ALLIANCE DEFENDING
FREEDOM
FOR FAITH. FOR JUSTICE.

July 12, 2013
VIA FAX & U.S. MAIL

Ms. Ingrid Day, President (on behalf of the Board of Education)
Mr. Robert Glass, Superintendent
Bloomfield Hills Schools
Booth Center
7273 Wing Lake Road
Bloomfield Hills, MI 48301

Re: **Voluntary, Student-Led Prayer at Football Games and Other School Events**

Dear President Day and Superintendent Glass:

We recently learned of a controversy at Bloomfield Hills Schools (the "District") over voluntary, student-led prayer at school-sponsored activities, including after the conclusion of football games. It is our understanding that the Americans Civil Liberties Union (the "ACLU") wrote the District a letter indicating that the Lahser High School football coach was leading students in prayer after the conclusion of games. The District investigated the matter and determined not only that the prayers were entirely student led but also that they were completely voluntary. Rather than closing the investigation and dismissing the ACLU's unfounded complaint, the District cited Regulation 5605.1, a policy banning "prayer or references of any religious nature … at school-sponsored events such as banquets, commencement, assemblies and programs," and attempted to prohibit the football team's longstanding practice of voluntary, student-led prayer. The District's stated reason for this action was to ensure that a coach's supervisory, but non-participatory, presence would not be mistakenly interpreted as the school's endorsement of students' religious speech. Although the District has since orally agreed to allow students to voluntarily pray after football games, it has taken no steps to revise its policies in order to bring them into compliance with the First Amendment. We write to inform you that, in our opinion, Regulation 5605.1 violates students' right to free speech and the free exercise of religion and to request that you amend the District's policies as soon as possible.

By way of introduction, Alliance Defending Freedom is an alliance-building legal organization that advocates for the right of people to freely live out their faith. We are committed to ensuring that religious students are free to exercise their First Amendment right to speak, associate, and learn on an equal basis with other members of the school community.

Throughout the controversy described above, the District has maintained that it "understand[s] the delicate balance of respecting a student's faith and freedoms, while maintaining a neutral learning environment." Robert Glass, Prayer in Schools?, *available at* http://www.bloomfield.org/news/item/index.aspx?pageaction=ViewSinglePublic&LinkID=598&ModuleID=113&NEWSPID=1 (last visited July 10, 2013). That is demonstrably not the case. Not only do the District's policies, many of which were last revised in the 1980s, completely fail

1000 Hurricane Shoals Rd. N.E. Suite D-1100, Lawrenceville GA 30043
Phone: 800 835 5233 Fax: 770 339 6744 AllianceDefendingFreedom.org

to address students' right to free speech, but Policy 5605 also mistakenly relies on the "clear separation of church and state" as a justification for regulating student expression. *See* Policy 5605 and Regulation 5605.1 (listed in the "5000 Series" of the District's policies which are explicitly described as pertaining to "Students").

Courts, including the United States Court of Appeals for the Sixth Circuit which has jurisdiction over the State of Michigan and the District, have long recognized that the "separation of church and state" is an "extra-constitutional construct [that] has grown tiresome." *ACLU of Ky. v. Mercer Cnty.*, 432 F.3d 624, 638 (6th Cir. 2005). "The First Amendment does not demand a wall of separation between church and state." *Id.* Accordingly, the District cannot rely on such platitudes to justify censoring students' private religious speech. "Students in school as well as out of school are 'persons' under Our Constitution. They are possessed of fundamental rights which the State must respect ...." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969)).

Voluntary, student-led prayer implicates at least two of those rights: the right to freedom of speech and the right to the free exercise of religion. The Supreme Court has made clear that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995); *see also id.* (recognizing "that a free-speech clause without religion would be Hamlet without the prince"). In the school context, that means the District may censure private student speech only after showing that it "would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Tinker*, 393 U.S. at 509 (quotation omitted); *see also Glowacki v. Howell Public Sch. Dist.*, No. 2:11-CV-15481, 2013 WL 3148272, at *7 (E.D. Mich. June 19, 2013) ("When it comes to pure student speech, ... *Tinker* provides the framework for assessing whether a particular speech restriction comports with the constitutional guarantee of free speech."). Students are otherwise free to "express [their] opinions, even on controversial subjects," not only in "the classroom," but also "in the cafeteria, or *on the playing field*, or [elsewhere] on the campus during the authorized hours." *Tinker*, 393 U.S. at 512-13 (emphasis added).

The Free Exercise Clause further ensures that school officials do not "impose special disabilities on the basis of [students'] religious views or religious status," *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990), such as their decision to engage in prayer after a game rather than cheers of victory or other forms of secular expression. Such discrimination is also precluded by the Free Speech Clause, which clearly protects students who adopt a religious viewpoint. *See Good News Club*, 533 U.S. at 112 n.4 (acknowledging that "[r]eligion is [a] viewpoint from which ideas are conveyed"). As students are undoubtedly allowed to express their thoughts about a great victory or stunning loss after a game is complete, they must also be allowed to engage in voluntary, student-led prayer regarding those events. *See id.* at 112 ("[S]peech discussing otherwise permissible subjects cannot be excluded ... on the ground that the subject is discussed from a religious viewpoint.").

