Appignani Humanist Legal Center

1777 T Street NW, Washington DC 20009-7125 | T 800.837.3792 202.238.9088 | F 202.238.9003 | legal@americanhumanist.org | www.humanistlegalcenter.org

October 13, 2015

Via Email

Ben Stein, Principal; bstein@rcsd.ms
Northwest Rankin High School
5805 Highway 25
Flowood, MS 39232
Fax: 601.992.6005

Lynn Weathersby; lweathersby@rcsd.ms
Superintendent, Rankin County School District

John G. Corlew; jcorlew@cmslawyers.com, sbowen@cmslawyers.com
Lynn Chain Wall; reviewer2@cmslawyers.com
Fred M. Harrell, Jr.; Harrell.rester@bellsouth.net

Re: Constitutional Violations at Northwest Rankin High School

Dear Rankin County School District officials and attorneys,

It is with great regret that we are writing you, once again, regarding yet another violation of the Establishment Clause *and* our binding Consent Decree. Because we are extending you the courtesy of a demand letter rather than an immediate motion for contempt, we expect you will promptly respond to our letter and remedy the situation forthwith.

A Northwest Rankin High School parent has contacted our office to request assistance with regard to what is correctly perceived as a series of constitutional violations occurring under the authority of your school and School District. The parent reports that her daughter's World History teacher, Mr. Rick Hammarstrom, who also serves as a pastor of Rehobeth Baptist Church (a fact which is prominently displayed on the School District's website), has repeatedly promoted Christianity and God-belief during class time while making hostile and disparaging remarks about atheists. For instance, on October 8, 2015, Mr. Hammarstrom stood up and announced during class: "Atheists are throwing a fit because they don't have their own day." He continued: "They do have their own day; it's called April Fool's Day, because you are a fool if you don't believe in god." According to the student, these types of remarks are becoming more frequent and the teacher continues to express hatred towards atheists and favoritism for Christians. The parent and student are atheists and understandably feel affronted and stigmatized by the teacher's actions. Worse, the teacher's hurtful remarks make the student feel extremely unwelcome in her own classroom.

The school's actions in permitting a teacher to make degrading remarks about atheists are a clear violation of the Establishment Clause of this First Amendment. We wish to remind you that the School District has "the affirmative duty to ensure that individual teachers are not . . . violating the guidelines of the establishment clause." *Breen v. Runkel*, 614 F. Supp. 355, 358 (W.D. Mich. 1985). The School Districe has already been held in contempt and admonished by the Court for repeatedly breaching this duty. Good faith is not a defense to contempt and you are court-ordered to ensure that your employees are complying with the Consent Decree and Establishment Clause. *See M.B. v. Rankin County Sch. Dist*., 2015 U.S. Dist. LEXIS 117289, *14-15 (S.D. Miss. July 10, 2015) ("Despite its Religion Policy and the Agreed Judgment, the District did not alter the program or its behavior. Evidence from prior years' ceremonies is probative and it aids the Court in determining whether the District has acted in willful violation of the Agreed Judgment.").[1] The Court stressed, as is relevant here:

> It may be true that the ceremony's organizer did not know the invocation was prohibited; however, *knowledge* implies that one has first been informed. Haney's lack of knowledge generates a number of questions, which the District has not answered. For example: **what steps did the District take to inform its employees of its Religion Policy incorporated in the Agreed Judgment**?; who was responsible for informing district employees of the policy?; since Haney acted alone in preparing the program, was there a process of approval for the content of the program? Any ignorance on Haney's part and the apparent ignorance of the other district officials **is more reflective of an absence in effort to comply with the Agreed Judgment than it is of the District's good faith attempt to comply.**

M.B. v. Rankin County Sch. Dist., 2015 U.S. Dist. LEXIS 117289, *20 (S.D. Miss. July 10, 2015).

As such, we hereby demand that the School District promptly provide us with written assurances that: (1) Mr. Hammarstrom will be warned that such remarks are unconstitutional and that if he continues this behavior, he will be subject to disciplinary action including termination; (2) all employees in the School District will be provided with a written notice that they are not to make remarks that have the effect of promoting religion or disparaging atheism; and (3) said written notice will be issued no later than October 26, 2015, and that a copy shall be provided to counsel for AHA. In addition, please provide us with a list of steps you will take to ensure that teachers are not endorsing religion or denigrating atheism during school hours, inclusive of any and all monitoring and enforcement mechanisms. If corrective steps are not taken immediately, AHA will pursue the matter through litigation in federal court.

