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**UNITED STATES DISTRICT COURT
DISTRICT OF HAWAI‘I**

CHILD EVANGELISM FELLOWSHIP)
OF HAWAI‘I, INC.,)

Plaintiff,)

v.)

No. CV-24-00034 DKW-WRP

HAWAI‘I STATE DEPARTMENT OF)
EDUCATION, KEITH HAYASHI,)

in his official capacity as Superintendent of)
the Hawai‘i State Department of Education,)
et al.,)

Defendants.)

**PLAINTIFF’S SUPPLEMENTAL BRIEF IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
LEGAL ARGUMENT.....	2
I. THE SPECIFIC AND OBJECTIVE CRITERIA MUST REMOVE ALL DISCRETION TO DENY APPLICATIONS ON THE BASIS OF CEF’S RELIGIOUS VIEWPOINT.....	2
II. DEFENDANTS SHOULD BE REQUIRED TO MAKE AN INITIAL DECISION WITHIN FOURTEEN (14) DAYS AND ANY APPEAL DECISION WITHIN TEN (10) DAYS.....	4
III. CEF SHOULD BE CLASSIFIED AS A TYPE II ORGANIZATION.....	5
A. It Would Be Unreasonable Not To Classify CEF As A Type II User....	6
B. It Would Be Viewpoint Discriminatory To Fail To Classify CEF As A Type II User.....	7
IV. THE COURT SHOULD ENTER THE FOLLOWING PRELIMINARY INJUNCTION.....	8
CONCLUSION.....	13

TABLE OF AUTHORITIES

CASES

Baldwin Park Free Speech Coalition v. City of Baldwin Park,
2020 WL 758786 (C.D. Cal. Feb. 13, 2020).....2

Child Evangelism Fellowship of MD, Inc. v. Montgomery Cnty. Pub. Schs.,
457 F.3d 376 (4th Cir. 2006).....4

Child Evangelism Fellowship of Minn. v. Minneapolis Special Sch. Dist. No. 1,
690 F.3d 996 (8th Cir. 2012).....7

Cogswell v. City of Seattle, 347 F.3d 809 (2003).....6

Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985).....6

Desert Outdoor Adver., Inc. v. City of Moreno Valley,
103 F.3d 814 (9th Cir. 1996).....4

DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.,
196 F.3d 958 (9th Cir. 1999).....6

Epona v. Cnty. of Ventura, 876 F.3d 1214 (9th Cir. 2017).....2

Freedman v. State of Maryland, 380 U.S. 51 (1965).....2, 4

G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064 (9th Cir. 2006).....4

Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).....6, 7

Kev, Inc. v. Kitsap Cnty., 793 F.2d 1053 (9th Cir. 1986).....5

Thomas v. Chicago Park Dist., 534 U.S. 316 (2002).....3

Wacko’s Too, Inc. v. City of Jacksonville, 658 F. Supp. 3d 1086 (M.D. Fla. 2023)....4

STATUTES

Hawai’i Admin. Rule §8-39-1.....7

Hawai'i Admin. Rule §8-39-2.....3, 11

Hawai'i Admin. Rule §8-39-3.....*passim*

Hawai'i Admin. Rule §8-39-5.....*passim*

Hawai'i Admin. Rule §8-39-7.....3, 11

Hawai'i Admin. Rule §8-39-14.....4, 12

H.R.S. §302A-1148.....2

**SUPPLEMENTAL BRIEF IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION**

Pursuant to this Court’s Order (dkt. 33), Plaintiff Child Evangelism Fellowship of Hawai‘i, Inc. (“CEF”) hereby files this Supplemental Brief in support of its Motion for Preliminary Injunction (dkt. 4).

