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January 17, 2011

Mr. Myron L. Hanson
Director of Enrollment Services
University of Montana Financial Aid & Enrollment Services
E.L. 218
32 Campus Drive M.S. 2232
Missoula, Montana 58912

Re: Placement of University of Montana Work-Study Students at City Life Community Center

Dear Mr. Hanson:

The purpose of this letter is to request that you allow work-study students to be placed at the City Life Community Center. The undersigned represents City Life with respect to this matter.

Factual Background

City Life Community Center ("City Life") is a 34,000 square foot facility for teens in the heart of Missoula. It includes City Life Café, a full service sandwich and coffee bar; a gymnasium equipped for basketball, volleyball, and fencing; a Student Center, a space in which teens can engage in a variety of activities, including ping-pong, air hockey, video games, darts, and other recreational and social activities; and a paintball facility. Certain City Life spaces are available for rental by community groups and private individuals and families (*e.g.*, birthday parties). The operators of City Life offer a GED tutoring program, a "Ready to Work" program (which teaches basic work skills and prepares teens to be employable), and "Campus Life" (a more structured program for area teens).

A wide-ranging collection of community organizations use City Life facilities. These include Consumer Credit Counseling of Montana, Missoula Parks and Recreation, District Youth Court/Drug Court, Missoula County Public Schools, Fort Belknap Indian Reservation, Sentinel Kiwanis Club, Missoula Rotary Club, Missoula City Fire Department, and a number of religious and athletic organizations. In 2010, City Life was used by 43 not-for-profit or youth related programs in Missoula. Thirty-four of those groups were secular, while the remaining nine were religious, representing diverse backgrounds and denominations. A number of non-profit community organizations have office space on the top floor of the center. Given the varied nature of these groups, it is unsurprising that the activities that occur at City Life are incredibly diverse.

Pursuant to an agreement with the U.S. Secretary of Education, the University of Montana (UM) operates a work-study program. A number of UM students have expressed a desire to perform their work-study employment at City Life. Were they permitted to do so, they would work at City Life's café, perform janitorial tasks primarily, and man the student center (*e.g.*, checking teens in, handing out Wii controllers, and the like). Work-study students would not participate in religious worship or sectarian instruction. Those activities, if they occur at all, occur only in the Student Center after hours, and represent a comparatively small percentage of the total use of the facility—measured either in hours or in square feet. Work-study students would not even be present in the facilities while any inherently religious activities are underway.

As we understand it, you have expressed a concern that statutory and regulatory provisions governing grants for federal work-study programs might preclude the placement of UM work-study students at City Life.

Legal Analysis

By allowing students to perform work-study employment at City Life, UM would not violate its agreement with the Secretary of Education or the relevant statutory and regulatory provisions. Indeed, *forbidding* students to work at City Life would likely violate legal protections of religious freedom.

The Higher Education Act of 1965 sets forth the necessary contents of work-study agreements between the Secretary and participating universities. Such agreements must state that work performed by work-study students "does not involve the construction, operation, and maintenance of so much of any facility as is used or is to be used for sectarian instruction or as a place of religious worship." 42 U.S.C. § 2753(b)(1)(C). The relevant administrative regulation similarly provides that "FWS employment may not . . . [i]nvolve the construction, operation, or maintenance of any part of a facility used or to be used for religious worship or sectarian instruction." 34 C.F.R. § 675.20(c)(2)(iv). As we understand it, your concern is that certain spaces within City Life are "used for sectarian instruction or as a place of religious worship," and that UM work-study students might be involved in the "construction, operation, or maintenance" of those spaces.

The statutory and regulatory language should be read in light of its obvious purpose: to prevent violations of the First Amendment's Establishment Clause, which declares that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. UM would not violate the Establishment Clause by allowing its students to perform work-study employment at City Life. Accordingly, UM would not violate its agreement with the Secretary by allowing work-study students to work in the café, perform janitorial tasks, or man the student center at City Life.

Under current Supreme Court precedent, government programs violate the Establishment Clause when their purpose or primary effect is the advancement of religion. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 648–49 (2002); *Agostini v. Felton*, 521 U.S. 203, 222–23 (1997). A government aid program has the primary effect of advancing religion if it defines its

beneficiaries by reference to religion or results in indoctrination in religion for which the government is responsible. *Mitchell v. Helms*, 530 U.S. 793, 809 (2000).

Allowing City Life to employ UM work-study students would implicate neither of these concerns. The federal work-study program plainly has a secular purpose: to provide financial assistance to students trying to cover college expenses. It also does not have the primary effect of advancing religion. First, neither the overall federal program nor UM's operation of its campus-specific program defines its class of beneficiaries by reference to religion. Second, neither the overall program, nor UM's campus-specific program, nor the placement of UM work-study students at City Life would result in "indoctrination in religion" for which any government entity (including UM) is responsible. UM would simply be allowing work-study students to serve coffee and sandwiches, sweep floors, and hand out Wii controllers. Nothing of these activities result in *any* indoctrination in religion; even if they did, UM would not be responsible for that "indoctrination."

