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

FREEDOM FROM RELIGION FOUNDATION, INC. et al., Plaintiffs, v. MERCER COUNTY BOARD OF EDUCATION et al., Defendants.	Civil Action No. 1:17-cv-00642 Hon. David A. Faber ORAL ARGUMENT REQUESTED

MOTION TO DISMISS FIRST AMENDED COMPLAINT

Defendants Mercer County Board of Education, Mercer County Schools, and Deborah S. Akers (together, "Defendants"),[1] 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' First Amended Complaint (ECF No. 21 (hereinafter "FAC")) in its entirety. In support of this Motion, Defendants state:

1. The FAC, brought by Plaintiffs the Freedom From Religion Foundation, Jane Doe, her child Jamie Doe, Elizabeth Deal, and her child Jessica Roe (together, "Plaintiffs") asserts that Defendants have violated the United States Constitution, West Virginia Constitution, and 42 U.S.C. § 1983 because non-mandatory classes offering instruction that concerns the Bible are offered in Mercer County Schools. Plaintiffs seek a declaration that "Defendants' conduct" is unconstitutional, and an injunction prohibiting Defendants from offering Bible classes of any kind in the future. Plaintiffs Deal and Roe seek nominal damages. All Plaintiffs seek

[1] The term "Defendants" does not refer to Rebecca Peery.

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. The FAC 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.

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

d. 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 Motion to Dismiss First Amended Complaint, 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 the FAC it its entirety and granting such further relief as the Court deems just and reasonable.

Dated: April 19, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2017, the foregoing MOTION TO DISMISS FIRST AMENDED COMPLAINT 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.

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT

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

TABLE OF AUTHORITIES
(continued)

Page(s)

Rules

This is Plaintiffs'[1] second effort to craft a viable complaint against Defendants,[2] asking this Court to forever end all Bible classes of any kind taught in public school in Mercer County, West Virginia. After Plaintiffs reviewed Defendants' Motion to Dismiss the original Complaint (ECF Nos. 19-20) setting forth in detail why Plaintiffs lacked standing and failed to state any cognizable claim, they elected to file an Amended Complaint (ECF No. 21 (hereinafter "FAC")) pursuant to Fed. R. Civ. P. 15(a)(1)(B). The FAC does not solve the problems with the original Complaint, even though out-of-state serial plaintiff Freedom from Religion Foundation found two more plaintiffs to join it, because those new plaintiffs—Elizabeth Deal and her child Jessica Roe—also lack standing. FFRF tried and failed to manufacture standing in this Circuit before under similar circumstances in *Moss v. Spartanburg County School District Seven*, 683 F.3d 599 (4th Cir. 2012), which was dismissed for many of the same reasons this case ought to be.

FFRF has failed to locate a *Goldilocks* plaintiff.[3] The original plaintiffs Jane and Jamie Doe (and FFRF, whose associational standing can be based only on Jane Doe, its member) are "too hot"—they filed suit too soon, well before Jamie Doe, a kindergartener, was eligible to attend the Bible classes, meaning any purported injury is not certainly impending and is instead merely speculative. The new plaintiffs Deal and Roe are "too cold"—they joined this suit nearly a year after Roe began attending school in a different school district with no plans to return to school in Mercer County. On those facts and the particular claims they have brought, Deal and Roe lack standing. But unlike porridge, combining the plaintiffs who are "too hot" with the

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[1] The term "Plaintiffs" refers to Jane Doe, her child Jamie Doe, the Freedom From Religion Foundation or "FFRF," Elizabeth Deal, and her child Jessica Roe.

[2] The term "Defendants" refers to the Mercer County Board of Education, Mercer County Schools, and Mercer County Schools' Superintendent Dr. Deborah S. Akers; the term does not refer to Rebecca Peery.

