UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA, Plaintiff, v. TAREK IBN ZIYAD ACADEMY, et al. Defendants.	Civil File No. 09-CV-138 DWF/JJG **PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR DECLARATION OF UNENFORCEABILITY OF SECRECY CLAUSES AND RELATED NON-DISCLOSURE AGREEMENT OR, IN THE ALTERNATIVE, FOR A PROTECTIVE ORDER SPECIFYING TERMS OF DISCLOSURE**

INTRODUCTION

Tarek ibn Ziyad Academy's ("TIZA") Staff Handbooks include a secrecy clause, and related threat of legal action for violating it. Former TIZA employees have expressed fear about speaking to the ACLU in light of the secrecy clauses and non-disclosure agreements. TIZA has unreasonably refused to disclaim their application to this lawsuit, and has demanded that the ACLU tell witnesses they cannot share information protected by the secrecy clauses. TIZA cannot legally enforce the secrecy clauses and related non-disclosure agreements against employees who testify – indeed, it is unclear whether the agreements are enforceable at all – but still wields them as a sledgehammer to keep former employees quiet about what they saw at the school. This public school's efforts to keep the public from learning about how it works must not be allowed. Particularly given the Protective Order permitting TIZA to designate information confidential, TIZA cannot justify its refusal to disclaim application of the

secrecy clauses and related non-disclosure agreements to this case. Yet it continues to do so, creating further delay and intimidation in a lawsuit already rife with both.

For this Memorandum, the ACLU relies on the Declaration of Mark Wagner ("Wagner Decl.") and the papers and files in this case.

FACTUAL BACKGROUND

I. THE HANDBOOKS AND SECRECY CLAUSES

At least since 2005,[1] TIZA's Staff Handbook included a secrecy clause, warning TIZA employees that "[u]nauthorized release of confidential information is grounds for disciplinary action up to and including immediate termination or employment and may be grounds for legal action after termination." Wagner Decl. Ex. 1 at 6 (2005-2006 school year), Ex. 2 at 6 (2007-2008 school year), Ex. 3 at 6 (2008-2009 school year). "Confidential information" was sweepingly and vaguely defined; it "includes, *but is not limited to*, all information related to Academy business, finances, operations, office procedures, *and the like*." *Id.* (emphasis added). The same Handbooks include a related non-disclosure agreement by which the signer agrees not to "disclose or divulge to others . . . any trade secrets [or] confidential information." Wagner Decl. Ex. 1 at 51, Ex. 2 at 49, Ex 3 at 49. The non-disclosure agreements have no expiration date and purport to bind the signer as well as "personal representatives and successors in interest." *Id.*

[1] Although the ACLU requested "[a]ll handbooks, drafts of handbooks, or documents relating to handbooks created by or for TIZA," Wagner Decl. ¶2, the earliest Staff Handbook produced to the ACLU by TIZA (as opposed to Islamic Relief) is from 2007. *Id.* The minutes of a 2004 Board Meeting indicate earlier versions exist. *See id.*, Ex. 4 (minutes of August 29, 2004 Board Meeting in which "Staff Handbook – Version 14" is adopted).

The Minnesota Department of Education ("MDE") has objected to the secrecy clause. Deputy Commissioner Chas Anderson wrote TIZA, pointing out that "issues related to 'Academy business, finances, operations, office procedures and the like' are considered public data," as are the names and contact information of TIZA's teachers. Wagner Decl. Exs. 5-7. Ms. Anderson observed that the secrecy clause "appears to be written for a private entity rather than a public school such as TIZA." *Id.* Ex. 6.

TIZA issued revised Staff Handbooks effective June 12, 2009, and again effective November 12, 2009. *Id.* Exs. 8-9. The second revised version significantly reduced the data claimed as confidential. *Id.* Ex. 9 at 6, 51. Now, the only confidential, non-public data is that "which relates to a student," or which is "necessary to preserve the security and confidentiality of future tests and test administrations, data about maltreatment of minors, certain investigative data and data regarding pending or anticipated legal action." *Id.* The revised handbook explicitly "does not negate the classification of certain data as public under Minnesota law." *Id.* at 51.

