



October 24, 2018

Teresa Morgan, Superintendent  
Hardin County School District  
65 W.A. Jenkins Road  
Elizabethtown, KY 42701

**Re: Hardin County School District Policies Violate the Equal Access Act and the First Amendment**

Dear Superintendent Morgan:

First Liberty Institute has been retained by teachers and students in the Hardin County School District (the “District”) regarding the District’s prohibition of religious expression and assembly on school grounds, as well as District policies and practices restricting religious speech outside of school. Please direct all communications to First Liberty Institute.

Certain policies and customs adopted by the District in response to letters from anti-religious groups are unlawful. These policies, adopted on the advice of Atheists of America, are overreaching and deprive students and teachers of their First Amendment rights to religious expression and assembly. The Supreme Court has clearly established “the Constitution does not require complete separation of church and state.” *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). The Constitution, in fact, “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.” *Id.*

Though other clubs and groups are allowed to do so, the District’s policies as implemented at some of its schools prohibit members of the Fellowship of Christian Athletes (FCA) from announcing meetings through the public announcement system or from having bulletin boards displaying FCA’s activities because of the club’s religious viewpoint. Similarly, the FCA is prohibited from meeting during the District’s monthly “club time” although other non-curricular clubs such as the Photography Club and Friends of Rachel are allowed to meet at this time. These policies violate the Equal Access Act, 20 U.S.C. § 4071, and other state and federal law by discriminating against students “on the basis of the religious . . . content of the speech at such meetings.” *Id.* at § 4071(a). FCA and other religious clubs must be allowed the same access to school resources as non-religious clubs. “[T]he Establishment Clause requires neutrality toward religion, not hostility.” *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 297 (6th Cir. 2009). Similarly, certain restrictions the District has placed on teacher expression violate the private speech rights of teachers in the District.

We are willing to work with you to develop a policy that will protect the religious freedoms of students and teachers in the District while maintaining the neutrality required under the Establishment Clause. In any event, the District’s unlawful restrictions on religious speech

and assembly must end immediately. Specific unlawful practices found in the District's policies and customs are discussed more fully below.

## BACKGROUND

In the fall of 2016, the District told faculty and staff that students in religious or political groups could not meet during the school day even though other student clubs meet at that time. Since then, North Hardin High School has prevented students in FCA from meeting at club time between second and third period when other student clubs are meeting. On September 10, 2018, the Hardin County Certified Advisory Council meeting agenda explained the District's policy on religion in the attached certified meeting minutes. These policies were adopted pursuant to a letter from Atheists of America's lawyers.<sup>1</sup>

In response to these guidelines, schools in the district, including North Hardin High School, have further restricted FCA students' access to school facilities by prohibiting student members from using the Public Announcement ("PA") system and FCA's access to bulletin boards. Again, these restrictions were implemented because the FCA is a religious organization with religious beliefs and viewpoints.

These policies and practices are blatantly unlawful.

### **The Constitution and Establishment Clause prohibit religious hostility.**

Contrary to letters that Hardin County has received from anti-religion groups, the rights of both students and teachers to engage in private religious speech and expression is protected by the U.S. Constitution, the Kentucky Constitution, and the Kentucky Religious Freedom Restoration Act. *See* U.S. CONST. AMENDS. I, XVI; KY. CONST. §5; KY. REV. STAT. § 446.350. Schools must accommodate the religious beliefs of their teachers and students. *See Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); *Daugherty v. Vanguard Charter Sch. Academy*, 116 F. Supp. 2d 897, 906 (W.D. Mich. 2000) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000)) ("By no means do [the Religion Clauses] impose a prohibition on religious activity in our public schools.").

