

**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: June 19, 2017

REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT

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Plaintiffs' Opposition to Defendants' Motion to Dismiss ("Opp." (ECF No. 28))¹ only further illustrates that no plaintiff has standing to prosecute this case. The Doe Plaintiffs have never encountered the Bible classes of which they complain, and any potential encounter was over half a year away when they filed suit, meaning any purported future injury was not certainly impending and thus definitionally speculative. Intervening events have confirmed the wholly speculative nature of their claims: the Bible in the Schools classes have been suspended for at least a year while the Mercer County Board of Education undertakes a thorough review of and modification to the Bible in the Schools curriculum. This means that the Does cannot possibly encounter any Bible in the Schools classes for at least fifteen months (nineteen months after they filed this lawsuit), and can only speculate about the content of an as yet undetermined future curriculum at some as yet undetermined future point in time.

Plaintiffs Deal and Roe also lack standing because Plaintiffs never allege that Deal has any intention of enrolling Roe in Mercer County Schools in the future. Even if Deal did so intend, she and Roe are not entitled to prospective relief because, now that the Bible in the Schools classes are suspended, neither would be immediately in danger of contact with the classes if Roe did return to school in Mercer County. That leaves as the sole ground for this federal lawsuit a claim for nominal damages, which is insufficient for standing: nominal damages are incidental to other relief sought and cannot redress an injury.

In addition, Plaintiffs' claims against Defendants do not meet even the low threshold of pleading Rule 8 sets forth. The Opposition asks this Court to further lower the bar so that Plaintiffs can conduct discovery and reverse-engineer a lawsuit. The Court should reject that request out of hand and dismiss this case.

¹ As with the opening Memorandum, the term "Defendants" does not apply to Rebecca Peery.

I. NO PLAINTIFF HAS STANDING

A. Plaintiffs Doe and Plaintiff FFRF Do Not Have Standing

Plaintiffs do not dispute that when they filed this lawsuit, Jamie Doe was *at least* seven months away from either encountering the Bible in the Schools curriculum (as it existed at the time FFRF received a response to a freedom of information request) or from Jane Doe facing the decision whether to opt Jamie out of the classes. (Opp. 10.) Plaintiffs argued that this set of facts “demonstrate[d] that” the purported injury “is certain and unavoidable” because the Does “*will* face the dilemma of having to choose between unwanted exposure to *this bible [sic] class* or the burden of removing Jamie from her classmates” next school year. (Opp. 11-12 (emphasis added).) Assuming *arguendo* Plaintiffs’ argument is correct (it is incorrect because the Does were months away from *potential* exposure to injury when they filed their lawsuit and thus they and FFRF lacked—the injury they say may be suffered in the future is not “certainly impending” (Memorandum in Support of Motion to Dismiss, “Memo,” 5-8 (ECF No. 26)), it necessarily follows that the Does and FFRF lack standing if they do not face this choice in August.

Defendants further explained that the Does are attempting to bring a facial challenge to the *ipso facto* existence of classes that have anything to with the Bible, asking the Court for a broad injunction forever eliminating any such classes in Mercer County. (Memo. 2, 14-17.) The Does have never encountered the specific Bible in the Schools curriculum, the FAC says that Jane Doe does not want Jamie Doe to “any school bible [sic] courses,” and the FAC asks for a broad injunction against Bible classes of any kind. (*Id.* at 9-10, 14.) Although that is not a cognizable legal theory (*see id.* at 14-17), it helps illustrate why the Does are convinced they have standing: they believe this case is one of absolutes—any classes that have to do with the Bible (they think) are necessarily unconstitutional and must be enjoined. But the law in this type of case does not countenance such absolutes; Bible classes in public schools are *per se*

constitutional and can become unconstitutional only if the particular way in which they are conducted presents an Establishment Clause issue. (*Id.*)

This is the folly of the Does' standing theory: it assumes that either 1) the particular curriculum of the Bible in the Schools program has no bearing on the case, contrary to law, because all classes that have to do with the Bible are unconstitutional; or, 2) the Bible in the Schools curriculum is necessarily static, such that what FFRF received in response to its litigation-driven freedom of information request last year is what Jamie Doe would be taught if he attends the Bible in the Schools program next school year. More importantly, it rests heavily on the assumption that the Bible in the Schools program will be offered at all. This is precisely the type of "speculative chain of possibilities" the Supreme Court again in *Clapper* clarified is insufficient to satisfy the requirements of Article III. *Clapper v. Amnesty Int'l, USA*, 133 S. Ct. 1138, 1150 (2013). Even assuming *arguendo* the particular curriculum was relevant to them, the speculative chain of possibilities the Does say will lead to future injury is this:

1. More than seven months after filing this lawsuit, Jamie Doe will attend a public school in Mercer County that at that time will offer Bible in the School classes.

2. The Bible in the School classes offered in Jamie Doe's school will use the curriculum FFRF received in response to its freedom of information request.

3. Jane Doe will choose for Jamie Doe to opt out of taking the classes and thus experiencing the curriculum.

4. Jamie Doe will face a of risk being ostracized because he does not attend the Bible in the Schools classes.

(Opp. 11-13; FAC ¶ 33.)² This “attenuated chain of inferences necessary to find harm,” 133 S. Ct. at 1150 n.5, cannot create standing because “[a]llegations of possible future injury do not satisfy the requirements of Art. III,” *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

Developments that have taken place since Plaintiffs filed their lawsuit prove the speculative nature of their theories. On March 20, 2017, the Board of Education provided notice to the Bible in the Schools teachers that their employment may be terminated, and the Board finalized the terminations on April 11, 2017. (Supplemental Declaration of Kermit J. Moore (“Suppl. Moore Decl.”) ¶ 4 & Ex. E.) And on May 23, 2017, the Board of Education voted to suspend the teaching of the Bible in the Schools classes in all Mercer County Schools for “at least a year.” (See Suppl. Moore Decl. ¶ 3 & Ex. D.) Accordingly, Jamie Doe will *not* have the option of attending any Bible in the Schools class during the 2017-2018 school year.³ The

² Jane Doe cannot claim she is currently injured because she says she “already feels coerced to subject Jamie to the class” (Opp. 12) due to future “risk of ostracism from peers and even school staff” (FAC ¶ 33). See *Clapper*, 133 S. Ct. at 1151 (“[R]espondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.”).

³ Defendants recognize that bringing this information into this Reply in effect changes their Motion to Dismiss for lack of standing pursuant to Fed. R. Civ. P. 12(b)(1) from a pure facial challenge into a hybrid (or alternative) facial-factual challenge. Unlike the ordinary dichotomy between these two types of challenges (with only one being presented at a time), Defendants maintain that the allegations in the FAC show that Plaintiffs do not have standing *and*, due to the passage of time and intervening events, it has now become clear that the allegations Plaintiffs made in the FAC and in the Opposition were not just speculative and insufficient to ground standing, but—because they were so speculative—have now also proven untrue. *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1352 (S.D. Fla. 2003) (“[T]he motion to dismiss for lack of subject matter jurisdiction will be analyzed as both a facial and a factual challenge.”); see also *Rose v. Kanawha Cty. Bd. of Educ.*, No. 2:15-CV-02473, 2016 WL 1229112, at *4 (S.D.W. Va. Mar. 28, 2016) (Johnston, J.) (“In determining whether jurisdiction exists in the context of a factual attack, the district court is to regard the pleadings’ allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.”) (quotations omitted). Because Defendants recognize that these new factual developments are being submitted with this Reply brief (by necessity) for the first time, Defendants would not object to Plaintiffs filing a surrebuttal to this Reply limited to that discrete

earliest potential contact with the program is now *at least nineteen months* after this lawsuit was filed. (*Contra* Opp. 11-12, 15.)

