IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
BLUEFIELD DIVISION

FREEDOM FROM RELIGION FOUNDATION, INC., and JANE DOE, individually, and on behalf of JAMIE DOE, Plaintiffs, v. MERCER COUNTY BOARD OF EDUCATION, MERCER COUNTY SCHOOLS, and DEBORAH S. AKERS, individually and in her official capacity as superintendent of Mercer County Schools, Defendants.	Civil Action No. 1:17-cv-00642 Hon. David A. Faber ORAL ARGUMENT REQUESTED

DEFENDANTS' MOTION TO DISMISS

Defendants Mercer County Board of Education, Mercer County Schools, and Deborah S. Akers (together, "Defendants"), by and through their attorneys, respectfully move this Court pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure for an order Dismissing Plaintiffs' Complaint (ECF No. 1) in its entirety. In support of this Motion, Defendants state:

1. The Complaint, brought by Plaintiffs the Freedom From Religion Foundation and Jane Doe on behalf of herself and Jamie Doe (together, "Plaintiffs") asserts that Defendants have violated the United States Constitution, West Virginia Constitution, and 42 U.S.C. § 1983 because non-mandatory courses offering instruction that concerns the Bible are offered in Mercer County Schools. Plaintiffs seek an injunction prohibiting Defendants from offering Bible classes of any kind in the future. Defendants also seek nominal damages and attorneys'

fees. These claims fail for the following reasons:

a. Plaintiffs do not have standing to bring this case, and the Court accordingly lacks subject matter jurisdiction.

b. Plaintiffs' Complaint does not attack the particular curriculum of the Bible classes offering in Mercer County Schools; instead, it attacks the fact that any such classes, regardless of specific curriculum, exist. This does not state a cognizable legal claim, and flies in the face of decades of precedent. This requires dismissal with prejudice.

c. Plaintiffs' fail to state claims against Defendant Dr. Akers in her individual capacity because they do not allege that she did anything at all in that capacity. For the same reasons, Dr. Akers is entitled to qualified immunity.

d. Plaintiffs' claim for violation of 42 U.S.C. § 1983 against Defendant Dr. Akers in her official capacity is redundant of their claim against the Mercer County Board of Education and in any event is not adequately plead.

e. Plaintiffs' fail to adequately plead violations of 42 U.S.C. § 1983 against Defendants Mercer County Board of Education and Mercer County Schools.

2. In further support of this Motion, Defendants incorporate their Memorandum in Support of Defendants' Motion to Dismiss, which is filed contemporaneously with this Motion.

3. Defendants request oral argument on this Motion.

WHEREFORE, Defendants respectfully request that this Court enter an order dismissing Plaintiffs' Complaint it its entirety and granting such further relief as the Court deems just and reasonable.

Dated: March 13, 2017

Respectfully submitted,

O'MELVENY & MYERS LLP
MICHAEL J. WALSH, JR. (*pro hac vice*)
mwalsh@omm.com
DAVID R. DOREY (*pro hac vice*)
ddorey@omm.com
1625 Eye Street, N.W.
Washington, DC 20006
Tel: (202) 383-5150

BREWSTER, MORHOUS, CAMERON, CARUTH, MOORE, KERSEY & STAFFORD PLLC
By: */s/ Kermit J. Moore*
KERMIT J. MOORE (W.Va. Bar No. 2611)
kmoore@brewstermorhouse.com
418 Bland Street
P.O. Box 529
Bluefield, WV 24701
Tel: (304) 325-9177

FIRST LIBERTY INSTITUTE
HIRAM S. SASSER III (*pro hac vice*)
hsasser@firstliberty.org
JEREMIAH G. DYS
(W.Va. Bar No. 9998; Tex. Bar No. 24096415)
jdys@firstliberty.org
2001 West Plano Parkway
Suite 1600
Plano, TX 75075
Tel: (972) 941-4444

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2017, the foregoing MOTION TO DISMISS was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic case filing system and constitutes service of this filing under Rule 5(b)(2)(E) of the Federal Rules of Civil Procedure. Parties may access this filing through the Court's ECF system.

/s/ Kermit J. Moore
Kermit J. Moore

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
BLUEFIELD DIVISION

FREEDOM FROM RELIGION FOUNDATION, INC., and JANE DOE, individually, and on behalf of JAMIE DOE, Plaintiffs, v. MERCER COUNTY BOARD OF EDUCATION, MERCER COUNTY SCHOOLS, and DEBORAH S. AKERS, individually and in her official capacity as superintendent of Mercer County Schools, Defendants.	Civil Action No. 1:17-cv-00642 Hon. David A. Faber ORAL ARGUMENT REQUESTED

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

Other Authorities

Rules

Three plaintiffs ask the Court to issue an injunction forever ending Bible classes taught in public school in Mercer County, West Virginia. But none of these Plaintiffs has ever attended or even been eligible to attend such classes. Plaintiff Jamie Doe, Jane's Doe's child, a kindergartner, is not old enough to enroll. The only allegations about the specific curriculum taught in the classes come from out-of-state serial plaintiff Freedom From Religion Foundation ("FFRF"), which submitted a freedom of information request for the curriculum at issue well before Jamie Doe was even enrolled in kindergarten.

FFRF's most recent attempt to gin up standing in this Circuit in *Moss v. Spartanburg County School District Seven*, 683 F.3d 599 (4th Cir. 2012), was dismissed for many of the same reasons this Court should dismiss this case. None of the Plaintiffs[1] have standing to bring it. The purported harms Plaintiffs allege are merely speculative, resulting from choices the Does say they may have to make well into the future and related fear of potential ostracism that is grounded only in speculation, not in fact. The Court should accordingly dismiss their case for lack of subject matter jurisdiction.

Even if Plaintiffs had standing to bring this case, it should be dismissed for failure to state a claim. Plaintiffs ask for an injunction to end Bible classes in Mercer County Schools, despite the fact that over a half century of well-settled law holds that the Constitution permits Bible classes in public schools. Plaintiffs attempt to avoid this longstanding precedent by attacking the particular curriculum in the Mercer County "Bible in Schools" program, but Plaintiffs lack standing to make those allegations because they have never actually encountered that curriculum and do not say it drives their decision-making (on the contrary, they allege only that the per se

[1] In this brief, the term "Plaintiffs" refers to Jane Doe, her child Jamie Doe, and the Freedom From Religion Foundation or "FFRF." The term "Defendants" refers to the Mercer County Board of Education, Mercer County Schools, and Mercer County Schools' Superintendent Dr. Deborah S. Akers.

existence of a course in the Bible will cause them to be injured). The Court should also dismiss Plaintiffs' claims against Dr. Akers, who was named in her individual capacity despite the utter absence of allegations relating to her individual conduct, and because the official capacity claims are redundant and unnecessary. And the Court should dismiss Plaintiffs' claims under 42 U.S.C. § 1983, which are insufficiently pled under Rule 8.

I. FACTUAL BACKGROUND

Jane Doe is the mother of Jamie Doe, a student who attends an (unspecified) elementary school in Mercer County, West Virginia.[2] (Complaint, ECF No. 1, ¶ 10 (hereinafter "Compl.").) Jamie Doe is enrolled in kindergarten for the 2016-2017 school year. (*Id.* ¶ 11.) Jane Doe is an atheist who wishes to raise Jamie Doe "without religion." (*Id.* ¶ 10.) She is a member of FFRF, a "national" nonprofit organization that "defends the constitutional principle of separation between state and church." (*Id.* ¶¶ 8-9.)

There are nineteen elementary schools in Mercer County. (*See* Mercer County Public Schools, *Elementary Schools*, http://boe.merc.k12.wv.us/?q=node/5 (last visited Mar. 9, 2017) (attached as **Exhibit A** to the Declaration of Kermit J. Moore ("Moore Declaration") filed concurrently)).[3] Fifteen of those elementary schools offer classes as part of a "Bible in the Schools" program, reaching approximately 4,000 students—the "overwhelming majority" of those enrolled. (Compl. ¶¶ 21, 23-24, 40.) The classes are offered to elementary students once

[2] For the purpose of this Motion to Dismiss only, Defendants assume that all well-pleaded facts in the Complaint are true, as must the Court. *See Kyser v. Edwards*, No. 2:16-CV-05006, 2017 WL 924249, at *4 (S.D.W. Va. Feb. 9, 2017) (Tinsley, M.J.) ("Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation[.]") (citation, quotations, and subsequent history omitted).