[3] *E.g.*, *The Story of Goldilocks and the Three Bears*, http://www.indiana.edu/~slavicgf/e103/class/2011_02_09/goldilocks.htm (last visited Apr. 15, 2017).

plaintiffs who are "too cold" does not create a mix of plaintiffs who are "just right," as it appears FFRF is now attempting. Standing must be evaluated as to each plaintiff separately, and the Court should dismiss this 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 the Court to end Bible classes of any kind in Mercer County Schools, despite the fact that over a half century of well-settled law holds that the Constitution permits such classes in public schools. Plaintiffs attempt to avoid this longstanding precedent by devoting pages of the FAC to the particular curriculum used in the Mercer County "Bible in the Schools" program, but that is a red herring, designed to distract from the fact that their actual complaint (and concomitant requested relief) is with the per se existence of ***any*** courses that have anything to do with the Bible.

The Court should also dismiss Plaintiffs' individual capacity claims against Dr. Akers, which are supported only by conclusory allegations that are not entitled to a presumption of truth. And the Court should likewise dismiss Plaintiffs' claims against Mercer County Board of Education and Mercer County Schools 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.[4] (FAC ¶¶ 10-11.) Jamie Doe is enrolled in kindergarten for the 2016-2017 school year. (*Id.* ¶ 11.) Jane Doe is an atheist who wishes to

[4] For the purpose of this Motion to Dismiss only, Defendants assume that all well-pleaded facts in the FAC 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).

raise Jamie Doe "without religion." (*Id.* ¶ 31.) She is a member of FFRF, a "national" nonprofit organization that "defends the constitutional principle of separation between state and church." (*Id.* ¶¶ 8-9.)

Elizabeth Deal is the mother of Jessica Roe, a student who used to attend elementary school in Mercer County, West Virginia, first at Memorial Primary School and then at Bluefield Intermediate School. (*Id.* ¶¶ 12, 34, 43, 48.) Deal does not allege that she is a member of FFRF. When Roe attended school in Mercer County, Deal did not sign a permission slip for her to attend the "Bible in the Schools" program classes (*id.* ¶¶ 35, 38), and so Roe accordingly was placed elsewhere in the school while they took place (*id.* ¶¶ 42, 44).[5] Deal removed Roe from Mercer County Schools this school year; she now attends school in a "neighboring school district." (*Id.* ¶ 48.)

There are nineteen public elementary schools in Mercer County. (*See* Mercer County Public Schools, *Elementary Schools*, http://boe.merc.k12.wv.us/?q=node/5 (last visited Apr. 15, 2017) (attached as **Exhibit A** to the Declaration of Kermit J. Moore ("Moore Declaration") filed concurrently)).[6] Fifteen of those elementary schools offer classes as part of the "Bible in the Schools" program, reaching approximately 4,000 students—the "overwhelming majority" of those enrolled. (FAC ¶¶ 24-25, 62.) Accordingly, four elementary schools do ***not*** offer such classes. The classes are offered to elementary school students once per week and last for 30 minutes. (*Id.* ¶ 61.) They are not offered to kindergarten students; instead, instruction is offered "beginning in first grade." (*Id.* ¶ 11.) Participation is voluntary, and school policy requires

[5] The FAC alleges that an initial problem with where Roe was placed during the classes was corrected after a complaint by Deal. (FAC ¶¶ 39-40.)

[6] "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)).

"reasonable alternatives for students who opt-out." (*Id.* ¶¶ 62-63.) Jane Doe allegedly "received information from the school system about its bible [*sic*] classes," but the FAC does not say what information she received or the manner in which it was received. (*Id.* ¶ 32.) 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. (Complaint, ECF No. 1, at ¶¶ 19-21, 33.) A copy of this opinion is attached as **Exhibit B** to the Moore Declaration.[7] Although the original Complaint contained these relevant allegations, they are omitted from the FAC. The program receives no public funding; instead, it is funded by the non-profit Bluefield Bible Study Fund, Inc. (FAC ¶ 24.)

