



May 9, 2018

VIA EMAIL AND FIRST CLASS MAIL

AMERICAN CIVIL  
LIBERTIES UNION OF  
MARYLAND

MAIN OFFICE  
& MAILING ADDRESS  
3600 CLIPPER MILL ROAD  
SUITE 350  
BALTIMORE, MD 21211  
T/410-889-8555  
F/410-366-7838

FIELD OFFICE  
6930 CARROLL AVENUE  
SUITE 410  
TAKOMA PARK, MD 20912  
T/301-270-2258

[WWW.ACLU-MD.ORG](http://WWW.ACLU-MD.ORG)

OFFICERS AND DIRECTORS  
COLEMAN BAZELON  
PRESIDENT

SUSAN GOERING  
EXECUTIVE DIRECTOR

ANDREW FREEMAN  
GENERAL COUNSEL

Superintendent Verletta White  
Baltimore County Public Schools  
6901 Charles Street  
Towson, MD 21204

Chairman Edward A. Gilliss, Esq.  
Baltimore County Board of  
Education  
6901 Charles Street  
Towson, MD 21204

Dear Superintendent White and Chairman Gilliss:

We write on behalf of the American Civil Liberties Union of Maryland, Catonsville Middle School (CMS) student Mariana Taylor and the Taylor family, regarding difficulties Mariana faced recently from school officials after she respectfully exercised her right to quiet dissent during the Pledge of Allegiance. Inspired by Colin Kaepernick, Mariana, who is a sixth grader, in February began to silently kneel during the daily Pledge of Allegiance in teacher Lauren Zizwarek's homeroom class. Mariana did this as a form of peaceful protest against injustices she sees in America today, an exercise of her constitutional rights. *West Virginia v. Barnette*, 319 U.S. 624, 642 (1943). Regrettably, however, Ms. Zizwarek improperly reprimanded Mariana within earshot of the class, reducing her to tears and creating both a class disturbance and a humiliating incident for the child.

Although the family has since worked with CMS officials to try to address this matter, limitations and misunderstandings as to BCPS policy on student rights to dissent during patriotic exercises create obstacles to a complete resolution. Accordingly, we seek your assistance as school system leaders both to clarify BCPS policy on student rights to dissent and to better inform school officials about these rights and protections. In this way, the Taylors hope to use this unfortunate incident as a teachable moment benefitting students and educators at Catonsville Middle and throughout Baltimore County Public Schools.

The facts, as we understand them, are these:

On February 25th of this year, Mariana silently and respectfully knelt adjacent to her desk when the Pledge of Allegiance was recited during her morning homeroom class. She was confronted by Ms. Zizwarek, who initially asked Mariana to explain herself. When Mariana demurred, Ms. Zizwarek incorrectly told her that the "rules" require that she must stand for the Pledge. The teacher went on to suggest that rather than worrying about injustice, Mariana should stand

during the Pledge to honor the good things in America. She mentioned that she has family serving overseas in the military who she felt were being disrespected by Mariana's action. This made Mariana feel like the teacher was telling her, as well as her classmates, that Mariana is a bad influence, which hurt her. She began to cry, and left the classroom in tears at the conclusion of the homeroom period. No attempt was made by Ms. Zizwarek to check on Mariana's well-being as she departed. The girl was only tended to when her next teacher noticed Mariana's emotional state and suggested that she see her guidance counselor, Ms. Stephanie Walsh.

Mariana's mother, Joanne Taylor, learned of this situation when Mariana called her from Ms. Walsh's office, while still in an emotional state. Understandably concerned, Mrs. Taylor immediately went to the school to meet with her daughter, the teacher and counselor. There, Ms. Zizwarek provided an account of the incident that differed significantly from the accounts later provided to the Taylors by Mariana and a classmate who had witnessed the incident. During this initial meeting, Ms. Zizwarek claimed that she had acted out of concern for Mariana, because she was worried at the child's fixation upon America's problems; She did not explain how this concern would lead her to reprimand Mariana for being disrespectful, or permit her to let her student leave the classroom alone and in tears. Ms. Walsh spoke in support of Mariana, commending her action as "brave." Ms. Zizwarek said she was sorry if she had misunderstood school policy or had been wrong in questioning Mariana, but that she believed she was acting in the child's best interests, due to a commotion involving some boys in the back of the room. Ms. Zizwarek recommended *not* that she alert the class of her mishandling of the situation, but that Mariana make a presentation to the class, explaining her silent protest. At the conclusion of this meeting, based on the teacher's representation of events, it was proposed that the incident be addressed by having a "restorative circle" to address Mariana's behavior and her classmates' reported reactions.

Later that night, Mariana told the Taylors her account of what had happened, which she said she had been afraid to do in front of Ms. Zizwarek, given that it would have required her to contradict her teacher. Shortly thereafter, Mariana's account was confirmed to Mrs. Taylor by the parent of one of Mariana's classmates, who had heard a vivid account of the incident from her own child. This prompted Mrs. Taylor to email CMS Principal Douglas Elmendorf, to raise concerns about the incident, explaining the factual discrepancies between the teacher's account and her daughter's. Included in Mrs. Taylor's email to the Principal was her rejection of the notion that Mariana should have to explain herself to her classmates, given the disapproval of the child's protest already expressed to the class by their teacher.

