



November 18, 2009

CEASE AND DESIST

Tamara L. Baysinger
Charter Schools Program Manager
Idaho Public Charter School Commission
650 W. State Street
P.O. Box 83720
Boise, Idaho 83720-0037

Re: Unconstitutional Retaliation against Nampa Classical Academy

Dear Ms. Baysinger:

As you are well aware, the Alliance Defense Fund represents the Nampa Classical Academy in federal litigation against officials of the Idaho Public Charter School Commission, the Idaho Department of Education, and the State Board of Education (Case No. 09-CV-00427-EJL). After the subject of this litigation arose, you began issuing voluminous public records requests and notices of defect to the Academy in direct retaliation for the Academy's lawsuit against the Commission. Now, you refuse to recuse yourself from the Commission's programmatic audit scheduled for December 7-8, 2009, despite the obvious conflict of interest that arises from your participation on the auditing committee. Therefore, you are hereby requested to cease and desist immediately from taking further retaliatory actions against the Academy.

The Unlawful Public Records Requests

Your public records requests violate federal and state law. Under Idaho law and the Federal Rules of Civil Procedure, all documents involved in a federal lawsuit are exempt from disclosure outside of those proceedings and according to the Federal Rules. See I.C. § 9-340A; Fed. R. Civ. P. 26(d)(1). Contrary to the Commission's erroneous position, IDADA 04.11.01.526 does not permit the Commission to circumvent the Federal Rules of Civil Procedure and Idaho statutory law in issuing public records requests for documents relating to the Academy's litigation with the Commission. The Federal Rules of Civil Procedure preempt any administrative regulations that Idaho may provide for its own state and administrative courts. See *Champion Produce, Inc. v. Ruby Robinson Co., Inc.*, 342 F.3d 1016, 1028 (9th Cir. 2003) ("the Supreme Court has construed valid Federal Rules of Civil Procedure to have the same meaning irrespective of whether the underlying substantive law is federal or state, and irrespective of any differences between federal and state procedural law."); *Seltzer v. Chesley*, 512 F.2d 1030, 1034 (9th Cir. 1975) (citing *Hanna v. Plumer*, 380 U.S. 460 (1965)) ("The U. S. Supreme Court has made it clear that under the *Erie* doctrine state law is not controlling over the

Federal Rules of Civil Procedure.”) Federal law does not permit you to issue public records requests during a lawsuit involving the same facts and issues.

On October 29, 2009, you issued two public records requests to the Academy for all purchase order documents, credit card transactions, reimbursement requests by board members, monthly balance sheets, and monthly cash flow forms. You requested that all documents from July 2009 to the present be produced—which happens to be the date on which the Commission first applied its unconstitutional policy to the Academy. Further, on November 2, 2009, you issued a public records request to the Academy requesting all curricular materials relating to the seventh grade assignment on “Comparing the Codex Hammurabi with the Mosaic Law.” Most recently, On November 17, 2009, you issued an additional public records request again relating to curriculum materials.

You are not permitted to issue public records requests to the Academy concerning any issues that relate to the litigation while it is pending. While the charter school laws and regulations permit public records requests to the Academy in general, these requests may not be made to circumvent the Federal Rules of Civil Procedure.

Unconstitutional Retaliation

The Constitution protects the right to petition the government for redress of grievances, which includes filing lawsuits to protect civil rights. *Soranno’s Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989). Government officials who retaliate against someone for filing a lawsuit may be subject to civil liability, including money damages, attorneys’ fees and costs. *Mendocino Envtl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999).

The Academy filed a federal lawsuit against the Commission and the Department in the United States District Court for the District of Idaho on September 1, 2009, challenging the Commission’s unconstitutional policy and practice of banning all religious books in the Academy’s school. Mere days after the Academy filed suit, you issued several public records requests to the Academy, asking for numerous documents in a matter of a few days. Yet even when the Academy informed you that it was collecting documents to comply with your request, you, nevertheless, issued notices of defect claiming that the Academy failed to comply. Further, on October 23, 2009, you issued a notice of defect based on the Academy allegedly failing to provide the report requested by William Goesling on October 16, 2009. Finally, on November 13, 2009, you sent the Academy a notice of defect alleging that the Academy is not in compliance with the charter school regulations, including that it failed to respond to public records requests.

You and the Commission have taken these actions in direct retaliation against the Academy for filing a lawsuit against the Commission over its unconstitutional religious books policy. Each of the unlawful public records requests and notices of defect were issued by you after the Academy filed its lawsuit, a right it is entitled to under the First Amendment. You must cease immediately from continuing to issue notices of defect. Failure to do so may result in you being subject to legal liability for First Amendment retaliation.

Your Involvement in the Programmatic Audit is a Conflict of Interest

The Academy is aware that you intend to serve on a programmatic audit committee that is due to visit the Academy on December 7-8, 2009. Your involvement in the programmatic audit is an obvious conflict of interest as your employer is being sued by the Academy. Moreover, the unlawful and retaliatory public records requests, unreasonably short response times, and notices of defect that you have issued to the Academy, along with your continued inappropriate comments to the press, demonstrate your biased position and serve as independent grounds for recusal from the audit committee.

Moreover, based in part on your recent actions, we are amending the complaint to include you as an individual defendant, and are also adding a retaliation claim to the case.

DEMAND

It is hereby demanded upon you that you cease and desist from the unlawful activities outlined above, which include (1) rescinding all improperly issued notices of defect, (2) terminating current and future public records requests that relate to the subject matters contained in the Academy's litigation with the state, (3) recusing yourself from any of the Commission's audits of the Academy, (4) discontinuing any communications with my clients concerning the lawsuit, and (5) discontinuing your accusatory and inappropriate public comments. You are tasked with representing a professional, neutral body, not one that is an instigator, accuser, investigator, judge and jury.

Lastly, I have advised my clients to begin immediately using any and all relevant religious documents and text as part of their curriculum. We have already forwarded your office a list of those documents that the Academy is or will be using. Again, please cease any and all communications directly with my clients concerning the issues related to the litigation.

Sincerely,



David A. Cortman
Senior Legal Counsel
Alliance Defense Fund

Cc: William Goesling, on behalf of the Commission
Michael Gilmore, Counsel for Defendants
NCA
Bruce Skaug, Esq.
Amy White, Esq.
David Hacker, Esq.