Center for Law & Religious Freedom

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Ms. Nancy Albarrán
Superintendent, San Jose Unified School District
855 Lenzen Avenue
San Jose, CA 95126

By email (superintendent@sjusd.org) and CMRRR 7019 2280 0001 0477 3126

Re: Ongoing Violation of Federal Equal Access Act, 20 U.S.C. §§ 4071-4074, and the First Amendment to the U.S. Constitution

Dear Superintendent Albarrán:

Christian Legal Society's Center for Law & Religious Freedom is among the oldest religious freedom organizations in the United States and was instrumental in the passage of the Equal Access Act ("EAA").[1] Together with the law firm of Seto Wood & Schweickert LLP, we have been engaged by the Fellowship of Christian Athletes ("FCA") and FCA's corporate legal counsel, Sherman & Howard LLC, to write on behalf of students in the San Jose Unified School District (herein, "SJUSD" or the "District") who wish to form student clubs associated with FCA in order to urge the District to stop its illegal and unconstitutional discrimination against, and harassment of, these students due to their religious beliefs. The District was informed of its violations of the EAA this summer but has taken no steps to remedy them. *See* Exhibit 1.

For several years, students within the District have met without incident in officially recognized student FCA groups for the purpose of engaging in religious speech. However, in May of 2019, after students and faculty expressed hostility towards FCA's religious beliefs, the District instructed schools within its jurisdiction to revoke official recognition of student FCA groups. The District has provided no reasons for its revocation of recognition and its failure to comply with the EAA and the First Amendment. Correspondence from SJUSD officials confirms that the District was aware of its obligations under the EAA to provide meeting-related rights to the student FCA groups on an equal basis with other noncurriculum-related groups. But the District nevertheless failed to follow clearly established law requiring the District to give student FCA groups the same official recognition and associated benefits, including meeting space and eligibility for ASB funding, that it gives to other groups.[2]

Attorneys from Sherman & Howard sent letters to the District over the summer explaining that these revocations violated the EAA and requesting the District to reinstate the student FCA

[1] *See* 128 Cong. Rec. 11784-85 (1982) (Sen. Hatfield statement) (recognizing assistance).
[2] *See Board of Education v. Mergens*, 496 U.S. 224 (1990); *Prince v. Jacoby*, 303 F.3d 1074, 1086 (9th Cir. 2002) ("The School District unlawfully discriminates against Prince and the World Changers by denying them equal access to [ASB] funds."). Many noncurricular groups are officially recognized and meet in SJUSD high schools, including Key Club, Big Sister/Little Sister, and Frisbee Club, thereby triggering application of the EAA.

groups for the current school year. Unfortunately, the District not only failed to respond to these letters, but also denied recognition to the student FCA groups for the current school year.

Moreover, the District has refused to prevent students and even faculty from harassing students participating in FCA meetings. The District has repeatedly permitted students to congregate outside the FCA students' meetings while shouting and holding signs that mischaracterize and disparage their fellow students' religious beliefs. During an October meeting, while some students were holding signs and shouting outside the FCA meeting space, student reporters for the school newspaper entered the FCA students' meeting and proceeded to take hundreds of pictures of the students in attendance during the half-hour meeting. Before this meeting, a District employee left his classroom to confront a guest speaker and criticize FCA's religious beliefs. On December 4, the school security officer had to intervene to prevent student protestors from entering the FCA students' meeting in order to disrupt it. More disturbingly, the attempt to intrude on the FCA meeting was encouraged by Pioneer faculty, who also participated in the protest. Despite full awareness of these efforts by some students and faculty to intimidate, stigmatize, harass, and bully the students participating in FCA meetings, District officials have taken no action to punish or prevent this conduct.

Approved by Congress with overwhelming bipartisan support, the EAA protects all students, including those participating in religious clubs and LGBT clubs, from being excluded from public secondary school campuses.[3] The EAA exemplifies the foundational wisdom that a free society prospers only when the free speech rights of all are respected, regardless of the current popularity of their beliefs.

