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May 8, 2024

Via E-Mail Only

██████████
District Administrator
Franklin Public Schools
8255 West Forest Hill Avenue
Franklin, WI 53132
██████████@franklin.k12.wi.us

RE: First Amendment protections of student speech

Dear District Administrator ██████████:

Liberty Counsel writes to Franklin Public Schools (“FPS” or “the District”) in follow-up to our April 29, 2024 letter and incorporates by reference the facts and law set forth therein. Liberty Counsel’s April 29 letter requested the District approve for broadcast the video submission by our student client “Michael Roe” (“M.R.”), for the May 1, 2024 broadcast of the student video broadcast of “The Saber Roar.” We requested a written response by close of business May 1 that the District had broadcast the video. We have received no response from the District, but learned from our client of the District’s shifting excuses and false claims that the student “did not follow the guidelines.” If you are represented by counsel, please forward this letter to counsel immediately.

We now write to demand that District administrators cease unconstitutional censorship of student speech, and approve the broadcast of the submitted video on The Saber Roar. No further substantive edits will be made to the video’s content. Please **provide written confirmation to Liberty Counsel by Friday, May 10, 2024**, that the video will be broadcast prior to (or on) the last scheduled broadcast date. If we do not receive this response, Liberty Counsel will take additional action to prevent irreparable harm to cherished First Amendment liberties.

The District has extended favorable treatment to other student productions about at least one other faith; and numerous secular subjects that the District did not require to be tied to a particular holiday. *See, e.g.*, the production on the [Multicultural Club](#) (“It is always great to show your pride in your culture and background... people can dive deep into their culture and learn more about what it means to be their true selves... it’s a really good experience overall and you get to talk to everyone about their culture; religion...”).

The Saber Roar has aired many student video productions on a variety of topics, including but not limited to Weird Holidays, Cultural Misconceptions, Traditions, Foods, Black History Month, Halloween, Thanksgiving, Christmas, Valentine's Day, and many more, including a student production on [Ramadan and why it is important](#) to people who identify as Muslim, but the District now will not air a student production on [Easter and why it is important](#) to people who identify as Christian, as compiled by a student writer/videographer/editor, with student participants.

The video produced by Liberty Counsel's student client complied with the written guidelines by (and verbal discussion with) the student's Video Production Teacher. The District (via Principal [REDACTED] is now trying to claim that the student's video "did not meet the guidelines," which is false. Two emails were sent on March 13, 2024, one between the Video Production Teacher and the student on that date; and one between Assistant Principal [REDACTED] and the Video Production Teacher. Despite the student's request to Principal [REDACTED] seeking clarity, Principal [REDACTED] has declined to identify which of these two emails he believes constitutes "the guidelines."

One March 13, 2024 email was sent by the Video Production Teacher to M.R. at 12:50 PM, stated in applicable part: "Hey [M.R.], We had spoken about a segment you wanted to plan today. I am cool with you moving forward on the project, just make sure you tie it to something relevant on the calendar (I.E. Easter). Let me know what your plans look like moving forward. Good luck!"

The other March 13, 2024 email was sent at 12:18 PM by Assistant Principal Hein to the Video Production Teacher, and was forwarded by the Video Production Teacher without additional written comment other than "Here," but on Friday, March 15, 2024 at 9:50 AM. The forwarded email from Mr. Hein simply stated:

I think we can do it as long as its **educational** and **related to what has already been shared** from the district level. Here's **what was in the all-district newsletter re: Ramadan**.

The student **could do a feature sharing the event of Easter or something like that?** As long as we're not advocating as to why one religion is better than the other, etc. It should be **purely informational and/or historical**, and **ideally related to an upcoming event** (like Ramadan).

(Emphasis added). See full email string, attached. This email's written guidelines required content that was "educational" "related to what has already been shared" (i.e., a religious subject like Ramadan). The student was given broad discretion ("could do" a feature "sharing the event of Easter") that ended in an open-ended question mark ("*or something like that?*").

