FREEDOM FROM RELIGION *foundation*

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June 30, 2021

SENT VIA EMAIL AND U.S. MAIL:
shill@waupun.k12.wi.us

Steve Hill
District Administrator
Waupun Area School District
950 Wilcox St.
Waupun, WI 53963

Re: Unconstitutional Partnership with Religious Organization

Dear Mr. Hill:

I am writing on behalf of the Freedom From Religion Foundation (FFRF) regarding a constitutional violation occurring in the Waupun Area School District (District). FFRF is a national nonprofit organization, headquartered in Madison, WI, with more than 36,000 members across the country, including more than 1,500 members in Wisconsin. Our purposes are to protect the constitutional principle of separation between state and church, and to educate the public on matters relating to nontheism.

It has come to FFRF's attention that the District has partnered with Church Health Services (CHS) to provide on-site mental health and substance abuse counseling for students. The District has opted to waive the facilities use fees as well as waive oversight of the services as a whole. After reviewing records provided by the District on May 7, 2021, it is clear that the District's partnership with CHS, both in its conceptualization and in the execution of the Memorandum of Understanding (MoU), is unconstitutional for several reasons.

While we certainly support the District's goal of providing mental health and substance use counseling to students of a vulnerable and impressionable age, explicitly partnering with a faith-based organization appears to favor not only religion but Christianity over all religions. We believe that the District can achieve its goal of providing mental health and substance use counseling without partnering with a faith-based organization.

1. **The partnership between the district and CHS unconstitutionally entangles the state with religion, favors religion over non-religion, and favors Christianity over other religions.**

It is a fundamental principle of Establishment Clause jurisprudence that the government cannot demonstrate a preference for religion. The Supreme Court has said, "The touchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'" *McCreary County v. ACLU,* 545 U.S. 844, 860 (2005), (quoting *Epperson v. Arkansas,* 393 U.S. 97, 104 (1968); *Everson v. Bd. of Educ. of Ewing,* 330 U.S. 1, 15-16 (1947); *Wallace v. Jaffree,* 472 U.S. 38*,* 53 (1985)).

By partnering with and directing students to seek counseling services from a Christian organization, the District appears to show preference for religion over non-religion, and Christianity over other religions, which is a violation of the neutrality required by the Establishment Clause.

The District attempts to detangle itself from CHS with a series of provisions in the MoU. Accordingly,

- The District shall not be involved in any record keeping or collection. ℙ 3;
- The District shall establish the schedule when CHA is permitted to offer services, but CHS maintains control over his/her hours of work. ℙ 4;
- The MoU is terminable by either party. ℙ 5;
- The District and CHS each establish separate mailing addresses for legal notice purposes. ℙ 6(a);
- CHS's advertising of services must include explicit language the the services are "NOT SCHOOL SPONSORED SERVICES." ℙ 6(a);
- Records maintained by CHS are not pupil records. ℙ 6(b);
- Employees of CHS, shall at no time be employees, common law, or otherwise, of the District. ℙ 9;
- The MoU does not establish a joint employer relationship. ℙ 9; and
- Each party shall indemnify, defend, and hold harmless the other party from and against any and all claims, demands, losses, liabilities, damages, expenses and causes of action where claims arise from fault, negligence, gross negligence, or recklessness of the party. ℙ 11.

However, these attempts to detangle itself are futile. First, the MoU is inconsistent in its attempt to detangle the relationship.

- The District controls the type of services CHS may provide on-site. ℙ 1;
- The District is responsible for CHS's operational costs related to use of District facilities. ℙ 3;
- The District must approve CHS's written notices to students and advertisements. ℙ 6(a);
- CHS anticipates the release of patient records to the District, ℙ 6(b), even though CHS is obligated to disclose confidential information to the District, ℙ 13; and
- The parties shall collaboratively develop policies and procedures. ℙ 7;

These provisions demonstrate a collaborative relationship between the District and CHS. Yet the District purports to control CHS's scope of activities, while CHS is allowed autonomy in its provision of services.

Second, the regular presence of CHS on-campus creates the impression that the District favors religion over non-religion, and Christianity over other religions. Despite the attempts to detangle the relationship contractually, the reasonable observer entering a school building to find CHS offering services would presume that the District endorses and approves of the services and views of CHS.

Further, the MoU attempts to minimize the faith-based nature of CHS by characterizing the organization as "a mental health counseling provider." But according to CHS themselves, they are "an ecumenical

health ministry committed to enacting God's plan." CHS identifies as a "faith-based healthcare organization." They refer to the community as their "local congregation" and refer to their services as "health ministries." The omission of their religious affiliation and failure to characterize CHS as a faith-based organization is a misleading representation of the partnership.