In order to comply with the law and to respect the rights of its students, the District must immediately restore official recognition to the student FCA groups at District schools. The District must also take prompt action to end the harassment of students participating in FCA meetings.

The District's Actions Regarding Student FCA Groups

1. *Bowing to pressure, the District revoked its recognition of student FCA groups while continuing to recognize other noncurriculum-related student groups.*

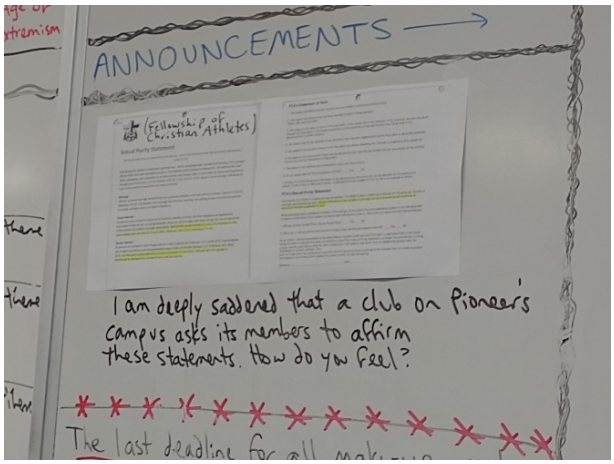
During the 2018-19 school year, officially recognized student FCA groups met at Pioneer High School, Willow Glen High School, and Leland High School. The students met to engage in religious speech, study the Bible, encourage and support one another, and pray. They chose to meet as student FCA groups because FCA focuses on encouraging the spiritual lives of students who participate in, or are interested in, organized athletics. FCA students also engage in service projects in their communities. For example, FCA students in the Bay Area have been involved in several charitable projects, including: helping at homeless shelters and soup kitchens; providing

[3] *See, e.g., Board of Educ. v. Mergens,* 496 U.S. 226 (1990) (requiring access for religious student group); *Straights and Gays for Equality v. Osseo Area School No. 279,* 540 F.3d 911 (8th Cir. 2008) (requiring access for LGBT student group).

Christmas gifts to disadvantaged children; providing sports equipment to children in the Dominican Republic and Haiti; and cleaning the bleachers after sporting events.

On or about April 23, 2019, a history teacher at Pioneer High School, Peter Glasser, posted a Statement of Faith and a Sexual Purity Statement on his classroom whiteboard. Under these statements, Mr. Glasser wrote, "I am deeply saddened that a club on Pioneer's campus asks its members to affirm these statements. How do you feel?" This insensitive and stigmatizing display remained up for a week over the complaints of FCA students who had Mr. Glasser as a teacher. Mr. Glasser's display not only disparaged some of his students' religious beliefs, but also mischaracterized the standards for student FCA groups, which do not have membership requirements, but instead welcome all students to participate in meetings, as long as they are not disruptive.

Peter Glasser's Whiteboard



At the same time, students at Pioneer pressured District officials to derecognize the FCA student group. Despite evidencing a clear understanding of the District's legal duty under the EAA to "provide[] equal access to all student groups, regardless of the focus or viewpoint of the group," District officials bowed to pressure and derecognized the student FCA groups. *See* Exhibit 2. The District's decision was made prior to any discussion with the FCA student leaders. Principals at Willow Glen and Pioneer provided FCA student leaders with the same verbatim "talking points from the district." *Id.* Shortly thereafter, four Pioneer students who opposed the FCA students being allowed to meet thanked the Pioneer principal for "removing the FCA as a club from the school ASB" but indicated that they had "additional concerns about the future of [FCA] at Pioneer." *See* Exhibit 3.

