STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

November 20, 2009

Via Email

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Re: Mr. Cortman's Letter to Tamara L. Baysinger, dated November 18, 2009

Dear Mr. Cortman, Mr. Skaug and Ms. White:

I am writing this letter to Mr. Cortman in response his letter of November 18, 2009, addressed to Tamara L. Baysinger. I am also addressing this letter to Mr. Skaug in his role as local counsel for the Federal District Court case of *Nampa Classical Academy v. Goesling* and to Ms. White in her role as the attorney handling NCA's administrative matters before the Idaho Public Charter School Commission. From my telephone conversation with Mr. Cortman this morning, I understand that he is advising NCA with regard to administrative matters before IPCSC when the matters involve issues in the Federal lawsuit. This letter addresses three concerns.

1. I ask that Mr. Cortman as an attorney in the Federal case cease all direct communication with Ms. Baysinger and go through counsel (either me or other members of the Attorney General's staff) if he wishes to communicate with her.

2. This letter explains that Ms. Baysinger has not acted unlawfully and has not retaliated against Nampa Classical Academy.

3. Plaintiffs' Motion for a Temporary Restraining Order asked, among other things, to restrain members of the Idaho Public School Charter Commission (IPCSC) from issuing a Notice of Defect. See Dkt. 6, page 2. The District Court denied the TRO Motion and expressly stated: "Plaintiffs have not demonstrated a likelihood of success on the merits" and "there is a serious question as to whether or not the Plaintiffs have standing." See Dkt. No. 13. I have included a copy of that Decision with this letter. Thus, there is no reason for any Defendant or for Ms. Baysinger to proceed as if a TRO were in place when there is none. Thus, the Nampa Classical Academy must comply with State law, which includes being subject to IPCSC and other State oversight. Filing suit in Federal Court is not a "Get Out Jail Free" card that exempts NCA from oversight for expenditure of tax dollars and from conducting its educational mission in accordance with State law.

Each of these concerns is addressed in more detail below. For the reasons stated below, I urge your client NCA to fully comply with State law and to cooperate with Ms. Baysinger as she carries out the IPCSC's statutory mandates.

Counsel's Communication with Ms. Baysinger

Lawyers and lay persons have different obligations. During litigation lawyers are supposed to communicate with opposing parties or their representatives through opposing counsel; non-lawyers are under no such restriction. Idaho Rule of Professional Conduct 4.2 and the commentary to it, particularly Comment 4, sets forth and elucidates these points as follows:

> **RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL**
>
> **In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.**
>
> ***Commentary***
>
> [1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the mat-

ter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] ***This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.***

....

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. ... ***Parties to a matter may communicate directly with each other***, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] ***Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government.*** ...

....

[7] ***In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.*** ...

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). ***Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.***

[Emphasis added.]

Mr. Cortman, you and I are lawyers. Rule 4.2 states that we cannot communicate directly with the other's clients. On the other hand, Ms. Baysinger is not a lawyer. Under Comment 4, as a lay representative of the Defendants who are members of the Idaho Public Charter School Commission, she may communicate at any time with your client Nampa Classical Academy and its officers and employees concerning whether they are in compliance with State law. "The prohibition against a lawyer contacting a person he or she knows is represented by another lawyer does not apply to non-lawyers." *Northwest Bypass Group v. U.S. Army Corps of Engineers*, 488 F.Supp.2d 22, 28 (D.N.H. 2007) (citing New Hampshire's Rule 4.2 and Comment 4).

The letter to Ms. Baysinger, however, is another matter. NCA's own filings, which refer to Ms. Baysinger, show that she may be a "constituent" within the meaning of Comment 7. Specifically, Mr. Moffett's Declaration, Dkt. 6-3, p. 3, ¶ 9, refers to his Ex. 6, which contains various e-mails and newsclips, including an e-mail from Ms. Baysinger, Dkt. 6-8, p. 2, and a newsclip in which she was quoted, *id.*, p. 4.

