IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

A.W., a minor by and through her next friend, C.W., Plaintiff, vs. CALCASIEU PARISH SCHOOL BOARD, Defendant.	Case No. Judge **PLAINTIFF'S MEMORANDUM IN SUPPORT OF APPLICATION/MOTION FOR TEMPORARY RESTRAINING ORDER**

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I. Introduction

Plaintiff A.W. is moving for a temporary restraining order regarding Defendant's refusal to approve, and provide school transportation to and from, a field trip slated for May 1, 2008 that Plaintiff and other student members of her Fellowship of Christian Athletes ("FCA") Club desire to attend. (Compl. ¶ 2.) The Defendant routinely approves field trips and provides transportation to a wide range of events and activities for students and student clubs including, but not limited to:

- Bowling at "Petro bowl" for students to "learn[] a team sport" (Pl.'s Mot. TRO Ex. C-246);
- going "alligator hunting" (*id*. Ex. C-233);
- "perform[ing] at the Black Heritage Festival" (*id*. Ex. C-237);
- visiting the "New Orleans School of Cooking" to "participate in a cooking class and tour La. oldest city and learn about the history of Cajun/Creole cooking" (*id*. Ex. C-285);
- "learn[ing] how to roller skate" at "Skate City" (*id*. Ex. C-245);
- playing "putt-putt" with the purpose of "shar[ing] the sport of gold" (*id*. Ex. C-228);
- visiting the mall to "see Santa, Chick FilA, [and] Chipmunk Christmas movie" (*id*. Ex. C-227);
- going to the movie theater to watch "Mr. Magorium's Wonder Emporium" (*id*. Ex. C-226);
- going to the movie theater "to see Beowulf" (*id*. Ex. C-241);
- visiting "Reeves Uptown Catering Place" for a "Choral Christmas performance" (*id*. Ex. C-248);
- visiting "Grant Tree Farm" to study "lifecycles of organisms" (*id*. Ex. C-250);
- attending the "Mardi Gras parade" (*id*. Ex. C-360);
- taking a "nature walk" (*id*. Ex. C-225);
- going to the "Houston Museum of Fine Arts" (*id*. Ex. C-276);
- "attend[ing] the Texas Renaissance Festival School Days" (*id*. Ex. C-229);
- attending a "free children's Celtic concert" (*id*. Ex. C-223);
- visiting "Holy Trinity Episcopal Church" where students "will observe and experience hands-on activities with pumpkins and value reading" (*id*. Ex. C-220);
- attending a "Houston Astros Game" as the end of the year activity for the Builder's club" (*id*. Ex. C-99);
- visiting "the LA Dep of Wildlife and fisheries facility" (*id*. Ex. C-92);
- going to "Rosa Hart Civic Center" to "attend the Rudolph ballet" (*id*. Ex. C-255);
- "visit[ing] Jean LaFitte Cajun Prairie Museum, eat Cajun food at Cajun Restaurant, dance/listen to Cajun music" (*id*. Ex. C-257);
- visiting "Moody Gardens" to "instruct students on the rainforest and the role of coral reefs in the ocean (*id*. Ex. C-264);

- going to "Dry Creek Baptist Camp" to engage in :community building exercise – ropes course" (*id*. Ex. C-274);
- "walk[ing] to the nursing home to deliver handmade crafts and visit with the residents" (*id*. Ex. C-97);
- going to "Ci Ci's Pizza" for "end of year pizza party" for the "Big Brother/Big Sister Club" (*id*. Ex. C-117); and
- attending and event the stated purpose of which was to "support club members in making the choice to be involved in the Governor's Program on Abstinence." (*id*. Ex. C-112.)

Given the breadth of Defendant's forum, its refusal to approve the FCA club's field trip request and to provide transportation to and from the event based solely on the religious content and viewpoint of the Plaintiff's and the Club's expression is a clear-cut violation of the First Amendment and the Equal Access Act that requires immediate relief from this Court.

This situation did not need to come to a lawsuit, as the Board had ample opportunity to resolve this situation short of the present litigation. Shortly after the Plaintiff's field trip request was denied by FK White Middle School Principal Chris Fontenot, the Board had a meeting and discussed the denial. (Pl.'s Mot. TRO Ex. H ¶¶ 3-4.) At that meeting, which occurred on April 8, 2008, the founder and organizer of Just for Jesus presented information about the event and requested that the Board reverse the denial of the FCA Club's field trip request. (*Id*. ¶ 4.) At this meeting, a motion was made to treat the FCA Club's field trip request the same as field trip requests made by other student clubs (*i.e*., approve it and provide school transportation), yet that motion was defeated. (*Id*. ¶¶ 6-10.)

