

FREEDOM of CONSCIENCE DEFENSE FUND

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September 19, 2018

Honorable John M. Gore
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950 Pennsylvania Ave., NW
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Honorable Kenneth L. Marcus
Assistant Secretary for Civil Rights
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U.S. Department of Education
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Re: Classifying Religions in Public School Anti-Bullying Policies

Dear Mr. Gore and Mr. Marcus:

The Freedom of Conscience Defense Fund is a team of pro bono attorneys who litigate First Amendment cases at the trial level. We monitor with interest the U.S. Department of Justice Civil Rights Division's (CRD) and the U.S. Department of Education Office for Civil Rights' (OCR) enforcement of federal civil rights laws that protect public school students from religiously motivated bullying and discrimination.¹ At issue are the Departments' current policies and guidelines directing public schools to "take immediate concerted action" to protect Muslim students from bullying. I write to argue that any public school initiative that classifies on the basis of religion is not only bad policy; it is unconstitutional.

In this letter, we outline what we view are the flaws of the Departments' current policies, and we make specific recommendations for a neutral approach that protects all students from bullying, regardless of religion. In addition to complying with the First Amendment, these recommendations correspond to the Attorney General's recent guidelines on religious liberty² as well as the OCR's ongoing commitment in "ensuring that the provision and allocation of educational resources afford equal educational opportunity for all students."³

¹ See, e.g., Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c (prohibits in public schools discrimination based on race, color, sex, religion, or national origin); Letter from Russlynn Ali, Asst. Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., *Dear Colleague Letter: Harassment & Bullying* 5 n. 14 (Oct. 26, 2010) ("DOJ has the authority to remedy discrimination based solely on religion under Title IV."), <https://goo.gl/etxH8W>.

² Federal Law Protections for Religious Liberty, 82 Fed. Reg. 49668 (Oct. 26, 2017) ("Government may not officially favor or disfavor particular religious groups."), <https://goo.gl/Nuzpx4>; Promoting Free Speech & Religious Liberty, Exec. Order No. 13798 § 4, 82 Fed. Reg. 21675 (May 4, 2017), <https://goo.gl/Hij1oG>.

³ Letter from Catherine E. Lhamon, Asst. Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., *Dear Colleague Letter: Resource Comparability* (Oct. 1, 2014), <https://goo.gl/HsQ5cu>.

1. Overview of the Departments' Unconstitutional Policies

The CRD and OCR currently enforce several policies and guidelines targeting or emphasizing specific religious groups for special protections.⁴ For example, the CRD and OCR circulate a “Fact Sheet” on combating discrimination against Muslim students.⁵ The DOJ also issues guidance entitled “Twenty Plus Things Schools Can Do to Respond to or Prevent Hate Incidents Against Arab-Americans, Muslims, and Sikhs.”⁶ Directions include:

- “Treat all anti-Arab, anti-Muslim, or anti-Sikh incidents seriously”;⁷
- “Identify special concerns by Arab, Muslim, or Sikh staff or students. Conduct a full assessment of tensions in your school”; and
- “Make cultural awareness learning opportunities concerning Arab Americans, Muslims, and Sikhs available to staff, students, and the general community. Use the leadership of these groups to help with the training.”

In addition, the DOJ has “sponsored a series of webinars,” including “Strategies for Educators, Counselors, and Community Members to Build Protective Factors for America’s Muslim Youth,”⁸ and “Helping Educators and Counselors Prevent Bullying of America’s Muslim Youth.”⁹

Although preventing bullying may be a compelling government interest, “the Religion Clauses ... and the Equal Protection Clause as applied to religion ... all speak with one voice on this point: Absent the most unusual circumstances, one’s religion ought not affect one’s legal rights or duties or benefits.”¹⁰

2. Religion-based Anti-Bullying Policies and the Constitution

2.1 The First Amendment prohibits government discrimination in favor of one religion.

Together, the Free Exercise Clause and the Establishment Clause prohibit the government from officially preferring one religious group to another.¹¹ To that end, the government “may not adopt programs or

⁴ Letter from Arne Duncan & John B. King, Jr., U.S. Dep’t of Educ., *Dear Colleague Letter* (Dec. 31, 2015), <https://goo.gl/9GnDGx>; U.S. Dep’t of Justice, *Combating Religious Discrimination Today: Final Report* (July 2016), <https://goo.gl/dMWxXn>; Jinnie Spiegler & Sarah Sisaye, *Protecting Our Muslim Youth from Bullying: The Role of the Educator*, Homeroom: The Official Blog of the U.S. Dep’t of Educ. (Feb. 2017), <https://goo.gl/AVLZ8z>.

