

Monday, June 20, 2022

MINUTES OF THE AD HOC CALENDAR COMMITTEE OF THE BRIDGEPORT BOARD OF EDUCATION, held June 20, 2022, at Central High School, 1 Lincoln Boulevard, Bridgeport, Connecticut.

The meeting was called to order at 5:36 p.m.

Present were members Chair Joseph Lombard and Erika Castillo. Board members Joseph Sokolovic, John Weldon, and Christine Baptiste-Perez\* were present. Board member Albert Benejan\* joined the meeting subsequently as noted. (\*remote participation)

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Supt. Michael J. Testani was present.

Atty. Rebecca Goldberg of Berchem Moses and Atty. Conrad Vahlsing of CAFE were present.

Ms. Castillo moved to approve the minutes of May 23, 2022. The motion was seconded by Mr. Lombard and unanimously approved.

Mr. Lombard noted the committee received a legal opinion from Berchem Moses related to holidays and school calendar. He said he saw no reason to hold an executive session on the matter.

Ms. Castillo moved “*to waive the attorney-client privilege and discuss the opinion in open forum.*” The motion was seconded by Mr. Lombard and unanimously approved.

Atty. Goldberg noted issues came up when students requested school holidays for Eid al-Fitr and Eid al-Adha.

She discussed issues around absence from school, inclusiveness, and demographic numbers.

Atty. Goldberg said there are state holidays set by Connecticut, but schools are not required to close for those legal holidays except for those occurring in January or December.

Atty. Goldberg said the guiding principle for closing schools due to a religious holiday is the First Amendment of the U.S. Constitution, which prohibits laws that either create an establishment of religion or prohibit the free exercise of religion. She said there is no Supreme Court case that directly addresses closures for holidays. The leading case is *Lemon vs. Kurtzman* (1971), which creates a test. She said the three-part analysis under the case indicates there has to be a secular purpose; the principal or primary effect cannot be to advance or inhibit religion; and the action cannot create excessive government entanglement with religion.

Atty. Goldberg discussed a 9th Circuit case from Hawaii covering Good Friday. She said the distinction between majority and minority religions was important. She said Hawaii indicated the stated secular purpose was just to provide another day off. That case cited a Supreme Court case that indicated the government can't be hostile to religion and could close its doors as to those who want to repair to a religious sanctuary.

Atty. Goldberg said maintaining diversity and inclusion, not forcing students to make difficult choices or making them to feel othered, can all be a secular purpose for the purposes of the *Lemon* test.

Atty. Goldberg said some courts have indicated that holidays such as Christmas and Good Friday have become secularized, but it is difficult to categorize a holiday for a religious minority that way.

Atty. Goldberg discussed the second prong of the *Lemon* test, which is the primary effect and whether it promotes a religion or religion in general.

Atty. Goldberg said a Connecticut Supreme Court case called *Griswold* impacted the third prong, the excessive entanglement prong. *Griswold* dealt with the ban of the sale of alcohol on Good Friday. The case included the need for the state to monitor alcohol sales.

Atty. Goldberg said, looking at the *Lemon* case there is no inherent barrier to closing for religious holidays as long as the right approach is adopted. She said a secular purpose must be identified, but the secular purpose would never stand on solid ground if the claim was that a minority religious holiday became secularized.

Atty. Goldberg said a complex part of this was considering all holidays in a diverse district. The more minority religions you have, the more complex it becomes. She said at some point there has to be an attempt to draw a line.

Atty. Goldberg noted holidays may impact parents whose workplaces are not closed for holidays. She said in a diverse district there should be an attempt to look at absence rates. She said this was discussed at the board meeting and the information did not show a clear pattern. Even if a numerical cutoff is established, students of a minority religion that are smaller will still have the problem that was considered by the board.

Atty. Goldberg said the U.S. Census does not collect data on religion, but the district should not poll students directly. She said one option is to poll teachers on attendance of students on a prior date of the holiday and how many absences they believe are attributable to it being a religious holiday, and whether it was a significant problem for instruction. Employee absentee rates can also be considered.

Atty. Goldberg said the legal analysis is murky as it applies to the Establishment Clause. She said schools can be closed for a religious holiday provided the board goes about it in the correct way. She said options include setting a threshold, gathering data to figure out the extent of disruption, or allowing absence on a religious holiday without penalty.

In response to a question, Atty. Goldberg said the *Lemon* case is considered on shaky ground, despite being the current law of the land, although the core principles will likely still exist.

In response to a question, Atty. Goldberg said the establishment of Eid al-Fitr as a holiday was articulated at the meeting on the perception that a large number of students would be absent, which is a secular purpose. Mr. Sokolovic said the board received over a thousand petition signatures from members of the community and the room was packed with at least eighty community members. Atty. Goldberg said decisions in this area are more commonly linked to attendance rather than the presence of vocal members of the community to create a secular purpose.

In response to a question, Atty. Goldberg said students of religious minorities could be “othered” if the school was not closed on their holiday.