Dr. Elmendorf responded to the Taylors via email twice on March 1. First, he suggested that all involved attend a second meeting with him. He said he believed the entire situation might be nothing but a misunderstanding, in that Ms.

Zizwarek seemed simply to have been trying to avert a class disruption, with Mariana's best interests at heart. Later in the day, after consulting with the BCPS Office of Curriculum, Dr. Elmendorf updated the Taylors, informing them that he had learned BCPS Superintendent's Rule 6307 prohibits kneeling during the flag salute as overly disruptive. He suggested that as an alternative compromise, the parties might want to discuss having Mariana remain seated during the Pledge.

On March 5th, the Taylors attended the meeting with Principal Elmendorf, Assistant Principal Lynetta Parker, and Ms. Zizwarek. Dr. Elmendorf said he had consulted further with BCPS legal advisors and the Office of Curriculum, and learned that this particular situation was not one that had been confronted before, nor one directly addressed by BCPS rules. This, he said, might explain some of the uncertainty about its proper handling. Dr. Elmendorf said the applicable policy was an old one, that likely needs to be updated. He said while the rules allow a student to sit during the Pledge, if a student wants to kneel, the reasons might have to be explained to the class, to prevent negative reactions. Mrs. Taylor continued to advocate for her daughter, restating her view that Ms. Zizwarek's response to Mariana's kneeling was inappropriate, and asking the school to accept her daughter's peaceful protest as being within her rights. Different options were discussed by Dr. Elmendorf and Ms. Zizwarek, including having Mariana make a presentation to the class, or having the teacher make a presentation, either with Mariana absent or with Mariana present.

Dr. Elmendorf said that given the discretion Rule 6307 allows the school to determine what is and is not disruptive, it could be agreed that in Mariana's specific case, she would be allowed to kneel during the Pledge. Each proposal about a class presentation was ultimately rejected, with the Principal deciding that the best course might just be to say nothing to the class, so long as there was no major disruption. The Taylors left the meeting with the understanding that the matter might be resolved for the moment, but with the worry that the problem might well recur with a different teacher or a different school, given the lack of clarity in BCPS Rule 6307 about the extent of student dissent permitted. For this reason, Mrs. Taylor made clear to school officials that she believes that Rule 6307 needs to be clarified. School officials acknowledged that such clarification could be helpful, but said that type of change is beyond their authority.

### **Terms of BCPS Superintendent's Rule 6307**

The existing version of BCPS Rule 6307 states, in pertinent part:

- A. It shall be the responsibility of the Superintendent to provide for appropriate patriotic exercises in the public schools. Exercises shall include the daily recitation of the Pledge of Allegiance to the flag.
- B. Any student or staff member who wishes to be excused from the participation in a flag salute shall be excused.

By its terms, this Rule is more limited in its protection of student speech rights than is the comparable State Code provision, Md. Educ. Art., 7-105 (d), which expressly excepts dissenting students both from requirement that they stand as well as the requirement that they salute.

We understand that a proposal has been introduced to amend BCPS Rule 6307, that would make it more consistent with the State rule. A copy of the proposal sent to Mrs. Taylor by a candidate for Baltimore County Board of Education is enclosed. We do not know if this proposal is related to the difficulties encountered by Mariana Taylor, or if it is unrelated. In any case, we commend BCPS officials on recognizing that greater clarity would be helpful in ensuring that students, teachers and school administrators understand the scope of student rights to dissent. Toward this end, we offer the following information about constitutional protections in this area, which we hope you will consider in connection with any amendment to the BCPS Rule, as well as in addressing Mariana's situation at Catonsville Middle, and future incidents of this kind.

### **Students Have a Constitutional Right to Respectful Dissent**

"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," the Supreme Court ruled famously in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). The *Barnette* case concerned religious objections to the flag salute by a family of Jehovah's Witnesses. But later cases make clear that students' rights to free expression -- as well as freedom from forced expression -- are protected by the Constitution, whatever the source of the students' beliefs. See, e.g., *Street v. New York*, 394 U.S. 576, 593 (1969).

Consistent with these federal court rulings, the right of students to refrain from participating during the Pledge has been settled law in Maryland since 1971, when the Court of Appeals struck down as unconstitutional a state law that required students to salute the flag. Maryland law now explicitly exempts from the Pledge of Allegiance "any student or teacher who wishes to be excused." Md. Code Ann., Education Art., § 7-105 (d). Furthermore, students who abstain from saluting the flag cannot be required to justify their actions or to explain them. See *Holloman v. Harland*, 370 F.3d 1252 (4th Cir. 2004). Rather, Maryland's high court has held that it is improper for a teacher or administrator to question the motive of one exercising that exemption, as Ms. Zizwarek did in this case. *State v. Lundquist*, 262 Md. 534, 554 (1971). "Given the gross disparity in power between a teacher and a student, such comments -- particularly in front of the student's peers -- coming from an authority figure with tremendous discretionary authority, whose words carry a presumption of legitimacy, cannot help but have a tremendous chilling effect on the exercise of First Amendment rights." *Id.* at 1269. One would hope that rather than attempting to shame those students who exercise their right to peaceful dissent, the role of an educator would be that of protecting and encouraging exercise of students' rights.