A former employee the ACLU contacted expressed a willingness to speak with the ACLU about TIZA, but also expressed fear regarding how the secrecy clause and related non-disclosure agreement would be applied. Wagner Decl. ¶3. The ACLU, of course, cannot advise the individual on the enforceability of the secrecy clause and non-disclosure agreement, or the likelihood of legal action by TIZA. The ACLU therefore sought written confirmation from TIZA that it would not enforce the illegal and outdated secrecy clauses and threats of legal action; TIZA flatly refused, offered no explanation or compromise, and in fact reaffirmed its belief in the applicability of the secrecy clauses.

Id. Exs. 10-11. Given TIZA's intransigence, the ACLU seeks a declaration that the secrecy clauses in TIZA's employee handbooks and related non-disclosure agreements purporting to constrain TIZA's current or former teachers and other employees from providing information to the parties in this case are unenforceable, thereby providing witnesses assurance that TIZA may not retaliate against them merely for communicating about the issues in this case. In the alternative, the ACLU seeks a protective order pursuant to Fed. R. Civ. P. 26(c), specifying that individuals can disclose information in connection with this case to any of the parties to the case or the Court without fear of sanctions resulting from the secrecy clauses in TIZA's employee handbooks and related non-disclosure agreements.

The ACLU certifies that it has met the meet-and-confer requirements of the Federal Rules of Civil Procedure and District of Minnesota Local Rules.

II. TIZA'S HISTORY OF INTIMIDATION

TIZA's position with respect to the secrecy clauses and non-disclosure agreements is only the last in a long line of intimidation efforts in connection with this lawsuit. After the ACLU brought this lawsuit, TIZA brought Counterclaims against the ACLU, seeking $500,000 in damages, simply because the ACLU's Executive Director discussed this lawsuit's allegations with interested news organizations. *See* Answer to First Amended Complaint, Affirmative Defenses and Counterclaims of TIZA *et al.* (Doc. 76).

After the ACLU noticed a deposition of a parent of a former TIZA student, TIZA held a parent meeting, at which TIZA Executive Director Asad Zaman accused the parent of selling his "Iman," or faith, (a charge that can be viewed as a call to violence) in front

of the entire school community. ACLU's January 26 Memorandum (Doc. 174) at 2-3; Declaration of Khalid Elmasry (Doc. 177) ¶5.

A former TIZA employee – Janeha Edwards – signed a declaration indicating fear she will be harassed by TIZA for cooperating with the ACLU. *See* Edwards Decl. (Doc. 176) at 3. Following Ms. Edwards' submission of her declaration, she was deposed by TIZA. During her deposition (which has not yet been completed), Ms. Edwards testified that after her declaration was filed, Nick Davis, a/k/a Nathaniel Khaliq, a man closely associated with TIZA, arranged meetings with her and her husband to tell her that her name would be dragged "through the mud" for speaking out against TIZA. Wagner Decl. Ex. 12 (printout out of St. Paul NAACP's website showing that Nick Davis is also known as Nathanial Khaliq), *id*. Ex. 13 (complaint to Department of Justice signed by Khaliq); Edwards Dep. 60:17-63:2, 66:16-21 (Wagner Decl. Ex. 14). Although Khaliq claimed otherwise, Edwards believes he was acting on behalf of TIZA. *Id*. 66:21-68:17.

Most recently, TIZA's counsel baselessly threatened to seek disqualification of the ACLU's attorneys if the ACLU contacted *former* employees of TIZA, claiming Rule 4.2 of the Minnesota Rules of Professional Conduct prohibits such contact. *See* Wagner Decl., Ex. 15. But Rule 4.2 plainly makes clear that "[c]onsent of the organization's lawyer is not required for communication with a former constituent." Minn. R. Prof. Conduct 4.2 cmt. [7].

