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REPLY TO FLORIDA

August 21, 2023

Via Email Only

Dr. Jason Reimann, Superintendent
Hayward Unified School District
24411 Amador Street
Hayward, CA 94544
jreimann@husd.k12.ca.us

RE: Good News Clubs Facilities Use Request – Fairview Elementary

Dear Superintendent Reimann:

Liberty Counsel is a national nonprofit litigation, education and public policy organization with a primary focus on First Amendment issues, particularly regarding religious liberty and the public schools. My colleague Mary E. McAlister, copied below, is licensed in California.

Liberty Counsel represents the Northern California Chapter of Child Evangelism Fellowship (“CEF”). CEF leadership greatly appreciates the good working relationship it has had in the past with Hayward Unified School District (“HUSD” or “District”). CEF leadership has asked Liberty Counsel to bring a matter to your attention regarding CEF’s longstanding request to use District facilities at Fairview Elementary to hold a Good News Club (“GNC”).

HUSD denied CEF’s Fairview Elementary facilities use request in February 2023, while at the same time, HUSD approved the meetings of another non-school-sponsored group, Girls on the Run. On April 18, 2023, the Good News Club submitted another facilities use request for an abbreviated term at Fairview. This request was also denied. On May 17, 2023, Liberty Counsel emailed Bernardo Varela informing him of CEF’s legal rights. CEF was still not permitted to meet.

In August 2023, CEF again submitted a facilities use request through Facilitron, this time for the 2023-24 school year. On August 17, 2023, HUSD again denied CEF’s request. Accordingly, I am writing to request that the District **please immediately approve CEF’s renewed facilities use request to hold a Good News Club after school on campus at Fairview Elementary School** this upcoming school year.

Please respond on behalf of HUSD in writing by August 31, 2023, or Liberty Counsel will take additional action to prevent continued irreparable harm to the rights of CEF.

Liberty Counsel has recently addressed issues of discriminatory treatment of CEF by the Providence Public School District in Providence, Rhode Island. This treatment resulted in a lawsuit filed by Liberty Counsel. The suit recently settled with a consent decree which includes Liberty Counsel's attorneys' fees. See <https://lc.org/newsroom/details/071823-good-news-club-wins-equal-access-in-ri-school-district>.

FACTS

As you may know, the Good News Club is a nurturing, welcoming, privately sponsored, after-school enrichment club offering training in morals, character, leadership and citizenship, from a Christian/Biblical perspective, through fun activities, projects, stories, songs and games. All children are welcome, regardless of religious belief, and may only attend with parental permission. Attendance is free, and no donations are solicited.

Prior to COVID-19, a Good News Club was held for numerous years immediately after school at Fairview Elementary. In January 2023, CEF representative Korede Adeniji sought to restart the club, and submitted a facilities use request for Fairview Elementary through the online platform Facilitron. Ms. Adeniji spoke with the principal of Fairview in February 2023.

The principal, Mario Gonzales, denied the use request. Ms. Adeniji further questioned him as to the reasons the request was denied, mentioning *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001), with no response. Ms. Adeniji then emailed Associate Superintendent Chien Wu-Fernandez, explained the situation, and included the fact that, as of April 18, the requested room still had not been used to expand the after-school program as Mr. Gonzales had stated. She further requested Ms. Wu-Fernandez' assistance in confirming GNC for an abbreviated 5-week term. Associate Superintendent Wu-Fernandez eventually responded, directing Ms. Adeniji to Bernardo Varela, the Director of School Leadership and Accountability.