Other requirements were "purely informational and/or historical," and "ideally" – certainly not a mandate – "related to an upcoming event." The "and/or" gave the student discretion to make the video "purely informational," which the video was. The video as authorized by Assistant Principal Hein could be – at the student's discretion - "purely informational" "*and*" "historical;" or alternatively, one or the other: "purely informational" "*or*" "historical." The student chose "purely informational," and "ideally" "related" to Christianity; specifically, Easter. The student's submitted video on Christianity/Easter thus complies with all of these (rather broad) guidelines. It even complies with the

arguably unconstitutional “not advocating as to why one religion is better than the other” “guideline,” in that all discussions of faith were from a positive, subjective standpoint of what the Christian faith means to each individual student interviewed.

The broad subject of the video is illustrated by its title (as approved by the Video Production Teacher) hosted on the “Studio Sign Up” Google document which was (and remains) “[Chris]tianity,” even though it later became styled “Easter” and was related *by the student* to Easter. The video discussed the Easter holiday, and the beliefs behind the holiday, as held by community members and students. Additional factual recitation and timeline follows:

On Monday, March 18, at 9:18 AM, the student followed up with the Video Production Teacher regarding the teacher’s last email:

Hey, sorry it took longer than expected for me to respond. If it’s still okay, I’d like to put the Christianity Segment in the May 1st show and I’ll connect it to Easter, and Orthodox Easter which happens May 5th. Also, I’m expecting this segment to be on the longer side (probably 3:30min-4min) if that’s okay. I’m excited about this project and believe it’ll be of high quality. Thanks!

Later that Monday, March 18, at 9:48 AM, the teacher responded:

Sounds great. I will need to see it before allowing it to be published on our Saber Roar channel. It is important that it follows the guidelines given by Mr. Hein and the school handbook. Let me know if you need any further support or clarification from me. Good luck and I’ll see you on Thursday!

The student wrote a list of questions, arranged interviews with friends, and spent many hours on the interviews and the editing of the video, to tell the Franklin Public Schools student body and staff the student’s story about the Easter holiday and what the central figure of Easter – Jesus Christ - means to a number of students who identify as Christians.

On Friday, April 26, 2024 at 9:15 AM, the student showed an almost-final copy of the video to the class, soliciting feedback as was solicited and provided for all other student video productions. In-class comments to the group or the individual student included words to the following effect:

- Teacher - “I really like the segment. I think everyone can agree that it’s the highest quality footage and filming that we’ve seen this year. With that being said, it’s not airing on the Saber Roar.”
- Teacher - “It’s not a quality issue, nor a bad segment, it’s just...”
- Teacher - “There’s a difference between cultural significance/information and personal religious experiences.”
- Teacher - “I can see that you are passionate about this project and I admire that. I will reconsider, but see... I’m also trying to cover my butt here. I don’t want to get in trouble. I’ll send it over to administration.”
- Teacher’s Aid - “I understand why this piece can’t air, but as a Christian, I liked the message...”

- Classmate “A.” - “I don’t really agree with how you [the teacher] said that the segment doesn’t relate to Easter.”
- Classmate “M.” - “You should show this to your church.”
- Classmate “S.” - “The difference between Ramadan and Easter is that Christianity is the main large religion, everyone knows about it.”
- Classmate “R.” - “At the end of the day, it’s a really well-filmed and -edited piece, the shots looked professionally and cinematically filmed. I really hope it airs. I know it’s more religious... but, Ramadan aired, so...”

On April 26, 2024, the Video Production Teacher told M.R. the video was “amazing, visually,” but apparently based on what the teacher had perceived from District staff, that it was “too religious” for him to approve to be seen in the weekly broadcast to the whole high school.

Later on April 26, the student provided Liberty Counsel’s Students’ Rights Memo to the teacher, and asked that he forward the memo with the video to administration for reconsideration. The teacher responded that same day, “I have shared it with all administrators. I simply forwarded your email and spoke with Mr. Jonas about our conversation earlier. I have not heard back from them yet.”

The student heard nothing over the weekend, nor on Monday, April 29, after Liberty Counsel had sent its April 29 letter requesting nondiscriminatory treatment of the student by the District. The student followed up with the Video Production Teacher on Tuesday, April 30, at 3:26 PM.

