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' TRIAL MEMORANDUM

I. FACTS EXPECTED TO BE PROVEN IN SUPPORT OF CLAIM

This is a case in which the City of Pawtucket has violated the Establishment Clauses of the state and federal Constitutions by issuing permits to public schools and to private Catholic schools for the use of City-owned playing fields and courts in a way that favors the private Catholic schools and disadvantages the public schools. All of the plaintiffs in this case are municipal taxpayers who reside in the City of Pawtucket. *Plaintiffs' Amended Complaint, ¶3-9 (admitted).* Additionally, at the time that the original complaint in this matter was filed, all of the plaintiffs had children who attended public high schools or public junior high schools in the City of Pawtucket, and five of the plaintiffs had children who participated in interscholastic sports programs offered by the public schools, including soccer. *Plaintiffs' Amended Complaint, ¶4, 6-8 (admitted).* Plaintiffs, who bring this complaint on behalf of themselves and as next friend of their children, 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).* Further, the interscholastic soccer programs at the City's public junior and senior high schools are negatively impacted by the preferential assignments of playing fields to private, sectarian schools. *Affidavit of John Scanlon, ¶10-12.*

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' Amended Complaint, ¶14 (admitted).* The City of Pawtucket expended municipal tax funds to develop and/or refurbish these playing fields. The City relies upon municipal tax funds to maintain these fields, and City employees perform the work to maintain them. *Plaintiffs' Amended Complaint, ¶14, 36 (admitted).* The City taxpayers contributed $1.2 million dollars to the development of the McKinnon/Alves Soccer Complex alone. *Plaintiffs' Amended Complaint, ¶29 (admitted).* 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 at any given time. *Plaintiffs' Amended 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' Amended 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' Amended Complaint, ¶18 (admitted); Affidavit of John Scanlon, ¶5.* For a number of years, the former Superintendent of Parks and Recreation, Defendant William Mulholland, issued permits for the use of the City's fields and courts. *Plaintiffs' Amended Complaint, ¶10 (admitted).* Until May, 2010, the City had no written policies, rules or regulations governing the issuance of permits; and Mulholland unilaterally decided how to issue permits and what permits would be issued for the use of the City's fields and courts. Both Mulholland and his supervisor, former Director of Public Works Jack Carney, 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.

[1] Jack Carney was the Director of Public Works for the City of Pawtucket from 1998 until his recent retirement in December, 2010. *depo of J. Carney, p. 5, lines 13-14.* Robert Howe replaced Mr. Carney as Director of Public Works.

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 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 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 the City administrator charged with the responsibility of issuing permits for the use of the City's fields and courts.

In 2011, William Mulholland retired. Subsequent to Mr. Mulholland's retirement, Assistant Superintendent Christopher Crawley took over the responsibility of issuing permits for the City's fields and courts. Like Mr. Mulholland before him, in the event that he has any questions or concerns with regard to a particular request, Mr. Crawley brings those concerns to the acting Public Works Director, Norman Lamoureux.

Mulholland and Crawley also issued, and continue to issue, 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' Amended Complaint, ¶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.[2] *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 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 and 2011, St. Raphael Academy's requests were granted, and the public school athletic directors' requests were denied. *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, at the Mayor's direction 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.* In 2011, despite the failure of St. Raphael Academy to file a timely application for the use of O'Brien Field, Crawley did not grant the public school's request for use of that field until after he was deposed in this case in September, 2011.

[2] For the fall, 2011, season, St. Raphael Academy failed to file an application for a permit in a timely manner.