These threats must stop, and the ACLU must be allowed to conduct discovery in this case without itself or witnesses having to fear retaliation by TIZA.

ARGUMENT

TIZA must know by now that its secrecy clause and threat of "legal action" cannot be enforced in this case. Refusing to acknowledge that fact sends the ominous signal that current and former employees who talk to the ACLU may be forced to defend themselves against a baseless, expensive lawsuit, and can only be explained as an attempt to intimidate potential witnesses. TIZA's past actions, described above, enhance such concerns. The Court should short-circuit TIZA's latest tactics by declaring that TIZA cannot enforce the secrecy clauses and related non-disclosure agreements to prevent current and former teachers, as well as other employees, from participating in this litigation. The ACLU's purpose in seeking to talk with these individuals is not to seek private student data or information, if any exists, that could legitimately be termed trade secrets, but rather to conduct discovery about the operations of this *public* school. Nor does the ACLU seek a broad declaration of the secrecy clauses' unenforceability due to their vagueness and overbreadth; the ACLU merely seeks an Order holding that the clauses are inapplicable to this lawsuit.

I. THE LITIGATION PRIVILEGE PREVENTS TIZA FROM ENFORCING THE SECRECY CLAUSES AND RELATED NON-DISCLOSURE AGREEMENTS

The ACLU needs to speak to former employees and substitute teachers in order to develop its case. Those individuals fear enforcement of a secrecy clause and non-disclosure agreement forbidding them from discussing "Academy business, finances, operations, office procedures, and the like." Wagner Decl. Exs. 1-3; *id.* ¶3. Because of the concern expressed, the ACLU sought written assurance from TIZA that it would not

attempt to enforce its secrecy clauses and non-disclosure agreements against individuals for participating in this lawsuit. TIZA declined, instead threatening to seek disqualification of the ACLU's counsel for even talking to TIZA's former employees. *Id.* Ex. 15. At the same time, TIZA reaffirmed its position that the secrecy clauses and non-disclosure agreements prevent employees from sharing information about TIZA with the ACLU. *Id.*

TIZA's threats have no basis. "[P]ublic policy favors the application of absolute privilege" against claims arising out of a witnesses' providing evidence relevant to a court proceeding "because absolute privilege seeks to encourage witnesses to participate in judicial proceedings so that the search for truth may be fruitful." *Mahoney & Hagberg v. Newgard*, 729 N.W.2d 302, 309 (Minn. 2007). A witness has absolute immunity even if he perjures himself because "the claims of the individual must yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible." *Briscoe v. LaHue*, 460 U.S. 325, 332-33 (1983). The privilege applies to all "statements that have reference, relation, or connection to the case." *Mahoney & Hagberg*, 729 N.W.2d at 308.

Apart from the applicability of the privilege, the purpose of an appropriate non-disclosure or confidentiality agreement is to protect trade secrets. TIZA, a public school, must not have any trade secrets. TIZA has even received grants, the entire purpose of which are to share TIZA's practices and procedures with other charter schools. *See, e.g.*, Wagner Decl., Ex. 16 at 269-270 (rough transcript of deposition of M. Fahey in which programs are described). What, exactly, is TIZA hiding?

II. THE DPA PREVENTS TIZA FROM ENFORCING THE SECRECY CLAUSES AND RELATED NON-DISCLOSURE AGREEMENTS

As a "government entity," TIZA's data practices are governed by the Minnesota Government Data Practices Act ("DPA"). Minn. Stat. §§ 13.01, subd. 1; 13.02, subd. 7a; 13.02, subd. 11 (defining school districts as covered by the DPA). The DPA "establishes a presumption that government data are public" and defines "government data" broadly. Minn. Stat. §§ 13.01, subd. 3; 13.02, subd. 7.