⁵ See U.S. Dep’t of Educ., U.S. Dep’t of Justice & White House Initiative on Asian Am. & Pac. Islanders, *Fact Sheet on Combating Discrimination against AANHPI & MASSA Students* (June 6, 2016), <https://goo.gl/KpirdU>.

⁶ Cmty. Relations Serv., U.S. Dep’t of Justice, *Twenty Plus Things Schools Can Do to Respond to or Prevent Hate Incidents Against Arab-Americans, Muslims, and Sikhs* (2014), <https://goo.gl/SE1oJi>.

⁷ According to a recent news article, representatives from the United Sikh and the Sikh American Legal and Education Fund met with Mr. Marcus to request that the OCR reclassify Sikhism from a religion to an ethnicity when investigating civil rights complaints. See Rebecca Klein, *Sikh Group to Department of Education: Treat Our Religion as An Ethnicity, Too*, Huffington Post, Sept. 13, 2018, <https://goo.gl/g91rru>.

⁸ Office of Juvenile Justice & Delinquency Prevention, U.S. Dep’t of Justice, *Strategies for Educators, Counselors, and Community Members to Build Protective Factors for America’s Muslim Youth* (Oct. 13, 2016), <https://goo.gl/myZmHg>.

⁹ Office of Juvenile Justice & Delinquency Prevention, U.S. Dep’t of Justice, *Helping Educators and Counselors Prevent Bullying of America’s Muslim Youth* (May 26, 2016), <https://goo.gl/NYqy3x>.

¹⁰ *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O’Connor, J., concurring in part and concurring in the judgment in part)

¹¹ *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); see, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845 (1995); *Larson v. Valente*, 456 U.S. 228, 244–45 (1982); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S.

practices which aid or oppose any religion. This prohibition is absolute.”¹² Thus, a policy or program that classifies on the basis of religion is subject to strict scrutiny, which means it can survive only if it is narrowly tailored to achieve a compelling interest.¹³

It is undisputed that protecting students from bullying and discrimination is a compelling government interest.¹⁴ Victims of bullying suffer from a range of psychological and school-related problems, including depression, anxiety, low self-esteem, and even suicide. As studies show, however, bullying is not limited to children of certain characteristics.¹⁵ That being so, favoring some students over others undermines a school district’s interest in ensuring all students receive a quality education. In fact, school policies that discriminate in favor of one religious class of students could cause the *opposite* effect. “When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion are generated.”¹⁶ Therefore, “[a] proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of neutrality toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents.”¹⁷

Even if protecting a particular religious sect justifies contravening the Religion Clauses, the government “must specifically identify an actual problem in need of solving.”¹⁸ In the context of anti-Muslim bullying, the following case is illustrative. In 2017, five families and two advocacy organizations sued the San Diego Unified School District after it adopted an “anti-Islamophobia initiative” to combat the purported widespread bullying of Muslim students.¹⁹ In doing so, the district school board relied on surveys provided by the Council on American-Islamic Relations (CAIR), an Islamic advocacy organization. CAIR claimed that after President Donald Trump’s election, a “plague” of Muslim bullying had swept through district schools.

756, 792–93 (1973); *Gillette v. United States*, 401 U.S. 437, 449 (1971); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947).

¹² *Larson v. Valente*, 456 U.S. 228, 246 (1982) (cleaned up).

¹³ *See id.* at 255.

¹⁴ The DOE and the Centers for Disease Control and Prevention (CDC) define bullying as “any unwanted aggressive behavior(s) by another youth or group of youths who are not siblings or current dating partners that involves an observed or perceived power imbalance and is repeated multiple times or is highly likely to be repeated.” R. Matthew Gladden et al., Ctrs. for Disease Control & U.S. Dep’t of Educ., *Bullying Surveillance among Youths: Uniform Definitions for Public Health & Recommended Data Elements 7* (2014), <https://goo.gl/JVQXnd>.

