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VIA ELECTRONIC
FACSIMILE AND U. S. MAIL

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Re: *Isaiah Martinez' Constitutional Right to Distribute Candy Cane Messages*

Dear Mr. Pfitzer and Ms. Kaplan:

I am writing on behalf of Isaiah Martinez, a first grade student at Merced Elementary School, and his parents, Alex and Myrna Martinez. As a matter of introduction, Advocates for Faith & Freedom is a nonprofit public interest law firm and education organization. We represent clients across the nation to preserve their religious liberty and other constitutional protections. It is our preference to meet and educate appropriate officials. However, when necessary, we proceed to litigation in order to secure these rights.

Factual Concerns Giving Rise To This Letter

On approximately December 11, 2013 Isaiah spoke with his 21-year-old sister about giving candy canes to his classmates as Christmas gifts and attaching the legend of the candy cane, which states the following:

A candy maker wanted to make a candy that would be a witness, so he made the CHRISTmas Candy Cane to incorporate several symbols for the birth, ministry, and death of Jesus Christ.

He began with a stick of pure white, hard candy. White, to symbolize the Virgin Birth, the sinless nature of Jesus, and hard to symbolize the Solid Rock, the foundation of the church, and firmness of the promises of God.

The candy maker made the candy in the form of a "J" to represent the precious name of Jesus, who came to earth as our savior. It also represents the staff of the "Good Shepherd" with which He reaches down into the ditches of the world to lift out the fallen lambs who, like all sheep, have gone astray.

The candy maker stained it with red stripes. He used the three small stripes to show the stripes of the scourging Jesus received by which we are healed. The large red stripe was for the blood shed by Jesus on the Cross so that we could have the promise of eternal life, if only we put our faith and trust in Him.

Unfortunately, the candy became known as a Candy Cane — a meaningless decoration seen at Christmas time. But the meaning is still there for those who "have eyes to see and ears to hear".

I pray that this symbol will again be used to witness to the Wonder of Jesus and His Great Love that came down at Christmas and remains the ultimate and dominant force in the universe today.

On approximately December 12, 2013 Alexandra assisted Isaiah in purchasing candy canes, printing the candy cane legend, and tying a copy of the legend to each candy cane in order to give one to each of his 24 classmates, to his first grade teacher and to the classroom parent. They were placed in a box for Isaiah to take to his school, Merced Elementary. Isaiah took the box of candy canes to his first grade class on Friday, December 13, 2013. Ms. Valerie Lu, Isaiah's teacher, took possession of the box once she saw that the Christmas gift had a religious message attached. Ms. Lu then communicated with the supervising principal of Merced Elementary, Mr. Gordon Pfitzer, to determine whether Isaiah would be permitted to distribute his Christmas gift to his friends at school. As a result, Isaiah was prevented from distributing his gift pending a decision from Mr. Pfitzer.

On approximately December 18, 2013 Ms. Lu spoke to Mr. Pfitzer who instructed Ms. Lu that Isaiah was not permitted to distribute his Christmas gift because it contained a religious message. Ms. Lu then spoke to Isaiah and told him that "Jesus is not allowed at school." In fear that he was in some sort of trouble, Isaiah then watched as Ms. Lu proceeded to rip the candy cane legend off of each candy cane and then throw the Christian messages back in to the box. He then watched as the box and messages were thrown into the trash by Ms. Lu. She then told Isaiah that he could distribute the candy canes now that the Christian messages were eliminated. We are informed and believe that Ms. Lu was acting on the explicit instructions of her supervisor, Mr. Pfitzer.

Later that day, Isaiah relayed these events to his 21-year-old sister, Alexandra, and to his parents, Alex and Myrna. Alex telephoned the school office and asked to speak with Ms. Lu about the situation. He was transferred to a voice mail wherein he left a message, only to learn later that the receptionist had transferred him to the wrong teacher's voicemail. On approximately December 19, 2013 Alexandra spoke to Ms. Lu. Ms. Lu stated that she had sought

direction from Mr. Pfitzer because of the religious content of the Christmas gift. Ms. Lu stated that she was instructed by Mr. Pfitzer that no religious material was allowed to be distributed by students on school grounds and he further told Ms. Lu to prohibit the distribution of the candy cane message. The Martinez family is informed and believes that Mr. Pfitzer specifically instructed Ms. Lu to remove the candy cane legend, throw them in the trash, and then to allow distribution of the candy cane.

On the evening of December 19, 2013, Alexandra asked Isaiah if he wanted to distribute the candy gift as previously intended since the classroom Christmas party and gift exchange would occur the following day, Friday, December 20, 2013. Isaiah expressed that he desired to hand out the messages with the candy cane so that he could share the Christian meaning behind Christmas and the candy cane with his fellow students. Alexandra and Isaiah then acquired and assembled more candy canes and attached the legend of the candy cane to each candy cane. Alexandra informed Isaiah that she would contact the principal the next day in order to ensure that he would be able to hand out his Christmas gifts.

