Appignani Humanist Legal Center

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October 25, 2015

Via Email

Dr. Donna J. DeSiato – Superintendent ddesiato@esmschools.org
EMS School District
407 Fremont Road
East Syracuse, NY 13057

Grenardo Avellino – Principal gavellino@esmschools.org
East Syracuse Minoa Central High
6400 Fremont Road
East Syracuse, NY 13057

RE: Constitutional violation

Dear Dr. DeSiato and Mr. Avellino,

A student from ESM Central High School has contacted our office to request assistance with regard to a serious constitutional violation that has occurred under the authority of your school and school district. The student, currently a senior, reports that she has been seriously mistreated by her teacher simply because she chooses to exercise her right to opt out of the Pledge of Allegiance. As you should know, the right of students to opt out of Pledge participation was settled long ago by the United States Supreme Court in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Consequently, any actions by your school or its agents infringing upon that right would be actionable as a serious constitutional violation.

The student in question, for several reasons, does not wish to participate in the Pledge of Allegiance exercise in any manner. She objects to the "under God" wording of the Pledge, and also does not believe that the nation provides justice for all. She also feels that flag-salute ceremonies are a poor way of expressing respect for country, as they tend to encourage feelings of national superiority and intolerance for others. Based on these deeply held principles, until this past Tuesday, October 20, the student had not been taking part in the Pledge exercise for over a year. Quietly remaining seated during Pledge recital, she bothered no one and had no difficulties in opting out.

Unfortunately, on Tuesday things changed radically, due to no fault of the student. It seems that shortly after the daily Pledge recitation, students began discussing the subject of

opting out of the Pledge, thus initiating what might have been an interesting and constructive conversation had the situation been handled properly by the adult in the room. Instead, the classroom teacher, Mr. Suddaby, inexplicably reacted to the subject with great hostility toward those who opt out of the Pledge, and toward the student in question in particular. When the student correctly mentioned in the discussion that she has the right to opt out, Mr. Suddaby lashed out at her, calling her "disrespectful" and "selfish," even using profanities, and saying that from now on she would be forced to stand. "I don't care about the law," he reportedly said at one point. His aggressive and intimidating behavior inflicted great distress on the student, to the point that she broke down in tears, yet he still went on for several minutes thereafter. When the class broke for lunch, the student went to counseling and was unable to return to the class after lunch. She was so shaken up that she had to stay home the next day.

When she returned to school on Thursday, Mr. Suddaby offered a cursory apology (not saying he was actually sorry for his actions, but instead saying only that he was sorry the student's feelings were hurt), and this was offered only as an administrator sat nearby, monitoring the class for the day. It's noteworthy that he also apologized to the class for being "rude." We do appreciate that the school appears to have realized that the situation needed monitoring and that at least some form of apology was seen as necessary. Still, we are not sure the school realizes the full measure of the wrongdoing that was committed here. Stated bluntly, the actions of this teacher are a sickening display of patriotism at its worst, an example of self-righteous, intolerant behavior that runs contrary to the very ideals for which real American patriots stand. In what might have been a marvelous teachable moment, where the importance of pluralism, tolerance, and the rights of free speech and dissent could have been discussed in a safe and open environment, this teacher instead drove the conversation into an ugly gutter of bigotry. Not for a moment did he stop to consider that a young person had given thoughtful consideration to the meaning of an exercise, applied her own personal principles to the situation, and taken the significant step of doing what she thought was right. Such an occurrence in any environment would be alarming, but in the context of a public school, where education and critical thinking are supposed to be central values, it is especially appalling.

Based on the above, we demand the following assurances: (1) That students and teachers in your school district be advised that students may stay seated for any Pledge exercise at the school and that any written policy containing a standing requirement be rescinded; (2) That teachers be instructed that under no circumstances should they attempt to persuade students to refrain from exercising the right to nonparticipation, question students as to the reason for nonparticipation, or characterize opting out as misconduct or otherwise wrongful; and (3) That no disciplinary or other retaliatory measures of any kind will be directed toward any student for nonparticipation in the Pledge exercise. It is important that these assurances be provided in writing to the entire school and to all teachers. The student here knows that other students at the school have been harassed and intimidated by other teachers over Pledge participation. Therefore, it is imperative that the issue be addressed formally, school-wide, and in writing.

The American Humanist Association (AHA) is a national nonprofit organization with over 490,000 supporters and members across the country, including many in New York. The mission of AHA's legal center is to protect one of the most fundamental principles of our democracy: the First Amendment rights to free speech and religious liberty. Our legal center

includes a network of cooperating attorneys from around the country, including New York, and we have litigated constitutional cases in state and federal courts from coast to coast.

