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November 8, 2005

**BY FACSIMILE AND CERTIFIED MAIL**

Principal Dave Casey  
L.V. Berkner High School  
1600 East Spring Valley Road  
Richardson, Texas 75081  
Facsimile: 469-593-7210

**Re: Illegal Prohibition of Private Islamic Prayer**

Dear Principal Casey:

Our clients are observant Muslim students who attend L.V. Berkner High School. They desire to engage in the daily prayer required by their faith without fear of government reprisal. We are writing to ask you to immediately cease and desist from your school's illegal decision to punish Muslim students if they choose to exercise their constitutionally guaranteed right to engage in private, student-initiated prayer on the School's campus. (To protect their privacy and to avoid any retaliation, we are not identifying our clients' identities at this time).

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan, public interest law firm dedicated to protecting the free expression of all religious traditions. For over ten years, the firm has represented Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, and Sikhs, and many others in a variety of cases involving federal and state constitutional law issues. The Becket Fund specializes in protecting the First Amendment rights of public school students and litigates in support of their rights—both as primary counsel and *amicus curiae*—in federal and state courts throughout the country and abroad.<sup>1</sup>

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<sup>1</sup> See, e.g., Adelle M. Banks, *Pledge Tossed By Judge*, SUN HERALD (Sep. 15, 2005) at A1 (describing Becket Fund role in protecting recital of Pledge of Allegiance in public schools).

### The Relevant Facts

It is our understanding that the operative facts concerning the School's decision to punish Muslim students for praying are as follows: Islamic law requires observant Muslim to pray five times daily, including the *zuhr* or noon-day prayer. The *zuhr* prayer takes approximately three minutes to complete, and requires the praying person to alternate between positions of standing, genuflecting, and bowing their head to the floor. Failure to meet this obligation is considered a sin. The *zuhr* prayer must be performed at some point during a three-hour period after the sun has begun to decline in the sky but before the mid-afternoon prayer period *asr* begins. The exact time of the prayer period varies with the seasons and the location of the praying person, but is determined to the minute by Islamic religious authorities. For example, on November 7, 2005, the *zuhr* period began at 12:11 and ended at 3:09. The School normally releases students from class at 4:10 p.m., so during certain times of year, the entire *zuhr* prayer period falls during the school day. Accordingly, it is necessary for Muslim students to pray the *zuhr* at school during these times.

For the past several years, schools in the Richardson Independent School District have accommodated the need of Muslim students to pray the *zuhr* or noon-day prayer. At the beginning of this school year, some Muslim students at Berkner High School approached school administrators to clarify arrangements for the School accommodating their praying of the *zuhr* during the 2005-06 school year. Permission was given to these and other observant Muslim students to use an empty lecture hall for the *zuhr* prayer. This policy was similar to that followed by Richardson High School, which allows Muslim students to be briefly excused from class and use a vacant room for praying the *zuhr* prayer.

On October 3, 2005, the first day of the 2005-06 school year that it was necessary for Muslim students to pray the *zuhr* prayer at school, Muslim students at Berkner used the room to pray the *zuhr* prayer. In particular, the students arranged with their teachers to be excused from class approximately 10 minutes early so that they could go the empty lecture hall, pray, and then return. For the next two weeks, the School accommodated Muslim students praying the *zuhr* prayer in this way without incident.

However, on October 11, two teachers noticed Muslim students praying in the lecture hall. They left, returning with the School Attendance Secretary, who demanded to know what the Muslim students were doing. When the students responded that they were praying the *zuhr* prayer and that they had received permission to do so, she exclaimed, "I will take care of this," and returned to her office.

Two days later, on October 13, two Assistant Principals and a police officer were waiting for the Muslim students when they went to pray. They prohibited them from using the empty lecture hall to pray. Moreover, they told them that School policy prohibited them from praying *anywhere* on campus. That same day, when one Muslim student attempted to pray outside on the School porch, an assistant principal confronted her and reiterated the prayer ban policy,

telling her she could not pray on the porch, in the parking lot, or anywhere on campus.

