UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Margaret Rogers, et al.,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	C.A. No. 09-493ML
	:	
William D. Mulholland, et al.,	:	
	:	
Defendants.	:	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This case challenges the constitutionality of the City of Pawtucket's policy of allowing City officials the absolute, unfettered discretion to issue permits for playing fields owned, operated, and maintained by the City with municipal tax funds. In the exercise of their discretion, City officials afford preferential treatment to private, sectarian schools with regard to the permitting of certain fields to the detriment of interscholastic sports programs operated by the City's public schools. Plaintiffs are municipal taxpayers, some of whom have children who attend the City's public high schools or junior high schools, and who participate in the public school interscholastic sports programs. Plaintiffs object to the expenditure of their municipal tax dollars to allocate to private, sectarian schools preferred, exclusive use of certain publicly financed and maintained athletic fields. Defendants admit that City officials have issued permits to sectarian and public schools on a case by case basis and that even now, after the adoption in 2010 of written policies governing the issuance of permits, they have not followed those written policies but have instead continued to issue permits as they always have. Further, the written

policies adopted in 2010 codify both a consideration of historical permitting and a substantial amount of discretion in the City officials charged with the authority to issue permits. Those officials have manipulated the permitting process to insure that St. Raphael Academy, a private, sectarian school, has had almost exclusive use of O'Brien Field after school on weekdays for its football practice and that the field is locked when high school football is not in season. Additionally, St. Raphael Academy is granted an exclusive permit after school on weekdays during the fall soccer season for one of three soccer fields at the McKinnon/Alves Soccer Complex, while all seventeen (17) of the public high school and public junior high school fall soccer teams share two City fields for games and three City fields for practices. Because none of these facts are in dispute, Plaintiffs are entitled to summary judgment as a matter of law, and Defendants' motion for summary judgment must fail.

SUMMARY OF UNDISPUTED FACTS

All of the plaintiffs in this case are municipal taxpayers who reside in the City of Pawtucket. *Plaintiffs' Complaint, ¶3-9 (admitted).* Additionally, five of the plaintiffs have children who attend public high schools or public junior high schools in the City of Pawtucket; and of those, two have children who are currently participating in interscholastic sports programs offered by the public schools. *Plaintiffs' Complaint, ¶4, 6-9 (admitted).* These Plaintiffs bring this complaint on behalf of themselves and as next friend of their children. *Id.* They object to the expenditure of their tax dollars for the purpose of providing private, sectarian schools preferred and virtually exclusive use of certain playing fields owned, operated, and maintained by the City. *Id. at 30(admitted).*

The City of Pawtucket owns and, through its Division of Parks and Recreation, operates and maintains the McKinnon/Alves Soccer Complex, the Doreen Ann Tomlinson Field, the O'Brien Field, Fairlawn Veterans' Memorial Park, and Pariseau Field. *Plaintiffs' Complaint, ¶14 (admitted).* These fields were developed, and/or refurbished, and are currently maintained, in substantial part, with municipal taxes. *Plaintiffs' Complaint, ¶23, 30 (admitted).* The City taxpayers contributed $1.2 million dollars to the development of the McKinnon/Alves Soccer Complex alone. *Id.* The public high schools and junior high schools in the City rely upon the use of these and other City fields and courts to offer, as part of their curriculum, interscholastic sports programs which reach over three hundred public junior high school students and over six hundred public high school students. *Plaintiffs' Complaint, ¶17 (admitted); Affidavit of John Scanlon, ¶4.* The public high schools and junior high schools in the City of Pawtucket are also funded, in part, by municipal taxes. *Plaintiffs' Complaint, ¶15 (admitted).*

Before using the City's fields and courts to conduct interscholastic sports programs, the City's public schools must submit, to the Division of Parks and Recreation, a request for permits. *Plaintiffs' Complaint, ¶14 & 18 (admitted); Affidavit of John Scanlon, ¶5.* The Superintendent of Parks and Recreation, Defendant William Mulholland, has issued and continues to issue permits for the use of the City's fields and courts. *Plaintiffs' Complaint, ¶10 (admitted).* Until May, 2010, the City had no written policies, rules or regulations governing the issuance of permits; and Mulholland decided how to issue permits and what permits would be issued for the use of the City's fields and courts based upon the permits he had issued during the prior year. Both Mulholland and his supervisor, the Director of Public Works, agree that he "grandfathered"

