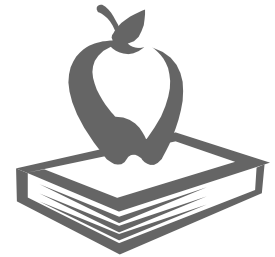




ACLU

AMERICAN CIVIL LIBERTIES UNION
of MINNESOTA



A PRIMER ON THE PLEDGE OF ALLEGIANCE IN PUBLIC SCHOOLS

In 2002, Minnesota joined a growing number of states that encourage public schools to instruct students regarding patriotic activities, including reciting the Pledge of Allegiance at least once a week. Minnesota's law allows for students and teachers to decline to participate in the reciting the pledge. This opt-out provision is meant to ensure that an individual's freedom of conscience is not violated. Students and staff who decide not to take part in the pledge should have that decision respected. Any effort by schools to punish, harass or embarrass a student or teacher who decides to opt out of reciting the pledge violates Minnesota law and the First Amendment.

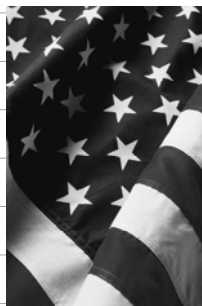
The Freedom of Conscience

The First amendment ensures that an individual shall not be compelled to engage in acts of patriotism. In West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), the United States Supreme Court ruled that a school cannot force a student to recite the Pledge of Allegiance. *Id.* at 641. The court found that our nation does not the need to compel patriotism. The decision was written as the nation fought the totalitarian regimes of Germany and Japan during World War II. The decision articulated that a major reason for the strength of America's democratic institutions was that dissent was allowed and patriotic acts were voluntary:

"To believe that patriotism will not flourish if

patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes.

When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.



"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." West Virginia State Board of Education v. Barnette (1943)

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. If there are any circumstances which permit an exception, they do not now occur to us."

Barnette clearly stands for the proposition that a student cannot be compelled to give the Pledge of Allegiance while attending public school. Efforts to punish students who refuse to give the pledge are not allowed. "It is well established that a school may not require its students to stand for or recite the Pledge of Allegiance or punish any student for his/her failure to do so." Rabideau v. Beckmantown Central School District, 89 F. Supp.2d 263, 267 (N.D. N.Y. 2000.)

Minnesota’s Pledge Statute and Opt Out Provision

Minnesota law requires all public and charter school students to recite the Pledge of Allegiance at least once a week (unless the local school board annually votes to waive this requirement.) MN ST § 121A.11 (3) (b). Subdivision 3 (b) states that any teacher or student may opt out of reciting the pledge:

“Any student or teacher may decline to participate in recitation of the pledge.”

The opt out provision of the Statute does not require the individual to justify their reasons for not reciting the pledge. The underlying issue in the *Barnette* case was whether West Virginia school districts could force students who were Jehovah’s Witnesses

to recite the pledge or face punishments including expulsion. The plaintiffs argued that reciting the pledge would violate their religious beliefs. While striking down the West Virginia statute, the Supreme Court did not limit its holding to religious objections to the pledge, but rather defended every citizen’s “freedom to differ”. *Barnette* 319 U.S. 624, 641. The freedom to differ is recognized by the Minnesota statute’s opt out provision, which allows a student or teacher to decline to recite the pledge. If a student or teacher does not wish to participate in the Pledge of Allegiance, that wish is to be respected without the individual being required to justify that decision

Punishments and Other Forms of Coercion

Barnette and its progeny explain that the Constitution requires that students' recitation of the Pledge must be voluntary. Minnesota’s Pledge law recognizes that requirement by providing a broadly worded opt out provision. Of course, the Pledge is not truly optional if a school imposes discipline or punishment on those who choose to refrain. Formal discipline like detentions or suspensions may not be imposed for non-participation, nor can other types of non-disciplinary penalties (such as reducing grades, requiring transfers to different classes, withholding letters of recommendation, denying ASB offices, and so on). "It is well established that a school may not require its students to stand for or recite the Pledge of Allegiance or punish any student for his/her failure to do so." *Rabideau v. Beekmantown Central School District*, 89 F.Supp.2d 263, 267 (N.D.N.Y. 2000). Some schools have imposed other, more subtle forms of coercion against students who do not wish to recite the pledge. Requirements such as making a formal opt out request to the principal, filling out an opt-out request form and

maintaining a record of a student’s decision to opt out do not serve any legitimate purpose and only intimidate students who do not wish to recite the pledge. Public expressions of belief in the ideals of liberty and justice should be voluntary, not coerced. Direct or indirect pressure designed to force individuals to pledge allegiance, violates the fundamental freedoms that the American flag is meant to represent.