Thus, it was inconsistent with Comment 7 for counsel to contact Ms. Baysinger directly without first ascertaining whether she was a constituent of one or more of the Defendants. *See Inorganic Coatings, Inc. v. Falberg*, 926 F.Supp. 517, 519-520 (E.D.Pa. 1995) (it was improper for an attorney to talk to a representative of the opposing corporate party about matters of substance, including the merits of the impending lawsuit with the opposing party, without the presence of his counsel); *University Patents, Inc. v. Kligman*, 737 F.Supp. 325, 328 (E.D.Pa. 1990) ("The underlying policy and Official Comment to the Rule make clear that it was intended to forbid ex parte communications with all institutional employees whose acts or omissions could bind or impute liability to the organization ... .").

Perhaps Mr. Cortman may take the position that he has a right to communicate with Ms. Baysinger under the example of Comment 5 (exercising a constitutional right to petition to or to communicate with the government), but that would seem to be disingenuous in this case. Ms. Baysinger is an employee of the State Board of Education assigned to the position of Charter Schools Program Manager, and it seems most likely that Comment 4 was intended to apply to members of the Commission or to the State Board of Education, who are appointed by the Governor and confirmed by the Senate, rather than to Ms. Baysinger, who works under their direction and supervision and does not operate as a "free agent" who may initiate policies or take actions without permission or delegation from IPCSC members who are the head of the agency. *But see U.S. ex rel. Lockyer v. Hawaii Pacific Health*, 490 F.Supp.2d 1062, 1089 (D.Haw. 2007). And, given the letter's stated intention "to add you [Ms. Baysinger] as an individual defendant," Mr. Cortman should have surmised, based upon every other Defendant's representation by the Idaho Attorney General's Office, that she likewise would be represented by the same counsel and have directed the letter to me, not to Ms. Baysinger. However, if there has been any confusion before, this letter puts you on notice that all communications from lawyers in the Federal case to Ms. Baysinger should be through counsel and not directly to Ms. Baysinger.

Neither Ms. Baysinger nor Any Defendant Has Acted Unlawfully or Retaliated Against NCA

Regarding the merits of the letter to Ms. Baysinger, after NCA filed suit against the members of the IPCSC, Ms. Baysinger did not "beg[in] issuing [1] voluminous public records requests and [2] notice of defect to the Academy [3] in direct retaliation for the Academy's lawsuit against the Commission." To clarify the second point first, Ms. Baysinger has not issued Notices of Defect to NCA under any authority other than that of the IPCSC. The IPCSC has delegated the authority to issue Notices of Defect on some technical matters to Ms. Baysinger, but in those circumstances the Notices of Defect are still issued under the name of and carry the authority of the IPCSC itself pursuant to Idaho § 33-5209.

As for the first point regarding requests for information that Ms. Baysinger, on behalf of the IPCSC, sent to NCA, the Idaho Public Charter School Commission has an obligation under Idaho law to determine whether NCA (and other public charter schools for which it is the authorized chartering entity) operate in accordance with Idaho law. See Idaho Code § 33-5209. Ordinarily, other public charter schools with which Ms. Baysinger works provide necessary information informally after something as simple as an e-mail or telephone request. Ms. Baysinger used the Public Records Act to attempt to obtain information, but she did not do so in retaliation for NCA filing suit. She did so because of NCA's recalcitrance in turning over information routinely obtained without any legal process from other public charter schools. As for the third point, there is no reason for Ms. Baysinger to "cease and desist immediately from taking further retaliatory actions against the Academy" because she has not taken and will not take any retaliatory action.

And, as a practical matter, I am puzzled why NCA ever refused to turn over financial data to the IPCSC. Sooner or later, NCA must account for its expenditure of public funds, and there was nothing to be gained by delaying the inevitable review of its expenditures.

Ms. Baysinger's Public Records Requests of October 29, 2009, did not violate Federal or State law. The IPCSC's administrative inquiries under the Public Charter Schools Act of 1998, whether labeled Public Records Act requests or made directly under the Public Charter Schools Act, are independent of the suit in Federal Court and may go forward unless enjoined. As described in Mr. Cortman's letter, the October 29, 2009 requests addressed purchase order documents, credit card transactions, reimbursement requests by board members, monthly balance sheets, and monthly cash flow forms, all of which are related to NCA's legal requirements to account for its expenditure of public funds and none of which addressed issues related to NCA's lawsuit. See Idaho Code § 33-5209(2)(b) and -(c), addressing public charter schools' requirements to meet accounting standards and to demonstrate fiscal soundness. It appears that the letter is attempting to make hay out of Ms. Baysinger's courtesy of asking for information under the Public Records Act rather than demanding this information under the Public Charter Schools Act, but surely form will not govern over substance—Ms. Baysinger had a right to this information under the Public Charter Schools Act. See Idaho Code § 33-5206(7), as implemented by IDAPA 08.02.04.300.03, which provides: "An authorized chartering entity [the IPCSC] may reasonably request that a public charter school provide additional information to ensure that the public charter school is meeting the terms of its charter."