The American Humanist Association (AHA) is a national nonprofit organization with over 490,000 supporters and members across the country, including many in Mississippi. The mission of AHA's legal center is to protect one of the most fundamental principles of our democracy: the constitutional mandate requiring a separation of church and state. Our legal center includes a network of cooperating attorneys from around the country, including

[1] Indeed, "the District has previously told the Court that its 'Religion Policy is stated in *terms which are clear and easily understood by teachers, administrators, other school officials*, and any groups seeking to make use of the school facilities.'" *M.B. v. Rankin County Sch. Dist*., 2015 U.S. Dist. LEXIS 117289, *18 (S.D. Miss. July 10, 2015).

Mississippi, and we have litigated constitutional cases in state and federal courts from coast to coast, including Mississippi.

The First Amendment's Establishment Clause "commands a separation of church and state." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). It requires the "government [to] remain secular, rather than affiliate itself with religious beliefs or institutions." *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989). The Establishment Clause "create[s] a complete and permanent separation of the spheres of religion activity and civil authority." *Everson v. Bd. of Ed*, 330 U.S. 1, 31-32 (1947). *Accord Engel v. Vitale*, 370 U.S. 421, 429 (1962). Separation "means separation, not something less." *McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948). In "no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart." *Id.*

The Supreme Court "has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987). *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 303 (2000); *Lee v. Weisman,* 505 U.S. 577, 592 (1992). The Establishment Clause "absolutely prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith." *School Dist. v. Ball*, 473 U.S. 373, 385 (1985). These principles have led the Supreme Court to hold both that "permitting student-led, student-initiated prayer" at school-sponsored events unconstitutionally endorses religion, and that including prayer in school events unconstitutionally coerces students to participate in religious activity. *Santa Fe*, 530 U.S. at 301-03, 308; *Lee*, 505 U.S. at 590-92. *Lee* and *Santa Fe* are "merely the most recent in a long line of cases carving out of the Establishment Clause what essentially amounts to a per se rule prohibiting public-school-related or -initiated religious expression or indoctrination." *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 165 (5th Cir. 1993).[2] The same is true of the Fifth Circuit.[3] *See also Herdahl v. Pontotoc Cnty. Sch. Dist*., 933 F. Supp. 582, 591 (N.D. Miss. 1996).

"The State must be certain… that subsidized teachers do not inculcate religion." *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971). School districts must not permit any "of its teachers' activities [to] give[] the impression that the school endorses religion." *Marchi v. Board of Coop. Educ. Servs.*, 173 F.3d 469, 477 (2d Cir. 1999). *See Holloman v. Harland*, 370 F.3d 1252, 1285 (11th Cir. 2004) (teacher's practice of initiating silent prayer with her students with "let us pray" and ending it with "amen" violated Establishment Clause); *Bishop v. Aronov*, 926 F.2d 1066,

[2] *See Santa Fe*, 530 U.S. at 294 (student prayers at football games unconstitutional); *Lee*, 505 U.S. at 580-83 (1992) (prayers at graduation ceremonies unconstitutional); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (moment of silence to start school day unconstitutional); *Sch. Dist. v. Ball*, 473 U.S. 373, 385 (1985); *Stone v. Graham*, 449 U.S. 39 (1980) (posting of Ten Commandments on classroom walls unconstitutional); *Sch. Dist. Abington v. Schempp*, 374 U.S. 203, 205 (1963) (daily scripture readings unconstitutional); *Engel v. Vitale*, 370 U.S. 421 (1962) (school prayer unconstitutional); *McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948); *Everson v. Bd. of Ed*, 330 U.S. 1, 31-32 (1947); *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982)

[3] *See Doe v. Sch. Bd*., 274 F.3d 289, 294 (5th Cir. 2001) (statute authorizing prayer in classrooms unconstitutional); *Doe v. Santa Fe Indep. Sch. Dist*., 168 F.3d 806, 816 (5th Cir. 1999), *aff'd*, 530 U.S. 290 (2000) (student-led prayer at graduation and football prayers unconstitutional); *Ingebretsen v. Jackson Pub. Sch. Dist*., 88 F.3d 274, 280 (5th Cir. 1996) (student-led prayers at school-sponsored events unconstitutional); *Doe v. Duncanville Indep. Sch. Dist*., 70 F.3d 402, 407 (5th Cir 1995) (school officials' supervision of student-initiated and student-led prayers preceding basketball unconstitutional); *Duncanville*, 994 F.2d at 163; *Treen*, 653 F.2d 897; *Hall v. Bd. of Sch. Comm'rs*, 656 F.2d 999, 1003 (5th Cir. 1981); *Meltzer v. Bd. of Pub. Instruction,* 548 F.2d 559, 574 (5th Cir. 1977) (en banc).