It is noteworthy that upon the request of Mulholland, the City Council so named O'Brien Field in honor of 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 typically 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.* Mulholland decided, 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 historically 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 have historically been permitted to the public high schools and junior high schools, who use 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.* Until the fall, 2011 season, all of the public high school and junior high school fall soccer teams shared 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 could not play afternoon games at Pariseau Field because the Jenks Junior High School soccer teams used the field for practice at that time. *Id.* When Tolman High School had a soccer game scheduled at 4:00 p.m., more often than not, one of the other public school teams was displaced and was 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 informed the public school athletic directors that the City lacked the manpower to prepare fields for public school freshmen, junior varsity, or junior high school games; however,

employees of Parks and Recreation continued to prepare fields for St. Raphael Academy varsity games. *Id. at ¶13.*

In sum, Plaintiffs expect to prove that both before and after the adoption of written policies for the permitting of Pawtucket's playing fields, the Division of Parks and Recreation for the City of Pawtucket used their unfettered discretion to issue permits that favored private, sectarian schools over the needs of public junior high schools and high schools. Only the threat of legal action in 2008 and the deposition of Mr. Crawley in the instant case in 2011 prompted the City to issue permits to the public schools for the use of O'Brien Field. Except for these two years, St. Raphael's Academy is the only school which has been issued permits for the use of O'Brien Field for interscholastic sports.

II. ANTICIPATED WITNESSES

Plaintiffs – Plaintiffs are expected to testify as to their status as municipal taxpayers and their objections to the manner in which the City has issued permits to schools for the use of public playing fields. Plaintiffs believe that the City has impermissibly favored private, sectarian schools and that it has engaged in a permitting process that has the effect of endorsing religion. Plaintiffs object to the use of municipal funds to support the maintenance of fields which are reserved primarily for the use of private, sectarian schools and to policies which disadvantage their children's opportunities to participate in public school sponsored interscholastic sports programs.

John Scanlon and Raymond McGee – Mr. Scanlon and Mr. McGee are athletic directors employed by the Pawtucket School Department who have the responsibility for the public junior and senior high school interscholastic sports programs. Mr. Scanlon and

Mr. McGee request permits for the use of the City's playing fields each year in the spring and in the fall. They are expected to testify as to the needs of the public school interscholastic sports programs, the manner in which permits have been issued, and how the Division of Parks and Recreation has handled permits to the detriment of the public school interscholastic sports' programs and to the benefit of private, sectarian schools.

William Mulholland and Christopher Crawley – Former Superintendent of Parks and Recreation and current Assistant Superintendent of Parks and Recreation. Mr. Mulholland and Mr. Crawley are expected to testify as to the manner in which permits have been and are issued to schools for the use of City owned playing fields.

III. SUPPORTING CASE LAW

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.

It is well settled that standing is determined at the time a complaint is filed. *Smith v. Jefferson Cty. Bd. Of Sch. Commissioners*, 641 F.3d 197, 206 (6th Cir., 2011). Plaintiffs in this case have standing both as municipal taxpayers of the City of Pawtucket and 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 junior and senior high schools. Defendants admit those paragraphs in the complaint which identify Plaintiffs' status. *Plaintiffs' Complaint, ¶3-9 (admitted).* Municipal taxpayers establish standing by proving an unconstitutional expenditure of tax funds, regardless of whether less

money would have been expended in the absence of a constitutional violation. *Smith*, 641 F.3d at 210-211.

Even a minimal expenditure of municipal taxes will suffice to establish municipal taxpayer standing. For example, the United States Court of Appeals for the Eleventh Circuit found that municipal taxpayers had standing to challenge a county commission's practice of opening meetings with a prayer because "the County expended public funds to select, invite, and thank invocational speakers for the Planning Commission meetings …" The speakers were selected by administrative personnel employed by the Commission. *Pelphrey v. Cobb County, Ga.*, 547 F.3d 1263, 1267-68, 1281 (11th Cir., 2008). See also *Koenick v. Felton*, 190 F.3d 259, 263 (4th Cir., 1999) (holding that a municipal taxpayer had standing to challenge a policy of granting county employees the Friday before Easter and the Monday after Easter as paid holidays on the grounds that "tax revenues fund the public school system … and thereby fund the paid, statutory holidays for school employees."). See also *American Atheists, Inc. v. City of Detroit Downtown Development Authority*, 567 F.3d 278, 284-5 (6th Cir. 2009) (holding that "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.") citing *Doremus v. Bd. of Educ. of Hawthorne*, 342 U.S. 429, 433-35, 72 S.Ct. 394, 96 L.Ed. 475 (1952). In *Donnelly v. Lynch*, 691 F.2d 1030-32(1st Cir., 1982*) rev'd on other grounds*, 104 S.Ct. 1355 (1984), 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….

