

FREEDOM FROM RELIGION *foundation*

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August 19, 2019

SENT VIA EMAIL AND U.S. MAIL:

Richard.Doyle@sanjoseca.gov

Richard Doyle
Office of the City Attorney
200 E. Santa Clara St.
16th Floor
San Jose, CA 95113

Re: Discretionary funding to parochial school

Dear Mr. Doyle:

I am writing on behalf of the Freedom From Religion Foundation to alert you to constitutional concerns regarding the City of San Jose's recent decision to award a private religious school discretionary funds. FFRF is a national nonprofit with more than 30,000 members, including more than 4,000 in California. FFRF's purposes are to protect the constitutional separation between state and church, and to educate the public about matters related to nontheism.

It is our understanding that the City of San Jose recently awarded more than \$800,000 in funds to be paid directly to a private religious school, Cristo Rey San Jose Jesuit High School, for a work-study program.¹ We understand that these taxpayer funds will be used, at least in part, to pay for students' tuition at Cristo Rey.

Media reported that the school was the only applicant for the funds, and that local public school superintendents were unaware that the funding was available. Despite the City's assertion that it emailed area school districts about the grant, area superintendents reportedly never received any notification until last Tuesday's City Council meeting when the grant to Cristo Rey was approved. We understand that the City failed to provide the names of any school officials that the City emailed, citing "privacy concerns." The City reportedly posted information about this grant on an online platform, BidSync, and the proposal was reportedly viewed by 23 entities around the country, many of which were not school districts, even though the grant was only available to high schools in San Jose. Multiple City Council members reportedly raised concerns about the bidding process, the failure to contact local public schools, and the speed at which the grant was approved after the bid was placed on BidSync.

¹ Nadia Lopez, *San Jose superintendents raise concern over six-figure award to Catholic school*, San Jose Spotlight (Aug. 18, 2019), available at sanjosespotlight.com/san-jose-superintendents-raise-concern-over-six-figure-award-to-catholic-school/.

There are two major problems with this grant to Cristo Rey. First and foremost, by paying a portion of students' tuition to a private religious high school, the City is subsidizing religious instruction, in violation of California's "no aid" clause. Second, the City appears to have given Cristo Rey favored treatment compared to area public schools, since Cristo Rey received actual notice of the grant and public school administrators did not. This preference for giving the funds to a religious school rather than a public school is also itself unconstitutional.

The Establishment Clause of the First Amendment prohibits any "sponsorship, *financial support*, and active involvement of the sovereign in religious activity." *Walz v. NY Tax Comm'n*, 397 U.S. 664, 668 (1970) (emphasis added); *see also Mitchell v. Helms*, 530 U.S. 793, 819 (2000); *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 754–55 (1976). The California Constitution also specifically states that "No public money shall ever be appropriated for the support of any sectarian or denominational school . . ." Cal. Const. Art. IX § 8. Granting taxpayer funds to a religious school to subsidize student tuition violates this prohibition.

The Supreme Court upheld the application of a similar provision in the Washington Constitution to prohibit the use of taxpayer funds to pay for religious instruction. *Locke v. Davey*, 540 U.S. 712 (2004). Paying Cristo Rey students for their work at the city would be a secular use of funds, but paying the school itself, which will apply a portion of the funds to student tuition, is directly subsidizing religious education.

The reported concerns over the transparency of the bidding process are noteworthy because they may create the appearance that City acted favorably toward Cristo Rey by giving the school actual notice of the funding while providing less adequate notice to area public schools.² But regardless of whether the City provided adequate notice, awarding these discretionary funds to a private religious school to subsidize tuition remains illegal. The *appearance* that the City gave Cristo Rey favored treatment may compound the constitutional violation, as the First Amendment prohibits even the appearance of religious endorsement by government officials. *See, e.g., Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 787 (1995) (Souter, J., concurring) ("Effects matter to the Establishment Clause, and one, principal way that we assess them is by asking whether the practice in question creates the appearance of endorsement to the reasonable observer."); *Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593–94 (1989) ("The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief . . ."). But clearing up the concerns over the bidding process would not absolve the City of legal liability.

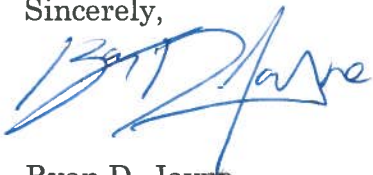
This grant program is a far cry from the program at issue in the Supreme Court's 2017 decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012. That case involved a neutrally scored, generally available grant program with multiple applicants and no indication that any applicant received favored treatment. More importantly, *Trinity Lutheran* prohibits the exclusion of

² And of course, if the City did give preferential notice to Cristo Rey, that would further violate the state constitution's specific guarantee of religious freedom "without discrimination or preference." Art. I § 4. Giving actual notice of an \$800,000 grant to a religious school that the mayor co-founded without giving the same notice to any other qualifying applicant would amount to giving preference to that school and its religious message.

religious entities from grant programs for secular projects (in that case, playground resurfacing). The Court specifically differentiated *Locke v. Davey* because awarding funds for religious instruction would be unconstitutional, and the government cannot be a requirement to include recipients who would use taxpayer funds in an unconstitutional way. *See id. at 2022–25*. The same is true here, as the award to Cristo Rey would subsidize religious instruction.

The City's decision to award more than \$800,000 of discretionary funds to a private religious school, subsidizing religious instruction, is unconstitutional. Combined with the mayor's personal connection to the school and the alleged failure to give public school administrators the same notice provided to Cristo Rey, the appearance of an unfair bias is overwhelming. Please respond in writing with the steps the City takes to correct this misstep and to ensure that it will not force San Jose taxpayers to support a religion that they do not believe in.

Sincerely,



Ryan D. Jayne
Staff Attorney