Even if the Court concludes that this potential contact over a year from now is sufficient for standing (it is not), the Does' theory fails at the second link in their chain of contingencies. Mercer County suspended the Bible in the Schools program to allow a "thorough review" of the curriculum by the Board and by "community members and religious leaders along with our teachers." (Suppl. Moore Decl. **Ex. F** (Mercer County School Board Memo #344).) There is no way of knowing now the contents of the curriculum of a Bible in Schools program that may return to Mercer County Schools no earlier than the fall of 2018. It is entirely indeterminate, can only be the subject of the Does' speculation, and is only relevant to the extent that the Does' actual claim is as against Bible classes of any sort (which does not state a claim (*see* Memo. 14-17; Section II, *infra*)).

The fact that the second link is indeterminate also renders the third link speculative. Learning about the Bible is a fundamental part of every child's education. *See Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963) ("[O]ne'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."). Assuming Jane Doe does not actually oppose and want an injunction against *all* Bible classes of *any* kind, she might well want Jamie Doe to attend any revised Bible in the Schools classes.

issue. Counsel for Defendants informed counsel for Plaintiffs of this development and Defendants' position on surrebuttal prior to filing this Reply. (*See* Suppl. Moore Decl. ¶ 9.)

And the fourth link is (and always has been) speculative because it is based on a hypothetical risk of what the Does say third parties who are not before this Court may do well into the future. *Clapper*, 133 S. Ct. at 1150 n.5 (“Plaintiffs cannot rely on speculation about the unfettered choices made by independent actors not before the courts.”) (quotation omitted).

The Does’ brittle chain of inferences has thus already been broken by the passage of time since the Complaint was filed. This is exactly why the Constitution prohibits federal courts from considering hypothetical claims of injury that do not “proceed with a high degree of immediacy”; to allow otherwise would be to, as here, open the floodgates for courts deciding cases “in which no injury would have occurred at all.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 n.2 (1992); *see also, e.g., McConnell v. FEC*, 540 U.S. 93, 226 (2003)

§ 305 amended the Communication Act’s requirements with respect to the lowest unit charge for broadcasting time. But this price is not available to qualified candidates until 45 days before a primary election or 60 days before a general election. Because Senator McConnell’s current term does not expire until 2009, the earliest day he could be affected by § 305 is 45 days before the Republican primary election in 2008. This alleged injury in fact is too remote temporally to satisfy Article III standing.

Beck v. McDonald, 848 F.3d 262, 271 (4th Cir. 2017) (“[A]n injury-in-fact must be concrete in both a qualitative *and* temporal sense.”) (quoting *Whitmore*, 495 U.S. at 155).

The two cases the Opposition cites on this point are not to the contrary. (Opp. 12 (citing *Lee v. Weisman*, 505 U.S. 577 (1992); *Freedom From Religion Found. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469 (3d Cir. 2016).) In both cases, the plaintiff had already experienced the alleged religious establishment of which he or she complained, making it far from speculative. *See Weisman*, 505 U.S. at 584 (“Deborah and her family attended the graduation, where the prayers were recited.”); *New Kensington*, 832 F.3d at 473-74 (“Schaub had visited the high school and come into contact with the monument . . .”). In addition, the alleged religious establishment in both cases was very much a binary question: in *Weisman*, it was

prayers (irrespective of particular content) made at school graduations, 505 U.S. at 581.⁴ In *New Kensington*, it was a public monument of the Ten Commandments (the content of which has literally been “set in stone” for millennia⁵), 832 F.3d at 472.

The facts in each case were clear cut—the alleged religious establishment, having been established and not subject to relevant change, was certainly impending and was either constitutional or not. But Bible classes in public school do not lend themselves to this kind of up-or-down analysis; because they are *per se* constitutional, only the specific curriculum taught in a particular class can push one over the line into unconstitutional territory. (See Memo. 14-17 (citing, *inter alia*, *Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam) (“The Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.”)).) Because the particular curriculum taught is what matters, filing suit well in advance of when such a class may be offered, and not actually knowing what will be taught in that class, necessarily means the case is an exercise in speculation—the curriculum can and very likely will change from one school year to the next, as has already been shown in this very case.

This should not come as any surprise: school curricula are routinely reviewed and revised by teachers, administrators, Board members, and experts. (See, e.g., Suppl. Moore Decl. **Ex. F** (“The review cycle for state required courses in the elementary schools is six (6) years, so it makes sense to review our elective elementary Bible curriculum at this time.”); *id.* **Ex. I** at 4

⁴ See also *id.* at 588-89 (“The question is not the good faith of the school in attempting to make the prayer acceptable to most persons, but the legitimacy of its undertaking that enterprise at all when the object is to produce *a prayer* to be used in a formal religious exercise which students, for all practical purposes, are obliged to attend.”) (emphasis added).

⁵ See Exodus 34:27-28 (NIV) (“Then the Lord said to Moses, ‘Write down these words, for in accordance with these words I have made a covenant with you and with Israel.’ Moses was there with the Lord forty days and forty nights without eating bread or drinking water. And he wrote on the tablets the words of the covenant—the Ten Commandments.”).

(“After forming hypotheses about students’ learning needs, teachers can examine current instruction and test the hypotheses by implementing instructional changes they believe are likely to raise student achievement. Drawing from the data, teachers need to determine whether to continue the instructional improvement in its current form, modify or extend the approach, or try a different approach.”).) Although the imminence of a purported future injury is “somewhat elastic” depending on the facts and circumstances of a case, the Does complaint far stretches this concept too far “beyond its purpose.” *Clapper*, 133 S. Ct. at 1147 (quotation omitted).

B. Plaintiffs Deal and Roe Do Not Have Standing

Plaintiffs Deal and Roe do not have standing to sue for prospective relief because the FAC does not allege that Deal intends for Roe to re-enroll in public school in Mercer County. Therefore, they would not benefit from any prospective relief. In fact, the FAC goes out of its way to artfully plead that at least one other (unspecified) reason undergirded Deal’s decision to school Roe outside Mercer County.⁶ (FAC ¶ 48.) The Opposition attempts to amend the FAC by carefully saying that Deal “could send” Roe back to school in Mercer County “were it not for the ongoing administration of the Bible in the Schools program.” (Opp. 16.) This is not permissible: “It is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss. To hold otherwise would mean that a party could unilaterally amend a complaint at will, even without filing an amendment, and simply by raising a point in a brief.” *Marsh v. Virginia Dept. of Transp.*, No. 6:14-CV-00006, 2014 WL 6833927, at *8 (W.D. Va. Dec. 3, 2014) (citation omitted); cf. *Barclay White Skanska, Inc. v. Battelle Mem’l Inst.*, 262 F.

⁶ Defendants do not “baldly speculate” that Deal would not re-enroll Roe in school in Mercer County. (*Contra* Opp. 17 n.4.) Defendants simply observed that the FAC starkly fails to say it, even though it’s obviously a necessary element of Plaintiffs’ claims. *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009) (“Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a short and plain statement of the claim *showing that the pleader is entitled to relief.*”) (emphasis added, quotation omitted).

App’x 556, 563 (4th Cir. 2008) (“A plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment.”) (quotation omitted).

But even if such an amendment was permitted, it would be futile because what Deal “*could*” do with Roe—more of the same artful language—is not relevant to the question (as opposed to what Deal “*will*” do with her). *E.g.*, *Issa v. Sch. Dist. of Lancaster*, 847 F.3d 121, 126 n.2 (3d Cir. 2017) (plaintiff brothers “decided they no longer wished to attend school in the School District. . . . the brothers have ‘chosen not to enroll’ and disavowed any intention to ‘further their education’ within the School District. Their claims for equitable relief are therefore moot.”); *Seamons v. Snow*, 84 F.3d 1226, 1239 (10th Cir. 1996) (“Brian does not allege in the complaint that he wants to return to the school.”). Moreover, as discussed in Section I.A, *supra*, all Bible in the Schools classes have been suspended for at least a year. If Deal actually wants Roe to begin attending school in Mercer County again, that desire will be borne out by her decision to enroll Roe for the next school year. And because the Bible in the Schools classes are not being offered for at least a year, Deal and Roe are not entitled to prospective relief incident to Roe’s purported return to school in Mercer County. (*See* Memo. 11 (citing, *inter alia*, *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.”) (citation omitted)).)

