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August 18, 2022

Via Email and First-Class Mail

President Jenny Lam
San Francisco Board of Education
555 Franklin Street
San Francisco, CA 94102

Re: Resolution 225-10A1

Dear President Lam,

Pursuant to Government Code § 54960.1(b), I write to request that the San Francisco Unified School District Board of Education ("School Board" or "Board") repeal Resolution No. 225-10A1. As explained in further detail below, the School Board acted unlawfully, both procedurally and substantively, in adopting its resolution designating certain religious holidays as San Francisco Unified School District ("SFUSD") holidays. More specifically, the School Board violated the notice and agenda requirements of the Brown Act by failing to provide proper notice of its proposed resolution. In addition, the School Board violated the Establishment Clause of the United States Constitution and Article I, Section 4, of the California Constitution in adopting the resolution.

To be clear at the outset, we share in full the School Board's laudable objective of reducing discrimination against members of the Muslim community. No child should be forced to deal with discrimination at school or anywhere else based on their religion. But there are lawful and effective means to advance those important objectives. It is not permissible or necessary to violate the U.S. and California Constitutions to do so.

Background Facts

“On May 10, 2022, Resolution 225-10A1 - Resolution to include the observance of Eid al-Fitr and Eid al-Adha in the SFUSD Academic and Instructional Calendars was introduced by Commissioner Alexander for first reading at the Board of Education.” August 9, 2022 Agenda Item Details, BoardDocs, SFUSD.

https://go.boarddocs.com/ca/sfusd/Board.nsf/goto?open&id=CEZR7S679FDA&fbclid=IwAR0K59RI2H7Vw2pKggtCBY92Ff0-j8OZUAMQyZLUueYIEnp_Cn1SSHb-CEo (accessed August 17, 2022).

“At the June 13, 2022 Curriculum and Program Committee, Commissioner Alexander introduced an amended version of this Resolution. The Curriculum and Program Committee forwarded the Amended Resolution with no recommendation.” *Id.*

The agenda for the School Board’s August 9, 2022 meeting listed the item as follows:

225-10A1 – (Amended) Resolution to include the observance of Eid al-Fitr and Eid al-Adha in the SFUSD Academic and Instructional Calendars – Commissioner Matt Alexander

Id. At its meeting on August 9, 2022, by a 5-1 vote, the School Board adopted Resolution No. 225-10A1 (Amended), which resolved in pertinent part as follows:

THEREFORE BE IT RESOLVED: In recognition of the significance of these days for the students and families of San Francisco’s Muslim communities, schools and offices in SFUSD will be closed on the Eid Al Fitr and Eid Al Adha Holidays. If the holidays were to fall on the weekend, schools and offices will be closed on the day before or the day after the weekend depending on which day is closest to the last day of Eid Al Fitr and Eid Al Adha. The Board of Education directs staff to take appropriate steps to modify the SFUSD instructional and classified calendar to include these holidays, beginning with the 2023-2024 school year;¹

A complete copy of the amended resolution is attached hereto as Exhibit A.

https://go.boarddocs.com/ca/sfusd/Board.nsf/goto?open&id=CEZR7S679FDA&fbclid=IwAR0K59RI2H7Vw2pKggtCBY92Ff0-j8OZUAMQyZLUueYIEnp_Cn1SSHb-CEo (accessed August 17, 2022).

¹ The resolution also provided, “FURTHER BE IT RESOLVED: That the Board of Education, as a transition to full implementation, directs staff to inform educators, schools and Muslim students and families of their options for obtaining excused absences for these Holidays during the 2022-2023 school year; and work with Arab American educators to recommend curriculum for schools and educators to use in celebrating Arab-American Heritage Month, as well as intentionally acknowledging (sic) Arab American Heritage Month in official SFUSD communications.” *See* Exhibit A.