Further, federal courts have held that the government cannot rely on Establishment Clause concerns to infringe on Free Exercise rights. *See Wigg v. Sioux Falls School District 49–5*, 382 F.3d 807, 815 (8th Cir. 2004) ("[The school district's] desire to avoid the appearance of endorsing religion does not transform [a teacher's] private religious speech into a state action in violation of the Establishment Clause. Even private speech occurring at school-related functions

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<sup>1</sup> *See* Katherine Knott, *School spokesman takes questions from ministers*, THE NEWS-ENTERPRISE, (Oct. 8, 2018) [http://www.thenewsenterprise.com/news/education/school-spokesman-takes-questions-from-ministers/article\\_4dc4d1c6-701c-50e9-b9cf-75ca00e3d41c.html](http://www.thenewsenterprise.com/news/education/school-spokesman-takes-questions-from-ministers/article_4dc4d1c6-701c-50e9-b9cf-75ca00e3d41c.html); Katherine Knott, *Atheists group issues reminders about freedoms to public schools*, THE NEWS-ENTERPRISE, (Aug. 27, 2018), [http://www.thenewsenterprise.com/news/education/atheists-group-issues-reminder-about-freedoms-to-local-schools/article\\_2c49ba4f-54d1-5de2-a7c2-c051ac75c9ae.html](http://www.thenewsenterprise.com/news/education/atheists-group-issues-reminder-about-freedoms-to-local-schools/article_2c49ba4f-54d1-5de2-a7c2-c051ac75c9ae.html); Katherine Knott, *HCS guidelines prompt reaction*, THE NEWS-ENTERPRISE, (Sept. 27, 2018), [http://www.thenewsenterprise.com/news/education/hcs-guidelines-prompt-reaction/article\\_c5bf5715-e376-5cce-8753-0736db31f0d7.html](http://www.thenewsenterprise.com/news/education/hcs-guidelines-prompt-reaction/article_c5bf5715-e376-5cce-8753-0736db31f0d7.html).

is constitutionally protected ....”); *Draper v. Logan County Public Library*, 403 F. Supp. 2d 608, 621 (W.D. Ky. 2003).

**The District must provide religious clubs the same access to school facilities as secular clubs.**

Pursuant to the Equal Access Act (EAA) and other state and federal law, religious clubs must be afforded the same recognition, access and rights as other noncurricular clubs. *See* 20 U.S.C. § 4071, KY. REV. STAT. § 158.183.

The District’s policy, practice, and custom of prohibiting religious groups from announcing meetings over the public address (“PA”) system, using bulletin boards, or using other school property or venues is unlawful. The Supreme Court held that schools must grant religious groups the same ability to announce meetings as secular groups in the school. *See Bd. of Educ. v. Mergens*, 496 U.S. at 237, 247 (1990) (EAA requires same recognition of religious clubs as other noncurricular clubs including access to school newspaper, bulletin boards, public address system, and Club Fair); *see also Prince v. Jacoby*, 303 F.3d 1074, 1086 (9th Cir. 2002) (requiring equal access to loudspeaker and use of bulletin boards); 20 U.S.C. § 4072(3). Similarly, Department of Education Guidelines state that “where student groups that meet for nonreligious activities are permitted to announce or advertise their meetings . . . school authorities may not discriminate against groups that meet to pray.”<sup>2</sup>

The District’s policy, practice, and custom of prohibiting FCA or other religious groups from meeting during noncurricular time also violates the EAA and students’ constitutional rights. Religious groups must be allowed to meet at any “noninstructional time” that any other noncurricular groups are allowed to meet. 20 U.S.C.S. § 4071(a). Noninstructional time includes but is not limited to time between classes, *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 119 (D. Mass. 2003), lunch time, *Ceniceros by & through Risser v. Bd. of Trs.*, 106 F.3d 878, 882 (9th Cir. 1997), and home room, *Boyd Cty. High Sch. Gay Straight All. v. Bd. of Educ.*, 258 F. Supp. 2d 667, 680 (E.D. Ky. 2003).

For example, one Friday each month, North Hardin High School allows noncurricular clubs such as the Photography Club, Pep Club, Friends of Rachel, Culture Club, and the Beta Club to meet during the noninstructional time between second and third period. FCA is denied the ability to meet during this time because it is a religious group. This violates the EAA and other federal and state law.

Further, the District’s guidelines state that “there should be no emails/announcements made regarding organized prayer events.” We understand this policy is applied to all FCA meetings. If secular groups are allowed to publicize their events using school property, the EAA requires that a religious student group, such as the FCA, also be allowed to publicize its events in the same way, including prayer events. The District cannot suppress the private speech of students or student groups because the speech is religious. This is viewpoint discrimination and it is presumed unconstitutional. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828-829 (1995). Accordingly, the Sixth Circuit held that a school’s practice of distributing

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<sup>2</sup>Available at [https://www2.ed.gov/policy/gen/guid/religionandschools/prayer\\_guidance.html](https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html)

flyers, including flyers describing religious activities, does not violate the Establishment Clause. *See Rusk v. Crestview Local Sch. Dist.*, 379 F.3d 418 (6th Cir. 2004).

