LIBERTY
INSTITUTE
Restoring Religious Liberty in America

April 1, 2014

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RE: STUDENT-LED PRAYER AT SCHOOL

Dear Ms. Almond, et al:

Liberty Institute represents Marcos Perez whose daughter previously attended your school.

It is our understanding that, during the week of March 10, 2014, upon witnessing our client's five-year old daughter bowing her head and praying for her food while at school, a lunchroom supervisor instructed her to stop. When our client's daughter inquired, "But it's good to pray," she was told by this school official, "It is not good." And, when she attempted to do so anyway, she was *again* restrained from bowing her head, folding her hands, and silently saying grace. This is a violation of the federal law and we expect the school district to apologize to the Perezes and the community as well as take steps to ensure this does not happen again.

The key distinction to be made in any case involving religious expression in the public school context is that between *government* speech and *private student* speech. "[T]here 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." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) *quoting Bd. of Educ. Of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226, 250 (1990) (emphasis added).

It is a foundational principle of American jurisprudence that the First Amendment protects the religious liberty of students in America's public schools. As the Supreme Court of the United States held in the 1969 landmark case of *Tinker v. Des Moines,* "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years." *Tinker*, 393 U.S. 503, 506 (1969).

Just because a lunchroom supervisor – an official of the state school – may not agree with the practice of prayer does not give this supervisor the freedom to insert the state's beliefs for that of the student. "State-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are persons under our Constitution. They are possessed of fundamental rights which the state must respect, just as they themselves must respect their obligations to the state . . . [Students] may not be confined to the expression of those sentiments that are officially approved." *Id.* at 511.

Thanking God for the blessing and provision of food by a 5-year old girl is not a sufficient rationale for a school official to censor the free exercise of religion by a student. "In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views . . . school officials cannot suppress 'expressions of feelings with which they do not wish to contend.'" *Id.* (citation omitted)

It is a fundamental principle of our country that our school classroom ought to places in which school officials provide, "vigilant protection of constitutional freedoms." *Id.*at 512. Yet, that vigilance extends beyond the classroom. "A student's rights, therefore, do not embrace merely the classroom hours. When he is ***in the cafeteria***, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects," including the subject – and act – of prayer. *Id.* at 512-13 (emphasis added). And, if the Court was not clear enough, the Eleventh Circuit Court of Appeals has observed, the Constitution "does *not* permit [a public school] to confine religious speech to whispers or banish it to broom closets. If it did, the exercise of one's religion would not be free at all." *Chandler v. Siegelman*, 230 F.3d 1313, 1316 (11th Cir. 2000) (emphasis added).

In addition, the actions of the lunchroom supervisor constitute unlawful viewpoint discrimination. *See Good News Club v. Milford Centr. Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Central Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). Even in a non-public forum, the law is clearly established that the state cannot engage in viewpoint discrimination. *See Perry Educ. Ass'n. v. Perry Local Educators'*

Ass'n., 460 U.S. 37, 45, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983); *see also Chandler v. Georgia Public Telecommunications Com'n*, 917 F.2d 486, 491 (11th Cir. 1990). There is nothing in the law that would permit a school official to engage in viewpoint discrimination and everything in the law to suggest the strongest of constitutional protections to our client's daughter – and all of the students in Seminole County Schools – to fully engage their First Amendment freedoms while at school

It is unnecessary for lunchroom supervisors – or any school official – to be engaged in a constant review of what is an appropriate expression of religious liberty while at school. Schools "do not endorse everything they fail to censor." *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990). While it may be tempting to censor speech in the name of the Establishment Clause, the First Amendment, "does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *Id.* at 248 *quoting McDaniel v. Paty,* 435 U.S. 618, 641 (1978). The better approach to be taken has been outlined by both the Seventh Circuit and the Ninth Circuit:

> The desirable approach is not for schools to throw up their hands because of the possible misconceptions about endorsement of religion, but that instead it is [f]ar better to teach [students] about the first amendment, about the difference between private and public action, about why we tolerate divergent views…The school's proper response is to educate the audience rather than squelch the speaker. Schools may explain that they do not endorse speech by permitting it. If pupils do not comprehend so simple a lesson, then one wonders whether the [] schools can teach anything at all. Free speech, free exercise, and the ban on establishment are quite compatible when the government remains neutral and educates the public about the reasons.

Hills v. Scottsdale Unified Sch. Dist., 329 F.3d 1044, 1055 (9th Cir. 2003) (quoting *Hedges v.*
Wauconda Cmty. Unit Sch. Dist. No. 118, 9 F.3d 1295, 1299-1300 (7th Cir. 1993).

Simply because the form of expression involved here was a prayer does not give the state the right to suppress this child's free exercise of religion. As the Court noted in *Sante Fe*, "[N]othing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the school day." 530 U.S. 290, 313 (2000).

Furthermore, engaging in such religious discrimination places Seminole County Schools in jeopardy of losing Federal funding. The U.S. Department of Education guidelines specifically protect this very type of prayer:

> Students may pray when not engaged in school activities or instruction, subject to the same rules designed to prevent material disruption of the education program that are applied to other privately initiated expressive activities. Among other things, students may read their Bibles or other scriptures, ***say grace before meals***, and pray or study religious materials with fellow students during recess, ***the lunch hour***, or other non-instructional time to the same extent that they may engage in non-religious activities. As long as the prayer is student-initiated and not substantially disruptive to the school environment, schools may not restrict or punish students from praying or expressing their faith, even in front of non-believers. This mean that if a school district allows students to converse with each other about any topic during lunch, recess, or free time, it has to allow students to prayer, either individually or in a group, as long as the prayers are not disruptive.

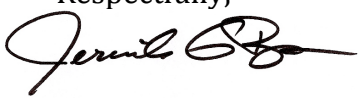
U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, *available at* http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html (emphasis added).

In the situation involving the 5-year old daughter of Mr. Perez, there are no allegations that a silent bow of the head, folding of the fingers, and prayer led to any form of disruption. Indeed, the *greater* disruption was likely made by the school official.

To resolve this issue amicably, we ask that the school district issue a public apology for this instance of religious discrimination and announce the steps it is taking to ensure this does not happen in the future on or before April 7, 2014 to avoid any enforcement actions.

Thank you for your prompt attention to this matter and your adherence to the vital principles of religious liberty.

Respectfully,



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