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November 11, 2014

Via Email
Brian R. Stephens, Ed.D. – Superintendent bstephens@tsud.net
Tracy Unified School District
1875 W. Lowell Ave.
Tracy, CA 95376

Troy Brown – Principal troybrown@tusd.net
Merrill F. West High School
1775 W. Lowell Ave
Tracy, CA 95376

RE: Constitutional violation

Dear Dr. Stephens and Mr. Brown,

This office represents Derek Giardina in his claims against your school district for gross misconduct relating to the violation of his constitutional rights. Mr. Giardina, in conjunction with a speech class, led a recitation of the Pledge of Allegiance over the school intercom. In doing so, he omitted the words "under God" to conform to his religious beliefs. Because of this, the school has disciplined him, giving him a detention and lowering his grade in the class. Such a reaction is totally unwarranted, and Mr. Giardina demands that his grade be recalculated to remove any negative consequence arising from omission of the "under God" language and that the discipline be removed from his academic record.

Mr. Giardina prefers not to participate in the Pledge exercise in any manner because he objects to the recitation on several grounds, including the "under God" language in particular. As an agnostic, he feels that such a statement is untrue and does not belong in any government-sponsored pledge, particularly since the God-language was not part of the original Pledge but was added in 1954 during the Cold War. He participated in the assignment in question, which involves reading morning school announcements and then reciting the Pledge, on four occasions with his partner, who also objected to the "under God" wording. Upon being given the assignment, Mr. Giardina was not told that the assignment was optional and that there were alternatives.

The first time they participated, his partner read announcements and then Mr. Giardina said the Pledge, including the God-language, even though he felt uncomfortable doing so. The second time they participated a few weeks later, Mr. Giardina's partner said the Pledge and

omitted the God-language. The third time, Mr. Giardina said the Pledge and omitted the God-language. Importantly, up to this point no school staff person had instructed the students that they were breaking any rule, that they were required to include the God-language, or that their grades would be lower for reciting the Pledge according to the way it was written prior to the insertion of the God-language in 1954. Also, still no mention had been made of the morning announcements being an optional assignment.

Mr. Giardina discovered that he was being penalized for not including the God-language only after the third time he and his partner did the announcements assignment. It was only then that he learned that he was receiving just 50 of the possible 100 points for the announcements assignment, and only then that he was told that there was an "alternative" to doing the morning announcements. Thus, in light of these facts, to punish him and dock his grade for is wholly unfair and an offense to his constitutional rights.

Moreover, the "alternative" assignment that was offered to Mr. Giardina can only be described as punitive. Whereas the announcements assignment requires absolutely no preparation (the students simply go to the office and read a few brief announcements that are already prepared for them), the "alternative" would have required him to fully prepare four classroom speeches of about five minutes long each – writing them, practicing them, and then delivering them – to be graded based on the overall quality of the speech. This can only be understood as retaliatory, and is in no way comparable to the simple announcements assignment. For this reason – and also for the reason that there is nothing unacceptable about the God-free version of the Pledge – Mr. Giardina chose not to accept the alternative assignment and instead simply went forward with the announcements assignment and recited the Pledge in its original form.

As a compromise, Mr. Giardina is willing to discuss fair alternatives to the announcements assignment if the school is uncomfortable with him reciting the original Pledge – though, for the record, it remains his view that the original Pledge should be acceptable. However, the school district must remove any record of discipline in connection with this dispute from his record, and it must give Mr. Giardina full credit for each announcement without penalizing him for reciting the Pledge in the manner chosen. It is noteworthy that Mr. Giardina was falsely told that state law requires that the Pledge be recited with the God-language, and the record seems clear that an effort was made to coerce him into submitting to the school district's view, in contradiction to his sincerely held religious beliefs, despite the fact that the law did not require such. Based on this, a public apology to Mr. Giardina is also in order here.