Schools are required to administer benefits equally between secular and religious groups. *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 288 (6th Cir. 2009) (stating that the Religion Clauses command the States to be neutral in their relations with groups of religious believers and non-believers and not an adversary of either side). Government programs that allocate benefits based on distinctions between non-religious and religious recipients are generally doomed from the start. *Id.* at 289; *see also Steele v. Indus. Dev. Bd.*, 301 F.3d 401, 415 (6th Cir. 2002) (“It is without question that a religious organization may receive “general government benefits” consistent with the Establishment Clause.”).

By singling out religious groups and providing them inferior access to school resources than that provided other noncurricular groups, the District shows a hostility to religion that itself violates the Establishment Clause. *Good News Club v. Milford Central School*, 533 U.S. 98, 119 (2001) (“[W]e cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint . . . .”); *School District of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963) (“[T]he State may not establish a ‘religion of secularism’ in the sense of affirmatively opposing or showing hostility to religion, thus ‘preferring those who believe in no religion over those who do believe.’” (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952))).

### **The First Amendment protects private religious expression of teachers.**

The District’s policies, practices, and customs regarding teacher social media posts and wearing “religious logos” to school violate teachers’ rights by failing to distinguish between school speech and private speech. The Supreme Court has emphasized that “private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.” *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

The policy on posting on social media burdens the right to religious expression of teachers and staff by attempting to control what they can say about their religion outside of the classroom. The private speech on a teacher’s social media account could not be attributed to the District by a reasonable observer by the mere fact that the teacher has Hardin County listed as an employer. *Rusk v. Crestview Local Sch. Dist.*, 379 F.3d 418, 420 (6th Cir. 2004) (“Whether a particular state action endorses religion depends upon how a reasonable observer would interpret the action.”). Indeed, courts have held that a teacher may participate in on-campus “Christian-based after-school” programs after the school day, and even do so on school property. *Wigg v. Sioux Falls Sch. Dist.* 49-5, 382 F.3d 807, 809, 815-16 (8th Cir. 2004).

Similarly, courts have held that teachers may wear small, unobtrusive religious symbols without violating the Establishment Clause. *See Nichol v. Arin Intermediate Unit 28*, 268 F. Supp. 2d 536, 554 (W.D. Pa. 2003) (“A reasonable observer . . . could not perceive that [the school] was endorsing religion by permitting its employees to wear small crosses or similar jewelry with religious content or viewpoint to work at school”); *see also Cooper v. Eugene Sch.*

*Dist.*, 301 Ore. 358, 380 (1986) (noting that small crosses and Stars of David are permissible “common decorations that a person might draw from a religious heritage”).

Likewise, the District’s policy that “nothing religious is allowed in the classroom” conflicts with Kentucky law that allows teachers to display excerpts from certain foundational texts of the United States and Kentucky and other governmental records. KY. REV. STAT. § 158.195. That statute specifies “there shall be no content-based censorship . . . based on religious references in these writings, documents, and records.” *Id.*

### **REQUEST**

We request that the Hardin County School District immediately cease its unlawful restrictions on religious speech and assembly, and adopt a written policy that guarantees the religious liberty rights of its students, teachers, and staff. The District should immediately allow students in FCA or any other religious club to meet at all times when other noncurriculum student groups are meeting and grant these organizations equal access to school facilities such as the PA system, bulletin boards, and other school property. Additionally, the District cannot restrict a teacher’s right to religious expression outside of school including the ability to post religious beliefs on social media. The policy should allow teachers to wear nonobstructive religious symbols at school in accordance with their religious beliefs. Classroom materials should be allowed pursuant to KY. REV. STAT. § 158.195. We are happy to help the District revise its policies regarding religion to comply with the law.

Please respond by November 1, 2018. If you fail to do so we will proceed as our clients direct, which could include legal action against the District and any offending District officials.

Sincerely,



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