



May 20, 2015

***Via Email and Certified Mail RRR#***

Mr. Dan Phillips - dan.phillips@somersetnv.org  
*Somerset Academy Losee Campus Middle/High School Principal*

Mr. Eric Brady - eric.brady@somersetnv.org  
Mr. Eric Elison - eric.elison@somersetnv.org  
Mr. Will Harty - will.harty@somersetnv.org  
Ms. Amy Malone - amy.malone@somersetnv.org  
Mr. Cody Noble - cody.noble@somersetnv.org  
*Somerset Academy Losee Campus Board of Directors*

Somerset Academy – Losee Campus  
4650 Losee Road  
North Las Vegas, NV 89081

**RE: Violation of Student Religious Liberty in Class Assignment**

Dear Principal Phillips:

Tim and Kate Fraiser retained Liberty Institute as legal counsel in connection with the decision by Somerset Academy Sixth Grade Teacher Miss Jardine and affirmed by Assistant Principal Jenyan Martinez, to deny their daughter Mackenzie Fraiser's reference to the Bible as part of a school assignment. Please direct all future communication regarding this matter to me.

In February 2015, Miss Jardine instructed her 6<sup>th</sup> grade students in the Technology class at Somerset Academy to create a PowerPoint presentation entitled, "All About Me." The purpose of the assignment was to instruct students in the use of technology and the presentation software PowerPoint by having them create a presentation that would explain to the audience more about the student as a whole person.

The assignment required that one of the slides contain an "inspirational saying." That slide was in keeping with the nature of the assignment: to compose a PowerPoint presentation that reflected the student's identity. It was natural, then, that each student would select an "inspirational saying" revealing something about their identity. Miss Jardine explained to the class that none of the students were permitted to put "Bible verses or quotations from the Book of Mormon" on the "inspirational sayings" slide, even though such sayings would undoubtedly qualify as "inspirational." Mackenzie intended to place a Bible verse (in particular, John 3:16) on that slide to explain to her audience one of the most central parts of her identity: her Christian faith. But, Miss Jardine's instructions were clear: the "All About Me" presentation could *not* contain Bible verses. Mackenzie relented and settled for replacing the verse with a more

mundane, entirely secular saying. Upon completion of the assignment, the students, including Mackenzie handed the assignment in to Miss Jardine, the classroom teacher.

A few months later, Mackenzie started work on a Leadership class assignment in which she was to address the topic of self-esteem. As she and her parents discussed the assignment, her parents suggested that Mackenzie acknowledge that she derives her sense of self-esteem from having been made in the image of God. Mackenzie hesitated, explaining to her parents that, because Miss Jardine had expressly barred any reference to faith in the Technology class assignment, she thought it was unlawful and wrong to mention her faith in any school assignment.

This classroom instruction barring his daughter from expressing her faith in a classroom assignment perplexed Mackenzie's father, a pastor. He sent an email to Mackenzie's teacher and Somerset Academy's Assistant Principal asking why she had been denied the right to include the Bible verse in her assignment. In an email to the Fraisers, dated May 1, 2015, Assistant Principal Martinez explained:

I spoke with Miss Jardine yesterday to gather information regarding the nature of the assigned "All About Me" project from last quarter. The project was assigned with the intent to have students present them to the class. Miss Jardine saw that Mackenzie had included Biblical sayings in her presentation material.

The U.S. Department of Education states that students have the right to engage in voluntary prayer or religious discussion free from discrimination, but that does not include the right to have a captive audience listen or compel other students to participate. When Mackenzie created the project with the expectation she would present the Biblical saying to the class, the matter became one of having a captive audience that would be subject to her religious beliefs. Had the assignment been designed to simply hand in for a grade, this would not have been an issue. Therefore, considering the circumstances of the assignment, Miss Jardine appropriately followed school law expectations by asking Mackenzie to choose an alternate quote for the presentation.

The entire email colloquy on the subject between our client and your staff has been attached to this letter as Exhibit 1 for your review and consideration.

### **Private Student Speech Protected by Constitution**

It is a bedrock constitutional principle that students retain First Amendment freedoms while at school. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 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."). Private student speech, such as student class assignments, is protected by the Constitution and the government must remain neutral toward the private expression of religion by students. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("Our precedent establishes that private religious speech, far from

being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.”); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (“Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”).

While it may be tempting to censor student speech in the name of protecting students from any exposure to religion, the First Amendment, “does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.” *Bd. of Educ. v. Mergens*, 496 U.S. 226, 248 (1990) quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978). Indeed, doing so establishes a hostility to religion that itself violates the Establishment Clause. *Good News Club v. Milford Central School*, 533 U.S. 98, 119 (2001) (“[W]e cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint . . . .”); *School District of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963) (“[T]he State may not establish a ‘religion of secularism’ in the sense of affirmatively opposing or showing hostility to religion, thus ‘preferring those who believe in no religion over those who do believe.’” (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952))). The better approach to be taken has been outlined by both the Seventh and Ninth Circuit U.S. Courts of Appeal:

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

*Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044, 1055 (9th Cir. 2003) (quoting *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299-1300 (7th Cir. 1993) (emphasis added); see also *Wigg v. Sioux Falls School District 49–5*, 382 F.3d 807 (8th Cir. 2004) (“[The school district’s] desire to avoid the appearance of endorsing religion does not transform Wigg’s private religious speech into a state action in violation of the Establishment Clause. Even private speech occurring at school-related functions is constitutionally protected . . . .”).

