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April 8, 2015

Via Email

John W. Friend – Superintendent
Carlisle Area School District
623 W. Penn Street
Carlisle, PA 17013

friendj@carliseschools.org

Colleen Friend – Principal
Wilson Middle School
900 Waggoners Gap Road
Carlisle, PA 17013

friendc@carliseschools.org

RE: Constitutional violation

Dear Mr. Friend and Ms. Friend,

A student from Wilson Middle School has contacted our office to request assistance with regard to a serious constitutional violation that is occurring under the authority of your school and school district. The student, currently in eighth grade, reports that she was wrongfully berated, humiliated, and otherwise mistreated by a school staff member for exercising her constitutional right to opt out of the Pledge of Allegiance. Moreover, this mistreatment was reinforced by an authority figure within the school. 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 personal reasons, does not wish to participate in the Pledge exercise in any manner. On Thursday, April 2, she happened to be at the school nurse's office when the school's Pledge of Allegiance exercise took place. The school nurse ordered everyone present to stand up, but the student remained seated as she typically does. She reports that subsequently, when it was her turn to be seen by the nurse, the nurse asked loudly, "Why didn't you stand for the Pledge?" The student replied that the Pledge exercise is voluntary and that no explanation for opting out is needed. Shockingly, the nurse responded by ordering her out of the room, yelling, "Fine! Then leave! I have the right to not service you!"

The student reports that she left the nurse's office in tears and went to the administrative offices to call her mother. A secretary then led the student to an office, but at that time the same nurse appeared again, saying, "She isn't calling a parent until I have a long conversation with her!" Still sobbing, the student said she only wanted to call her mother. At this point a school counselor arrived and took the student to his office, where the student remained for the first two class periods. Though he showed some sympathy, he also incorrectly instructed the student that she should stand in the hallway if she does not wish to stand for the Pledge exercise! The student politely tried to explain that she is under no obligation to stand in the hallway as such, to which the counselor replied that it was "district policy," apparently unaware that "district policy" does not trump federal law.

To say that the actions of school district staff in this situation have inflicted trauma upon this child would be an understatement. She was bullied and subjected to public embarrassment for doing nothing more than harmlessly exercising her constitutional rights. The actions of the nurse are indefensible, as she provides an example of the kind of overzealous, dangerous patriotism that any true patriot would loathe. The student was left angry and scarred by this mean-spirited hostility, which is only made worse by the fact that it came from a person trusted with the health and well being of students. Moreover, the nurse's refusal to give the child medical attention calls into question her fitness for the job.

Based on the above, we demand the following assurances: (1) That students and all staff 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 all staff 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. We also demand a public, written apology from the school district for the mistreatment of this child.

The American Humanist Association (AHA) is a national nonprofit organization with over 415,000 supporters and members across the country, including many in Pennsylvania. 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 Pennsylvania, 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

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).

(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. 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 disciplined 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 school staff. 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.