On April 30 at 7:02 PM Principal ██████ responded on behalf of the teacher (and the District) with the first of many emails belatedly claiming “guidelines” were not followed by the student; where such were not provided originally to the student; nor which have been enforced against other student productions:

As with other students who created segments around a holiday, **you were provided guidelines** that your segment should focus on **providing factual information about Easter from a historical and cultural perspective, as well as the student traditions around said holidays.**

As it is made, your video does/did not yet do this. The segment created will not run as it currently exists on our next show. We have 4 more Saber Roars and we are happy to work with you to edit your video to fit the guidelines provided and air a segment on a Saber Roar.

(Emphasis added). Nevertheless, on Wednesday, May 1, at 9:00 AM, the student expressed appreciation for Principal ██████ email, and requested that Principal ██████ send (or resend) the original guidelines. Principal ██████ responded at 4:02 PM with more smoke and mirrors:

As per your conversation and email with [the Video Production Teacher] in March, **the guidelines messaged and verbalized** surrounding this project were that the focus was going to be on the informational, historical, and/or cultural context of the holiday Orthodox Easter.

Anything that is **educational and informative works**, so long as it is **primarily focused on providing facts surrounding the holiday**. A good example of a project that would be consistent with these guidelines (and which was also subject to these same guidelines) is the video on Ramadan that was recently aired, which **primarily provided general information about Ramadan**, including **when it occurred, why it is celebrated, what practices and traditions accompany the holiday**, and what students most enjoy about the holiday. Please work with [the teacher] in class as you progress and let us know if you have any questions.

(Emphasis added). On May 2, 2024 at 9:43 AM, the student responded requesting the documents referenced by Principal [REDACTED] so he could try to align his project to these shifting standards:

Thank you for your email yesterday (May 1, 2024 at 4:02 PM). You referenced the “email with [the Video Production Teacher] in March” as containing the written portion of the guidelines messaged and verbalized surrounding my proposed project on Easter.

Just so I am on the same page - is the email below the March email you referenced in yesterday’s email?

Would you or [the Video Production Teacher] or Mr. [REDACTED] be able to direct me to a copy of the all-district newsletter referenced in the March email, that referenced Ramadan? It would also be helpful for me to review a copy of the all-district newsletter that referenced Easter.

On Friday, May 3, 2024, Principal [REDACTED] responded with more of the same, claiming (contrary to the March 13 [REDACTED] email) that no information was actually shared with the FPS community via newsletter; declined to answer which specific March 13, 2024 email was “the email with [the Video Production Teacher] in March,” to which Principal [REDACTED] had referred; declined to state whether a District newsletter referenced Easter; and reiterated to the student that he was referencing elusive unwritten “oral guidelines” and subjective standards (that were already met by the original video presentation):

To offer clarity, information was not shared with our community via the newsletter.

The guidelines that your project will need to meet are those that [the teacher] provided to you orally and as set forth in my earlier email: the video must be primarily focused on providing **factual information regarding the holiday, how it is celebrated, and other relevant historical or cultural information about the holiday**. As I said in my earlier email, the Ramadan video meets these guidelines because it **primarily provided general information about Ramadan**, including when it occurs, why it is celebrated, the practices and traditions accompanying the holiday, and what students enjoy most about the holiday. Again, please work with [the teacher] to make sure your video complies with these guidelines.

(Emphasis added). The Ramadan video broadcast on April 3, 2024,¹ was filled with student discussion of Ramadan and associated Islamic religious beliefs and practices, as well as video b-roll of religious practices and religious worship. The Ramadan video showed student interviewees explaining what religious practices were important to them, personally. There is nothing wrong with this – but the District cannot claim that the Ramadan video is acceptable, and M.R.’s video on Easter and the religious significance that Christian students – personally - attach to the central figure of Easter – Jesus Christ - is somehow unacceptable.

Moreover, the Ramadan video included copious, specific (not “generalized” as Principal █████ claimed) student discussion of the holiday; discussion of fasting and prayer – including *Fajr* prayer and *duas* (specific supplications to God) – “read[ing] Quran,” receiving God’s “blessings,” contemplating “this life” (versus the life to come), “forgiveness,” “repentance” and more.

In certain sections of the Ramadan video, there is seen and heard the Islamic call to prayer (which is inherently religious in nature); as well as clips of and discussion of political conflict in Gaza and elsewhere. This is all perfectly permissible under the First Amendment. Students have the right to discuss or advocate for their faith, beliefs, and traditions; and discuss current events – in the context of classroom assignments, student newspaper editorials, or media productions. But the District cannot show favoritism and deem one student video on religion “informational” or “educational” and another “too religious.”