A few days later, the School slightly modified its absolute ban of Muslim prayer on School grounds. The School established a new policy under which Muslim students could pray the *zuhr* prayer on campus during the lunch hour, but only if they prayed “discreetly” in the library and only if they were willing to forego eating lunch. There are two major reasons why this policy fails to properly accommodate Muslim students’ constitutionally guaranteed right to engage in private prayer.

First, because the School divides students up into three groups—A, B, and C—for lunch, there are some Muslim students whose assigned time for lunch does not correspond to the time period in which they must pray the *zuhr* prayer. This is currently the case for all Muslim students in the “A” group, which eats lunch from 11:42 a.m. to 12:11 p.m. For these students, their only option is to be briefly excused from class so that they may pray. However, the School’s policy absolutely prohibits these students from praying on School grounds. As a result, the School policy forces these students to make an untenable choice: either they obey their religious beliefs and pray in violation of the School policy and face discipline, or they violate their religious beliefs by foregoing their required prayer.<sup>2</sup>

Second, under the School policy, a student who decides to pray the *zuhr* prayer in the library during the lunch period is prohibited from also going to the lunchroom to eat lunch. Because students are not allowed to eat in the library, this policy forces students who have their lunch period during the *zuhr* prayer period to make an unacceptable choice: either they obey their religious beliefs and go hungry, or they violate their religious beliefs by not praying.<sup>3</sup>

In sum, the School’s policy fails to accommodate Muslim students’ constitutionally guaranteed right to prayer. For some students, they are absolutely prohibited from praying on campus, while other students are forced to go hungry if they pray.

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<sup>2</sup> Some Muslim students have risked discipline by continuing to leave class to pray in secret in bathroom stalls or other overlooked spots on campus. It is not a little ironic that the School policy forces students exercising their constitutional rights to behave like students sneaking out of class to engage in illegal behavior.

<sup>3</sup> The library is also a wholly inadequate place for prayer. Muslim students, in order to try and abide by the requirement that they pray “discreetly,” are forced to pray in the aisles between stacks of books. Their prayers are frequently interrupted by other students stepping over them to retrieve books.

### **The School's Decision to Punish Muslim Students for Praying Violates Their Constitutional Right to Free Exercise of Religion**

The School's policy of punishing Muslim students attempting to pray as their faith requires violates the Free Exercise Clause for two reasons.

First, the Supreme Court has stressed that, "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993). *See also id.* at 532 ("[T]he First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."). Laws that fail these requirements of neutrality and general applicability must undergo strict scrutiny analysis. Here, the School's policy fails this bedrock requirement of neutrality. Muslim students are prohibited from being excused from class (or the lunchroom) to pray, but other students are allowed to leave class for all sorts of secular reasons. For example, students may leave to conduct or attend pep rallies, participate in sporting events, participate in other extracurricular activities, attend to medical needs, or use school restrooms. Indeed, the School has promulgated an entirely different schedule for days on which there are pep rallies. *See* <http://www.richardson.k12.tx.us/schools/bhs/bells/bells2.html#apr>. By allowing students to be excused from class to engage in all manner of secular activities, but prohibiting Muslim students from being excused to pray, the School demonstrates impermissible hostility toward the Muslim religion. *See, e.g., Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (Alito, J.) (striking down policy that exempted police officers from shaving requirements for medical reasons but not religious reasons because it demonstrated forbidden hostility to religion).<sup>4</sup>

Because the School's policy fails the Free Exercise Clause's neutrality requirement, it may only be sustained if it satisfies strict scrutiny, that is, if the School demonstrates that it used the least restrictive means to advance a compelling government interest. *See, e.g., Lukumi*, 508 U.S. at 546 (strict scrutiny applies to non-neutral laws under the Free Exercise Clause). We are not aware of any compelling government interest the School might have in preventing observant Muslim students from praying on school grounds. Moreover, any interest the School might have can be easily met by means less restrictive on religious exercise than the current policy. For example, the School could allow students whose lunch period falls during the *zuhr* prayer period to pray during lunch and eat lunch. And for those students who are not able to pray the *zuhr* prayer during lunch, the School could allow them (as before) to be briefly excused from class to pray. Indeed, this is precisely the policy that Richardson High School follows. The existence of such a policy that