[3] "A court may take judicial notice of information publicly announced on a party's web site, so long as the web site's authenticity is not in dispute and 'it is capable of accurate and ready determination.'" *Jeandron v. Bd. of Regents of Univ. Sys. of Md.*, 510 F. App'x 223, 227 (4th Cir. 2013) (citing Fed. R. Evid. 201(b)).

per week, and last for 30 minutes. (*Id.* ¶ 39.) They are not offered to kindergarten students; instead, instruction is offered "beginning in the first grade." (*Id.* ¶ 28.) Participation is voluntary, and school policy requires "reasonable alternatives for students who opt-out." (*Id.* ¶¶ 40-41.) Jane Doe allegedly "received information from the school system about its bible [*sic*] classes," but the Complaint does not say what information she received. (*Id.* ¶ 27.) Jane Doe does not allege that she sought or intended to seek "reasonable alternatives" for Jamie Doe, nor that Jamie's school denied or intended to deny any such request.

In 1985, the West Virginia Office of the Attorney General issued an opinion explaining that Bible instruction in West Virginia's public schools is permissible so long as certain guidelines are followed. (*Id.* ¶¶ 19-21, 33.) A copy of this opinion is attached as **Exhibit B** to the Moore Declaration.[4] Jane Doe does not reference these guidelines, nor does she allege that the "Bible in the Schools" program does not comply with them. The program receives no public funding; instead, it is funded by the non-profit Bluefield Bible Study Fund, Inc. (*Id.* ¶ 23.)

On May 8, 2015, more than a year before Jamie Doe began attending kindergarten,[5] FFRF sent a "freedom of information request to Mercer County Schools" asking for information about the "Bible in the Schools" program and "copies of certain course materials." (*Id.* ¶ 29.) Neither FFRF nor Doe allege that Mercer County provided Doe with similar information or materials about the Bible program in connection with Jamie Doe's enrollment in school. FFRF

[4] The Court may consider this opinion in deciding Defendants' motion to dismiss without converting it into a motion for summary judgment because it is integral to and explicitly relied on in the Complaint. *See E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 448 (4th Cir. 2011).

[5] Jamie Doe's first day of kindergarten was August 10, 2016. (*See* Mercer County Public Schools, *2016-2017 Student Calendar*, at 2-3, http://boe.merc.k12.wv.us/downloads/2016_2017%20Student%20Calendar.pdf (last visited Mar. 9, 2017) (attached as **Exhibit C** to the Moore Declaration.).) The Court should take judicial notice of this document for the reasons stated in Note 1.

received responsive information to its request on August 26, 2016 and September 12, 2016. (*Id.* ¶¶ 30, 43.) Plaintiffs commenced this lawsuit shortly thereafter, on January 18, 2017 (*see generally* Compl.), and most of the Complaint is devoted to allegations about specific aspects of the course materials FFRF received in response to its request (i*d*. ¶¶ 29-67)

Plaintiffs request a declaration that the "Bible in the Schools" program is unconstitutional, that Defendants be permanently enjoined from "organizing, administering, or otherwise endorsing" Bible courses of any kind for students of Mercer County Schools, and that Plaintiffs be awarded nominal damages and attorneys' fees and costs. (*Id.* at pp. 15-16.)

II. ARGUMENT

This lawsuit should be dismissed because Plaintiffs plainly lack standing to bring it. Mercer County does not offer the "Bible in Schools" program to kindergarten students like Jamie Doe, so Jane Doe never had to make, and does not imminently have to make, the allegedly "untenable choice" between enrollment and the "risk of" ostracism. (*Id.* ¶ 28.) And even though it is Plaintiffs' burden to plead facts showing they have standing, the harm they allege is entirely speculative and conclusory, undergirded by no facts. Further, because FFRF does not allege that it has direct standing, it too must be dismissed along with its member Jane Doe.

Even if Plaintiffs had standing, the Complaint would still need to be dismissed, and with prejudice, because it fails to state a cognizable legal claim. Read in the light most favorable to Plaintiffs as Rule 12(b)(6) requires, the allegations in the Complaint make clear that Plaintiffs are attacking the very existence of a program in public school that teaches about the Bible, rather than any particular content found in its curriculum. Because it is well-settled that public schools may offer Bible classes to their students, Plaintiffs' attempt to prevent Mercer County from doing so should be rejected.

And even if the Court finds that Plaintiffs have standing and state a claim on which relief

can be granted, it should still dismiss Dr. Akers from the case. The Complaint is devoid of allegations that Dr. Akers did anything to Plaintiffs in her individual capacity, and Plaintiffs need not include her as a redundant defendant in her official capacity. Finally, Plaintiffs' claims brought under 42 U.S.C. § 1983 should be dismissed because Mercer County Schools does not have final policymaking authority, and Plaintiffs failed to identify or challenge any policy of the final policymaker, the Mercer County School Board.

A. Plaintiffs Do Not Have Standing to Sue

Plaintiffs lack standing to prosecute this action because none of them have alleged concrete injuries that have occurred or are certainly impending. As the Supreme Court held in *Clapper v. Amnesty International USA*:

> To establish Article III standing, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling. Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes--that the injury is certainly impending. Thus, we have repeatedly reiterated that threatened injury must be certainly impending to constitute injury in fact, and that allegations of possible future injury are not sufficient.

133 S. Ct. 1138, 1147 (2013) (citations and quotations omitted).[6] Indeed, Jane Doe does not allege that Jamie Doe participated in the Bible in Schools program or was ostracized due to non-participation, probably because Jamie Doe is too young to enroll in the program, so she has not been forced to make the "untenable choice" she alleges she will have to make at some point in the future.

[6] Plaintiffs do not claim they have taxpayer standing. Nor could they: under the *Flast* exception to the general rule prohibiting taxpayer standing, Plaintiffs must at a minimum show that "tax dollars are 'extracted and spent'" on the challenged conduct. *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 138-39 (2011) (citing *Flast v. Cohen*, 392 U.S. 83, 106 (1968)). But the Bible class at issue in this litigation is entirely financed by the Bluefield Bible Study Fund, Inc., an independent non-profit. (Compl. ¶¶ 22-23.)

FFRF does not allege direct standing. And FFRF's associational standing in this litigation is entirely dependent on Jane Doe's personal standing (since she is FFRF's member and FFRF does not allege that it is injured (Compl. ¶ 9)). *See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 155 (4th Cir. 2000) ("[A]n association may have standing to sue in federal court either based on an injury to the organization in its own right or as the representative of its members ***who have been harmed***.") (emphasis added). As out-of-state Plaintiff FFRF knows from its own history of attempting to manufacture standing for itself in this Circuit, even a promotional letter sent to its member is not sufficient for standing (and Jane Doe does not even make ***that*** allegation); instead, Plaintiffs' allegations about the Bible in Schools program are based almost entirely on information that ***FFRF*** received in response to a freedom of information request, which is plainly insufficient to create standing for ***Jane Doe***. *See Moss*, 683 F.3d at 606 ("Our conclusion that Tillett [who received a letter concerning Bible curriculum] was not injured by the School District's policy requires the further conclusion that the Freedom From Religion Foundation also lacks standing."); *see also Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) ("[A]n organization whose members are injured may represent those members in a proceeding for judicial review. But a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization in evaluating the problem, is not sufficient.") (citation omitted).