Some of the students who had expressed opposition to FCA's continued presence on campus helped form a Satanic Temple Club chapter and sought recognition to meet as an officially recognized student group at Pioneer. The District recognized the Satanic Temple Club for the 2019-2020 academic year but denied recognition to the FCA student club. Despite these students' expressed antipathy toward FCA and their identification of "protesting" as one of the club's core

activities, the District approved the Satanic Temple Club to meet on the same day and at the same time as the student FCA chapter. See Exhibit 4.

2. *The District has permitted students and teachers to stigmatize, intimidate, harass, and bully fellow students who choose to attend student FCA meetings.*

Certain students at Pioneer High School (including students connected with the Satanic Temple Club) spent the fall semester harassing the FCA students in an attempt to force the FCA students to stop meeting. On September 16, 2019, students circulated flyers announcing a planned protest to be held outside of the specific room in which the FCA students were meeting. See Exhibit 5. When shown these flyers, the principal indicated that he had no intention of interfering with the protest, despite harassment of students being a violation of both California Educational Code § 48900 and District Board Policy 3515.2. Due to the announced protest immediately outside of their meeting room, the concerns of their parents, and the inaction of District officials, the FCA student leaders reluctantly cancelled their September 18 meeting, which was to have been their first meeting in the 2019-2020 school year.

On October 23, 2019, with the full knowledge and consent of District officials, some students began protesting directly outside of the room in which the FCA students were meeting. They carried signs disparaging the FCA students' religious beliefs, such as "HATRED IS NOT A RELIGIOUS BELIEF." *See* Exhibit 6. This protest grew to nearly 20 students. In addition, Mr. Glasser stationed himself at the office sign-in desk and asked the invited speaker for the FCA meeting, a Stanford football player, whether he knew that the FCA student club had been derecognized for its religious beliefs. At this same meeting, students from the school newspaper, *The Pony Express*, which has published editorials expressing antipathy toward FCA students' religious views, entered the FCA students' meeting and proceeded to walk around the room, taking hundreds of pictures of the FCA students during their half-hour meeting.

On December 4, 2019, some students again organized a protest of about 20 students directly outside the FCA students' meeting. These student protestors shouted and carried signs disparaging the FCA students' religious beliefs. In addition, at least one teacher took part in this protest and encouraged a number of students to attempt to intrude into the FCA students' meeting with the purpose of disrupting the meeting. The school security officer had to intervene to prevent disruption of the FCA students' meeting. *See* Exhibit 7.

To date, the District has taken no action to discipline or reprimand any student or faculty for this conduct despite being fully aware of these incidents. The FCA student leaders and their families are understandably concerned that the harassment will continue to escalate in the coming weeks if District officials continue to neglect their duty to provide an educational environment free from harassment. Instead of teaching students respect and tolerance for others with whom they disagree, the District has permitted, and itself contributed to, a hostile educational environment in which FCA students are being stigmatized, intimidated, harassed, and bullied for their religious beliefs.

The District's Actions and Inaction Violate Federal Law and the Constitution

1. *The District's revocation of its recognition of student FCA groups violates clearly established law under the Equal Access Act.*

The EAA makes it unlawful "for any public secondary school which receives Federal financial assistance … to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting … on the basis of the religious. . . content of the speech at such meetings." 20 U.S.C. § 4071(a). *See Board of Education v. Mergens*, 496 U.S. 226, 235-236 (1990). As the Ninth Circuit has held, the EAA "guarantees public secondary school students the right to participate voluntarily in extracurricular groups dedicated to religious, political, or philosophical expressive activity protected by the First Amendment when other student groups are given this right." *Prince v. Jacoby*, 303 F.3d 1074, 1078 (9th Cir. 2002).