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<sup>4</sup> The School's forbidden hostility toward religion is only exacerbated by the fact that it appears to be targeted particularly at preventing Muslim prayer. Although Muslim students have been told they may not engage in voluntary, student-initated prayer on campus (even in an empty lecture hall, the School porch, or the School parking lot), the School does allow Christian students to meet every morning for prayer by the School flag pole and routinely permits voluntary student prayer before sporting events on School grounds.

accommodates Muslim students' religious beliefs at another school in this very School District belies any potential claim of the School that it cannot implement such a policy on its campus.

Second, the School's policy also violates the Free Exercise Clause because it substantially burdens the religious exercise of Muslim students pursuant to a system of individualized assessments. *See, e.g., Sherbert*, 374 U.S. 398, 404 (1963) (strict scrutiny applies where the government substantially burdens religious exercise pursuant to a system of individualized assessments). *See also Employment Div. v. Smith*, 494 U.S. 872, 884 (1990) ("where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason"). The School's policy allowing teachers and school administrators to excuse students from class for a variety of reasons is a classic example of a system of individualized assessments. Moreover, it is indisputable that the School policy substantially burdens the religious exercise of Muslim students. Some Muslim students are forced to choose between following their religious beliefs, and going hungry at lunch; others are forced to make a choose between following their religion and suffering discipline for missing a few minutes of class to pray. Absent satisfaction of strict scrutiny, the Free Exercise Clause prohibits the government from forcing religious adherents to make that choice. *See, e.g., Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 140 (1987) (government may not require religious adherents to choose between "following precepts of [their] religion and forfeiting benefits") (quoting *Sherbert*, 374 U.S. at 404). Because, as discussed above, the School's policy fails strict scrutiny, the School's policy of denying Muslim students the ability to pray as their faith requires violates the Free Exercise Clause for this reason also.

**The School's Decision to Punish Muslim Students for Praying Violates Their Right to Free Exercise of Religion Under the Texas Religious Freedom Act**

The School's prohibition on the observant students' prayer also violates the Texas Religious Freedom Act, TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001-110.112, which provides that "a government agency may not substantially burden a person's free exercise of religion" unless "the application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that interest." TEX. CIV. PRAC. & REM. CODE ANN. § 110.003. Here, as discussed above, it is indisputable that the School's policy of forcing Muslim students to choose between praying and going hungry or between praying and facing discipline substantially burdens their religious exercise. And, as discussed above, the School cannot satisfy the strict scrutiny test that the Texas Religious Freedom Act applies.<sup>5</sup>

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5 This letter satisfies the notice requirement of TEX. CIV. PRAC. & REM. CODE ANN. § 110.006.

### **The School's Decision to Punish Muslim Students for Praying Violates Their Constitutional Right to Freedom of Speech**

The decision by Muslim students to pray the *zuhr* prayer is private, student-initiated speech, fully protected by the Free Speech Clause of the First Amendment. It is well-established that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Moreover, 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).

One of the bedrock protections afforded private speech under the First Amendment's Free Speech Clause is that the government may not discriminate against or censor speech because of its content. *See, e.g., Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985). Indeed, a long line of Supreme Court cases have made clear that the government—including schools—“may not discriminate on the basis of viewpoint” by singling out private religious speech for disfavor. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001); *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981). But here the School did precisely that—expressly and unequivocally prohibiting the speech of Muslim students because of its religious viewpoint. That is, students may be excused from class to engage in secular speech at pep rallies (or other secular activities), but are prohibited from being similarly excused when the speech they wish to engage in is prayer. Absent satisfaction of strict scrutiny, the Free Speech Clause prohibits this type of censorship. Because, as discussed above, the School cannot satisfy strict scrutiny, its policy also violates the Free Speech Clause.