On November 2, 2009, Ms. Baysinger, acting in response to information supplied by persons with personal knowledge about NCA, asked for information about curricular materials to determine whether NCA's curricular materials comply with State law. See Idaho Code § 33-5209(2)(f). On November 17, 2009, IPCSC Chairman Goesling, not Ms. Baysinger, issued another request for information. The November 17 letter from Chairman Goesling was a demand for a required report from the school to the Commission, and not a Public Record Act request. Both this demand, as well as the November 2 Public Records Act request, were independently sustainable under Idaho Code § 33-5206(7), as implemented by IDAPA 08.02.04.300.03.

This recitation of events shows that neither Ms. Baysinger nor the IPCSC acted unlawfully or for retaliatory purposes. They requested information necessary for them to do the statutory tasks assigned to the IPCSC as the authorized chartering entity.

The letter to Ms. Baysinger in effect takes the position that any entity or organization subject to State regulation or control is freed from that regulation or control by the simple expedient of filing suit against the State officers who are responsible for administering the State's regulation. Under the letter's rationale, if a canal company sued officers of the Idaho Department of Water Resources in Federal Court, alleging that State was infringing upon its property rights for the use of water, the State-appointed water master would then be forbidden to issue any orders regarding distribution of water to the Canal Company and would further be forbidden from asking the Canal Company how much water it was diverting. Under that rationale, if a school district and the State were engaged in a lawsuit over whether the school district was providing adequate school facilities, the State would be forbidden to send a structural engineer to do an on-site inspection under the Idaho Uniform School Building Safety Act and would be further forbidden even to ask whether there had been a safety inspection. Under that rationale, if a city sued the State seeking to halt the implementation of new discharge standards for sewage treatment plants, the State would be forbidden from conducting on-site sampling and from asking for the results of on-site sampling.

Under that rationale, ongoing administrative regulation and data collection are suspended when a lawsuit is filed. If any of you are aware of any Federal Court cases that hold that ongoing State administrative regulation and collection of data are suspended by Federal Rule of Civil Procedure 26(d)(1) and are *ipso facto* a violation of Federal Rule 26(d)(1), please provide them to me, because I do not know of any. Further, please provide me any case law that you have found that is inconsistent with the holdings of *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 40 (1933); *Exira Community School Dist. v. State*, 512 N.W.2d 787, 790 (Iowa 1994); *Avon Lake City School Dist. v. Limbach*, 35 Ohio St.3d 118, 122, 518 N.E.2d 1190, 1193 (1988); *Delta Special Sch. Dist. No. 5 v. State Bd. of Educ.*, 745 F.2d 532, 533 (8th Cir. 1984); *Academy of Charter Schools v. Adams County School Dist. No. 12*, 994 P.2d 442, 447 (Colo. App. 1999), that neither school districts nor public charter schools are persons with constitutional rights protected by 42 U.S.C. § 1983.

Next, the letter states that Ms. Baysinger's "involvement in the programmatic audit is an obvious conflict of interest as your employer is being sued by the Academy," which is among the reasons that the letter contends should "serve as independent grounds for [Ms. Baysinger's] recusal from the audit committee." I am aware of no State law or Federal Court holding that allows an entity spending public money to sue State officers whose job it is to see that the public money is spent as required by State law and thereby free themselves of oversight by the very public officials they just sued. Again, if you are aware of any such case holdings, please provide them to me.

Nevertheless, this issue seems to be a red herring. The State did not appoint the members of the programmatic audit committee; Diane Demerest of the Idaho Charter School Network did. Unlike NCA's legal requirement to submit to an on-site inspection, see IDAPA 08.03.01.301, which Ms. Baysinger has a right to demand, there is no legal requirement that Ms. Baysinger be

a member of the programmatic audit committee. To avoid distractions from the important task of the programmatic audit committee, Ms. Baysinger will inform Ms. Demerest that she will decline to be a member of that committee for its program audit of NCA.