The District's revocation of FCA recognition violates not only Supreme Court precedent but also law clearly established by the Ninth Circuit in *Prince*. In that case, just as here, the school district allowed a Christian student group to meet but refused to grant it access to ASB funds or to engage in fundraising activities permitted to other groups. *Id*. at 1077. The *Prince* court unanimously held that the school district itself "discriminate[d] against [religious students] by denying them equal access to those funds." *Id*. at 1086. Moreover, the court held that a school district "discriminates against [members of a Christian club] based on their viewpoint, when it prohibits them from engaging in or charges them to participate in other fund-raising activities . . . on an equal basis with other ASB groups." *Id*.

Furthermore, the Supreme Court and the Ninth Circuit have both held that merely allowing students to meet informally on campus fails to satisfy the EAA's requirements. In *Mergens*, the Court rejected the school district's attempt to excuse its noncompliance with the EAA by arguing that it let the students meet albeit without recognition. The Court firmly rebuffed that maneuver: "Although the school apparently permits respondents to meet informally after school . . . we hold that [the school district's] denial of respondents' request to form a Christian club denies them 'equal access' under the Act." 496 U.S. at 247. *See also, Prince*, 303 F.3d at 1082 (observing that the Supreme Court in *Mergens* "disagreed with the school district's reasoning" that it complied with the EAA by "allow[ing] the Christian group only to meet informally on the school premises after school").

Some school districts have tried to evade the EAA's requirements by creating a two-tiered system of noncurricular student clubs in which religious student groups are consigned to second-class status. But the Supreme Court in *Mergens* required the school district to provide the religious student group with the same benefits, including official recognition and access to the school newspaper, bulletin boards, club fair, and public address system, that other noncurricular student groups enjoyed. In *Prince*, the Ninth Circuit rejected a recalcitrant school district's attempt to create a two-tiered system of noncurricular student groups, in which one tier enjoyed official recognition and its attendant benefits while the other tier was allowed to meet but denied official recognition and its attendant benefits. 303 F.3d at 1082; *id* at 1077 ("[W]e hold that the School District violated either the Act or [the student's] First Amendment rights by denying her Bible club

the same rights and benefits as other School District student clubs and by refusing to allow the Bible club equal access to school facilities on a religion-neutral basis.") Under Supreme Court and Ninth Circuit precedent, the District's refusal to restore recognition and its attendant benefits to the student FCA group violates the EAA, a violation of federal law that is not ameliorated by the District's allowing the FCA students to meet.

2. *Under clearly established law, the District's refusal to recognize FCA student groups is viewpoint discrimination that violates the students' First Amendment rights.*

The District's refusal to give the FCA students the same benefits that it gives to other groups violates not only the EAA, but also the First Amendment and its condemnation of viewpoint discrimination. Deeming viewpoint discrimination "an egregious form of content discrimination," the Supreme Court has emphasized that "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). Similarly, in *Prince*, the Ninth Circuit held that the District's disparate treatment of a religious student group violated students' rights because it was based "purely on [the group's] religious viewpoint in violation of the First Amendment." *Prince*, 303 F.3d at 1091. *See* Donovan, 336 U.S. 211, 226 (3d Cir. 2003) (same). Here, as in *Prince*, the District has singled out the FCA students for derecognition solely because of their perceived religious beliefs.

Both the Third and Ninth Circuits have held that the First Amendment is violated when school officials deny a religious club "equal access to meet on school premises during the activity period solely because of the club's religious nature." *Id*. *Accord Prince*, 303 F.3d at 1077. Such an "exclusion constitutes viewpoint discrimination." *Donovan*, 336 F.3d at 226. *See also, Child Evangelism Fellowship of Minn. v. Minneapolis Spec. Sch. Dist. No. 1*, 690 F.3d 996, 1001-1002 (8th Cir. 2012)(school district's exclusion of a religious group from a limited public forum violated the First Amendment even though the group "was merely accorded less favorable treatment than other groups, as opposed to being denied access outright.")

Finally, the District here has violated the FCA students' free speech rights because it has restricted their speech in response to listeners who do not like what they think the FCA students' speech might be. This "heckler's veto" is a classic violation of the speakers' free speech rights: Students and faculty complained to District officials, and a few weeks later, the FCA students were derecognized.