most of the permits, including permits issued to various schools in the City.[1] *Depo. of Wm. Mulholland, vol. I, p. 31, lines 11-24; p. 32, lines 1-7. Depo. of J. Carney, p. 11, lines 20-24; p. 23, lines 4-7.* If a school requested a permit different from the permits issued to it for the prior year, Mulholland decided on a case by case basis whether to issue the permit. *Depo. of Wm. Mulholland, vol. I, p. 33, lines 16-24; p. 34, lines 1-2, 13-16, 19-24; p. 35, lines 1-9, 23-24; p. 36, line 1.* In his discretion, if there was some controversy or conflict with regard to the issuance of a particular permit, it was Mulholland's practice to seek advice and guidance from the Director of Public Works, who in turn consulted with the Mayor or his staff. *Depo. of Wm. Mulholland, vol. I, p. 36, lines 9-14; p. 38, lines 1-3; p. 39, lines 12-16, 18-21;p. 40, lines 22-24; p. 41, lines 1-2. Depo. of J. Carney, p. 14, lines 20-24.* In other words, Mulholland, with the assistance of the Director of Public Works, exercised complete discretion with regard to the issuance of permits for the use of the City's fields and courts.

In May, 2010, the City adopted a written policy entitled "Playing Field and Court Permit Policy, Rules and Regulations" [hereinafter, Permit Policy]; however, when Mulholland issued permits for the fall, 2010 season he did not follow the Permit Policy, but instead issued permits in the same way and applied the same criteria that he had prior to the adoption of the Permit Policy. *Depo. of Wm. Mulholland, vol. I, p. 46, line 24; p. 47 lines 1-24; p. 48, lines 6-11, 19k-24; p. 49, lines 1-2.* Even if he had applied the Permit Policy, "the history of the organization's usage of the fields in general and the particular field at issue," as well as unidentified "miscellaneous criteria," are both listed in the Permit Policy among the "criteria for

[1] Jack Carney was the Director of Public Works for the City of Pawtucket from 1998 until his recent retirement in December, 2010. *Plaintiffs' Complaint,* ¶12 *(admitted); depo of J. Carney, p. 5, lines 13-14.* His position was vacant at the time of his deposition.

determination of field use." *Plaintiffs' Statement of Undisputed Facts, Exhibit 1.* Further, the Permit Policy codifies Mulholland's historical discretion to issue or deny permits for field use: "The Department Superintendent reserves the right to reject or approve any permit application in his/her discretion based upon, but not limited to, field availability, conditions, usage, maintenance, field marking demands, previous proper use of the field, financial and availability consideration." *Id.* at A(12). Thus, the City's Permit Policy, both as it is written and as it is applied, continues to vest complete discretion in Mulholland with regard to the issuance of permits for the use of the City's fields and courts.

Mulholland also issues permits for use of the City's fields and courts to St. Raphael Academy and to Bishop Keough, both private, sectarian high schools operated by the Roman Catholic Diocese of Providence. *Plaintiffs' Complaint, ¶20-21.* During every fall season since approximately 2003 or 2004, St. Raphael Academy has requested a permit for the use of O'Brien Field for football practice every weekday afternoon. *Affidavit of John Scanlon, ¶6. Depo. of Wm. Mulholland, vol. I, p. 65, lines 22-24; p. 66, lines 1-9.* During every fall season since approximately 2004, the public school athletic directors have requested a permit for the use of O'Brien Field for soccer practice every weekday afternoon. *Affidavit of John Scanlon, ¶7.* Each year, other than 2008, Mulholland has granted St. Raphael Academy's request and has denied the public school athletic directors' request. *Id. at ¶6 and 7.* Even in 2008, Mulholland initially granted St. Raphael Academy the permit it sought; however, following a meeting with one of the plaintiffs, the Mayor, Plaintiffs' attorney, the public school athletic directors, St. Raphael Academy representatives, and others, Mulholland issued revised permits, granting Jenks Junior High School a permit for soccer on O'Brien Field in the fall season on weekday afternoons. *Depo. of Wm. Mulholland, vol. I, p. 72, lines 21-24; p. 73, lines 1-2; vol. II, p. 48 lines 16-24; p.*

