UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

OPEN GATE WESTERN HERITAGE CHURCH, a Louisiana nonprofit corporation	)	**Case No.**
Plaintiff,	)	
v.	)	**JUDGE:**
CALCASIEU PARISH SCHOOL BOARD, and WAYNE SAVOY, Superintendent of the Calcasieu Parish School Board,	)	**MAGISTRATE:**
***Defendants*.**	)	

PLAINTIFF'S APPLICATION FOR A PRELIMINARY INJUNCTION

COMES NOW the Plaintiff, Open Gate Western Heritage Church, by and through the undersigned counsel, and makes this application pursuant to Fed. R. Civ. P. 65(a) for a preliminary injunction forbidding the Defendants, and officers and agents under the control or direction of the Defendants, from applying or enforcing an exclusion from access to school facilities under School Board Policy KG based upon "worship" activities and to allow the Plaintiff the opportunity to use the Calcasieu Parish School Board facilities for Sunday Church services or other religious activities on equal terms with other community groups and organizations.

As grounds for this application, the Plaintiff submits the averments set fort in the Verified Complaint and Memorandum in Support of Plaintiff's Application for a Preliminary Injunction filed contemporaneously with this Application.

Wherefore, the Plaintiff's respectfully request and pray that the Court, after a hearing on this matter, preliminarily enjoin the Defendants as requested above.

Dated: April 8, 2011

s/Robert J. Williams

Robert J. Williams
La. Bar # 24909
ROBERT J. WILLIAMS, L.L.C.
4830 Lake Street
Lake Charles, LA 70605
337-562-1116 telephone
337-478-5250 facsimile
robin@rjwilliamslaw.com

Attorney for the Plaintiff

Participating Attorney for
THE RUTHERFORD INSTITUTE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

OPEN GATE WESTERN HERITAGE CHURCH, a Louisiana nonprofit corporation	)	**Case No.**
Plaintiff,	)	
v.	)	**JUDGE:**
CALCASIEU PARISH SCHOOL BOARD, and WAYNE SAVOY, Superintendent of the Calcasieu Parish School Board,	)	**MAGISTRATE:**
***Defendants*.**	)	

ORDER

IT IS ORDERED:

That Plaintiff's, Open Gate Western Church, request for a preliminary injunction is granted forbidding the Defendants, Calcasieu Parish School Board and its officers and agents under the control or direction of the Defendants, from applying or enforcing an exclusion from access to school facilities under School Board Policy KG based upon "worship" activities and to allow the Plaintiff the opportunity to use the Calcasieu Parish School Board facilities for Sunday Church services or other religious activities on equal terms with other community groups and organizations.

_____
JUDGE'S SIGNATURE

_____
PRINTED NAME AND TITLE

_____
DATE

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

OPEN GATE WESTERN HERITAGE CHURCH, a Louisiana nonprofit corporation	)	**Case No.**
Plaintiff,	)	
v.	)	**JUDGE:**
CALCASIEU PARISH SCHOOL BOARD, and WAYNE SAVOY, Superintendent of the Calcasieu Parish School Board,	)	**MAGISTRATE:**
***Defendants*.**	)	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S APPLICATION FOR A PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

INTRODUCTION

This civil rights action seeks to protect the First and Fourteenth Amendment rights of the Plaintiff, Open Gate Western Heritage Church ("Open Gate"), from action by the Calcasieu Parish School Board ("the Board") that deprives the Plaintiff, as well as other religious organizations, of their fundamental constitutional rights. Although Open Gate had been using, since 2008, without incident or complaint and in return for compensation paid to the Board, the cafeteria area of Fairview Elementary pursuant to a policy of the Board allowing civic, religious, governmental and school organizations to use school facilities under the control of the Board when not being used for school, in February 2011 Open Gate was informed it could no longer use school facilities under a policy of the Board forbidding use of such facilities for "worship" (Comp. ¶¶ 11, 18). Open Gate was thereby forced to seek alternative facilities for holding its Sunday services (Comp. ¶ 22).