The Brown Act

The Brown Act sets forth the following notice requirements, in pertinent part, that the School Board must follow relative to the issues it plans to take up at regularly scheduled Board meetings:

(a) (1) At least 72 hours before a regular meeting, the legislative body of the local agency, or its designee, shall post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session. . . .

(3) No action or discussion shall be undertaken on any item not appearing on the posted agenda, except that members of a legislative body or its staff may briefly respond to statements made or questions posed by persons exercising their public testimony rights under Section 54954.3. . .

Government Code § 54954.2.

The California Attorney General’s guide to the Brown Act explains, with regard to the agenda requirements, that “the purpose of the brief general description is to inform interested members of the public about the subject matter under consideration so that they can determine whether to monitor or participate in the meeting of the body.” *See* The Brown Act, Open Meetings for Local Legislative Bodies, 2003, California Attorney General’s Office at 16, Available at <https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/brownAct2003.pdf>

This commentary by the Attorney General is consistent with the California Court of Appeal’s decision in *Carlson v. Paradise Unified School Dist.* (1971) 18 Cal.App.3d 196, 199. In *Carlson*, the court analyzed similar language in Section 966 of the Education Code and rejected an agenda item, which described a proposed school closure as a “school site change,” calling it “misleading and inadequate to show the whole scope of the board’s intended plans.” *Id.* Similarly, in *Moreno v. City of King* (2005) 127 Cal.App.4th 17, 26–27, the Court of Appeal held that an agenda item which referenced “Public Employee (employment contract)” was not sufficient to convey the fact that a particular employee’s dismissal would be discussed. It should have stated directly “Public Employee Dismissal.” *Id.*

In the instant matter, the notice provided to San Francisco residents by the School Board was similarly inadequate, for it did not make clear that the important purpose of the August 9, 2022 hearing was to authorize two new school holidays based on their religious significance. The agenda item listed the proposed action as a “Resolution to include the observance of Eid al-Fitr and Eid al-Adha in the SFUSD Academic and Instructional Calendars.”

The Merriam-Webster Dictionary defines “observance” to mean “a customary practice, rite or ceremony,” “a rule governing members of a religious order,” “an act or instance of following a custom, rule, or law,” or “an act or instance of watching.” Merriam-Webster.com Dictionary, Merriam-Webster, available at <https://www.merriam-webster.com/dictionary/observance> (cessed August 17, 2022). The plain meaning of the term “observance” thus does not make

clear that the purpose of the resolution was to authorize religious holidays, i.e., days off from school for which public employees will necessarily be paid.

California Education Code § 37222 uses the term “observe” with regard to days of special significance to convey the notion that schools will “conduct suitable commemorative exercises” on such days.² Education Code § 37221 explicitly specifies that schools “remain open on, but shall celebrate with appropriate commemorative exercises” a list of (non-religious) holidays on specific dates that are observed by public schools in this manner. Accordingly, there is no basis to assume that “observance” equals school closure under the California Education Code.

Indeed, even the School Board was evidently aware that its notice for the August 9, 2022 hearing was inadequate. While in Committee, the title of the Resolution was amended to state directly that the purpose of the resolution was to authorize school holidays on both the Eid al-Fitr and Eid al-Adha religious holidays. As originally drafted, the resolution had the same vague title as the agenda description: “Resolution to include the observance of Eid al-Fitr and Eid al-Adha in the SFUSD Academic and Instructional Calendars.” After the amendment, the resolution was retitled to state directly that its intent was to create two school holidays: “Resolution to Authorize School Holiday on Eid al-Fitr and Eid al-Adha in the SFUSD Academic and Instructional Calendars.” Notwithstanding this clarifying revision to the resolution in Committee, the description of the resolution in the agenda was not changed. Instead, it contained the same vague language as the title of the original draft resolution, only referencing the possibility of some unspecified form of “observance” and not explicitly stating the very significant fact that the resolution would create two new religious school holidays.