Mr. Sokolovic said setting policy with any kind of parameters will have a disparate impact on protected groups. He said new board policy would make it harder for minority groups to get a holiday. He said his concern was the board not creating policy until the Islamic community got their day off approved. He said we can't let this happen again. He noted we're meeting here on a day that the state celebrates Juneteenth, and the schools are closed.

Atty. Goldberg said aside from Christmas and Good Friday what is being discussed is inherently about minority groups. The two options are to close for every single holiday that someone asks you to close for, which is not tenable, or take an a 'la carte approach. She said this is a very difficult issue because someone will always feel left out.

Mr. Benejan\* joined the meeting.

Ms. Castillo said she read the document in its entirety. She said she was pleased to see a lot of the same steps that the board explored without having received the written opinion previously. She said the *Lemon* test was close as we can get to having a model to structure the conversation around. She said for Eid the board ultimately landed on allowing a closure for the reason of inclusiveness of minority groups in advancing the district's commitment to educational equity. She said at the end of the day we're elected officials for the city of Bridgeport, and this is the community we serve. She said this conversation has made it clear that there's really no way of perfecting this.

In response to a question, Atty. Goldberg said a middle ground approach to holidays involves looking at data because there is no way to judge between religions other than based on data. She discussed the potential polling of teachers. She noted very large school districts such as New York City might close individual schools based on demographic information.

In response to a question, Atty. Goldberg said the *Lemon* test applies to any government action, which could include removing a holiday from the calendar. She said some of the holidays may be based on demographic information from the past which are no longer applicable. She said she would prefer to frame it as the board looking at the calendar anew rather than saying we're removing a holiday.

In response to a question, Atty. Goldberg said Title VII calls for reasonable accommodations for someone's religious observance, which would apply to staff members. She said as long as the right of the staff member to take time off is preserved, with or without pay, the board will meet its obligation.

Ms. Baptiste-Perez said she looked at the *EEOC vs. Abercrombie-Fitch* case regarding Title VII.

Mr. Lombard thanked Atty. Goldberg and said it was very affirming to see that the way the board organically approached this seemed to be in line with the *Lemon* test.

Atty. Vahlsing said another way to get data on demographics may be to compare absentee rates for staff and students. For example, comparing a holiday on Friday to other Fridays in the month.

Atty. Vahlsing said the *Lemon* test asks, does our act violate the First Amendment, which is the first question that should be addressed because it would be an issue potentially addressed in court. Equality is equally important, but it is a secondary question.

Atty. Vahlsing said CAGE does not currently have a policy on deciding how and when to schedule days off. He said Branford recently adopted a “nuclear option,” which is no holidays for any religious holiday, which passes the Establishment Clause test. The second test would be whether a policy fits aspirations for equality.

Atty. Vahlsing said the attorneys at CAGE are sort of a legal reference desk that does not form attorney-client relationships. He noted he disagreed with almost nothing in Attorney Goldberg’s legal analysis.

Atty. Vahlsing said CAGE had two policies that deal with religious observances and displays and another one that covers school calendars, which does not touch religious issues. He noted Connecticut does not have a case on point about school closures. He said he has no idea how a policy would create a threshold number for school closures.

Atty. Vahlsing said he doubted another alternative – to create a policy based on nonobjective factors – would stand up in court. Such factors could include promoting cultural tolerance in the community, which is secular, but very arbitrary.

Atty. Vahlsing said CAGE is not opposed to creating a custom policy for a district, but it would be difficult to articulate a legally defensible policy about this that is also attuned to a district’s need. He said the bigger choice is

picking one of three options: (1) the nuclear option; (2) determining a numerical threshold for school closures; and (3) closures based on a subjective, secular reason. He said the board should consult its attorney before adopting one of these options. He said whatever you do, you should always tie it back to something you can articulate that is not religious in nature.

Ms. Castillo said where we landed on the decision for closure was on the promotion of inclusiveness for minority groups in advancing a commitment to educational equity. Atty. Vahlsing said the crazy thing is trying to do the right thing – by incorporating minority religions – conflicts with the First Amendment, which does not let state actors entangle themselves with religion.

In response to a question, Atty. Vahlsing said attendance data is the most concrete datapoint school boards can get. He said in the past Jewish school holidays were created because it became a logistical, secular problem to have schools open. He said petitions would likely represent community sentiment, not absenteeism data.

Mr. Lombard asked if there was any standard for discrimination around holidays. Atty. Vahlsing said there are laws around discrimination, but it depends on the act involved.

Atty. Vahlsing said sometimes the law can be cold. He urged the board not to compare things such as LGBTQ issues to religion because different laws or amendments apply.

Mr. Lombard said we had to think beyond religious holidays.



Ms. Baptiste-Perez noted the changing demographics of the district, while at the same time having a hard time collecting sufficient data. She said we could not even get ten percent of parents to answer a Covid mask survey. She said not even two percent of the city participated in an election. She said when the board meeting was packed over Eid, when the board meetings have light attendance, that said something.

