Appignani Humanist Legal Center

1821 Jefferson Place NW, Washington, DC 20036 | T 800.837.3792 202.238.9088 | F 202.238.9003 | legal@americanhumanist.org | www.humanistlegalcenter.org

September 12, 2018

Via Email

Don Embry – Superintendent
Bedford County Schools
500 Madison Street
Shelbyville, TN 37160

Sent via email: embryd@bedfordk12tn.net

David Parker – Principal
Cascade Middle School
1165 Bell Buckle Wartrace Road
Wartrace, TN 37183

Sent via email: parkerd@bedfordk12tn.net

RE: Constitutional Violation

Dear Mr. Embry and Mr. Parker,

Our office was recently contacted by a parent of a child attending Cascade Middle School regarding a serious constitutional violation. Specifically, the parent reports that their child is being subjected to religious proselytizing and coercion by a science teacher, Mr. Edmonson. The parent reports that the classroom curriculum is frequently infused with religious doctrine, unscientific materials, and outright misinformation, as described in more detail below.

Mr. Edmonson recently played a video called "The Theory of Genesis: How Old Is the World?" — a Christian video that disputes scientific consensus on the age of the world, instead promoting a "young earth" view. Children are urged to reject the scientifically accepted view of evolution in this class, merely because it conflicts with biblical interpretation. The child reports that "the great flood" is mentioned almost daily, and that other videos with Christian overtones have also been shown to the class. The teacher also reportedly frequently tells the class that "God" is responsible for events.

The inappropriateness of this activity is hopefully self-evident to you. The purpose of this letter is to bring these transgressions to your attention and to demand that appropriate steps be taken to stop them. It seems clear that this teacher is purposefully injecting religious views into

the public school classroom, and if it continues your school district will face litigation to put it to a halt.

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

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 government "may not promote or affiliate itself with any religious doctrine or organization," "discriminate among persons on the basis of their religious beliefs and practices." *Id.* at 590-91. "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa." *Everson v. Bd. of Ed*, 330 U.S. 1, 16 (1947). At the most fundamental level, the Establishment Clause prohibits the government from promoting "a point of view in religious matters" or otherwise taking sides between "religion and religion or religion and nonreligion." *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 (2005) (citations omitted).

Establishment Clause cases "have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1992). It is firmly established that Establishment Clause protection "extends beyond intolerance among Christian sects – or even intolerance among 'religions' – to encompass intolerance of the disbeliever and the uncertain." *Wallace v. Jaffree*, 472 U.S. 38, 52-54 (1985).[1]

To comply with the Establishment Clause, governmental activity must pass the *Lemon* test,[2] 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 addition, in *Lee v. Weisman*, the Supreme Court formulated the separate "coercion test," declaring that "at a minimum, the

[1] *See also Allegheny*, 492 U.S. at 615 (The Establishment Clause "guarantee[s] religious liberty and equality to the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism."); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 216 (1963) ("this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another"); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) ("We repeat and again reaffirm that neither a State nor the Federal Government" can "pass laws or impose requirements which aid all religions as against non-believers."). Thus, 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).

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

[Establishment Clause] guarantees that government may not coerce anyone to support or participate in religion or its exercise." 505 U.S. 577, 587 (1992).

The Supreme Court "has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools," *Edwards*, 482 U.S. at 583-84, where "there are heightened concerns with protecting freedom of conscience from [even] subtle coercive pressure." *Lee*, 505 U.S. at 592. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 303 (2000) (student-led, student-initiated prayers before high school football games unconstitutional); *Lee*, 505 U.S. 577 (1992) (nondenominational prayer at graduation unconstitutional); *McCollum v. Bd. of Ed.*, 333 U.S. 203, 231 (1948).

Furthermore, the Supreme Court has recognized parents' constitutionally-protected interest in guiding "the religious future and education of their children." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). Parents "entrust public schools with the education of their children, but condition their trust on the understanding" that they will not advance "religious views that may conflict with the private beliefs of the student and his or her family." *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987). *See Doe by Doe v. Beaumont Indep. Sch. Dis*t., 240 F.3d 462, 466-67 (5th Cir. 2001); *Bell v. Little Axe Indep. Sch. Dist.*, 766 F.2d 1391, 1398 (1985). The actions described above are thus "intrinsically unconstitutional" because they interfere "'with the rights of parents to raise their children according to family religious traditions.'" *M.B. v. Rankin Cty. Sch. Dist*., 2015 U.S. Dist. LEXIS 117289, at *27-28 (S.D. Miss. 2015) (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 226 (1963)).

"The State must be certain … that subsidized teachers do not inculcate religion." *Lemon*, 403 U.S. at 619. 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). Constitutional doctrine teaches that a school cannot endorse religion in the classroom, *Wallace*, 472 U.S. 38; *Stone*, 449 U.S. 39 (Ten Commandments display in public school unconstitutional); *Schempp*, 374 U.S. 203; *Engel*, 370 U.S. 421, or at events it hosts, *Santa Fe*, 530 U.S. 290; *Lee*, 505 U.S. 577. *See also Doe v. Elmbrook Sch. Dist*., 687 F.3d 840, 856 (7th Cir. 2012), *cert. denied*, 134 S. Ct. 2283 (2014).