1073 (11th Cir. 1991) ("a teacher's [religious] speech can be taken as directly and deliberately representative of the school").[4]

Even "permit[ting] [a teacher] to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause." *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994) (teacher prohibited from discussing religion with students during the school day). In fact, even allowing a teacher to wear a t-shirt promoting "Jesus" would violate the Establishment Clause. *See Downing v. W. Haven Bd. of Educ*., 162 F. Supp. 2d 19, 27-28 (D. Conn. 2001) ("For the defendants to have permitted Downing to wear a shirt during classroom instruction that was emblazoned with the words 'JESUS 2000 - J2K' would likely have violated the Establishment Clause of the First Amendment. Such speech does not have a secular purpose, would have the primary effect of advancing religion, and would have entangled the school with religion."). Yet here, the teacher is not merely "discussing" his religious beliefs with students, which alone would be constitutionally problematic, but is aggressively disparaging atheists, making the school's actions particularly egregious.

To comply with the Establishment Clause, a government practice must pass the *Lemon* test,[5] pursuant to which it must: (1) have a secular purpose; (2) not have the effect of advancing or endorsing religion; and (3) not foster excessive entanglement with religion. *Allegheny*, 492 U.S. at 592. Government action "violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). In applying this test to public school activity, the Supreme Court has emphasized that courts must defend the wall of separation with an even greater level of vigilance because "there are heightened concerns with protecting freedom of conscience from [even] subtle coercive pressure in the elementary and secondary public schools." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). As shown below, the school's

[4] *See also Karen B*, 653 F.2d 897; *Borden v. Sch. Dist.*, 523 F.3d 153, 174 (3rd Cir. 2008) (coach silently bowing head and kneeling while team prayed violated Establishment Clause); *Doe v. Duncanville Indep. Sch. Dist*., 70 F.3d 402 (5th Cir. 1995) (school's practice of allowing coaches to participate in student prayers during athletic events violated Establishment Clause); *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 163 (5th Cir. 1993) (*Duncanville I*) (school officials' supervision of student-initiated and student-led prayers preceding basketball games violated Establishment Clause); *Roberts v. Madigan*, 921 F.2d 1047, 1056-58 (10th Cir. 1990) (a teacher's display of a Bible in his classroom "had the primary effect of communicating a message of endorsement of a religion"); *Steele v. Van Buren Public Sch. Dist.*, 845 F.2d 1492, 1493 (8th Cir. 1988) (permitting teachers to conduct prayer at school functions unconstitutional); *Bell v. Little Axe Indep. Sch. Dist*., 766 F.2d 1391, 1396-97 (10th Cir. 1985) (finding unconstitutional endorsement when teachers "participat[ed] in religiously-oriented meetings involving students"). *See also Doe v. Wilson Cty. Sch. System*, 564 F. Supp. 2d 766 (M.D. Tenn. 2008) (holding that principal and kindergarten teacher who bowed their heads during a nonschool sponsored prayer event and wore 'I Prayed' stickers during instructional time endorsed the prayer event and thus violated Establishment Clause); *Daugherty v. Vanguard Charter Sch. Academy*, 116 F. Supp. 2d 897, 910 (W.D. Mich. 2000) ("The presence of teachers and elementary students together, for prayer, on school premises, albeit during non-instructional hours, is a matter of heightened concern."); *Carlino v. Gloucester City High Sch*., 57 F. Supp. 2d 1 (D.N.J. 1999), *aff'd*, 44 Fed. Appx. 599 (3rd Cir. 2002) (principal's involvement with a baccalaureate service unconstitutional); *Sease v. Sch. Dist*., 811 F. Supp. 183, 192 (E.D. Pa. 1993) ("Clearly, a school employee's participation in, or sponsorship of, a public school gospel choir during school hours would be a violation of the Establishment Clause."); *Quappe v. Endry*, 772 F. Supp. 1004 (S.D. Ohio 1991), *aff'd*, 979 F.2d 851 (6th Cir. 1992) (participation of teacher in religious club for students meeting in elementary school directly after close of school day established "symbolic nexus between the school and the club, thus providing the active government participation necessary to find a constitutional violation"); *Breen v. Runkel*, 614 F. Supp. 355 (W.D. Mich. 1985) (teachers praying and reading Bible in classrooms unconstitutional); *Doe v. Aldine Indep. Sch. Dist.*, 563 F. Supp. 883, 888 (S.D.Tex. 1982).

[5] The test is derived from *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

actions in permitting a teacher to promote Christianity and degrade atheism are unconstitutional pursuant to each prong of the *Lemon* test.

