



October 24, 2011

VIA FACSIMILE (615-792-2551) AND U.S. MAIL

Ms. Dianne Proffitt, Chairperson (on behalf of the Cheatham County Board of Education)
Dr. Tim Webb, Director of Schools
Ms. Jenny Simpkins, Principal, Sycamore High School
Cheatham County School District
102 Elizabeth Street
Ashland City, TN 37015

Re: Teacher Participation in Field of Faith Event

Ladies and Gentlemen:

We have been contacted by a District staff, the FCA Club, and community members regarding restrictions on the participation of faculty and staff in the recent Field of Faith event held after school at Sycamore High School. We are concerned that your legal counsel may have provided you with inaccurate legal advice that impermissibly restricted the constitutional rights of teachers and staff to engage in private religious expression. The purpose of this letter is to provide you with guidance and clarification on the rights of school teachers and staff to participate in religious activity when done so in their private capacities as citizens.

It is our understanding that on Friday evening, October 19, 2011, the Sycamore High School Fellowship of Christian Athletes sponsored the Fields of Faith event, a community-wide religious event held on the school's athletic field. FCA followed the same procedures open to other community groups to request use of the field. The organizers invited the Pleasant View community, including District teachers and staff, to attend and actively participate in the event. The organizers also invited Gwen White Owl, a teacher at Sycamore High School, to speak at the event and relate a personal testimony to the attendees. The organizers took precautions to ensure that all attendees at the event would be aware that Mrs. White Owl was participating in her private capacity as a community member and not in her official capacity as a District employee. It is our understanding that the District administration desired for Mrs. White Owl and all of its teachers and staff to be able to actively participate in the event. However, the District was informed by its legal counsel that while teachers and staff may passively attend the event, they may not pray, speak, or otherwise actively participate in any manner. The District's legal counsel was apparently concerned that such active participation would violate a 2009 settlement agreement between the District and the ACLU.

It is our opinion that District teachers and staff members have a constitutional right to participate in such private, religious events in their personal capacities without violating the Establishment Clause. Their right to do so cannot be abrogated by a settlement agreement to which the teachers, in their private capacities as citizens, are not parties.

The Supreme Court has recognized that “there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.” *Bd. of Ed. of Westside Cmty. Sch. Dist. v. Mergens*, 496 U.S. 226, 250 (1990) (emphasis added). Applying this principle, courts have repeatedly held that a school’s faculty and staff have the constitutional right to participate in community-sponsored religious activities before and after their contracted work times because their participation is constitutionally protected private speech. In *Wigg v. Sioux Falls School Dist.*, 382 F.3d 807 (8th Cir. 2004), the school district prohibited an elementary teacher from participating in an after-school Bible club that was held at the school where she taught and that was attended by students in her class. The school district claimed to be concerned “that her participation in the organization might be perceived as an establishment of religion.” *Id.* at 811. The Court ruled that “Wigg’s participation in the after-school Club constitutes private speech,” and such “private speech occurring at non-school functions held on school grounds” is entitled to constitutional protection. *Id.* at 815. The court further held that the school district’s policy violated the teacher’s right to free speech:

SFSD's policy of prohibiting all employees-even on their own time-from participating in any religious-based programs held on school grounds is an overly-broad remedy. In an effort to avoid an establishment of religion, SFSD unnecessarily limits the ability of its employees to engage in private religious speech on their own time....As such, **SFSD's Religion Policy preventing SFSD employees from participating in religious-based activities is viewpoint discriminatory and, thus, per se unconstitutional.**

Id. at 814 (emphasis added).

The right of school officials to engage in private, religious speech was further upheld in *Doe v. School Dist. of City of Norfolk*, 340 F.3d 605 (8th Cir. 2003), where a school board member recited a prayer at the school-sponsored graduation despite specific instructions prohibiting prayer at the ceremony after the school district was threatened with a lawsuit by the ACLU. The court ruled that even though the board member “was given access to the podium as a result of the School Districts' past practice of allowing School Board members, whose children were part of the graduating class, to address the students and the audience,” *id.* at 608, his recitation of the Lord’s Prayer was private speech protected by the First Amendment.

[Board Member] Scheer undeniably took advantage of his School Board membership to gain access to a forum in which he could espouse his personal views. However, private speech is constitutionally protected, even though it occurs at a school related function. . . . [T]he lack of involvement in Scheer's conduct on the part of the School District requires a determination that the recitation of the Lord's Prayer constituted private speech.

Id. at 613.

The U.S. Department of Education has likewise recognized the right of teachers and staff to participate in religious activities on school grounds in their personal capacities.

Teachers may, however, take part in religious activities where the overall context

makes clear that they are not participating in their official capacities. . . . Similarly, teachers may participate in their personal capacities in privately sponsored baccalaureate ceremonies.

U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645, 9647 (Feb. 28, 2003) (available at http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html).

It is clear that District teachers and staff have the constitutional right to participate in these types of religious activities and their participation in them does not cause the District to violate the Establishment Clause. The teachers and staff who desired to actively participate in the Fields of Faith event would be acting solely in their personal capacities as community members. FCA would advise attendees that the District did not sponsor or endorse the event and that Mrs. White Owl's speech would be made in her private capacity as a citizen and not as a representative of the school. Any Pascagoula teachers and staff present at the event would merely be part of a much larger gathering of community members. As to Mrs. White Owl's involvement, she has the right to participate in religious activities in her personal capacity. The situation would be no different from Mrs. White Owl teaching a Sunday school class at a church that rented school facilities for its Sunday services. In both situations, Mrs. White Owl is acting in her personal capacity as a citizen and has the same right to express her religious beliefs as any other citizen. Furthermore, the District's settlement agreement with the ACLU, which is not binding upon the private religious expression of District employees, cannot be used to justify censorship of private religious speech. Any attempt to abridge the First Amendment right of school teachers and staff to participate in and even lead non-school religious events on school grounds held before or after school would be a violation of their constitutional rights.

To minimize further attacks against the District by groups such as the ACLU over the permissible participation of District teachers and staff in non-school religious events, we suggest that the District advise all employees who exercise their right to participate in religious activities and expression to clearly indicate that they are participating in their private capacities as citizens and not as representatives of the District. Doing so will allow District employees to freely exercise their right to religious freedom while preventing any confusion among parents or students over whether the employee is acting in his or her private capacity as a citizen, while also avoiding the current violation of employees' constitutional rights that the District is engaging in.

Please let us know your response to this letter and how you will choose to respond to similar situations in the future in order to protect the constitutional rights of District employees.

Sincerely,



David Cortman, ADF Senior Counsel
Jeremy D. Tedesco, ADF Legal Counsel
J. Matthew Sharp, ADF Litigation Staff Counsel



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