That leaves as the sole basis for Deal and Roe’s federal lawsuit a request for nominal damages. Such a request standing alone is insufficient to invoke the jurisdiction of this Court because nominal damages cannot redress an injury. *E.g.*, *New Kensington*, 832 F.3d at 483-84 (Smith, J., concurring dubitante) (“[J]ust as the ‘psychic satisfaction’ from being told that you were right . . . does not redress past harm, nominal damages do not serve to redress past injury. . .

. If a plaintiff were seeking to be compensated for past harms, he would seek compensatory damages.”) (citation omitted).⁷ Nominal damages are “clearly incidental” to other relief sought—which, here, is nothing—and so “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). And it is little surprise that such an “incidental” request must be predicated on some *other* claim and cannot stand alone; this principle of law is well-settled, particularly when it comes to remedies. *Freedom From Religion Found., Inc. v. City of Green Bay*, 581 F. Supp. 2d 1019, 1030 (E.D. Wis. 2008) (“Thus, for justiciability purposes, there is no reason to treat nominal and declaratory relief differently. Each is a different form of *remedy* available in cases where the court has Article III jurisdiction. But neither were intended to confer jurisdiction that did not otherwise exist.”) (citation omitted); *Shank v. Safeco Ins. Co. of Am.*, No. 2:15-CV-09033, 2016 WL 4534028, at *2 n.1 (S.D.W. Va. Aug. 30, 2016) (Goodwin, J.) (“A demand for punitive damages is not a standalone claim under West Virginia law.”).

II. THE FAC DOES NOT STATE A COGNIZABLE LEGAL CLAIM

The Opposition says that Plaintiffs’ goal is not a broad injunction prohibiting Bible classes of any kind in Mercer County, arguing that is just a “fanciful” reading of the FAC. (Opp. at 7.) That is contrary to the FAC’s actual allegations particular to the Does, and contrary to the express relief the FAC requests. (Memo. 14-17; FAC pp. 20-21 at § C (requesting the Court issue a permanent injunction against “organizing, administering, or otherwise endorsing bible [sic] classes” of any kind).) The Opposition’s cherry-picked quotations from *Charles v. Front*

⁷ Judge Smith also explained that the Fourth Circuit’s decision in *Covenant Media of South Carolina, LLC v. City of North Charleston*, 493 F.3d 421 (4th Cir. 2007) may have “suggested” that a claim for nominal damages might suffice for standing purposes, but explained that “like many of the cases that seem to say that a case is saved from mootness *at least* by nominal damages, the plaintiffs sought both compensatory and nominal damages.” *Id.* at 484 n.3.

Royal Volunteer Fire & Rescue Dept., Inc., 21 F. Supp. 3d 620 (W.D. Va. 2014), in an effort to induce the Court to ignore what the FAC actually requests, miss the point. (Opp. 8.) *Charles* stands for the uncontroversial proposition that a Rule 12(b)(6) motion can only be used to dismiss a “‘claim’ in its entirety,” not to snipe at a portion of the relief requested with respect to an otherwise sound claim. 21 F. Supp. 3d at 629 (“[D]efendants concede that Ellinger has stated a claim”). Here, in contrast, the FAC’s requested relief (and factual allegations) demonstrates that Plaintiffs have no cognizable claim because they do not want an injunction against the particular Bible in the Schools curriculum but instead a sweeping injunction against Bible classes of every stripe. *Compare Bontkowski v. Smith*, 305 F.3d 757, 762 (7th Cir. 2002) (“It would be appropriate and indeed quite sensible for a judge confronting a complaint that does not demand proper relief to ascertain whether the plaintiff wants the improper relief sought in the complaint or nothing; if so, the complaint must be dismissed.”). The Opposition’s contrary arguments also appear somewhat disingenuous in view of statements that counsel for FFRF has made to the media about this case.⁸ (See Suppl. Moore Decl. **Ex. G** (“Elliott said the suit seeks to end Mercer County’s current Bible in the Schools program all together, rather than change the course content and how it is taught.”); *id.* **Ex. H** (“The program is ‘unconstitutional at its core and cannot be saved via modifications,’ said Patrick Elliott ‘There is no legally permissible way for Mercer County Schools to continue with *any type of program like this.*’”) (emphasis added); *id.* **Ex. D** (“Patrick Elliot, an attorney for the foundation, said the lawsuit does seek to end the program. ‘We see no way the program can meet the guidelines’ that would make it constitutional, he said, regardless of any changes that may be made in lesson plans.”).)

⁸ The Court “may take judicial notice of matters of public record in considering a motion to dismiss.” *Lewis v. Newton*, 616 F. App’x 106, 106 (4th Cir. 2015).

III. **DR. AKERS SHOULD BE DISMISSED FROM THIS LITIGATION**

The Opposition admits that the FAC does not state a claim against Dr. Akers, but entreats the Court to allow Plaintiffs to conduct discovery so they “may develop facts about her more specific conduct” and thereby reverse-engineer a claim against her. (Opp. 20.) The law demands otherwise. *Iqbal*, 556 U.S. at 678-79 (“Rule 8 . . . demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation . . . [and] does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”) (citations omitted).

IV. **PLAINTIFFS’ SECTION 1983 CLAIMS AGAINST MERCER COUNTY BOARD OF EDUCATION AND MERCER COUNTY SCHOOLS SHOULD BE DISMISSED**

The Opposition misstates the law with respect to municipal liability for claims brought under § 1983, which “attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered.” *Riddick v. School Bd. of City of Portsmouth*, 238 F.3d 518, 523 (4th Cir. 2000); (*contra* Opp. 19 n.6). Mercer County Schools does not have final authority to create municipal policy, and Plaintiffs do not contend otherwise. (Memo. 18-19.) The Board of Education does have such final authority (*id.*), but the FAC does not identify with particularity any of *its* policies that caused any constitutional violation. *Carter v. Morris*, 164 F.3d 215, 218 (4th Cir. 1999) (requiring “litigants to identify the offending municipal policy with precision”); *Barrett v. Bd. of Educ. of Johnston Cnty.*, 590 F. App’x 208, 210 (4th Cir. 2014) (“There were no factual allegations showing that *the Board* had a policy, custom, or practice that led to the alleged violations.”) (emphasis added). Because the FAC says that Board of Education policy is responsible for the alleged violations at issue (FAC ¶ 93) but does not identify any such policy with particularity (and the Opposition does not contend that Board Policy I-45 caused the violation (*compare* FAC ¶ 101-02 with Memo. 19)), Plaintiffs have not met the requirements of Rule 8 with respect to this claim.

* * *

For the reasons discussed above and in the Memorandum, the FAC should be dismissed.

Dated: May 24, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2017 the foregoing REPLY 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

**SUPPLEMENTAL 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 following 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 supplemental declaration in support of Defendants’ Motion to Dismiss First Amended Complaint and Defendants’ Reply in Support of Motion to Dismiss First Amendment Complaint.

3. On May 23, 2017, the Mercer County Board of Education voted to suspend the teaching of all Bible in the Schools classes for at least a year. Attached as **Exhibit D** is a true and correct copy of a May 23, 2017 news article by Charlie Boothe entitled *Suspended: Bible In The Schools Program On Hold* that was posted on the public website of the *Bluefield Daily*

¹ The term “Defendants” does not refer to Rebecca Peery.

Telegraph. The URL is: http://www.bdtonline.com/news/suspended-bible-in-the-schools-program-on-hold/article_f7d32c80-4027-11e7-b0fc-b3782747512d.html.

4. On March 20, 2017, the Mercer County Board of Education provided notice to the Bible in the Schools teachers that their employment may be terminated. The Board finalized the terminations of the Bible in the Schools teachers on April 11, 2017. Attached as **Exhibit E** is a true and correct copy of an April 7, 2017 news article by Greg Jordan entitled *Bible in the Schools Teachers Face Possibility of Dismissal* that was posted on the public website of the *Bluefield Daily Telegraph*. The URL is: http://www.bdtonline.com/news/bible-in-the-schools-teachers-face-possibility-of-dismissal/article_75d4eac0-1b33-11e7-aa40-fb725ddac9ff.html.