49, lines 1-18; p. 52, lines 2-10. Affidavit of John Scanlon, ¶8. It is noteworthy that upon the request of Mulholland, the City Council so named O'Brien Field, in honor a prominent St. Raphael Academy football coach. *Depo. of Wm. Mulholland, vol. II, p. 87, lines 6-16 . Plaintiffs' Statement of Undisputed Facts, Exhibit 6.* It is also noteworthy that the Division of Parks and Recreation unlocks O'Brien Field in August and relocks it again at the completion of St. Raphael Academy's football season. *Depo. of Wm. Mulholland, vol. II, p. 71, lines 16-22.* As with the issuance and denial of permits, Mulholland decides, on a case by case basis and in his discretion, whether a particular City-owned field should be locked at any particular time. *Depo. of Wm. Mulholland, vol. I, p. 120, lines 3-10.*

As noted above, the City also owns and maintains the McKinnon/Alves Soccer Complex, which encompasses three fields. Since the construction of the complex, the Division of Parks and Recreation has designated one of the three fields specifically and exclusively for the use of St. Raphael Academy. *Depo. of Wm. Mulholland, vol. I, p. 69, lines 3-14.* The remaining two fields are permitted to the public high schools and junior high schools, who share these two fields for all of the Shea High School boys' junior varsity games, all of the Tolman High School boys' junior varsity and varsity games, all of the Tolman High School girls' varsity games, all of the Goff Junior High School boys' games, all of the Goff Junior High School girls' games, all of the Jenks Junior High School boys' games, all of the Tolman High School boys' junior varsity and varsity practices, and all of the Tolman High School girls' varsity practices. *Affidavit of John Scanlon, ¶11.* Currently, all of the public high school and junior high school fall soccer teams are sharing two fields for games and three fields for practices. These fields cannot accommodate all of the public high school and junior high school games and practices. *Id. at ¶7.*

In 2010, the public school athletic directors requested permits for fall soccer on week-day afternoons at O'Brien Field and for all three fields at the McKinnon/Alves Complex. Mulholland, after consultation with Carney, who consulted the Mayor, denied the request for O'Brien Field. Instead, Mulholland issued a permit to Jenks Junior High School for soccer practice at Pariseau Field and issued a permit for two of the fields at the McKinnon/Alves complex, to be shared by ten public school teams. *Depo. of Wm. Mulholland, vol. I, p. 75, lines 9-24; p. 76, lines 1-2, 14-24; p. 77, lines 1-8; vol. II, p. 7, lines 10-15;p. 11, lines 16-24; p. 12, lines 1-23. Affidavit of John Scanlon ¶9-11. Plaintiffs' Statement of Undisputed Facts, Exhibits 3-5.* As a result, the Tolman High School junior varsity soccer team and the Tolman High School freshman football team cannot play afternoon games at Pariseau Field because the Jenks Junior High School soccer teams are using the field for practice at that time. *Id.* When Tolman High School has a soccer game scheduled at 4:00 p.m., more often than not, one of the other public school teams is displaced and is forced to reschedule its game or cancel its practice. *Id. at ¶12.* Meanwhile, St. Raphael Academy had the exclusive use of one of the McKinnon/Alves soccer fields during fall soccer season on weekday afternoons and the exclusive use of O'Brien Field during fall football season (concurrent with fall soccer season) on weekday afternoons.

Finally, for the past two or three years, the Division of Parks and Recreation has informed the public school athletic directors that the City lacks the manpower to prepare fields for public school freshmen, junior varsity, or junior high school games; however, employees of Parks and Recreation continue to prepare fields for St. Raphael Academy varsity games. *Id. at ¶13.*

DISCUSSION OF LAW

Summary judgment is appropriate when there are no material facts in dispute, and the moving party is entitled to judgment as a matter of law. *Driver v. Town of Richmond,* 570 F.Supp.2d 269, 273 (D.R.I. 2008), *citing EEOC v. Steamship Clerks Union, Local 1066,* 48 F.3d 594, 603 (1st Cir. 1995); *Barense v. town of Barrington,* 955 F.Supp. 151, 153 (D.N.H. 1996), *citing Rodriguez-Garcia v. Davila,* 904 F.2d 90, 94 (1st Cir. 1990). If the non-moving party offers facts in opposition to the motion, the Court does not weigh conflicting evidence or determine credibility, but must draw all inferences in the light most favorable to the non-moving party, *Matsushita elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986); however, a mere scintilla of evidence is insufficient to support a non-moving party's position – the evidence must be of sufficient weight upon which a jury could reasonably find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512 (1986). The Court must deny a motion for summary judgment as to a party who does not establish the existence of an element essential to his or her case, and upon which he or she has the burden of proof. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 106 S.Ct. 2548, 2553 (1986). Plaintiffs submit that no material facts are in dispute that are necessary to prove their case, and that based upon the undisputed facts, Defendants' motion must be denied and Plaintiffs' granted for the reasons set forth herein.