Since the Supreme Court's ruling in *Barnette*, federal courts have irrefutably recognized the First Amendment right of students to remain silent and seated during the Pledge.[1] That "students have a constitutional right to remain seated during the Pledge is well established." *Frazier v. Winn*, 535 F.3d 1279, 1282 (11th Cir. 2008) (per curiam), *cert. denied*, 558 U.S. 818 (2009) (finding that all public school students have the First Amendment right not to stand during the Pledge). *See also Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1274, 1278-79 (11th Cir. 2004) (noting that the right to remain seated and silent during the Pledge is "clearly established"); *Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412, 417 (3d Cir. 2003) ("For over fifty years, the law has protected elementary students' rights to refrain from reciting the pledge of allegiance to our flag. Punishing a child for non-disruptively expressing her opposition to recitation of the pledge would seem to be as offensive to the First Amendment as requiring its oration.") (citation omitted); *Rabideau v. Beekmantown Cent. Sch. Dist*., 89 F. Supp. 2d 263, 267 (N.D.N.Y 2000) ("It is well established that a school may not require its students to stand for or recite the Pledge of Allegiance or punish any student for his/her failure to do so.") (citing *Barnette*, 319 U.S. 624; *Russo v. Cent. Sch. Dist. No. 1*, 469 F.2d 623 (2d Cir. 1972)).

Indeed, the federal appellate courts have been unanimous in concluding that public school officials are prohibited from compelling students to stand during the Pledge. *See, e.g*., *Frazier*, 535 F.3d at 1282; *Holloman*, 370 at 1274-79; *Circle Sch. v. Pappert*, 381 F.3d 172, 178 (3d Cir. 2004); *Walker*, 325 F.3d at 417; *Lipp v. Morris*, 579 F.2d 834, 836 (3d Cir. 1978) (ruling that a state statute requiring students to stand during the Pledge was an unconstitutional compulsion of expression); *Goetz v. Ansell*, 477 F.2d 636, 637-38 (2d Cir. 1973) (holding that a student has the right to remain quietly seated during the Pledge and cannot be compelled to leave the room if he chooses not to stand); *Banks v. Bd. of Public Instruction*, 314 F. Supp. 285, 294-96 (S.D. Fla. 1970), *aff'd*, 450 F.2d 1103 (5th Cir. 1971) (concluding that a rule requiring students to stand during the Pledge was unconstitutional). *See also Newdow v. United States Cong*., 328 F.3d 466, 489 (9th Cir. 2002) (noting that schools may not "coerce impressionable young schoolchildren to recite [the Pledge], or even to stand mute while it is being recited by their classmates.").

Federal district courts and state courts have also consistently ruled that students have a constitutional right to remain silent and seated during the Pledge. *See Rabideau*, 89 F. Supp. 2d at 267; *Frain v. Baron*, 307 F.Supp. 27, 33-34 (E.D.N.Y. 1969) (enjoining school from "excluding [students] from their classrooms during the Pledge of Allegiance, or from treating any student who refuses for reasons of conscience to participate in the Pledge in any different way from those who participate."); *State v. Lundquist*, 262 Md. 534, 554-55 (Md. 1971) (state statute requiring teachers and students to salute the flag during the Pledge violated the First Amendment freedom of speech clause). *Cf. Sheldon v. Fannin*, 221 F. Supp. 766, 768 (D. Ariz.

[1] In *Barnette*, the Supreme Court held that public school officials are forbidden under the First Amendment from compelling students to salute the flag or recite the Pledge. 319 U.S. at 642. Notably, the Court was aware that the government might demand other "gestures of acceptance or respect: . . . a bowed or bared head, a bended knee," *id.* at 632, and reiterated that the government may not compel students to affirm their loyalty "by word or *act*." *Id*. at 642 (emphasis added).

1963) (enjoining elementary school from suspending Jehovah's Witness students solely because they silently refused to stand for the national anthem).

The student here does not deserve to be mistreated merely because she chooses to exercise her constitutional rights. Indeed, instead of rote recitation, she has given thoughtful consideration of the underlying religious and political issues raised by the exercise, and this should, if anything, earn her the respect of teachers. In *Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 503, 506-07 (1969), the Supreme Court famously declared: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years." (citing *Barnette*, among other cases)

In *Banks*, the court applied *Tinker* to the act of refusing to stand for the Pledge and held: "The conduct of Andrew Banks in refusing to stand during the pledge ceremony constituted an expression of his religious beliefs and political opinions. His refusal to stand was no less a form of expression than the wearing of the black armband was to Mary Beth Tinker. He was exercising a right 'akin to pure speech.'" 314 F. Supp at 295. Importantly, not only do students have the right to silently sit during the Pledge, but they also have a right to affirmatively protest the Pledge exercise. *See Holloman*, 370 F.3d at 1273-74 (raising fist during Pledge was protected speech even if fellow classmates found it objectionable and distracting). Referring to *Banks*, the Eleventh Circuit pointed out in *Holloman* that "its ruling was not based on Banks's First Amendment right to remain silent, *but his First Amendment right to affirmatively express himself*." 370 F.3d at 1273-74 (emphasis added).

We are most hopeful that you will recognize the concerns raised by this letter and address them properly. Please respond within seven (7) days. We thank you in advance for your attention to this matter.

Very truly yours,
Monica Miller, Esq.