When the government sponsors an "intrinsically religious practice," it "cannot meet the secular purpose prong" of the *Lemon* test. *Jager v. Douglas Cnty. Sch. Dist.*, 862 F.2d 824, 829-30 (11th Cir. 1989). *See also Santa Fe*, 530 U.S. at 309 ("infer[ring] that the specific purpose of the policy" permitting but not requiring student-led prayers was religious thus failing the purpose prong); *Holloman*, 370 F.3d at 1285; *Jaffree v. Wallace*, 705 F.2d 1526, 1534-35 (11th Cir. 1983), *aff'd*, 472 U.S. 38 (1985).[6] Here, there is no possible secular purpose for the teacher's actions in promoting Christianity and disparaging atheism during class time. *See Holloman*, 370 F.3d at 1285-86 (teacher's participation in silent prayer with students "during the school day" lacked secular purpose); *Peloza*, 37 F.3d at 522 (teacher's discussion of religion with students before and after class "would not have a secular purpose"); *Karen B.*, 653 F.2d at 901 (no secular purpose in authorizing teacher-initiated prayer at the start of school day); *Downing v. W. Haven Bd. of Educ.*, 162 F. Supp. 2d 19, 27-28 (D. Conn. 2001) (allowing teacher to wear shirt "that was emblazoned with the words 'JESUS 2000 - J2K'" would "not have a secular purpose").

Yet, regardless of the purposes motivating the prayers, the School District's actions fail *Lemon's* effect prong. The "effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval [of religion]." *Wallace v. Jaffree*, 472 U.S. 38, 56 n.42 (1985) (quotation marks omitted). The "prohibition against governmental endorsement of religion 'preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.'" *Allegheny*, 492 U.S. at 593 (citation omitted). Whether "the key word is 'endorsement' 'favoritism,' or 'promotion,' the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief[.]" *Id.* at 593-94. Moreover, the "'disparate treatment of theistic and non-theistic religions is as offensive to the Establishment Clause as disparate treatment of theistic religions.'" *Am. Humanist Ass'n v. United States*, 63 F. Supp. 3d 1274, 1283 (D. Or. 2014) (citation omitted).

The teacher's actions have the obvious effect of endorsing God-belief and disapproving atheism, thus violating the Establishment Clause. *See Holloman*, 370 F.3d at 1286-87; *Borden v. Sch. Dist.*, 523 F.3d 153, 176-77 (3d. Cir. 2008) (coach "was endorsing religion" in violation of the second prong when he silently kneeled and bowed head during prayer with students); *Duncanville*, 70 F.3d at 405-06 (coach's participation in prayer was "an unconstitutional endorsement."); *Karen B.*, 653 F.2d at 899 (permitting teacher to lead students in prayer failed second prong). For instance, in *Duncanville*, the Fifth Circuit held that basketball coaches' mere participation in prayer with players during practices and after games was "an unconstitutional endorsement of religion." 70 F.3d at 406. The court explained that the "[d]uring these activities DISD coaches and other school employees are present as representatives of the school and their

[6] *See also North Carolina Civil Liberties Union v. Constangy*, 947 F.2d 1145, 1150 (4th Cir. 1991) (finding religious purpose in judge's practice of opening court sessions with prayer, as it involved "an act so intrinsically religious"); *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759, 760-63 (9th Cir. 1981) ("the invocation of assemblies with prayer has no apparent secular purpose"); *Hall v. Bradshaw*, 630 F.2d 1018, 1020-21 (4th Cir. 1980) (state's inclusion of prayer on state map failed purpose prong).

actions are representative of DISD policies." *Id.* As such, the court ruled: "DISD representatives' participation…signals an unconstitutional endorsement of religion." *Id.*

The policy challenged in *Santa Fe* allowed the senior class to elect students to deliver a "brief invocation and/or message" at football games. 530 U.S. at 296-97. Despite the fact that any message would be student-led and student-initiated, the Supreme Court found the policy unconstitutional as it "involves both perceived and actual endorsement of religion." *Id.* at 305, 310. Here, unlike in *Santa Fe*, the proselytizing speech is *not* even student-initiated and rather than being a voluntary football game, the remarks are delivered in the formal classroom setting to a captive audience of students.

