



FREEDOM of CONSCIENCE DEFENSE FUND

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Dear Ms. Marten:

I write with regard to the San Diego Unified School District's (SDUSD) collaboration with the Council on American-Islamic Relations (CAIR) to "combat Islamophobia" and the bullying and discrimination of Muslim students. As President and Chief Counsel of the Freedom of Conscience Defense Fund, a national public interest law firm specializing in Constitutional Law, I have serious concerns about the constitutionality of SDUSD's approach to address the challenges faced by the Muslim student community.

We can agree that all students, regardless of ethnicity or religious belief, should have a safe learning environment at school. However, SDUSD's decision to adopt Islam-centric training and resources provided by CAIR could result in government entanglement with religion; a wholly disproportionate favoritism towards Muslim students to the exclusion of students of other faiths or no faith; and potential threats to the First Amendment rights of non-Muslim students. Taken as a whole, the district's actions, when implemented, would likely violate the U.S. Constitution, and consequently would invite time-consuming and expensive legal challenges.

First, SDUSD's collaboration with CAIR raises questions of impermissible, "excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602 (1971). That being so, courts have long held that the First Amendment is a safeguard against "[a] union of government and religion." *Malnak v. Yogi*, 592 F.2d 197 (3d Cir. 1979). SDUSD claims that it is working with CAIR only to combat Islamophobia, bullying, and discrimination. However, the First Amendment prohibits a governmental agency from attempting to effect a secular goal by the propagation of religious concepts. *See id.*

Here, the district's implementation of the resources set forth by CAIR, *the nation's most prominent Islamic advocacy group*, does not address the secular goal of combating *per se* "bullying." Rather, it is the wholesale realignment of school curricula and the students' learning environment to the recommendations of a religious organization whose stated mission is to "enhance the understanding of Islam" and "empower American Muslims."

In support, according to the "LCAP Gaol 4: Positive School Environment, Climate and Culture with Equity at the Core, and Support for the Whole Child" PowerPoint, which was presented at SDUSD's April 4th, 2017 board meeting, some of the district's "Action Steps" to be taken during this initiative is to "provide resources and strategies to support students during the upcoming month of Ramadan"; "review and vet materials related to Muslim culture and history"; "explore and engage in formal partnerships" with CAIR; and "[p]rovide . . . opportunities for staff related to *awareness and advocacy for Muslim culture.*"

(Emphasis added.) In totality, an objective observer could reasonably infer that a primary effect of SDUSD's plan is to advance and promote Islam, which would give "the effect of communicating a message of government endorsement of religion." See *Lemon v. Kurtzman*, 403 U.S. 602; see also *Lynch v. Donnelly*, 465 U.S. 668 (1984).

Second, SDUSD's plan to devote time and resources to aid Muslim students raises concerns of unconstitutional disproportionality. It is well established that the government (e.g. a public school district) cannot impart or attempt to impart "a message that religion or a particular religious belief is favored or preferred." *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005). Indeed, the Supreme Court has held that "school sponsorship of a religious message is impermissible because it sends the ancillary message to [students] who are nonadherents that they are outsiders, not full members . . . and an accompanying message to adherents that they are insiders, favored members. . . ." *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 390 (2000) (internal quotation marks omitted).

Here, the district's advancement of training and resources advanced by CAIR, an Islamic organization, and designed exclusively for Muslim students, could send a message to students that *only* Muslim students can receive special protection from bullying and discrimination. Indeed, one could wonder whether the district would ever adopt and implement recommendations by the Catholic League or another Christian advocacy organization to stop the bullying of and discrimination against Christian students.

Further, SDUSD's plan not only raises concerns about unconstitutional disproportionality; it adopts an unbalanced weight of attention to Muslims in light of the American people's religious affiliations. For example, a 2014 study by the Pew Research Center stated that 70.6% of the American population identified themselves as Christians. On the other hand, according to the Pew Forum, as of 2016, 3.3 million Muslims are living in America, comprising about 1% of the total U.S. population. It is reasonable to infer that SDUSD's disproportionate focus on addressing bullying and discrimination of Muslim students, and not students of other faiths, clearly shows favoritism to Islam.

In addition, SDUSD's initiative establishing Muslim students as a special class of bullied and discriminated students disregards and pushes bullied and discriminated students of other faiths to the margins. For example, Christianity is the most discriminated religion in the world. According to Open Doors USA, nearly 215 million Christians worldwide face intense levels of persecution for their faith. Further, the Center for Study of Global Christianity has estimated that over 90,000 Christians were killed in 2016 for their religious beliefs. Although these are global statistics, they clearly demonstrate that discrimination and bullying is not limited to Muslims.

Third, SDUSD's plan increases the likelihood that students who express viewpoints and opinions contrary to Islamic teachings will be singled out for discipline. To explain, the district has adopted the definition of "bullying" as put forth by the U.S. Department of Health and Human Services: "Aggressive behavior that is intentional and that involves an imbalance of power or strength. Typically, it is repeated over time." However, in the Endnotes section of CAIR's report, which formed the basis of this initiative, CAIR states that "the term 'bullying' refers exclusively to bias-related actions committed by students." The common definition of "bias" is to "incline toward or away from something or someone." *Bias*. American Heritage Dictionary (5th ed. 2017).

Thus, it is possible that if, during this initiative, SDUSD interprets the term "bullying" in accordance with CAIR's definition, then any criticism of Islam, or even the favoring of one's own religion

as opposed to Islam, could constitute bullying. Such actions implicate serious First Amendment free speech issues. Further, it is plainly contrary to SDUSD's Board Policy 5145.2(a), which states that the Board "respects students' rights to express ideas and opinions, take stands on issues, and support causes, even when such speech is controversial or unpopular."

For the reasons set forth above, by showing favoritism to Islam, SDUSD will most certainly face lawsuits challenging its decision on constitutional grounds. To be sure, such litigation will be costly and burdensome. For example, I represented four Christian firefighters who sued the San Diego Fire Department because it forced them to participate in San Diego's annual gay pride parade. I won that case in the trial and appellate courts; consequently, the City of San Diego was ordered to pay hundreds of thousands of dollars in attorneys' fees and costs. There is no doubt that taxpayers will not tolerate litigation concerning this issue, especially if there are reasonable, alternate anti-bullying strategies that SDUSD could adopt that do not raise constitutional concerns.

To conclude, it is important that schools take steps to ensure that all students are treated with the respect and dignity that they deserve, including Muslim students. However, "[t]he Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn." *Lemon v. Kurtzman*, 403 U.S. 602 at 625. If SDUSD's collaboration with CAIR appears to endorse Islam in the eyes of an objective observer and opens the possibility of threats against students' First Amendment rights, then the district's initiative would certainly cross the line and run afoul of the Constitution. Therefore, the most prudent course of action would be to rescind the prior vote on this issue and consider another approach that does not implicate serious constitutional questions. If SDUSD continues with the present initiative, then it will undoubtedly find itself in a needless, lengthy, and expensive court battle that it will inevitably lose.

Sincerely,

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A handwritten signature in black ink that reads "Charles S. LiMandri". The signature is written in a cursive style with a large initial "C".

Charles S. LiMandri