A. PLAINTIFFS HAVE STANDING IN THIS CASE AS MUNICIPAL TAXPAYERS AND AS PARENTS AND NEXT FRIENDS OF CHILDREN WHO ATTEND THE CITY OF PAWTUCKET'S PUBLIC HIGH SCHOOLS AND JUNIOR HIGH SCHOOLS AND WHO PARTICIPATE IN THE INTERSCHOLASTIC SPORTS PROGRAMS OFFERED BY THEIR SCHOOLS.

In their memorandum of law in support of their motion for summary judgment, Defendants argue strenuously that Plaintiffs lack standing in this matter based upon their status as federal taxpayers. Defendants' argument entirely misses the mark. Plaintiffs indeed have standing, based upon their status as municipal taxpayers of the City of Pawtucket, as well as their status as parents and next friends of public school high school and junior high school students, and especially those students who participate in the interscholastic sports programs offered as part of the curriculum of the City's public high schools and junior high schools. Defendants admit those paragraphs in the complaint which identify Plaintiffs' status. *Plaintiffs' Complaint, ¶3-9 (admitted).* The federal courts have repeatedly distinguished municipal taxpayers from federal and state taxpayers in their analysis of taxpayer standing. The United States Court of Appeals for the Sixth Circuit has recently summarized the long line of cases which recognize this distinction:

> As a general rule, a taxpayer concerned that government officials have misspent his tax dollars does not have a personal stake in the dispute – any more than any other taxpayer does – and thus lacks the "concrete and particularized" injury that Article III requires. [*DaimlerChrysler Corp.] Cuno,* 547 U.S. [332,] at 344, 126 S.Ct. 1854 (internal quotation marks omitted).
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> Yet that general rule gives way to an exception for *municipal* taxpayers. Since the Court first articulated the general prohibition against taxpayer standing in *Frothingham,* it has maintained that the "peculiar relation of the corporate taxpayer to the corporation" sets municipal taxpayers apart from their federal (and state) counterparts: Like a shareholder of a private corporation, a municipal taxpayer has an immediate interest in how the municipality spends resources that reflect his contributions. *Frothingham [v. Mellon,]* 262 U.S. at 487, 43 S.Ct. 597; *see also Cuno,* 547 U.S. at 349, 126 S.Ct. 1854; *ASARCO, Inc. v. Kadish,* 490 U.S. 605, 613, 109 S.Ct. 2037, 104 L.Ed. 2d 696 (1989) (plurality opinion).
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> In applying this distinction, we have held that, so long as the challenged government action involves the expenditure of municipal funds (or the loss of municipal revenue), *Frothingham's* bar on taxpayer suits does not apply. … Only if the challenged local governmental action involves neither an appropriation nor expenditure of city funds will the municipal taxpayer lack standing, for in that case he will have suffered no "direct dollars-and-cents injury." *Doremus v. Bd. of*

> *Educ. of Hawthorne,* 342 U.S. 429, 433-35, 72 S.Ct. 394, 96 L.Ed. 475 (1952); *compare Pelphrey v.Cobb County,* 547 F.3d 1263, 1280-81 (11th Cir.2008) (municipal taxpayers had standing because the challenged practice involved the expenditure of public funds), *Koenick v. Felton,* 190 F.3d 259, 263 (4th Cir. 1999) (same), *Cammack v. Waihee,* 932 F.2d 765, 770-71 (9th Cir. 1991) (same), *D.C. Common Cause v. District of Columbia*, 858 F.2d 1, 4-5, 8-9 *(*D.C.Cir. 1988) (same*), and Donnelly v. Lynch*, 691 F.2d 1029, 1030-32(1st Cir. 1982) (same) *rev'd on other grounds,* 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984), *with ACLU-NJ v. Twp. Of Wall,* 246 F.3d 258, 262-64 (3d Cir. 2001) (plaintiffs did not have municipal-taxpayer standing because they did not show the city spent any funds on the challenged activity), *Doe v. Duncanville Indep. Sch.Dist.,* 0 F.3d 402, 408 (5th Cir. 1995) (same), *Foremaster v. City of St. George*, 882 F.2d 1485, 1489 n. 5 (10th Cir. 1989) (same), *Pulido v. Bennett,* 848 F.2d 880, 885-86 (8th Cir. 1988) (same), *modified on other grounds,* 860 F.2d 296 (8th Cir. 1988), *and Freedom from Religion Foundl, Inc. v. Zielke,* 845 F.2d 1463, 1470 (7th Cir. 1988) (same). …
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> *Flast* and *Hein* have no application here. As *Frothingham* itself explained, and as we have since held, the general rule against taxpayer standing does not extend to municipal-taxpayer suits. *See* 262 U.S. at 487, 43 S.Ct. 597; *Hawley,* 773 F.2d at 74d1-42.