There are at least six specific reasons why the Does lack standing to bring this case:

First, Jamie Doe is enrolled in kindergarten (Compl. ¶ 11), yet the Bible class Plaintiffs challenge is only offered to students in the first grade or above (*id.* ¶ 28). As such, the purportedly "untenable choice[]" the Does face and on which they base their so-called injury was, at a minimum, over seven months away when they filed suit. *See Lujan v. Defs. of Wildlife*,

504 U.S. 555, 571 n.5 (1992) ("standing is to be determined as of the commencement of suit"); *Beck v McDonald*, 848 F.3d 262, 271 (4th Cir. 2017) ("And while it is true that threatened injuries rather than actual injury can satisfy Article III standing requirements [in certain circumstances], not all threatened injuries constitute an injury-in-fact. Rather, as the Supreme Court has emphasized repeatedly, an injury-in-fact must be concrete in both a qualitative and temporal sense.") (citations and quotations omitted); *cf.* Moore Declaration **Ex. C** (showing that the 2016 school year began in August). The fact that Plaintiffs may have to make an "untenable choice[]" in August 2017 does not constitute an injury-in-fact in January 2017, even if Plaintiffs think it is reasonably likely they will have to make their choice during the next school year. *See Beck*, 848 F.3d at 276 ("Further, we read *Clapper*'s rejection of the Second Circuit's attempt to import an 'objectively reasonable likelihood' standard into Article III standing to express the common-sense notion that a threatened event can be 'reasonably likely' to occur but still be insufficiently 'imminent' to constitute an injury-in-fact.") (citation omitted); *see also Chambliss v. Carefirst, Inc.*, 189 F. Supp. 3d 564, 570 (D. Md. 2016) ("Under *Clapper* . . . an 'objectively reasonable likelihood' of harm is not enough to create standing, even if it is enough to engender some anxiety."). The Complaint therefore fails to show the Does have an actual or imminent spiritual injury as a result of "direct and unwelcome contact with an alleged religious establishment in their community." *Moss*, 683 F.3d at 605 ("[W]e must guard against efforts . . . to derive standing from the bare fact of disagreement with a government policy, even passionate disagreement premised on Establishment Clause principles. Such disagreement, taken alone, is not sufficient to prove spiritual injury.").

Second, the Does allege that the Bible course is offered in fifteen elementary schools in Mercer County (Compl. ¶ 24), but there are nineteen elementary schools in the County (*see*

Moore Declaration **Ex. A**). The Complaint does not say that Jamie Doe attends one of the fifteen elementary schools where the course is offered, as opposed to one of the four where it is not. Accordingly, the Complaint fails to meet Plaintiffs' burden of showing that Jamie Doe even attends a school where the Bible class might (eventually) be offered to Jamie. *Lujan*, 504 U.S. at 561 ("The party invoking federal jurisdiction bears the burden of establishing [standing]. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported . . . ") (citations omitted); *Ohio Valley Envtl. Coal., Inc. v. McCarthy*, No. CV 3:15-0271, 2016 WL 4744164, at *6 (S.D.W. Va. Sept. 9, 2016) (Chambers, C.J.) ("To demonstrate an injury in fact for purposes of Article III standing, a plaintiff must show a personal stake in the claim."); *cf. Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009) ("Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.").

Third, even if Jamie Doe currently attends an elementary school where the Bible course is offered, the Complaint does not say that he is unable to attend one of the elementary schools in Mercer County where the course is ***not*** offered. Because, as discussed above, the Does' purported injuries are not "certainly impending," they are not permitted to "manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm," *Clapper*, 133 S. Ct. at 1151, by choosing to enroll Jamie in a school where the course is offered if an alternative school where the course is not offered is available to them.[7]

Fourth, both of the harms the Does identify as being caused by a hypothetical future

[7] *Suhre v. Haywood Cty.*, 131 F.3d 1083 (4th Cir. 1997), is inapposite. That pre-*Clapper* case stands for the proposition that someone who is already injured by coming into direct contact with an allegedly offensive religious display need not ***also*** "change[] his behavior in response to the display" in order to have standing to sue. *Id.* at 1087. That is far different from attempting to manufacture standing when direct contact is not certainly impending.

opting out of the Bible course are themselves nothing but armchair conjecture. Jane Doe says that she fears being "ostracized by other students or staff because of Jamie's nonparticipation" in the course next school year. (Compl. ¶ 27.) Similarly, the Complaint purports that Jamie Doe faces a "risk of ostracism from peers and even school staff." (Compl. ¶ 28; *see also id.* ¶ 74.)[8] But the Complaint contains no facts supporting these bald allegations—for example, it does not allege facts to show that other children or parents have been similarly ostracized, that staff or students in Mercer County are prone to marginalize members of minority groups, or that the Does have experienced intolerance of any kind in the community, let alone due to Jane Doe's atheism. As such, it is evident that these alleged harms are no more than the "mere conjecture" courts have time and again held cannot support Article III standing. *See Friends of the Earth*, 204 F.3d at 156 ("The injury in fact requirement also blocks suit by those whose allegations of injury are based on mere conjecture rather than an actual or threatened invasion of their legally protected interests.") (citing *Lujan*, 504 U.S. at 560); *see also Moss*, 683 F.3d at 606 (finding plaintiff, her child, and FFRF lacked standing because "[t]hey had no personal exposure to the . . . [Bible] course apart from their abstract knowledge . . . . they have alleged nothing to suggest that the policy or the Bible School course injured them in any way. . . . [the] child never participated in the course and had not been pressured or encouraged to attend the course by

[8] Plaintiffs may also say Jane Doe is separately harmed because she "feels coerced by her government into subjecting her child into religious indoctrination and raising her child in a specific set of religious beliefs to which [she] does not adhere." (Compl. ¶ 76.) But this purported harm is entirely dependent on the conjecture that Jamie Doe will feel ostracized in the future for opting out of the Bible course (assuming it is even available to Jamie). That is, there can be no feeling of coercion but for the alleged future ostracism to cause it (which is itself merely speculative). This attenuated chain of speculation, which amounts to self-harm, is not sufficient to ground standing. *See Clapper*, 133 S. Ct. at 1150 ("[R]espondents' speculative chain of possibilities does not establish that injury . . . is certainly impending or is fairly traceable . . . ."); *Beck*, 848 F.3d at 276-77 ("Simply put, these self-imposed harms cannot confer standing.").

anyone. Neither [the parent] nor her child suffered any adverse repercussions from the child's decision not to enroll in the course. . . . [and they] do not suggest that they were the targets or victims of alleged religious intolerance . . . .").

Fifth, as explained in more detail below, the Complaint as pleaded is a facial challenge to Mercer County schools offering voluntary Bible classes at all (which does not state a valid legal claim), not to the particular content of those classes. However, to the extent the Complaint is attempting to challenge the specific content of the Bible classes, Plaintiffs do not have standing to do so—the Does do not allege they have ever encountered the specific content of the classes or that it in any way drives Jane Doe's (future) decision-making process, let alone that the Does have been injured by it. That is likely why they do not say the purported future need for Jamie Doe to opt out of the Bible class is based on its specific curriculum; instead it is based on the fact that Bible classes are generally offered ***at all***. (*See* Compl. ¶ 27 ("Jane Doe does not wish for Jamie to participate in ***any school bible courses*** or to be ostracized . . . because of Jamie's nonparticipation."); *id.* ¶ 74 ("Forcing Jane Doe to choose between putting her child ***in a bible study class*** or subjecting her child to a risk of ostracism by opting out . . . .") (emphases added).) The information Jane Doe allegedly received about the Bible class is not identified with any specificity in the Complaint, and there are no allegations in the Complaint tying the information to the purported injuries. (*Id.* ¶ 27.) In fact, it appears that the only Plaintiff to have encountered the specific curriculum is out-of-state Plaintiff FFRF, and then only in response to an apparent litigation-driven freedom of information request. (*Id.* ¶¶ 29-30, 43.) As FFRF should know from its last attempt to manufacture standing in this Circuit where none existed, that allegation is not sufficient to demonstrate standing. *See Moss*, 683 F.3d at 606 (mother who "only read [promotional letter about Bible class] in preparation for this litigation" did not have standing, nor

did FFRF, which, as here, "relied exclusively on her alleged injury to support its standing"); *cf. Beck*, 848 F.3d at 276-77 ("Simply put, these self-imposed harms cannot confer standing.").

