

Mr. Dennis Kane
Superintendent of Schools

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June 22, 2012

HAND DELIVERED

Joelle Silver
14 Rosemont Drive
Amherst, NY 14226

Re: Inappropriate Religious Expression in Your Classroom

Dear Ms. Silver:

This counseling letter touches upon your rights and responsibilities under the First Amendment of the U.S. Constitution, especially as they relate to the expression of your religious beliefs and the competing requirement that government (made up of government employees) maintain a separation of church and state.

I am sure that you are familiar with the First Amendment, at least to some degree. Nevertheless, I want to begin this letter with a review of essential principles. Effective in 1791, the First Amendment consists of a mere forty-five words, addressing the weighty subjects of religion (including the Establishment Clause and Free Exercise Clause), speech, press, assembly, and petition. It reads:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The scope and import of these words has been greatly affected by a subsequent amendment and Supreme Court decisions. For example, the Amendment's proscription against "establishment of religion, or prohibiting the free exercise thereof" applies to each of the states and their local governments by virtue of the Fourteenth Amendment (1868) and a 1947 decision of the Supreme Court, *Everson v. Board of Education*, 330 U.S. 1. The decision in *Everson* holds that the First Amendment applies to the states, and that the Establishment Clause forbids not only practices that "aid one religion" or "prefer one religion over another," but as well those that "aid all religions."

Since *Everson*, the Supreme Court has consistently interpreted the Establishment Clause ("Congress shall make no law respecting an establishment of religion") as requiring the separation of church and state, and applying to the states and their subdivisions, including school districts.

Indeed, the Establishment Clause requires that government pursue a course of "complete neutrality toward religion," and not promote religion or entangle itself in religious matters. (Emphasis added). *Wallace v. Jaffree*, 472 U.S. 38 (1985). See, also, *Lee v. Weisman*, 505 U.S. 577 (1992); *Bd. of Educ. of the Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994); and *McCreary Cnty. v. ACLU*, 545 U.S. 844 (2005).

In addition to the limitations imposed by the Establishment Clause, I also want to caution you that your Constitutional Rights, including those you enjoy under the First Amendment, are not without their limitations. For example, inciting a riot, using fighting words, or falsely yelling "fire" in a crowded theater is not constitutionally protected speech.

"The protections the First Amendment affords speech and expressive conduct are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution." (Emphasis added). *Virginia v. Black*, 538 U.S. 343 (2003) (upholding a state law banning cross burning carried out with the intent to intimidate).

More significantly, as an employee of a public school district, you are a public servant, working for a municipal corporation that is a unit of local government in New York State. As such, your rights to free speech and expression are not as broad as if you were simply a private citizen. Illustrating this point is the Supreme Court decision of *Garcetti v. Ceballos*, 547 U.S. 410 (2006), which held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." (Emphasis added).

Consequently, "When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." (Emphasis added). *Id.*

With the benefit of this background information, you will perhaps be better prepared to understand how a public school teacher's violation of the Establishment Clause may lead to very severe discipline, including termination of employment. That ultimate penalty was upheld by the U.S. Court of Appeals for the Second Circuit, with jurisdiction over New York State, in the case of *Roasario v. Does 1-10*, 36 F.Appx 25 (2d Cir. 2002). There, the court held that a school district lawfully terminated a teacher for speaking with students about her religious views in class. The court further justified the termination by noting that the school board had a compelling interest in avoiding Establishment Clause violations.

In another Second Circuit decision, *Marchi v. Board Cooperative Educational Services of Albany, Schoharie, Schenectady & Saratoga Counties*, 173 F.3d 469 (2d Cir. 1999), cert.

denied, 528 U.S. 869 (1999), the U.S. Court of Appeals for the Second Circuit upheld a BOCES directive instructing one of its teaching employees to stop using “references to religion in the delivery of [his] instructional program unless it is a required element of a course of instruction and . . . has prior approval by [his] supervisor.” According to the court in *Marchi*, a public school risks violating the required separation of church and state “if any of its teachers’ activities gives the impression that the school endorses religion.” In order to avoid such a violation, a school may prohibit teacher religious expressions that “risk giving the impression” that the district endorses religion.