American Atheists, Inc. v. City of Detroit Downtown Development Authority, 567 F.3d 278, 284-5 (6th Cir. 2009). In *American Atheists,* the organization itself, one individual member, another individual, and one professional corporation challenged Detroit's inclusion of religious organizations in a redevelopment grant program. The Sixth Circuit Court of Appeals denied Defendant's challenge to Plaintiffs' standing as municipal taxpayers, for the reasons set forth above. In *Donnelly v. Lynch, supra.,* The United States Court of Appeals for the First Circuit also supported the long recognized concept of municipal taxpayer standing in a challenge to the City of Pawtucket's ownership and erection of a crèche.

> The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of this Court….

Id. at 1031. (Citation omitted.) *See also, Fausto v. Diamond,* 589 F.Supp. 451, 459 (D.R.I. 1984) (holding that municipal taxpayers had standing to challenge the City's maintenance of a memorial to the unborn child).

In this case, it is uncontroverted that the City of Pawtucket has spent very substantial sums ($1.2 million on McKinnon/Alves alone) to develop the City's athletic fields, that they continue to maintain these fields, and that City personnel manage and care for them. Consequently, Plaintiffs, as municipal taxpayers, have standing to challenge the constitutionality of the manner in which the City issues permits for the use of its fields. Defendants' argument to the contrary based on cases which address federal taxpayer standing are inapposite.

The undisputed facts in this case provide an even stronger basis for standing as to those plaintiffs who bring this action as parents and next friends of their children who attend the City's public high schools and junior high schools and who participate in their school's interscholastic sports programs. Mulholland, together with the Director of Public Works and the Mayor, have exercised their unfettered discretion to deny sufficient permits to the public high schools and junior high schools to accommodate all of their interscholastic athletic programs. At the same time, they have granted preferential and exclusive permits to St. Raphael Academy for O'Brien Field and for one of the McKinnon/Alves fields on weekday afternoons in the fall, thereby disrupting the games and practices of the public high school and junior high school interscholastic sports programs. *Affidavit of John Scanlon, ¶6-7, 9-12.* Additionally, because of a shortage of manpower, the Division of Parks and Recreation has declined to prepare the fields used by freshmen and junior varsity public school teams, while continuing to prepare the fields used by St. Raphael Academy's varsity teams at no charge to the school. *Affidavit of John Scanlon, ¶13.* Thus, Defendants are spending municipal tax dollars to assist an interscholastic

sports program run by a private, sectarian school, while public school interscholastic sports programs are denied the same assistance as a result of limited manpower. Finally, O'Brien Field, which is not permitted to any public school interscholastic sports programs, is locked to the public for the entire year other than the months it is permitted to the St. Raphael Academy football team for practice. These actions of the City not only impact municipal taxpayers as a whole, they directly and specifically impact the programs available to public high school and junior high school students in Pawtucket. *See Northwestern School District v. Pittenger,* 397 F.Supp. 975, 980 (W.D. Pa. 1975) (parents of children attending schools have standing to raise related Establishment Clause claim).

B. THE MANNER IN WHICH THE CITY OF PAWTUCKET ISSUES PERMITS TO SCHOOLS FOR THE USE OF THE CITY'S ATHLETIC FIELDS FOR INTERSCHOLASTIC SPORTS PROGRAMS IS UNCONSTITUTIONAL BECAUSE THE CITY IMPERMISSIBLY FAVORS RELIGIOUS INSTITUTIONS, THEREBY ADVANCING RELIGION.

