

May 15, 2013

Jim Judd, Superintendent
Michelle Howell, Board President
705 Lucky St., Fayette, MO 65248

Darren Rapert, Principal
Gwen Pope
510 N. Cleveland, Fayette, MO 65248

cc: jjudd@fayette.k12.mo.us, drapert@fayette.k12.mo.us, gpope@fayette.k12.mo.us

Re: Unconstitutional Morning Devotional Prayer Sessions at Fayette High School

A student at Fayette High School (“FHS”) who is a member of the American Humanist Association (“AHA”) recently informed us that Gwen Pope, an FHS teacher, holds Christian devotional prayer sessions for students each Friday morning in her classroom. Students are encouraged to attend these sessions by an announcement made by the principal over the school’s intercom system.¹ These public school prayer sessions are clearly unconstitutional.

The AHA is a national nonprofit organization with over 10,000 members and 20,000 supporters across the country, including in Missouri. The mission of AHA’s legal center is to protect one of the most fundamental principles of our democracy: the constitutional mandate requiring separation of church and state.²

The Supreme Court has made clear that the First Amendment’s Establishment Clause “has erected a wall between church and state. That wall must be kept high and impregnable.” Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1, 18 (1947). To do so, “the Constitution mandates that the government remain secular, rather than affiliate itself with religious beliefs or institutions.” County of Allegheny v. ACLU, 492 U.S. 573, 610 (1989). In order to secure this freedom from state-backed religion, the Constitution requires that any governmental “practice which touches upon religion, if it is to be permissible under the Establishment Clause,” must have a “secular purpose” and not “advance . . . religion.” *Id.* at 592. Specifically, the government “may not promote or affiliate itself with any religious doctrine or organization.” *Id.* at 590. Courts “pay particularly close attention to whether the challenged governmental practice either has the purpose or effect of [unconstitutionally] ‘endorsing’ religion.” *Id.* at 592. Endorsement includes “conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.” *Id.* at 593. Not only may the government not advance, promote, affiliate with, endorse, prefer or favor any *particular* religion, it “may not favor religious belief over disbelief” or “adopt a preference for the dissemination of religious ideas.” *Id.* (citations omitted).

¹ The announcement invites students to attend the “Friday morning devotionals in Mrs. Pope’s room.”

² The very first sentence of the Bill of Rights mandates that the state be secular: “Congress shall make no law respecting an establishment of religion.” This provision, known as the Establishment Clause, “build[s] a wall of separation between church and State.” Reynolds v. United States, 98 U.S. 145, 164 (1878). Pursuant to the Fourteenth Amendment, the Establishment Clause applies to the states. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

This includes any school-sponsored, -promoted or -affiliated religious activity in a public school. A religious activity is “state-sponsored” and therefore unconstitutional if “an objective observer . . . will perceive official school support for such religious [activity].” Board of Educ. v. Mergens, 496 U.S. 226, 249–50 (1990). The Supreme Court has frequently reiterated its “heightened concerns with protecting freedom of conscience [of students] from subtle coercive pressure [in favor of religion] in the elementary and secondary public schools.” Lee v. Weisman, 505 U.S. 577, 592 (1992) (holding prayers at graduation unconstitutional). This includes in particular “prayer exercises in public schools [which] carry a particular risk of indirect coercion” and are therefore unconstitutional. *Id.* (citing Sch. Dist. Abington v. Schempp, 374 U.S. 203, 205 (1963) (Bible reading before class unconstitutional) and Engel v. Vitale, 370 U.S. 421 (1962) (prayer at beginning of school day unconstitutional)).³ Courts have accordingly consistently ruled that the Establishment Clause prohibits teachers from leading, sponsoring, or participating in prayer with students, whether during school hours or not (*i.e.* in extracurricular settings such as athletic events, graduations and student clubs).⁴

Not only is leading students in prayer at school unconstitutional, so is “inviting or encouraging students to pray.” Herdahl v. Pontotoc County Sch. Dist., 933 F. Supp. 582, 591 (N.D. Miss. 1996). In fact, “the cases are quite clear that government-mandated prayer for students in public schools is impermissible,” as well as “student-led and student-initiated prayer at public school functions.” Warnock v. Archer, 380 F.3d 1076, 1080 (8th Cir. 2004). Any time a “teacher or administrator [acts with the] intent to facilitate or encourage prayer in a public school [it] is per se . . . unconstitutional.” Holloman v. Harland, 370 F.3d 1252, 1285 (11th Cir. 2004).⁵

