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Marc Bluestone, Superintendent
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Dear Mr. Bluestone and Mr. Anderson,

Our office has been asked to assist a family of children in New Town Public Schools with regard to what is correctly perceived as a constitutional violation that has occurred under the authority of your school and school district. The parents, Jesse Moore and Kristina Leiffer, report a pattern of coercion and mistreatment in connection with their child's 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 system or its agents infringing upon that right would be actionable as a serious constitutional violation.

The student in question, a six-year-old first grader, does not want to participate in the Pledge exercise in any manner, but instead wishes to sit silently at his desk during the exercise in an undistruptive manner. This is a decision that the child has made himself, and is supported by his parents. (In fact, the child's older brother, also a student at the school, voluntarily stands for the exercise, and is supported by his parents in that decision as well. Mr. Moore and Ms. Leiffer raise their children to think independently and critically, and do not dictate instructions with regard to participation in such activity).

When the child has attempted to sit out the Pledge, however, he has been instructed by his teacher to stand – even physically lifted out of his chair – at the risk of disciplinary or retaliatory measures if he refused to stand. When Mr. Moore and Ms. Leiffer intervened to point out that their child cannot be forced to stand, their concerns were treated dismissively by both the teacher (a Mrs. Miller) and, subsequently, by Mr. Anderson. In fact, to make matters worse, the child has now been instructed to stand outside the classroom – a public reprimand and humiliation that is totally unwarranted and unlawful – during the Pledge exercise. *See, e.g., McCollum v. Board of Ed.*, 333 U.S. 203, 209-10 (1948); *State ex rel. Weiss v. District Bd. of Sch. Dist.*, 76 Wis. 177, 199-200 (1890).

Based on the above, this letter demands immediate assurances: (1) That all students and teachers in New Town School District 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, question students as to the reason for nonparticipation, or shame or embarrass students for exercising the right of 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 320,000 supporters and members across the country, including North Dakota. 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, 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

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).

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

The child here does not deserve to be ostracized merely because he chooses to exercise his constitutional rights. Pledge participation is not a litmus test for good citizenship, nor should it be a contingency upon which good classroom standing relies. Indeed, there are numerous reasons that even the most enthusiastic patriot might wish to refrain from a daily oath of national loyalty.

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 14 days. We thank you in advance for your attention to this matter.

Very truly yours,
Monica Miller, Esq.