Ms. Adeniji then directed her emails to Mr. Varela, who said he would check in with the teacher who had offered the use of her classroom for the GNC meetings when that teacher returned. Two weeks later, the teacher had returned to the classroom and Ms. Adeniji followed up with Mr. Varela, including in her correspondence the fact that another teacher had also offered the use of her room for the GNC meeting. After multiple emails over the span of eight days with no response by Mr. Varela, Ms. Adeniji requested the assistance of Liberty Counsel. On May 17, 2023, Liberty Counsel emailed Mr. Varela, informing him of CEF's legal rights. Mr. Varela still did not respond. In August 2023, CEF again submitted a facilities use request through Facilitron, this time for the 2023-24 school year. On August 17, 2023, HUSD once again denied CEF's request.

The District permits other similarly-situated groups to meet directly after school at multiple locations, including Girl Scouts ("Scouts") and [Girls on the Run](#) ("GOTR"). GOTR is currently meeting at East Avenue Elementary, Harder Elementary, and Palma Ceia Elementary. GOTR is a 501(c)(3) nonprofit organization which offers its character-building lessons and running program for girls. GOTR "provides skill-building experiences to nurture physical, social and emotional competencies that can be applied in other areas of life such as home, school and in the community," teaching character qualities such as "Empowerment, Responsibility, Intentionality, Diversity, Connectedness, Joy, Optimism, Gratitude, Nurturing, Healthy, Open-hearted, Compassion;" in order

to “Nurture [girls’] physical, emotional and spiritual health.”¹ Similarly, the GNC also nurtures students’ spiritual health and teaches good character, but does so for both girls and boys, without regard to sex.

California law and District policies do not permit the District to deny the use of facilities to the GNC, particularly where such are made available to Scouts and GOTR. District practice has been to make facilities freely available to these and other groups similarly situated to the GNC, immediately after school. Moreover, the First Amendment to the United States Constitution, made applicable to the States (and the District) by the Fourteenth Amendment, also prohibits discriminatory denials of facilities use based on unbridled administrator discretion, or based upon religious viewpoint.

DISTRICT POLICIES AND STATE LAWS

Hayward USD Board Policy [BP 1330](#), Use of School Facilities, applies to facilities use requests made by the GNC and others. BP 1330 states that the “Governing Board believes that district facilities and grounds are a **vital community resource** which should be used to foster community involvement and development. Therefore, **the Board authorizes the use of district facilities** by district residents and **community groups for purposes specified** in the Civic Center Act, **to the extent that such use does not interfere with school activities or other school-related uses.**” (Emphasis added).

BP 1330 is the local implementation of the [California Civic Center Act](#), which in applicable part, states:

38134. (a) (1) The governing board of a school district **shall authorize the use of school facilities** or grounds under its control **by a nonprofit organization, or by a club or an association organized to promote youth and school activities**, including, but **not necessarily limited to**, any of the following:

(A) The Girl Scouts; the Boy Scouts; Camp Fire USA; or the YMCA.

The language of the statute is mandatory. Scouts and scouting programs are a “statutorily approved youth group,” under the Act, and the U.S. Supreme Court has determined that the Good News Club is similarly situated to Scouts under *Good News Club v. Milford Central School District*, 533 U.S. 98 (2001). The GNC is thus within the mandate of the Civic Center Act as an authorized youth group, as well as within the ambit of BP 1330.

Furthermore, the GNC’s programming and curriculum is supportive of and directly related to the mandate of California Education Code § 233.5(a), which requires schools to

. . .impress upon the minds of the pupils the principles of **morality, truth, justice**, patriotism, and a true comprehension of the rights, duties, and dignity of American citizenship, and **the meaning of equality and human dignity**, including the **promotion of harmonious relations**, kindness toward domestic pets and the **humane treatment of living creatures**, to teach them to **avoid idleness, profanity**,

¹ <https://www.gotrorthstate.org/programs>

and falsehood, and to instruct them in **manners** and **morals** and the **principles of a free government**. . . to **prevent acts of hate violence**... (Emphasis added).

