

September 15, 2020

Constitutional Concerns Regarding Third-Party Virtual Learning Services

Dear Education Administrator:

I am writing to make you aware of an important development that may affect public education in your state, particularly given the increased focus on virtual learning during the 2020-2021 school year. American Atheists recently learned that at least some schools in states — for example in Ohio, Michigan, and New Mexico — have contracted with third-party virtual learning services that are inappropriately integrating sectarian religious elements into classes. We have received numerous complaints from parents regarding this matter, and we are continuing to investigate which third-party companies are engaging in this activity and how many districts are impacted. However, we urge you to take proactive measures to ensure that schools in your state comply with constitutional requirements when providing virtual learning.

American Atheists is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the “wall of separation” between government and religion created by the First Amendment. We strive to create an environment where atheism and atheists are accepted as members of our nation’s communities and where casual bigotry against our community is seen as abhorrent and unacceptable. We promote understanding of atheists through education, outreach, and community-building and work to end the stigma associated with being an atheist in America. As advocates for religious liberty, American Atheists believes that no young person should be subject to religious coercion in education.

The complaints American Atheists received involve the inclusion of curricular materials that explicitly promote elements of Christian theology and have no place in a public school curriculum. Specifically, the curriculum had a substantially disproportionate focus on myths of the “ancient Hebrews,” which was not in accordance with the state learning standards.

For example, students were asked to recount the story of the Tower of Babel and explain Yahweh’s motivations, draw a pictorial representation of the story, and recount the Bible story. Another lesson instructed the students to make plant, animal, and human “forms” out of clay and “think about how you feel when you create, and then destroy, each of your forms. How does it feel to bring form out of nothing? How does it feel to create something out of a lump?” By advancing a particular religious viewpoint, these

materials violate the Establishment and Free Exercise Clauses of the First Amendment and the Religious Freedom Restoration Act, and may violate provisions of state law as well.

Moreover, based on both complaints American Atheists has received and statements made by these third-party virtual learning vendors, we believe these lessons, and perhaps others that violate constitutional requirements, are quite widespread.

Therefore, we ask you to take steps to ensure that school districts in your state are aware of their constitutional duties in this area. First, we ask you to inform school districts that they should carefully review virtual learning curricula and materials for compliance with constitutional requirements as well as state learning standards. Second, it is important that educators know that modules, units, and lessons should not be taken out of context. For example, we have received complaints where materials that could be permissible in high-level English classes — specifically, lessons involving analysis of sermons — were taught to younger students in a devotional manner. Finally, we ask you to communicate to school districts that students should not be penalized or in any way disadvantaged for refusing to participate in any assignments that promote religion generally or any particular religious beliefs.

The Establishment Clause of the First Amendment to the U.S. Constitution demands that government remain neutral between different religious sects and between religion and nonreligion,¹ a requirement that extends to state governments via the Fourteenth Amendment.² When it comes to the education of our children, the government should be “particularly vigilant” in ensuring schools do not promote religious views that may conflict with the religious beliefs of students and their families.³ “Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family.”⁴ When a school or school district “chooses to introduce and exhort religion in the school system,” it violates the Establishment Clause and the religious freedom of not only the students

¹ *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

² *School District of Abington Twp. v. Schempp*, 374 U.S. 203, 205 (1963).

³ *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987); see also *Widmar v. Vincent*, 454 U.S. 263, 274, n.14 (1981).

⁴ *Edwards*, 482 U.S. at 584.

in its care and their parents, but also the faculty and staff required to take part in such activity, as well as the local taxpayer forced to fund it.⁵

The Free Exercise Clause imposes an additional barrier against religious instruction in public schools by prohibiting the government from taking an action that discriminates along religious lines or otherwise regulates or prohibits religious conduct.⁶ Although neutral and generally applicable government acts that only incidentally infringe religious exercise do not violate the Free Exercise Clause, government acts that are not neutral must be narrowly tailored to achieve a compelling governmental interest.⁷ Moreover, the Religious Freedom Restoration Act [42 U.S.C. 2000bb.] prohibits the government, including programs that received federal funding, from compelling an act inconsistent with a person's observance or practice of their beliefs.⁸

Although these virtual learning services are private companies, because they contract with government entities around the country to provide curricular instruction to public school students, they may be considered a state actor and potentially be held liable as such under 42 U.S.C. § 1983.⁹ Similarly, under these circumstances, they may be liable for failure to comply with various contract requirements or for indemnification if school districts face liability.

As atheists, nonbelievers, and humanists — and as parents entitled to control the upbringing of their children — our constituents hold the sincere belief that decisions about whether and when their children will be introduced to religious beliefs, ideas, and concepts belong to their children alone and are not something to be dictated by a government contractor. Currently, about 24% of adults are religiously unaffiliated, and

⁵ *Coles by Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 385-86 (6th Cir. 1999)

⁶ *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993); see also *Employment Div. v. Smith*, 494 U.S. 872, 876-77 (1990).

⁷ *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

⁸ Jeff Sessions, *Federal Law Protections for Religious Liberty, Memorandum for All Executive Departments and Agencies*, U.S. Dept. of Justice (Oct. 6, 2017), <https://www.justice.gov/opa/press-release/file/1001891/download>; see also *Guidance Regarding Department of Education Grants and Executive Order 13798*, U.S. Dept. of Educ., <https://www2.ed.gov/about/offices/list/oep/edguidanceonreligiousliberty.pdf>.

⁹ See *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961).

atheists and agnostics make up about 7% of the total population.¹⁰ Studies show that approximately 13% of youth ages 13-18 identify as atheists and more than a third are non-religious.¹¹ Another 6% of Americans follow various non-Christian faiths.¹² In a recent survey of nonreligious Americans, nearly a third of respondents (29.4%) reported being discriminated against in education because of their nonreligious viewpoint.¹³ A recent study showed that Muslim and atheist parents face disproportionate discrimination by public school principals.¹⁴ For these reasons, we are especially vigilant regarding failure to uphold the separation of religion and government in public education settings.

Please do not hesitate to contact us if you have questions or if we can be helpful as you consider how best to respond to these concerns. You can reach me by email at agill@atheists.org. Thank you for your time and attention to this matter.

Sincerely,



Alison M. Gill, Esq.
Vice President, Legal & Policy
American Atheists

¹⁰ Daniel Cox & Robert P. Jones, *America's Changing Religious Identity: Findings from the 2016 American Values Atlas*, Public Religion Research Institution (Sep. 6, 2017), <https://www.prrri.org/research/american-religious-landscape-christian-religiously-unaffiliated/>.

¹¹ *Gen Z: The Culture, Beliefs and Motivations Shaping the Next Generation*, The Barna Group and Impact 360 Institute (Jan. 23, 2018).

¹² *America's Changing Religious Landscape*, Pew Research Center, 3 (May 12, 2015).

¹³ S. Frazer, A. El-Shafei, & Alison Gill, *Reality Check: Being Nonreligious in America*, 24 (2020).

¹⁴ Pfaff S., et al., "Do Street-Level Bureaucrats Discriminate Based on Religion? A Large-Scale Correspondence Experiment among American Public School Principals," *Public Administration Review* (Aug. 30, 2020), <https://onlinelibrary.wiley.com/doi/full/10.1111/puar.13235>.