On May 8, 2015, more than a year before Jamie Doe began attending kindergarten,[8] 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.* ¶ 51.) 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 received responsive information to its request on August 26, 2016 and September 12, 2016. (*Id.* ¶¶ 52, 65.) Plaintiffs commenced this lawsuit shortly thereafter, on January 18, 2017 (*see* ECF No. 1), and much of the FAC is devoted to allegations about specific aspects of the course

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

[8] 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 Apr. 15, 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.

materials FFRF received in response to its request (FAC ¶¶ 51-89). Deal and Roe joined this lawsuit on March 28, 2017. (*See generally* FAC.)

Plaintiffs request a declaration that "Defendants' conduct" is unconstitutional, that Defendants be permanently enjoined from "organizing, administering, or otherwise endorsing" Bible classes of any kind for students of Mercer County Schools "in grades kindergarten through eighth grade," that plaintiffs Deal and Roe be awarded nominal damages, and that Plaintiffs be awarded attorneys' fees and costs. (*Id.* at pp. 20-21.)

II. ARGUMENT

A. No Plaintiff Has Standing

1. *Plaintiffs Doe and Plaintiff FFRF Do Not Have Standing*

Plaintiffs Jane and Jamie Doe 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).[9] Indeed, Jane Doe does not allege that Jamie Doe participated in the Bible in the Schools program or was ostracized due to non-participation, probably because Jamie Doe is too young to enroll in the program, so she has

[9] 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. (FAC ¶¶ 23-24.)

not been forced to make the "untenable choice[]" she alleges she will have to make at some point in the future. (FAC ¶ 33.)

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 (FAC ¶ 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 three specific reasons why the Does and FFRF lack standing to bring this case:

First, Jamie Doe is enrolled in kindergarten (FAC ¶ 11), yet the Bible classes Plaintiffs

challenge are only offered to students in the first grade or above (*id.* ¶¶ 11, 29, 33). 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 initially filed this suit, the relevant date for this analysis. *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 allegation that Jane Doe may have to make an "untenable choice[]" in August 2017 does not constitute an injury-in-fact in January 2017, even if the Does 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 (FAC ¶ 25), but there are nineteen elementary schools in the County (*see* Moore Declaration **Ex. A**). Although Jamie Doe now attends kindergarten at "at an elementary school within Mercer County Schools that offers bible [*sic*] classes beginning in first grade" (FAC ¶ 11) and Jane Doe "plans on Jamie Doe attending first grade at the same school" (*id.* ¶ 29), the FAC fails to say that Jamie is unable to attend one of the four elementary schools in Mercer County where the course is ***not*** offered. The FAC attempts to skirt this deficiency by pleading in the most conclusory fashion that Jamie Doe's school is the "most convenient" (*id.* ¶ 30), but this is insufficient. *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); *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."). 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.[10] That the Does and FFRF are attempting to manufacture standing to bring

[10] *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.

this lawsuit is further bolstered by the fact that serial plaintiff FFRF submitted a freedom of information request for the curriculum of the Bible classes over a year before Jamie Doe began attending school, and over two years before he could potentially even be eligible to attend a Bible class. (FAC ¶¶ 11, 51; *see also* Note 8, *supra*.)

Third, as explained in more detail in Section II.B, *infra*, 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, the Does do not have standing to do so—they 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. *Compare 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 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 . . . ."). 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* FAC ¶ 32 ("Jane Doe does not wish for Jamie to participate in ***any school bible*** [*sic*] ***courses*** or to be ostracized . . . because of Jamie's nonparticipation."); *id.* ¶ 113 ("Forcing Jane Doe to choose between putting her child ***in a bible*** [*sic*] ***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 FAC, and there are no allegations in the FAC tying that information to the purported future injuries. (*Id.* ¶ 32.) In fact, it appears that as between the Does and FFRF, only FFRF has encountered the specific curriculum, and then only in response to an apparent litigation-driven freedom of information request submitted well before Jamie Doe started school. (*Id.* ¶¶ 51-52, 65.) As FFRF should know, 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.").