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 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); *Holloman v. Harland*, 370 F.3d 1252, 1285 (11th Cir. 2004) (teacher's practice of initiating silent prayer with her students violated Establishment Clause); *Doe v. Duncanville Indep. Sch. Dist*., 70 F.3d 402 (5th Cir. 1995). A teacher's "[religious] speech can be taken as directly and deliberately representative of the school." *Bishop v. Aronov*, 926 F.2d 1066, 1073 (11th Cir. 1991). School "officials have long been prohibited by the Establishment Clause from inserting religious exercises into school activities." *S.D. v. St. Johns Cnty. Sch. Dist*., 632 F. Supp. 2d 1085, 1093 (M.D. Fla. 2009). *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).[3]

Simply "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). In *Roberts v. Madigan*, the Tenth Circuit held that a teacher's religious books on his desk "had the primary effect of...endorsement" even though his actions were "passive and *de minimis*" and "discreet." 21 F.2d 1047, 1056-58, 1061 (10th Cir. 1990). *See also 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."). The teacher at issue here did not merely "discuss" his religious beliefs with students, which is alone violative, but continues to endorse God-belief to a captive audience of young students. Such actions plainly violate the *Lemon* test as well as the separate coercion test, *infra*.

Where, as here, the government promotes an "intrinsically religious practice," it "cannot meet the secular purpose prong." *Jager v. Douglas Cnty. Sch. Dist*., 862 F.2d 824, 829-30 (11th Cir. 1989).[4] A teacher's discussion of his religious beliefs with students before and after class "would not have a secular purpose." *Peloza*, 37 F.3d at 522. Necessarily then, a teacher's repeated promotion of God-belief *during* classtime—and worse, as part of the curriculum— reflects an impermissible purpose. *See Holloman v. Harland*, 370 F.3d 1252, 1285 (11th Cir. 2004) (a "teacher or administrator's intent to facilitate or encourage prayer in a public school is *per se* an unconstitutional intent to further a religious goal."). *See also Santa Fe*, 530 U.S. at 309-10 ("infer[ring] that the specific purpose of the policy" permitting but not requiring student-led prayers was religious thus failing the purpose prong); *Treen*, 653 F.2d at 901 (5th Cir. 1981) (no secular purpose in authorizing teacher-initiated prayer at the start of school day) *aff'd*, 455 U.S. 913 (1982).

Yet, regardless of the purposes motivating it, the teacher'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,

[3] *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, 40-42 (1985) (moment of silence to start school day unconstitutional); *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, 422-23 (1962) (school prayer unconstitutional); *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982) (prayers by students and teachers in classroom unconstitutional)

[4] *See Stone*, 449 U.S. at 41; *Jaffree v. Wallace*, 705 F.2d 1526, 1534-35 (11th Cir. 1983), *aff'd* 472 U.S. 38 (1985); *N.C. Civil Liberties Union v. Constangy*, 947 F.2d 1145, 1150 (4th Cir. 1991)

prohibits government from appearing to take a position on questions of religious belief[.]" *Id.* at 593-94.

Even the "mere appearance of a joint exercise of authority by Church and State provides a significant symbolic benefit to religion," and, therefore, has the impermissible primary effect of advancing religion. *Larkin v. Grendel's Den*, 459 U.S. 116, 126-27 (1982). The Supreme Court has stated that:

> an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.

School Dist. v. Ball, 473 U.S. 373, 390 (1985) (internal citation omitted).

It is settled law that teaching creationist or similar ideas in any guise in public schools violates the Establishment Clause. *See Epperson v. Arkansas*, 393 U.S. 97 (1968) (holding that a statute that forbids the teaching of evolution in public schools violates the Establishment Clause); *Edwards*, 482 U.S. 578 (holding that a statute requiring the teaching of creationism alongside evolution in public schools violates the Establishment Clause); *Freiler v. Tangipahoa Parish Bd. of Educ*., 185 F. 3d 337, 346 (5th Cir. 1999) (holding that a required disclaimer to be read before evolution lessons in public schools that states that they were "not intended to influence or dissuade the Biblical version of Creation" and that urged students "to exercise critical thinking and gather all information possible and closely examine each alternative" violates the Establishment Clause because it "protect[s] and maintain[s] a particular religious viewpoint").[5]

In *Kitzmiller*, 400 F. Supp. 2d 707, for instance, the court held that "teaching about supposed gaps and problems in evolutionary theory are creationist religious strategies that evolved from earlier forms of creationism," and that therefore, such teachings constitute "an endorsement of a religious view" in violation of the Establishment Clause.