Nothing in the “guidelines” set forth in the March 13, 2024 emails, nor in the syllabus for “Video Production Company II (The Saber Roar Class)” – Course #HT1005Y; nor its [grading rubric](#) justifies the District’s rejection of M.R.’s video submission. Indeed, the syllabus states “Students will ... write, produce and direct other creative original productions. **The programs are student driven and as open and varied as their imaginations.**” (Emphasis added). Nothing in “the school handbook” “guidelines” was violated. See the [Franklin High School Handbook](#). While the Handbook’s “Harassment” policy mentions “harassment, abusive and/or derogatory language and behavior...relating to religious beliefs or moral convictions,” nothing in the student’s Easter video can remotely be considered “harassment.”

The District has opened a forum for student expression under the criteria set forth above and applicable to The Saber Roar. The District has permitted other students to produce videos which the students deem of interest to the larger student body, including discussion of culture or religious beliefs and the meanings of religious concepts or practices behind holidays. Now, the District is claiming M.R. “didn’t comply with guidelines.”

Outside of narrow categories of speech that may be lawfully prohibited, the student(s) who produce Saber Roar videos have the editorial and creative freedom to produce a video that reflects the message they wish to convey. Any opinions or religious or other advocacy in these videos are attributable to the individual students who produced the video (and the students or others who were interviewed), and not the District.

¹ https://www.youtube.com/watch?v=c2_JotpXf_Q&t=207s

“Viewpoint discrimination” is impermissible. As set forth previously at length, the United States Supreme Court and various federal courts have confirmed that speech consisting of religious viewpoint may not be subjected to discrimination on the basis of that religious viewpoint. *See Good News Club v. Milford School District*, 533 U.S. 98 (2001) and progeny.

Unbridled discretion is also impermissible. The presence of vague guidelines – the lack of written guidelines — or no guidelines at all — to govern speech restrictions is disfavored in First Amendment law. Even in a nonpublic forum the government “must be able to articulate some sensible basis for distinguishing what may come in from what must stay out.” *Minn. Voters Alliance v. Mansky*, 585 U.S. 1, 138 S.Ct. 1876, 1888, 201 L.Ed.2d 201 (2018). Policies that afford unlimited discretion to a decisionmaker are vulnerable to viewpoint discrimination. *See id.* at 1891 (without “objective, workable standards” to guide a decisionmaker's discretion, the decisionmaker's own beliefs may shape his decisions). For this reason, courts have found unconstitutional grants of “unbridled discretion,” meaning laws that provide no standards by which a government official's decision to restrain speech must be guided. *See Barrett v. Walker Cnty. School Dist.*, 872 F.3d 1209, 1221-23, 1225 (11th Cir. 2017) (holding that the unbridled discretion doctrine applies to limited public fora, but declining to decide whether it applies outside the context of prior restraints on expression). Moreover, “[c]ourts have found that unwritten, informal, unevenly enforced ‘policies’ that in fact afford great discretion to the decisionmaker, even in limited public fora, are w[o]nt to lead to viewpoint discrimination.” *McMahon v. City of Panama City Beach*, 180 F.Supp.3d 1076, 1109 (N.D. Fla. April 12, 2016) (citations omitted). Where a policy is unwritten, **it may lead to the use of impermissible post-hoc rationalizations for decisions that were actually motivated by viewpoint discrimination.** *McMahon*, 180 F.Supp.3d at 1109 (collecting cases). And now, the District is engaging in exactly that.

Leaving a decision wholly to administrator discretion vests the decision maker with unfettered discretion to burden or ban protected speech, 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). 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). “[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).

