FREEDOM FROM RELIGION *foundation*

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December 27, 2017

SENT VIA MAIL AND EMAIL:
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Ms. Joan Lark
President
Bret Harte Union High School District Board of Education
323 South Main St.
Angels Camp, CA 95221

Re: Threatened lawsuit over religion in the science classroom

Dear President Lark:

I am writing on behalf of the Freedom From Religion Foundation ("FFRF"). FFRF is a national non-profit organization representing over 30,000 members nationwide with over 3,800 members in California. We wrote to Superintendent Chimente in 2012 and 2013 objecting to the unconstitutional distribution of student directory information to a religious organization and the district's support of baccalaureate services.

We write now to address the issue a Bret Hart High School sophomore and his attorney have raised with this board. We understand that a 16-year-old student is represented by attorney Greg Glaser who, according to his website, specializes in facilitating real estate deals without realtors. He also purports to offer "legal services to individuals willing to promote fundamental constitutional ideals," specifically on curious issues such as "Health Freedom," "Sovereignty," and "Separation of Powers."

According to reports, Glaser has argued that the board must undo its policy related to religious instruction and has said, "if the board clings to this unconstitutional policy, then my clients are prepared to litigate." We understand he had some support at the meeting. It is unclear exactly how Glaser thinks policy 6142.93 should be amended, but he said "Our goal is simple, we're asking the board to lift their ban on God in science class."

Glaser's petition is misguided. The law here is clear. First, schools may not promote religion. Second, students do not have a First Amendment right to use class time designated for a specific subject—during which other students are trying to learn—to promote their off-topic personal religious beliefs. The district's policy comports with these two constitutional norms.

1. Public schools may not promote religion.

As an initial matter, it is well settled that public schools may not advance or promote religion. *See generally*, *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Epperson v. Arkansas,* 393 U.S. 97 (1967); *Sch. Dist. of Abington Twp. v. Schempp,* 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962); *McCollum v Bd. of Ed*., 333 U.S. 203 (1948). There is no ambiguity when it comes to school-organized or school-imposed religion: it is unconstitutional.

Glaser's client is not seeking to discuss science in the classroom, but another topic entirely. Courts have consistently ruled that creationism, creationism "science," intelligent design, and all assorted offshoots are not science, but religious. *See, Edwards v. Aguillard*, 482 U.S. 578 (1987); *Epperson v. Arkansas,* 393 U.S. 97 (1968) (holding that school officials may not prohibit the teaching of evolution); *Freiler v. Tangipahoa Parish Bd. of Educ.,* 201 F.3d 602 (5th Cir. 2000) (holding that reading a disclaimer before teaching evolution violates the Establishment Clause); *Peloza v. Capistrano Unified Sch. Dist.,* 37 F.3d 517 (9th Cir. 1994) (holding school's prohibition on teaching creationism valid because permitting a teacher "to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause."); *Webster v. New Lenox Sch. Dist. No. 122,* 917 F.2d 1004 (7th Cir. 1990) (holding school board's prohibition on teaching "creation science" valid because the board had a responsibility to ensure that the teacher was not "injecting religious advocacy into the classroom."); *Kitzmiller v. Dover Area Sch. Dist.,* 400 F. Supp. 2d 707 (M.D. Pa 2005) (holding that a policy requiring students to hear a statement that intelligent design is alternative to Darwin's theory of evolution violates the Establishment Clause); *McLean v. Arkansas Bd. of Ed.,* 529 F. Supp. 1255 (D.C. Ark., 1982) (striking down a state statute mandating "balanced treatment for creation science and evolution science" because it violated the Establishment Clause).

Every attempt to smuggle religion into science classrooms by means of "alternative theories" has failed. As the court which most recently dealt with this issue explained, any theory that "depends upon 'supernatural intervention,' which cannot be explained by natural causes, or be proven through empirical investigation, and is therefore neither testable nor falsifiable" is "simply not science." *Dover*, 400 F. Supp. 2d at 717 (quoting *McLean*, 529 F. Supp. at 1267).

This distinction between creationism and religion is duly reflected in the final sentence of policy 6142.93 "Philosophical and religious theories are based, at least in part, on faith, and are not subject to scientific test and refutation. Such beliefs shall not be discussed in science classes, but may be addressed in the social science and language arts curricula." In other words, this is an accurate reflection of how courts have decided the issue.