On December 20, 2013 Alexandra contacted Mr. Pfitzer. Mr. Pfitzer told Alexandra that he consulted with the school district administration by speaking with Ms. Sheryl Lesikar with regard to whether Isaiah would be permitted to hand out the Christmas gift at school. He told Alexandra that pursuant to his discussion with Ms. Lesikar, that neither he nor the school district would permit Isaiah to distribute the candy cane legend because of its religious content. Mr. Pfitzer informed Alexandra that Ms. Lesikar had sent an email to Isaiah's parents explaining that Isaiah was not permitted to distribute the Christmas gift or any religious materials on school grounds. Alexandra informed Mr. Pfitzer, however, that no such email had been received and that Alexandra believed Isaiah's constitutional rights were being infringed upon as a result of this religious censorship.

On behalf of Isaiah, Alexandra demanded that Mr. Pfitzer and the school district respect Isaiah's rights to free speech and free exercise religion as December 20, 2013 was the last day of school before the Christmas vacation began. Additionally, as Alexandra was speaking to Mr. Pfitzer, the classroom Christmas party was occurring. Mr. Pfitzer reaffirmed that Isaiah was not permitted to hand out religious messages on school property, but could hand out the messages off campus as students left the school. By that time, only ten minutes were left in the school day. Alexandra then spoke to Ms. Lu who instructed Alexandra to take Isaiah outside the gates of the school just before the end of the school day in order to distribute Isaiah's Christmas gift as children left the school. Alexandra then took Isaiah outside the schoolhouse gate and he attempted to distribute his Christmas gifts to the students from his class amidst the end-of-day scamper. He was not entirely successful as the many other students were leaving school at the same time, parents were rushing their kids from campus and some students remained inside the schoolhouse gates.

Meanwhile, other students in Isaiah's class handed out Christmas gifts to their fellow classmates. Some of these gifts expressed secular messages concerning Christmas and were

packaged with images of Santa Claus, penguins with Santa hats, Christmas trees, and other secular messages through images and writings.

Additionally, one student handed out a package that was wrapped in paper wherein its contents were not visible until unwrapped. Ironically, this gift included a candy cane and the legend of the candy cane. Had the student informed school officials of the contents of his or her gift, the student would have been prohibited from distributing the contraband.

Isaiah's First Amendment Right to Free Speech

It has been well established by the United States Supreme Court that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Independent Community School District*, 89 S.Ct. 733, 736 (1969). The Court held that “[s]chool officials do not possess absolute authority over their students. Students in school as well as out of school are ‘persons’ under our Constitution. They are possessed of fundamental rights which the State must respect. . .” *Id.* at 739. Most notably, the U.S. Supreme Court has clearly articulated the rule on more than one occasion “that student expression may not be suppressed unless school officials reasonably conclude that it will ‘materially and substantially disrupt the work and discipline of the school’”. *Morse v. Frederick*, 127 S.Ct. 2618, 2626 (2007) (citing *Tinker* 89 S.Ct. 733, 740).

Therefore, any policy that suppresses a student’s free speech, in this case the censorship of the candy cane legend, violated Isaiah’s constitutional rights unless the school district reasonably concluded that there would be material and substantial disruption of the school’s work or discipline because of the candy cane message. Here, the school district cannot reasonably come to that conclusion. The Court explained in *Tinker*:

The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student’s rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during authorized hours, he may express his opinions, even on controversial subjects. . . .

Tinker, 89 S.Ct. 733 at 739-40.

The Fifth Circuit Court of Appeals previously ruled on a very similar case to Isaiah’s, which concerned the distribution of the candy cane legend by a third grade elementary school student. There, the United States Fifth Circuit Court of Appeals ruled that a public school principal engaged in unconstitutional viewpoint discrimination when he prohibited a student from distributing the candy cane legend at school. *Morgan v. Swanson*, 659 F.3d 359, 410 (5th Cir. 2011). The Fifth Circuit found viewpoint discrimination in the fact that the student “would

have been allowed to share his candy-cane pen in his goodie bag only if he removed the attached card containing the religious message.” *Id.* After extensively analyzing Supreme Court precedent concerning speech cases in public schools, the Fifth Circuit held:

In short, what one child says to another child is within the protection of the First Amendment unless one of the narrow exceptions discussed above applies, and none does in this case. Accordingly, we hold that the First Amendment protects all students from viewpoint discrimination against private, non-disruptive, student-to-student speech. Therefore, the principals’ alleged conduct—discriminating against student speech solely on the basis of religious viewpoint—is unconstitutional under the First Amendment.

Id. at 412.

The Third Circuit Court of Appeals took a different approach involving the distribution of the candy cane legend by a student. *Walz ex rel. Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 280-81 (3d Cir. 2003). *Walz* held that school officials were permitted to restrict the speech of a first grade student who sought to distribute the candy cane legend within his school’s seasonal party because it was “meant to have an educational component” and because the party was “highly structured, supervised, and regulated” by school officials who prohibited “the exchange of gifts with commercial, political, religious, or other undertones that promoted a specific message.” *Id.* at 279. Notwithstanding *Walz*’ failure to apply Supreme Court precedent prohibiting viewpoint discrimination, *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 834 (1995) (targeting views taken by speaker on a subject is unconstitutional), the strict regulation of the gift exchange was not present in Isaiah’s classroom nor was there any educational purpose for the gift exchange.