The notice provided by the School Board regarding the creation of two new religious holidays failed to satisfy the notice requirements of the Brown Act. Residents cannot be required “to guess” as to whether they should attend a hearing or seek additional information from the Board. *San Diegans for Open Gov’t v. City of Oceanside*, 4 Cal.App.5th 637, 209 Cal.Rptr.3d 305 (Cal. App. 2016). As a result, the School Board was precluded from voting to authorize two new religious holidays at its August 9, 2022 meeting. Government Code § 54954.2(a)(1) & (a)(3).

U.S. Constitution – Establishment Clause

“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Larson v. Valente*, 456 U.S. 228, 244, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982). In *Lemon v. Kurtzman*, 403 U.S. 602, the Court established a three-part test for determining whether a statute violates the Establishment Clause. “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither

² California Education Code Section 3722 – days designated as having special significance:
(a) On each day designated and set apart as a day having special significance, all public schools and educational institutions are encouraged **to observe** that day and to conduct suitable commemorative exercises.
(b) It is the intent of the Legislature that the exercises encouraged by subdivision (a) be integrated into the regular school program, and be conducted by the school or institution within the amount of time otherwise budgeted for educational programs. (emphasis added).

advances nor inhibits religion . . . ; finally, the statute must not foster ‘an excessive government entanglement with religion.’” *Id.* at 612–13.

More recently, the Supreme Court has held that “[w]hile the *Lemon* Court ambitiously attempted to find a grand unified theory of the Establishment Clause, in later cases, we have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance.” *American Legion et al. v. American Humanist Assn. et al.*, 588 U. S. ___, ___ (plurality opinion). *See also Kennedy v. Bremerton School District*, 597 U.S. ___, ___ (2022) (“In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by “reference to historical practices and understandings.”) (internal citations and quotations omitted).

In the instant case, it is unequivocally clear that Resolution No. 225-10A1 did not have a secular legislative purpose. The resolution states explicitly that its purpose is to create two school holidays, based on their religious significance, for the benefit of the members of a specific religion. There is no reference to any secular purpose (such as absenteeism) to justify the holiday. *See Metzl v. Leininger*, 57 F.3d 618, 623 (7th Cir. 1995) (referencing high rates of absenteeism as a possible secular basis for a school holiday); *Cammack v. Waihee*, 932 F.2d 765 (9th Cir.1991) (permitting Hawaii to recognize a state holiday on Good Friday where Court found that statute had a secular purpose to "have more legal holidays" or to "provide Hawaiians with another holiday" and where public employees were "not encouraged in any way to use the holiday for worship").³ Nor is there any historical basis for the resolution, for the School Board has never previously authorized closure of schools on the holidays in question.

The resolution makes reference to “24.9% of the world population, known as Muslims . . . ,” but the resolution fails to cite any statistics regarding the religious affiliation of the student population in San Francisco.

According to Pew Research, the religious affiliations of the adult population in San Francisco is as follows:

- Christian – 48%
- Hindu – 5%
- Jewish – 3%
- Buddhist – 2%
- Muslim – 1%
- Other World religions – 1%
- Other Faiths – 3%
- Atheist – 5%
- Agnostic – 10%
- Nothing in particular – 20%
- Don’t know – 2%

³ The ruling was 2-1, with a strong dissent disputing the State’s claim that it had a secular basis for making Good Friday a state holiday. *Id.* at 782-789.

See <https://www.pewresearch.org/religion/religious-landscape-study/metro-area/san-francisco-metro-area/> (accessed August 17, 2022). See also The Bay Area Muslim Study, Institute for Social Policy and Understanding, Farid Senzai and Hatem Bazian (relying on 2013 data to estimate that 250,000 Muslims live in the Bay Area, but only about 3% of that number – *i.e.*, about 7,500 people- live in San Francisco). Executive Summary available at <https://www.siliconvalleycf.org/sites/default/files/publications/bay-area-muslim-study-ONBA-project-executive-summary-web.pdf> (accessed August 17, 2022).

