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October 16, 2015

Hiram Sasser *via email*
Liberty Institute
2001 West Plano Parkway, Suite 1600
Plano, Texas 75075

Re: Bremerton School District/Joseph Kennedy

Dear Mr. Sasser:

We are attorneys representing the Bremerton School District in Bremerton, Washington. The District has provided us with a copy of your letter to the District's Superintendent and Board of Directors, dated October 14, 2015, for response. In accordance with the Washington State Rules of Professional Conduct Rule 4.2 (and the corresponding provision of the Oklahoma Rules of Professional Conduct), please direct all further communication regarding this matter to this office.

The District has worked in good faith with Mr. Kennedy to identify clear guidelines by which he is able to exercise his fundamental religious freedoms, while respecting and avoiding any violation of the constitutional rights of others in the school community. The District remains willing to discuss and clarify those expectations. However, it must be understood that the guidelines and directives provided by the District to Mr. Kennedy must be adhered to.

In large part, the District agrees with your characterization of existing federal case law under the First Amendment. However, we believe that you materially misunderstand key facts in this case.

First, in describing the development of Mr. Kennedy's practice of praying immediately following Bremerton High School football games, you assert that he did not invite anyone to join him in his "short prayer of thanksgiving for player safety, fair play, and spirited competition," and that "he does not pray in the name of a specific religion or deity, and he does not say 'amen.'" While this may presently be the case following the District's guidance to Mr. Kennedy on September 17, 2015, to be clear, the opposite was true prior to that direction. Mr. Kennedy acknowledged during the District's inquiry that, among others, coaching staff from other teams were invited to join in his post-game prayer. Mr. Kennedy also acknowledged that the activity was, indeed, prayer. And contrary to your assertion, local media published video of Mr. Kennedy beginning his post-game address on September 14, 2015, with the word "Lord," and ending it with the word "amen." That Mr. Kennedy impermissibly led students in prayer immediately following the end of football games prior to the September 17 guidance is without question.

Of course, following receipt of written guidance on September 17, 2015, Mr. Kennedy has confirmed his understanding of it (including signing a statement of expectations that all District employees were asked to acknowledge), and to the District's knowledge, he has complied with the District's directives. It is my understanding that Mr. Kennedy has provided short, inspirational, secular talks to students and coaches immediately following games. This is consistent with the guidance the District provided to Mr. Kennedy, and has been an entirely positive and inclusive activity.

The more important factual inaccuracy in your letter and analysis is your repeated characterization of Mr. Kennedy's post-game prayers (prior to September 17) or talks (following that date) as occurring "on his own time," after his duties as a District employee had ceased. In fact, those talks occur immediately following completion of the football game, when students are still on the football field, in uniform, under the stadium lights, with the audience still in attendance, and while Mr. Kennedy is still in his District-issued and District-logoed attire. Critically, at that time, Mr. Kennedy *remains on duty*. All District-employed coaches and assistant coaches are responsible for supervision of students not only before and during games, but following completion of the contest and until the players have returned to the locker room, changed out of their uniforms, and been released to their parents or otherwise depart the District-sponsored activity. We believe that this expectation is clearly understood by all coaches employed by the District. After all, the District activity is *not merely an athletic contest.* The event encompasses all of the pre-game preparation and post-game activities attendant to and which are, as much as the game itself, reasons for school district athletic programs.

As such, your analogy to *Wigg v. Sioux Falls Sch. Dist.*, 382 F.3d 807 (8th Cir. 2004), is inapt. In that case, a religious club, along with many other clubs, was allowed to use school district facilities for voluntary club purposes after the school day had ended. The court ruled that a teacher for the school district could not be prohibited from participating in that club's activities on the basis of the district's interest in avoiding an Establishment Clause violation, because her participation occurred after her work day had ended, involved an event that was not district-sponsored, and, importantly, after "nonparticipating students … exited the building." 382 F.3d 807, 815. Under those circumstances, the court found that no reasonable person would perceive the teacher's participation in the club's activities as school district endorsement of religion.

Mr. Kennedy's situation is markedly different. His post-game talks occur immediately following the end of the game, during a District-sponsored event at which he is paid to attend and perform his job duties. During the time following completion of the game, until players are released to their parents or otherwise allowed to leave the event, Mr. Kennedy, like all coaches, is clearly on duty and paid to continue supervision of students. During such times, Mr. Kennedy must continue to comply with the guidelines that have been provided to him.

On the other hand, once Mr. Kennedy is truly no longer on duty, the analysis in *Wigg* applies, and he is free to engage in such activities as he chooses, so long as they are otherwise consistent with the District's policies regarding private use of District facilities—which do not prohibit religious activities. For example, one recent media report states: "Nearly an hour after the game, Kennedy told KING 5 he waited until the lights were out and he was the only person left in the stadium. Then, he walked to the 50-yard-line, alone, and bowed his head in prayer." The District has absolutely no concern with this conduct, as it appears to have occurred after Mr. Kennedy's duties for the District had ended. Of course, this is but one example of off-duty conduct that poses no concerns to the District; the point is that the District does not purport to control Mr. Kennedy's private conduct, including exercise of his religious rights, when he is not on duty for the District.

Moreover, the District's guidance to Mr. Kennedy does not prohibit all religious exercise *even while he is on duty as a District-paid coach*. He is free to engage in religious activity, including prayer, even while on duty, so long as doing so does not interfere with performance of his job duties, and does not constitute District endorsement of religion. However, Mr. Kennedy must be cautious to avoid the constitutional violations identified in *Borden v. Sch. Dist. of the Township of East Brunswick*, 523 F.3d 153 (3rd Cir. 2008).

The facts of that case are remarkably similar to those present here. The *Borden* court upheld the school district's prohibition of the coach joining in or even bowing his head or kneeling during voluntary, student-initiated prayer, because he had a long-standing and well-known history of having led students in prayer: "[B]ased on the history and context of Borden's conduct in coaching the EBHS football team over the past twenty-three years, Borden is in violation of the Establishment Clause when he bows his head and takes a knee while his team prays." *Id.* at 175. "The history of Borden's prayers with the football team leads to a reasonable inference that his current requested conduct is meant 'to preserve a popular "state-sponsored religious practice"' of praying with his team prior to games." *Id.* at 177 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000)). "We find that, based on the history of Borden's conduct with the team's players, his acts cross the line and constitute an unconstitutional endorsement of religion. … Based on this history, we hold that a reasonable observer would conclude that Borden is showing not merely respect when he bows his head and takes a knee with his teams and is instead endorsing religion." *Id.* at 178.

Given the marked similarity of facts between the *Borden* case and Mr. Kennedy's prior, long-standing and well-known history of leading students in prayer, the District has no choice but to conclude that a federal court would rule in the same way here. That is, any overt actions on Mr. Kennedy's part, appearing to a reasonable observer to endorse even voluntary, student-initiated prayer, while he is on duty as a District-paid coach, would amount to District endorsement of religion in violation of the Establishment Clause. For these reasons, the District affirms the

guidance and expectations provided to Mr. Kennedy on September 17, 2015. Given the significant potential liability to which conduct violating those guidelines would expose the District, strict adherence is required and expected, and violations cannot be tolerated.

Please let me know if you have any questions or wish to discuss these matters further.

Sincerely,

PORTER FOSTER RORICK LLP

Jeffrey Ganson

JG:cn
cc: Anthony Ferate (via email)
Aaron Leavell (via email)
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