The policy of the Board forbidding after hours use of school facilities for "worship" is a patent violation of the guarantees to freedom of speech and freedom of religion and constitutes unlawful discrimination, in violation of the Constitutions of the United States and the State of Louisiana. Because of the violation of these rights, Open Gate and other religious institutions that have been barred from school facilities under the Board's unwritten policy, for no reason other than that they desire to exercise their religious beliefs and practices, do now and continue to suffer irreparable harm in the deprivation and infringement of their fundamental rights (Comp. ¶ 23). For the reasons set forth below, the Plaintiff is likely to prevail on their claims that the unwritten policy forbidding "worship" activities violates the First and Fourteenth Amendments to the United States Constitution, and because the violations are inflicting irreparable harm, a preliminary injunction should issue forbidding enforcement of that unwritten policy.

STATEMENT OF FACTS

Open Gate Church is a nonprofit, 501(c)(3) corporation formed for the purpose of operating a Christian church and bringing together persons in the Lake Charles, Louisiana, area who desire to come to know the gospel of Jesus Christ (Comp. ¶ 4). Beginning in 2008, Open Gate regularly met for Sunday services in the cafeteria at Fairview Elementary, a school controlled and operated by the Board (Comp. ¶ 11). These services involve the coming together of persons in accordance with the tenets of the Christian faith and engaging in prayer, the reading of scripture passages from the Bible, the singing of religious hymns and anthems, the exposition of Christian beliefs through a sermon or homily, and engaging in Christian rites such as baptism and the Lord's Supper (or Eucharist) (Comp. ¶ 12).

The school was available to Open Gate under Policy KG of the Board (see Complaint, Exh. A). Titled "USE OF SCHOOL FACILITIES," Policy KG provides that "the function of school buildings and grounds shall be to accommodate approved school programs for students and to assist in meeting community needs" and that use of school buildings by the community is a secondary function "and shall be scheduled at times which do not interfere with regular school activities. Civic, religious, governmental, school organizations and Board approved groups may use school facilities."

Under Policy KG, groups may use school facilities based upon a properly documented application and a signed lease agreement between the group and the board that includes (a) a hold harmless statement, (b) the group's commitment to obtain liability insurance naming the Board as an additional insured, and (c) a statement by the group to assume responsibility for damages or maintenance expenses resulting from the use (Comp. ¶ 9). Community groups also

pay a fee, established by rules and regulations of the Superintendent for using school facilities, and Open Gate executed a lease agreement and paid $40.00 per week to use the Fairview Elementary cafeteria (Comp. ¶ 11).

However, in December 2010, Open Gate's pastor, Dr. Mark D. Stagg, was contacted by a representative of the Board and given notice that after 60 days the Plaintiff could no longer use the Fairview Elementary cafeteria or any other school facility operated by the Board (Comp. ¶ 13). Dr. Stagg was informed that the problem perceived by the Board administration is that churches were using school facilities on a long-term basis and were getting a "free ride" (Comp. ¶ 14).

On or about December 7, 2010, at its regularly scheduled public meeting, the Board was presented with a proposal to change the policy and procedure for rental of building facilities (Comp. ¶ 15). According to the minutes of the meeting (see Complaint Exh. B), "[s]taff recommended that the committee grant permission to authorize the school board's attorney to draft a revision of the current policy that gives principals more defined guidance as well as updating the fee schedule and prohibiting the use of schools for worship." A motion was made and seconded to approve the staff's recommendation, and the motion carried.

On February 22, 2011, Pastor Stagg was informed by Carl Bruchhaus, Chief Financial Officer of the school district, that Open Gate would not be allowed to use Fairview Elementary for Sunday church services after February 27, 2011 and that the Board had adopted a policy excluding use of school buildings for "worship," which policy was now in effect (Comp. ¶ 18). That same day legal counsel assisting Open Gate contacted the Board's attorney by electronic mail to inquire why Open Gate was being forbidden from using school buildings for Sunday church services, pointing out that, to his knowledge, the Board had not taken any action on a

revision to Policy KG (Comp. ¶ 19). In response, the Board's attorney sent counsel for Open Gate a reply e-mail message explaining that although no change to Policy KG has been drafted, Bruchhaus believes that the Board has approved a change to the policy and Bruchhaus had instructed school principals to give Open Gate and other religious organizations notice that they would not be allowed to use school buildings after 60 days (Comp. ¶ 20).

