



RE: Students' Right to Free Expression and the Pledge of Allegiance

To Massachusetts School Officials:

This letter concerns the rights of students who choose not to participate in the daily recitation of the Pledge of Allegiance, which they have a right to do under both state and federal law without any consequence. For the reasons stated below, the ACLU of Massachusetts believes that any policy that imposes any sanction or burden on students who choose not to participate in the Pledge or other such rituals clearly violates the First Amendment to the United States Constitution, Article 16 of the Declaration of Rights, and the Massachusetts Students Free Expression Act, M.G.L., c. 71, § 82.

As discussed in more detail below, under free speech principles, schools may not force students to explain their beliefs, send students to the principal's office or out of the classroom, or mete out any other form of discipline or punishment or pressure as it relates to students exercising their free expression rights -- including their right not to participate in the Pledge of Allegiance. Indeed, such treatment of students may also constitute "threats, intimidation or coercion" in violation of the Massachusetts Civil Rights Act. M.G.L. c. 12, §§ 11H and I.

Analysis

To start, we note that Section 69 of Chapter 71 of the Massachusetts General Laws states that "[e]ach teacher at the commencement of the first class of each day in all grades in all public schools shall lead the class in a group recitation of the 'Pledge of Allegiance to the Flag.'" However, this provision does *not* mandate that students recite the pledge or participate in the pledge ceremony. *Doe v. Acton-Boxborough Reg'l Sch. Dist.*, 468 Mass. 64, 74 (2014) ("no Massachusetts school student is required by law to recite the pledge or to participate in the ceremony of which the pledge is a part"). In fact, it could not. "That students have a constitutional right to remain seated during the Pledge is well established." *Frazier v. Winn*, 535 F.3d 1279, 1282 (11th Cir. 2008).

In the seminal case *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), the U.S. Supreme Court ruled that a compulsory flag salute would violate students' right to freedom of expression. Lower courts have since recognized that this right of expression protects students who engage in silent protest or visibly express dissent during the recitation of the pledge. Courts have held that students may express themselves by remaining seated, *Banks v. Bd. of Public Instr.*, 314 F.Supp. 285 (S.D.Fla.1970)¹, raising their fist, *Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2008), and kneeling, *V.A. v. San Pasqual Valley Unified Sch. Dist.*, No. 17-CV-02471-BAS-AGS, 2017 WL 6541447 (S.D. Cal. Dec. 21, 2017), rather than participate in the pledge ceremony by standing at attention.²

¹ *vacated on procedural grounds* by 401 U.S. 988, 91 S.Ct. 1223, 28 L.Ed.2d 526 (1971), *reinstated without published opinion by dist. ct. and aff'd*, 450 F.2d 1103 (5th Cir.1971)

² This is consistent with constitutional protections, which guarantee that students may engage in expression as long as their expression does not create a substantial and material disruption. *Tinker v. Des Moines Indep. Cmty. School District*, 393

Under both state and federal law, schools may not abridge students' right to free expression. M.G.L., c. 71, § 82. *See also Pyle v. Sch. Comm.*, 667 N.E.2d 869, 872 (Mass. 1996) (noting that section 82 incorporates and enhances federal student free speech rights and is mandatory upon all public schools).

School personnel abridge this right not only by imposing official discipline, such as detention, but also by reprimanding a student for exercising the choice not to participate in the pledge ceremony or by demanding the student justify or explain a refusal to participate. *See, e.g., Rabideau v. Beekmantown Cent. Sch. Dist.*, 89 F. Supp. 2d 263, 267 (N.D.N.Y. 2000) (finding that school abridged student's First Amendment rights in part by sending student to principal's office to discuss refusal to stand); *Frain v. Baron*, 307 F.Supp. 27, 33-34 (E.D.N.Y. 1969) (enjoining school from treating any student who refuses to participate in the pledge differently from those who participate). Indeed, "[c]ourts have a long (and unequivocal) history of siding with students over schools when faced with similar restrictions, finding that schools cannot force students into patriotic expression under the threat of retaliation." *V.A.*, 2017 WL 6541447, at *4. *See also Bowler*, 514 F.Supp.2d at 177 (stating, in the student speech context, where the First Amendment is implicated, "the ties goes to the speaker, not the censor").

Certainly, disagreement with the political message students express by sitting out the pledge, be it perceived as "anti-police" or a demand for racial equality, cannot justify or excuse the abridgement of the students' right. *See Bowler*, 514 F. Supp. 2d at 176 (stating "the school must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" to justify a regulation on speech); *see also Banks*, 314 F.Supp. at 295 (affirming student's right to remain seated during pledge and noting that student did so to protest against Black repression in America).

"[S]chools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'" *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038, 2046 (2021). Notably, in *Spence v. State of Wash.*, 418 U.S. 405 (1974), the Supreme Court rejected the argument that speech may be suppressed to protect a purported interest in preserving the flag as an unalloyed symbol of the nation. *Id.* at 412-13. A speaker may not be punished "for failing to show proper respect for our national emblem." *Id.* at 412; *see also Barnette*, 319 U.S. at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein").

And "[t]hough schools may regulate students' speech in some limited circumstances, public school students . . . cannot be punished merely for expressing their personal views on the school

U.S. 503 (1969). "To support the regulation of student speech under *Tinker*, school officials must produce some *evidence* that a restriction 'is necessary to avoid material or substantial interference with schoolwork or discipline.'" *Bowler v. Town of Hudson*, 514 F. Supp. 2d 168, 178 (D. Mass. 2007) (original emphasis). "The risk that student counseling may be required, or the likelihood of unplanned classroom discussions, does not rise to the level of a substantial and material disruption comprehended by *Tinker*." *Id.* *See also Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2048. Certainly, sitting silently while others say the pledge does not qualify as disruption under this standard.

premises—whether ‘in the cafeteria, or on the playing field, or on the campus during the authorized hours.’” *V.A.*, 2017 WL 6541447, at *4 (citing *Tinker*, 393 U.S. at 506).

As the *Barnette* Court also stated:

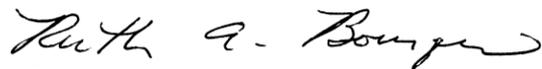
[W]e apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous, instead of a compulsory routine, is to make an unflattering estimate of the appeal of our institutions to free minds. . . . [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

319 U.S. at 637.

Conclusion

For all these reasons, schools may not discipline or question students who choose to exercise their protected rights not to participate in recitation of the Pledge of Allegiance, the singing of the National Anthem, or other expressions of purported patriotism.

Sincerely,



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