Turning now to the facts as I understand them, the District received a complaint letter from the Freedom from Religion Foundation (“FFRF”), dated June 7, 2012, concerning your classroom. I arranged for you to be provided with a copy of the complaint letter shortly after I received it. I also initiated an investigation into the allegations contained in the FFRF’s June 7th letter, which was carried out by my administrators. That investigation confirmed a substantial number of the allegations made by FFRF. It also led me to conclude that there were additional examples of your personal religious expression in your High School classroom that were either missed or omitted by FFRF’s June 7th letter.

Specifically, as a result of the investigation, I find that you have four commercially produced posters displayed in your classroom that feature the following Bible verses:

“WASH AWAY ALL MY INIQUITY AND CLEANSE ME FROM MY SIN....WASH ME, AND I WILL BE WHITER THAN SNOW.” PSALM 51:2,7.

“THE LORD IS MY ROCK, AND MY FORTRESS, AND MY DELIVERER; MY GOD, MY STRENGTH, AND WHOM I WILL TRUST.” PSALM 18:2.

“THE HEAVENS DECLARE THE GLORY OF GOD; THE SKIES PROCLAIM THE WORK OF HIS HANDS.” PSALM 19:1

“LET THEM PRAISE THE NAME OF THE LORD, FOR HIS NAME ALONE IS EXALTED, HIS SPLENDOR IS ABOVE THE EARTH AND THE HEAVENS.” PSALM 148:13

In addition, I find that you placed another poster on your classroom wall, which appears to have been generated with the use of a computer and printer. The poster in question superimposes the following Bible verse over computer generated images of an American flag, school books, etc.:

“Be on guard. Stand true to what you believe. Be courageous. Be strong. And everything you do must be done in love.” 1 Corinthians 16:13-14.

I also find that you posted a sketch or drawing on your classroom wall, depicting three crosses on a hill. I conclude that this artwork is an obvious reference to the crucifixion of Jesus Christ at Calvary, in Jerusalem.

In addition, I find that you posted a quote from President Ronald Reagan on your classroom wall, which states:

“Without God there is no virtue because there is no prompting of the conscience...without God there is a coarsening of the society; without God democracy will not and cannot long endure...If ever we forget that we are One Nation Under God, then we will be a Nation gone under.”

Furthermore, I find that since late September or early October, you have permitted the High School's student Bible Study Club, which you are the staff monitor of, to place and maintain a 'Prayer Request' box in your classroom, covered with bible verses and other religious messages, such as:

“Inspired Bible Club Prayer Requests.”

“For where two or three have gathered in my name, I am in the midst.” Matthew 18:20.

“And whatever you ask in prayer, you will receive, if you have faith.” Matthew 21:22.

“Whatever you ask in my name, this I will do, that the father may be glorified in the son. If you ask me anything in my name, I will do it.” John 14:13-14.

“We have to pray with our eyes on God, not on the difficulties.”
Oswald Chambers.

In addition, I find that you have placed sticky notes on your desk that contain bible verses and other religious messages, such as:

“I will remain confident of this: I will see the goodness of the Lord in the land of the living. Wait for the Lord; be strong and take heart and wait for the Lord!” Psalm 27:13-14.

“For the company of the godless is barren, and fire consumes the tents of the corrupt. They conceive mischief and bring forth iniquity, and their mind prepares deception.” Job 15:34-34.

“So let us seize and hold fast and retain without wavering the hope we cherish and confess, and our acknowledgement of it, for He

who promised it is reliable (sure) and faithful to His word.”
Hebrews 10:23.

“Lord, when we are wrong make us willing to change, and when we are right make us easy to live with.” (quoting Scottish Clergyman, Peter Marshall).

I also find that you have placed and maintained a humorous poster in your classroom, depicting an antique telephone and including the following script:

“It’s for you... GOOD MORNING, THIS IS GOD...I WILL BE HANDLING ALL YOUR PROBLEMS TODAY. I WILL NOT NEED YOUR HELP, SO HAVE A GOOD DAY.”