INTRODUCTION

As CEF pointed out in its moving papers, Defendants’ use policies have unconstitutionally discriminated against CEF on the basis of its religious viewpoint, both on their face and as applied against CEF. (Dkt. 4, Motion for Preliminary Injunction, at 4-26; dkt. 32, Reply in Support of Preliminary Injunction, at 2-13.) Defendants failed to contest, and therefore conceded, that their use policies were unconstitutional prior restraints and that their officials engaged in unconstitutional viewpoint discrimination. (Dkt. 4, Reply in Support of Preliminary Injunction, at 2-4.) This Court, too, recognized Defendants’ concessions. (Dkt. 33, Order Directing Supplement Briefing, at 1-3.) The Court therefore directed Plaintiffs to submit a supplemental brief on (1) objective criteria by which CEF’s use applications should be judged, (2) reasonable time limits for evaluation of CEF’s applications, (3) CEF’s classification as a Type II user under Defendants’ policies, and (4) proposed preliminary injunction language. CEF proposes the following objective criteria, time restrictions, and classification as a Type II user, as well as the proposed preliminary injunction that should issue.

LEGAL ARGUMENT

I. THE SPECIFIC AND OBJECTIVE CRITERIA MUST REMOVE ALL DISCRETION TO DENY APPLICATIONS ON THE BASIS OF CEF'S RELIGIOUS VIEWPOINT.

As the Ninth Circuit has noted, the criteria “must be sufficiently specific and objective so as to effectively place some limits on the authority of City officials to deny a permit.” *Epona v. Cnty. of Ventura*, 876 F.3d 1214, 1222 (9th Cir. 2017). The appropriate objective criteria should be constructed as follows:

(1) Licensing schemes that begin with a requirement that the application “shall” be granted when the application “complies with [licensing] regulations” is sufficiently definite. *Baldwin Park Free Speech Coalition v. City of Baldwin Park*, 2020 WL 758786, *9 (C.D. Cal. Feb. 13, 2020). Hawai‘i statutes provide that CEF “shall” be granted access. (*See* dkt. 1, Verified Compl. ¶23 (quoting H.R.S. §302A-1148(a)).) And, the burden to demonstrate a denial of access under such a “shall be granted” regime must fall on Defendants. *See Freedman v. State of Maryland*, 380 U.S. 51, 58 (1965) (“First, the burden of proving the film is unprotected expression must rest on the censor.”).

(2) The criteria must not be constructed to “prevent or exclude communication of a particular content, but to coordinate multiple uses of limited space, to assure preservation of park facilities, to prevent uses that are dangerous, unlawful, or impermissible under the Park District’s rules, and to assure financial accountability

for damage caused by the event.” *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322 (2002). Defendants should be required to use the limited and objective criteria of whether the applicant (a) is a “not for profit community” organization (dkt. 1, V. Compl. ¶27 (citing Hawai‘i Admin. Rule §8-39-3)); (b) intends to provide “educational or recreational” activities for students in the district (dkt. 1, V. Compl. ¶27 (citing Hawai‘i Admin. Rule §8-39-3)); (c) has timely submitted the appropriate written application demonstrating eligibility to use school facilities (Hawai‘i Admin. Rule §8-39-2); (d) intends to offer its programs for free or to charge a fee to students participating in the educational or recreational activity (Hawai‘i Admin. Rule §8-39-3); (e) has agreed to otherwise comply with all applicable state laws and local ordinances, assume the costs for repairs to facilities damaged during the organization’s use of school facilities, executed the release of liability to the State of Hawai‘i for injuries or damages arising out of the organization’s use of school facilities, and the other relevant considerations of Hawai‘i Administrative Rule §8-39-7; and (f) does not consider the viewpoint of the organization applying to use school facilities.

(3) The criteria must include a requirement that the deciding government official clearly articulate the reasons for any denial of CEF’s application. *See Thomas*, 534 U.S. at 324 (upholding licensing scheme that required government official to “clearly explain its reasons for any denial”); *Desert Outdoor Adver., Inc.*

v. City of Moreno Valley, 103 F.3d 814, 819 (9th Cir. 1996) (invalidating ordinance that allowed the government to “deny a permit without offering any evidence to support” the reason for the denial).