The Establishment Clause of the First Amendment requires government to remain neutral towards religion. In order to determine whether a government sponsored program violates the Establishment Clause, the Court must determine whether it "has the forbidden 'effect' of advancing or inhibiting religion." *Zelman v. Simmons-Harris,* 536 U.S. 639, 649, 122 S.Ct. 2460, 2465 (2002). A government aid program does not run afoul of the Establishment Clause if, for example, the beneficiaries are "a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice …" *Id.* at 652, 2466. The aid program must be neutral as to religion and religious organizations, i. e. "the program allocates benefits in an evenhanded manner to a broad and diverse spectrum of beneficiaries." *American Atheists, supra.* 567 A.2d at 289, *citing Good News Club v. Milford Cent. Sch.,* 533 U.S. 98, 114, 121 S.Ct. 2530 (plurality opinion).

> Since its earliest explorations of the Establishment Clause, the Court has underscored neutrality as a central, though not dispositive, consideration in sizing up state-aid programs. … Programs that allocate benefits based on distinctions among religious, non-religious and areligious recipients are generally doomed from the start. … Yet programs that evenhandedly allocate benefits to a broad class of groups, without regard to their religious beliefs, generally will withstand scrutiny. …
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> The implementation of a program also may reveal that what purports to be evenhanded is not. An aid program on its face may offer benefits to all comers but may in reality favor only religious groups-say, a program providing roof repairs only for buildings with steeples, or a program refurbishing large auditoriums in a neighborhood where the only buildings that fit the bill are houses of worship. In *Committee for Public Education & Religious Liberty v. Nyquist,* for example, the Court struck down a program that provided aid to private schools where "all or practically all" of those schools eligible to receive grants were "related to the Roman Catholic Church and [taught] religious doctrine to some degree." 413 U.S. 756, 768 (1973) (internal quotation marks omitted); *cf. Lukumi,* 508 U.S. at 534-38, 113 S.Ct. 2217 (considering law's "adverse impact," which affected one religious group's practices almost exclusively, as evidence of purpose to target the religion for detrimental treatment in violation of the Free Exercise Clause).

Id. at 289-290. (Citations omitted). *See Good News Club v. Milford Cent. Sch.,* 533 U.S. 98, 114, 121 S.Ct. 2093 (2001); *Mitchell v. Helms,* 530 793, 809-10, 120 S.Ct. 2530 (2000) (plurality opinion); *Texas Monthly, Inc. v. Bullock,* 489 U.S. 1, 14-15, 109 S.Ct. 890, 103 (1989).

The manner in which the City of Pawtucket has allocated permits to schools for use of fields for interscholastic sports programs fails the neutrality "test" elucidated in Establishment Clause jurisprudence. Mulholland's deposition testimony establishes that prior to 2010, the City had no formal policy of any kind with regard to the issuance of permits to schools. *Depo. of Wm. Mulholland, vol. I, p. 21, lines 3-13; p. 31, lines 3-10.* Mulholland "grandfathered" most of the permits. *Depo. of Wm. Mulholland, vol. I, p. 31, lines 11-24; p. 32, lines 1-7. Depo. of J. Carney, p. 11, lines 20-24; p. 23, lines 4-7.* If he was confronted with a new request, he decided whether or not to issue the permit on a case by case basis, and if he believed the request was controversial, he sought "direction and guidance" from the Director of Public Works. *Depo. of*

wm. Mulholland, vol. I, p. 33, lines 16-24; p. 34, lines 1-2, 13-16, 19-24; p. 35, lines 1-9, 23-24; p. 36, lines 1, 9-14; o. 38, lines 1-3. Depo. of J. Carney, p. 14, lines 20-24. Following the adoption of a written Permit Policy, Mulholland continued to issue permits to schools in the same manner and with the same discretion that he had always exercised. *Depo. of Wm. Mulholland, vol. I, p. 46, line 24; p. 47, lines 1-24; p. 48, lines 6-11, 19-24; p. 49, lines 1-2.* In fact, the Permit Policy incorporates criteria that continue Mulholland's policy of "grandfathering" permits to schools and allow him to consider "miscellaneous criteria" of his own choosing. *Plaintiffs' Statement of Undisputed Facts, Exhibit 1.* One must therefore look to the actual manner in which the City has issued and continues to issue field permits to schools for their interscholastic sports programs in order to determine if the City's practice is consistent with the neutrality required by the Establishment Clause.