Given the available data, there is thus not even a reasonable basis for inference that the Board’s resolution had a secular or historical basis.

California Constitution

Like the United States Constitution, the California Constitution also prohibits all laws "respecting an establishment of religion." Article I, Section 4, California Constitution. In addition, however, the California Constitution provides that “[f]ree exercise and enjoyment of religion without discrimination or preference are guaranteed.” *Id.* “Preference thus is forbidden even when there is no discrimination.” *Fox v. City of Los Angeles*, 22 Cal.3d 792, 796 (Cal. 1978). “The current interpretations of the United States Constitution may not be that comprehensive.” *Id.*

In *Mandel v. Hodges*, 54 Cal.App.3d 596, 617 (Cal. Ct. App. 1976), the California Court of Appeal ruled that an executive order by the Governor authorizing the closure of a state office for a period of three hours in observance of Good Friday was a violation of the California Constitution. More specifically, after also concluding the order violated the federal Establishment Clause, the Court of Appeal held “the executive action in question "further violates Article I, Section 4 of the California Constitution in that it constitutes discrimination and preference.” *Id.* at 617.

In the current case, Resolution No. 225-10A1 would create a similar inequity in the San Francisco School calendar, by providing school holidays for one religion while not providing the same treatment for other religions. For example, members of the Hindu, Jewish and Buddhist faiths, which reportedly constitute a higher percentage of the population in San Francisco than Muslims, do not have a school holiday dedicated to their most important religious days. Good Friday is also not designated as a holiday for Christians. Atheists and agnostics have no holidays dedicated to them. Thus, a preference is being given to one group’s religious beliefs over others, which also implicates Equal Protection concerns. And it is not a solution to provide for holidays for all religions. For if members of all the foregoing religious groups, along with others, were to seek school holidays for their various days of religious significance, then additional school days would be lost, with further negative consequences for San Francisco public school students and their families.

Hardships for School Families are Real

Resolution 225-10A1 also fails to take into consideration the deleterious effects on students and families that result from closing schools. In considering the consequences of school closure in

another context, the California Department of Education has outlined numerous consequences that should be considered:

Using an Equity Lens:

Socioeconomically disadvantaged families may not have options for alternate child care.

Working parents and guardians are disproportionately affected by school closure and could suffer significant professional or economic consequences as a result.

Students receiving free or reduced-price meals may not have a reliable alternate source of healthy food.

Students with Individualized Education Programs (IEPs) may not have access to needed services during school closure.

Schools provide safe and supportive environments for their students; our most vulnerable students rely on them most.

Available at <https://www.cde.ca.gov/ls/ep/schoolclosurecons.asp> (accessed on August 17, 2022).

Accordingly, while the School Board is attempting to assist a discrete part of the student population with Resolution No. 225-10A1, a significant effect of the resolution will be to create hardship for a large number of students and parents who in many instances may have to work and therefore cannot be available for child-care on the holidays in question.

San Francisco is Not the Same as Other Cities.

The Board cites the policies of school boards in other locations as an additional basis for its resolution. Most prominent amongst those is the City of New York, which has established a school holiday for Eid al-Fitr. As a threshold matter, Muslim students reportedly make up approximately 10% of the student population in New York,⁴ a number far higher than the foregoing data demonstrates is the case in San Francisco. Moreover, the New York School Board's policies as to religion are markedly distinct from the established practices of school boards in major cities in California. The New York School Board explicitly authorizes school closure on Christian, Jewish and Muslim holidays, such as Christmas, Good Friday, Rosh Hashana, Yom Kippur, Passover and Eid al-Fitr. Available at <https://www.schools.nyc.gov/about-us/news/2022-2023-school-year-calendar> (accessed on August 17, 2022). By contrast, in the largest school districts in California – including Los Angeles, San Diego, and Orange County – school calendars specifically do not reference religious holidays. Winter break, for example, simply comes at the end of the first semester and makes no mention of Christmas. Spring break is not tied to Good Friday or Passover. In San

⁴ See Religiosity, Education and Civic Belonging: Muslim Youth in New York City Public Schools. Available at https://www.tc.columbia.edu/i/media/6581_musnycreport.pdf (accessed August 17, 2022).