¹⁵ In 2017, 19% of students nationwide in grades 9–12 reported being bullied on school property in the 12 months preceding the survey. Laura Kann et al., Ctrs. for Disease Control & Prevention, U.S. Dep’t of Health & Human Servs., *The 2017 Youth Risk Behavior Surveillance System 108* (2018), <https://goo.gl/dRDAiW>; *see also* StopBullying.gov, Dep’t of Health & Human Servs., *Who Is at Risk* (last reviewed Feb. 7, 2018) (“No single factor puts a child at risk of being bullied or bullying others.”), <https://goo.gl/rRczmZ>.

¹⁶ *Wright v. Rockefeller*, 376 U.S. 52, 67 (1964) (Douglas, J., dissenting) (cleaned up); *see, e.g., Kunz v. New York*, 340 U.S. 290, 313 (1951) (Jackson, J., dissenting) (“If any two subjects are intrinsically incendiary and divisive, they are race and religion.”).

¹⁷ *Kiryas Joel*, 512 U.S. at 696 (internal quotation marks omitted).

¹⁸ *Brown v. Entm’t Merch. Ass’n*, 564 U.S. 786, 799 (2011) (internal quotation marks omitted); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 644 (1994) (plurality) (“[The government] must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”).

¹⁹ *Citizens for Qual. Educ. San Diego, et al. v. San Diego Unified Sch. Dist., et al.*, No. 17-CV-1054-BAS-JMA (S.D. Cal.). The federal district court’s decision on the plaintiffs’ motion for a preliminary injunction is pending.

But the school district’s state-mandated bullying reports showed otherwise. Indeed, in 2015 and 2016, the district reported to California’s Department of Education just two incidents of bullying related to Muslim students. On the other hand, the district reported eleven incidents of anti-Semitic bullying.²⁰ Further, according to a district “Protected Class” report, from July 2016 to December 2016, just seven out of approximately 130,000 children were reported to have been bullied because of their religion. That report did not show how many of those seven students, if any, were Muslim.²¹ The plaintiffs claim the initiative unnecessarily singled out Muslim students for special protections, thereby violating the Establishment Clause. Given the lack of evidence of any concrete problem of Muslim bullying, the plaintiffs argue that the initiative’s purpose—to combat Islamophobia—is speculative at best and cannot support a compelling interest.²²

Public schools boards have a moral—and legal—obligation to protect students from bullying and harassment. They also have an obligation to ensure that all students learn in a safe and nurturing environment. But “local school boards must discharge their important, delicate, and highly discretionary functions within the limits and constraints of the First Amendment.”²³ To that end, the CRD and ORC should encourage school districts to uphold the Establishment Clause’s absolute prohibition against government preference toward one religion. In this regard, the Departments’ current policies and guidelines, even if well-intentioned, fail.

2.2 Policies that Favor One Religion Violate the Equal Protection Clause.

The Fourteenth Amendment provides that “No State shall ... deny to any person within its jurisdiction the equal protection of the laws.”²⁴ The Supreme Court has repeatedly recognized that “[a]t the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.”²⁵ To be sure, anti-bullying programs that focus on perceptively disadvantaged students are motivated in part by good intentions. But ultimately, the Fourteenth Amendment “protect[s] *persons*, not *groups*.”²⁶ For this reason, anti-bullying programs that classify on the basis of religion “not only raise grave constitutional questions, they also undermine the moral basis of the equal protection principle.”²⁷

When the government distributes benefits based on race or religion, that action is reviewed under strict scrutiny.²⁸ Thus, the Departments’ policies and guidelines favoring Muslim students can be justified only if

²⁰ See Pls.’ Mot. Prelim. Inj., LiMandri Decl. ¶ 5, Ex. 3; ¶ 6, Ex. 4, *Citizens for Qual. Educ. San Diego, et al. v. San Diego Unified Sch. Dist.*, et al., No. 17-CV-1054-BAS-JMA (S.D. Cal. filed Feb. 23, 2018), available at <https://goo.gl/XhbtKQ>.

²¹ *Id.* at ¶ 7, Ex. 5.

²² See Pls.’ Mem. in Supp. of Mot. Prelim. Inj. at 15, *Citizens for Qual. Educ. San Diego, et al. v. San Diego Unified Sch. Dist.*, et al., No. 17-CV-1054-BAS-JMA (S.D. Cal.) (citing *Brown, supra*, at 800), available at <https://goo.gl/DCH5rt>.

²³ *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 865 (1982) (internal quotation marks omitted).

²⁴ U.S. Const. amend. XIV, § 1.