Donnelly, 691 F.2d 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 paid City personnel manage and care for them. Finally, as part of the responsibilities for which they are paid, City employees receive, process, and issue the permits in question. 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.

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 junior and senior high schools and who participate in their school's interscholastic sports programs. Mulholland, 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 junior and senior high school interscholastic sports programs. *Affidavit of John Scanlon,* ¶*6-7, 9-12.* At the time of filing in this case, five of the plaintiffs had children attending

the public middle schools or high schools in Pawtucket. Two had children participating in public school interscholastic athletic programs. Currently, four plaintiffs are parents of students who attend Tolman High School, and one of those students plays soccer for Tolman High School. *Plaintiffs' Statement of Undisputed Facts,* ¶ 16-19. William Mulholland's decision to issue permits to St. Raphael Academy for O'Brien Field and for one of the three fields at the McKinnon/Alves complex, while denying the public school athletic directors' requests for additional fields, displaced public school soccer teams, forced the rescheduling or cancellation of games or practices, and denied public school teams adequate facilities for all of their games and practices. *Plaintiffs' Statement of Undisputed Facts,* ¶36, 39, 44-46. Parents of public school students have standing to raise constitutional challenges to practices and policies that impact their children. *Parents Involved in Community Schools v. Seattle Sch. D. No. 1*, 127 S.Ct. 2738, 2741 (2007) (holding that parents have standing to challenge race based student assignment plan); *Northwestern Sch. D. v. Pittenger,* 397 F.Supp. 975, 980 (W.D. Pa., 1975) (parents of children attending schools have standing to raise related Establishment Clause claim).

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 interscholastic sports programs 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 has not been permitted to any public school interscholastic sports programs except

in the fall of 2008 and 2011, is locked to the public for the entire year other than the months it has been 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 junior and senior high school students in Pawtucket.

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 AND ENDORSING 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. …
>
> 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. 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 allowed him and now his successor to consider "miscellaneous criteria" of their own choosing. *Plaintiffs' Statement of Undisputed Facts, Exhibit 1.*

The City of Pawtucket has issued and continues to issue 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 has been permitted to conduct its practices on O'Brien Field is St. Raphael Academy football, which has typically been granted a permit for O'Brien Field for every weekday afternoon during the fall. In fact, O'Brien Field has been 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. In 2011,

although St. Raphael Academy failed to comply with the Permit Policy which is now supposed to govern the issuing of permits, Christopher Crawley refused to issue a permit for O'Brien Field to the public junior high schools upon their timely application in 2011. Instead, he held the field open for St. Raphael's long after the application deadline had passed. Only after he was deposed in this case did the City finally grant a permit for the use of O'Brien Field to the public junior high schools.

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 led to the cancelling of public school games and practices as a result of insufficient field space. *Affidavit of John Scanlon, ¶11-12.*

The manner in which the City of Pawtucket issues field permits 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); *Wirtz v. City of South Bend, 2011 WL 3922697*(N.D. Ind., 2011) (noting that "For governmental aid to religious institutions to be seen, for constitutional purposes, as not 'endorsing' religion, … the religious institutions must be getting nothing more than the

secular governmental services or supplies on the same terms and conditions as anyone else as part of a neutral program.").

IV. PROBABLE LENGTH OF TRIAL

Plaintiffs anticipate the probable length of trial to be two (2) days.

Plaintiffs,
By and through their Attorney,

/S/ Sandra A. Lanni, Esquire

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CERTIFICATION

This is to certify that on the 15th day of December, 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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/S/ Sandra A. Lanni, Esquire