2. *Plaintiffs Deal and Roe Do Not Have Standing*

Unlike the Does, Plaintiffs Deal and Roe actually encountered the Bible in the Schools program—while Roe attended Mercer County Schools as a student in the first through third grades. (FAC ¶¶ 34-47.) Deal decided that Roe would not attend the classes. (*Id.*) Beginning no later than August 2016, however—many months before Deal and Roe joined this lawsuit[11]—Deal "removed" Roe from Mercer County Schools and sent her to school in a "neighboring school district." (*Id.* ¶ 48.) "The Bible in the Schools program and the treatment Jessica received as a result of not participating in the bible [*sic*] classes were ***a major reason***" why Deal did this. (*Id.* (emphasis added).) The FAC fails to identify the ***other*** reason(s) for Deal's decision. And the FAC also fails to allege that Deal intends to re-enroll Roe in school in Mercer County if the Court enjoins the Bible classes (likely because the other reason(s) for the move remains and is compelling enough that the status quo will be maintained). This is fatal to Deal

[11] *See* Note 8, *supra*, explaining that the 2016-2017 school year began on August 10, 2016.

and Roe's claims. *See Lujan*, 504 U.S. at 561 ("The party invoking federal jurisdiction bears the burden of establishing [standing].") (citations omitted); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) ("a plaintiff must demonstrate standing separately for ***each form*** of relief sought") (emphasis added).

Deal and Roe purport to bring claims for declaratory relief, for an injunction, and for nominal damages (but, importantly, not for compensatory damages). (FAC pp. 20-21 at §§ A-D.) The claim for an injunction fails because Deal has no plans for Roe to return to school in Mercer County. There is no risk that Roe will have future contact with alleged religious establishment, and thus neither plaintiff has standing to seek prospective relief. *See Lebron v. Rumsfeld*, 670 F.3d 540, 560 (4th Cir. 2012) ("A plaintiff who seeks . . . to enjoin a future action must demonstrate that he 'is ***immediately in danger*** of sustaining some direct injury' as the result of the challenged official conduct.") (emphasis added) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)); *see also Beck*, 848 F.3d at 277 ("Plaintiffs do not have standing to seek injunctive relief . . . because allegations of . . . past Privacy Act violations are insufficient to establish an ongoing case or controversy.").

The same is true regarding the claim for declaratory relief, which is prospective in nature and thus cannot benefit Deal or Roe. *See Lewis v. Continental Bank Corp.*, 494 U.S. 472, 479 (1990) ("[I]n order to pursue the declaratory and injunctive claims . . . [plaintiff] must establish that it has a specific live grievance . . . and not just an abstract disagreement over the constitutionality of such application . . . . the mere power to [do something again] is not an indication of the intent to do so, and thus does not establish a particularized, concrete stake that would be affected by our judgment.") (quotation omitted); *Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977) ("For a declaratory judgment to issue, there must be a dispute which calls, not for an

advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts.") (quotation omitted); *Am. Humanist Ass'n v. Greenville Cnty. Sch. Dist.*, 652 F. App'x 224, 229 (4th Cir. 2016) ("Because the Does' children no longer attend school in Greenville County, they will not be subject to injury from implementation of the revised prayer and chapel policies. We therefore grant the school district's motion to dismiss with respect to the prospective prayer and prospective chapel claims brought by the Does.").

The sole remaining claim, for nominal damages, cannot by itself give Deal and Roe standing to sue at the outset of a case, as here—it fails to meet the redressability requirement of Article III. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998) ("The 'irreducible constitutional minimum of standing' contains three requirements. . . . third, there must be redressability – a likelihood that the requested relief will redress the alleged injury.") (citation omitted); *see generally Freedom from Religion Found. Inc. v. New Kensington Arnold School Dist.*, 832 F.3d 469, 482-92 (3d Cir. 2016) (Smith, J., concurring dubitante). Nominal damages, standing alone, do not meet the redressability requirement because they do not compensate for past injury that will not recur, just as a declaratory judgment does not compensate. *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1264 (10th Cir. 2004) (McConnell, J., concurring) ("Nominal damages are damages in name only, trivial sums such as six cents or $1. They do not purport to compensate for past wrongs. They are symbolic only.") (citation omitted); *see also id.* at 1266 ("The question, as with declaratory judgment actions involving past conduct, is whether an award of nominal damages will have practical effect on the parties' rights and responsibilities in the future. . . . a declaratory judgment action involving past conduct that will not recur is not justiciable. That is equally true here. Labeling the requested relief 'nominal damages' instead of 'declaratory judgment' should not