Counsel for Plaintiff then sent a letter to the Board on April 14, 2008, advising the Board that its denial violates the Plaintiff's rights under the First Amendment and the Equal Access Act, and informing the Board that if it failed to grant the FCA club equal treatment it would likely face a lawsuit. (Pl.'s Mot. TRO Ex. D.) Counsel for Defendant responded with a letter dated April 17, 2008, stating that the Board's decision would not be reversed. (*Id*. Ex. E.) Then,

on April 21, 2008, counsel for Plaintiff spoke to Defendant's counsel by phone and advised him of the Plaintiff's intent to file a lawsuit against the Board and to seek a temporary restraining order if the Board did not grant equal treatment to the FCA club. (Compl. ¶ 62.) During this call, Plaintiff's counsel also informed Defendant's counsel of a successful lawsuit brought against East Baton Rouge Parish School Board in November 2007 for its unlawful denial of a student club's request to attend and receive transportation to a Just for Jesus event. (*Id*. ¶ 63.) Counsel for Defendant stated that the Board would not change its mind. (*Id*. ¶64.) Finally, on April 22, 2008, counsel for Plaintiff left a voicemail for Defendant's counsel, advising him that unless the Board granted the FCA club equal access, Plaintiff would file a lawsuit and motion for temporary restraining unless the FCA club's field trip was approved, including transportation to and from the event. (*Id*. ¶ 65.) Despite all these efforts, Plaintiff still had to access the courts to obtain her desired relief.

Defendant's recalcitrance to reverse its decision is difficult to comprehend given the applicable law, as discussed below, but it is even more incomprehensible considering the Board has approved field trips to innumerable other religious events and activities. (Pl.'s Mot. TRO Ex. C-150-173 (listing field trip approvals for religious events).) Why are all these other religious-oriented field trips approved, yet Just for Jesus is denied? The Defendant approved a field trip whose purpose was to bring "students, parents, teachers, and community [members]" together "to pray for our young people and for our world," and another trip to "Greater Mt. Zion Church" where students would "participate in a Church musical." (*Id*. Ex. C-166.) And these are just two of the numerous religious-oriented field trips approved by the Defendant. Opening a forum to religious speech and then picking and choosing what religious speech is acceptable within that forum, as Defendant is doing here, is blatant viewpoint discrimination that violates

the First Amendment. *See, e.g., Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1279 (10th Cir. 1996) (where city opened forum to discussion of religious topics, city committed viewpoint discrimination when it prohibited showing of film because it "advocat[ed] the adoption of the Christian faith" while at same time permitting "strictly historical" and "philosophical" discussions of Christianity).

Under the circumstances of this case, a temporary restraining order is warranted. Defendant's discriminatory treatment will irreparably harm Plaintiff and other Club members for every day that it is permitted to continue, and will permanently and irrevocably harm the FCA Club if not discontinued by May 1, 2008, the day of the Just for Jesus event. Additionally, an affidavit submitted herewith illustrates that numerous student members of the FCA Club will not be able to attend the imminent "Just for Jesus" event without school provided transportation to and from the Lake Charles Civic Center. (*See* affidavit of student members attached hereto as Exhibit F.) Put simply, unless Plaintiff and her fellow Club members receive field trip authorization and access to all attendant benefits and privileges, substantial and irreparable harm to important constitutional and statutory guarantees will occur.

Fortunately, case law illustrates that this is a straight forward case of unlawful religious discrimination. The issue of student club access to field trips has already been addressed by other federal courts, and the question of whether a school may lawfully exclude some student groups (like Plaintiff's) from field trip access while affording other groups field trip access has been answered with a resounding "no." For example, in *Prince v. Jacoby*, 303 F.3d 1074 (9th Cir. 2002), the Ninth Circuit reviewed a challenge to a school's refusal to allow a student's Bible club the same benefits as other student clubs. There, the Bible club sought equal access to student/staff time, school supplies, audio/visual equipment, and (as is the case here) use of

school provided transportation to and from field trips. *Id*. at 1090-92. The *Prince* Court held that the school's restriction on access to facilities and benefits was based purely on the religious content and viewpoint of the Club's speech in violation of the First Amendment. *Id*. at 1091. Reasoned the court: "While certainly not required to grant student clubs access to [the above listed] benefits, the school has chosen to do so. Having done so, it cannot deny access to some student groups because of their desire to exercise their First Amendment rights without a compelling government interest that is narrowly drawn to achieve that end." *Id*.