²⁵ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007).

²⁶ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

²⁷ *Id.* at 240 (Thomas, J., concurring).

²⁸ See *Johnson v. California*, 543 U.S. 499, 505–506 (2005).

they are narrowly tailored to achieve a compelling state interest.²⁹ The “means chosen,” accordingly, must “fit the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate [religious favoritism] or stereotype.”³⁰ Protecting students from bullying may be a compelling interest, but dividing students along religious lines is an extreme approach considering religious classifications would have “no logical stopping point.”³¹

That some students are bullied because they are Muslim is not in dispute. But if the Departments were to crunch the numbers, they would find that anti-Jewish bullying far surpasses any alleged “plague” of Muslim bullying. According to the FBI’s Uniform Crime Reporting program,³² law enforcement reported 1,538 offenses of religiously motivated hate crimes in 2016. Of those incidents, 24.8 percent were anti-Muslim. On the other hand, 54.2 percent were anti-Jewish. According to the Anti-Defamation League, anti-Semitic incidents in K-12 schools increased by approximately 100 percent each year for the past two years.³³ And in 2017, anti-Semitic incidents on college and university campuses increased by 89 percent from 2016. These statistics show the pitfalls inherent in religious-based classifications.

Moreover, the constitutional imperative of equal protection does not change in the face of political correctness or appeals to sympathy from sectarian activists. Groups like CAIR argue that “anti-Islamophobia initiatives” further interests such as “promoting tolerance,” “encouraging inclusion,” and “increasing cultural awareness.” While those interests have merit, CAIR ultimately aims to enshrine tolerance and inclusion as “a permanent justification” for religious favoritism.³⁴ This “offend[s]” the “fundamental equal protection principle” of religious equality.³⁵

Classifications of students according to their religion “embody stereotypes that treat individuals as the product of their [religion], evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.”³⁶ Given the Supreme Court’s commitment to equality and neutrality, the CRD and OCR should rescind any policy or guideline directing public schools to single any religious group for special protections.³⁷

3. “Diversity and Tolerance” Initiatives and the Threat of Outside Sectarian Activists

3.1 Case Study: CAIR and the Myth of “Islamophobia”

In recent years, outside activist groups have increasingly pressured school districts to adopt policies and programs to “foster diversity” and “promote tolerance.” More often than not, these groups take advantage of their access to impressionable children to promote their political or religious agenda. The Supreme Court has recognized the danger of allowing sectarian groups to indoctrinate students, which is why it “has been

²⁹ See *id.*; see also *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546–47 (1993).

³⁰ *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003).

³¹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989).

³² Unif. Crime Reports, Crim. Justice Info. Servs. Div., FBI, *Unif. Crime Report, Hate Crime Stats. 2016* (2017), <https://goo.gl/kssa79>.

³³ Anti-Defamation League, *Audit of Anti-Semitic Incidents: Year in Review 2017* (2018), <https://www.adl.org/media/11174/download>.

³⁴ See *Grutter*, 539 U.S. at 342.

³⁵ *Id.*

³⁶ *Miller v. Johnson*, 515 U.S. 900, 912 (1995).

³⁷ *Larson, supra*, at 246.

particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.”³⁸ Indeed, the Court holds that “[i]n no activity of the State is it more vital to keep out divisive forces than in its schools.”³⁹ The Council on American-Islamic Relations (CAIR) is one such force.

CAIR identifies itself as America’s largest Muslim civil liberties organization.⁴⁰ In keeping with its religious identity, CAIR “believes the active practice of Islam strengthens the social and religious fabric of our nation.”⁴¹ CAIR’s founder, Omar Ahmad, said: “Islam isn’t in America to be equal to any other faith, but to become dominant. The Koran, the Muslim book of scripture, should be the highest authority in America, and Islam the only accepted religion on Earth.”⁴² Relevant here, Ibrahim Hooper, CAIR’s Director of Strategic Communications, said: “I wouldn’t want to create the impression that I wouldn’t like the government of the United States to be Islamic sometime in the future. But I’m not going to do anything violent to promote that. I’m going to do it through education.”⁴³

Part of CAIR’s strategy is to perpetuate the myth of “Islamophobia,” which it defines as “a closed-minded hatred, fear or prejudice toward Islam and Muslims.” Nationwide, CAIR falsely claims that a plague of “Islamophobia” festers in public schools and that school officials have utterly failed to address it.⁴⁴ Borrowing politically correct language such as “promoting tolerance” and “fostering diversity,” CAIR pressures many school districts to allow them to rewrite their anti-bullying policies; conduct professional development “workshops” to learn about Islamic religious practices; teach students “how to become allies to Muslim students”; and revise school curricula to make it more “inclusive” for Muslim students. Indeed, children as young as kindergarteners have been subjected to lectures by imams and forced to learn material

³⁸ *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) (“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”).