Finally, in reference to Dr. Luther Robinson, M.D., who you procured as a guest speaker to address your Anatomy and Physiology class on May 31, 2012, I find that his power point presentation included two slides that displayed Bible verses, in the context of his lecture on morphology, which focused on human embryonic and fetal development, including birth defects and genetic disorders. The slides included the following Bible verses:

“And the angel of the Lord appeared...and said, “...Now therefore beware. I pray thee, and drink not wine or strong drink.” Judges 13:3,4

“Whom shall I send and who will go for Us?” “Then I said...”
Isaiah 6:7,8.¹

I further find that you knew or should have known of the content of these slides in advance of Dr. Robinson’s presentation to your class on May 31, 2012, since, in the “Guest Speaker Request Form” that you filled out (copy enclosed), you indicated that you had reviewed the materials in advance of the presentation.

Based upon all the foregoing circumstances and facts, I find that the religious materials that you have posted or displayed in your classroom are not solely for your own inspiration. Rather, it is my conclusion that you are using your publicly funded classroom to express your personal religious beliefs to your students, including but not limited to your apparent belief in the divine inspiration and authority of the Bible as the word of God, and to advance Judeo-Christian

¹ Dr. Robinson’s slide provides an incomplete quote of Isaiah 6:7,8. The complete verses read: “He touched my mouth with it and said, ‘Behold, this has touched your lips; and your iniquity is taken away and your sin is forgiven.’ Then I heard the voice of the Lord, saying, ‘Whom shall I send, and who will go for Us? Then I said, ‘Here am I. Send me!’” (New American Standard Bible). These verses have no apparent relevance to Dr. Robinson’s lecture. Nor do they communicate the idea that “students should be advocates for those in need,” which is the interpretation that Ms. Silver proposed in a written response emailed to me on June 16, 2012.

principles. I am therefore directing you to immediately remove all of the afore-described posters, notes, artwork, prayer box, etc., so that anyone visiting or attending your class in the future will not see any religious messages or content attached to or otherwise placed on the public property of the District.

If you need to be able to occasionally glance at inspirational Bible verses between classes during the course of the day, I suggest that you keep such material in a discreet folder that only you will have access to. You may keep such a folder in a drawer of your desk, so long as you take precautions not to share it or disclose its contents to your students or their parents or guardians.

I am further directing you to more carefully screen the presentation materials of future guest speakers, *in advance of each presentation*, to ensure that such materials do not include any religious messages or content. In the event that you find religious messages or content, then you will need to comply with Board Policy 1999 8331, which is addressed below in greater detail.

You must also carefully refrain from using any references to religion in the delivery of your instructional program *unless* it is a required element of a course of instruction and has my prior approval (or my successor's prior approval).

Except for wearing religious jewelry, such as a cross, I am also directing you to refrain from all other forms of communication with students during the school day (whether verbal, email, texting, written, etc.) that would conflict with your duty to show complete neutrality toward religion and to refrain from promoting religion or entangling yourself in religious matters.

I am also directing you to carefully review and comply with the following Board Policies, copies of which I have enclosed herewith – Policy 2005 8271 (Acceptable Use of Computers/Technology and Internet Access), Policy 1999 8331 (Controversial Issues), and 1999 8322 (Curriculum Areas in Conflict With Religious Beliefs). With respect to Policy 8271 in particular, you should already be well familiar with paragraph 9 thereof, since it is one of the policies reviewed with all school staff at the start of each school year. Paragraph 9, entitled "Ethical Use (Staff)," provides:

"Use of District network resources and any other CCSD technology resources are a privilege. Religious messages and materials that are intended or could be perceived to be proselytizing are strictly prohibited."

Among other things, Policy 8271 means that you may not use District projectors, smart boards, copiers, printers, computers, email program, etc., for communicating or relaying any religious messages and materials that are intended or could be perceived to be proselytizing. Thus, using a District owned projector to display Dr. Robinson's selected Bible verses constituted a violation of said Policy. In the future, you must carefully avoid violating Policy 8271.

With respect to Policy 8331, you are now on notice that injecting religious content into your curriculum and/or inviting outside speakers who inject religious content into their presentations to your class is an inherently controversial issue. Policy 8331 contemplates the possibility that

an outside speaker may be called upon to address controversial issues, but only if approved in advance by the principal. In the case of Dr. Robinson's presentation, I find that your Principal, Susan Cain, was not given prior notice that Dr. Robinson would inject Bible verses into his presentation, and therefore you failed to comply with Policy 8331. In the future, you must carefully avoid violating that Board Policy.