CEF's program and curricula is thus "school-related" because it contains significant teaching on "the principles of morality, truth, justice," and many more concepts and character qualities. All of the bolded concepts are contained within or supported by the GNC curriculum. These concepts are necessary for students' wellness, so that they may grow up to be productive, well-rounded citizens. These concepts and CEF's teaching of them places CEF into the ambit of BP 1330 for facilities use as a "school-related" use. Character training for District children is directly related to the District's mission, and of great benefit to District schools. Compare with Hayward USD Board Policy BP 0100, Philosophy ("The community provides an essential resource to the educational program.") and Board Policy [BP 1000](#), Concepts and Roles ("Schools, parents/guardians, community members and local organizations **must continually collaborate as partners**" and "[t]he Board recognizes that schools are an important community resource and encourages community members to make appropriate use of school facilities") (Emphasis added).

School sites may certainly offer After School Education and Safety Program (ASES), 21st Century Community Learning Center Program (21st CCLC), 21st Century High School After School Safety and Enrichment for Teens Program (ASSETs), or other program[s] pursuant to Education Code 8421, 8482.3 or 8484.75. Nothing in California Education Code §§ 8421, 8482.3 or 8484.75 requires or authorizes a "curriculum related only" access policy, in violation of the Civic Center Act. The same is true for "Expanded Learning Opportunities" ("ELO") Grants for Local Educational Agencies (LEAs) funded by Assembly Bill 86 (AB 86). Nothing in the bill intends, requires, or authorizes school districts to violate the Civic Center Act.

Under Assembly Bill 86, the character instruction and support provided by the GNC is an existing behavioral health partnership provided to the District at no charge, extending the services the ELO grant funding can purchase for the students. ELO Programming guidelines encourage school districts to "**engage, plan and collaborate on program operations with community partners**," and to "**leverage**" existing behavioral health partnerships.

Nothing in AB 86 or the ELO Programming guidelines suggests school districts should sever relationships with community partners which provide programming pursuant to the Civic Center Act. CEF has long provided supplemental character instruction and support for the students, which directly benefits the District in achieving learning outcomes.

In sum, no requirements of the Civic Center Act have been superseded by any of the above statutory funding guidelines. The District is still obligated to make available space for qualifying groups providing character instruction to children. The District may not discriminate between similarly-situated groups, and the GNC. Fairview Elementary and the District would be hard-pressed to prove a lack of discrimination on the basis of religious viewpoint with the various other after school programs allowed at their schools.

CONSTITUTIONAL STANDARDS

A. Unbridled Discretion

California school districts do not have "the discretion to wholly undo subsection (a)" of the Civic Center Act by closing "the door incrementally in any way deemed proper." *Highland Neighborhood Watch v. Riverside Unified Sch. Dist.*, 87 F.3d 1319 (9th Cir. 1996).

Indeed, unbridled discretion arises when facilities use decisions (and any additional conditions for that use) are left wholly to administrator discretion. This vests a decision-maker with unfettered discretion to burden or ban facilities use, because “without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or view-point of the speaker.” *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 763–64 (1988). The risks of unbridled discretion “are just as present in other forums,” and the prohibition on unbridled discretion is a constant in forum analysis. *CEF of Maryland*, 457 F.3d 376, 386 (2006). This has been a matter of consensus among the courts of appeals. *Id.* at 386–87 (citing *Atlanta Journal & Constitution v. City of Atlanta Dep’t of Aviation*, 322 F.3d 1298, 1306–07, 1310–11 (11th Cir.2003); *DeBoer v. Village of Oak Park*, 267 F.3d 558, 572–74 (7th Cir.2001); *Lewis v. Wilson*, 253 F.3d 1077, 1079–80 (8th Cir.2001); *Sumnum v. Callaghan*, 130 F.3d 906, 919–20 (10th Cir.1997); *Sentinel Commc’ns Co. v. Watts*, 936 F.2d 1189, 1200 n. 11 (11th Cir.1991)); as well as *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1069 (4th Cir. 2006).