2. **In waiving the facility use fees, the district unconstitutionally shows favor for religion over non-religion, and Christianity over other religions.**

According to the MoU, "the District agrees to provide rent-free space at Meadow View Primary, Rock River Intermediate, Waupun Junior/Senior High School, SAGES, and the Education Service Center so that [CHS] may provide school-based mental health and substance abuse services to students and their families." Further, "[CHS] is not responsible for costs (such as utilities) related to their use of the District facilities." The fee waiver also captures custodial and supervisory fees.

At issue here is whether po7510—the District's Use of District Facilities policy—should govern the facility use agreement between the District and CHS. The District seems to waive the application of the policy, but then applies an exemption to the policy, which insinuates that the policy should originally apply. Regardless of whether the policy applies or not, the current facility use fee waiver between the District and CHS is unconstitutional.

Po7510 should govern the CHS's use of facilities.

First, according to the MoU, "in the performance of this Agreement, each party agrees to comply with all applicable laws, rules, and regulations of duly constituted government bodies." Here, the Board of Directors is a governmental body with "rules and regulations" set out as policies. It goes without saying that the Board, and the District, are subject to these Board policies. The MoU further states that "[CHS] shall comply with all applicable Board policies and Administrative Rules." The MoU states only one exception to the applicability of Board policies, which regards disclosure of confidential information. The MoU does not exempt the application of po7510. Thus, both the District and CHS are subject to all Board policies, including po7510.

Po7510 establishes a four group scheme that anticipates a fee structure for faith-based organizations like CHS. Group 1 organizations (WASD Sponsored Activities and Classroom Events) and Group 2 organizations (Non-Profit Organizations not supervised by the District, but servicing District students of the District) may use District facilities at no charge. But, Group 3 organizations (Non-profit organizations with paid employees that charge admission and/or material fee), like "Church volleyball" or "501(c)" organizations, are scheduled to pay an hourly rate for facility use. Group 4 organizations are for-profit organizations and are also scheduled to pay an hourly rate for facility use.

CHS is a 501(c)(3) organization, and thus not a Group 4 organization. By the District's own admission, CHS is not sponsored by the District.

Here, CHS is much more akin to Group 3 than Group 2 because Group 2 organizations (e.g. Waupun Little League and 4-H) are free for parents and participants whereas Group 3 organizations (e.g. church volleyball and Club Breakout) are fee-based. CHS charges families for counseling services.[1] The District recognizes that CHS may bill families for counseling services. See MoU ℙ 3. While CHS may offer fee reductions based on poverty level and/or bill insurance providers, ultimately alleviating the family from paying out-of-pocket, CHS is still billing for services. Thus, CHS is a Group 3 organization and should be charged for use of district facilities.

[1] https://www.churchclinic.org/eligibility-requirements2.html

Second, the Facility Use Terms and Conditions[2] that accompanies po7510 anticipates that faith-based organizations be charged for use of the District's facilities. According to the Terms and Conditions, "*all* contracts for facility usage are granted with this[3] understanding." There is no written exception to these terms and conditions nor is there an exception to po7510 for faith-based organizations.

In the alternative, the District may apply po6330—Leasing School Property. This policy permits the Board to authorize the leasing of school sites, buildings, and equipment *not needed for school purposes . . . at a reasonable rental fee*." CHS's services, though benefiting the school community, are not needed for school purposes. Thus, should the District apply po6330, the District must still charge a reasonable rental fee.

Last, the District attempts to exempt itself from enforcing po7510—the District's Use of District Facilities policy—by ad hoc concluding that "[CHS's] access to such facilit[ies are] not use of District facilities, in accordance with Administrative Regulation." This conclusion both oversteps Board policy and logic. Po7510 does not include any exemptions or exceptions for the District to apply and the District has no authority to create or impute such exemptions or exceptions without prior designation. The District offers no reasoning, evidence, or support for their conclusion that CHS's use of district facilities does not constitute use of District facilities under administrative regulation or Board policy.

Po7510 does not allow the Board to waive District facility use fees.

Neither the po7510 nor the Terms and Conditions thereof allow for fee exemptions for Group 3 organizations. Thus, CHS must be charged the Group 3 facility use rate. Failure to do so violates Board policy and violates the Establishment Clause by unduly favoring a religious organization over secular organizations.

In the alternative, where the board applies po6330, the Board is still required to charge a reasonable rental fee.

Even if neither po7510 nor po6330 apply, the fee waiver is impermissible.

Even if neither po7510 nor po6330 apply, the District has violated the Establishment Clause by entangling itself in religion and demonstrating a preference for religion over non-religion, and Christianity over other religions. In failing to charge the faith-based organization with district facility use fees, while still charging secular organizations district facility use fees, the District has shown preference for religion over non-religion. Further, the District has shown preference for religion over non-religion, and preference for Chrisitanity over other religions, by failing to hold a period of open bidding for the contract for counseling services. The District has exclusively made the contract for counseling services available to a Christian organization and no others.