The District's failure to honor these principles appears to result from a fundamental miscomprehension of the Establishment Clause, which guarantees that "[s]tate power is no more ... used ... to handicap religions, than it is to favor them." *Everson v. Bd. of Educ.*, 330 U.S. 1,

18 (1947). In short, voluntary, student-led prayer is incapable of implicating the Establishment Clause's strictures. As explained in *Good News Club v. Milford Central School*, 533 U.S. 98, 115 (2001), the Supreme Court has "never extended [its] Establishment Clause jurisprudence to foreclose private religious conduct." That is because the Constitution respects the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quotation omitted).

Accordingly, "nothing in the Constitution ... prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday." *Id.* at 313. Students' religious liberty is only "abridged when the State *affirmatively sponsors* the particular religious practice of prayer." *Id.* (emphasis added). It is clear in this case that the Lahser High School football coach did not sponsor or participate in the team's prayers. He merely stood by respectfully while students voluntarily exercised their First Amendment rights—like responsible citizens—after the game. Such non-participatory supervision does not violate the Establishment Clause, regardless of what the youngest spectators might misperceive. *See Good News Club*, 533 U.S. at 119 ("We decline to employ the Establishment Clause [as] a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive.").

The Equal Access Act, for example, specifically provides that "employees or agents of the school" may be "present at religious [student club] meetings ... in a nonparticipatory capacity" to observe events and ensure appropriate behavior. 20 U.S.C. § 4071(c)(3). These school-sponsored club meetings are undoubtedly part of a public school's educational "program." Regulation 5605.1. Yet, the Supreme Court upheld the lawfulness of this practice in the face of Establishment Clause attack, explaining that "secondary school students [of all ages] are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion).

Moreover, any apprehension on the part of the school regarding "a mistaken inference of endorsement [was] largely self-imposed, because the school itself ha[d] control over any impressions it [gave] its students." *Id.* at 251. The correct answer to any District concerns about a mistaken appearance of school endorsement of student prayer is thus educating the audience, not censuring students' protected religious speech. *See Rusk v. Crestview Local Sch. Dist.*, 379 F.3d 418, 422 (6th Cir. 2004) ("Schools may explain that they do not endorse speech by permitting it. If pupils do not comprehend so simple a lesson, then one wonders whether [their] schools can teach anything at all. Free speech, free exercise, and the ban on establishment are quite compatible when the government remains neutral and educates the public about the reasons [for its actions]." (quoting *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1300 (7th Cir. 1993)).

Supreme Court precedent clearly explains that only speech "attributable to the school" may constitute "an unconstitutional endorsement of religion by the State." *Chandler v. Siegelman*, 230 F.3d 1313, 1316 (11th Cir. 2000). The Court has never "obliterate[d] the distinction between State speech and private speech in the school context." *Id.* Consequently,

the District's ban on student "prayer or references of any religious nature … at school-sponsored events such as banquets, commencement, assemblies and programs," which taken at face value would preclude even the formation of a religious student club, plainly violates students' rights under the First Amendment and the Equal Access Act. *See* 20 U.S.C. § 4071 ("It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious … content of the speech at such meetings.").

"The Establishment Clause does not require the elimination of private speech endorsing religion in public places" and the "Free Exercise Clause does not permit the State to confine religious speech to whispers or banish it to broom closets." *Chandler*, 230 F.3d at 1316. As the United States Court of Appeals for the Eleventh Circuit has explained, "[p]rivate speech endorsing religion is constitutionally protected even in school. Such speech is not the school's speech even though it may occur in the school. Such speech is not unconstitutionally coercive even though it may occur before non-believer students." *Id.* at 1317. The District is therefore constitutionally precluded from censuring "genuinely student-initiated religious speech," as it attempted to do in this case, and as its policy clearly permits, indeed, mandates. *Id.*

Given the District's recent actions, the blatantly unconstitutional nature of Regulation 5605.1 (which plainly led to the District's unlawful actions), and the inclusion of the judicially maligned and free-speech-squelching phrase "clear separation of church and state" in Policy 5605, we are deeply concerned that the First Amendment rights of religious students in the District will be unlawfully infringed. We request an **immediate response** to our letter detailing the actions the District will take to revise its policies and fully protect students' right to freely exercise their religion and engage in private religious speech. In the meantime, we plan to closely monitor the District's activities and to encourage students who fear the adverse affects of the District's policies to contact us for legal advice. Although we would prefer to reach an amicable resolution of this issue, we will not hesitate to take all actions necessary to ensure that the District meets its obligations under the First Amendment, including—if required—the filing of a federal lawsuit. *See, e.g.*, *K.A. v. Pocono Mountain Sch. Dist.*, 710 F.3d 99 (3d Cir. 2013) (affirming a preliminary injunction in our client's favor); *Gilio v. Sch. Bd. of Hillsborough Cnty.*, 905 F. Supp. 2d 1262 (M.D. Fla. 2012) (granting a preliminary injunction in our client's favor); *A.Z. v. Nova Classical Academy*, No. 13-CV-975 (D. Minn. complaint filed Apr. 25, 2013) (settled after the school changed its policy on student expression). Thank you for your prompt attention to this matter.

Sincerely,

Rory T. Gray

Rory T. Gray
Jeremy D. Tedesco
J. Matthew Sharp
Alliance Defending Freedom
1000 Hurricane Shoals Rd. NE, Ste. D-1100
Lawrenceville, GA 30043

Joel J. Kirkpatrick
Joel J. Kirkpatrick, P.C.
843 Penniman Ave.
Suite 200
Plymouth, MI 48170