In sum, the policy is sufficient in this regard. Religion cannot be preached in the science classroom and if it is to be discussed in a pedagogically appropriate manner, it ought to be in the social science or English classes.

This does not end the inquiry because Glaser apparently believes his client has a right to set the terms of science education for all students in that classroom. This belief stems from a misreading of the relevant law.

2. Students do not have a right to monopolize class time to promote their religion.

It's unclear precisely why Glaser believes his client has a right to distract from the education of other students or how such a right would allow schools to function at all, but according to online comments he has made on news stories on this subject,[1] he believes this client has a free speech right to do so. Glaser also seems to believe that the science classroom is an open "forum for the discussion of the scientific origins of mankind."[2] This is to misunderstand that the law. Twice.

First, if the classroom were a public forum, any citizen could use it to deliver any message it chose. But a public high school classroom is a nonpublic forum. *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 776 (10th Cir. 1991)(holding that a 9th grade government class is a nonpublic forum); *Bishop v. Aronov,* 926 F.2d 1066 (11th Cir.1991); relying on *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267–69 (1988). In *Hazelwood*, the Supreme Court recognized that creating and operating a school newspaper as part of a journalism class did not create a public forum. 484 U.S. at 263. As a nonpublic forum, school officials could regulate the contents of speech in the classroom in "any reasonable manner." *Id.* at 270.

Put another way, the classroom is a place where the government itself is speaking, teaching children. As the Ninth Circuit, which has jurisdiction over California, put it, "We do not face an example of the government opening up a forum for either unlimited or limited public discussion. Instead, we face an example of the government opening up its own mouth." *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1012 (9th Cir. 2000).

As government speech in a nonpublic forum the school's "control of its own speech is not subject to the constraints of constitutional safeguards and forum analysis . . . Simply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist." *Id. at* 1013. This includes Glaser and his client; they have no ability or right to dictate what is taught in public school classrooms.

Second, even if the science classroom were considered a limited public forum, the school is within its rights to limit the forum to "the discussion of certain subjects." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)(*citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-6, n.7 (1983)). As already explained, creationism is not a scientific explanation for the origins of mankind, as the courts have said. So even if classes were an open forum for scientific discussion, religion is not science and there is no right for a student to inject it into a science dialogue.

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[1] *See, e.g.,* http://www.uniondemocrat.com/localnews/5813008-151/bret-harte-student-wants-science-class-to-make#comment-3662614588

[2] *Id.*

It is of course true that "[n]either students [n]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). But in *Tinker,* the students passively wore armbands, they did not seek to takeover a classroom lesson. They "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder." *Tinker*, 393 U.S. at 514. This is not what Glaser is seeking for his client.

The district policies do not violate the First Amendment rights of students, even under the most liberal construction of *Tinker*. Nothing prevents Glaser's client from discussing his religion with other students in the halls, at lunch, between classes, or any other time when it will not derail a science class.

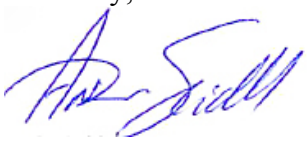
Glaser's position is no different than a student who believes devoutly in astrology asking for the right to use astronomy class to promote that view, or a student who thinks that alchemy is a viable pursuit using chemistry class to discuss that debunked idea, or a student who believes that demons or djinns cause disease hijacking a biology class with this outdated and unsubstantiated notion.

Glaser's client is free to believe whatever he wishes. He's not free to derail the education of every other student because of that belief. Doing so is an "invasion of the rights of others [and] is, of course, not immunized by the constitutional guarantee of freedom of speech." *Tinker*, 393 U.S. at 513. Even the dissenting Supreme Court justices in *Hazelwood* agreed: "[T]he school may constitutionally punish the budding political orator if he disrupts calculus class but not if he holds his tongue for the cafeteria . . . because student speech in the noncurricular context is less likely to disrupt materially any legitimate pedagogical purpose." *Hazelwood*, 484 U.S. at 283 (Brennan, J. *dissenting*).

Glaser concluded his misguided remarks by asking the board to "do the right thing and restore the Constitution to Bret Harte." The current policy accurately reflects the Constitution. Glaser is not seeking a restoration of the First Amendment, but favoritism for his client's particular brand of religion. Glaser is seeking religious privilege and his request should be rejected.

Should Glaser carry out his threat and sue the district, FFRF would be pleased to consult with your counsel, *pro bono*, and submit an *amicus* brief to the court in favor of the policy. We look forward to your response.

Sincerely,



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