Rather than bowing to the hecklers, the District should have explained that freedom of speech requires all of us to hear ideas with which we disagree and to respect the right of others to express ideas that we do not like. Our free society is nurtured when public schools teach the importance of protecting free speech for all--rather than the lesson the District is currently teaching, which is that it will suppress students' speech simply because other students and faculty do not like their religious beliefs. Quite simply, governmental restriction on speech it deems "offensive" is viewpoint discrimination because "[g]iving offense is a viewpoint." *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017).

3. *Under clearly established law, the District's targeting students for their religious beliefs, as well as its denial of access to a generally applicable program of benefits because of those beliefs, violate the Free Exercise of Religion Clause***.**

The Free Exercise Clause guarantees all Americans the "right to believe and profess whatever religious doctrine [they] desire[]." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). Government may not regulate, compel, or punish religious beliefs. *See id.*; *Sherbert v. Verner*, 374 U.S. 398, 402 (1963); *Torcaso v. Watkins*, 367 U.S. 488, 492-95 (1961). The government cannot impose special burdens upon individuals because of their religious beliefs or status. *Smith*, 494 U.S. at 877; *McDaniel v. Paty*, 435 U.S. 618, 627 (1978). To state what should be obvious, the government may not "penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities." *Sherbert*, 374 U.S. at 402.

The District's actions violate the Free Exercise Clause in part because they are motivated by and reflect hostility towards the FCA students' religious beliefs. *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2024 n.4 (2017). Government action "targeting religious beliefs as such is never permissible." *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 530 (1993). *See also McDaniel*, 435 U.S. at 626 (plurality opinion). Religious beliefs in particular may not be targeted because District officials find them offensive. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1731 (2018) ("[I]t is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive.")

Even if the District's actions and inaction were not targeting the FCA students' religious beliefs, the mere denial of access to a government program of generally applicable benefits because of a religious organization's beliefs is status discrimination that violates the students' free exercise of religion. "[I]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Trinity Lutheran*, 137 S. Ct. at 2022. Nor can the District pressure a religious organization to "renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified." *Id.* at 2024. But that is precisely what the District has done by denying FCA students recognition and the accompanying full access to the benefits available to other student groups. The District is limiting the FCA students' access solely because its perception of their religious beliefs. The District's actions are "odious to our Constitution . . . and cannot stand." *Id.* at 2025.

Conclusion

It is our clients' hope that this matter will be resolved amicably based on the clear legal obligations described above and the common interest of all parties in promoting mutual respect. To resolve this matter, the District must:

(1) Rectify its unlawful conduct and comply with the EAA and the First Amendment by restoring official recognition, with all its attendant benefits, to the FCA student groups;

(2) Take all necessary and proper measures to protect SJUSD students attending FCA clubs from actions that are stigmatizing, intimidating, bullying, and harassment, including taking prompt measures to prevent its employees and students from continuing their harassment of students who wish to associate with FCA;

(3) Compensate our clients for the reasonable time their attorneys have spent protecting their rights in this matter; and

(4) Implement mandatory training for its administration and faculty with respect to students' religious speech and exercise as protected by federal law.

We respectfully request a response by January 28, 2020. Should the District fail to reinstate official recognition to the FCA student clubs and pay the compensation amount by January 28, 2020, we are prepared to pursue all available legal remedies, including injunctive relief, damages, attorneys' fees, and other equitable remedies.

This letter also puts the District on notice that attempts to retaliate against FCA or any students for asserting their protected rights will lead to further legal liability for the District and its officials. The District must also preserve all documents, including emails and electronic documents, that may be related to this matter in any way.

Thank you for your attention to this matter. You can reach us by email at rsmith@clsnet.org or by phone at 703-894-1081 for further discussion.

Respectfully,

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