Cases arising here within California will most certainly receive the First Amendment protection afforded by the Fifth Circuit in *Morgan* because California statute confers a greater degree of protection. “The Supreme Court has held that the First Amendment guarantees only limited protection for student speech in the school context. . . . In contrast, the California Education Code extends students’ free speech rights while on campus to the same extent those rights may be exercised outside of the school context.” *Lovell By & Through Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 371 (9th Cir. 1996) (citing Cal. Ed. Code § 48907(a) (“Pupils of the public schools, including charter schools, shall have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions . . .”).)

Therefore, any conduct that discriminates against student speech solely on the basis of religious viewpoint is forbidden and unconstitutional under California statute. Moreover, even under *Tinker* and its progeny, discrimination based on viewpoint is only permitted in limited circumstances that are nonexistent here. *Morgan* at 407. Here, the school district’s refusal to permit Isaiah to distribute the candy cane legend because of its religious content violates Isaiah’s First Amendment constitutional rights because of the complete prohibition on religious

communication while freely permitting other students to distribute gifts and goodie bags without censorship of nonreligious viewpoints. Just like in *Morgan*, the principal would only allow Isaiah to distribute the candy canes so long as no religious message viewpoint was attached. Thus, Isaiah was a victim of viewpoint discrimination at the hands of district officials, the principal and his teacher.

The First Amendment Prohibits Hostility Toward Religion

The First Amendment's Establishment Clause "mandates governmental neutrality" not only among different religions, but also "between religion and non-religion." *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005). Mr. Pfitzer and Ms. Lu's efforts to eliminate the communication of all religious content from students' private interactions amounts to a school-sponsored message of hostility toward religion. See *McCullum v. Bd. of Educ. of School Dist. No. 71*, 333 U.S. 203, 211-12, 68 S.Ct. 461, 92 L.Ed. 649 (1948) ("hostility to religion [and] religious teachings" is "at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion"). The U.S. Supreme Court has clearly declared that government "may not be hostile to any religion or to the advocacy of noreligion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). Likewise, California Education Code § 220 broadly prohibits discrimination, harassment, intimidation and bullying based on religion and, consequently provides additional protection for Isaiah's religious communications.

When assessing hostility in the public school setting, the Ninth Circuit considers whether an objective observer in the position of a student would have viewed Mr. Pfitzer and Ms. Lu's conduct hostile. *Brown v. Woodland Joint Unified School Dist.*, 27 F.3d 1373, 1383 (9th Cir. 1994). Here, the objective observer would be based upon a first grade student and the vulnerable mentality of a first grader must be taken into consideration. It is hardly questionable whether a first grader would be in fear and intimidated when his candy canes are confiscated, the hand crafted religious messages are ripped from their ribbons and the teacher states that "Jesus is not allowed in school." In fact, when asked how he felt when he saw Ms. Lu rip-off the candy cane legend, Isaiah described himself as being nervous and in fear that he was in trouble for doing something wrong.

Eradicating the governmental disapproval and hostility experienced by Isaiah as a result of his religion is exactly why the Establishment Clause exists. Moreover, the First Amendment exists to protect, among other principles, Isaiah's freedom to communicate religious views on his elementary school campus. *Morgan* at 396 ("At the core of the First Amendment's right to free speech is the right of one student to express a religious viewpoint without fear.")

Conclusion

The actions of the school district were hostile and intimidating to Isaiah. Notwithstanding the fact that he is only in first grade, he is entitled to First Amendment protection. Therefore, we demand that the school district provide a written apology to Isaiah and his family for the actions

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taken this last Christmas and for the policy of prohibiting all forms of religious expression at Merced Elementary.

In order to rectify the standing policy at Merced Elementary, we demand that the school district adopt an official policy that expressly prohibits school officials (including teachers) from adopting any action or from engaging in any expression that can reasonably be viewed by a religiously affiliated student as disapproval of the student's religion or hostile toward the student's religion. This policy will also need to affirm the right of students to express and communicate their own religious viewpoints on school property without fear of rebuke by school officials. This will help to ensure that young students like Isaiah are not intimidated by school officials into believing that there is something wrong with their religion or their religious views. Of course, this policy will function within the boundaries of jurisprudence that permit some limitations on speech that causes substantial disruption, promotes drug use, or is lewd or obscene.

Additionally, we demand that the school district adopt a policy that requires teachers and other school officials to be trained at least once per year on the First Amendment, particularly as it relates to the rights of students to express themselves with religious viewpoints and to be free from religious hostility and free from school officials' disapproval of their religion.

These actions will help to provide students with an environment of neutrality and true tolerance. We would be happy to assist the school district in drafting the proposed policies and providing the training to school officials on the First Amendment. Our services may be provided pro bono under the appropriate circumstances.

If we do not hear from you by January 13, 2014, we will be forced to take legal action. Please contact me with any questions or to commence discussions.

Kind regards,



Robert H. Tyler, Esq.
General Counsel
Advocates for Faith & Freedom

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