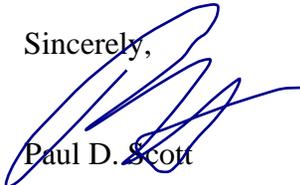
Francisco in particular, spring break does not even overlap with those holidays in the current calendar.

Other Alternatives

The simple reality here is there is a better way. The San Francisco School Board acknowledged in its resolution SFUSD's standing obligation to ensure that all students of all religions be informed they are entitled to miss school to celebrate religious holidays of significance to their families. That means providing students and families with notice of their rights and with the basic resources necessary for students to make up for a missed day of school. To the extent that the School Board is not already taking such steps, then it can assist all families, including Muslim families, by immediately beginning to do so.⁵

To the extent that the School Board is seeking to accomplish the laudable goal of reducing discrimination, then, rather than closing schools, SFUSD could take advantage of time in the classroom to educate students about the panoply of different religious and non-religious traditions and the many shared values amongst them. That is a far more constructive way to educate children than simply giving them a vacation day.

Based on the foregoing, please advise by August 31, 2022 via email and mail whether the Board of Education will rescind its resolution without delay. This letter is being written in an effort to avoid unnecessary litigation, so a reply by the foregoing date is respectfully requested.

Sincerely,

Paul D. Scott

cc: San Francisco Taxpayers Association

⁵ The second resolved paragraph in the Board's resolution (which mandates that Arab American families be informed of those rights) suggests that the School Board has not already been communicating such rights to families.

EXHIBIT A

Resolution to ~~Authorize School Holiday on include the observance of~~ Eid al-Fitr and Eid al-Adha in the SFUSD Academic and Instructional Calendars

Commissioner Alexander

WHEREAS, The City and County of San Francisco has a sizeable and growing Muslim population. Islam is the world's second-largest religion with 1.9 billion followers, or 24.9% of the world's population, known as Muslims; and

WHEREAS, A large portion of the City's Muslim population includes school-age children and young adults enrolled in schools that are part of the San Francisco Unified School District; and

WHEREAS, Eid al-Fitr, or "Feast of Breaking the Fast," is the most important holiday celebrated by Muslims worldwide, to mark the end of Ramadan, the ninth month of the Islamic calendar during which Muslims fast from sunrise to sunset. Eid al-Fitr is a holiday ~~of gratitude~~ that involves special services, ceremonies, and traditions celebrated with family and the community; and

WHEREAS, Eid al-Adha, also known as the "Festival of Sacrifice," is the second most important holiday on the Islamic calendar, ~~and is a day of remembrance~~. Eid al-Adha is celebrated with ~~activities~~~~prayer~~ and traditions involving food, family, and charitable giving; and

WHEREAS, San Francisco public schools are in recess during the Christian holiday of Christmas and schools are closed on days, such as Lunar New Year, Martin Luther King, Jr. Day, and Cesar Chavez Day, that are culturally significant to populations in San Francisco and traditionally involve community events and gatherings; and

WHEREAS, Unlike these other days of cultural significance and community celebration, San Francisco public schools remain open and in session on Eid al-Fitr and Eid al-Adha when they are observed during the school year. Therefore; Muslim public school students in San Francisco must make a difficult choice between attending school and not fully ~~participating in honoring or observing~~ their ~~cultural so important~~ traditions, or missing school entirely so that they may join family and community members in participating in holiday celebrations and activities; and