Sixth, Plaintiffs do not have standing to assert a claim for nominal damages because they have not experienced any actual harm in the past; the Complaint rests solely on allegations of speculative future harm that by definition has not happened. (Compl. ¶¶ 11, 27-28, 74.) Claims for nominal damages must be based on past, completed harm. *See Chapin Furniture Outlet Inc. v. Town of Chapin*, 252 F. App'x 566, 572 (4th Cir. 2007) ("In the absence of a constitutional deprivation, Chapin's nominal damages claim does not save this case from mootness. Moreover, the fact that Chapin could have suffered some constitutional deprivation if the Town had enforced the Ordinance does not save its claim for nominal damages—such damages are reserved for constitutional deprivations that have occurred, not those that are merely speculative."); *compare Am. Humanist Ass'n v. Greenville Cty. Sch. Dist.*, 652 F. App'x 224, 231–32 (4th Cir. 2016) ("Initially, we conclude that the plaintiffs continue to have an interest in the outcome of the past chapel claim despite the Does' move to Alabama. The plaintiffs' claim for nominal damages based on a prior constitutional violation is not moot because the plaintiffs' injury was complete at the time the violation occurred.") (citing *Central Radio v. City of Norfolk*, 811 F.3d 625, 632 (4th Cir. 2016)).

B. The Complaint Does Not State a Cognizable Legal Claim

Even if Plaintiffs had standing, their Complaint fails and should be dismissed with prejudice because it is a facial attack on Mercer County's constitutional right to offer optional Bible classes in public schools for the benefit of the many students who are interested in receiving Bible instruction. Indeed, Jane Doe alleges that she "does not wish for Jamie to participate in ***any*** school bible courses" whatsoever (irrespective of particular content), and thinks she may be "ostracized by other students or staff because of Jamie's nonparticipation."

(Compl. ¶ 27 (emphasis added); *see also id.* ¶ 10 ("Jane is an atheist . . . .").) Jane Doe says she and Jamie face an "untenable choice[]": either for Jamie Doe to attend the Bible class, or by virtue of his non-attendance, be "the only or one of only a few children who do not participate," thus "be made conspicuous by absence, and essentially be identified as a non-Christian or nonbeliever" and be subject to a "risk of ostracism from peers and even school staff." (*Id.* ¶ 28.) Jane Doe asks the Court to permanently enjoin Defendants from "organizing, administering, or otherwise endorsing bible classes" of any kind. (*Id.* at p. 15 § C.) Plaintiffs' Complaint is not a mere quibble with particular aspects of the curriculum of the Bible in Schools program; instead, Plaintiffs seek to eliminate the Bible in Schools program entirely.[9] In fact, Jane Doe alleges that she would ***never*** allow Jamie Doe to participate in any Bible class at all, no matter what. (*Id.* ¶ 27.) Because Plaintiffs challenge the very existence of a program that teaches about the Bible, the Complaint fails to state a cognizable legal claim upon which relief may be granted. "Dismissal under Rule 12(b)(6) is appropriate only where ***the complaint lacks a cognizable legal theory*** or sufficient facts to support a cognizable legal theory." *Yesko v. Fell*, No. ELH-13-3927, 2014 WL 4406849, at *3 (D. Md. Sept. 5, 2014) (emphasis added) (citing *Hartmann v. Calif. Dept. of Corr. & Rehab.*, 707 F.3d 1114, 1122 (9th Cir. 2013)).

The Constitution does not prohibit schools from teaching about religion or from using materials that have a religious basis. *See Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam) ("The Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like."). It has been settled law for more than half a century that courses in the Bible and in religion may be offered in public schools. For example, in the nearly fifty-year-old case *Epperson v. Arkansas*, the Supreme Court instructed that "[s]tudy of religions

[9] If Plaintiffs actually have quibbles with particular aspects of the curriculum, Defendants are and always have been willing to discuss it with them.

and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment's prohibition." 393 U.S. 97, 106 (1968). And not long ago in *Mellen v. Bunting*, the Fourth Circuit confirmed that if Virginia Military Academy "desires to teach cadets about religion, it is entitled to offer such classes in its curriculum." 327 F.3d 355, 372 n.10 (4th Cir. 2003) (citing with approval *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 76 (2d Cir. 2001) ("[T]he Establishment Clause does not prohibit schools from teaching about religion.").

Other caselaw supporting this proposition is voluminous. *See, e.g.*, *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963); *McGowan v. Maryland*, 366 U.S. 420, 445 (1961); *see also Altman*, 245 F.3d at 76; *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311, 1315-16 (8th Cir. 1980) (quoting *McGowan*, 366 U.S. at 445). In fact, Courts have long recognized the historical, social, and cultural significance of religion in our lives and in the world generally. *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984); *Wiley v. Franklin*, 468 F. Supp. 133, 150 (E.D. Tenn. 1979) ("To ignore the role of the Bible in the vast area of secular subjects . . . is to ignore a keystone in the building of an arch, at least insofar as Western history, values and culture are concerned."). Indeed, the Supreme Court held that it might well be that one's education is ***incomplete*** without a study of comparative religion, or the history of religion and its relationship to the advancement of civilization. *Schempp*, 374 U.S. at 225 ("[T]he Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment."); *see also Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 236 (1948) (Jackson, J., concurring) (discussing impossibility of educating in the absence of religious culture and history); *Crockett v. Sorenson*, 568 F. Supp.

1422, 1429 (W.D. Va. 1983) ("Secular education imposes immediate demands that the student have a good knowledge of the Bible. . . . it becomes obvious that a basic background in the Bible is essential to fully appreciate and understand both Western culture and current events."). Accordingly, there is a legitimate time, place, and manner for the discussion of religion in the public classroom. *Schempp*, 374 U.S. at 225; *see Florey*, 619 F.2d at 1315-16; *Bauchman v. W. High Sch.*, 132 F.3d 542, 556 (10th Cir. 1997) (allowing that selecting religious songs for a body of choral music and religiously affiliated performance venues amounted to religiously neutral educational choices); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 407 (5th Cir. 1995) (holding the Establishment Clause does not prohibit choirs from singing religious songs as part of a secular music program); *Crockett*, 568 F. Supp. at 1429 ("the Establishment Clause permits a course of Bible study to be taught in the public schools").

Thus, Mercer County Schools' optional Bible classes cannot be *per se* unconstitutional. *Compare Hall v. Bd. of Comm'rs of Conecuh Cty.*, 656 F.2d 999, 1002 (5th Cir. 1981) ("The parties agree that study of the Bible in public schools is not per se unconstitutional"). As explained in the prior section, the Does have never seen or experienced the precise curriculum offered, and do not have standing to challenge it. As the allegations in the Complaint make clear, this lawsuit is a challenge to the existence of classes that have anything to do with the Bible, at all, and Plaintiffs seek an injunction to eliminate those classes. That is not a cognizable legal theory, and requires dismissal with prejudice. Fed. R. Civ. P. 12(b)(6); *see Action NC v. Strach*, __ F. Supp. 3d. __, 2016 WL 6304731, at *4 (M.D.N.C. Oct. 27, 2016) ("A complaint may fail to state a claim upon which relief may be granted . . . by failing to state a valid legal cause of action, i.e., a cognizable claim . . . .") (citing *Holloway v. Pagan River Dockside Seafood, Inc.*, 669 F.3d 448, 452 (4th Cir. 2012)); *Schreiber v. Dunabin*, 938 F. Supp. 2d 587,

594-95 (E.D. Va. 2013) ("Courts recognize that a plaintiff can plead himself out of court by pleading facts that show that he has no legal claim.") (quotation omitted).

C. Dr. Akers Should Be Dismissed From This Litigation

1. *Plaintiffs State No Claim Against Dr. Akers In Her Individual Capacity*

Plaintiffs have not identified any action that Dr. Akers, the superintendent of Mercer County Schools, took in her individual capacity. The two sentences below are the only allegations specific to Dr. Akers in Plaintiffs' Complaint:

> Defendant Deborah S. Akers is the Superintendent of Mercer County Schools. Her primary duty is the implementation of Mercer County Schools' policies and programs, consistent with the rules and regulations promulgated by the West Virginia Department of Education, the laws and Constitution of the State of West Virginia, and the laws and Constitution of the United States of America.

