



September 2, 2014

Re: Response to Americans United's Letter Regarding Teacher and Staff Constitutional Rights

Dear Superintendent:

You likely received a letter this week from Americans United for Separation of Church and State (AU) encouraging you to disregard the recently enacted North Carolina Senate Bill 370 and the U.S. Constitution by prohibiting teachers and staff from even passively bowing their heads in order to be respectful of private student-initiated, student-led religious expression at school. The letter may have left you with the impression that you must order district employees to flee the room the moment a student engages in prayer or other religious expression. But AU completely ignores the importance that the particular facts and circumstances of a situation play in determining what is permissible at school. The purpose of this letter is to provide your District with guidance on the constitutional rights of school administrators and teachers to voluntarily participate in private religious expression at work. Specifically, there are three general guidelines to assist you in complying with North Carolina law and the U.S. Constitution:

1. When not on contract time, school employees may engage in public and private religious expression with anyone and at any location (including school property).
2. During contract time, school employees may engage in private religious expression, including prayer, on their own or with other school employees as long as students are not present or the context makes clear that they are not acting in their official capacity as an employee.
3. During contract time, school employees may be present when students engage in student-initiated, student-led religious expression, including prayer, in order to ensure safety and maintain order. School employees may show respect for students' religious expression, such as bowing their heads, when it occurs. But employees should not lead, direct, encourage, or actively participate in the students' religious expression.

It is our hope that the discussion of these guidelines below will further assist you in understanding why the District need not comply with the AU's inaccurate, blanket demands.

The Rights of School Employees Outside of Contract Time

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 certain

constitutional rights to engage and participate in religious expression before and after their contracted work times without violating the Establishment Clause.

In *Wigg v. Sioux Falls School District*, 382 F.3d 807 (8th Cir. 2004), for instance, the school district prohibited an elementary school 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 rights:

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.

Id. at 814 (emphasis added).

SB 370 properly recognizes the rights of school employees during non-contract time. It states that school boards “may not prohibit school personnel from participating in religious activities on school grounds that are initiated by students at reasonable times before or after the instructional day.” This describes the exact scenario in the *Wigg* case where a teacher participated in an after-school religious activity on school grounds. Although AU argues that *Wigg* is the “exception,” in reality *Wigg* stands for the proposition that whenever a school employee is off-duty or when the context establishes that the employee is acting in her private capacity, she may engage in religious expression. SB 370 thus follows *Wigg* to ensure that when school employees are not on the clock, their right as private citizens to lead and actively participate in religious expression with anyone and at any location is fully protected.

The Rights of School Employees During Contract Time

“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (emphasis added). However, because teachers act as government representatives while at work, they must remain neutral towards religion—neither promoting nor disparaging it—in their interactions with students. But when alone or with other staff members, teachers are free to engage in personal religious expression. As the U.S. Department of Education has explained:

Teachers may ... take part in religious activities where the overall context makes clear that they are not participating in their official capacities. Before school or during lunch, for example, teachers may meet with other teachers for prayer or Bible study to the same extent that they may engage in other conversation or nonreligious activities. 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).

In *Tucker v. State of California Department of Education*, 97 F.3d 1204, 1208-09 (9th Cir. 1996), the California Department of Education enacted policies prohibiting employees from “[e]ngag[ing] in any religious advocacy, either written or oral, during the work hours or in the workplace.” The State claimed it was doing so to “remain[] neutral on religious matters and avoid[] the establishment of religion.” *Id.* at 1212. The Ninth Circuit ruled that the policy violated the free speech rights of school employees. *Id.* at 1214. While the court acknowledged that the department “may permissibly restrict such religious advocacy” when a teacher “teaches,” it reaffirmed that “speech by a public employee, even a teacher, does not always represent, or even appear to represent, the views of the state.” *Id.* at 1213.

For example, if one employee suggested to another during the course of a private conversation at the office that he should consider being baptized or circumcised, or, while at his work station, wrote a letter to his sister suggesting that she enter a convent or convert to Judaism, his conduct would not carry or give the impression of carrying the impermissible “imprimatur of state approval on religious sects or practices.” In fact, most of the conduct covered by the orders is speech that could in no way cause anyone to believe that the government endorsed it.

Id. at 1212. Because students are not present during such circumstances, there is no risk of “endorsement” when a school employee expresses a religious viewpoint or offers a prayer.

When students are present, school employees must maintain a neutral stance towards religion, thus ensuring that students are free to engage in student-initiated, student-led religious expression, including prayer. SB 370 clearly states this limitation, explaining that school employees shall not “lead, direct, or encourage any religious or antireligious activity in violation of that portion of the First Amendment of the Constitution of the United States prohibiting laws respecting an establishment of religion.” It thus properly respects the supreme authority of the Constitution and requires school staff to follow its dictates. However, SB 370 also recognizes that neutrality does not require school employees to vacate the premises when student-led religious expression occurs. To the contrary, their obligations as school employees to ensure the safety of students and maintain order may require them to remain present during religious activities that are student-initiated and student-led. And when school employees are present, nothing in the Constitution prohibits them from showing respect for students’ religious beliefs by, according to SB 370, “adopt[ing] a respectful posture.”

AU relies heavily on the case of *Borden v. School District of the Township of East Brunswick*, 523 F.3d 153 (3d Cir. 2008), where the U.S. Court of Appeals for the Third Circuit ruled that a football coach who bowed his head and knelt with players as they prayed violated the Establishment Clause. What AU negligently omits is that the Third Circuit based its decision on the additional fact that the coach had “organized, participated in, and led prayer activities with his team on numerous occasions for twenty-three years.” *Id.* at 179.

Without Borden's twenty-three years of organizing, participating in, and leading prayer with his team, this conclusion would not be so clear as it presently is. We agree with Borden that bowing one's head and taking a knee can be signs of respect. Thus, if a football coach, who had never engaged in prayer with his team, were to bow his head and take a knee while his team engaged in a moment of reflection or prayer, we would likely reach a different conclusion because the same history and context of endorsing religion would not be present.

Id. at 178-79 (emphasis added). The court acknowledged that merely bowing one's head to show respect for student expression does not violate the Constitution where there is no evidence of a long history of previous unconstitutional conduct.

Given the importance of keeping students safe and maintaining order during any school activities involving students, it is often necessary for school staff to be present when student religious expression occurs. In fact, whenever you anticipate that school employees will be present during the course of student-initiated and student-led activities involving religious expression, the school should explain that the primary purpose for such school employee attendance and involvement is to ensure student safety and maintain order. But under such circumstances, nothing forbids teachers from respecting student-initiated and student-led prayer by bowing their heads.

We hope this letter proves helpful in dispelling some of the unfounded allegations of unconstitutional conduct raised in AU's letter. If your school district has additional questions or concerns, or would like assistance in ensuring that your policies governing religious expression by school employees comply with relevant state and federal law, Alliance Defending Freedom's Legal Team would be happy to assist you at no cost. Please feel free to call ADF at 770-339-0774 if you have questions.

Sincerely,

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