The undisputed facts establish that the City of Pawtucket is issuing field permits for interscholastic sports programs to only two types of schools – public schools operated by the Pawtucket School Department and sectarian schools operated by the Roman Catholic Diocese of Providence. No private non-sectarian schools and no sectarian schools affiliated with other religious groups are the beneficiaries of the City's field permits for interscholastic sports programs. Furthermore, the only interscholastic sports program that is permitted to conduct its practices on O'Brien Field is St. Raphael Academy football, which is granted a permit for O'Brien Field for every weekday afternoon during the fall. In fact, O'Brien Field is locked before the St. Raphael Academy football team begins its fall practice and after the St. Raphael Academy football team concludes its season. *Affidavit of John Scanlon. Depo. of Wm. Mulholland, vol. I, p 65, lines 22-24; p. 66, lines 1-9; vol. II, p. 71, lines 21-24; p. 72, lines 9-16.* Although Mulholland issued Jenks Junior High School a permit for the use of O'Brien Field on

weekday afternoons during the fall of 2008, he did not "grandfather" Jenks the following year, but instead returned O'Brien Field to St. Raphael Academy in 2009. During the fall soccer season, St. Raphael Academy is also granted an exclusive permit for use of one of the three soccer fields at the McKinnon/Alves Soccer Complex, while eleven public school soccer teams share two fields for games and three fields for practice. *Affidavit of John Scanlon, ¶7, 11, Exhibit A; Depo. of Wm. Mulholland, vol. I, p. 69, lines 3-14.* In 2010, a request by the public school athletic directors for the use of the McKinnon/Alves soccer field permitted to St. Raphael Academy was simply denied, despite the fact that the denial of this request has resulted in the cancelling of public school games and practices as a result of insufficient field space. *Affidavit of John Scanlon, ¶11-12.*

The City and its officials have attempted to marginalize Plaintiffs' claim that the City is violating the Establishment Clause of the First Amendment and of the Rhode Island Constitution by arguing that Plaintiffs simply want the fields they want at the times they want them. What the City ignores, however, is that this matter is brought by municipal taxpayers and by the parents of public school children who object, not because the City denied *them* a personal permit, but because the City is granting permits for interscholastic sports programs in a manner that favors schools which are affiliated with a particular religion over Pawtucket's own public school interscholastic sports programs that are part of the public school curriculum. *Plaintiffs' Complaint, ¶18 (admitted).* The manner in which the City of Pawtucket issues field permits which are necessary to the conduct of the schools' interscholastic sports programs benefits only one type of private entity – private schools operated by the Roman Catholic Diocese of Providence. The City's actions are not neutral and therefore impermissibly advance religion in violation of the Establishment Clause of the First Amendment. *See Barense, supra.* (holding that

Town's provision of free trash collection and snow plowing to churches promoted religion and consequently violated the Establishment Clause).

C. THE CITY OF PAWTUCKET'S PERMIT POLICY FOR CITY-OWNED FIELDS IS UNCONSTITUTIONAL ON ITS FACE BECAUSE IT CONTINUES TO ALLOW CITY OFFICIALS COMPLETE DISCRETION WHEN ISSUING PERMITS.

In 2010, the City of Pawtucket adopted a written Permit Policy "concerning the use of the City's playing fields and related facilities." *Plaintiffs' Statement of Undisputed Facts, Exhibit 1, p. 1.* The Permit Policy requires a permit for "organized or regular use of the City's playing fields and related facilities by groups." *Exhibit 1, A1.* The Permit Policy purports to replace an unwritten, informal policy that vests complete and unfettered discretion to issue permits in the Superintendent of Parks and Recreation. *Depo. of Wm. Mulholland, vol. I, p. 18, lines 21-24; p. 19, lines 1-3, 10-24; p. 20, lines 1-4, p. 21, lines 3-13; p. 31, lines 3-24; p. 32, lines 1-7. Depo. of J. Carney, p. 11, lines 20-24; p. 23, lines 4-7.*

Permit policies for the use of government owned recreational facilities are subject to scrutiny under both the First Amendment and the Equal Protection Clause, applicable to the States through the Fourteenth Amendment. The Equal Protection Clause "proscribe[s] … state action of every kind that operates to deny any citizen the equal protection of the laws." *Gilmore v. City of Montgomery, Ala.*, 417 U.S. 556, 565, 94 S.Ct. 2416 2422 (1974). Even if a claim does not deal with a suspect classification or a fundamental constitutional right, the Equal Protection Clause requires a rational basis for laws or policies that affect some groups differently from others. *Northwestern School District v. Pittenger*, 397 F.supp 975, 981-2 (W.D.Pa. 1975). When a law or a policy implicates a right guaranteed by the First Amendment, then a higher level of scrutiny will apply. Further, policies that implicate First Amendment protections and