5. Attached as **Exhibit F** is a true and correct copy of Mercer County Schools Board Memo #344 regarding “*Elementary Bible Program*,” dated May 23, 2017.

6. Attached as **Exhibit G** is a true and correct copy of a May 10, 2017 news article by Charles Boothe entitled *Bible in High Schools: Mercer BOE Mulls Offering Course That Meets Nationally Accepted Standards* that was posted on the public website of the *Bluefield Daily Telegraph*. The URL is: http://www.bdtonline.com/news/bible-in-high-schools-merceroe-mulls-offering-course-that/article_81b400e4-351c-11e7-86c8-97881fff4421.html.

7. Attached as **Exhibit H** is a true and correct copy of an April 23, 2017 news article by Joe Heim entitled *A Popular Public School Bible Class in West Virginia Faces Legal Challenge* that was posted on the public website of *The Washington Post*. The URL is: https://www.washingtonpost.com/local/education/a-popular-public-school-bible-class-in-west-virginia-faces-legal-challenge/2017/04/23/14c50460-2144-11e7-ad74-3a742a6e93a7_story.html?utm_term=.36470a0b8808.

8. Attached as **Exhibit I** is a true and correct copy of a 2011 white paper by the

National Association of Elementary School Principals entitled *Student Assessment: Using Student Achievement Data to Support Instructional Decision Making*. This white paper is publicly available at the URL: http://www.naesp.org/sites/default/files/Student%20Achievement_blue.pdf.

9. On May 24, 2017, counsel for Defendants informed counsel for Plaintiffs by emailed letter that Defendants do not object to Plaintiffs filing a surrebuttal to Defendants' Motion to Dismiss First Amended Complaint with respect to the factual standing challenge contained in Defendants' Reply in Support of Motion to Dismiss First Amended Complaint.

Dated: May 24, 2017

Respectfully submitted,

By: /s/ Kermit J. Moore
Kermit J. Moore (W.Va. Bar No. 2611)
Brewster, Morhous, Cameron, Caruth,
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Exhibit D

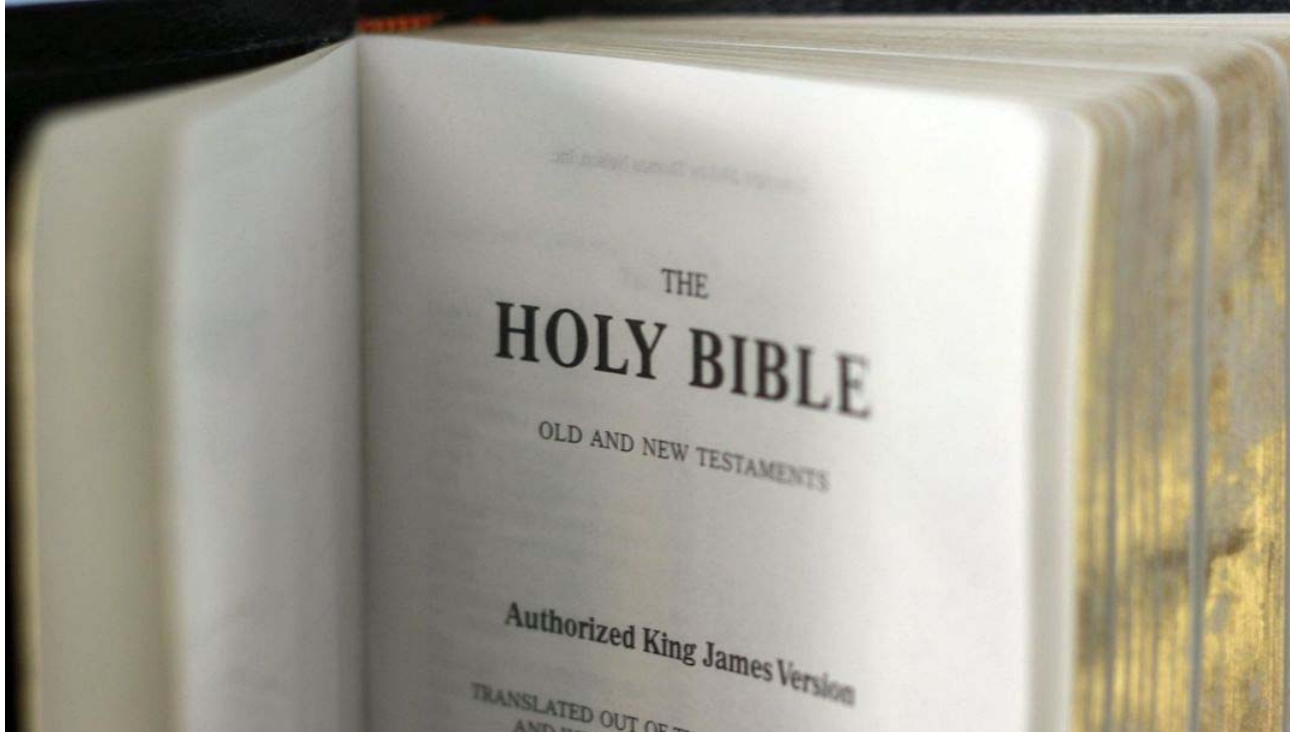
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FEATURED

TOP STORY

Suspended: Bible in the Schools program on hold

By CHARLIE BOOTHE Bluefield Daily Telegraph 8 hrs ago



PRINCETON — Mercer County's Bible in the Schools program is being suspended for next year, providing time for a review of the optional class for elementary and middle school students.

Members of the board of education approved the suspension last night at their regular meeting.

“Since the Bible class is an elective, I would like to include community members and religious leaders along with our teachers in this process,” said Dr. Deborah Akers, superintendent of schools. “In order to conduct a thorough review, we need to allow at least a year to complete the task. Therefore, I am recommending that we suspend the elementary Bible classes until this review is completed.”

However, the board has approved a secondary elective for high school students, using the text, “The Bible and Its Influence,” which will be offered next year.

“This text has become the standard for academic Bible study in the United States due to its broad acceptance in the educational community,” Akers said. “Adopting a curriculum for the secondary schools sets the stage for us to consider reviewing our elementary curriculum. The review cycle for state required courses in the elementary schools is six (6) years, so it makes sense to review our elective elementary Bible curriculum at this time.”

That elementary Bible curriculum is the subject of a lawsuit filed in January that contends the program “endorses one religion, improperly entangles public schools in religious affairs, and violates the personal consciences of nonreligious and non-Christian parents and students.”

The suit also says the classes that are taught in the program are basically “Sunday school” classes, which, the suit says, are illegal.

Jeremiah Dys, an attorney with First Liberty Institute, one of the law firms representing the school system, agrees with the board’s decision.

“It makes sense to do this review, which is more or less routine anyway,” he said. “I think it provides a prime opportunity for the community to provide their input on the future of the curriculum.”

The school system will review the program, he said, and “make sure we get it in the best shape possible.”

Dys said the lawsuit wants to end any Bible instruction in the school system at all, and the

attempt to do so is based on “pure conjecture and speculation.”

Mercer County schools has filed a motion to dismiss the suit in Federal District Court in Bluefield. The hearing on that motion is set for June 19 in Beckley.

The Freedom From Religion Foundation, a Wisconsin-based firm, filed the suit and asks that the current Bible in the Schools program end.

Patrick Elliot, an attorney for the foundation, said the lawsuit does seek to end the program.

“We see no way the program can meet the guidelines” that would make it constitutional, he said, regardless of any changes that may be made in lesson plans.

The program, which is offered in 15 elementary schools and three middle schools, is financed by donations, but the school system administers it.

Earlier this month, the board approved “The Bible and Its Influence” class to be offered next school year to high school students.

Amanda Aliff, the school system’s coordinator of pupil services, told the board that the course could be taught as elective in an English or social studies course, would meet educational and legal standards, and use the Bible as a primary source.

