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RE: Pledge of Allegiance

Dear Mr. Koers,

A teacher from Franklin Central High School, Duane Nickell, has contacted our office to report a very troubling set of events that took place during the past school year in response to his informing his students about their fundamental free speech rights. Dr. Nickell reports that early in the school year, prior to the daily flag salute, he briefly mentioned to his students that participation in the Pledge of Allegiance is voluntary. Dr. Nickell's statement, as you surely know, is fully accurate, as the Supreme Court long ago ruled that public school students have a free speech right under the First Amendment of the United States Constitution to opt out of the Pledge of Allegiance exercise. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).<sup>1</sup> With the exercise occurring daily and many students not knowing that participation is voluntary, Dr. Nickell was doing exactly what a good teacher should do: informing and educating students about an exercise that would be occurring each day in his classroom.

Nevertheless, perhaps as proof of the old maxim that no good deed goes unpunished, Dr. Nickell was subsequently called down to your office and reprimanded for his actions. He was told, surprisingly, that he should *not* inform his students that the Pledge of Allegiance is

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<sup>1</sup> Since *Barnette*, courts have irrefutably recognized the First Amendment right of students to remain silent and seated during the Pledge. 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.") (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)).

voluntary. This would seem to suggest that the school is affirmatively choosing to deceive students, apparently believing that the community is best served if children make their way through thirteen years of public schooling with the false understanding that Pledge participation is mandatory and that nonparticipation is offensive.

This scenario is problematic on many levels, not least of which that it is plainly dishonest toward the students who entrust school officials with their education. Moreover, to take this stance toward Pledge nonparticipation implies negative assumptions about those who respectfully opt out, when in fact there are numerous legitimate reasons for choosing to sit out the exercise. To cast a cloud of negativity toward opting out, or to equate participation in the exercise with actual patriotism, is to misunderstand the very notion of good citizenship.

Dr. Nickell should be commended, not reprimanded, for taking the time to inform students about their rights in an objective, nonjudgmental manner. Your actions toward him suggest that he would be disciplined if he were to refer to the exercise in the future as “the voluntary Pledge of Allegiance exercise” or “the voluntary flag salute.” This intimidation was taken so seriously by him that he opted to wait until now, when he has left the employment of your school, to register his formal objection.

The American Humanist Association (AHA) is a national nonprofit organization with over 600,000 supporters and members across the country, including many in Indiana. 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 Indiana, and we have litigated constitutional cases in state and federal courts from coast to coast.

We are hopeful that you will reconsider your position toward Pledge nonparticipation and your treatment of Dr. Nickell. Should we be informed that this kind of action is taken again toward any teachers who wish to inform students of their rights regarding Pledge participation, we will make our legal center available to assist with their defense. Feel free to contact us if you wish to discuss any aspect of the matter.

Very truly yours,

Monica Miller, Esq.