### **Department of Education Guidelines Contradict Assistant Principal Martinez**

The United States Department of Education affirmed this long-standing position of neutrality toward the free exercise of religion by students—including such expression as part of a student’s written or oral classroom assignment:

**Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions.** Such home and classroom work should be judged by ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the school. Thus, if a teacher's assignment involves writing a poem, the work of a student who submits a poem in the form of a prayer (for example, a psalm) should be judged on the basis of academic standards (such as literary quality) and neither penalized nor rewarded on account of its religious content.

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

Assistant Principal Martinez wrongly concluded that Mackenzie could not express her religious beliefs as part of her “All About Me” assignment. We are unaware of any decision by the Supreme Court of the United States, any other federal or state court, or the United States Department of Education preventing a student from expressing her religious beliefs as part of a student assignment on the ground that a “captive audience . . . would be subject to her religious beliefs.” Contrary to Assistant Principal Martinez’s incorrect—and unlawful—assumption, when a student speaks within the classroom, her speech does *not* automatically become government speech. Decades of Supreme Court jurisprudence and the United States Department of Education guidelines come to precisely the opposite conclusion: absent other factors not present in this situation, student assignments constitute private student speech that cannot be censored by school officials (teachers, administrators, etc.) based on the religious content of their submissions.

### **Censoring Private Student Speech Inhibits Protected Student Expression**

Suppressing student religious speech—even during classroom assignments—carries the danger of chilling protected expression by students. It is this very danger of chilling private student speech that the Supreme Court of the United States has rejected when protecting private expression by students. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835-36, 844 (1995) (Expressing the concern that censoring private student speech based solely upon the viewpoint offered by that speech can chill individual thought and expression.). And that is precisely what has happened here: Mackenzie now fears expressing her religious beliefs in subsequent assignments precisely because she has been taught by Miss Jardine that speaking about religion as part of an assignment is wrong. Unless Somerset Academy corrects such instruction, the lesson taught to each student at Somerset Academy is that students must hide their religion in the classroom.

Somerset Academy violated the constitutional and civil rights of our client. We therefore demand that, within ten (10) days of this letter, Somerset Academy issue a written apology to Mackenzie Fraiser and permit her to re-submit her original presentation, inclusive of the expression of her religious beliefs. Absent such written apology and assurance that students in

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Somerset Academy may express their religious beliefs in their school assignments, our client is prepared to take legal action against Somerset Academy, seeking all appropriate and available relief in order to preserve Mackenzie's constitutional and statutory rights under federal and Nevada law.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeremy Dys", with a stylized flourish at the end.

Jeremy Dys,  
Senior Counsel.

Enclosure.

CC: U.S. Department of Education,  
Office of Civil Rights  
Seattle Office  
915 Second Avenue, Room 3310  
Seattle, WA 98174-1099

The Hon. Adam Paul Laxalt  
Office of the Attorney General  
100 North Carson Street  
Carson City, NV 89701

# **EXHIBIT 1**

From: Tim Fraiser  
Sent: Wednesday, April 29, 2015 3:27 PM  
To: Kelsey Strickland  
Cc: Jenni Martinez  
Subject: Freedom of Speech

Ms. Jardine,

Mackenzie told us that you told her class they were not allowed to use any "Biblical sayings" in their PowerPoints.

Can you please explain if this is true? Perhaps, she misunderstood you? Since I am certain you understand that this clearly infringes on my daughters/your students right to freedom of speech, I want to make sure we understand your instructions.

-Tim Fraiser

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From: Jenni Martinez  
Date: Fri, May 1, 2015 at 6:57 AM  
Subject: RE: Freedom of Speech  
To: Tim Fraiser  
Cc: Dan Phillips

Hello Mr. Frasier.

I spoke with Miss Jardine yesterday to gather information regarding the nature of the assigned "All About Me" project from last quarter. The project was assigned with the intent to have students present them to the class. Miss Jardine saw that Mackenzie had included Biblical sayings in her presentation material.

The U.S. Department of Education states that students have the right to engage in voluntary prayer or religious discussion free from discrimination, but that does not include the right to have a captive audience listen or compel other students to participate. When Mackenzie created the project with the expectation she would present the Biblical saying to the class, the matter became one of having a captive audience that would be subject to her religious beliefs. Had the assignment been designed to simply hand in for a grade, this would not have been an issue. Therefore, considering the circumstances of the assignment, Miss Jardine appropriately followed school law expectations by asking Mackenzie to choose an alternate quote for the presentation.

Sincerely,

Jenyan C. Martinez, M.Ed.  
Assistant Principal  
Somerset Academy Losee  
(702) 826-4373

“Reach for the moon. Even if you miss, you’ll land amongst the stars.” ~Les Brown

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