Consider also *Straights and Gays for Equality (SAGE) v. Osseo Area Schools-Dist. No. 279*, 471 F.3d 908 (8th Cir. 2006), where the Eighth Circuit reviewed a grant of preliminary injunctive relief enjoining a school's refusal to allow a student club to, among other things, take field trips and participate in fundraising activities. The school routinely granted permission for other student clubs to do so. The Eighth Circuit upheld the issuance of preliminary injunctive relief, holding that the school impermissibly afforded certain noncurricular groups (*e.g.*, cheerleading and synchronized swimming) with greater access to school facilities and communication options than noncurricular groups, such as SAGE, in violation of the Equal Access Act. *Id*. at 913.

Consequently, case law makes abundantly clear that Defendant may not lawfully sidestep the First Amendment and the EAA by providing some student club access but withholding full access. Here, Defendant currently allows the student members of the Club to meet on campus as a student club and to utilize some benefits and privileges. Defendant apparently believes that this is all the law requires, for they insist on withholding approval for Club members to take field trips and continue to withhold key benefits that accompany field trip approval (*e.g.*, school provided transportation). (Compl. ¶¶ 2-6, 59-66.) Defendant is mistaken. As shown above, this

same situation presented itself in both *Prince* and *SAGE*, and the courts there found First Amendment and/or EAA violations.

Accordingly, Plaintiff requests that this Court immediately issue a temporary restraining order requiring the Defendant to approve Plaintiff's and FCA Club's field trip request to attend the Just for Jesus event on May 1, 2008, at Lake Charles Civic Center, and to afford Plaintiff and her Club all of the attendant rights, benefits, and privileges given to other student clubs in relation to approved field trips.

II. Facts[1]

III. Argument

A. Standard for Issuance of a Temporary Restraining Order

The legal standard for issuance of a temporary restraining order is the same as that for a preliminary injunction. Specifically, a plaintiff must demonstrate: (1) a substantial likelihood of success on the merits; (2) substantial threat of irreparable injury if the injunction is not issued; (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted; and (4) that the grant of an injunction will not disserve the public interest. *Speaks v. Kruse*, 445 F.3d 396, 399, 400 (5th Cir. 2006). As shown below, Plaintiff satisfies the elements necessary for a temporary restraining order to issue.

B. Plaintiff has a Substantial Likelihood of Succeeding on the Merits.

Defendant's practice of denying field trip authorization to student clubs based on the content and viewpoint of the student club members' desired speech (pursuant to Policies granting them unbridled discretion over access to the student club forum) implicate a number of constitutional provisions. These include the Free Speech and Free Exercise Clauses of the First

[1] Rather than repeat the facts alleged in the Verified Complaint, and due to the time constraints imposed by the immediacy of the relief necessitated by Defendant's actions, Plaintiff hereby incorporates the facts alleged in the Complaint by reference.

Amendment, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and the EAA.[2] As to each of her claims, Plaintiff demonstrates a substantial likelihood of success.

1. Defendant is violating the Free Speech Clause

a. Plaintiff's speech is safeguarded by the First Amendment.

Religious speech is, without question, protected by the First Amendment. *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) ("religious worship and discussion . . . are forms of speech and association protected by the First Amendment"). As the Supreme Court has explained:

> Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. . . . [I]n Anglo-American history . . . government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince.

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (citations omitted).

Here, Plaintiff and other FCA Club members desire to express their religious views on many subjects addressed by other student clubs that are permitted to take field trips. These subjects include issues related to religious beliefs; cultural diversity; promoting respect and dignity for other students; community service; cultivating leadership and teamwork; fostering strong moral character; encouraging loyalty to school, community, and nation; sexual abstinence; avoiding substance abuse and other destructive decisions; and current political issues. (Compl. ¶ 44.) Plaintiff's speech is unquestionably protected by the First Amendment.

[2] Due to time constraints imposed by the immediacy of the relief Plaintiff seeks, Plaintiff has not briefed her due process, equal protection, free association, and free exercise claims herein. Plaintiff maintains that these rights were also violated and will include these claims as the case proceeds.

b. Defendant created and maintains a designated public forum for speech by student groups.

"[A] public forum may be created by government designation of a place or channel of communication . . . for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 802 (1985). Importantly, the Supreme Court has held that school facilities become public forums when "school authorities . . . 'by policy or by practice' open[] those facilities 'for indiscriminate use by the general public,' or by some segment of the public, such as student organizations." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) (citation omitted) (emphasis added). Government intent is the central question in determining establishment of a designated public forum, and the government's "policy and practice" are key to determining whether the government intended to designate a place not usually open to assembly and debate as a public forum. *Cornelius*, 473 at 802.