3. **The counseling services suggested impute special education and curriculum considerations that foreseeably violate state and federal law and board policy.**

[2] https://core-docs.s3.amazonaws.com/documents/asset/uploaded_file/1199353/WASD_Fee_Schedule.pdf
[3] "This" refers to the incorporation of the terms and conditions.

As a local education agency receiving federal funding for special education programming[4], the District must adhere to the Individuals with Disabilities Education Act (IDEA), which requires the District to offer free appropriate public education (FAPE) for students with disabilities. See 34 C.F.R. §300. In part, this means that services are provided at (a) public expense, (b) under public supervision and discretion, and (c) without charge. *Id*. This includes special education services *and* related services. *Id*. Related services include psychological services, counseling services, and psychotherapy services. See 34 C.F.R. §300.34; *T.G. v. Board of Education of Piscataway*, 576 F. Supp. 420 (D.N.J. 1983).

Further, a "child with a disability" in Wisconsin is eligible for the IDEA's FAPE services. This includes any child with "other health impairments." Wis. Stat. 115.76(5). "Other health impairments" is broadly defined and may include any chronic or acute health problem that adversely affects a child's educational performance, including substance abuse problems. Wis. Admin. Code PI 11.36(10). These students are also eligible for related services, which includes social work services, psychological services, and counseling services. Wis. Stat. 115.76(14)(a).

Here, CHS provides services that fall within the purview of state and federal law. Foreseeably, CHS will provide services for students with an individualized education plan (IEP). If this is the case, the school district is required to provide CHS's services at public expense, under public supervision and discretion, and without charge to the students and families. The school district has already established that CHS may bill families for services, will offer no protections for families who are inappropriately or inaccurately billed, and indemnify themselves from negligent billing. This is unconscionable.

Further, the district must supervise the provision of services. Supervision of services does not need to create an employer-employee relationship, but it does call into question (1) the validity of the indemnification clause and (2) CHS's ability to provide secular services. First, because the District is statutorily required to supervise the provision of services, an indemnification clause would cause a conflict of law. In such a case, the indemnification clause may be controlled by statute and sever from the MoU. Without such indemnification, the District is further entangled in CHS's religious agenda.

Second, each student receiving services offered by the District has a right of conscience and a right to a secular education. According to District policy, "It is not the province of a public school to advance or inhibit religious beliefs or practices. [ ] No matter how well intended, either official or unofficial sponsorship of religiously-oriented activities by the school are offensive to some and tend to supplant activities which should be the exclusive province of individual religious groups, churches, private organizations, or the family." See po8800. These are wise words that the District adopted in 2014 and revised in 2018. And yet, the District has already forgotten them. In partnering *either officially or unofficially* with an organization "committed to enacting God's plan," the District has violated policy and violated the federal constitution by advancing Chrisitian beliefs or practices.

Even if CHS limits services to students without an IEP, the mere fact that the student receives mental health counseling or substance abuse counseling suggests that the student's educational performance is

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[4] https://core-docs.s3.amazonaws.com/documents/asset/uploaded_file/515124/2019-20_WASD_Annual_Meeting_Packet.pdf

affected and that the child should be evaluated for either an IEP or a 504 plan under the Americans with Disabilities Act. This puts the school on notice to conduct a Child Find meeting, perform observations, develop an IEP team, perform evaluations, and more—again, without advancing or inhibiting religion and at no expense to the student or family.

Further, the District's Religion in the Curriculum policy (po2270) requires that, in compliance with the First Amendment of the U.S. Constitution, "students [ ] receive unbiased instruction in the school[]" and instructional materials shall not be designed to influence students to accept or reject a particular religious belief . . . ." With CHS's blatantly Chrisitan mission and leadership, it is nearly impossible to imagine counseling—which is akin to educational instruction—that remains secular.

Last, Wis. Admin. Code PI 31 permits a district to pay for school mental health programs. Here, expenditures include "salaries and fringe benefits an [eligible school district] pays to employ, hire, or retain a social worker or costs to contract for the services of a social worker." Here, the contract with CHS would again impermissibly entangle the school district with religion and impermissibly allocate public funds to a religious organization exclusively. While CHS may be one option among many mental health providers, they may not be the only option and they still may not uniquely benefit from District facility use fee waivers. Thus, the District's consideration of CHS as a school mental health program is invalid.

To avoid these constitutional concerns, the District must discontinue the partnership with CHS. The MoU permits either party to terminate the MoU by giving written notice to the other party two weeks (or 14 calendar days) in advance. The problem here is immense, and the solution is simple. Please inform us in writing of the actions that the District is taking to remedy these constitutional violations.

Sincerely,

Joseph McDonald
Patrick O'Reiley Legal Fellow
Freedom From Religion Foundation