In principle, BCPS recognizes these established constitutional protections through Superintendent's Rule 6307. But as occurred here, the wording of the Rule leaves substantial room for misunderstanding and misinterpretation by teachers and administrators alike. And while the proposed amendment provided to Mrs. Taylor would be an improvement, we think the Rule could yet be further clarified, to address specifically situations like that presented here, where a student wishes to raise concerns symbolically by quietly "taking a knee" during the Pledge. Although this is a newer issue brought to prominence by Colin Kaepernick and other sports heroes, courts that have considered the matter have upheld student rights to kneel in dissent during patriotic exercises. *E.g., V.A. v. San Pasqual Valley Unified School District*, 2017 WL 6541447 (S.D.Calif. 2017) (Granting injunction preliminarily enjoining school officials from prohibiting students from kneeling during the National Anthem). Mariana's case shows that Baltimore County schools should be prepared for such student activism in the future.

Around the country, students today are choosing to speak out against injustice by peacefully protesting during patriotic exercises such as the National Anthem or the Pledge of Allegiance – either by refusing to stand, by taking a knee, or by raising a fist in the air. The ACLU supports these students in both their activism and their messages of freedom and equality. While still a young child at age 11, Mariana Taylor is precocious in her activism, and we believe her willingness to take a knee in support of her beliefs, even when it prompts controversy, warrants respect from teachers and school officials as an act of moral courage. Society benefits when students are taught the power of words and the importance of integrity behind their speech. The Constitution empowers students to be honest about their convictions and to peacefully express their moral opposition, even when that opposition addresses America's failure to live up to its ideals.

We urge Baltimore County school officials to work with the Taylor family in their effort to use Mariana's experience as an opportunity to review, reconsider, and improve BCPS policies on student dissent, and to educate students, teachers and administrators about Constitutional protections for freedom of speech.

We would be happy to discuss this matter with you at your convenience, and to collaborate in helping to ensure that our educators serve as guardians for our students' rights and liberties.

Sincerely,



Deborah A. Jeon  
Legal Director



Jay Jimenez  
Legal Program Associate

AMERICAN CIVIL  
LIBERTIES UNION OF  
MARYLAND

Cc: Dr. Douglas Elmendorf

1 INSTRUCTION: Schedules

2 Patriotic Exercises

3 I. Policy Statement

4

5 THE BOARD OF EDUCATION OF BALTIMORE COUNTY (BOARD) IS  
6 COMMITTED TO HONORING THE FLAG OF THE UNITED STATES OF  
7 AMERICA BY CONDUCTING OPENING AND PATRIOTIC EXERCISES IN  
8 EVERY BALTIMORE COUNTY PUBLIC SCHOOL (BCPS). [Provisions shall  
9 be made for the display of the flag of the United States of America on the site of  
10 each school, office, or other installation of the Board of Education of Baltimore  
11 County (Board) and for the display of said flag in each classroom of every Baltimore  
12 County Public School.]

13

14 II. Standards

15

16 A. PROVISIONS SHALL BE MADE FOR THE DISPLAY OF THE FLAG  
17 OF THE UNITED STATES OF AMERICA ON THE SITE OF EACH  
18 SCHOOL, OFFICE OR OTHER INSTALLATION OF THE BOARD AND  
19 FOR THE DISPLAY OF SAID FLAG IN EACH CLASSROOM OF  
20 EVERY BCPS SCHOOL.

21

22 B. THE SUPERINTENDENT SHALL ESTABLISH PROCEDURES FOR  
23 THE PROPER CUSTODY, CARE AND DISPLAY OF THE FLAG.

24

25 C. [A.] EACH CLASSROOM SHALL HAVE A PROGRAM AT THE  
26 BEGINNING OF EACH DAY OF CLASSES PROVIDING [It shall be the  
27 responsibility of the Superintendent to provide] for appropriate patriotic  
28 exercises THAT [in the public schools. Exercises shall] include the daily  
29 recitation of the Pledge of Allegiance to the flag. [B.] Any student or staff  
30 member[,] who wishes to be excused from [the] participation in ANY  
31 PROGRAM PERMITTED UNDER THIS SUBPARAGRAPH [a flag  
32 salute,] shall be excused.

33

34 III. Implementation

35

36 The Board directs the Superintendent to implement this policy.

37

38

POLICY 6307

1 Legal Reference: *Annotated Code of Maryland*, Education Article §7-105, [*Display of*  
2 *Flag;*] *Patriotic Exercises*

3

4

5 Related Policies: Board of Education Policy 5600, *Students' RESPONSIBILITIES AND*  
6 *Rights [and Responsibilities]*  
7 [Board of Education Policy 6304, *Commemorations and Observances*]  
8

9

10 Policy

Board of Education of Baltimore County

11 Adopted: 10/31/69

12 Revised: 04/22/08

13 Revised: 05/07/13

14 REVISED: \_\_\_\_\_