Academically, it “falls in line with what we do every day in English classes,” she said, explaining that the Bible is used as a work of literature, not only studying its historic influence but artistic and literary value as well.

The course would use the Bible and its imagery, poetry, history and context to study its political, economic and social impact at different points in history, and how it has influenced world culture, she said.

“It would incorporate analysis, evaluation and critical thinking skills,” she added.

Aliff said teachers would have the textbook, an assessment program and training on how it

should be taught to meet the necessary standards.

“Students who don’t have a knowledge of biblical content are at a disadvantage,” she said, using examples of literary and cultural references and imagery that have their origins in the Bible. “You can’t exactly separate these from secular things.”

The guidelines to teach Bible in public schools are part of an opinion issued by West Virginia Attorney General Charlie Brown in 1985.

Brown wrote that the state 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 ...” he wrote. “Course content must study the Bible only for its historical and literary qualities, or in the context of comparative religion and 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.”

— *Contact Charles Boothe at cboothe@bdtonline.com*

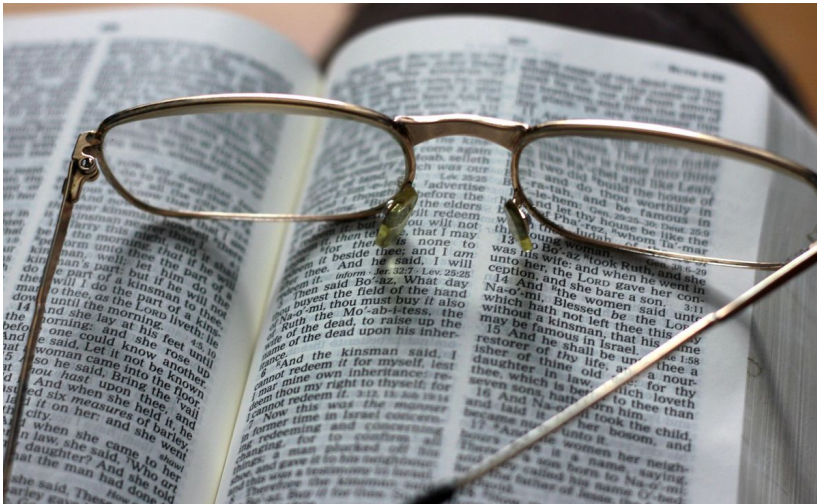
Exhibit E

http://www.bdtonline.com/news/bible-in-the-schools-teachers-face-possibility-of-dismissal/article_75d4eac0-1b33-11e7-aa40-fb725ddac9ff.html

FEATURED

Bible in the Schools teachers face possibility of dismissal

By GREG JORDAN Bluefield Daily Telegraph Apr 7, 2017



MorgueFile



PRINCETON — When spring arrives, county school systems routinely have to consider the possibility of dismissing personnel for reasons such as the end of grants funding their salaries, but this year in Mercer County the list includes teachers for a Bible in the Schools program now subject to litigation.

In January, a lawsuit was submitted by the Freedom From Religion Foundation on behalf of a plaintiff listed as Jane Doe, an atheist who wishes to raise her daughter, listed as Jamie Doe, without religion. In the lawsuit, the plaintiff says the child risks being ostracized by other students if she does not participate in the Bible classes.

First Liberty Institute based in Plano, Texas., which is representing Mercer County Schools, filed a motion in March to dismiss the suit. In court documents First Liberty attorneys argued that the plaintiffs do not have standing to bring the case to court. First Liberty Institute also argues that the complaint does not attack the particular curriculum of the Bible classes offered in Mercer County Schools; instead, it attacks the fact that any such classes, regardless of the specific curriculum, exist.

This year approximately eight Bible in the Schools teachers are on the list of possible force reductions, but this is part of a standard procedure the state requires boards of education to conduct each year, Superintendent Dr. Deborah Akers said. This is the time of year when school boards must look at contracts for the coming school year.

“We have a timeline on notifying individuals about their employment for the following year,” Akers said. “We have the litigation in the Bible program going on and we do not have an answer from the courts as of yet; so because we don’t know, as a precautionary measure then we have to give the notice to those teachers. That’s all a precaution because we’re in the middle of litigation.”

The Bible in the Schools teachers are on the same list as teachers that were being paid with grants that have not been renewed. In that instance, the school board doesn’t know if those grants will be renewed because the Legislature has not turned in a state budget yet, Akers said. The state’s timeline requires the school system to notify those teachers, too. People on the force reduction list are

often called back when grants are funded again, and the same could apply to the Bible in the Schools teachers when the suit is resolved.

Akers emphasized more than once that Mercer County Schools is continuing its efforts to keep the Bible in the Schools program.

"We are still vigorously contesting it," she said of the lawsuit. "But we have these mandatory timelines that we're up against that puts us in this position. We haven't stopped contesting it. We're still fighting it."

The Mercer County Board of Education has not acted yet on the recommendations. There will be reduction-in-force and transfer hearings during its April 11 meeting at the Mercer County Technical Education Center. The hearings are scheduled to begin at 6:30 p.m.

— Contact Greg Jordan at gjordan@bdtonline.com

Exhibit F

BOARD MEMO #344

**MERCER COUNTY SCHOOLS
Princeton, West Virginia**

M E M O R A N D U M

TO: Board of Education Members

FROM: Deborah S. Akers, Superintendent

DATE: May 23, 2017

RE: **Elementary Bible Program**

At our last Board meeting, the Board approved a new secondary elective, “The Bible and Its Influence.” This text has become the standard for academic Bible study in the United States due to its broad acceptance in the educational community.

Adopting a curriculum for the secondary schools sets the stage for us to consider reviewing our elementary curriculum. The review cycle for state required courses in the elementary schools is six (6) years, so it makes sense to review our elective elementary Bible curriculum at this time.

Since the Bible class is an elective, I would like to include community members and religious leaders along with our teachers in this process. In order to conduct a thorough review, we need to allow at least a year to complete the task. Therefore, I am recommending that we suspend the elementary Bible classes until this review is completed.

Our secondary classes will be conducted as planned and we are hopeful that the middle school classes can be developed by the beginning of the next school year.

I recommend approval.

DSA/klw

Exhibit G

http://www.bdtonline.com/news/bible-in-high-schools-merceroe-mulls-offering-course-that/article_81b400e4-351c-11e7-86c8-97881fff4421.html

FEATURED

TOP STORY

Bible in high schools: Mercer BOE mulls offering course that meets nationally accepted standards

By CHARLES BOOTHE Bluefield Daily Telegraph May 10, 2017



PRINCETON — The Mercer County Board of Education is mulling a decision to offer a Bible course to high school students, a course that meets nationally accepted standards.

But no decision has yet been made on whether the high school course, if approved, would replace the Bible in the Schools program now offered in elementary schools.

That program is the subject of a lawsuit filed by The Freedom From Religion Foundation, Inc., a Wisconsin-based group, which says the current program “endorses one religion, improperly entangles public schools in religious affairs, and violates the personal consciences of nonreligious and non-Christian parents and students.”

Two parents were eventually part of the suit, alleging their children risked ostracism from other students if they did not participate in the Bible classes, which are optional.

The lawsuit also alleges the Bible classes now being taught are presented as a “Sunday school” class rather than a secular class.

Amanda Aliff, the school system’s coordinator of pupil services, presented a plan to the board Tuesday night that would offer either an English or social studies elective course to high school students that would meet educational and legal standards but use the Bible as a primary source.

The textbook used in the course, she said, is “The Bible and Its Influence” and it is used in 625 public high schools in 43 states.

Academically, it “falls in line with what we do every day in English classes,” she said, explaining that the Bible is used as a work of literature, not only studying its historic influence but artistic and literary value as well.

The course would use the Bible and its imagery, poetry, history and context to study its political, economic and social impact at different points in history, and how it has influenced world culture, she said.

“It would incorporate analysis, evaluation and critical thinking skills,” she added.

Aliff said teachers would have the textbook, an assessment program and training on how it

should be taught to meet the necessary standards.