³⁹ *Id.* (quoting *McCullum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring)); see, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 133 (2001) (Stevens, J., dissenting); *Skoros v. City of New York*, 437 F.3d 1, 46 (2d Cir. 2006); *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1389 (3d Cir. 1990); *Brown v. Gilmore*, 258 F.3d 265, 292 (4th Cir. 2001); *Bauchman v. W. High Sch.*, 132 F.3d 542, 570 (10th Cir. 1997).

⁴⁰ Despite its benign appearance, CAIR is notorious in public policy and national security circles for its ties to Islamic supremacism. Federal prosecutors have acknowledged that Muslim Brotherhood leaders founded CAIR and that it has conspired with Muslim Brotherhood affiliates to support terrorists. See Opp’n to CAIR’s Mot. for Leave to File Br., etc., *United States v. Holy Land Found. for Relief & Dev.*, Cr. No. 3:04-CR-240-G, 2007 WL 2011319 (N.D. Tex. Sept. 4, 2007). In 2007, federal prosecutors named CAIR as an unindicted coconspirator with the Holy Land Foundation for Relief and Development and five of its leaders for materially supporting Hamas. See Trial Br. Attach. A, *United States v. Holy Land Found.*, Cr. No. 3:04-CR-240-G (N.D. Tex. May 29, 2007). Among those convicted in the Holy Land Foundation trial was Ghassan Elashi, the founder of CAIR’s Dallas chapter. See *United States v. Elashi*, 440 F. Supp. 2d 536 (N.D. Tex. 2006), *aff’d in part, vacated in part, rev’d in part sub nom. United States v. Elashyi*, 554 F.3d 480 (5th Cir. 2008). In 2008, the FBI ended formal contact with CAIR because of its ties to terrorism. See Letter from James E. Finch, Special Agent, FBI, to Muslim Community Outreach Program (MCOP) Invitee (Oct. 8, 2008). In 2014, the United Arab Emirates, as part of a federal law to combat extremism, designated CAIR as a terrorist organization. See *UAE Cabinet Approves List of Designated Terrorist Organisations, Groups*, Emirates News Agency (Nov. 15, 2014, 10:34 PM).

⁴¹ *About Us*, Council on American-Islamic Relations, <https://goo.gl/CEw78c> (last visited Sept. 17, 2018).

⁴² Lisa Gardiner, *American Muslim leader urges faithful to spread Islam’s message*, San Ramon Valley Herald (July 4, 1998).

⁴³ Lou Gelfran, *Reader Says Use of ‘Fundamentalist’ Hurting Muslims*, Minneapolis Star Tribune (April 4, 1993).

⁴⁴ Jonathan S. Tobin, *FBI Statistics Belie Islamophobia Hysteria*, Commentary (Nov. 20, 2011), <https://goo.gl/eQb7hH>.

designed to promote Islam and denigrate anyone who disagrees with Islam as “Islamophobic.” Consequently, school boards influenced by CAIR’s lobbying are unwittingly opening a pathway for Islamic indoctrination and invidious discrimination.

4. The Danger of a Religion-based Anti-Bullying Policy

Instead of protecting students from bullying and harassment, a religion-based anti-bullying policy hurts students, educators, and the overall learning environment. In addition to being invidiously discriminatory, such a policy dilutes concrete definitions like “bullying” and “harassment,” it allows for unbridled discretion in enforcement decisions, and it potentially punishes student expression protected under the First Amendment.⁴⁵

First, groups like CAIR push to redefine well-established terms such as “bullying,” “harassment,” or “bias” into amorphous vagaries that punish broad swaths of conduct and speech protected by the First Amendment. For example, CAIR defines “bullying” as referring “*exclusively* to bias-related actions committed by students.”⁴⁶ This definition is in stark contrast to the definition of “bullying” used by the DOJ and DOE.⁴⁷ So, in working with CAIR on an “anti-Islamophobia” initiative, which definition would a school board adopt? Would a school board member even catch the difference? This is no small matter. The definition of “bias” is a “preference or an inclination, especially one that inhibits impartial judgment.”⁴⁸ Thus, under CAIR’s definition of “bullying,” non-Muslim students who have a *preference* or *inclination against Islam* are “bullies.” Put together, it is not hard to see how a student’s opinion in World History class during an open discussion about Islam—say, radical Islam, the persecution of Christians in Muslim-majority countries, or women’s rights under sharia law—would be perceived as “bias” or “Islamophobic” by CAIR.