The litany of religious activities the Supreme Court has allowed government to fund makes it even more clear that UM need not forbid work-study students to work at City Life in order to comply with rules designed to prevent Establishment Clause violations. The Court has allowed the State of Ohio to pay for K-12 education at private religious schools, *see Zelman, supra*; has allowed the federal government to pay for educational materials and equipment loaned and given to parochial schools, *see Mitchell, supra*; has allowed the New York City Board of Education to send publicly-paid public school remedial education teachers onto the premises of religious schools, *see Agostini v. Felton, supra*; has allowed the University of Virginia to fund an evangelical student publication, *see Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); has allowed a California public school district to send a publicly-paid deaf interpreter onto the premises of a parochial school, *see Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); has allowed the State of Washington to pay for a blind man's seminary education, *see Witters v. Wash. Dep't of Servs.*, 474 U.S. 481 (1986); among other things. In light of these precedents, it is unthinkable that UM's placement of work-study students at City Life would be deemed a violation of the Establishment Clause, and thus of the statutory and regulatory provisions designed to prevent such violations.

It is worth noting that the Supreme Court's Establishment Clause jurisdiction has become considerably less restrictive in recent decades. For example, in *Agostini*, the Court actually overruled two of its older, "strict separationist" precedents: *Aguilar v. Felton*, 473 U.S. 402 (1985), and *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985). In *Mitchell*, the Court expressly overruled *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977). The relevant statutory and regulatory provisions should be interpreted and applied in light of these significant developments in the directly germane constitutional law.

A overly strict and narrow construction of the relevant statutory language—ignoring the underlying purpose of complying with the Establishment Clause—would lead to absurd results. For example, student and community religious groups use UM meeting space (including the University Center) for religious worship and instruction. Indeed, the Supreme Court held three decades ago that the Free Speech Clause *requires* public universities to give student religious groups equal access to meeting space for religious instruction and worship. *See Widmar v.*

Vincent, 454 U.S. 263 (1981). It would be absurd to interpret the relevant work-study statutory and regulatory provisions to forbid the placement of work-study students in jobs involving the "operation or maintenance" of such facilities. If the provisions were interpreted that way, UM would not be able to itself hire many of the work-study students it currently employs.

The University of Arizona hosted the recent memorial service for those killed by Jared Loughner in Tucson. That event include prayer and Scripture reading. Can it really be the case that the University of Arizona will violate its work-study agreement with the Secretary of Education by allowing employing work-study students to serve as janitors or in the concession stands at the McKale Memorial Center, where the memorial service occurred?

Similarly, the Supreme Court has held that the Constitution requires public school districts to give religious community organizations equal access to meeting space in public school facilities for religious activities, including worship and religious instruction. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001). Again, it would be bizarre to conclude that work-study students could not "operate" or "maintain" public school facilities because religious instructions and worship sometimes occur there.

Along the same lines, religious individuals and groups often use public streets, parks, and sidewalks for religious worship, instruction, and expression. The First Amendment forbids the government from excluding speakers because of the religious content of their speech. *See, e.g.*, *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995). Again, it is hard to believe that the work-study statute and regulation therefore forbid universities from allowing work-study students to perform maintenance services at public parks, streets, and sidewalks.

Refusing to allow UM students to perform work-study employment at City Life might actually *violate* the First Amendment. Denying City Life an otherwise available benefit because it allows religious activities to occur on its premises infringes upon its constitutionally protected rights without adequate justification.

In *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996), a senior center operated by the City of Albuquerque refused to allow a local pastor to show *Jesus*, a film recounting the life of Christ as described in the Gospel of Luke. The City rejected the request in order to comply with the Older Americans Act, under which the senior center received federal funding. The Act provides funds on the condition that the "facility will not be used and is not intended to be used for sectarian instruction or as a place for religious worship." 42 U.S.C. § 3027(a)(14)(A)(iv). Of course, this language is virtually identical to the relevant provisions of the Higher Education Act and the corresponding regulation that are the source of your concerns about placing work-study students at City Life. The U.S. Court of Appeals for the Tenth Circuit held that the city *violated* the First Amendment by denying the pastor's request to show the film. The fact that the city was trying to comply with the Older Americans Act did not immunize it from liability.

Conclusion

We understand and appreciate your desire to comply with UM's agreement with the Secretary of Education and with applicable law. However, the work-study statute and regulation, properly interpreted, do not require you to forbid work-study students from working at City Life on the ground that religious activities sometimes occur there. Indeed, the law likely forbids such an approach. We therefore respectfully request that you permit UM students to perform their work-study employment at City Life.

Thank you in advance for your consideration. We look forward to hearing from you soon.

Very truly yours,

/s Gregory S. Baylor

Gregory S. Baylor
Senior Counsel

cc: Brent Gyuricza
Travis C. Barham, Esq.