-level federal court noted that a public school is not permitted to single out religious groups for exclusion as it relates to materials to be distributed or made available to the students of that school from private community groups.[7] In particular, the court held that a public school violated the First Amendment by refusing to distribute materials advertising private religious community groups' activities where it distributed or made available materials for private secular community groups.[8] The court stated that "the district cannot refuse to

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[2] Rusk, 379 F3d at 419.

[3] Rusk, supra. It should also be noted that the Michigan Court of Appeals has ruled that public school distribution of materials advertising events sponsored by religious organizations does not violate state law either where the school also distributes materials for private secular community groups even where the elective distribution takes place in elementary schools. See Scalise v Boy Scouts of America, 265 Mich App 1 (2005) l v den 473 Mich 859 (2005).

[4] Rusk, 379 F 3d at p. 423 (citing Good News Club v Milford Cent Sch, 533 US 98, 1218 ct 2093 (2001) and Bd of Educ of Westside County Sch v Mergens, 496 US 226 110 5 ct 2356 (1990).

[5] Scalise v Boy Scouts of America, 265 Mich App 1 (2005) lv den 473 Mich 853 (2005).

[6] Hills v. Scottsdale Unified School District, 329 F3d 1044 (9th Cir, 2003) cert den 124 S. Ct. 1146 (2004); Child Evangelism Fellowship of Maryland v. Montgomery County Public Schools, 373 F3d 589 (4th Cir, 2004). Child Evangelism Fellowship of New Jersey, Inc. v Stafford Township School District, 386 F.3d 514 (3rd Cir, 2004); see also Child Evangelism Fellowship of Maryland, Inc v Montgomery County Public Schools 457 F3d 376 (4th Cir, 2006).

[7] Hills v Scottsdale Unified School District, 329 F.3d 1044, 1053 (9th Cir., 2003) cert den 124 S. Ct. 1146 (2004).

[8] See Hills, 329 F.3d at 1055-56.

distribute literature advertising a program with underlying religious content where it distributes quite similar literature for secular [programs]."[9]

Likewise, in 2004 yet another high-level federal court held that a public school was engaged in unconstitutional viewpoint discrimination where it improperly excluded private religious community groups from the school's take-home flyer program.[10] In that particular case, the community group fliers were put in teacher's mailboxes and then distributed by the teachers to the students.[11] When the same school district tried to change its policies to change the rule about materials handed out to students but still excluded religious groups, the federal court again ruled in 2006 that this exclusion was unconstitutional.[12]

Moreover, in October of 2004, a high-level federal court specifically said that when a public school refuses to distribute fliers for a religious organization while readily distributing fliers from other groups, the school is engaging in impermissible "viewpoint-based religious discrimination."[13]

Also recently as October 26, 2010, a US District Judge in Michigan approved a preliminary injunction against a Michigan public school based on evidence that the school refused to allow distribution to students of fliers advertising a Christian summer youth camp even though it appears that school allowed distribution of fliers by various private community organizations. J.S v Holly Areas Schools, 749 F.Supp.2d 614 (W.D. Mich, 2010).

In short, the rule of law is that private religious groups are entitled to the same equal access to school literature distribution programs as any other community groups.

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[9] Hills, 329 F.3d at 1053.

[10] Child Evangelism Fellowship of Maryland v Montgomery County Public Schools, 373 F.3d 589, 594 (4th Cir., 2004).

[11] See Child Evangelism Fellowship of Maryland, 373 F.3d at 592.

[12] Child Evangelism Fellowship of Maryland, Inc. V Montgomery County Public Schools, 457 F3d 376 (4th Cir, 2006).

[13] Child Evangelism Fellowship of New Jersey Inc. v Stafford Township School District, 386 F.3d 514, 527 (3rd Cir., 2004).