The American Humanist Association (AHA) is a national nonprofit organization with over 350,000 supporters and members across the country, including many in California. 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 California, and we have litigated constitutional cases in state and federal courts from coast to coast.

A review of applicable law here shows that Mr. Giardinia was entirely within his rights at all times and that his rights were not adequately protected by your school district. Since the

Supreme Court's ruling in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), federal courts have irrefutably recognized the First Amendment right of students to opt out of the Pledge of Allegiance exercise entirely, which includes the right to remain silent and seated during the Pledge.[1] Conditioning a student's grade on full participation in the Pledge, with the words "under God" included, is therefore a clear violation of the First Amendment. Thus, the omission of the two words, particularly on valid religious grounds, should be without question.

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 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

[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).

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 he chooses to exercise his constitutional rights. Indeed, instead of rote recitation, he has given thoughtful consideration of the underlying religious and political issues raised by the exercise, and this should, if anything, earn him the respect of teachers. 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).

The cases clearly establish that in addition to opting out of the Pledge entirely, students have a right to participate while omitting the words "under God" if they so choose. *See Newdow v. Rio Linda Union Sch. Dist*., 597 F.3d 1007, 1016 (9th Cir. 2010) ("children 'may choose not to participate in the flag salute for personal reasons' or they can simply omit any words they find offensive."); *Lewis v. Allen*, 5 Misc. 2d 68, 74, 159 N.Y.S.2d 807 (Sup. Ct. 1957) ("the child of a nonbeliever may simply omit the words, 'under God', in reciting the pledge."), *aff'd*, 11 A.D.2d 447 (App. Div. 1960) *aff'd*, 14 N.Y.2d 867 (1964). A student's "right to disbelieve is guaranteed by the First Amendment," and no student "can be compelled to recite the words 'under God' in the pledge of allegiance." *Id.* The fact that the school did not (1) explain to Mr. Giardina beforehand that his grade would be affected for omitting "under God" or (2) tell him that he could do an alternative assignment instead or (3) offer a fair alternative, rather than a punitive one, when an alternative was finally offered, all point to unfair treatment based on religious discrimination.

Note that some courts have even held that even teachers have a right to *refuse to lead* the class in the pledge exercise, even when they are *statutorily required* to do so. *See Russo v. Central School District No. 1*, 469 F.2d 623 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973) (a school board violated a high school teacher's constitutional right of free speech by dismissing her for standing in silence instead of saluting the flag); *Hanover v. Northrup*, 325 F. Supp. 170, 172

(D. Conn. 1970) ("There is no question but that Mrs. Hanover's refusal to recite or lead recitation of the Pledge of Allegiance is a form of expression protected by the first amendment which may not be forbidden at the risk of losing her job. It does not matter that her expression took the form of silence"); *Opinions of Justices to Governor*, 372 Mass. 874, 877-78 (1977) ("In our view, the rationale of the *Barnette* opinion applies as well to teachers as it does to students"). *A fortiori*, under *Barnette*, a student must not be required to say the words "under God" if a class exercise requires the announcement of the Pledge.

Punishing Mr. Giardina for saying the Pledge while omitting "under God" also amounts to impermissible viewpoint discrimination under the First Amendment. Such viewpoint discrimination is *per se* unconstitutional. *See Rosenberger v. Rector*, 515 U.S. 819, 828-29 (1995). When "the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* at 829. As such, schools "may not favor one speaker over another." *Id.* at 828. In *Zamecnik v. Indian Prairie School Dist.*, 636 F.3d 874, 874-75 (7th Cir. 2011), for example, the Seventh Circuit recognized that forbidding a "Be Happy, Not Gay" shirt, even if it had a tendency to provoke disruption, would run afoul to the First Amendment prohibition against viewpoint discrimination, explaining: "a school that permits advocacy of the rights of homosexual students cannot be allowed to stifle criticism of homosexuality." *Id.* at 876. Certainly the reverse is true as well. By harshly penalizing a student for conveying a contrary message, one that seeks *inclusivity* on religious grounds (by omitting a religious expression that causes divisiveness and that alienates non-theists), the school has favored one viewpoint ("God" belief) over another, in clear violation of the First Amendment. *See also Hedges v. Wauconda Community Unit School District No. 118,* 9 F.3d 1295, 1297 (7th Cir. 1993) ("no arm of government may discriminate against religious speech when speech on other subjects is permitted in the same place at the same time").