“Students who don’t have a knowledge of biblical content are at a disadvantage,” she said, using examples of literary and cultural references and imagery that have their origins in the Bible. “You can’t exactly separate these from secular things.”

Professional development would be available for teachers of the elective, including the legality of the course as well as how it should be taught.

Aliff used the example of how Shakespeare is taught, incorporating the writer’s works into classes that help build knowledge as well as develop academic skills.

Elective courses using the Bible in this way are not offered in any of the county’s high schools, but Aliff said it could be offered in all four.

“Students need eight electives to graduate,” she said, and this elective could be one they take.

Board member Gene Bailey questioned why the standards related to the course did not mention the Bible, but he liked the course itself.

“The textbook sounds great,” he said.

Schools Superintendent Dr. Deborah S. Akers said the standards are the “overarching concept” that academic standards will be met and delivered by the course.

“To deliver those standards we are going to use the content of the Bible,” she said. “It’s very similar standards to any class.”

Akers said the textbook that will be used has been “vetted” to meet legal requirements.

“We don’t want to deviate from this textbook,” she said, adding that it gives the schools a firm basis for meeting those legal guidelines.

A suggestion was also floated to possibly bring the course to the middle schools, and Aliff said that may be a possibility at some point, using the appropriate lessons in a nine-week exploratory class.

Akers said after the presentation a decision on whether to retain the current elementary Bible classes has not yet been made.

The Mercer County Board of Education administers the elementary school program, but all funding (about \$450,000 a year) is provided by the Bibles in the Schools organization.

The lawsuit seeking to end those classes includes examples of lesson plans that it alleges do not follow secular teaching.

Mercer County schools, represented by First Liberty Institute of Plano, Texas, and the law firm of O'Melvey & Myers LLP of Washington, D.C., filed a motion to dismiss the suit last month in federal court in Bluefield.

Grounds to dismiss included the fact that the lawsuit "does not attack the particular curriculum of the classes, but attacks the fact that such classes exist. This is not a cognizable legal claim and flies in the face of decades of precedent."

Patrick Elliott, an attorney with the Freedom From Religion Foundation, said a response to the motion to dismiss will be filed this week.

Elliott said the suit seeks to end Mercer County's current Bible in the Schools program all together, rather than change the course content and how it is taught.

"We see no way the program can meet the guidelines" that would make it constitutional, he said after the motion to dismiss was filed.

The guidelines to teach Bible in public schools are part of an opinion issued by West Virginia Attorney General Charlie Brown in 1985.

Brown wrote that the state 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 ... “ he wrote. “Course content must study the Bible only for its historical and literary qualities, or in the context of comparative religion and 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.”

The lawsuit asks the court to prohibit the Mercer County Board of Education, Mercer County Schools and Akers from “organizing, administering, or otherwise endorsing bible classes for Mercer County School students.”

It also seeks “nominal damages” for the plaintiffs as well as court costs and attorney fees.

The lawsuit also says the defendants’ conduct, which has no “legitimate secular purpose,” will cause “a deprivation of constitutional rights in violation of the First And Fourteenth Amendments to the United States Constitution.”

— Contact Charles Boothe at cboothe@bdtonline.com.

Exhibit H

The Washington Post

Education

A popular public school Bible class in West Virginia faces legal challenge

By **Joe Heim** April 23

PRINCETON, W.Va. — Gym is Trenton Tolliver’s favorite class. But the 7-year-old is also a huge fan of the weekly Bible course at Princeton Primary, his public elementary school. He gets to play matching games about Bible stories and listen to classic tales. Noah and the Ark is a favorite. Adam and Eve and the garden of Eden, of course. And the story about how their son Cain killed his brother, Abel.

“That one was a little bit of a surprise,” Trenton said as he sat with his parents, Brett and Courtney Tolliver, one day this month watching his little sister’s soccer practice on a lush field in this small town in the mountains of southern West Virginia.

This spring, Bible classes such as Trenton’s are on the minds of many here in Mercer County. For decades, the county’s public schools have offered a weekly Bible class during the school day — 30 minutes at the elementary level and 45 minutes in middle school. Bible classes on school time are a rarity in public education, but here they are a long-standing tradition. The program is not mandatory, but almost every child in the district attends. And there is widespread support for the classes: Parents and community members help raise nearly \$500,000 a year to pay for the Bible in the Schools program.

Now Bible in the Schools is facing a stiff legal challenge. Two county residents with school-age children argue in a lawsuit that the program violates the establishment clause of the First Amendment and the West Virginia constitution. Filed in January and amended last month by the Freedom From Religion Foundation,

the suit charges that the Bible class “advances and endorses one religion, improperly entangles public schools in religious affairs, and violates the personal consciences of nonreligious and non-Christian parents and students.”

Supporters are adamant that the weekly class is an elective meant to explore the history and literature of the Bible, not to promote religious belief.

“My experience with it has been very positive. I’ve never known of anyone who has been pressured or felt ostracized,” said the Rev. David W. Dockery, senior pastor at First Baptist Church of Princeton. “Any time God’s word can be proclaimed is beneficial and is a good thing.”

Trenton’s parents also find it hard to see why there would be objections.

“I think it’s a great program mainly because it’s the only chance for some of these kids to even see the Bible,” said Brett Tolliver, 27. “More importantly, I don’t know who it harms. The kids aren’t forced to be there.”

Courtney Tolliver, 26, a teacher in the district, agrees.

“It’s not teaching religion, but it teaches character and respect and how important it is to tell the truth,” she said. “The kids love it and the ones who don’t participate aren’t made to feel left out.”

But the plaintiffs in the suit and their backers argue that the program’s popularity shouldn’t matter in the face of Supreme Court rulings such as *McCullum v. Board of Education* in 1948 that have banned public schools from initiating or sponsoring religious activity. The suit alleges that the lessons in the Mercer schools are similar to what a child would hear in Sunday school and that they advocate the Ten Commandments and treat stories in the Bible as historical fact.

The suit quotes from one lesson: “If all of the Israelites had chosen to follow the Ten Commandments, think of how safe and happy they would have been.” Another lesson asks students to imagine that humans and dinosaurs existed at the same time. It says: “So picture Adam being able to crawl up on the back of a dinosaur! He and Eve could have their own personal water slide! Wouldn’t that be so wild!”

The district declined a request to observe one of the classes.

Elizabeth Deal, who describes herself as agnostic, is one of the plaintiffs in the case. Her daughter attended elementary school in nearby Bluefield, but Deal kept her out of the Bible class. Even though the class was

optional, Deal said there weren't any alternative lessons or activities for those who opted out. Her daughter was told to sit in the computer lab for that half-hour and read a book.

Bypassing the class left her vulnerable to bullying. Deal said other students told her daughter that she was going to hell. One day a student saw her daughter reading a "Harry Potter" novel and told her, according to the mother: "You don't need to be reading this. You need to be reading the Bible."

Eventually Deal moved her daughter to a public school a few miles away in Virginia where there is no Bible class. She pays an out-of-state fee of several hundred dollars, but she no longer worries about her child being taunted.

Deal said she joined the suit because she believes strongly in the separation of church and state. "When something is wrong," she said, "you have to stand up against it."

God is a big deal in Mercer County, home to about 125 churches that dominate the main streets of its biggest towns, Princeton (population 6,400) and Bluefield (10,400), and smaller burghs such as Athens (1,000), Bramwell (360) and Oakvale (120). A lot of the good jobs in the county have left — 22 percent of its 61,000 residents live below the poverty level — but the churches have stayed.

You can find the Church of God here. And the Church of Christ. And the Church of Jesus. There are a couple of Catholic churches, a synagogue and a mosque, but the vast majority of houses of worship are Baptist, Methodist or Pentecostal. The radio in the region is filled with gospel stations, Bible talk shows and Christian rock. Billboards tout the Ten Commandments or offer stern messages on abortion and eternal salvation. Beneath a Chick-fil-A billboard in Princeton, another asks: "If you die tonight. Heaven or Hell?"