This type of scenario no doubt invites school officials to invade the private thoughts and beliefs of students, probing for possible bias or “close-minded prejudice,”⁴⁹ and it accordingly prompts “arbitrary, discriminatory, and overzealous enforcement” of anti-bullying policies simply because the speech “hurt” someone’s “feelings” or “triggered” a negative response.⁵⁰ But “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.”⁵¹

⁴⁵ In any event, CAIR’s recommended anti-bullying policies are unnecessary because every school district nationwide enforces state and federally mandated anti-bullying policies that protect *all* students.

⁴⁶ Council on American-Islamic Relations California, *Mislabeled: The Impact of School Bullying and Discrimination on California Muslim Students* 29 (2015) (emphasis added), available at <https://goo.gl/nZ8VaF>. CAIR also defines “Islamophobia” as “the close-minded prejudice against or hatred of Islam and Muslims.” *Id.*

⁴⁷ See *supra* note 13.

⁴⁸ *Bias*, American Heritage Dictionary (5th ed. 2017).

⁴⁹ See *supra* note 41.

⁵⁰ *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951).

⁵¹ *Texas v. Johnson*, 491 U.S. 397, 414 (1989); see, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (noting that government may not prohibit speech based on the “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint”); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001) (Alito, J.) (“[T]he Supreme Court has held time and again, both within and outside the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it.”).

Second, a religion-based anti-bullying policy goes beyond an alleged bully's conduct and instead focuses on his motives (*e.g.*, whether he is "Islamophobic") and ultimately his political or religious beliefs. This Orwellian approach empowers school officials—or even outside groups like CAIR—to "re-educate" the student so that he conforms to institutional expectations or the status quo (*e.g.*, to be "tolerant" or even become "allies to Muslim students"). But any attempt to recondition a student's beliefs or opinions under the threat of discipline exceeds the school's proper role. After all, the school is an institution of education, not indoctrination.

5. What We Recommend

To be clear, school districts do have a wide range of constitutionally sound measures to address violence, threats, and abuses.⁵² But schools should ensure an *equally* safe and welcoming educational environment for *all* students, regardless of religion. Given the foregoing, we encourage the CRD and OCR to take the following actions:

1. Rescind all policies and guidelines that direct or encourage school districts to single out a religious sect for preferential treatment or otherwise classify on the basis of religion;
2. Issue guidance to school districts about prohibiting sectarian organizations like CAIR to advance their political or religious agenda in schools; and
3. Publish a sample anti-bullying policy that incorporates the foregoing recommendations and emphasizes, among other things, precise definitions of "bullying," "harassment,"⁵³ and "discrimination" and a focus on an alleged bully's objectively offensive conduct rather than his motive or intent.

The above recommendations are consistent with the Constitution and both Departments' bullying prevention guidelines. Should you have questions about our recommendations, we would be happy to discuss them.

Sincerely,



Daniel J. Piedra, J.D.
Executive Director
Freedom of Conscience Defense Fund

⁵² The Supreme Court and lower courts have held that schools have considerable latitude in regulating student speech. *See, e.g., Virginia v. Black*, 538 U.S. 343 (2003) (punish threats of violence); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) ("prohibit the use of vulgar and offensive terms" at school); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969) (restrict on-campus speech when there is evidence of "a substantial risk" it will materially disrupt school activities); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999) (prohibit harassment under Title IX where the behavior is "so severe, pervasive, and objectively offensive that it denies its victims equal access to education").

⁵³ It is worth noting that "harassment" is not exempted from the First Amendment's protections. *See Saxe, supra*, 206 ("[T]here is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements ... that denigrate religious beliefs."); *see also DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596–97 (5th Cir. 1995) (holding that when an anti-discrimination law is applied "solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech").

Mr. Gore and Mr. Marcus
September 19, 2018
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