Although no formal, written amendment to Policy KG has been approved by the Board, the Board has approved in principle a policy or practice which prohibits use of school facilities under Policy KG for "worship" and has instructed or allowed Bruchhaus to enforce such a policy or practice (Comp. ¶ 21). Based upon the unwritten and indefinite "no worship" policy and practice of the Board, Open Gate has been excluded from school buildings and facilities otherwise available under Policy KG and has been required to relocate its Sunday services to the McNeese State University Baptist student center, where it pays $200 per week for use of the facility (Comp. ¶ 22).

ARGUMENT

I. PLAINTIFF IS ENTITLED TO PRELIMINARY INJUNCTION

The standard for issuance of a preliminary injunction is well settled. In order to obtain a preliminary injunction, the plaintiff must demonstrate each of the following prerequisites: 1) a substantial likelihood of success on the merits; 2) a substantial threat that failure to grant the injunction will result in irreparable injury; 3) the threatened injury outweighs any damage that the injunction will cause to the adverse party; and 4) the injunction will not have an adverse effect on the public interest. *Johnson Controls, Inc. v. Guidry*, 724 F.Supp. 2d 612, 619 (W.D.La. 2010).

A. The Plaintiff will suffer irreparable harm if the preliminary injunction is not entered.

As set forth in the Complaint, this case implicates First Amendment rights to freedom of expression and freedom of religion. The church services which Open Gate was holding at Fairview Elementary were unquestionably activity protected by the free speech and free exercise clauses of the First Amendment to the United States Constitution. *Bronx Household of Faith v. Bd. of Educ. of the City of New York*, 331 F.3d 342, 354-55 (2d Cir. 2003) (citing *Good News Club v. Milford Central Schools*, 533 U.S. 98, 112 (2001)). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *See also Palmer ex rel. Palmer v. Waxahachie Ind. Sch. Dist.*, 579 F.3d 502, 506 (5th Cir. 2009) and *Nat'l People's Action v. Village of Wilmette*, 914 F. 2d 1008, 1013 (7th Cir. 1990) (even temporary deprivation of First Amendment rights is sufficient proof of irreparable harm).

In *Bronx Household of Faith*, the Court held that a school district's refusal to allow a church to use school facilities pursuant to the district's policy allowing community groups to use school facilities for a fee was "irreparable harm" that justified granting the church a preliminary injunction. The court there wrote as follows:

> Here, the alleged deprivation of plaintiffs' First Amendment rights results directly from a policy of the defendant Board of Education that prohibits "religious services or religious instruction" in school facilities. Since it is this policy that led to a denial of the church's request to rent space in Middle School 206B and directly limits plaintiffs' speech, irreparable harm may be presumed. Because the plaintiffs' allegations entitle them to a presumption of irreparable harm, the district court's finding that the plaintiffs have fulfilled this requirement for the issuance of a preliminary injunction cannot be said to be an abuse of discretion.

Bronx Household of Faith, 331 F.3d at 350. The Fourth Circuit also has recognized that an exclusion from a public forum for expression created by a public school constitutes irreparable

harm to constitutional rights that justifies the grant of a preliminary injunction. *Child Evangelism Fellowship v. Montgomery County Public Schools*, 373 F.3d 589, 593 (4th Cir. 2004).

The harm that Open Gate has suffered and continues to suffer here is no different. Open Gate has been excluded from what is otherwise a public forum, i.e., the school facilities under the control of the Board opened to community groups under Policy KG, because of the religious nature of the expressive activities it desires to engage in. This restriction and burden upon Open Gate's First Amendment rights is plainly irreparable harm that satisfies the second prong of the preliminary injunction test.

