IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-cv-02126-MSK-CBS

FREEDOM FROM RELIGION FOUNDATION, INC.;
JOHN DOE;
DOECHILD;
JOHN ROE;
MARY ZOE;
ROECHILD-1; A MINOR CHILD; and
ROECHILD-2, A MINOR CHILD,

Plaintiffs,

v.

CHERRY CREEK SCHOOL DISTRICT # 5; and
MONTE C. MOSES, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF SCHOOLS OF CHERRY CREEK SCHOOL DISTRICT # 5,

Defendants.

PLAINTIFFS' MOTION FOR RECONSIDERATION
WITH ARGUMENT AND CITATIONS

COME NOW the Plaintiffs, by undersigned counsel, and hereby move the Court to reconsider its Order dismissing this case. In support of this Motion, it is stated as follows:

Certificate Under D.C.Colo.LCivR 7.1A

Counsel for the Plaintiffs has conferred with counsel for the Defendants by telephone to resolve this matter and advises the Court that the Defendants do not consent to this Motion.

1. Plaintiffs have simultaneously filed with this Motion a Third Amended Complaint which responds to the concerns the Court expressed in its dismissal order. Most of these changes are

attributable to new information supplied by Messrs. Barton G. Prieve and Robert L. Stuart which was not available when the previous complaints were filed. Both Messrs. Prieve and Stuart have been very active in the Defendant School District's activities and they only stepped forward to provide information to Plaintiffs' counsel within the past month.

2. Plaintiffs take issue with the Court equating this case with holiday displays where the secular objects of Christmas have been held to neutralize the religious impact of a manger scene. The Court has erroneously failed to differentiate between holiday displays on government property and this case, which involves young, impressionable children in public schools settings. The latter have always received special treatment by the United States Supreme Court in religion cases. See, e.g., *Edwards v. Aguillard,* 482 U.S. 578 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963); and *McCollum v. Board of Education* 333 U.S. 203 (1948). The other 39 Developmental Assets no more neutralize the religious character of Asset 19 than did the high school football game and its attendant activities neutralize the pre-game student prayer in *Santa Fe Ind. School Dist. v. Doe*, 530 U.S. 290 (2000) or did the middle school graduation ceremony neutralize the prayers in *Lee v. Weisman*, 505 U.S. 577 (1992).[1] In neither of these cases did the Court suggest that prayer would lose its religious identity and be secularized by treating it as merely a part of an otherwise secular unit or event.

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[1] Under the Court's theory that Asset 19 cannot be dissected on a "granular" level, prayer in a public school classroom would be constitutionally permissible if it were a component of a good citizenship curriculum, and even creationism could be taught as part of a program studying the history of the human race.

3. Plaintiffs also take issue with the Court's ruling that, to violate the Establishment Clause, the challenged action must be sectarian, that is, it must be related to a particular faith or sect. In *Santa Fe*, supra, even though the student prayer was required to be "nondenominational," 530 U.S. at 294, it was declared unconstitutional. Many years earlier, the Court had rejected the argument that nondenominational or nonpreferential prayer was excluded from Establishment Clause scrutiny and that the Constitution forbade only sectarian establishments. For a an analysis of this subject and its history, we refer the Court to the concurring opinion of Justice Souter in *Lee v. Weisman*, 505 U.S. 601-618.

4. In addition, the prayer in *Santa Fe* was held to be unconstitutional even though it was required by the Texas school district to be nonproselytising. The 40 Developmental Assets, on the other hand, are intended to proselytize, i.e. to bring about a conversion, a change, to an allegedly better way of life. Not only do they recommend attendance at a religious institution, the Defendants urge students to embrace as many of the 40 Developmental Assets as possible or risk failure and Asset 19 is obviously one of the 40.[2]

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[2] A serious problem with the 40 Developmental Assets is that almost one-half are outside the control of the student. For example, Asset 3 (Appendix A to Third Amended Complaint, p. 3) states: "Young person receives support from three or more nonparent adults." This sounds admirable but what if the young person doesn't have three or more nonparent adults who support him? What if the parent(s) isn't actively involved in helping the young person succeed in school? (See Asset 6 at Appendix A to Third Amended Complaint, p. 3). In fact, the first sixteen Assets fall into this category. This deficiency significantly compromises the efficacy of the Assets and the claims made about them.

Implicit in the Assets program is that one of its primary objectives is to keep families and communities together. This is consistent with Lutheran dogma which frowns on divorce and encourages community through churchgoing. It is obviously an important element of the

5. Asset 19 violates each of the three criteria set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The criteria are cumulative, meaning that a challenged practice must pass all three tests; if it fails but one of the tests, it is unconstitutional. The three criteria are (1) the practice must have a secular purpose, (2) it must neither advance nor inhibit religion, and (3) it must not foster an excessive entanglement with religion. *Id.* at 612-13.

6. Asset 19 recommends that students engage in activities in a religious institution. This violates the first prong because it is patently religious and has no secular purpose. The argument that it is part of a 40 point program to benefit youth does not make it secular unless we are willing to say that prayer or any other religious observance can be spared Establishment Clause scrutiny simply because it is couched in terms of secular goals. See *Stone v. Graham*, 449 U.S. 39 (1980) (Ten Commandments posted in public schools held to violate the Establishment Clause even though they bore a notation that their secular application can be seen in legal systems of the western world and the United States).

7. Asset 19 violates the second prong of the *Lemon* test because its principal effect is to advance religion. The Asset is phrased in terms of "activities" at a religious institution. If those activities are not religious, why then must they be engaged in at a religious institution? The answer is obvious and clever phrasing does not conceal the underlying purpose of Asset 19. It is to motivate students to go to church whether at the behest of their parents or on their own initiative. This is the

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Developmental Assets program and is further evidence that the Assets are an integral part of the Lutheran religion's moral code not only for youth but for families and communities as well. (See Appendix E to Third Amended Complaint, pp. 4, 5).

principal effect intended by Asset 19.

8. Asset 19 violates the third prong of *Lemon* because it entangles the Defendant School District and its Superintendent with religion. The Search Institute, sponsor of the program, was founded by a Lutheran minister and was originally named the Lutheran Youth Group. Lutheranism is a Protestant sect. To this day, the Lutheran Brotherhood plays a dominating role in the management of the Search Institute. For these reasons, Plaintiff also challenge the constitutionality of the 40 Developmental Assets as a unit on the grounds that they constitute a moral code for Lutheran youth. Each of the Assets has a stated biblical underpinning (See Appendix E to the Third Amended Complaint, Exhibit 1) and the history of the Assets program clearly shows that religion is at its core.

9. Plaintiffs believe that the Search Institute works closely with the Defendants. For example, if this case is reinstated and can move forward, Plaintiffs intend to show that Dr. Peter L. Benson, President of the Institute and originator of the Assets program, visits the School District periodically to assist in implementation of the program and communicates from time to time to give the program a boost. Counsel understands that his next visit is scheduled for May of 2009. This is evidence of further entanglement.

10. Asset 19 is palpably religious. It violates all three prongs of the *Lemon* test and is an endorsement of religion by Cherry Creek School District # 5. Its constitutionality should be viewed by the Court separately and it should not be allowed to conceal its true colors behind the other 39 Assets. Further, if all 40 Development Assets taken as a unit, are, as Plaintiffs believe, a moral code for Lutheran youth, they, too, fail the *Lemon* test. These are factual questions that need to be

resolved at trial or through discovery, not on the face of the pleadings.

For the foregoing reasons, it is respectfully requested that the Court vacate its dismissal order and reinstate this case so that it can proceed to discovery, trial, and ultimate judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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