The Rev. Ray Hurt has been the lead pastor at the Church of God in Princeton for more than two decades. The church, one of the largest buildings in town, can hold up to 2,000 people for Sunday services and often does. For Hurt, Bible in the Schools, which has been in the public schools here in one form or another since 1939, is simply a way for students to further their knowledge.

"There is a great deal of not just poetry and prose in the Bible, but from what I've read almost every piece of history that's in the Bible has eventually been proven," he said. "We see the Bible not just as a book of faith but as a pretty accurate account of history that informs us about a lot of things that happened."

Hurt, whose son, the Rev. J.B. Hurt, is also a minister in the Church of God and a member of the county school board, says he would oppose the program if he thought it was being used to teach religion or if

students were required to take the class. But he also embraces the idea that the Bible offers irrefutable lessons in morality and teaches the difference between right and wrong.

“If you read the Bible, you’re going to get a whole lot of good ideas that are going to stick with you and make you a better person,” he said. “You don’t have to push religion with it. It speaks for itself in terms of morals and ethics and those things.”

The idea that a weekly Bible class for 6,600 students in 16 public elementary schools and three middle schools is somehow simply an academic offering doesn’t sit well with Lynne White, 54, a former two-term school board member and mother of two sons who went through Mercer schools.

“As a person of faith myself, I don’t see any problem with having an after-school Bible program,” White said. “But to me this seems a pretty clear violation of the Constitution.”

White holds the school board and leadership responsible for spreading what she says is a false sense of what the Bible in the Schools program is and does.

In a commentary for the Charleston Gazette-Mail, White wrote that “the Bible in the schools program in Mercer County is being sustained on a foundation of lies.”

She argued that the classes are character education based on biblical values, that they were not electives because West Virginia doesn’t offer electives in elementary or middle school and that even though the classes are funded by private donations, that doesn’t mean they should be taught during the instructional day. She also said it was untrue that children who didn’t take the class weren’t made to “feel different or ostracized.”

When White posted the article on Facebook, she heard from some supporters, but many others questioned her faith. “I will pray for you and all non-believers Lynne White. God Bless!!” one wrote.

Another wrote:

“Lynne White You are not a Christian, a Christian is a person who strives to be more Christ like with everything they do and I do not believe Christ would be working to shut this program down or alter it to include your worldly views.”

If it were simply a popularity contest, Bible in the Schools would be allowed to continue as is. Even the president of the local mosque in Princeton says it should stay.

“It’s good to be God-fearing no matter how you approach it,” said Mohammad Iqbal, head of the Islamic Society of the Appalachian Region. “Whether it’s the Bible, whether it’s Koran, whether it’s Torah, whether it’s some other book. But it should be optional, not enforced. If the parents have no objection and the student has no objection, it is okay.”

But the program’s fate will not be resolved by popular vote or on Facebook posts. Instead, the question will be tried in the courtroom of Judge David A. Faber of the U.S. District Court for the Southern District of West Virginia in Bluefield. (Faber was nominated by President George H.W. Bush.)

Representing the Mercer school district is the First Liberty Institute, a nonprofit law firm based in Texas that specializes in religious freedom cases. Hiram Sasser, a lawyer at the firm, said the district’s main objective is to allow the Bible course to remain as an elective while making sure it complies with the law. The district filed a motion to dismiss the lawsuit on Wednesday.

“There are two things to look at,” Sasser said. “The first is whether you can have a Bible course at all. And the other is whether you can have the Bible course as it is presently constituted. It’s fair to say that we’re very confident on the first issue. And on the second issue . . . our client is very, very flexible in terms of making sure that the content is in compliance with the law.”

But the plaintiffs aren’t looking for flexibility. They want the Bible class out of the school day.

The program “is unconstitutional at its core and cannot be saved via modifications,” said Patrick Elliott, a lawyer with the Freedom From Religion Foundation. “There is no legally permissible way for Mercer County Schools to continue with any type of program like this.”

According to Elliott, the Mercer program is “extremely rare” and there are only a handful of districts around the country with similar courses.

The amended complaint, Elliott said, seeks to prevent the school system from “organizing, administering, or otherwise endorsing Bible classes for Mercer County Schools’ students in grades kindergarten through eighth grade.”

Charles C. Haynes, the founding director of the Religious Freedom Center at the Newseum in Washington, doesn't foresee the program surviving a court challenge in its current form.

"This is a loser for the school district," Haynes said. "It's difficult to satisfy the First Amendment in elementary school when it comes to the Bible. Students at that age really aren't prepared to tell the difference between what is history and what is religious conviction."

Haynes argues that people of faith are doing their religion a disservice when they try to have it taught by a government entity. They would rightly object, he said, if they lived somewhere where they were the religious minority and supporters of another religion wanted a course on their faith taught in public schools.

"Even if 99.9 percent of the people in the community want it, they need to remember that liberty of conscience is not up for a vote," he said.

Trenton Tolliver is oblivious to the Bible battle that swirls around him. His first-grade school year ends next month. Hanging in the balance of the court case is what he will learn in the Bible course in second grade. Or if there will be a Bible course at all.


Joe Heim joined The Post in 1999. He is currently a staff writer for the Metro section. He also writes Just Asking, a weekly Q&A column in the Sunday magazine.  Follow @JoeHeim

Exhibit I

BEST PRACTICES
FOR BETTER SCHOOLS™

Student Assessment

Using Student Achievement Data to Support Instructional Decision Making



National Association of Elementary School Principals



Student Assessment

Using Student Achievement Data to Support Instructional Decision Making

2

About NAESP

The mission of the National Association of Elementary School Principals (NAESP) is to lead in the advocacy and support for elementary and middle-level principals and other education leaders in their commitment for all children.

Gail Connelly, *Executive Director*

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Best Practices for Better Schools™, an online publications series developed by the National Association of Elementary School Principals, is intended to strengthen the effectiveness of elementary and middle-level principals by providing information and insight about research-based practices and by offering guidance for implementing them in schools. This series of publications is intended to inform discussion, strategies, and implementation, not to imply endorsement of any specific approach by NAESP.

About This White Paper

The content of this issue of Best Practices for Better Schools™ is excerpted with permission from [Doing What Works](http://DoingWhatWorks.org) (DWW), a website sponsored by the U.S. Department of Education. The goal of DWW is to create an online library of resources to help principals and other educators implement research-based instructional practice. DWW is led by the Department's [Office of Planning, Evaluation & Policy Development](http://OfficeofPlanning.Evaluation&PolicyDevelopment.org) (OPEPD), which relies on the [Institute of Education Sciences](http://InstituteofEducationSciences.org) (and occasionally other entities that adhere to standards similar to those of IES) to evaluate and recommend practices that are supported by rigorous research. Much of the DWW content is based on information from IES' [What Works Clearinghouse](http://WhatWorksClearinghouse.org) (WWC), which evaluates research on practices and interventions to let the education community know what is likely to work.

NAESP was the only national education association awarded a grant to widely disseminate highlights of best-practice content from the [DWW website](http://DWWwebsite.org). Readers are encouraged to visit the website to view all of the resources related to this best practice and to share this online resource with colleagues, teachers, and other educators. No additional permission is required.

NAESP cares about the environment. This white paper is available from NAESP as an online document only. NAESP members and other readers are encouraged to share this document with colleagues.

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Using Student Achievement Data to Support Instructional Decision Making

PRINCIPALS KNOW that student achievement data offers invaluable support for making good decisions about instruction. But how that data are used is critical. This white paper outlines five recommendations to help principals put student achievement data to the best possible use:

- Make data part of the ongoing cycle of instructional improvement;
- Teach students to examine their own data and set learning goals;
- Establish a clear vision for schoolwide data use;
- Provide supports that foster a data-driven culture within the school;
- Develop and maintain a districtwide data system.

Summaries of these practices follow.

Make data part of an ongoing cycle of instructional improvement.

To help all students achieve, teachers need to systematically and routinely use data to guide instructional decisions and meet students' learning needs. Data use is an ongoing cycle of collecting multiple data sources, interpreting data to formulate hypotheses about strategies to raise student achievement and implementing instructional changes to test hypotheses.