Finally, the school's actions in permitting teachers to promote religion and degrade atheism in the classroom fosters excessive entanglement with religion, thus violating the Establishment Clause under *Lemon's* third prong. *See Duncanville*, 70 F.3d at 406 (faculty's participation in "prayers improperly entangle[d] [the school] in religion"); *Karen B*., 653 F.2d at 902 (permitting teachers to lead prayers would result in "excessive governmental entanglement with religion."); *Mellen v. Bunting*, 327 F.3d 355, 375 (4th Cir. 2003) (university's sponsorship of prayer failed "*Lemon's* third prong."); *Constangy*, 947 F.2d at 1151-52 (when "a judge prays in court, there is necessarily an excessive entanglement of the court with religion."). Like the Establishment Clause generally, the prohibition on excessive government entanglement with religion "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum*, 333 U.S. at 212. In this situation, "where the underlying issue is the deeply emotional one of Church-State relationships, the potential for seriously divisive political consequences needs no elaboration." *Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 797 (1973).

It is apodictic that "[t]eachers and other public school employees have no right to make the promotion of religion a part of their job description and by doing so precipitate a possible violation of the First Amendment's establishment clause[.]" *Grossman v. S. Shore Pub. Sch. Dist*., 507 F.3d 1097, 1099 (7th Cir. 2007). Clearly, the "Constitution does not entitle teachers to present personal views to captive audiences." *Mayer v. Monroe Cty. Cmty. Sch. Corp*., 474 F.3d 477, 480 (7th Cir. 2007). *See Johnson v. Poway Unified School Dist*., 658 F. 3d 954, 957 (9th Cir. 2011) (rejecting First Amendment challenge by teacher to school requiring that he remove classroom banners that read "In God We Trust," "One Nation Under God," "God Bless America," and "God Shed His Grace on Thee," and "All men are created equal, they are endowed by their CREATOR"); *Lee v. York Co. School Div*., 484 F. 3d 687 (4th Cir. 2007) (rejecting First Amendment challenge by teacher to school requiring that he remove from the classroom a "National Day of Prayer poster, featuring George Washington kneeling in prayer," newspaper articles about religion in politics and newsletters about local missionaries); *Downing v. West Haven Board of Ed.*, 162 F.Supp.2d 19 (D. Conn. 2001) (school board's response to teacher wearing "Jesus 2000" shirt was appropriate and did not violate teacher's First Amendment rights because the school would risk Establishment Clause violation). *See also Marchi v. Bd of Cooperative Educational Services*, 173 F.3d 469, 477 (2d Cir. 1999) (upholding school's cease and desist directive to teacher, and rejecting free exercise claim of teacher who shared his religious conversion experience with his students, because "that risks giving the impression that the school endorses religion" and it has a "compelling interest in avoiding

Establishment Clause violations"); *Peloza v. Capistrano Unified Sch. Dist*., 37 F.3d 517, 522 (9th Cir. 1994) (school district's interest in avoiding violation of Establishment Clause justified prohibiting teacher from discussing religion with students before and after class and holding that to "permit [a teacher] to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause"); *Roberts v. Madigan*, 921 F.2d 1047, 1056-58 (10th Cir. 1990) (teacher could be prohibited from reading Bible during silent reading period, and from stocking two books on Christianity on shelves, because these could leave students with the impression that Christianity was officially sanctioned); *Langlotz v. Picciano*, 683 F. Supp. 1041 (E.D. Va), *aff'd sub nom* 905 F.2d 1530 (4th Cir. 1990)(counselor fired for using 'Christian Perspective' in job function); *Knight v. Conn. Dep't of Health*, 2000 U.S. Dist. LEXIS 21120, *10 (D. Conn. Feb. 22, 2000).

The Court recently admonished the School District for repeatedly failing to comply with the First Amendment and the Consent Decree. The Court made abundantly clear:

> Regardless of the faith shared by a fraction or by the majority of its pupils, schools owe a duty to all students to refrain from conduct which gives the appearance of advocating a particular religion. In fairness to and protection of all, they must remain neutral. This same duty is owed to the parents who submit their children to the protection of educators, entrusting that they will sharpen their academic minds. **Parents don't drop off their children at the school house door to have their child's religious beliefs affirmed, questioned or compromised**. *See Lee*, 505 U.S. at 643-44 ("Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family.") (citation omitted).

M.B., 2015 U.S. Dist. LEXIS 117289, at *23.

In view of the aforementioned authorities, it is evident that the School District is in violation of the Establishment Clause and the Consent Decree. As such, the School District and its officials may be sued under 42 U.S.C. § 1983 for damages, an injunction, and attorneys' fees, and it may also be subject to heavy contempt fines and attorneys' fees pursuant to the Consent Decree. *See M.B. v. Rankin County Sch. Dist*., 2015 U.S. Dist. LEXIS 117289, *34 (S.D. Miss. July 10, 2015) ("Defendant School District shall pay a fine of $10,000 per infraction to the Plaintiff for any future violations of the Consent Decree").

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.

Sincerely,
Monica L. Miller, Esq.