### **The School's Decision to Punish Muslim Students for Praying Endangers Federal Funds for the School Under the No Child Left Behind Act**

Section 9524 of the No Child Left Behind Act requires annual certification that the School is in compliance with the Secretary of Education's guidance as a condition to receiving future federal funds.

As a condition of receiving funds under this chapter, a local educational agency shall certify in writing to the State educational agency involved that no policy of the local educational agency prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary schools and secondary schools, as detailed in the guidance required under subsection (a) of this section. The certification shall be provided by October 1 of each year. The State educational agency shall report to the Secretary by November 1 of each year a list of those local educational agencies that have

not filed the certification or against which complaints have been made to the State educational agency that the local educational agencies are not in compliance with this section.

20 U.S.C. §7904. That guidance unequivocally provides that students must be excused from class to say prayers just as other students are excused from class for non-religious reasons:

*Accommodation of Prayer During Instructional Time*

It has long been established that schools have the discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation in such instruction or penalize students for attending or not attending. Similarly, schools may excuse students from class to remove a significant burden on their religious exercise, where doing so would not impose material burdens on other students. For example, it would be lawful for schools to excuse Muslim students briefly from class to enable them to fulfill their religious obligations to pray during Ramadan.

Where school officials have a practice of excusing students from class on the basis of parents' requests for accommodation of nonreligious needs, religiously motivated requests for excusal may not be accorded less favorable treatment. In addition, in some circumstances, based on Federal or State constitutional law or pursuant to State statutes, schools may be required to make accommodations that relieve substantial burdens on students' religious exercise. School officials are therefore encouraged to consult with their attorneys regarding such obligations.

Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools, 60 Fed. Reg. 9645, 9647 (Feb. 28, 2003). Here, the School's policy of punishing Muslim students for praying instead of accommodating their religious exercise violates these federal regulations. Accordingly, if the School persists in this illegal policy, the School District may be required to forfeit all of its federal funds.

**The School Must Immediately Cease and Desist From Its Unlawful Conduct**

We understand that it is possible that the School may not have been aware of the constitutional and statutory rights and obligations at play when making its decision to punish Muslim students for praying. The purpose of this letter is to briefly familiarize you with the constitutional and statutory principles at issue and explain the illegality of the School's actions. Because the School has violated the students' constitutional rights, it is potentially liable for damages and attorney fees under 42 U.S.C. §§ 1983 and 1988. It is also potentially liable for

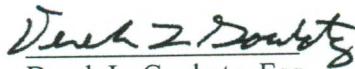
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damages and attorney fees under the Texas Religious Freedom Act and in danger of costing the entire District its federal funding under the No Child Left Behind Act.

Accordingly, we request that the School immediately cease and desist from its illegal policy of punishing Muslim students for praying as their faith requires. Specifically, we request that Muslim students be allowed to pray the *zuhr* prayer on campus, and that they be excused from class to the extent necessary for them to meet their *zuhr* obligation. Moreover, the students should not be penalized for their past attempts to pray and any disciplinary records based on students' attempts to pray should be expunged. We also request that the School refrain from any future attempts to prohibit prayer on campus or any failures to accommodate observant Muslim students' religious exercise during the school day.

Absent a decision by the School to cease and desist from its unlawful activities, we will be forced to pursue litigation to vindicate the constitutional and statutory rights of our clients and other Muslim students at Berkner. Should you have any questions, please feel free to contact our office immediately. We look forward to working with you to bring your School policies into speedy compliance with the Constitution and Texas law.

Sincerely,

  
Derek L. Gaubatz, Esq.  
Director of Litigation

  
Eric C. Rassbach, Esq.  
Legal Counsel  
State Bar No. 24013375

cc

Mr. Jim Nelson  
Superintendent  
Richardson Independent School District  
400 S. Greenville Ave.  
Richardson, Texas 75081  
Facsimile: 469 593 0302  
(By facsimile and certified mail)