change the analysis."); *Morrison v. Bd. of Educ. of Boyd Cty.*, 521 F.3d 602, 610 (6th Cir. 2008) ("No readily apparent theory emerges as to how nominal damages might redress past [harm].").

That is why a "claim for nominal damages, which is clearly incidental to the relief sought, cannot properly be the basis upon which a court should find a case or controversy where none in fact exists." *Kerrigan v. Boucher*, 450 F.2d 487, 489-90 (2d Cir. 1971); *see also Steel Co.*, 523 U.S. at 107 ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement."). Accordingly, "[b]y seeking only nominal damages," Deal and Roe are "conced[ing] at the outset . . . that they suffered no actual injury, or at least that the injury they claim cannot be redressed by an award of actual damages; thus appearing to have no standing." *Freedom From Religion Found., Inc. v. Franklin Cty., Ind.*, 133 F. Supp. 3d 1154, 1158 (S.D. Ind. 2015).[12]

3. *The Plaintiffs Cannot Be Combined into a Composite Plaintiff with Standing*

FFRF cannot bolster the standing of the Does, who have not been injured, by adding new plaintiffs and creating a fictionalized composite plaintiff with standing. The standing of each

[12] Plaintiffs may cite to the Fourth Circuit's opinion in *Covenant Media of S.C., LLC v. City of North Charleston* in response to this argument, but the Court there did not hold otherwise. It held that the case was not moot where the plaintiff sought an injunction and ***both*** "compensatory and nominal damages," explaining that if the plaintiff was determined to be correct on the merits after trial it would be entitled to "at least nominal damages." 493 F.3d 421, 429 n.4 (4th Cir. 2007). That is quite different from a case where, as here, plaintiffs' sole claim at the outset is for nominal damages. The Fourth Circuit also did not consider the redressability requirement in *American Humanist Association v. Greenville County School District*, which focused on whether a claim for nominal damages had become moot after plaintiffs moved to another state while litigation was pending and thus could no longer ask for prospective relief. 652 F. App'x at 231 ("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."); *compare Morrison*, 521 F.3d at 611 ("While we may have allowed a nominal–damages claim to go forward in an otherwise-moot case, we are not required to relax the basic standing requirement that the relief sought must redress an actual injury.") (citations omitted); *accord Freedom From Religion Found., Inc. v. City of Green Bay*, 581 F. Supp. 2d 1019, 1032–33 (E.D. Wis. 2008) (FFRF's claim was not justiciable "where nominal damages were the only monetary relief sought from the beginning" of the case).

plaintiff must be considered individually and as to the particular claims each plaintiff has brought; "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996); *Friends of the Earth, Inc.*, 528 U.S. at 185 ("a plaintiff must demonstrate standing separately for each form of relief sought"); *cf. Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 345 (4th Cir. 1998) ("Thus courts considering class certification must . . . avoid the real risk, realized here, of a composite case being much stronger than any plaintiff's individual action would be.").