Here, Defendant's Policies and practice "evince[] a clear intent to create a public forum." *Id*. Defendant imposes virtually no limit on the subject matters that student club members can seek to address besides the individual interests, passions, and beliefs of the student club members. Indeed, Defendant permits student clubs, such as 4-H Clubs, Key Clubs, Big Brother/Big Sister, Abstinence clubs, Builders Club, and Rebel Riot, to take advantage of field trip opportunities and to discuss their views on issues related to sexual abstinence, service to others, character development, and much more. (Compl. ¶¶ 7-17 (listing numerous approved field trips); Pl.'s Mot. TRO Ex. C-92-379 (field trip forms showing the broad range of topics addressed on such trips).) Defendant's forum is plainly a designated forum for private student speech.

c. Defendant's content-based exclusion of Plaintiff and fellow Club members from field trip access and attendant benefits violates their free speech rights.

In a designated public forum, content-based restrictions on speech are subject to strict scrutiny; they can survive only if they serve a compelling state interest and are narrowly tailored to achieve that interest. *Widmar*, 454 U.S. at 270. Defendant's withholding of field trip authorization to Plaintiff and other FCA Club members based on the religious content of their desired speech violates the First Amendment. *See Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone").

Defendant's discrimination against Plaintiff's intended religious speech (Compl. ¶¶ 55-56) (specifying the intended religious content of the Club's speech)) is indistinguishable from the discriminatory exclusion struck down in *Widmar v. Vincent*. There, similar to what Defendant is doing here, a university opened up its facilities for use by student groups but excluded a religious student club from that forum. 454 U.S. at 265. The university excluded the group because, like the Club at issue here, it engaged in "religious worship and discussion." *Id*. The Court held that the university's "discriminatory exclusion [was] based on the religious content of [the] group's intended speech," and required the university to "show that its regulation is necessary to serve a compelling interest and that it is narrowly tailored to achieve that end." *Id*. at 269-70. Like in *Widmar* and as shown herein, Defendant cannot assert a legitimate, let alone compelling, interest to support its discriminatory treatment of Plaintiff and other Club members as it relates to field trip authorization and attendant benefits.

d. Defendant's viewpoint-based exclusion of Plaintiff and other Club members from the student forum violates the First Amendment irrespective of the type of forum.

Viewpoint discrimination occurs when the government denies a speaker access to a speech forum based solely on the viewpoint that speaker expresses on an otherwise permissible subject matter. *Cornelius*, 473 U.S. at 806. Viewpoint discrimination is unconstitutional regardless of the forum. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993). Viewpoint discrimination occurs at its most basic level when the government permits religion to be discussed in a forum, yet picks and chooses which religious views it will permit to be expressed, and which it will not.

For instance, in *Child Evangelism Fellowship of N.J., Inc. ("CEF") v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 519 (3d Cir. 2004), the defendant school district opened a forum in which it permitted local community groups to distribute literature to students. The community groups would create the flyers and deliver them to individual schools within the district. *Id*. at 520. The school district opened the forum to groups that expressed religious views, but excluded the plaintiff's flyers because the district "disfavored . . . the particular religious views that Child Evangelism espouses." *Id*. at 529. As the Third Circuit succinctly put it, "Suppressing speech on this ground is indisputably viewpoint-based." *Id*. at 530. *Accord Pruitt v. Wilder*, 840 F. Supp. 414, 418 (E.D. Va. 1994) (prohibiting references to deities on license plates, but permitting all other religious references, constituted viewpoint discrimination); *Church on the Rock, supra*.

Here, the Defendant routinely approves field trips for, and provides school transportation to, religious events and activities. (Pl.'s Mot TRO Ex. C at 150-173 (listing approved field trips to religious events and activities).) The Defendant has approved field trips with the following religious purposes: "to pray for our young people and our world" (*id*. Ex. C-156); to "promote

National Day of Prayer" (*id*. Ex. C-157); to "provide color guard" at the "Tabernacle of Praise" annual conference (*id*. Ex. C-162); "to participate in a Church musical" at "Greater Mt Zion Church" (*id*. Ex. C-166); "to perform for the National Day of Prayer Program" (*id*. Ex. C-167); and "to provide choral music for church conference-convention" at "St. Paul Methodist Church" (*id*. Ex. C-173). Defendant violates the prohibition on viewpoint discrimination by opening its field trip forum to religious speech and expression, while at the same time prohibiting Plaintiff's field trip request based solely on Plaintiff's particular religious viewpoint.