Finally, any requirement that students must recite the words "under God" as a condition for their grade (or be punished for not saying those words, such as the "option" of an alternative but much more onerous assignment) is a violation of the First Amendment's Establishment Clause and Free Exercise Clause. *See Torcaso v. Watkins*, 367 U.S. 488 (1961) (ruling that the government could not require persons who qualified for office to declare their belief in the existence of God). In *Torcaso*, the Supreme Court made clear that "[n]either a state nor the federal government can constitutionally force a person 'to profess a belief or disbelief in any religion.'" *Id*. at 495. More generally, the government cannot "impose requirements which aid all religions as against non-believers," or aid "those religions based on a belief in the existence of God as against those religions founded on different beliefs." *Id.*[2] The Court held that doing so violates the mandate of "'separation between church and State.'" *Id.*

Any attempt to coerce an atheist "to take an affirmation despite [his] sincere religious objections [is also] a violation of the Free Exercise Clause." *Separationists, Inc. v. Herman*, 939 F.2d 1207, 1215 (5th Cir. 1991).[3] The "free exercise of religion means, first and

[2] Furthermore, the Supreme Court in *Torcaso* recognized: "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, *Secular Humanism* and others." *Id.* at n.11 (emphasis added).

[3] *See also Ferguson v. Commissioner*, 921 F.2d 588, 590-91 (5th Cir. 1991) (holding that requiring a witness to swear or affirm when doing so is against that person's sincerely held beliefs violates the Free

foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the . . . government may not compel affirmation of religious belief." *Employment Div. v. Smith*, 494 U.S. 872, 876-877 (1990) (citing *Torcaso*, 367 U.S. 488). The Supreme Court has recognized that the First Amendment "on the subject of religion has a double aspect." *Cantwell v. Conn*., 310 U.S. 296, 303-04 (1940). It explained:

> On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts, - freedom to believe and freedom to act.

Id.

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 717-18 (1981). For instance, in *Herman*, 939 F.2d 1207, 1215 (5th Cir. 1991), the court held that a judge's attempt to coerce an atheist "to take an affirmation despite her sincere religious objections, was a violation of the Free Exercise Clause." *See also Speiser v. Randall*, 357 U.S. 513 (1958) (statute requiring loyalty oath as a condition to receiving property tax exemption violates First Amendment); *Wieman v. Updegraff*, 344 U.S. 183 (1952) (state employees cannot be required to take a loyalty oath denying affiliation with Communist Party).

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.

Exercise Clause); *Gordon v. Idaho*, 778 F.2d 1397, 1401 (9th Cir. 1985) (holding that an oath or affirmation burdens free exercise); *United States v. Looper*, 419 F.2d 1405, 1407 (4th Cir. 1969) (holding that an oath or affirmation with a reference to God burdens free exercise). *See also Nicholson v. Board of Comm'rs*, 338 F. Supp. 48, 56-58 (M.D. Ala. 1972) (required oath containing words "so help me God" violates Free Exercise Clause); *Silverman v. Campbell*, 486 S.E.2d 1, 2 (S.C. 1997) (holding that a state statute requiring "so help me God" at the conclusion of an oath of office for public notary violated the No Religious Test Clause). *See also Sherbert v. Verner*, 374 U.S. 398, 402 (1963) (citing *Torcaso*) (Free Exercise Clause does not allow government to "compel affirmation of a repugnant [religious] belief").