The unbridled discretion inquiry is “not a static inquiry, impervious to context,” but “even in cases involving nonpublic or limited public forums,” if a policy “does not provide sufficient criteria to prevent viewpoint discrimination,” then it “generally will not survive constitutional scrutiny.” *Id.* (internal quotations and alterations omitted). *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1069 (4th Cir. 2006). *See also Bell v. City of Winter Park, Fla.*, 745 F.3d 1318, 1324 (11th Cir. 2014) (“A grant of unrestrained discretion to an official responsible for monitoring and regulating First Amendment activities is facially unconstitutional”)(internal citations omitted). “[A] government official cannot have unbridled discretion to decide who may engage in protected activities in a public forum.” *Perry v. Los Angeles Police Dep’t*, 121 F.3d 1365, 1370 (9th Cir. 1997).

B. Viewpoint Discrimination

The Supreme Court and various federal courts have confirmed that organizations holding a religious viewpoint may not be subjected to discrimination on the basis of their religious viewpoint. *See Good News Club v. Milford School District*, 533 U.S. 98 (2001); *Hills v. Scottsdale Unified School District*, 329 F.3d 1044 (9th Cir. 2003); *Child Evangelism Fellowship v. Montgomery County*, 373 F.3d 589 (4th Cir. 2004); *Child Evangelism Fellowship of New Jersey Inc. v. Stafford Township School District*, 386 F.3d 514 (3d Cir. 2004). *See also Child Evangelism Fellowship of Greater San Diego v. Acle*, 2009 WL 484204, in which discriminatory treatment of the Good News Club resulted in Liberty Counsel receiving attorney fees in the amount of \$86,902.50. Where the District by policy and practice permits other, similarly situated groups to meet, whether at Fairview Elementary, or District-wide, the District must extend equal treatment to the GNC, including meeting space, facilities access and fee waivers; and including announcements about the club or its activities.

Multiple courts of appeal have rejected improper treatment of CEF on the basis of CEF’s Christian religious viewpoint. The nature of the program presented by the GNC was considered by the Eighth Circuit Court of Appeals in another Liberty Counsel case, *Child Evangelism Fellowship of Minnesota v. Minneapolis Special Sch. Dist. No. 1*, 690 F.3d 996, 1003-04 (8th Cir. 2012):

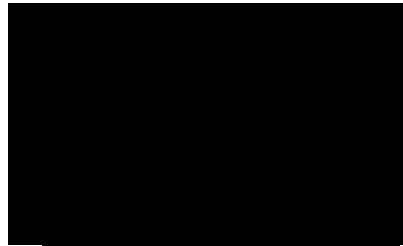
The record reflects that the organization, structure and activities of the various GNCs around the country have not changed since the programs were litigated in *Milford* [more than twenty] years ago. The Supreme Court and our court have both consistently held that this type of speech is private speech, not school sponsored. *See*

Milford, 533 U.S. at 113, 121 S.Ct. 2093; *Wigg*, 382 F.3d at 815; *Ladue*, 28 F.3d at 1509–10. Our sister circuits have ruled similarly. *E.g.*, *Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 525 (3d Cir.2004) (holding that the purpose of the school’s forum was not to convey its own message but to assist all organizations in the community). Following this precedent, we hold that CEF’s meetings, even as part of the after-school program, are not school sponsored.

Id. at 1004. (Emphasis added).

Liberty Counsel has represented CEF chapters nationwide without a loss in extensive litigation. Given the clarity of the law, and the simple nature of the facilities use request, I am requesting that Hayward Unified School District immediately permit the Good News Club to resume on-campus meetings at Fairview Elementary School. I am requesting a written response on behalf of the District, by **August 31, 2023**, regarding this request.

If I do not receive this response, I will unfortunately conclude that the District is indifferent to the concerns expressed herein, and Liberty Counsel will take further action to prevent continued irreparable harm to the liberties of our clients. Thank you for your attention to this request.



c.

Via Email:

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