Atty. Vahlsing noted Atty. Goldberg suggested the teacher survey. He said no district has asked CAFE to come up with a way to compare attendance rates. He said he was not aware of a district that had set up a threshold. He said community demographics could be helpful.

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Ms. Baptiste-Perez said she received hundreds of e-mails on the prior issue and was able to hear parents of children in the district.

In response to a question, Atty. Vahlsing said the question becomes, when does it become impracticable to hold school because of absenteeism. He said an absentee rate on a holiday could be compared to a non-holiday. He said a threshold has to be set high enough not to cancel too many days, but it has to be low enough to engage equality. He said it is extremely complicated and he sympathized with the board.

Mr. Sokolovic said he investigated policies around Connecticut. He said it was a mistake to rely on attendance only on deciding whether it is a disruption because a policy that called for no tests or major lessons would be a disruption to 19,000 students.

Atty. Vahlsing said there was a policy around holding school on a religious holiday. He said districts do have policies that

prohibit tests on days before holidays, for example, but it is tied to a historical absentee rate.

Mr. Sokolovic said we are empowered to set the calendar, which is one of the board's only powers. He gave the example of setting Festivus as a school holiday. He noted the federal government, and the state did not need additional powers to add a holiday, and the same should apply to the board. He said doing nothing is the best option. He said we may be creating solutions for something that's not a problem.

Atty. Vahlsing said the fourth option of doing nothing was available to the board. He said a board can be sued at any time for any reason. He said he believed Atty. Goldberg's advice was based on if the district was sued.

Mr. Sokolovic said a board policy could be overturned with a two-thirds vote. He said if any policy is proposed, it should just incorporate a legal parameter such as calling for a secular reason so we're always aware and cognizant of that requirement.

Atty. Vahlsing said there is a double-edged sword in litigation. If the board were to violate a written policy, which would create clear evidence for the other side.

Mr. Lombard said the policy could help a minority group advocating for a holiday. Ms. Castillo said Bridgeport as the largest district in the state could set the precedent. She said the purpose of forming the committee was to be proactive. She added that we have learned there is no perfect way to do this, so the board should not aim for perfection.

In response to a question, Atty. Vahlsing said overwhelming community support for a holiday gets into the gray area of subjective reasons because it is not directly tied to the operation of the schools and the educational mission.

Ms. Castillo said the board did look at attendance data, but the information was contradictory. Atty. Vahlsing said even a one percent increase in absenteeism is an increase. Mr. Lombard questioned the use of historical data of absentee rates because people didn't know they could take the day off. He said one possibility was to look at measuring a future year. He noted student representatives spoke up in favor of the Eid al-Fitr holiday who indicated they supported the holiday in solidarity with their classmates.

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Mr. Weldon said as of now the district did not have a policy where students are allowed to just take the day off. He said even if data was gathered, we would not know whether the absenteeism was the result of the minority religion.

Mr. Lombard noted there was a lot of community support from other religious leaders for Eid al-Fitr, but yet historical data did not provide definitive information.

Mr. Weldon said each student was entitled to ten excused absences each year. Atty. Vahlsing said an excused absence was different than a district closing schools. Ms. Castillo said she did not believe the Muslim community would have dropped the issue if the board had deferred the issue to study attendance data.

Ms. Baptiste-Perez said she heard from people that the push for the Eid holiday started about a decade ago, but it was never seriously analyzed or those advocating it were

ignored. She said this made the case for having a policy in place.

Mr. Weldon said this is a messy topic and it appears people in the past avoided it because that was the easiest thing. He said it would come to a point where the board would have to have a serious conversation. He said the conversation now is not one the board would want to have in five years and while being backed into a corner. He said it was an important conversation that would save some unfortunate decisions way down the road.

Atty. Vahlsing said he believed Branford adopted the nuclear option because it was the clearest, simplest way out of an incredibly difficult task. He said it seemed the board wanted to create something that makes the community involved and represented; it just can't be religious in nature. He said any decision the board reaches should involve consultation with its counsel.

Mr. Sokolovic said he was in favor of having no policy, but if a policy is created, he suggested CAFE provide a draft policy. Atty. Vahlsing said he did not believe the problem was drafting the policy, but what the board wants in the policy.

In response to a question, Atty. Vahlsing said he had not been engaged by the other districts that established Eid as a policy.

Ms. Castillo said our district looks nothing like Branford's. Such a policy would put the next generation of board members in the same spot. She said this was an opportunity to lead.

Ms. Baptiste-Perez suggested not creating an answer to a question that doesn't exist. She said the Eid question exists and a decision was made that passes the *Lemon* test. She said nothing else was on the table at this point.

Mr. Lombard said at least one board member has mentioned another holiday to him. He said it was worth discussing the issue and he was glad to see participation from the board members.

Ms. Castillo moved to adjourn the meeting. The motion was seconded by Mr. Lombard and unanimously approved.

The meeting was adjourned at 7:50 p.m.

Respectfully submitted,

John McLeod

*Approved by the committee on July 11, 2022*