We are aware of a 40-year old outdated state regulation which asserts that "No solicitation for attendance of religious instruction classes shall be permitted on public school premises" and that the "staff of the public school system shall neither encourage non discourage participation in any religious instruction program. '"[14] However, to the extent that this regulation can be read to require that school officials single out religious fliers for exclusion from a program where the schools distribute fliers from private secular community groups, then no less than three high-level federal courts and one Michigan-based federal district court have declared that this kind of exclusion would violate the U.S. Constitution and we have found no high-level federal courts which have reached the opposite conclusion.[15] A state regulation regarding the dissemination of religious information that violates the federal constitution is unenforceable. Cantwell v State of Connecticut, 310 US 296, 60 S Ct 900 (1940). The regulation in question was adopted over 40 years ago, long before these federal court decisions declared this type of an exclusion of religious materials to be unconstitutional.

Conclusion

In short, Fremont Public School's decision to shut down the release of students to the Bible Released Time class violated federal and state law. As a result of the school's decision, there have been several inaccurate media reports inaccurately suggesting that off-campus Bible released time classes are unlawful. Release for future classes should be reinstated immediately. This shut-down should not be repeated. Also, the school should make it clear to media outlets that, after further investigation, the school has confirmed that allowing release of students for off-campus released time religious instruction is entirely consistent with state and federal law.

Sincerely,

RICKARD, DENNEY, GARNO & ASSOC.

Timothy W. Denney

TWD/ah
enclosure

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[14] Mich Admin. Code R 340.75.

[15] Child Evangelism Fellowship of Maryland v Montgomery Public Schools, 373 F3d 589 (4th Cir. 2004); Child Evangelism Fellowship of New Jersey, Inc. v Stafford Twp School Dist. 386 F3A 574 (3rd Cir. 2004); Hills v Scottsdale Unified School District, 329 F3d 1044 (9th Cir. 2000).

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JOINT STATEMENT OF CURRENT LAW ON RELIGION IN THE PUBLIC SCHOOLS

Religion In The Public Schools: A Joint Statement Of Current Law

The Constitution permits much private religious activity in and about the public schools. Unfortunately, this aspect of constitutional law is not as well known as it should be. Some say that the Supreme Court has declared the public schools "religion-free zones" or that the law is so murky that school officials cannot know what is legally permissible. The former claim is simply wrong. And as to the latter, while there are some difficult issues, much has been settled. It is also unfortunately true that public school officials, due to their busy schedules, may not be as fully aware of this body of law as they could be. As a result, in some school districts some of these rights are not being observed.

Student Garb

17. Religious messages on T-shirts and the like may not be singled out for suppression. Students may wear religious attire, such as yarmulkes and head scarves, and they may not be forced to wear gym clothes that they regard, on religious grounds, as immodest.

Released Time

18. Schools have the discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation or penalize those who do not attend. 20. Schools may not allow religious instruction by outsiders on premises during the school day.

Appendix

Organizational Signers of "Religion in the Public Schools: A Joint Statement of Current Law"

American Civil Liberties Union
American Ethical Union
American Humanist Association
American Jewish Committee
American Jewish Congress
American Muslim Council
Americans for Religious Liberty
Americans United for Seperation of Church and State
Anti-Defamation League
Baptist Joint Committee

B'nai B'rith
Christian Legal Society
Christian Science Church
Church of Scientology International
Evangelical Lutheran Church in America,
Lutheran Office for Governmental Affairs
Federation of Reconstructionist Congregations and Havurot
Friends Committee on National Legislation
General Conference of Seventh-day Adventists
Guru Gobind Singh Foundation
Interfaith Alliance
Interfaith Impact for Justice and Peace
National Association of Evangelicals
National Council of Churches
National Council of Jewish Women
National Jewish Community Relations Advisory Council (NJCRAC)
National Ministries, American Baptist Churches, USA
National Sikh Center
North American Council for Muslim Women
People for the American Way
Presbyterian Church (USA)
Reorganized Church of Jesus Christ of Latter Day Saints
Union of American Hebrew Congregations
Unitarian Universalist Association of Congregations
United Church of Christ, Office for Church in Society

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