Further, federal courts have found schools guilty of viewpoint discrimination under circumstances similar to those at issue here, where a religious student club is being prohibited from expressing a religious viewpoint on otherwise permissible topics. *See, e.g., Prince*, 303 F.3d at 1091-92 (where school district offered noncurriculum clubs access to "student/staff time, school supplies, AV equipment, and school vehicles to convey their club messages," but denied the same access to a student Bible club, such exclusion was "based purely on the [club's] religious viewpoint in violation of the First Amendment"); *Donovan ex rel. Donovan v. Punxsatawney Area Sch. Bd*, 336 F. 3d 211, 226 (3d Cir. 2003) ("[The Bible Club] is a group that discusses current issues from a biblical perspective, and school officials denied the club equal access to meet on school premises during the activity period solely because of the club's religious nature. Accordingly, we hold that the exclusion constitutes viewpoint discrimination"); *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819, 828-833 (1995) (holding that university's denial of funding to student group amounted to impermissible viewpoint discrimination where the denial was premised on the ground that the contents of the group's publication revealed an avowed religious perspective).

Defendant's actions here are similar to the unlawful actions of the school officials in the above cases. Similar to the groups there, Plaintiff and her fellow FCA Club members seek to express their religious views regarding subject matters permitted to be discussed within the student organization forum created and maintained by the Defendant. The topics that may be addressed within the Defendant's student club forum are virtually limitless. Field trips have been approved for a broad range of purposes, including "character building" (Pl.'s Mot. TRO Ex. C-144), "interact[ing] with people outside [the] school environment" (*id.* Ex. C-138), "understand[ing] the importance of healthy living choices" (*id.* Ex. C-140), "enhanc[ing] physical well-being and practic[ing] good manners in a group" (*id.* Ex. C-141), and "provid[ing] an experience that is culturally diverse" (*id.* Ex. C-123), to name just a few. In addition to these topics, the student clubs that operate within the Defendant's forum also address leadership development (Pl.'s Mot. TRO Ex. B-8 (Beta Club)); community service (*id*. Ex. B-33 (Key Club)); fostering strong moral character and loyalty to community and nation (*id*. Ex. B-46 (Builder's Club)); sexual abstinence (*id*. Ex. B-72 (GPA Club)); cultural awareness and social tolerance (*id*. Ex. B-31 (International club)); and preventing destructive decisions (*id*. B-37 (SADD).)

Plaintiff and her Club address all these issues through a religious viewpoint. (Compl. ¶¶ 55-56, 81.) Further, the Just for Jesus event addresses many of the topics listed above from a Christian point of view. For example, at the "Just for Jesus" event, Plaintiff and other FCA club members will, among other things, interact with students from other religious denominations; experience cultural differences among students; view a NASA space video and listen to several astronauts' stories about orbiting in the Apollo 8 spacecraft; learn about serving others and inspiring better moral behavior; view Christian dance, art, and choir performances by other

students and clubs; and listen to a short presentation of the Gospel. (Compl. ¶ 55.) Plaintiff and other Club members will also experience presentations about, and discuss alternative viewpoints related to, evolutionary theory, handling peer pressure, developing good morals, abstaining from drugs, and reaching out to others. (*Id*. ¶ 56.) The Just for Jesus event addresses topics that may be permissibly discussed within the Defendant's student club forum, and Defendant's denial of Plaintiff's field trip request based solely on the religious viewpoint her and the FCA club's speech expresses on otherwise permissible subject matters violates the First Amendment.

e. Defendant has no legitimate, let alone compelling, reason for its discrimination.

Defendant cannot possibly justify its withholding of field trip authorization to Plaintiff and other student members of the FCA Club. If Defendant contends that approving the FCA Club's field trip would constitute illicit sponsorship of the Club and its religious speech, relevant case law proves such an argument wholly unpersuasive. Indeed, in *Board of Educ. of the Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990), a school defended its refusal to grant official club status to a religious club due to sponsorship concerns under the Establishment Clause. *Id*. at 247-48. The *Mergens* Court flatly rejected the argument:

> Specifically, [the school board] maintain[s] that because the school's recognized student activities are an integral part of its educational mission, official recognition of [the students'] proposed club would effectively incorporate religious activities into the school's official program, endorse participation in the religious club, and provide the club with an official platform to proselytize other students. We disagree.

Id. According to the Court, the school's "mistaken inference of endorsement" was "largely self-imposed," as the school itself possessed control over any impression it might give to its students:

> To the extent a school makes clear that its recognition of [the students'] proposed club is not an endorsement of the views of the club's participants, students will reasonably understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech.