that grant government officials absolute discretion in the permitting process are uniformly held unconstitutional on their face, especially when the subject matter of the policy affords the opportunity for censorship. *City of Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750, 755-56, 108 S.Ct. 2138 (1988) (referencing a long line of cases holding licensing statutes unconstitutional when they vest "unbridled discretion in a government official over whether to permit or deny expressive activity"); *Driver v. Town of Richmond,* 570 F.Supp.2d 269 (D.R.I. 2008) (applying intermediate scrutiny to content neutral regulation regarding placement of highway signs, and holding the challenged statute unconstitutional because it required the consent of the local police chief prior to the placement of a highway sign, with no limits on the chief's discretion to grant or allow the sign) ; *The Nationalist Movement v. City of Boston,* 12 F.Supp.2d 182 (D.Ma. 1998) (holding a regulation unconstitutional because it granted unlimited discretion to administrative officials in the permitting process). For example, the Court allowed a facial challenge to a city ordinance which required annual permits to place newsracks on public property because an annual application was required and because the circulation of newspapers is "commonly associated with expression." *City of Lakewood,* 486 U.S. at 760-61. The Court proceeded to "hold those portions of the Lakewood ordinance giving the mayor unfettered discretion to deny a permit application and unbounded authority to condition the permit on any additional terms he deems 'necessary and reasonable,' to be unconstitutional." *Id.* at 772.

Permit policies for parks and recreational facilities are subject to First Amendment challenges. *Thomas v. Chicago Park District,* 534 U.S. 316, 122 S.Ct. 775 (2002). Because parks and recreational facilities may be used for expressive activities, and because all groups

who seek to use the City's playing fields and related facilities must first obtain a permit, it is appropriate to consider whether the Permit Policy is valid on its face.[2]

> A content-neutral time, place, and manner regulation can be applied in such a manner as to stifle free expression. It thus must contain adequate standards to guide an official's decision and render that decision subject to effective judicial review.

Id. at 316. This is so because "Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content." *Id.* at 323, *citing Forsyth County v. Nationalist Movement,* 505 U.s. 123, 131, 112 S.Ct. 2395 (1992).

Pawtucket's Permit Policy[3] provides only illusory standards to guide the official who is faced with an application for a permit. While the Permit Policy purports to include criteria and the weight they are to be given in the issuance of a permit, those criteria include undefined "miscellaneous criteria." *Plaintiffs' Statement of Undisputed Facts, Exhibit 1, A5(d).* Furthermore, the Permit Policy reserves to the Superintendent of Parks and Recreation "the right to reject or approve any permit application in his/her discretion" without limiting the factors that the Superintendent may consider. *Exhibit 1, A12(a).* The fact that Mulholland has continued to grant permits in exactly the same way that he had prior to the adoption of the Permit Policy demonstrates that the Policy has not limited his discretion in the least. *See Driver,* 570 F.Supp.2d at 280 (noting tht it is "appropriate for the Court to consider the manner in which a

[2] Indeed, Mulholland issues permits, not just to schools, but to various groups who are holding events in support of a particular cause. *Plaintiffs' Statement of Undisputed Facts, Exhibit 5.*

[3] Pawtucket's Permit Policy was adopted after the complaint in this case was filed.

statute has been implemented in weighing a facial challenge to it.) For all of these reasons, the Policy must be declared unconstitutional on its face.

CONCLUSION

There is no dispute that City of Pawtucket has and continues to empower the Superintendent of Parks and Recreation to issue permits for the use of its fields and related facilities in his complete and absolute discretion, in violation of the First and Fourteenth Amendments of the United States Constitution. Further, the Superintendent has exercised his authority in such a way as to benefit private, sectarian schools operated by the Roman Catholic Diocese of Providence. By so doing, the City has failed to abide by the neutrality towards religion required by the Establishment Clause. Plaintiffs have standing to bring this action both as municipal taxpayers and as parents and next friends of their children who attend Pawtucket's public high schools and junior high schools and who participate in the interscholastic sports programs which are part of the schools' curriculum. Plaintiffs are entitled to summary judgment as a matter of law, and Defendants' motion for summary judgment must be denied.

Plaintiffs,
By and through their Attorney,

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CERTIFICATION

This is to certify that on the 2nd day of February, 2011, a true and accurate copy of the within was filed electronically and is available to be viewed and downloaded from the ECF Filing System:

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