(Compl. ¶ 14.) The Complaint's only allegations of action taken by a superintendent reference a memo that a Superintendent Baker, presumably a predecessor of Dr. Akers, sent over thirty years ago. (*See id*. ¶ 20.) Because the Complaint is devoid of allegations against Dr. Akers in her individual capacity, the individual capacity claims should be dismissed. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 543 (1986) ("The . . . complaint alleged that the action was brought against the defendants 'in their individual and official capacities.' There is, however, nothing else in the complaint . . . to support the suggestion that relief was sought against any School Board member in his or her *individual* capacity."); *Lizzi v. Alexander*, 255 F.3d 128, 137 (4th Cir. 2001) ("[T]he mere incantation of the term 'individual capacity' is not enough to transform an official capacity action into an individual capacity action.") (citation omitted).[10]

[10] Dr. Akers is also entitled to qualified immunity because Plaintiffs "failed to plead sufficient facts showing that [she] violated the[ir] rights." *Barrett v. Bd. of Educ. of Johnston Cty.*, 590 F. App'x 208, 210 (4th Cir. 2014).

2. *Plaintiffs' Section 1983 Official Capacity Claim Against Dr. Akers Is Redundant and Should Be Dismissed*

Plaintiffs bring a claim for violating 42 U.S.C. § 1983 against Dr. Akers in her official capacity. This claim is redundant of the claim against the Board of Education. As the Supreme Court has explained, "[t]here is no longer a need to bring official-capacity actions against local government officials, for under *Monell* . . . local government units can be sued directly for damages and injunctive or declaratory relief." *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978)). Plaintiffs have sued the Mercer County School Board for violating § 1983, so the Court should dismiss the separate § 1983 claim against Dr. Akers as duplicative.[11]

D. Plaintiffs' Section 1983 Claim Should Be Dismissed

1. *Mercer County Schools Is Not a Final Policymaking Official*

Plaintiffs' claims under 42 U.S.C. § 1983 suffer from independent infirmities beyond those discussed above. In particular, Plaintiffs fail to allege that Mercer County Schools is a final policymaking official. The law of liability for schools under § 1983 is identical to the law of liability under § 1983 for municipalities. *See Barrett v. Bd. of Educ. of Johnston Cty.*, 590 F. App'x 208, 210 (4th Cir. 2014) ("The Board, for purposes of a civil rights lawsuit under § 1983, is indistinguishable from a municipality.") (citing *Riddick v. Sch. Bd. of City of Portsmouth*, 238 F.3d 518, 522 n.3 (4th Cir. 2000)). And as the Fourth Circuit explained in *Riddick*:

> [N]ot every decision by every municipal official will subject a municipality to section 1983 liability. Rather, municipal liability attaches ***only*** when the decisionmaker possesses ***final authority*** to establish municipal policy with respect to an action ordered. To qualify as a 'final policymaking official,' a municipal officer must have the responsibility and authority to implement final

[11] If the Court does not dismiss the claim for redundancy, it should alternatively be dismissed for the same reasons the § 1983 claim against the Board should be dismissed, which are discussed in Section II.D.2, *infra*.

municipal policy with respect to a particular course of action.

238 F.3d at 523 (citations and quotations omitted) (emphases added). In addition, "[t]he question of who possesses final policymaking authority is one of state law." *Id.* In West Virginia, the "final policy making authority for a school district resides with the members of its county board of education. . . . [which has] broad authority to control and manage the schools and school interests for all school activities and upon all school property." *Carr-Lambert v. Grant Cty. Bd. of Educ.*, No. 2:09-CV-61, 2009 U.S. Dist. LEXIS 58194, at *8 (N.D.W. Va. July 2, 2009) (citing W. Va. Code §§ 18-5-1, 18-5-13). Plaintiffs do not and cannot allege that Mercer County Schools has the responsibility or authority to implement final school policy. Therefore, the claims against Mercer County Schools should be dismissed.

2. *Plaintiffs Fail to Identify a Mercer County School Board Policy*

In addition to final policymaking authority—which rests with the Mercer County School Board—Plaintiffs must plead that "the execution of a policy or custom" of the Board "caused the violation." *Barrett*, 590 F. App'x at 210 (citing *Love-Lane v. Martin*, 355 F.3d 766, 782 (4th Cir. 2004)). But the Complaint fails to identify any policy or custom of ***the Board***; instead, the Complaint identifies only things ***Mercer County Schools*** allegedly did. (*See* Compl. ¶¶ 31, 33 ("Per Mercer County Schools policy . . . .").) What Mercer County Schools did does not itself establish § 1983 liability for the Mercer County School Board because there is no respondeat superior liability under § 1983. *Barrett*, 590 F. App'x at 210 (citing *Monell*, 436 U.S. at 691); *Bd. of Cty. Comm'rs of Bryan Cty., Okl. v. Brown*, 520 U.S. 397, 403–04 (1997) ("Locating a 'policy' ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality."). Having failed to identify any policy or custom of the

Board, despite the fact that Board Policy is posted on the Internet for anyone to review,[12] the Complaint fails to state a plausible claim against the Board for violation of § 1983. *Barrett*, 590 F. App'x at 210 ("Appellants' claims against the Board of Education . . . fail because the Appellants failed to make sufficient factual allegations that move the claims from conceivable to plausible. There were no factual allegations showing that ***the Board*** had a policy, custom, or practice that led to the alleged violations.") (emphasis added); *cf. Ashcroft v. Iqbal*, 556 U.S. 662, 683 (2009) ("Unlike in *Twombly*, where the doctrine of *respondeat superior* could bind the corporate defendant, here, as we have noted, petitioners cannot be held liable unless they themselves acted . . . .").

III. CONCLUSION

For each of the reasons stated above, the Complaint should be dismissed.

Dated: March 13, 2017

Respectfully submitted,

O'MELVENY & MYERS LLP
MICHAEL J. WALSH, JR. (*pro hac vice*)
mwalsh@omm.com
DAVID R. DOREY (*pro hac vice*)
ddorey@omm.com
1625 Eye Street, N.W.
Washington, DC 20006
Tel: (202) 383-5150

BREWSTER, MORHOUS, CAMERON, CARUTH, MOORE, KERSEY & STAFFORD PLLC
By: */s/ Kermit J. Moore*
KERMIT J. MOORE (W.Va. Bar No. 2611)
kmoore@brewstermorhous.com
418 Bland Street
P.O. Box 529
Bluefield, WV 24701
Tel: (304) 325-9177

[12] *See* Mercer County Public Schools, *Board Policy*, http://boe.merc.k12.wv.us/?q=node/22 (last visited Mar. 9, 2017). The Court may take judicial notice of this for the reasons stated in Note 1.

FIRST LIBERTY INSTITUTE
HIRAM S. SASSER III (*pro hac vice*)
hsasser@firstliberty.org
JEREMIAH G. DYS
(W.Va. Bar No. 9998; Tex. Bar No. 24096415)
jdys@firstliberty.org
2001 West Plano Parkway
Suite 1600
Plano, TX 75075
Tel: (972) 941-4444

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2017, the foregoing MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic case filing system and constitutes service of this filing under Rule 5(b)(2)(E) of the Federal Rules of Civil Procedure. Parties may access this filing through the Court's ECF system.

/s/ Kermit J. Moore
Kermit J. Moore

Exhibit A

The Insurance Store Steering Committee

POLICIES OPEN FOR PUBLIC COMMENT

I-22 Active

WEATHER

Los Angeles, CA

73°

10:10 am PST

Sunny

MERCER COUNTY ADMINISTRATIVE/ TEACHERINFO WEB PAGES

Admin Login
Teacher Login

2016-2017 Calendar

2016-2017 BOE Goals

Community Eligibility Provision for School Meal Program

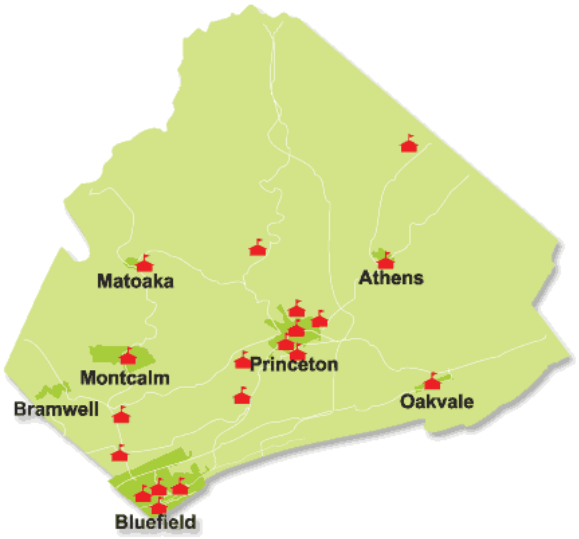
Parents reminded of immunization requirements

High School Climate Surveys

Elementary Schools

We have nineteen Elementary School facilities through Mercer County. These schools serve students from pre-kindergarten to the eighth grade in certain areas. Click the school name for detailed information on that facility.