B. The Defendants will suffer no harm if a preliminary injunction is issued.

In contrast, the Board and Defendant Wayne Savoy, Superintendent of the Calcasieu Parish Schools, do not face the prospect of any injury if they are required to allow Open Gate to resume use of Fairview Elementary or some other available school facility for Sunday worship services. At no time have the Defendants or any of their agents or employees asserted that Open Gate's use of the school is an imposition upon the school district or contrary to the best interests of the school district. The minutes of the December 7, 2010 meeting of the Board where the change in facility use policy was discussed do not raise any specific problem or tangible harm the Board was seeking to address in making the policy change. S*ee* Complaint Exh. B. Open Gate's use of Fairview Elementary since 2008 has been without incident, so the Defendants cannot credibly claim a fear of harm based upon some past incident. Indeed, the Board and the public actually are presently suffering harm because the Board is not receiving rental fees for facilities it would otherwise receive from Open Gate and other churches which have been excluded under the new facility use policy.

C. Open Gate will likely succeed on its claim that the denial of its request to use School District facilities violates the Constitution.

The allegations of the Complaint plainly set forth serious questions about whether the Defendants' policy prohibiting the use of school facilities under Policy KG for "worship" violates the First Amendment rights of Open Gate and other religious organizations. There can be little doubt that the School District created a limited public forum for expression by adopting Policy KG. The policy makes school facilities under the control of the Board available to community groups for meetings and other social events. The policy is little different from the one at issue in *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390-91 (1993), where the Supreme Court held that a school district created a limited public forum for expression by opening its facilities for use by community groups for social, civic, and recreational purposes. The Court went on to hold that the school district could not exclude a religious group from using school facilities under the policy because the group was entitled to have access to the public forum the school district created. Similarly, in *Bronx Household of Faith*, 331 F.3d at 342, the court had no trouble in finding that a school district policy allowing the use of school facilities by community groups created a limited public forum for expression, access to which was protected by the First Amendment.

Because Policy KG creates, at the very least, a limited public forum, the Defendants may not deny access to school facilities on grounds that offend the Constitution. In *Good News Club*, 533 U.S. at 106-107, the Supreme Court, following its precedent in *Lamb's Chapel*, held that a school which allowed community groups to use school facilities for meetings had violated the First Amendment rights of a religious group by forbidding the group to use the school for religious meetings. The Court held that once a state entity opens its property for use by community groups, "[t]he State's power to restrict speech …is not without limits. The restriction

must not discriminate against speech on the basis of viewpoint, [*Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995)], and the restriction must be 'reasonable in light of the purpose served by the forum,' *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985)." *Good News Club*, 533 U.S. at 106-07.

The facts set forth in the Complaint demonstrate that the Defendants' prohibition on use of facilities for "worship" (Comp. ¶ 18), thereby barring Open Gate and other churches from further use of school facilities for church services, violates the First Amendment on several grounds. First, the exclusion of "worship" from the public forum created by Policy KG constitutes viewpoint discrimination in violation of the First Amendment. This was the conclusion of Judge Berrigan of the District Court for the Eastern District of Louisiana in *Campbell v. St. Tammany Parish Sch. Bd.*, 2003 WL 21783317 (E.D. La. July 30, 2003), which involved a nearly identical exclusion included in a school board's facility use policy. The St. Tammany Board policy similarly provided that no group may be allowed to conduct "religious services" on school premises.[1] Even though Judge Berrigan concluded that the plaintiff's proposed use of the school was for a religious service purportedly excluded by St. Tammany's facility use policy, the court determined that the exclusion constituted unconstitutional viewpoint discrimination. Even assuming a school policy could segregate "worship" from other kinds of expression on civic, social or political matters from a religious viewpoint, the church services excluded under St. Tammany's policy included expression on the kinds of topics which were within the scope of the forum created by the school board's policy. "The proposed meeting," Judge Berrigan wrote, "included a discussion of family and political issues, from a legally