Strict scrutiny is triggered when governments “treat *any* comparable secular activity more favorably than religious exercise,” and it “is no answer that a State treats some comparable secular ... activities as poorly as or even less favorably than the religious exercise at issue.” *Tandon v. Newsom*, 141 S. Ct. 1294, 1296, (2021)(citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 67-68 (2020) (*per curiam*)(emphasis original). Accord, *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 686 (9th Cir. 2023)(“targeting is not required for a

From: [REDACTED], [REDACTED], [REDACTED], [REDACTED] <[REDACTED]@franklin.k12.wi.us>
Date: Fri, Mar 15, 2024 at 9:50 AM
Subject: Fwd: Saber Roar Question
To: [REDACTED], [REDACTED] <[REDACTED], [REDACTED]@franklinsabers.org>

Here

----- Forwarded message -----

From: [REDACTED] <[REDACTED]@franklin.k12.wi.us>
Date: Wed, Mar 13, 2024 at 12:18 PM
Subject: Re: Saber Roar Question
To: [REDACTED], [REDACTED] <[REDACTED], [REDACTED]@franklin.k12.wi.us>

I think we can do it as long as its educational and related to what has already been shared from the district level. Here's what was in the all-district newsletter re: Ramadan.

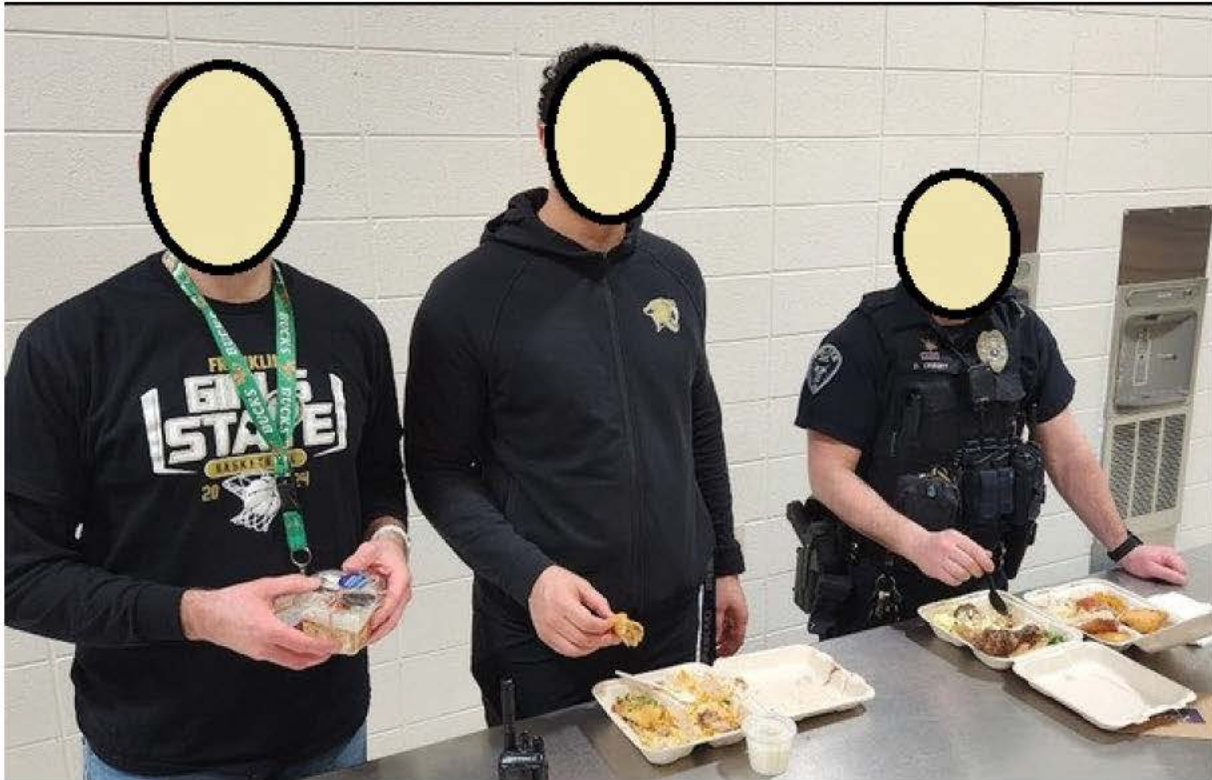
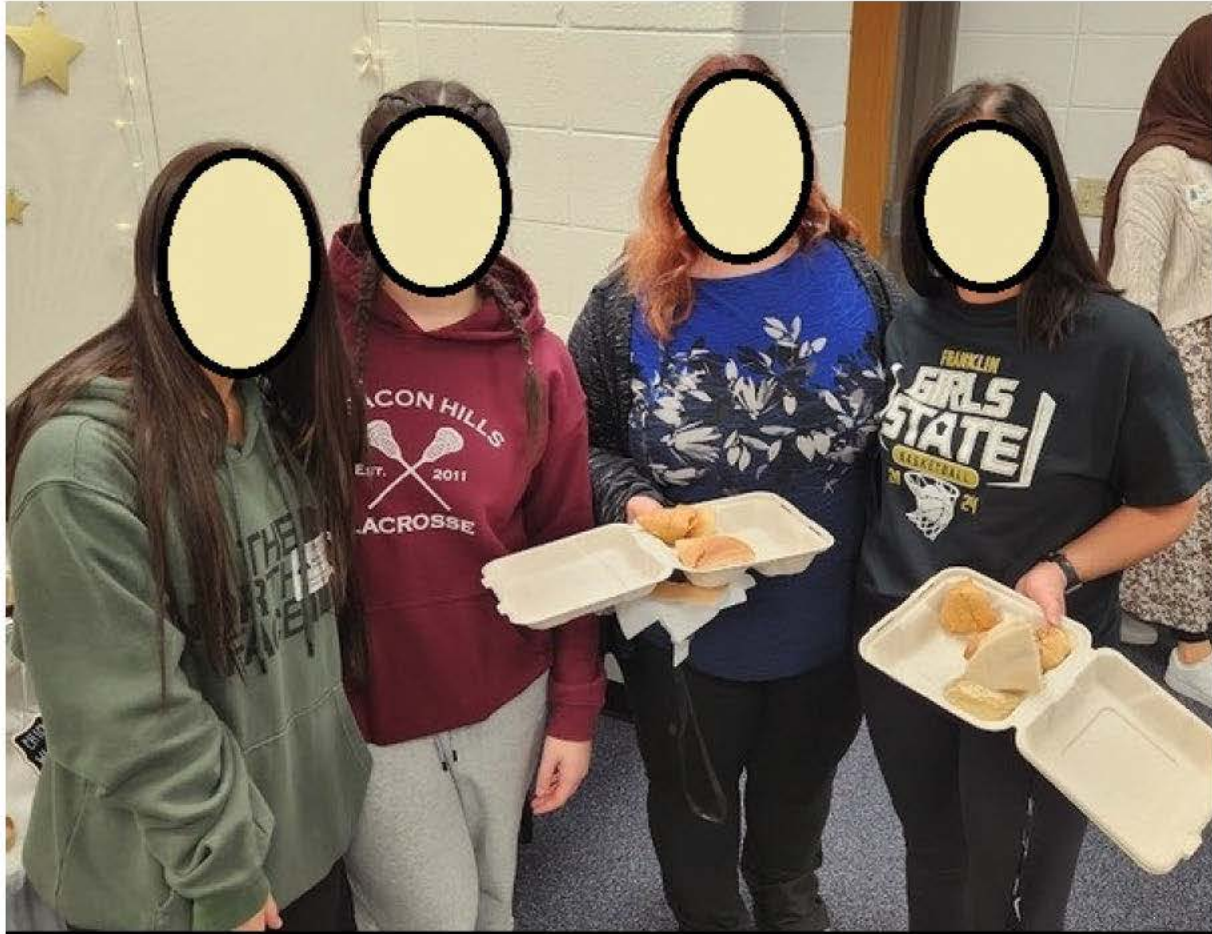
The student could do a feature sharing the event of Easter or something like that? As long as we're not advocating as to why one religion is better than the other, etc. It should be purely informational and/or historical, and ideally related to an upcoming event (like Ramadan).

Let me know what you think.

SHARING ABOUT RAMADAN

Last Friday, for the third year in a row, a group of Muslim parents and students surprised Franklin High School staff and district leadership with a special meal to celebrate the beginning of Ramadan. Ramadan begins on the evening of Sunday, March 10th and runs through the evening of Tuesday, April 9th. Please remember those that may be fasting during the days of Ramadan. Shared in the special message that was given to attendees of the lunch, "the practice of fasting is one of the five pillars of Islam and helps to build self discipline, restraint, generosity and strengthens a connection to God."

Thank you to the parents and students that took time to create such great dishes and to share more about Ramadan. This type of kindness and generosity only helps us all to be a #BetterCommunity



With Saber Pride,



Associate Principal
Franklin High School

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