ATHENS SCHOOL (K-5)
BLUEFIELD INTERMEDIATE (3-5)
BLUEWELL ELEMENTARY (K-5)
BRUSHFORK ELEMENTARY (K-5)
CERES ELEMENTARY (K-5)
CUMBERLAND HEIGHTS ELC (PRE-K)
GLENWOOD SCHOOL (K-8)
LASHMEET/MATOAKA (K-5)
MELROSE ELEMENTARY (K-5)
MEMORIAL ELEMENTARY (K-2)
MERCER ELEMENTARY (3-5)
MONTCALM ELEMENTARY (K-6)
OAKVALE (K-5)
PRINCETON PRIMARY (K-2)
SILVER SPRINGS ELC (PRE-K)
SPANISHBURG (K-5)
STRALEY ELEMENTARY (3-5)
SUN VALLEY ELEMENTARY (K-5)
WHITETHORN ELEMENTARY (K-2)



Click here for a printable version of Maps to Mercer County Schools

Medication In School

Child Too Sick For School?

Tardies, Early Dismissals Addressed In Revised Attendance Policy

CLICK HERE FOR BULLYING AWARENESS AND PREVENTION RESOURCES.

NAVIGATION

Recent posts

User login

Username: *

Password: *

Log in

Request new password

Exhibit B

STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

CHARLIE BROWN
ATTORNEY GENERAL

October 31, 1985

Dr. W. Tom McNeel
State Superintendent of Schools
West Virginia Board of Education
Building 6, Room 358
Capitol Complex
Charleston, West Virginia 25305

Re: Academic Study of the Bible in Public Schools

Dear Dr. McNeel:

Your letter of September 26, 1985, has requested that we define the parameters within which a course in the Bible or a class utilizing the Bible as a main textbook may be taught in the public schools of West Virginia. You also have requested guidance on legal requirements for teachers of any such classes.

Both our state and federal constitutions speak to these points. The United States Constitution simply prohibits the government from imposing "an establishment of religion, or prohibiting the free exercise thereof." U. S. Constitution, amendment I. Our state constitution establishes the same principles but in broader and more far-reaching terms. The West Virginia Constitution guarantees inter alia that no one "shall be compelled to frequent or support any religious worship, place or ministry, whatsoever;" it prohibits any tax "for the support of any church or ministry;" and provides that "it shall be left free for every person to select his religious instructor, and to make for his support, such private contract as he shall please." W. Va. Constitution, Article III, Section 15. As can be seen, our West Virginia Constitution takes very seriously the importance of absolute religious freedom, echoing our state motto Montani Semper Liberi ("Mountaineers are always free").

These constitutional principles were established at a time when the religious persecutions of the Reformation and its aftermath were fresh in the mind. Even in the early days of American history, men and women had been sent to the stocks, the whipping posts, and the dungeons for their religious beliefs, and some had forfeited their lives. In Europe, and elsewhere around

the globe, religious disagreement had led to people being torn apart on the rack, roasted on the spit, and mauled in battle, all in God's name. Today, we see similar turmoil in Northern Ireland and the Middle East.

At the same time it is to be remembered that the constitutional framers were, by and large, religious people. One historian has declared that our American political forebearers saw the "spiritual" as liberating, but they saw the "ecclesiastical" as the enemy. They were in no way hostile to religion; they simply regarded it as a personal matter. See: Elwyn A. Smith, Religious Liberty in the United States (Philadelphia: Fortress Press, 1972).

The courts have examined questions of religion in public education in light of the two religion clauses in the First Amendment: i.e., does the activity tend to "establish" any religion, and does the activity impinge upon anyone's free exercise of religion? It is recognized that the two clauses sometimes seem to be in conflict, and also that one person's free exercise of religion may readily intrude upon another person's right to be free from that particular version of religious ideology.

The Establishment Clause received its classic definition in the Supreme Court's 1947 decision in Everson v. Board of Education, 330 U.S. 1, 91 L. Ed. 2d 711, 67 S. Ct. 504 (1947). The court said the clause meant "at least this":

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institution, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice-versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a

"wall of separation between Church and State." 330 U.S. at 15-16, 91 L. Ed. 2d at 723.

More recently, the Supreme Court established a three-prong test for determining whether the Establishment Clause has been violated. First enunciated in Lemon v. Kurtzman, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105, reh. denied 404 U.S. 876, 30 L. Ed. 2d 123, 92 S. Ct. 24 (1971), the test asks whether a challenged practice (1) reflects a secular purpose, (2) has a primary effect that neither advance nor inhibits religion, and (3) avoids excessive entanglement between government and religion. If any one of the questions is answered in the negative, the law or practice is unconstitutional. Justice O'Connor has recently elaborated upon the first two prongs of the Lemon test, supra, declaring that the purpose prong "asks whether government's actual purpose is to endorse or disapprove of religion," and the effect prong "asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." Lynch v. Donnelly, 465 U.S. 668, 79 L. Ed. 2d 604, 104 S. Ct. 1355 (1984); see also Wallace v. Jaffree, 472 U.S. _____, 105 S. Ct. 2479 (1985).

The Free Exercise Clause, perhaps easier to interpret than the Establishment Clause, has been construed to mean the right of every person to choose among types of religious training and observance, absolutely free of state compulsion. Abington School District v. Schempp, 374 U.S. 203, 10 L. Ed. 2d 844, 83 S. Ct. 1560 (1963). The West Virginia Supreme Court has cogently declared that where religious freedom is concerned, "the law knows no heresy." State ex rel. Hughes v. Board of Education, 154 W. Va. 107, 174 S.E.2d 711 (1970), appeal dismissed 403 U.S. 944, 29 L. Ed. 2d 854, 91 S. Ct. 2274 (1971). The right to religious freedom includes the right to be irreligious. Wallace v. Jaffree.

It scarcely need be noted here that the courts have utilized the foregoing principles to prohibit many religious activities in the schools. Notable among these are organized prayer, Engel v. Vitale, 370 U.S. 421, 8 L. Ed. 2d 601, 85 S. Ct. 1261 (1962), Abington School District, supra; daily devotional readings from the Bible, Abington School District, supra; posting of the Ten Commandments in classrooms, Stone v. Graham, 449 U.S. 39, 66 L. Ed. 2d 199, 101 S. Ct. 192, reh. denied 449 U. S. 1104, 66 L. Ed. 2d 832, 101 S. Ct. 904 (1980); and most recently, a moment of silence for "meditation or voluntary prayer," Wallace v. Jaffree, supra.

While the courts have barred these activities because they either tended to establish religion through the public schools or

impinged upon the religious freedoms of others, the courts have repeatedly declared that government's posture should not be one of hostility towards religion; rather it should be one of neutrality. Wallace v. Jaffree; Abington School District, supra; Torcaso v. Watkins, 367 U.S. 488, 6 L. Ed. 2d 982, 81 S. Ct. 1680 (1961).

On the one hand, then, it is abundantly clear that the West Virginia schools can never endorse or propagate any religion, and the public treasury cannot be used, directly or indirectly, in support of any particular religious idea. On the other hand, these strictures do not prohibit the public schools from teaching "about" religion, from the standpoint of academic inquiry. Study of the Bible in public schools clearly is not per se unconstitutional. Hall v. Board of School Commissioners of Conecuh County, 656 F.2d 999 (5th Cir. 1981). The Bible has, after all, been central to much of Western history and a source for much of our culture's literature. It could certainly be said that the educated person must know something of the Bible just as he or she must know something of Shakespeare.