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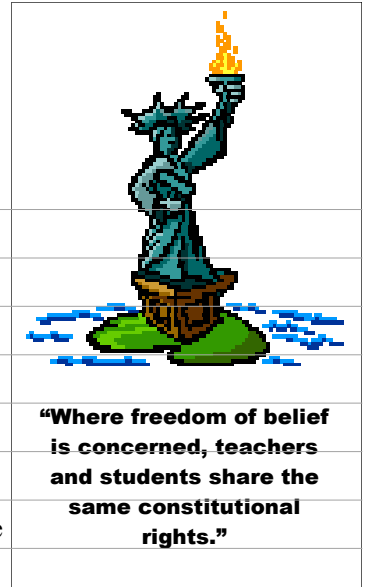
Parental Permission

Some schools improperly ask students if they have parental permission to refrain from the Pledge. All people, including students, have an individual right of conscience not to recite oaths with which they disagree. Because the right to sit quietly during the pledge of allegiance is a personal right of each student, it is not for the parent or the guardian to grant permission to decline to participate. *In re Matter of Matter of Bustin*, 10 Ed. Dept. Rep. 168 (N.Y. 1971). It is equally impermissible for schools to notify parents of a child’s decision to opt out of the Pledge because it may have a chilling effect on the student’s exercise of his or her First Amendment Rights. *Circle School v. Phillips*, 270 F.Supp.2d 616 (E.D. Pa., 2003). For this reason, schools should also refrain from maintaining a written record of a student’s decision to opt out of reciting the Pledge.

Minnesota’s statute allows students to "opt out " whether or not they have parental permission. Schools cannot add additional requirements, such as parental permission, to the state statute.

Reasons for Non-Participation

The Barnette case arose from the religious objections of a Jehovah's Witness to the flag salute, but the rule is not limited to students who are religiously-motivated. For example, the students in Frain and Goetz objected to saying the Pledge because they believed the nation did not yet have "liberty and justice for all." Later Supreme Court cases have made clear that Barnette was decided on freedom of expression grounds, and is not limited to freedom of religion. See Street v. New York, 394 U.S. 576, 593 (1969). Students' right to free expression is protected by the constitution whatever the source of the students' beliefs. See Maryland v. Lundquist, 278 A.2d 263 (Md. 1971) (school must allow any student to refrain from saying the Pledge, not just students with religious objections).



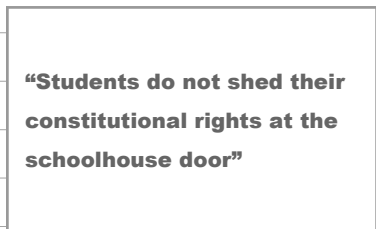
On a practical level, it is counter-productive to quiz students about whether they have a good enough reason to sit out the Pledge. The very act of questioning implies that the school has defined which beliefs are acceptable, essentially establishing the orthodoxy of belief Barnette forbids. Most schools would never question students who recite the Pledge about whether they "really mean it." The same applies to students who opt out.

Standing, Sitting, and Leaving the Classroom

The right to express oneself by not participating in the pledge includes the right to remain seated while others stand. In the famous case of Tinker v. Des Moines School Dist., 393 U.S. 503, 506 (1969), the U.S. Supreme Court upheld the right of students to silently protest by wearing black armbands. The Court recognized that students do not shed their constitutional rights at the schoolhouse door. Remaining seated during the pledge is a form of silent expression just like the black armbands in Tinker. A student may maintain respectful silence whether seated or standing. As Barnette noted, a school cannot enforce uniformity of thought "by word or act," 319 U.S. at 642, and standing is an act of uniformity.

the pledge "can no more be required than the pledge it—self"); Sheldon v. Fannin, 221 F.Supp. 766 (D.Az. 1963) (student may not be disciplined for choosing not to stand during the National Anthem).

For the same reason, it is improper to require a student to leave the classroom while other students recite the pledge. Removal from the classroom is a form of punishment, and a student's non-disruptive exercise of free speech rights cannot be the basis for punishment. See



Frain v. Baron, 307 F.Supp. 27 (E.D.N.Y. 1969) (school is enjoined from "excluding [students] from their classrooms during the Pledge of Allegiance, or from treating any student who refuses for reasons of conscience to participate in the Pledge in any different way from those who participate.") Ushering students in and out of the classroom is also counterproductive, because it draws attention to the dispute and takes time away from instruction.

"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) (emphasis added). See also, Rabideau, 89 F.Supp.2d at 267; 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





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Teachers and the Pledge

Where freedom of belief is concerned, teachers and students share the same constitutional rights. As the U.S. Supreme Court said in Tinker v. Des Moines Independent School District, 393 U.S. 503, 506 (1969), "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Later courts have relied on Tinker and Barnette to find that it violates the

First Amendment rights of teachers to fire them or take other adverse employment action for exercising their right to maintain respectful silence during the flag salute. See, Opinion of the Justices, 363 N.E.2d 251, 254 (Mass. 1977); Russo v. Central School District No. 1, 469 F.2d 623 (2nd Cir. 1972); Maryland v. Lundquist, 278 A.2d 263 (1971); Hanover v. Northrup, 325 F. Supp. 170 (D. Conn. 1970).

Enforcement

Because the right not to recite the Pledge flows in part from the First Amendment to the U.S. Constitution, school districts and individual employees that impose punishment on non-participating students may be sued under a federal law that prohibits state employees from infringing on federal constitutional rights. 42 U.S.C. § 1983. If liable, the defendants could face injunction and pay damages, costs, and attorney's fees.