



October 21, 2011

VIA FACSIMILE (901-284-6525) AND U.S. MAIL

Mr. Frank Farrell, Chair (on behalf of the School Board)
Mr. Ben Wortham, Superintendent
Mr. Larry Davis, Principal, Clay Hill Elementary
School District of Clay County
900 Walnut Street
Green Cove Springs, FL 32043

Re: Response to FFRF Letter

Dear Messrs. Farrell, Wortham, and Davis:

You recently received a letter from the Freedom from Religion Foundation regarding allegations that Principal Davis mentioned a weekly "Prayer Around the Flagpole" event held at Clay Hill Elementary. The event is a community-led event sponsored by local pastors, and it occurs at 8:15 a.m. before the start of the school day. It is our understanding that Principal Davis's discussion of the event was made in his Friday "Bark," an internal newsletter distributed solely to the faculty and staff of Clay Hill Elementary. The same newsletter also discussed No Child Left Behind waivers, a call for teachers to sign up to participate in the SES tutoring program, and information regarding grants available for teachers, among other announcements.

FFRF claims that "[i]t is grossly inappropriate for principals, teachers, and other public school employees, or outside adults to actively participate in or promote student-run religious organizations and activities." However, it is FFRF that has grossly misstated the facts by claiming that the internal document was a "school newsletter" and by making blanket, across-the-board, claims about the law that are grossly inaccurate. FFRF 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 the District with guidance on the constitutional rights of school administrators and teachers to voluntarily participate in private religious expression at work. It is our hope that this letter will assist you in understanding why the District need not comply with the FFRF's inaccurate, blanket demands.

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 at work and to participate in community-sponsored religious activities before and after their contracted work times without violating the Establishment Clause. Some examples follow.

In *Tucker v. State of Cal. Dept. of Educ.*, 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 the employees. *Id.* at 1214. While the court acknowledged that the department “may permissibly restrict such religious advocacy” when a teacher “teaches” or when an employee makes “a public speech on education,” 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.

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 U.S. Department of Education has likewise recognized the right of teachers and staff to engage in private religious expression at work 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 Principal Davis was well within his right to mention the weekly Prayer Around the Flagpole event in his weekly staff newsletter. The context of the newsletter made it clear that the event was merely one out of 10 different announcements included in the newsletter. The event is community led, occurs before school, and is not sponsored by the school district. Principal Davis did not violate the Establishment Clause by giving equal treatment to the Prayer Around the Flagpole event as was given to other announcements that he believed would be of interest to the teachers and staff. Furthermore, based on the cases and the U.S. Dept. of Education guidelines above, staff and teachers have the constitutional right to voluntarily participate in the before school Prayer Around the Flagpole when doing so in their private capacities as citizens. Their voluntary participation in such events does not cause the District to violate the Establishment Clause. Any attempt to abridge the First Amendment right of school administrators and teachers to participate in voluntary before-school prayer groups would be a violation of their constitutional rights.

To minimize further attacks against the District by groups such as the FFRF over private religious expression by District faculty and staff, we suggest that the School District advise all administrators, teachers, and staff who exercise their right to participate in voluntary 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 District. Doing so will allow District faculty and staff to freely exercise their right to religious freedom while preventing any confusion among fellow staff members and the community over whether the employee is acting in his or her private capacity as a citizen.

Please feel free to call ADF to discuss any questions you may have.

Sincerely,



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



Roger K. Gannam, Lindell & Farson, P.A.