Indeed, in its 1963 decision on prayer in schools, the United States Supreme Court said:

> [I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.

Such study is now common in higher education. Both public and private colleges in West Virginia offer courses examining the Bible. The possibility of such courses in the elementary and secondary schools, of course, has caused the present inquiry.

The cases that have reached the courts on use of religious texts for public instruction have come from both ends of the spectrum. In one of the earlier cases, Calvary Bible Presbyterian Church v. Board of Regents, 436 P.2d 189 (Wash. 1968), a group of conservative Christians opposed the University of Washington's course entitled "Bible Literature" because they felt its academic inquiry was too liberal. They wanted to bar the University from teaching Bible at all, but the State Supreme

Court held that the course was a proper academic subject. In a case from New Jersey, however, Malnak v. Maharishi Yogi, et al., 592 F.2d 197 (3rd Cir. 1979), a federal court did prohibit five high schools from continuing their courses in transcendental meditation using a book by the Maharishi Yogi because the courses constituted state establishment of religion.

A key precedent for many of these issues is the Supreme Court's 1948 decision in Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 92 L. Ed. 2d 648, 68 S. Ct. 461 (1948), which dealt with an Illinois program in which teachers employed by various denominational groups were sent into the public schools to give religious instruction to students from their denominations when the students' parents requested it. Even though the program was voluntary, and thus did not violate the Free Exercise Clause, the Court said it was unconstitutional because the furnishing of the physical facilities and the students in place (under compulsory attendance laws) constituted an establishment of religion by the state. In that case, of course, the instruction was avowedly religious.

Several cases from the southeastern United States have specifically examined public school courses in the Bible. In a 1970 decision, the Martinsville, Virginia, elementary schools were barred from continuing their Bible courses, which had been taught for a one-hour period each week by teachers employed and trained by a group of local citizens known as the "Religious Education Council." The court held that the McCollum decision controlled, because the private council was, in fact, "a religious group," and both school buildings and students were being furnished for the courses. Vaughn v. Reed, 313 F. Supp. 431 (W.D. Va. 1970).

Thirteen years later, the same court (though with a different judge sitting) held a similar program in the City of Bristol, Virginia, unconstitutional on the same grounds. The court cited the "strong religious overlay that stems from the conception and management of the program by the sponsors." Crockett v. Sorenson, 568 F. Supp. 1422 (W.D. Va. 1983).

One federal appeals court in 1981 considered an Alabama public high school course entitled "Bible Literature." The court found factually that the class "consisted entirely of a Christian religious perspective and within that a fundamentalist and/or evangelical doctrine," and that the textbook used, The Bible for Youthful Patriots, "reveals a fundamentalist Christian approach to the study of the Bible devoid of any discussion of its literary qualities." Hall v. Board of School Commissioners of Conecuh County, 656 F.2d 999 (5th Cir. 1981).

By far the most thorough review of the issues in an instructional program in Bible comes from the case of Wiley v. Franklin, 468 F. Supp. 133 (E.D. Tenn. 1979), involving the Chattanooga and Hamilton County, Tennessee, schools. The case came before the local federal court three times in 1979-1980.

Begun in 1922, the program was financially supported, except for some minimal administrative oversight costs, by a local civic group known as the "Public School Bible Committee." The Committee sponsored teacher selection and assignments (though principals had a right of refusal over any teacher), prepared the Bible study curricula, and conducted teacher training courses. Teachers selected were evangelical Protestant Christians. Among other sources of revenue, the Committee solicited "love offerings" from the parents of the children who participated in the classes. The school boards, in allowing the committee's program to operate in the schools, specifically recited that the courses were to be for purposes of understanding the American heritage and world history. Students could elect not to take the courses, in which case they would go to an empty classroom, the library, or elsewhere. At the time the lawsuit was instituted, the policy was altered so that students had to make a positive election to attend the Bible class rather than opt out of it. Grades were never a part of the student's formal academic record. Bible teachers were not required to have state teacher certificates. The program involved only the elementary levels, and the teachers declared that their instructional method was to "let the Bible speak for itself," with avoidance of any personal interpretation. All critical analysis of the Bible was avoided.

The plaintiff students claimed that their free exercise rights were being violated because they felt coercion and peer pressure to participate in the Bible classes (they reported that some family tensions had resulted from it), and that the straightforward teaching of the Bible constituted religious instruction.

In its first opinion, Wiley v. Franklin, supra, the court declared that the discussion must:

> begin with the premise that the Bible is a religious book * * *. Thus, to simply read the Bible without selectivity is to read a religious book and to teach the Bible literally without interpretation is to convey a religious message or teach a religious lesson.

The court then examined the facts and found the Chattanooga program unconstitutional because the sponsoring Committee was

primarily motivated by religious goals, the course content tended to advance the Christian faith (and thus inhibit other faiths), and, because the Committee controlled the teachers and curriculum, there was excessive entanglement between religion and government.

However, the court allowed the city schools to reform their program to comply with constitutional standards, including (1) selection and deployment of the teachers and curriculum by the school board instead of the Committee, (2) elimination of any particular religious commitment or view as a requisite for teachers, and (3) elimination of "all lessons titles whose only reasonable interpretation is a religious message."

Upon a later review, Wiley v. Franklin, 474 F. Supp. 525 (1979), the court held that employment of teachers whose only qualifications were a teacher permit and 12 quarter hours of higher education in Bible literature was an "inadequate assurance" for the teaching of a nonreligious course, but the court gave its approval to the use of teachers holding bachelor's degrees in Biblical literature and regular state elementary teacher certificates or permits. The court also dealt with a specific portion of the curriculum in this opinion, holding unacceptable a lesson teaching the Resurrection of Jesus as recounted in the New Testament. The court said that this New Testament passage forms the central statement of the Christian religious faith, and said its "only reasonable message is a religious message. It is difficult to conceive how it might be taught as secular literature or secular history."

On its third trip before the court, 497 F. Supp. 390 (E.D. Tenn 1980), six tape recordings of actual class sessions were reviewed. The opinion reiterated the standard to be met:

> 'The ultimate test of the constitutionality of any course of instruction founded upon the Bible must depend upon classroom performance. It is that which is taught in the classroom that renders a course so founded constitutionally permissible or constitutionally impermissible. If that which is taught seeks either to disparage or to encourage a commitment to a set of religious beliefs, it is constituionally impermissible in a public school setting.* * *'

The court gave its approval to lessons concerning the Israelite's capture of the walled city of Jerico under the leadership of Joshua and a story about the relationship between Saul and David. Both had been presented without biblical

readings. The story of Saul and David was linked to current world affairs. Approval was also given to Jesus' parable of the talents. In the lesson, Jesus was identified as a teacher and the disciples as his students. The emphasis was upon the idea behind the parable that "practice makes perfect" and that a student's talents grow only as they are used.

The Court did, however, bar further use of three other lessons. One dealt with God punishing the Babylonian king, Belshazzar, by destroying his kingdom; the second dealt with Moses' building of the Tabernacle and the Israelites worship of the golden calf; the third told of the destruction of Sodom and Gomorrah by fire and brimstone. The Court held that the intent and purpose of these three lessons was to convey a religious message rather than a literary or historical one.

While the courts in the foregoing cases have found that constitutional principles prohibit private civic groups from operating Bible instruction programs because of the religious groundings of the several groups, the same would be true in West Virginia even if the groups were not religiously oriented. West Virginia law places upon duly elected state and county boards of education the duty of operation of the public schools, and this duty cannot be abandoned to private groups. W. Va. Code §§ 18-2-5, 18-5-1 et seq.

Likewise, uncertified and privately employed teachers cannot deliver West Virginia's public education, irrespective of any question of religious orientation. Public school teachers must be employed by county boards of education in accord with Code 18-5-4, and they must be certified as public school teachers by the State Superintendent of Free Schools. Code 18A-3-1 et seq.

In summary, then, West Virginia public schools can offer instruction "about" the Bible, treating it for its academic value as history and literature. This instruction must, however, neither advance nor inhibit religion, and it must be conducted in accord with the general school laws of West Virginia.