[1] Although the policy originally had been upheld by the Fifth Circuit in *Campbell v. St. Tammany Parish Sch. Bd.*, 206 F.3d 482, 485 (5th Cir. 2000), the United States Supreme Court vacated the Fifth Circuit's decision and remanded the case back for reconsideration after the high court decided *Good News Club*. *Campbell v. St. Tammany's Sch. Bd.*, 533 U.S. 913 (2001).

protected religious viewpoint." *Campbell, supra*, at *9. "It is difficult to imagine any religious service, no matter how traditional or nontraditional that does not include sermons, homilies or lessons directed at moral and ethical conduct or how one should live one's life." *Id.* "[The plaintiff's] prayer meeting was 'quintessentially religious,' but it was not only worship; it included a discussion of family and political issues. St. Tammany may not preclude it from its forum." *Id.* at *10.

Open Gate's Sunday services also include the kind of expression which is within the scope of the forum created by the Board's Policy KG. The services include prayer, the reading of scripture passages from the Bible which teach lessons, the singing of religious hymns and anthems, and the exposition of Christian beliefs through a sermon or homily (Comp. ¶ 12). As in the *Campbell* case, this expression is properly within the scope of the forum created by Policy KG, notwithstanding the new and unwritten exclusion of "worship" activities. To exclude the expression because it is religious in nature and is connected with worship constitutes viewpoint discrimination in violation of the First Amendment.

Even more fundamentally, the Board's very policy of forbidding access to the forum by groups which engage in "worship" is unconstitutional viewpoint discrimination. Where an applicant for access to a limited public forum is excluded from that forum because of the religious nature of the applicant or the religious expression of the applicant, the applicant is the victim of viewpoint discrimination that is presumptively a violation of the First Amendment. *Good News Club*, 533 U.S. 109-110; *Child Evangelism Fellowship*, 373 F.3d at 594.

In order to justify denying churches equal access to school facilities under Policy KG, the Board has seized upon a single decision from a federal court in California holding that "worship" is somehow different from other speech and expression protected by the First Amendment and so

may be excluded under a facility use policy.[2] But the idea that "worship" is a distinct class of speech which can be excluded from a public forum consistent with the First Amendment is contrary to controlling Supreme Court precedent and was recently rejected by the Court of Appeals for the Seventh Circuit.

In *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775 (7th Cir. 2010), the court held that a university's decision to prevent a recognized student organization from receiving funding from student fees for activities that involved religion, including "worship," was unconstitutional. After pointing out that this kind of student fee funding program constitutes a public forum for First Amendment purposes, *id.* at 778 (citing *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000)), the court rejected the university's claim that its decision not to allow funds to be used for "worship" was a reasonable content-based restriction on access to the forum. In support, the Seventh Circuit cited the Supreme Court's recent decision in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), and *Widmar v. Vincent*, 454 U.S. 263 (1981), writing as follows:

> The Court [in *Christian Legal* Society] . . . reiterated the norm that universities must make their recognition and funding decisions without regard to the speaker's viewpoint. The Justices divided on the question whether Hastings College of the Law had satisfied the neutrality requirement, but no Justice disagreed with the propositions that "[a]ny access barrier must be reasonable and viewpoint neutral" (130 S. Ct. at 2984) and that "singl[ing] out religious organizations for disadvantageous treatment" (*id.* at 2987) is permissible only if the requirements of