With respect to Policy 8332, the text reads: "A student may be excused from the study of specific materials if these materials are in conflict with the religion of his/her parents or guardians." In the case of Dr. Robinson's presentation, I find that there was no advance notice to students or their parents and guardians that Dr. Robinson injected Bible verses into his materials. Consequently, you failed to provide students and parents with a meaningful opportunity to avail themselves to the opt-out protection afforded by Policy 8332. In the future, you must carefully avoid violating Policy 8332.

I am also concerned that you are not up to the task of monitoring the High School student's Bible Study Club, in compliance with District Policy and Regulation (Policy 7410 and Regulation 7410R.1 and 7410R.2, copies of which are enclosed herewith). Somehow, you have misinterpreted the Policy and Regulation as allowing the placement of the prayer box in your classroom throughout most of this school year, despite the fact that the Policy and Regulation speak only of permitting the club to "meet on school premises during non-instructional time." In your written explanation that you emailed to me on June 16, 2012, you also wrote "...it was my understanding that school administrators approved the Bible Club, and as a result the student members of the club are permitted equal access to school facilities for their club activities." However, administrative approval of the club did not amount to carte blanche approval all the activities that Bible Club might conceive of after obtaining administrative approval to form as a student group. Nor does it change the fact that the law's provision for equal access to school facilities is limited to permitting club members to meet during non-instructional time.

Moreover, I direct your attention to that part of Policy 7410 that warns – "The Board prohibits student organizations whose activities may be unlawful or may cause disruption or interference with the orderly conduct of the educational process." Clearly then, not every club activity may be presumed to be approved, lawful, or non-disruptive simply because a club received initial approval to form. I also note that you overstepped the boundary of your monitoring role by permitting Bible Club members to requisition space in your publicly owned classroom for the long-term placement of a 'prayer request box'. (To the extent that you allowed such use of your classroom, you were involved to some degree in the club's prayer request box activity). The placement of that box in your classroom is especially problematic because it is too easily perceived as the District endorsing or lending support to religion, which is a violation of the Establishment Clause.

Consequently, if you choose to continue monitoring the Bible Study Club next school year, you must carefully re-examine Policy 7410 and Regulation 7410R.1 and 7410R.2, so that you can better protect that club from being disciplined and possibly banned. Under no circumstances should you participate in the club's meetings or activities. Likewise, under no circumstances should you permit any club activities that could be interpreted as being promoted or sponsored by yourself, or the larger District for which you work.

Please be advised that your failure to follow any of the above directions will be considered insubordination, which could lead to serious disciplinary consequences, including the termination of your employment.

You are further instructed to acknowledge that you have had an opportunity to review the contents of this letter by signing the copy provided herewith and returning it to me within the next five business days. Your failure to sign will be interpreted as a refusal and dealt with accordingly. Please note that your signature is merely an acknowledgment of your review of this letter and does not indicate your agreement with its contents. This procedure for acknowledgment is more fully outlined in your union's collective bargaining agreement with the School District. If you have any questions, please contact me.

Very truly yours,)



Dennis Kane
Superintendent

Enclosures:

Copy of 19 photographs taken of your classroom, which I reviewed before writing this letter.
Copy of Guest Speaker Request Form for Dr. Robinson, submitted by Silver.
Board Policy 2005 8271 (Acceptable Use of Computers/Technology and Internet Access).
Board Policy 1999 8331 (Controversial Issues).
Board Policy 1999 8332 (Curriculum Areas in Conflict With Religious Beliefs).
Board Policy 1999 7410 (Extracurricular Activities).
Administrative Regulation 2000 7410R.1 (Extracurricular Activities Guidelines)
Administrative Regulation 2000 7410R.2 (Student Organizations: Limited Open Forum)

cc w/encl.:

Susan Cain, Principal of the High School
Ronald LaVere, District Technology Coordinator
Jeffrey Kuemmel, President CCTA
Personnel File

Joelle Silver