Id. at 251 (citation omitted). Importantly, affording custodial oversight for the Club's upcoming field trip would not constitute impermissible sponsorship. This issue was addressed in *Mergens,* where the Court specifically considered and dispelled the school's argument that sponsorship fears arising out of assignment of a club advisor justified discriminatory treatment of the religious club. *See id*. at 252. Indeed, the Court noted that custodial oversight of a club's activities would not "impermissibly entangle government in the day-to-day surveillance or administration of religious activities." *Id*. at 253.

In like manner, other federal courts have rejected the idea that discriminatory treatment of religious student clubs is somehow required to avoid sponsorship concerns under the Establishment Clause. *See, e.g.*, *Hsu By and Through Hsu v. Roslyn Union Free School Dist. No. 3*, 85 F.3d 839, 862-64 (2d Cir. 1996) ("Applying the lines of analysis adopted by the Court in [*Mergens* and *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987)] we conclude that the School's recognition of the [Bible club] would not violate the Establishment Clause"); *Prince*, 303 F.3d at 1094 (9th Cir 2002) ("As in *Mergens*, the School District here can dispel any 'mistaken inference of endorsement' by making it clear to students that a club's private speech is not the speech of the school. There is no indication . . . that requiring access to religious groups would endorse religion any more than in *Mergens*"); *Widmar*, 454 U.S. at 274 (where student speech forum is available to a broad class of speakers, allowing religious speech "does not confer any imprimatur of state approval on religious sects or practices"); *Pinette*, 515 U.S. at 762, 763-64 ("We have twice previously addressed the combination of private religious expression, a forum available for public use, content-based regulation, and a State's interest in complying with the Establishment Clause. Both times, we have struck down the restriction on religious content"). In sum, neutral accommodation of religious activity does not violate the

Establishment Clause, and providing a neutral government benefit without discrimination upholds the Constitution.

2. Defendant is violating the Equal Access Act.

Defendant violates the EAA and well-settled precedent in denying field trip authorization, and thereby withholding rights and benefits afforded members of other student clubs, based on the religious content of Plaintiff's desired speech. *See* 20 U.S.C. § 4071 *et seq.* (public schools are required to provide equal access to limited open fora irrespective of religious, political, or other content of student speech); *Mergens*, 496 U.S. at 247 ("Given that the Act explicitly prohibits denial of equal access . . . on the basis of the religious content of the speech at [club] meetings . . . we hold that [the school district's] denial of respondents' request [for official recognition of their] Christian club denies them 'equal access' under the Act") (citation omitted); *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244 (3d Cir. 1993) (refusal of school to certify Bible club as a student club and accord it equal treatment with other student groups violated EAA)*; Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135 (C.D. Cal. 2000) (EAA requires school to provide a Gay-Straight Alliance Club access to the same benefits all other recognized clubs receive); *Boyd Cty. High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd Cty.*, Ky., 258 F. Supp. 2d 667 (E.D. Ky. 2003) (same). Again, these rights and benefits include obtaining official approval for their upcoming field trip on May 1, 2008, and, among other things, having access to school transportation to and from the event. (Compl. ¶¶ 3-4 (specifying benefits accorded to clubs that receive approval for field trip requests).) As shown below, Defendant triggered the EAA. The equality mandated by the Act requires Defendant to provide all—not just some or most—of the same rights and benefits afforded students of other clubs.

a. Defendant created a limited open forum and triggered the EAA.

The EAA provides that "[i]t shall be unlawful for any public secondary school which receives federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings." *Mergens*, 496 U.S. at 235, quoting 20 U.S.C. § 4071(a). The first two requirements for the EAA to apply are met in this case: FKWMS is a public secondary school under Louisiana law and it receives federal financial assistance. (Compl. ¶¶ 37-39.)

The third requirement triggering the EAA is satisfied too—creation of a limited open forum. The EAA dictates that a school has created such a forum "whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(b). When making this determination, the Supreme Court gives the EAA "[a] broad reading . . . consistent with the views of those who sought to end discrimination by allowing students to meet and discuss religion." *Mergens*, 496 U.S. at 239.