Accordingly, it is our opinion that instruction about the Bible can be given in West Virginia's public schools under the following guidelines:

1. Supervision and control of the courses must be under the exclusive direction of the boards of education;

2. The boards should do the hiring and firing of teachers for the Bible courses in the same manner they do for all other teachers;

3. Teachers must hold appropriate state certification as public school teachers;

4. No inquiry should be made to determine the religious beliefs, or the lack thereof, of teacher applicants;

5. The school boards should prescribe the curriculum and select all teaching materials, as with any other courses;

6. The courses should be offered as electives. Children who choose not to take the courses should be offered reasonable alternative courses;

7. The school boards may solicit contributions from any private organizations for the purpose of funding any and all costs of Bible courses. Such contributions shall be received with "no strings attached" other than the understanding that such funds may be earmarked for the Bible courses exclusively;

8. Course content must study the Bible only for its historical and literary qualities, or in the context of comparative religion; and

9. The courses must be taught in an objective manner with no attempt made to indoctrinate students into either the truth or falsity of the biblical materials, or their value for personal religious commitment. At the secondary school level, modern methods of critical scholarship should be utilized.

Because the ultimate test of any such instruction will be classroom performance, such programs will be difficult to administer. It is suggested that school systems desiring to

offer such courses work closely with their legal advisors in the development and administration of the programs, in accord with the guidelines furnished in this opinion.

Very truly yours,

CHARLIE BROWN
ATTORNEY GENERAL

By Michael Clay Smith Chief Deputy

MICHAEL CLAY SMITH

MCS/rm

Exhibit C

Mercer County Schools

FIRST IN EDUCATION: RUNNING FOR FIRST

2016-2017 Student Calendar

School Year Summary 2016-2017

IMPORTANT DATES

First Day for Pupils	August 10
SC Day (1 HR Early Dismissal)	August 17
Labor Day (Holiday)	September 5
SC Day (1 HR Early Dismissal)	September 21
Faculty Senate (2 HR Early Dismissal)	October 12
Election Day (Holiday)	November 8
Veteran's Day (Holiday)	November 11
SC Day (1 HR Early Dismissal)	November 16
Fall Break	November 23-25
Last Day of First Semester/Faculty Senate (2 HR Early Dismissal)	December 21
Winter Break	December 22—January 2
New Year's Day (Holiday)	January 2
*Continuing Education Day (Faculty and Staff)	January 3
Second Semester Begins / Students Return	January 4
Martin Luther King Day (Holiday)	January 16
SC Day (1 HR Early Dismissal)	January 18
SC Day (1 HR Early Dismissal)	February 15
*MU/OC (Make-Up/Out of Calendar Day)	February 27
Faculty Senate (2 HR Early Dismissal)	March 8
*OS (Outside School Environment Day)	March 10
*MU/OC (Make-Up/Out of Calendar Day)	March 13
*MU/OC (Make-Up/Out of Calendar Day)	March 24
*OS (Outside School Environment Day)	March 27
SC Day (1 HR Early Dismissal)	April 12
*OS (Outside School Environment Day)	April 14
Spring Break	April 17-April 21
*OS (Outside School Environment Day)	May 5
*OS (Outside School Environment Day)	May 12
SC Day (1 HR Early Dismissal)	May 17
*OS (Outside School Environment Day)	May 19
*MU/OC (Make-Up/Out of Calendar Day)	May 22
*MU/OC (Make-Up/Out of Calendar Day)	May 23
Graduation Day	May 26
Memorial Day (Holiday)	May 29
*MU/OC (Make-Up/Out of Calendar Day)	May 30
Last Day for Students / Faculty Senate (2 HR Early Dismissal)	June 5
Last Day for Teachers/Preparation Day	June 6
*Make-Up/Out of Calendar Days	June 7-30

*May be lost due to inclement weather.

Mercer County Schools has a website that offers an abundance of information including services available, lunch and breakfast menus, highlights, Board policies, student financial aid, school closings and delays, et cetera. You may access Mercer County Schools' website at: *http://boe.merc.k12.wv.us.*

SCHOOL CALENDAR ADDENDUM

Chart shows the order in which non-instructional days would be used to make up snow days.

	Missed Instructional Day	Scheduled Make-up Day
1	First Missed Day	02/27/2017 (MU/OC)
2	Second Missed Day	03/10/2017 (OS)
3	Third Missed Day	03/13/2017 (MU/OC)
4		03/24/2017(MU/OC)
5		03/27/2017 (OS)
6		04/14/2017 (OS)
7		05/05/2017 (OS)
8		05/12/2017 (OS)
9		05/19/2017 (OS)
10		05/22/2017 (MU/OC)
11		05/23/2017 (MU/OC)
12		05/30/2017 (MU/OC)

If more cancellations occur . . . We will begin with June 6, 2017, and move the P Day for the Closing of School to after the last Instructional Day.

TERMS

OS (Outside School Environment) - Day off for students and employees unless converted to instructional day.

H (Holiday) - Day off for students and employees.

P (Preparation Day for opening/closing of school) - Faculty and staff report.

E (Election Day) - Schools closed.

CE (Continuing Education) - Faculty and staff report.

CD (Curriculum Development Day) - Faculty and staff report; students report if converted to an instructional day.

OC (Out of Calendar Day) - Day off for students and employees unless converted to an instructional day.

August 2016

July

Su	Mo	Tu	We	Th	Fr	Sa
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

September

Su	Mo	Tu	We	Th	Fr	Sa
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	

Sun	Mon	Tue	Wed	Thu	Fri	Sat
	1	2	3	4 CE Day First Day for Teachers	5 CE Day	6
7	8 CE DAY	9 Preparation Day Faculty Senate BOE Meeting, 7:00 P.M., MCTEC, Seminar Center	10 First Day for Students 	11	12	13
14	15 First Day for Pre-K	16	17 School Collaboration (Dismiss 1 Hour Early)	18	19	20
21	22	23 BOE Meeting, 7:00 P.M., MCTEC, Seminar Center	24	25	26	27
28	29	30	31			

Mercer County Schools (http://boe.merc.k12.wv.us)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
BLUEFIELD DIVISION

FREEDOM FROM RELIGION FOUNDATION, INC., and JANE DOE, individually, and on behalf of JAMIE DOE, Plaintiffs, v. MERCER COUNTY BOARD OF EDUCATION, MERCER COUNTY SCHOOLS, and DEBORAH S. AKERS, individually and in her official capacity as superintendent of Mercer County Schools, Defendants.	Civil Action No. 1:17-cv-00642 Hon. David A. Faber ORAL ARGUMENT REQUESTED

DECLARATION OF KERMIT J. MOORE

I, Kermit J. Moore, declare under penalty of perjury that the foregoing is true and correct.

1. I am a partner of the law firm of Brewster, Morhous, Cameron, Caruth, Moore, Kersey & Stafford PLLC, counsel to Defendants Mercer County Board of Education, Mercer County Schools and Deborah S. Akers ("Defendants") in the above-captioned matter. I am a member in good standing of the Bar of West Virginia.

2. I respectfully submit this declaration in support of the accompanying Defendants' Motion to Dismiss and Memorandum in Support of Defendants' Motion to Dismiss.

3. Attached as **Exhibit A** is a true and correct copy of a public webpage on the Mercer County Public Schools website listing elementary schools in Mercer County Public Schools. The URL is: http://boe.merc/k12.wv.us/?q=node/5.

4. Attached as **Exhibit B** is a true and correct copy of the Opinion issued by the West Virginia Office of the Attorney General dated October 31, 1985, and entitled *Academic*

Study of the Bible in Public Schools.

5. Attached as **Exhibit C** is a true and correct copy of an excerpt from the Mercer County 2016-2017 School Calendar, which is posted on a public webpage on the Mercer County Public Schools website. The URL is: http://boe.merc/k12.wv.us/downloads/2016_2017% 20 Student%20Calendar.pdf.

Dated: March 13, 2017

Respectfully submitted,

By: */s/ Kermit J. Moore*

Kermit J. Moore (W.Va. Bar No. 2611)
Brewster, Morhous, Cameron, Caruth,
Moore, Kersey & Stafford PLLC
418 Bland Street
P.O. Box 529
Bluefield, WV 24701
Tel: (304) 325-9177
kmoore@brewstermorhous.com