WHEREAS, Under California law and San Francisco Unified School District Policy, a student may be excused from school when the absence is in observance of a religious holiday or ceremony. But even when Muslim students' absences are excused when observing Eid al-Fitr and Eid al-Adha, such students are still disadvantaged by losing a day of in-class instruction, which can cause them to fall behind their peers; and

WHEREAS, Sara Ouchene, a 17 year old SFUSD high school student organized a petition that quickly gathered nearly 600 signatures from students, parents and educators across SFUSD, that called for Eid al-Fitr and Eid al-Adha to be recognized ~~and observed~~ on the SFUSD calendar;

WHEREAS, Incorporating Eid al-Fitr and Eid al-Adha into the San Francisco Unified School District Calendar as days when schools are closed in recognition of the holidays would allow Muslim students to fully ~~participate in observe~~ these ~~sacred~~ holidays and maintain equal access to their educational opportunities; without potentially negative educational and social repercussions; and

WHEREAS, Other cities and counties with sizeable Muslim populations, including New York City; Detroit and Dearborn, Michigan; Trenton, Atlantic City, Paterson, and Montclair, New Jersey; Iowa City, Iowa, Philadelphia and Pittsburgh, Pennsylvania; Montgomery County, Maryland; and Broward County, Florida, have either incorporated Eid al-Fitr and Eid al-Adha as ~~observed~~ school holidays or have otherwise closed schools on these holidays; and

WHEREAS, San Francisco is a diverse and multicultural city where tolerance, inclusiveness, and respect for all people, cultures, and religious and spiritual beliefs are fundamental values championed by the City at all levels; and

WHEREAS, Incorporating Eid al-Fitr and Eid al-Adha on the District-wide calendar as days when San Francisco public schools would be closed ~~to allow students to observe these important Muslim holidays, would be is~~ consistent with and in furtherance of those core values; and

WHEREAS, studies have shown that Islamophobia has risen nationally and in the City of San Francisco in recent years. According to [AROC's TURATH report](#), a local study of Arabs and Muslims in SFUSD, virtually all Muslim students have felt discrimination at some point of their school lives by other students and/or faculty; and

WHEREAS, passing this resolution would not only enrich Muslim students, but would foster an environment of diversity and tolerance that would allow ~~students them~~ to learn from ~~the~~ their Muslim peers. Especially as Islamophobia rises, recognition of Muslim holidays would bring the Muslim community closer to feeling belonging in San Francisco; and

WHEREAS, the Board of Education of the San Francisco Unified School District has authority over the District-wide school calendar and the power to designate Eid al-Fitr and Eid al-Adha as days when schools are closed;

THEREFORE BE IT RESOLVED: In recognition of the significance of these days for the students and families of San Francisco's Muslim communities, schools and offices in SFUSD will ~~be closed not be in session~~ on the Eid Al Fitr and Eid Al Adha holidays. ~~and if~~ the ~~h~~holiday's ~~day~~ were to fall on the weekend, schools and offices will ~~be closed not be in session~~ on the day before or the day after the weekend depending on which day is closest to the last day of Eid Al Fitr and Eid Al Adha. ~~T and that~~ the Board of Education directs staff to take appropriate steps to modify the SFUSD instructional and classified calendar to include these holidays fully implement this observance as official holidays every year, beginning with the 2023-2024 school year;

FURTHER BE IT RESOLVED: That the Board of Education, as a transition to full implementation, ~~will direct~~ staff to ~~start by recognizing Eid on the 2022-2023 school calendar with the explicit responsibility of~~ informing educators, schools and Muslim students and families of their options for ~~obtaining excused absences for these Holidays during the 2022-2023 school year; and provide~~ taking Eid off, guidance for schools and educators in supporting students and families during Ramadan and ~~working~~ with Arab American educators to recommend curriculum ~~for schools and educators~~ to use in celebrating Arab-American Heritage Month, as well as intentionally ~~acknowledging uplifting Eid and~~ Arab American Heritage Month in official SFUSD communications.