The IPCSC Members Have Not Been Restrained from Holding NCA to Its Obligations Under State Law and May Continue to Enforce State Law

Ms. Baysinger has been doing her job as the Charter Schools Program Manager as required by law. The Commission's members were not enjoined when Plaintiffs sought an Order to prevent them from applying State law to NCA. See Memorandum Order, Dkt. 13, p. 6: "Plaintiffs' Motion for Temporary Restraining Order ... is DENIED." Thus, Ms. Baysinger and the IPCSC members may properly continue to do their jobs and may address issues before the Commission as required by law. In particular, Ms. Baysinger was not "circumvent[ing] the Federal Rules of Civil Procedure and Idaho statutory law" by asking for information in a Public Records Act request that could have been demanded directly under the Public Charter Schools Act.

The Federal District Court has not issued an order restraining the Idaho Public Charter School Commission from carrying out its statutory duties under the Public Charter Schools Act of 1998. It has already declined to do so once. The IPCSC and Ms. Baysinger will continue to do their jobs as they would normally do them, which includes demanding accountability for compliance with State law from NCA. I find no basis for the IPCSC members or Ms. Baysinger to comply with any of the demands on page 3 of Mr. Cortman's letter.

Sincerely,

Michael S. Gilmore
DEPUTY ATTORNEY GENERAL

MSG/jd
cc: Tamara Baysinger
Members of the IPCSC
Enc.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

NAMPA CLASSICAL ACADEMY, et al., Plaintiffs, vs. WILLIAM GOESLING, individually and in his official capacity as Chairman of the Idaho Public Charter School Commission, et al., Defendants.	Case No. 09-cv-427-EJL MEMORANDUM ORDER

Pending before the Court in the above-entitled matter is Plaintiffs' motion for temporary restraining order, filed on September 3, 2009. The motion was filed in conjunction with a verified complaint. The certificate of service indicates that the Defendants were served with a copy of the motion on the same date via electronic mail and UPS overnight delivery. The Defendants have filed a response in opposition to the motion.

Having fully reviewed the record herein, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, this motion shall be decided on the record before this Court without oral argument. Local Rule 7.1(d)(2)(ii).

Factual and Procedural Background

The Plaintiffs, Nampa Classical Charter Academy (NCA), Isaac Moffett, Maria Kosmann, and M.K., initiated this action following the August 14, 2009 special meeting of the Idaho Public Charter School Commission's (IPCSC) where the IPCSC adopted the Attorney General's position that the use of religious documents or texts in public school curriculum would violate Article IX, § 6 of the Idaho Constitution. (Dkt. No. 1, Ex. 1). This position, that NCA calls the "Policy," prompted NCA to file a complaint alleging violations of the First Amendment, Due Process Clause, Equal Protection Clause, Establishment Clause, and violation of Idaho Code § 33-5209 and § 33-5210. (Dkt. No. 1). The Policy, Plaintiffs allege, violates their Due Process and First Amendment rights by prohibiting the use of any "religious documents or text in a public school curriculum" or to "use religious text in class or in the classroom." (Dkt. No. 1, p. 3). The Complaint names several Defendants including: the IPCSC, its Chairman, William Goesling, the members of the IPCSC, the state Board of Education and its members, the Superintendent of Public Instruction, Tom Luna, and the Attorney General of the State of Idaho, Lawrence Wasden, and the Governor of the State of Idaho, C.L. "Butch" Otter. (Dkt. No. 1).

NCA also filed this motion for a temporary restraining order seeking to enjoin the Defendants from "enforcing their Order and Policy prohibiting all religious documents and text from the Academy's curriculum, from issuing and enforcing a Notice of Defect, and from revoking Plaintiff Academy's charter." (Dkt. No. 6). The school was scheduled to open on Tuesday, September 8, 2009. The Notice of Defect, Order, and Policy will irreparably injure Plaintiffs, they argue, by violating their First Amendment rights, damage to reputation and goodwill, loss of enrolled and future students attending Plaintiff Academy, damage to business relationships, eventual

closure of NCA, loss of NCA assets, loss of employment for NCA teachers, and NCA's students loss of ability to attend classes. The motion is made pursuant to Federal Rule of Civil Procedure 65(b).