II. DEFENDANTS SHOULD BE REQUIRED TO MAKE AN INITIAL DECISION WITHIN FOURTEEN (14) DAYS AND ANY APPEAL DECISION WITHIN TEN (10) DAYS.

The First Amendment demands that under any system of prior restraint, the government make a determination “within a *specified brief period*.” *Freedman v. State of Maryland*, 380 U.S. 51, 58 (1965) (emphasis added). Based on a host of similar matters, CEF proposes that Defendants be required to make an initial determination under Hawai‘i Administrative Rule §8-39-4(a) within fourteen (14) days of the written application, and any appeal taken under Hawai‘i Administrative Rule §8-39-14 from a denial of access be finally decided within ten (10) days of the appeal. The Ninth Circuit and other federal courts have upheld similar periods as constitutionally sufficient. *See, e.g., G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1082 (9th Cir. 2006) (accepting 14-day approval period as appropriately limiting). *See also Child Evangelism Fellowship of MD, Inc. v. Montgomery Cnty. Pub. Schs.*, 457 F.3d 376, 387 n.7 (4th Cir. 2006) (noting the district’s inclusion of a 15-day approval period); *Wacko’s Too, Inc. v. City of Jacksonville*, 658 F. Supp. 3d 1086, 1122 (M.D. Fla. 2023) (upholding 14-day decision period as constitutionally sufficient). In fact, the Ninth Circuit has held that individuals

prohibited from speaking for even a period of five days can be unconstitutionally restricting, *see Kev, Inc. v. Kitsap Cnty.*, 793 F.2d 1053, 1060 (9th Cir. 1986), so CEF’s proposed 14-day period is eminently reasonable.

III. CEF SHOULD BE CLASSIFIED AS A TYPE II ORGANIZATION.

Defendants define Type II users of school facilities as, *inter alia*, “not for profit community educational or recreational activities . . . conducting general recreational activities . . . for which no admission charge is made, collection taken or offering received during the use of school facilities.” (Dkt. 1, V. Compl. ¶27 (Hawai‘i Admin. R. §8-39-3(2)).) Defendants provide a list of examples of Type II users as, *inter alia*, “nonprofit community organizations” and “other educational or recreational activities approved by the school where no fees are assessed or collected.” (Dkt. 1, V. Compl. ¶30 (Hawai‘i Admin. R. §8-39-5(c)(2)(D)).) CEF unquestionably meets the technical definition of and requirements for classification as a Type II user. As the allegations of CEF’s Verified Complaint make clear, CEF is a non-profit community organization that offers educational and character-building programs to students in public school facilities at no charge. (*See, e.g.*, dkt. 1, V. Compl. ¶15 (CEF is “an international, non-profit children’s ministry” that offers “Christian after-school enrichment programs providing religious and other teaching and activities to encourage learning, spiritual growth, and service to

others”); *id.* ¶17 (CEF offers its Good News Club program to “all children without charging a fee”).)

To classify CEF as anything other than a Type II user of school facilities would be viewpoint based and unreasonable. Where, as here, the government has opened up a limited public forum for expressive activities, “[t]he power to restrict speech [is] not without limits. The restriction must not discriminate on the basis of viewpoint [and] the restriction must be reasonable in light of the purpose served by the forum.” *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001) (cleaned up). Failing to classify CEF as a Type II user would violate both prongs.

