



May 27, 2014

To: Hillary Austin, Superintendent haustin@elmiracityschools.com
Christopher Krantz, Principal ckrantz@elmiracityschools.com

Dear Ms. Austin and Mr. Krantz,

A student from Southside High School has contacted our office to request assistance with regard to what she correctly perceives as a constitutional violation that has been occurring regularly under the authority of your school and school district. The student reports a pattern of coercion in connection with her decision to refrain from participation in the school's daily Pledge of Allegiance exercise. As you probably 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). As such, any actions by your school or its agents infringing upon that right would be actionable as a serious constitutional violation.

The student in question, currently a sophomore, is an atheist and does not wish to participate in the Pledge exercise in any manner, because she objects to the "under God" language and feels that any level of participation in the exercise validates that affirmation. As such, she has attempted to simply sit at her desk during the exercise in an undistruptive manner. When she has done this, however, she has been instructed by her teacher to stand, at the risk of disciplinary or retaliatory measures if she refuses to do so. Moreover, in front of her classmates, this student has been told by her teacher that failure to stand for the Pledge is disrespectful to America and to military personnel in particular, and thus her patriotism and national loyalty have been publicly called into question.

Furthermore, we have been advised that coercion with regard to participation in the Pledge exercise at Southside High goes beyond just the classroom mentioned above. We have been informed that teachers – and even an administrator – in your school have inappropriately pressured students to participate in the Pledge exercise. For example, students have been told that nonparticipation is disrespectful and unpatriotic, that nonparticipation would itself be disruptive, and that participation is expected because nonparticipation would encourage others to opt out.

Based on the above, this letter demands immediate assurances: (1) That students and teachers at Southside High be advised that students may stay seated for any Pledge exercise at the school; (2) That teachers be instructed that under no circumstances should they attempt to persuade students to refrain from exercising the right to nonparticipation, or even question

students as to the reason for nonparticipation; and (3) That no disciplinary or other retaliatory measures of any kind will be directed toward any student for nonparticipation in the Pledge exercise.

The American Humanist Association (AHA) is a national nonprofit organization with over 260,000 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 many in 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*,

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. *Id.* 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).

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

The sophomore here does not deserve to have her patriotism questioned 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 her 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)

We are most hopeful that you will recognize the concerns raised by this letter and address them properly. Please respond within 21 days. We thank you in advance for your attention to this matter.

Very truly yours,

Monica Miller, Esq.