Defendants have filed an opposition to the motion arguing the Plaintiffs lack standing to raise their claims, are unlikely to succeed on the merits of the claims, and have failed to demonstrate the likelihood of an irreparable injury. (Dkt. No. 12). The Court has reviewed the motion, response, and record herein and makes the following ruling.

Standard of Law

Temporary restraining orders are designed to preserve the status quo pending the ultimate outcome of litigation. They are governed by Federal Rule of Civil Procedure 65(b) which requires the moving party to show that "it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party . . . can be heard in opposition...." "The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction." Brown Jordan Int'l, Inc. v. Mind's Eye Interiors, Inc., 236 F.Supp.2d 1152, 1154 (D. Haw. 2002). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." American Trucking Ass'ns, Inc. v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting Winter v. Natural Res. Def. Council, ___ U.S. ___, 129 S.Ct. 365, 374-75 (2008) ("Issuing a preliminary injunction based only a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the

plaintiff is entitled to such relief."). No longer are plaintiffs granted the presumption of irreparable harm upon a showing of a likelihood of success on the merits. Jacobsen v. Katzer, 609 F.Supp.2d 925, 926 (N.D. Cal. Jan. 5, 2009).

Discussion

In this case, NCA's motion is predicated on violations of the First Amendment, the Due Process Clause, the Establishment Clause, and the Idaho Code. NCA has failed to make the requisite showing for issuance of a TRO. The Plaintiffs' have not demonstrated a likelihood of success on the merits. As pointed out in the Defendants' opposition, there is a serious question as to whether or not the Plaintiffs have standing. (Dkt. No. 12). Moreover, the allegations here involve difficult questions of state law that bear on state policy problems of substantial public concern that may be more properly resolved in the state system. To grant the TRO would in effect give Plaintiffs the ultimate relief they seek in this case without the matter being fully considered and decided. Further, the TRO is not in the public interest as it would upset the State's efforts to establish a coherent policy with respect to public education.

The Court also finds the Plaintiffs have not established the likelihood of an immediate and irreparable injury. NCA argues is that if the Notice is issued it and the Policy enforced it will result in a chilling effect on the First Amendment rights of the Plaintiffs speech, damage the goodwill and reputation of NCA, loss of students, and damage the business. (Dkt. No. 6, p. 21). Further, the NCA argues issuance of the Notice and enforcement of the Policy would result in an unconstitutional advocation of nontheistic religion over other religious beliefs in violation of the Establishment Clause. The Motion alleges further irreparable harm will be suffered once NCA's charter is revoked. (Dkt. No. 6, p. 24). The motion is supported by several affidavits and exhibits.

Having reviewed the record herein, the Court disagrees that the harm alleged by the Plaintiffs is irreparable. Harm that is speculative, conjectural, attenuated or remote "does not constitute irreparable injury sufficient to warrant granting a [TRO and] preliminary injunction" Caribbean Marine Servs. Co. Inc. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988). The alleged injury here does not appear to be immediate. Although the Defendants voted to adopt the position of the Idaho Attorney General's Office at the August 14, 2009 Special Meeting, no Notice has been submitted to NCA. The injuries feared by the NCA are not yet ripe.

Similarly, Plaintiffs fail to identify a concrete immediate harm. The injuries alleged by the Plaintiffs include violation of their First Amendment rights, damage to reputation and goodwill, loss of enrolled and future students attending Plaintiff Academy, damage to business relationships, eventual closure of NCA, loss of NCA assets, loss of employment for NCA teachers, and NCA's students loss of ability to attend classes. (Dkt. No. 6, p.). Again, these predictions are mere speculation as to the potential for future harm. See Caribbean Marine Servs. Co., 844 F.2d at 675 (explaining that a plaintiff's prediction of possible injury is too remote and speculative to constitute irreparable injury). Because Plaintiffs can at this juncture only speculate as to what may transpire in the future, the Plaintiffs' motion is premature and denied. Id. at 674-76.

ORDER

Based on the foregoing, the Court being fully advised in the premises it is **HEREBY ORDERED** that Plaintiffs' Motion for Temporary Restraining Order is (Dkt. No. 6) is **DENIED.**

DATED: **September 10, 2009**

~~Honorable~~ Edward J. Lodge
U. S. District Judge