[2] In *Faith Center Church Evangelistic Ministries v. Glover*, 480 F.3d 891 (9th Cir. 2007), the court upheld a county library's policy allowing community groups to use a meeting room in the library but prohibiting use of the room for "religious services" to the extent the policy barred "religious worship." Although the court conceded that a church's worship services constitute protected speech and expression under the First Amendment, *id.* at 907-08, it determined that "worship" is a distinct category of speech and its exclusion constituted a content-based restriction on speech, not viewpoint discrimination. *Id.* at 914. Because it viewed the "worship" exclusion as a content-based restriction on access to a limited public forum, the restriction need only be reasonable to preserving the purposes of the forum. *Id.* at 910. Significantly, seven of the court's judges dissented from this opinion and voted to grant *en banc* review on the basis that the "worship" exclusion constituted viewpoint discrimination in violation of the First Amendment. *Id.* at 895, 902. Additionally, as discussed *infra*, on remand the district court ultimately struck down the "worship" restriction as violative of the First Amendment's Establishment Clause. *Faith Center Church Evangelistic Ministries v. Glover*, 2009 WL 1765974 (N.D. Cal. June 19, 2009), at *8-*10.

> "strict scrutiny" can be satisfied. *Christian Legal Society* described *Widmar* as a case holding that refusing to allow "religious worship and discussion" in a public forum is forbidden viewpoint discrimination (*ibid.*). There can be no doubt after *Christian Legal Society* that the University's activity-fee fund must cover Badger Catholic's six contested programs, if similar programs that espouse a secular perspective are reimbursed.

Badger Catholic, 620 F.3d at 781.

This conclusion that a "worship" exclusion from a public forum constitutes viewpoint discrimination is wholly consistent with opinions from the Supreme Court. As the *Badger Catholic* decision noted, in *Widmar* the Court struck down a university's facility use policy that forbade a student group from using facilities for the purpose of "religious worship or religious teaching." *Widmar* held that religious worship is a form of speech and association protected by the First Amendment, and a discriminatory exclusion of worship from a public forum must be justified by a compelling interest that is narrowly-drawn. *Widmar*, 454 U.S. at 269-70.[3] Significantly, the majority opinion took pains to reject the dissent's contention that "worship" is somehow different from other religious expression, holding that any distinction has no intelligible content. "There is no indication when 'singing hymns, reading scripture, and teaching biblical principles,' …cease to be 'singing, teaching, and reading'—all apparently forms of 'speech,' despite their religious subject matter—and become unprotected 'worship.'" *Widmar*, 454 U.S. at 270, n. 6. The Court went on to write that a distinction between religious worship and speech from a religious viewpoint "lacks a foundation in either the Constitution or in our cases, and is judicially unmanageable." *Id.* at 271, n. 9.

[3] Although *Widmar* indicates that the exclusion at issue was based on "content," subsequent cases make clear that the Court considers the exclusion of worship at issue in *Widmar* to be viewpoint discrimination. *See Christian Legal Society*, 130 S. Ct. at 2987 (revising the language of *Widmar* to reflect that the exclusion of worship constituted "viewpoint" discrimination). Additionally, *Widmar* applied strict scrutiny to the worship exclusion before it, not the "reasonable regulation" test applicable to content-based restrictions on speech in a public forum.

This same principle was expressed by Justice Scalia in his concurring opinion in *Good News Club*. Addressing the contention in Justice Souter's dissent that religious speech that constitutes "worship" could be excluded under a public school's facility use policy, Justice Scalia wrote:

> But we have previously rejected the attempt to distinguish worship from other religious speech, saying that "the distinction has [no] intelligible content," and further, no "*relevance*" to the constitutional issue. *Widmar* [*supra*]; *see also Murdock v. Pennsylvania*, 319 U.S., at 109 (refusing to distinguish evangelism from worship). Those holdings are surely proved correct today by the dissenters' inability to agree, even between themselves, into which subcategory of religious speech the Club's activities fell. If the distinction did have content, it would be beyond the courts' competence to administer. *Widmar*, [454 U.S.] at 269, n. 6; *cf. Lee v. Weisman*, 505 U.S. 577, 616-617 (1992) (SOUTER, J., concurring) ("I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible," than "comparative theology"). And if courts (and other government officials) were competent, applying the distinction would require state monitoring of private, religious speech with a degree of pervasiveness that we have previously found unacceptable. *See, e.g., Rosenberger v. Rector and Visitors of Univ. of Va.* [515 U.S. 819,] 844-845 [1995]; *Widmar*, *supra*, at 269, n. 6. I will not endorse an approach that suffers such a wondrous diversity of flaws.