³ See also Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 303 (2000) (student-delivered prayer before school football games unconstitutional); Wallace v. Jaffree, 472 U.S. 38, 48 (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); 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 e.g. Borden v. Sch. Dist., 523 F.3d 153, 174, n.16 (3rd Cir. 2008), *cert denied*, 555 U.S. 1212 (2009) (faculty participation in pre-game prayers unconstitutional); Doe v. Duncanville Indep. Sch. Dist., 994 F.2d 160, 163 (5th Cir. 1993); Marchi v. Bd of Cooperative Educational Services, 173 F.3d 469, 477 (2d Cir. 1999), *cert. denied*, 528 U.S. 869 (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 (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); Roberts v. Madigan, 921 F.2d 1047, 1056-58 (10th Cir. 1990), *cert. denied*, 112 S. Ct. 3025 (1992) (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); Jager v. Douglas Cty. Sch. Dist., 862 F.2d 824, 831 (11th Cir. 1989) *cert. denied*, 490 U.S. 1090 (1989) (pregame invocations at high school football games violated Establishment Clause); Steele v. Van Buren Public Sch. Dist., 845 F.2d 1492, 1493 (8th Cir. 1988) (permitting teachers to conduct prayer and religious activity at mandatory school functions unconstitutional); Hall v. Bd. of Sch. Comm’rs, 656 F.2d 999, 1003 (5th Cir. 1981) (high school’s morning devotional readings over public address system and teaching elective Bible literature course unconstitutional); Karen B., 653 F.2d at 902 (striking down statute authorizing voluntary student-initiated prayer or teacher-initiated prayer at the start of school day); Meltzer v. Bd. of Pub. Instruction, 548 F.2d 559, 574 (5th Cir. 1977), *aff’d on reh’g*, 577 F.2d 311 (1978) (*en banc*), *cert. denied*, 439 U.S. 1090 (1979) (Bible reading to students over the public address system each morning unconstitutional); 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 during nonschool hours and wore ‘I Prayed’ stickers during instructional time after the event could have been perceived as having endorsed the prayer event as representatives of the school, and thus violated the 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) (unpublished) (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) (“the practice of initiating, leading, or encouraging the recitation or singing of the ‘Aldine School Prayer’ . . . is in violation of the First Amendment.”).

⁵ See also Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 407 (5th Cir. 1995) (Duncanville II) (school’s practice of allowing its employees to participate in and supervise student prayers during athletic events unconstitutional); Steele, 845 F.2d at 1493 (8th Cir. 1988) (affirming

Turning to the particular school prayer practice at FHS, the Friday morning devotionals take place in Mrs. Pope's classroom after the school day begins at 7:30, when students arrive and the busses pull up.⁶ During these sessions, Mrs. Pope leads the students in prayer and often serves them breakfast. This practice has been ongoing for at least a year. The sessions typically consist of about fifteen or more FHS students and Mrs. Pope. The only outsider is Mrs. Pope's husband, who is known by the students to be affiliated with the nearby Central Methodist University. Non-participating students can see and hear the teacher praying with students as they walk by her classroom, which is close to the school entrance.

Where, as here, a governmental official, such as a public school teacher, leads her students in prayer during the school day, she has clearly violated the Establishment Clause. The prayer sessions would be also unconstitutional even if student-led because FHS has clearly endorsed and facilitated them. Holloman, 370 F.3d at 1287 (stating that “[s]chool personnel may not facilitate prayer simply because a student requests or leads it”).