A. It Would Be Unreasonable Not To Classify CEF As A Type II User.

“The reasonableness of the Government’s restriction of access to a nonpublic forum must be assessed in the light of the purpose of the forum and all the surrounding circumstances.” *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 809 (1985). “The ‘reasonableness’ analysis focuses on whether the limitation is consistent with preserving the property for the purposes to which it is dedicated,” *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 967 (9th Cir. 1999), and “emphasizes the consistency of the limitation in the context of the forum’s stated purpose.” *Cogswell v. City of Seattle*, 347 F.3d 809, 817 (2003). The State has indicated what its policy is concerning access to public school facilities, such that it is “the policy of the department of education that no available

public school building, facility, or grounds shall be denied for use by the public and community on the grounds of . . . religion.” (Dkt. 1, V. Compl. ¶24 (quoting Hawai‘i Admin. R. §8-39-1).) And, the purpose of the limited public forum created by Defendants’ policies is to permit “nonprofit community organizations” to offer “educational or recreational activities.” Hawai‘i Admin. R. §8-39-5(c)(2)(D). CEF explicitly meets that definition (dkt. 1, V. Compl. ¶¶15-19), and thus it would be patently unreasonable to exclude them from a forum created for the precise activity which CEF offers to students in the district.

B. It Would Be Viewpoint Discriminatory To Fail To Classify CEF As A Type II User.

Excluding CEF from Type II user classification would also be unconstitutionally viewpoint discriminatory. Just as in *Child Evangelism Fellowship of Minn. v. Minneapolis Special Sch. Dist. No. 1*, CEF meets the definition of the district’s criteria for organizations granted access to its facilities. *Compare* 690 F.3d 996, 1001 (8th Cir. 2012) (noting that CEF “provide[s] the enrichment programming described” in the relevant Minnesota statute), *with* (Dkt. 1, V. Compl. ¶¶30, 15, 17 (showing the CEF is a nonprofit community organization whose Good News Club program meets the programmatic requirements of a Type II user under Hawai‘i Admin. R. §8-39-5(c)(2)(D)).) Yet, as here (*e.g.*, dkt. 1, V. Compl. ¶¶51, 55, 64, 69), the district there essentially conceded that the only difference between CEF and the other programs permitted to use the facilities from which CEF was excluded was

CEF’s religious perspective. *CEF of Minn.*, 690 F.3d at 1001 (“CEF provides its enrichment programming from a religious perspective, while the groups who have been allowed to remain in the program do not.”) The Eighth Circuit held that “[e]xcluding CEF on this basis is prohibited viewpoint discrimination.” *Id.*

The Supreme Court’s seminal CEF decision likewise condemns Defendants’ actions here. “Just as there is no question that teaching morals and character development to children is a permissible purpose under Milford’s policy, it is clear that [CEF] teaches morals and character development to children.” *Good News Club*, 533 U.S. at 108. In other words, CEF met the strict criteria for access to facilities—as it meets the definitional requirements for a Type II user here. Yet, as here (*e.g.*, dkt. 1, V. Compl. ¶49), “because Milford found [CEF’s] activities to be religious in nature . . . it excluded [CEF] from use of its facilities.” 533 U.S. at 109. “We find it quite clear that Milford engaged in viewpoint discrimination when it excluded [CEF] from the afterschool forum.” *Id.* The same would be true here.

IV. THE COURT SHOULD ENTER THE FOLLOWING PRELIMINARY INJUNCTION.

THEREFORE, for good cause shown, it is hereby ORDERED, ADJUDGED, AND DECREED this _____ day of May, 2024, that Defendants, Defendants’ officers, agents, employees, and all other persons acting in active concert and participation with them, are hereby restrained and enjoined from enforcing or applying Defendants’ written and unwritten Use Policies and practices against

Plaintiff Child Evangelism Fellowship of Hawai‘i, Inc. (“CEF”) in any manner that denies CEF equal access to its facilities in violation of the First and Fourteenth Amendments to the United States Constitution. To wit,

A. Under Hawai‘i Administrative Rules §§8-39-3 and 8-39-5 and for purposes of determining CEF’s entitlement to access Defendants’ facilities, Defendants must classify CEF in the same category as other similarly situated nonprofit organizations providing community educational and recreational activities to students in Defendants’ schools;

B. Regardless of classification type under Hawai‘i Administrative Rules §§8-39-3 and 8-39-5, CEF shall be allowed access to Defendants’ facilities on an equal basis with similarly situated nonprofit organizations, including but not limited to the Boy Scouts, Girl Scouts, Cub Scouts, and Girls on the Run;