Data the ACLU seeks from TIZA's employees and others – information on the way that a public school is run – has not been made private or confidential by the DPA. *See* Minn. Stat. § 13.03, subd. 1. To the extent individual student or private data is revealed during any conversation or testimony, the Protective Order permits confidentiality designations. *See* Memorandum to Protective Order of December 28, 2009 (Doc. 135) at 10 ("[The order] offers a meaningful device for vindicating the privacy interests recognized in the DPA."). Similarly, nearly all information about current or former TIZA employees, applicants, independent contractors, or volunteers is public, including name, salary, benefits, job title, job description, complaints, disciplinary actions, and timesheets, among other things. *See* Minn. Stat. § 13.43. Any attempt by TIZA to enforce an agreement that extends far beyond the dictates of the DPA – indeed, that purports to extend to "information related to Academy business, finances, operations, office procedures, and the like" – is baseless and should not serve as a hindrance to discovery in this case.

III. THE UNREASONABLY VAGUE NATURE OF THE SECRECY CLAUSES PREVENTS TIZA FROM ENFORCING THEM AND THE RELATED NON-DISCLOSURE AGREEMENTS

In any event, the secrecy clauses and threat employed by TIZA is unenforceable as unreasonably vague and wholly unrelated to any legitimate business interest. Under Minnesota law, employee agreements governing trade secrets must have "a just and honest purpose, for the protection of a legitimate interest… and not [be] injurious to the public." *Bennett v. Storz Broadcasting Co.*, 134 NW 2d 892, 898 (Minn. 1965). "Restrictions which are broader than necessary to protect the employer's legitimate interest are generally held to be invalid." *Id.* at 899. An employee subject to an appropriate non-disclosure agreement "is entitled to fair notice of… what material is to be kept confidential." *Jostens, Inc. v. Nat'l Computer Sys.*, 318 NW 2d 691, 702 (Minn. 1982).

The pre-November 2009 secrecy clauses have an essentially limitless breadth, and are hopelessly vague about what information is purportedly confidential. The Handbooks state that the secret information that employees must not disclose "*includes, but is not limited to*… operations, office procedures *and the like*." *See* Wagner Decl., Ex. 2 at 6 (emphasis added). What legitimate business interest can TIZA, a public school, have in prohibiting its employees from discussing its policies and procedures? In addition, the terms' vagueness means that employees have no "fair notice" of what is actually to be kept secret. *See Jostens,* 318 N.W.2d at 702.

The secrecy clauses and related non-disclosure agreements are also "injurious to the public," *Bennett,* 134 N.W.2d at 898, which has an interest in knowing the policies

and procedures of public schools, particularly ones as successful as TIZA holds itself out to be. TIZA's broad notions of confidentiality and secrecy not only hinder the general public interest in understanding what happens at this public school, but also hinder the pursuit of justice in this very case. To the extent the secrecy clauses help TIZA operate in violation of the Establishment Clause, they are plainly injurious to the public interests enshrined in the First Amendment of the Constitution.

CONCLUSION

For all the reasons stated, the ACLU respectfully requests that the Court declare that the secrecy clauses in TIZA's employee handbooks and related non-disclosure agreements purporting to constrain TIZA's current or former teachers and other employees from providing information to the parties in this case are unenforceable, thereby providing witnesses assurance that TIZA may not retaliate against them merely for communicating about the issues in this case. In the alternative, the ACLU seeks a protective order pursuant to Fed. R. Civ. P. 26(c), specifying that individuals can disclose information in connection with this case to any of the parties to the case or the Court without fear of sanctions resulting from the secrecy clauses in TIZA's employee handbooks and related non-disclosure agreements.

DORSEY & WHITNEY LLP

Dated: June 28, 2010

By s/Ivan M. Ludmer

Peter M. Lancaster #0159840
Katie C. Pfeifer #0309709
Christopher Amundsen #0388096
Ivan Ludmer #0389498
Mark D. Wagner #0390308
Dustin J. Adams #0389892
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402-1498
Telephone: (612) 340-2600

Attorneys for Plaintiff American Civil Liberties Union of Minnesota