Good News Club, 533 U.S. at 126-127 (Scalia, J., concurring) (emphasis in original).

Thus, decisions of the Supreme Court specifically reject the distinction between "worship" and other religious speech that the Board has seized upon in order to bar Open Gate and other churches from the public forum created by Policy KG. Instead, those decisions and the decision in *Badger Catholic* make clear that an exclusion of "worship" from a public forum constitutes viewpoint discrimination, which is justified only if supported by a compelling government interest. *Widmar*, 454 U.S. at 269-70. While there is no indication what interest, much less a compelling one, justifies the "worship" exclusion, it should be pointed out that concerns about the First Amendment's Establishment Clause do not justify the exclusion. In *Good News Club*, 533 U.S. at 112-19, the Court rejected a school district's claim that an

appearance of endorsement justified exclusion of religious activity under a facility use policy, pointing out it had rejected similar claims in *Widmar* and *Lamb's Chapel*. And in *Bronx Household of Faith*, 331 F.3d at 356, the court, in the course of upholding a preliminary injunction granting a church access to school facilities, held that an Establishment Clause justification for excluding the church from school facilities was not shown because

> the proposed meetings: (1) occur on Sunday mornings, during nonschool hours; (2) are not endorsed by the School District; (3) are not attended by any school employee; (4) are open to all members of the public; (5) and there is no evidence that any school children would be on the school premises on Sunday mornings or would attend the meetings. To this list the district court might have added that the church apparently intended to pay rent for the use of the space.

These same facts apply here and require rejection of any Establishment Clause justification for the Board's "worship" exclusion.

The Board's "worship" exclusion policy also violates the First Amendment because it is unduly vague and grants officials administering the policy unfettered discretion in determining what organization and activities may have access to school facilities under Policy KG. Again, the policy is unwritten and provides no standards to guide school officials in determining what activities constitute "worship". When laws or policies are enforced that affect the exercise of expressive activities, it is imperative that officials responsible for enforcement are given explicit standards to guide their enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). "[A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 763 (1988). "Thus, there is broad agreement that, even in limited public and nonpublic forums, investing governmental officials with boundless discretion over access to the forum violates the First

Amendment." *Child Evangelism Fellowship of Md., Inc. v. Montgomery County Public Schools*, 457 F.3d 376, 386 (4th Cir. 2006). *See also Hall v. Bd. of Sch. Commrs. of Mobile County, Ala.*, 681 F.2d 965, 968 (5th Cir. 1982) (school policies regarding distribution of literature by teachers were unconstitutional because the policy was vague and did not provide standards for application).

By imposing an exclusion upon "worship," the Board has adopted an inherently vague and indefinite standard that is wholly inconsistent with the First Amendment principles just cited. As pointed out in Supreme Court decisions, any distinction between "worship" and other kinds of religious speech lacks "intelligible content." *Widmar*, 454 U.S. at 269, n. 6; *Good News Club*, 533 U.S. at 126-127 (Scalia, J., concurring). The ban on worship could be applied to any meeting where a prayer is said (even the saying of grace over a meal) since prayers certainly might be considered acts of "worship." Indeed, it is unclear whether the ban on "worship" could be applied to certain secular conduct. For example, would Policy KG apply to a civic group dedicated to art appreciation on the grounds that the group is engaged in the "worship" of art? Would it apply to meetings of the Boy Scouts on the grounds that certain ceremonies, including the Pledge of Allegiance, constitute acts of worship? If the Supreme Court is unable to define what constitutes "worship," then clearly school officials are not capable of doing so. This is particularly true in light of the absence of any criteria or standards to guide officers and agents of the Board in applying this exclusion. Therefore, the policy forbidding use of use of school facilities for "worship" is unduly vague in violation of the First Amendment.