Defendant grants official club status to several clubs that are non-curriculum related, including several FCA Clubs (including Plaintiff's), Key Clubs, Abstinence Clubs, Beta Clubs, 4-H Clubs, Big Brother/Big Sister Clubs, Students Against Destructive Decisions ("SADD"), Book clubs, Interact clubs, International clubs, and Chess Clubs. (Compl. ¶ 7; Pl.'s Mot. TRO Ex. B (documents describing recognized clubs at schools within Board's jurisdiction).) For a club to be "curriculum related," it must be directly tied to a class. *Mergens*, 496 at 239 ("[T]he term 'noncurriculum related student group' is best interpreted broadly to mean any student group that does not directly relate to the body of courses offered by the school"). "For example, a

French club would directly relate to the curriculum if a school taught French in a regularly offered course or planned to offer the subject in the future." *Id*. at 240. None of the recognized school clubs listed above are directly related to the "body of courses offered at [FKWMS]" like the French club in *Mergens*. They are accordingly non-curricular clubs, and the EAA is triggered. *Id*.

b. Defendant's refusal to give the students of the FCA Club the same benefits as students of other clubs violates the EAA.

"Equal access" under the Act requires public schools to provide the same rights and benefits to the students of all noncurriculum related clubs, not merely some or most of the benefits. Equal means just that. As addressed, *supra*, federal courts, including the Supreme Court, have so held. For example, in *Mergens*, 496 U.S. at 226, the defendant school district permitted a religious club to meet on campus (as does Defendant here). But, the district refused to provide the student members all of the rights and benefits given to student members of other noncurriculum related clubs, because of the religious content of the club's speech (again, as here). The Court held that the school district violated the club's right to "equal access" under the EAA both by denying the club access to rights and benefits of recognition, including "access to the School newspaper, bulletin boards, the public address system, and the annual Club Fair." *Id*. at 247. *See also*, *SAGE*, 471 F.3d at 912 (8th Cir. 2006) (where student club allowed to meet unofficially but denied communicative avenues afforded other noncurriculum groups, such as access to field trips and fundraising, EAA not satisfied).

In this case, Defendant is denying the students of the FCA Club the opportunity to take a requested field trip, and the rights and benefits afforded student members of other recognized student clubs at FKWMS and other schools under the Board's jurisdiction based solely on the religious content and viewpoint of Plaintiff's desired speech. (Compl. ¶¶ 5, 82-83, 110.) As

demonstrated, it is axiomatic that such blatant content- and viewpoint- based discrimination against student speech is prohibited by the EAA. Plaintiff's likelihood of success on the merits is accordingly clear.

C. If The Requested Temporary Restraining Order Is Not Issued, Plaintiff And Her Fellow Club Members Will Suffer Substantial Irreparable Harm.

Given the nature of Plaintiff's claims, she and her fellow Club members are entitled to a presumption of irreparable harm. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976). "Where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed." *Bronx Household of Faith*, 331 F.3d 342, 349 (2d Cir. 2003); *SAGE*, 471 F.3d at 913 ("[T]he . . . presumption of irreparable harm arises in the case of violations of the Equal Access Act because it protects expressive liberties") (quotation and citation omitted). The Eighth Circuit's discussion in *SAGE* as to irreparable harm is particularly relevant considering its factual similarities to this case:

> [A]lthough [the school] has afforded students the opportunity to hold SAGE meetings in school classrooms and place posters on a community bulletin board outside the meeting place, they have not, like student members of [other noncurriculum groups], been allowed to communicate via the PA, yearbook, and scrolling screen. Additionally, the students have been prohibited from holding fundraising events or having field trips. Therefore, the student members of SAGE are entitled to a presumption of irreparable harm, as they will not be able to exercise their rights absent a preliminary injunction.

SAGE, 471 F.3d at 913 (emphasis added).

Here, as in *SAGE*, Defendant is denying permission to Plaintiff and fellow Club members to take their planned field trip on May 1, 2008. (Compl. ¶ 2.) This denial is discriminatory in nature, is plainly violative of Plaintiff's statutory and constitutional rights, and constitutes irreparable injury. For each day that passes where Plaintiff and her fellow Club members are denied permission to take their proposed field trip (and accordingly denied all of the attendant

rights given to students of other officially recognized clubs who take field trips), they are prevented from expressing their religious views through all avenues. And, as discussed earlier, absent official approval of the field trip, many FCA Club members will not and/or cannot attend the upcoming Just for Jesus event. (*See* Pl.'s Mot TRO Ex. F (affidavit stating that several FCA club members cannot attend without school transportation).) This is due to the fact that without official approval, school transportation is not provided to and from the event. As the accompanying affidavits illustrate, the school transportation benefit is crucial to Club members, and the lack of such transportation presents a complete barrier to them being able to attend. (*Id*.) Clear, then, is that the irreparable harm Plaintiff and other FCA Club members are experiencing (and will experience) cannot be discontinued absent immediate injunctive relief from this Court.