C. Regardless of classification type under Hawai‘i Administrative Rules §§8-39-3 and 8-39-5, CEF shall be entitled to equal access for its after-school Good News Club program at Defendants’ facilities in all respects, such that Defendants:

- (i) must provide CEF equal access to available spaces in Defendants’ facilities whether classroom, cafeteria, or other available indoor spaces that are made available to other similarly situated nonprofit organizations providing community educational and recreational activities;

- (ii) must provide CEF equal access to available benefits in Defendants' facilities that are made available to other similarly situated nonprofit organizations providing community educational and recreational activities;
- (iii) must provide CEF equal access to available spaces in Defendants' facilities at the same time periods that are made available to other similarly situated nonprofit organizations providing community educational and recreational activities; and
- (iv) must provide CEF access to Defendants' facilities on an equal basis concerning fees charged, if any, whether rental fees, service charges, utility charges, or custodial charges outlined in Hawai'i Administrative Rule §8-39-5.

D. Defendants must amend the challenged Use Policies and any other written or unwritten policy, practice, guideline, or application pertaining to community use of school facilities to ensure Defendants evaluate all Facilities Use Applications using only neutral and objective criteria, including

- (i) whether the organization applying to use public school facilities is a not for profit community organization providing educational or recreational activities to students;

- (ii) whether the organization has timely submitted the appropriate written application established under Hawai‘i Administrative Rule §8-39-2;
- (iii) whether the nonprofit organization intends to or does charge a fee to students participating in the educational or recreational activity; and
- (iv) whether the nonprofit organization seeking access to public school facilities has agreed to otherwise comply with the requirements of Hawai‘i Administrative Rule §8-39-7, including compliance with all applicable state laws and local ordinances, assumption of costs for repairs to facilities damaged during the organization’s use of school facilities; execution of the release of liability to the State of Hawai‘i for injuries or damages arising out of the organization’s use of school facilities, and the other relevant considerations of Hawai‘i Administrative Rule §8-39-7.

E. Defendants shall revise and amend the Hawai‘i Administrative Rules to provide for precise time parameters governing the initial review and determination of all applications to use public school facilities and appeals of any adverse determinations and to provide for a written response outlining the specific reasons for any denial of a use application as follows:

- (i) Defendants shall amend Hawai‘i Administrative Rule §8-39-4(a) to provide that for periods of use not exceeding twelve consecutive months, Applications for Type I, II, and III uses shall be filled out by applicant and shall be approved or disapproved by the school’s principal or designee within a period not to exceed fourteen (14) days from the submission of the written application; and
- (ii) Defendants shall amend Hawai‘i Administrative Rule §8-39-14 to provide that applicants who have been denied the use of school buildings, facilities, and grounds may appeal the decision with the district superintendent, who shall issue a decision on the appeal within a period not to exceed ten (10) days; and
- (iii) Any decision denying the use of school facilities, whether the initial decision made by the school principal under Hawai‘i Administrative Rule §8-39-4 or any appeal from a denial made by the district superintendent under Hawai‘i Administrative Rule §8-39-14, must provide the applicant a written denial outlining the specific reasons that the application was denied and which of the criteria outline listed in Paragraph D of this injunction were not satisfied

CONCLUSION

The proposed preliminary injunction should issue immediately.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April, 2024, I cause a true and correct copy of the foregoing to be electronically filed with this Court. Service will be effectuated on all counsel of record via the Court's CM/ECF electronic notification system.

/s/ Daniel J. Schmid

Daniel J. Schmid

Attorney for Plaintiff

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.4(e), I hereby certify that the foregoing document was prepared in accordance with the requirements of Local Rule 7.4(b) and, not counting the items excluded by Local Rule 7.4(d), contains less than 12 pages as required by this Court's Order (dkt. 33).

/s/ Daniel J. Schmid

Daniel J. Schmid

Attorney for Plaintiff