



DEBORAH A. JEON
LEGAL DIRECTOR

February 5, 2010

VIA TELECOPY AND U.S. MAIL

Mrs. Khadija F. Barkley, Acting Principal
Roberto Clemente Middle School
18808 Waring Station Road
Germantown, Maryland 20874

Re: xxxx xxxx and the Pledge of Allegiance

Dear Principal Barkley:

AMERICAN CIVIL
LIBERTIES UNION OF
MARYLAND FOUNDATION
3600 CLIPPER MILL ROAD
SUITE 350
BALTIMORE, MD 21211
T/410-889-8555
F/410-366-7838
WWW.ACLU-MD.ORG

We write on behalf of the American Civil Liberties Union of Maryland and parent xxxx xxxx, regarding harassment of Mrs. xxxx's daughter, 13-year-old xxxx xxxx, due to her refusal to salute the flag during the school's daily recitation of the Pledge of Allegiance.

OFFICERS AND DIRECTORS
SARA N. LOVE
PRESIDENT

SUSAN GOERING
EXECUTIVE DIRECTOR

C. CHRISTOPHER BROWN
GENERAL COUNSEL

The facts of the case, as we understand them, are these: For reasons within her rights, on Wednesday, January 27, 2010, xxxx xxxx chose neither to stand nor to speak during the school's daily recitation of the Pledge of Allegiance. Instead, she sat quietly while students recited the Pledge. xxxx's first period teacher, Mr. xxxx xxxx, demanded that xxxx stand for the Pledge. When xxxx did not stand, Mr. xxxx ordered that she leave the classroom and stand out in the hall. He threatened to give her detention for refusing to stand for the pledge, and sent her to the counselor's office, where she spent the rest of first period. On Thursday, January 28, 2010, xxxx again refused to stand for the pledge. On this day, Mr. xxxx called upon two school resource officers to escort her out of the classroom and to the school counselor's office. As these events occurred in front of the entire class, they caused her great embarrassment and humiliation. Indeed, since these events, xxxx has been too humiliated to return to school, and has been advised by a psychologist that due to the distress she is experiencing, she should not return for an extended period.

Mrs. xxx contacted the school and spoke with Mr. xxxx shortly after these events, objecting to his conduct toward xxxx and requesting an apology. Mr. xxxx declined this request, contending that no apology is due. When Mrs. xxxx then turned to Assistant Principal James Richard for help, he informed her that *the student* should apologize to *Mr. xxxx*, for her "defiance."

We beg to differ.

The law is crystal clear that a public school cannot embarrass or harass a student for maintaining a respectful silence during the Pledge of Allegiance. The right of a student 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). It is improper for a teacher or administrator to even question the motive of one exercising that exemption. *State v. Lundquist*, 262 Md. 534, 554 (1971).

“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 have made 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 Street v. New York*, 394 U.S. 576, 593 (1969); *Lundquist, supra*.

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). “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.

Furthermore, the right to express oneself by not participating in the Pledge includes the right to remain seated while others stand. In cases involving students who remain seated during the pledge, courts have made the natural extension of *Barnette’s* rule that a school cannot enforce uniformity of thought “by word or act.” 319 U.S. at 642. “The right to differ and express one’s opinions, to fully vent his First Amendment rights, even to the extent of exhibiting disrespect for our flag and country by refusing to stand and participate in the Pledge of Allegiance, cannot be suppressed by the imposition of suspensions.” *Banks v. Board of Public Instruction*, 314 F. Supp. 285, 296 (S.D. Fla. 1970), *aff’d* 450 F.2d 1103 (5th Cir. 1971). *See also, Lipp v. Morris*, 579 F.2d 834 (3rd Cir. 1978) (standing during the Pledge “is an unconstitutional requirement that the student engage in a form of speech”); *Goetz v. Ansell*, 477 F.2d 636 (2nd Cir. 1973) (standing for the Pledge “can no more be required than the Pledge itself”). Nor may a school censure a student by sending him out of the room. *See Frain v. Schuker*, 307 F.Supp. 27 (E.D. N.Y. 1969) (school is enjoined from treating any student who refuses to participate in the Pledge in any different way from those who participate.)

To make matters clear beyond cavil, the Montgomery County school system explicitly acknowledges xxx’s right to act as she did, in its student handbook provision concerning “Patriotic Exercises”:

You will have the opportunity to participate in and/or watch

patriotic exercises in school.

You cannot be required to say a pledge, sing an anthem, or take part in patriotic exercises. No one will be permitted to intentionally embarrass you if you choose not to participate.

A Student's Guide to Rights and Responsibilities in the Montgomery County Public Schools, 2009-2010 School Year, available online at <http://www.montgomeryschoolsmd.org/students/rights/pdf/StudentRightsResponsibilities.pdf> (emphasis added, citations omitted).

* * *

Expression of patriotism in unsettling times certainly is a worthy and understandable emotion. But, as the Supreme Court recognizes, that expression is best honored by venerating the civil liberties and freedoms enshrined in the Constitution and not by losing patience with those whose views or actions do not conform to those of the majority. The right to differ is the bedrock upon which this country is founded, and the ability to express those differences is closely guarded.

Mr. xxxx's conduct in ordering xxxx xxxx to stand and salute the flag, demanding that she leave the classroom, and *having her escorted from the room by school police* in front of her entire class violates Maryland state law and the First Amendment to the United States Constitution. Accordingly, we ask that Mr. xxxx personally apologize to xxxx, and promise to respect xxxx's right to respectfully dissent in the future. We further request that both Mr. xxxx and Assistant Principal Richard hold a session with the class that witnessed this incident to review the Montgomery County school policy on patriotic exercise, and explain that trying to force a student to salute the flag is wrong, and it should never have occurred. Perhaps, in this way, this incident can be used as an educational opportunity for both students and faculty.

We understand that you are already in the process of scheduling a meeting with Mrs. xxxx and her daughter. We look forward to attending that meeting with the family, and to explaining further our view of actions necessary in order for the school to remedy this serious complaint.

Thank you for your prompt attention to this matter.

Sincerely,

Deborah A. Jeon
Legal Director

Ajmel Quereshi
Skadden Fellowship Attorney

Cc: Ms. Patricia O'Neil
President, Montgomery County Board of Education

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MARYLAND