The fact that the term "worship" is so indefinite also renders any policy implementing a ban on "worship" violative of the First Amendment's Establishment Clause. Under the Establishment Clause, a government policy must satisfy each of the following three prongs: (1)

it must have a secular purpose, (2) it must not advance or inhibit religion as its principal or primary effect, and (3) it must not foster an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Even assuming the policy barring "worship" complies with the first two prongs, it plainly does not comply with the third prong forbidding excessive government entanglement with religion. "Government action can violate the Establishment Clause not only by intentionally establishing, sponsoring, or supporting religion, but also if the end result is an excessive government entanglement with religion." *United States v. Holmes*, 614 F.2d 985, 989 (5th Cir. 1980) (citing *Walz v. Tax Commissioner*, 397 U.S. 664, 674 (1970)). Under this prong, courts ask "whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement." *Walz*, 397 U.S. at 675.

In *Faith Center Church Evangelistic Ministries v. Glover*, 2009 WL 1765974 (N.D. Cal. June 19, 2009), the court struck down a county library's facility use policy that prohibited use of library rooms for "religious services" by community organizations on the basis that the religious exclusion violated the entanglement prong of the Establishment Clause. The court pointed out that because county officials were required to review an application to determine whether the requested use was for a "religious service," the County would be called upon to inquire into religious doctrine in order to determine whether a particular activity qualified as a religious service. The court cited to *Widmar* and the Supreme Court's ruling there that "[m]erely to draw the distinction [between worship and other religious speech] would require the university—and ultimately the courts—to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases." 454 U.S. at

270, n. 6 (citing *Walz*, 397 U.S. at 668). Thus, the court found the "religious services" exclusion to violate the Establishment Clause.

This reasoning applies with equal force here. The Board's policy forbidding "worship" will require school officials to closely question and monitor all organizations which desire to avail themselves of Policy KG to determine whether particular practices and activities constitute "worship" for that particular group. In *Badger Catholic*, 620 F.3d at 781, the court was led to wonder how the university, in applying its exclusion of "worship," "would deal with an application by a student group comprising members of the Society of Friends. Quakers view communal silence as religious devotion, and a discussion leading to consensus as a religious exercise. Adherents to Islam and Buddhism deny that there is any divide between religion and daily life; they see elements of worship in everything a person does." These examples only scratch the surface of the problems that will necessarily arise in administering the "worship" exclusion adopted by the Board.

D. The public interest will not be harmed by granting the preliminary injunction.

The final consideration on a request for a preliminary injunction is how the public interest will be affected. If anything, the public interest will be furthered by granting the preliminary injunction because the Board and the school district will receive payment for the use of its facilities that it would not otherwise receive. In light of Open Gate's record of past use of Fairview Elementary School, there is no indication whatsoever that the interest of the public would be harmed by allowing Open Gate to continue using the school.

CONCLUSION

When all the factors are considered and weighed, there is no doubt that Open Gate's request for a preliminary injunction should be granted. While First Amendment interests will suffer significant harm if the "worship" exclusion is allowed to be enforced by the Defendants, the Defendants will not suffer any detriment whatsoever if an injunction restoring the status quo ante is entered. The law discussed above also demonstrates that Open Gate will almost certainly prevail on its claim that the Board has violated the First Amendment by adopting and enforcing the "no worship" amendment to Policy KG. Because all the elements required for a preliminary injunction exist here, it is respectfully requested that such an injunction be issued requiring that the Defendants, their officers and agents cease enforcement of the policy prohibiting school facility use for worship under Policy KG and allow Open Gate to rent Fairview Elementary or some other appropriate school facility for Sunday church services.

Dated: April 8, 2011

s/Robert J. Williams

Robert J. Williams
La. Bar # 24909
ROBERT J. WILLIAMS, L.L.C.
4830 Lake Street
Lake Charles, LA 70605
337-562-1116 telephone
337-478-5250 facsimile
robin@rjwilliamslaw.com

Attorney for the Plaintiff

Participating Attorney for
THE RUTHERFORD INSTITUTE