B. The FAC Does Not State a Cognizable Legal Claim

Even if Plaintiffs had standing, the Court should dismiss the FAC with prejudice because it is a facial attack on the constitutional right to offer optional Bible classes in public schools as an accommodation for the many students who are interested in receiving Bible instruction. The FAC asks for a blanket injunction against Defendants from "organizing, administering, or otherwise endorsing bible [*sic*] classes for Mercer County Schools' students in grades kindergarten through eighth grade" (FAC pp. 20-21 at § C), not for an injunction against the particular "Bible in the Schools" curriculum presently offered. And the FAC's allegations make clear that Plaintiffs' complaint is not a mere quibble with the particular curriculum of the "Bible in the Schools" program, but instead an attempt to eliminate classes of any stripe that teach about the Bible.[13] (*See, e.g.*, FAC ¶ 32 (Jane Doe "does not wish for Jamie to participate in ***any*** school bible [*sic*] courses" whatsoever); *id.* ¶ 31 ("Jane Doe is an atheist . . . ."); *id.* ¶ 113 ("Forcing Jane Doe to choose between putting her child in ***a bible*** [*sic*] ***class*** or subjecting her child to the risk of ostracism . . . .") (emphases added).) That is not a cognizable legal claim.

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)

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

("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 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 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 has long 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").[14]

Thus, optional Bible classes are not ipso facto 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 the allegations in the FAC make clear, this lawsuit is a challenge to the existence of classes that have anything to do with the

[14] Groups as diverse as the Anti-Defamation League, American Federation of Teachers, American Jewish Congress, Baptist Joint Committee on Public Affairs, Christian Legal Society, National Bible Association, and People for the American Way also agree that it is permissible to teach the Bible in public school. *E.g.*, The Bible Literacy Project & The First Amendment Center, *The Bible and the Public Schools: A First Amendment Guide* (1999), *available at* http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/bible_guide_graphics.pdf (last visited Apr. 18, 2017).

Bible, at all. That is not a cognizable legal theory, and requires dismissal with prejudice. *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

Plaintiffs have not identified with specificity any action that Dr. Akers, the superintendent of Mercer County Schools, took in her individual capacity, instead relying solely on sweeping conclusory allegations. (*E.g.*, FAC ¶ 96 ("Akers has the primary duties of implementing Mercer County Schools' policies and programs . . . ."); *id.* ¶ 97 ("Deborah Akers has created policies supporting and implementing the Bible in the Schools program for approximately 25 years.").) And the one even mildly specific allegation about Dr. Akers' conduct (*id.* ¶ 98 ("In overseeing the Bible in the Schools program, Deborah Akers has coerced ***students*** into receiving religious instruction.") (emphasis added)) is not tied to anything that happened to the particular Plaintiffs in this case (*i.e.* the FAC does not say that Dr. Akers coerced ***them***). *Cf. Moss*, 683 F.3d at 605 (there is no justification for "the sweeping conclusion that parents and students currently in school may challenge the constitutionality of school policies without demonstrating that they were personally injured in some way by those policies."). This threadbare pleading is insufficient to nudge the claim against Dr. Akers "across the line from conceivable to plausible," requiring its dismissal.

> Respondent pleads that petitioners 'knew of, condoned, and willfully and maliciously agreed to subject him' to harsh conditions of confinement 'as a matter of policy, solely on account of his religion, race, and/or national origin and for no

> legitimate penological interest.' The complaint alleges that Ashcroft was the 'principal architect' of this invidious policy, and that Mueller was 'instrumental' in adopting and executing it. These bare assertions . . . amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim . . . .

Iqbal, 556 U.S. at 680–81 (quotations omitted); *See also 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.") (quotation omitted).[15]

D. Plaintiffs' Section 1983 Claims Against Mercer County Board of Education and Mercer County Schools 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 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

[15] 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).

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, requiring it be dismissed.

2. *Plaintiffs Fail to Identify an Unconstitutional 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)). The FAC identifies just one Mercer County School Board policy, Policy I-45, which allegedly requires teachers to "develop lesson plans for each subject they are responsible for teaching and . . . to submit those plans to the school principal for review." (FAC ¶ 101.) The Policy also allegedly "directs school administrators to review and comment on lesson plans at least once every three months or more often as required by state policy." (*Id.* ¶ 102.) But the FAC fails to say how this Policy "caused the violation" at issue—"direct and unwelcome contact with an alleged religious establishment." *Moss*, 683 F.3d at 605 (quotations omitted).