The same reasoning underlying these cases applies with equal force to teacher informing the class that "God" is responsible for events. *Cf. Grossman v. South Shore Public Sch. Dist*., 507 F.3d 1097 (7th Cir. 2007) (upholding school's decision not to renew the contract of school guidance counselor who replaced educational literature about contraceptives with religious literature on abstinence). "Teachers 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[.]" *Id.* at 1099-1100. This includes any speech or conduct that "endorses a particular religion and is an activity 'that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.'" *Roberts*, 921 F. 2d at 1055 (quoting *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)).

---

[5] *See also Webster v. New Lenox Sch. Dist.*, 917 F.2d 1004, 1008 (7th Cir. 1990) (upholding school board's prohibition on the teaching of creation science to junior high students); *Peloza*, 37 F.3d at 521 (requiring that a public school teacher to teach evolution and not creationism does not violate the First Amendment); *Kitzmiller v. Dover Area Sch. Dist*., 400 F. Supp. 2d 707 (M.D. Pa. 2005) (holding that it was unconstitutional to teach Intelligent Design as an alternative to evolution in public school).

A "mere message of disapproval" suffices "for an Establishment Clause violation." *Catholic League v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1057 (9th Cir. 2009). In the present matter, the teacher unmistakably sent a message of disapproval of atheism, thus failing *Lemon*'s effect prong. The court in *Treen* held that *Lemon*'s effect prong was violated by a teacher "encouraging observance of a religious ritual in the classroom." 653 F.2d at 901. In *Holloman*, the Eleventh Circuit similarly ruled that a teacher's "prayer requests" violated the second prong of *Lemon* because "the effect of her behavior was clearly to promote praying, a religious activity." 370 F.3d at 1286.

The third *Lemon* prong, the question of excessive government entanglement with religion, is also violated here, as it is obviously inappropriate for an on-the-job public school teacher to be inexplicably promoting one particular religious view. *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."); *Jabr v. Rapides Parish Sch. Bd.*, 171 F. Supp. 2d 653, 661 (W.D. La. 2001) ("[t]eachers, who did not actively participate in Bible distribution, but merely observed non-school personnel distribute the material, became excessively entangled with religion in violation of the Establishment Clause."). 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.

Finally, the teacher's religious activities violate the Establishment Clause under the coercion test. *Lee*, 505 U.S. at 587-99.[6] In *Lee*, the Court held that a public school's inclusion of a nonsectarian prayer in a graduation ceremony was unconstitutionally coercive, even though the event was technically voluntary and students were not required to participate in the prayer. *Id.* at 586. The "State exerts great authority and coercive power…because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Edwards*, 482 U.S. at 584. The "symbolism of a union between church and state is most likely to influence children of tender years." *Ball*, 473 U.S. at 390. Elementary and middle school students are "vastly more impressionable than high school or university students." *Bell v. Little Axe Indep. Sch. Dist*., 766 F.2d 1391, 1404 (10th Cir. 1985). *See Peck v. Upshur Cnty. Bd. of Educ*., 155 F.3d 274, 288 n* (4th Cir. 1998) (equal access policy violated Establishment Clause "in the elementary schools" but not high schools, reasoning: "because children of these ages may be unable to fully recognize and appreciate the difference between government and private speech" the school's "policy could more easily be (mis)perceived as endorsement rather than as neutrality."). *See also Walz v. Egg Harbor Twp. Bd. of Educ*., 342 F.3d 271, 277 (3d Cir. 2003) (explaining that in "an elementary school" the line "between school-endorsed speech and merely allowable speech is blurred" and that "[w]hile 'secondary school students are mature enough and are likely to understand that a school

[6] "[C]oercion is not necessary to prove an Establishment Clause violation." *Id.* at 604 (Blackmun, J., concurring). *See Schempp*, 374 U.S. at 223 ("a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended."); *Santa Fe*, 168 F.3d at 818 ("we are not required to determine that such public school prayer policies also run afoul of the Coercion Test.").

does not endorse or support speech that it merely permits on a nondiscriminatory basis,'" elementary students "are different.") (citation omitted); *Berger v. Rensselaer Cent. Sch. Corp*., 982 F.2d 1160, 1170 (7th Cir. 1993) ("If the Supreme Court was concerned about the coercive pressures on fourteen-year-old Deborah Weisman, then we must be even more worried about the pressures on ten- and eleven-year-old fifth graders").

The district would even be permitted to restrict the teacher's conduct if it fell "short of an establishment violation." *Bishop v. Aronov*, 926 F.2d 1066, 1077 (11th Cir. 1991). But in this situation, a "clear establishment violation exist[s]," making the district's actions in enjoining the illegal activity necessary. *Id.*

We are most hopeful that you will recognize the concerns raised by this letter and address them properly. To avoid legal action, we ask that you notify us in writing of the steps you will take to rectify this constitutional infringement. Please respond within seven (7) days. We thank you in advance for your attention to this matter.

Very truly yours,
Monica Miller, Esq.