This is not a novel issue. For example, in Bell v. Little Axe Indep. Sch. Dist., 766 F.2d 1391, 1397 (10th Cir. 1985)⁷, the court heard a case in which teachers were initially supervising and participating in religious meetings involving students and non-students immediately before school. The meetings were advertised throughout the school and also commenced “shortly after school buses arrived.” *Id.* Eventually, the teachers were disallowed from participating, but one teacher was required to monitor the student-led activity. The court found it significant that teachers had participated in the meetings at one time when finding that the passive presence of even one teacher produced the same appearance of school authorization or approval. *Id.* at 1405. Also relevant to the court's finding of unconstitutionality was the fact that “[f]ew other student organizations ever met at the school, and *none* met during the morning between the arrival of the buses and the first class,” and the fact that students who pulled up in the busses were aware of what was going on inside the classroom. *Id.* In light of these facts, the court concluded that the prayer meetings “conferred an imprimatur of state approval on religion” in the school district and were therefore unconstitutional. *Id.* The court stated that “it does [not] matter that the meetings took place before classes actually began. The students were under the control and supervision of the school from the moment they boarded the school bus.” *Id.* at 1406. In FHS' case, the weekly classroom prayer sessions are similar to those in Bell, but are even more egregious. In Bell, the school was guilty of affiliating itself with a *student* group that promoted religion. Here, there is no student group. FHS is the sole actor as a school employee leads and organizes the prayer sessions.

Teachers simply cannot participate in prayers with students at school, nor can they promote their religious beliefs in any other way to their students. See e.g. Duncanville, 70 F.3d at 404 (coach's participation in prayers with his players during practices and after games was “an unconstitutional endorsement of religion”)⁸ and Pelozza, 37 F.3d at 522 (holding that to “permit [a teacher] to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause”).⁹

district court order that held that the school “violated the establishment clause . . . by permitting teachers to conduct prayer and religious activities at mandatory school functions.”); Human, 725 F. Supp. at 1507.

⁶ According to the FHS School Handbook, the school opens at 7:30 a.m.

⁷ *Overruled on other grounds by* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299 (1986).

⁸ See also Borden, 523 F.3d at 176 (“As in Duncanville, Borden's involvement in prayer at these two activities - as a participant, an organizer, and a leader - would lead a reasonable observer to conclude that he was endorsing religion.”).

⁹ See also Marchi v. Board of Cooperative Educational Services of Albany, 173 F.3d 469, 477 (2nd Cir. 1999).

That attendance at the morning devotionals is optional does not change the fact that they violate the Establishment Clause.¹⁰ It is the school's decision to promote and affiliate itself with Christianity that is unconstitutional. The school has endorsed the religious message of the prayers by permitting a teacher to deliver them to students at school.

Compounding the Establishment Clause violation here is the fact that Mrs. Pope prominently displays Christian literature on her desk.¹¹ This display violates the Establishment Clause, as a student would reasonably perceive it as her promoting her religious views to her students.¹² Furthermore, during class, Mrs. Pope has told students on several occasions that they will be punished "by God" if they aren't "good." She has also made sectarian references to the Bible during her math class.

In view of the foregoing, FHS has committed multiple constitutional violations. The school may be sued in federal court under 42 U.S.C § 1983 for injunctive and declaratory relief. In addition, because the law is area is well established, individual actors, such as the principals and teachers involved, are subject to suit in their *individual* capacity and are personally liable for damages for these violations, along with reimbursement of plaintiff's attorneys' fees.¹³

This letter serves as official notice of these constitutional violations and a demand that FHS terminate this and any similar illegal activity immediately.

Sincerely,

Monica Miller
William Burgess
American Humanist Association

¹⁰ See Engel, 370 U.S. at 430; Schempp, 374 U.S. at 224-25; Holloman, 370 F.3d at 1287-88 ("That students . . . may have been free to leave the room, does not alleviate the constitutional infirmities of Allred's moment of silence."); Jager, 862 F.2d at 832 ("whether the complaining individual's presence [at the football games] was voluntary is not relevant to the Establishment Clause analysis."); Lundberg v. W. Monona Cmty. Sch. Dist., 731 F. Supp. 331, 334 (N.D. Iowa 1989) ("The voluntariness of attendance at the [graduation] ceremony does not decrease the concern that prayer at the ceremony might still appear to have the stamp of school approval."); Aldine, 563 F. Supp. at 886-887.

¹¹ One book's title, "God's Game Plan," faces outward for all of the students to see. The publisher, which is also displayed to the class, is "Fellowship of Christian Athletes." There is an image of the Christian cross on the book as well.

¹² See Roberts, 921 F.2d at 1056-58 (teacher could be prohibited from stocking two books on Christianity on shelves, because they could leave students with the impression that Christianity was officially sanctioned).

¹³ Qualified immunity from suit is lost, and individuals may be sued in their personal, rather than official capacity, under Section 1983 when the law has already clearly established that acts of the sort they have engaged in are unconstitutional.