



August 18, 2011

VIA FACSIMILE (229-938-6528) AND U.S. MAIL

Mr. Wayne Rodolfich, Superintendent
Pascagoula School District
1006 Communny Ave.
Pascagoula, MS 39568

Re: Response to Aug. 10, 2011 Freedom From Religion Foundation Letter

Dear Superintendent Rodolfich:

You recently received a letter from the Freedom From Religion Foundation regarding a community prayer gathering held before the start of school at Pascagoula High School during which parents, students, and members of the community prayed for the upcoming school year. In its letter, FFRF demands that the District take steps to “prevent future prayer events organized by school officials.” The purpose of this letter is to respond to the erroneous claims contained in FFRF’s letter and provide you with guidance on the rights of school administrators and teachers to participate in religious activity when done so in their private capacities as parents and/or citizens. It is our hope that this letter will assist you in understanding why the District should not comply with FFRF’s demands.

It is our understanding that on Sunday, July 31, 2011, a group of community members, parents, and students, including members of the staff and faculty of Pascagoula High School, met outside of the entrance to the High School to pray for the school, faculty, staff, and students for the 2011-2012 school year. Not only did the prayer gathering occur on a Sunday, a day on which the school was closed, but it also occurred before August 1st, the first day on which teachers report to school, and before August 4th, the first day of school. During the gathering, several participants spoke to those in attendance and led collective prayers. It appears that Principal Al Sparkman participated in the gathering by speaking to his fellow community members of the difficulties faced by students at Pascagoula High School and participating in the prayer.

It is our opinion that this private, religious gathering which occurred on a weekend prior to the start of school is constitutionality permissible, and the teachers and staff members of the Pascagoula School District have a constitutional right to participate in such private, religious events in their personal capacities without violating the Establishment Clause.

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. 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).

It is clear that any teachers and administrators who participated in the prayer gathering at Pascagoula High School were doing so in their personal capacities as parents and/or community members. Based on the cases and the U.S. Dept. of Education guidelines above, they 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 gathering was held on a weekend before the start of the 2011-2012 school year. Any Pascagoula teachers and administrators present at the event were merely part of a much larger gathering of community members. Furthermore, the event was held outside of the front door to the High School, a location that any member of the community could freely access on a Sunday afternoon. As to Principal Sparkman's involvement, he has the right to participate in and lead religious activities in his personal capacity. The situation would be no different from Principal Sparkman teaching a Sunday school class at a church that rented school facilities for its Sunday services. In both situations, Principal Sparkman is acting in his personal capacity as a citizen and has the same right to express his religious beliefs as any other citizen. Any attempt to abridge the First Amendment right of school administrators and teachers to participate in and 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 FFRF over the permissible participation of District faculty and staff in non-school religious events, we suggest that Pascagoula School District advise all administrators, teachers, and staff who exercise their right to participate in religious activities and expression to clearly indicate that they are participating in their capacities as private citizens and not as employees or representatives of the Pascagoula School District. Doing so will allow District faculty and staff 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.

Thank you for your attention to this very important matter. Please feel free to call ADF to discuss any questions you may have.

Sincerely,



David Cortman
Senior Counsel



Jeremy D. Tedesco
Legal Counsel