It appears the FAC may make a roundabout attempt to say that a policy of ***Mercer County Schools*** may have caused such contact with respect to plaintiff Roe. (FAC ¶¶ 55 ("Per Mercer County Schools policy these lessons must be followed . . . ."); *id.* ¶ 39 (Roe "could still hear what was said during the bible [*sic*] class.").) But whatever Mercer County Schools did does not itself establish § 1983 liability because it is not final policymaker and there is no respondeat superior liability under § 1983. *Barrett*, 590 F. App'x at 210 (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978)); *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."). So too of any alleged actions of superintendents, principals, or teachers. *See, e.g.*, *Moss v. Spartanburg County Sch. Dist. No. 7*, 775 F. Supp. 2d 858, 873 (D.S.C. 2011)

> Plaintiffs, however, failed to show that two instances in which the School District employees administered discipline for student misbehavior was sanctioned or ordered by a School District official with final authority or otherwise establish that the School District had adopted a custom of administering discipline for misbehavior . . . . Plaintiffs further failed to connect the [alleged violations] with any overt policy adopted by the School District or otherwise identify any decisionmaker who authorized such conduct. Plaintiffs, therefore, did not carry their burden in establishing that the School District could be subject to § 1983 liability for these alleged violations.

See also Crittenden v. Florence Sch. Dist. One, 2017 U.S. Dist. LEXIS 24325, at *5-6 (D.S.C. Feb. 22, 2017). Having failed to identify any policy or custom of the Board that "caused the violation," despite the fact that Board Policy is posted on the Internet for anyone to review,[16] 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. Iqbal*, 556 U.S. at 683 ("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 FAC should be dismissed.

[16] *See* Mercer County Public Schools, *Board Policy*, http://boe.merc.k12.wv.us/?q=node/22 (last visited Apr. 17, 2017). The Court may take judicial notice of this for the reasons in Note 1.

Dated: April 19, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2017, the foregoing MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT 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.

By: */s/ David R. Dorey*
DAVID R. DOREY
Attorney for Defendants

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

FREEDOM FROM RELIGION FOUNDATION, INC. et al., Plaintiffs, v. MERCER COUNTY BOARD OF EDUCATION et al., Defendants.	Civil Action No. 1:17-cv-00642 Hon. David A. Faber

DECLARATION OF KERMIT J. MOORE IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT

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")[1] 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 Motion to Dismiss First Amended Complaint and Memorandum in Support of Motion to Dismiss First Amended Complaint.

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

[1] The term "Defendants" does not refer to Rebecca Peery.

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%20Student%_20Calendar.pdf

Dated: April 19, 2017

Respectfully submitted,

By: */s/ Kermit J. Moore*

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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

Like us on facebook

Click Here Heads Up App

MERCER COUNTY ADMINISTRATIVE/ TEACHERINFO WEB PAGES

Admin Login

Teacher Login

2016-2017 Calendar

2016-2017 BOE Goals

Community Eligibility Provision for School Meal Program

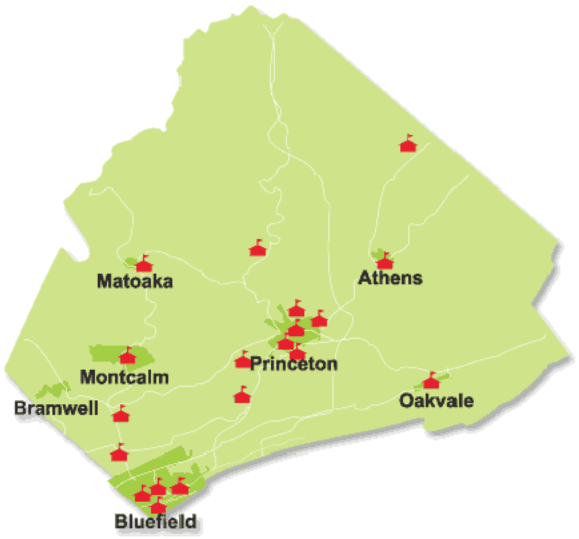
Parents reminded of immunization requirements

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

Medicat on 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)