D. The Balance Of Hardships Tips Decidedly In Plaintiff's Favor.

The balance of hardships also tips decidedly in Plaintiff's favor. Plaintiff's loss would perpetuate actions by Defendant violative of the EAA and the First Amendment, while Defendant's would not be harmed in any way by the issuance of an injunction. *See, e.g.*, *Mitchell v. Cuomo*, 748 F.2d at 807-08 (2d Cir. 1984) ("Faced with . . . a conflict between the state's . . . administrative concerns on the one hand, and the risk of substantial constitutional harm to plaintiffs on the other, we have little difficulty concluding that . . . the balance of hardships tips decidedly in plaintiffs' favor"); *Newsom ex rel. Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) (noting that a public school "is in no way harmed by issuance of a preliminary injunction which prevents it from enforcing a regulation, which . . . is likely to be found unconstitutional"). Indeed, Defendant already permits many student clubs at FKWMS and at other schools within Calcasieu Parish School System to attend field trips and to discuss many subjects of interest to them (*e.g.*, sexual abstinence, service to others, religious beliefs, and cultural diversity (Compl. ¶ 17.) Plaintiff and her Club merely seek similar approval

and to be given a chance to address these and other topics from a religious point of view. (*Id*. ¶¶ 81-83, 104-105.) Injunctive relief would simply require Defendant to comport with its duty to treat the student members of the Club the same as student members of other clubs.

E. The Issuance Of A Temporary Restraining Order Will Serve The Public Interest.

A temporary restraining order or preliminary injunction "upholding constitutional rights serves the public interest." *Newsom*, 354 F.3d at 261. Since Plaintiff's request for relief would uphold the constitutional rights of free speech, free exercise, due process, and equal protection, she has satisfied this factor of the preliminary injunction criteria. "[G]iven the importance of allowing the exchange of ideas in public schools and the possible chilling effect of the Regulation, the court concludes that an injunction limiting enforcement of the invalid restrictions would be in the public interest." *Raker v. Frederick County Pub. Schs.*, 470 F. Supp. 2d 634, 642 (W.D. Va. 2007) (granting student's motion for preliminary injunction of high school's prohibition on student speech related to abortion). Because all four factors for considering whether to issue a temporary restraining order weigh decidedly in Plaintiff's favor, the Court should grant Plaintiff's Motion.

IV. Conclusion

For the foregoing reasons, Plaintiff respectfully requests that this Court grant her request for a temporary restraining order, without condition of bond.

Respectfully submitted this the 24th day of April, 2008.

By: s/ J. Michael Johnson

Benjamin W. Bull, AZ Bar No. 009940
Jeremy D. Tedesco AZ Bar No. 023497
Alliance Defense Fund
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 Fax
jtedesco@telladf.org

David A. Cortman, T.A.
GA Bar No. 188810
Alliance Defense Fund
1000 Hurricane Shoals Road, NE
Building D, Suite 600
Lawrenceville, GA 30043
Telephone: (770) 339-0774
Facsimile: (770) 339-6744
dcortman@telladf.org

J. Michael Johnson
Alliance Defense Fund
Louisiana Regional Service Center
P.O. Box 52954
Shreveport, Louisiana 71135
Phone: (318) 798-8211
Fax: (318) 798-8213
mjohnson@telladf.org
ID # No. 26059
Local Counsel

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2008, a copy of the foregoing Plaintiff's Memorandum in Support of Application/Motion for Temporary Restraining Order was filed with the Clerk of Court using the CM/ECF system. I also certify that the non-CM/ECF participant School Board will be served with a copy of this Memorandum via a private process server along with a copy of the Summons, Complaint, Application/Motion, and all exhibits thereto. Further, the below counsel for the Defendant School Board has been served with courtesy digital copies of the Complaint, Application/Motion, Memorandum, and exhibits before the filing of this Memorandum, and will also be served a copy of each document via UPS priority overnight delivery upon filing.

CALCASIEU PARISH SCHOOL BOARD
c/o Wayne Savoy, Superintendent
1724 Kirkman Street
Lake Charles, LA 70601

TERRY J. MANUEL, ESQ.
Assistant District Attorney
1020 Ryan St.
Lake Charles, LA 70601

Attorney for Defendant School Board

s/ J. Michael Johnson

J. Michael Johnson, LA Bar No. 26059
Attorney for Plaintiff
Alliance Defense Fund
Louisiana Regional Service Center
P.O. Box 52954
Shreveport, Louisiana 71135
Phone: (318) 798-8211
Fax: (318) 798-8213
mjohnson@telladf.org

Local Counsel