Collaboration among teachers in each step of

the data-based inquiry process can maximize the benefits of data use by helping teachers share effective practices, adopt collective expectations for students' performance, gain a deeper understanding of students' needs, and develop effective strategies to better serve students.

ACTIONS

Collect and prepare a variety of data about student learning.

To gain a deeper understanding of students' learning needs, teachers need to collect data from multiple sources, such as annual state assessments, interim district and school assessments, classroom performance data, and other relevant data. A districtwide data system allows teachers to aggregate data by classroom, content areas, or assignment type to identify patterns in performance.

Interpret data and develop hypotheses about how to improve student learning.

Interpreting data allows teachers to identify the strengths and weaknesses of an entire class as well as individual students. As they examine the data, teachers can develop hypotheses about factors that affect students' learning and ways to improve instruction to help all students achieve. It is important for teachers to slow down and ask why during this phase of the cycle of instructional improvement.



Teachers can use students' data analysis to identify factors that may motivate student performance and then adjust their instruction to better meet students' needs.

Modify instruction to test hypotheses and increase student learning.

After forming hypotheses about students' learning needs, teachers can examine current instruction and test the hypotheses by implementing instructional changes they believe are likely to raise student achievement. Drawing from the data, teachers need to determine whether to continue the instructional improvement in its current form, modify or extend the approach, or try a different approach.

WHAT PRINCIPALS SAY

Principals can see how these actions are implemented in schools by viewing these web-based interviews with teachers and specialists:

[What Do You See in These Data?](#)

[Prepare, Inquire, Act](#)

[Helping Struggling Students by Using the SAT Process](#)

[Intervening Early Using Data From Multiple Assessments](#)

[Start With the Data](#)

[Supporting Data Use Through Teacher Collaboration Time \(Part 1\)](#)

[Supporting Data Use Through Teacher Collaboration Time \(Part 2\)](#)

[Using the Three-Week Assessment Cycle](#)

TOOLS

[A variety of tools and templates](#), including [an instructional integrity checklist](#) and [collaborative conference protocol](#), are available through Doing What Works to help principals and teachers implement this best practice in their school. Each tool is a downloadable document that principals can adapt to serve their particular needs.

Teach students to examine their own data and set learning goals.

Teachers should provide explicit instruction to elementary and secondary students on regularly using achievement data to monitor their own performance and establish learning goals. Teachers can use students' data analysis to identify factors that may motivate student performance and then adjust their instruction to better meet students' needs.

ACTIONS

Explain expectations and assessment criteria.

Students can better interpret their achievement data and set learning goals when they have a clear understanding of performance expectations and assessment criteria. Teachers need to explicitly articulate the content knowledge and skills students are expected to achieve throughout the school year; the goals for individual lessons, assignments, and performance tests; and the criteria used to assess performance toward those goals.

Provide feedback to students that is timely, specific, well formatted, and constructive.

Teachers can provide students with feedback that helps them understand their strengths and weaknesses and identifies specific areas for improvement. Effective tools and strategies include student-developed assessment rubrics and peer reviews.

Provide tools that help students learn from feedback.

Students need time and tools to help them analyze the data, diagnose their own errors, and learn from feedback. Tools such as teacher- and student-generated graphs and reflective questions guide students' data analysis and help them make data-based decisions to improve their performance. Students can keep learning logs in individual folders (hard copy portfolios or e-versions)



Students need time and tools to help them analyze the data, diagnose their own errors, and learn from feedback.

with a variety of formats for self-monitoring and tracking progress.

Use students' data to guide instructional changes.

Teachers need to collect and review students' learning goals and analyses to identify content areas and skills that need to be reinforced and factors that may motivate student learning. For example, teachers can organize small-group instruction around the subsets of goals students prioritized for themselves, or can reteach concepts that a majority of students identified as their weaknesses.

WHAT PRINCIPALS SAY

Principals can see how these actions are implemented in schools by viewing these web-based interviews with teachers and specialists:

[Helping Students Gain Ownership Over Their Learning](#)

[Engaging Students in Data Use Through Student Portfolios](#)

[Clear Expectations for Students](#)

[Data Boards Help Students Set Learning Goals \(Part 1\)](#)

[Data Boards Help Students Set Learning Goals \(Part 2\)](#)

[Taking Ownership](#)

[Go Back and Reflect](#)

TOOLS

[A variety of tools and templates](#), including [student goal-setting worksheets](#), [student surveys](#) and [research plans](#), are available through Doing What Works to help principals and teachers implement this best practice in their school. Each tool is a downloadable document that principals can adapt to serve their particular needs.

Establish a clear vision for schoolwide data use.

A strong culture of data use is critical to ensuring routine, consistent, and effective data-based decision making. Principals can form a data team to serve as advisors on data use throughout the school. The data team can represent a range of stakeholders such as an administrator, two to three teachers across different grade levels or content areas, one to two classroom support professionals (such as a coach or special education teacher), and a district-level staff member who works with data.

A data team comprising an assortment of stakeholders can solicit input from, and work with, the entire school community. A data team might write the school plan describing how the school will use data to support schoolwide goals, and defining key concepts critical to teaching and learning (e.g., achievement, data, evidence, collaboration). However, a data team does not hold staff accountable for using data, supervise the data-related activities, or provide expert advice. Rather, the team can provide leadership through modeling the use of data.

ACTIONS

Establish a schoolwide data team that sets the tone for ongoing data use.

The data team's role is to clarify the school's data use vision, model using data to make instructional decisions, and encourage other staff to use data to improve instruction.

Define critical teaching and learning concepts.

The data team can start by developing a shared vocabulary for critical education concepts, particularly data use. The data team may want to define critical concepts such as learning, data, evidence, achievement, or collaboration.



A data team can hold monthly meetings to monitor a school's progress in executing the data use plan and ensure that the school is using data effectively and consistently.

Develop a written plan that articulates activities, roles, and responsibilities.

While developing a written plan that ties data use to a school's goals, the data team can ensure the goals are attainable, measurable, and relevant. The written plan needs to be actionable and include critical elements such as specific data use activities, staff roles and responsibilities, and timelines. This could be a component incorporated into the school's strategic plan for student achievement, or any other existing plans for various funding sources such as Title I, literacy, etc.

Provide ongoing data leadership.

In its leadership role, the data team usually provides resources, support, and encouragement to school staff. Team members can also participate in grade- and subject-level meetings to facilitate staff collaboration in data use. The data team can hold monthly meetings to monitor the school's progress in executing the data use plan and ensure that the school is using data effectively and consistently.

WHAT PRINCIPALS SAY

Principals can see how these actions are implemented in schools by viewing these web-based interviews with teachers and specialists:

[Collaborative Structures for Data Use](#)

[Establishing a Common Understanding](#)

[You Can't Hide From Data](#)

[Earning Trust](#)

[Carrying Out the Vision](#)

Provide supports that foster a data-driven culture within the school.

Providing leadership through data facilitators or other instructional leaders, and ongoing professional development, helps teachers, principals, and other school staff

members obtain a thorough understanding of their roles and responsibilities in using data. Leadership, professional development, and time for collaboration do not establish the culture of data use; rather, they provide the supports needed to build a culture that fosters data use to guide instructional decision making.

ACTIONS

Designate a school-based facilitator who meets and collaborates with teacher teams in discussing data and solving problems.

A data facilitator can provide leadership for data analysis, train and encourage school staff to use data consistently and systematically, and serve as the leader of the data team. However, data interpretation and analysis is not solely the responsibility of data facilitators; teachers need to improve their data literacy knowledge and engage in effective ongoing assessment of student learning, collective analysis, and problem solving.

Dedicate structured time for staff collaboration.

During a dedicated and structured time, teachers and school staff can collaboratively analyze and interpret students' achievement data and identify instructional changes. To help facilitate the collaborative meetings during the structured time, participants usually focus their discussions on a specific and timely topic, follow the cycle of inquiry, and are prepared to enact a data-based action plan to carry out instructional modifications.

Provide targeted professional development regularly.

Professional development can help familiarize staff with components of the data system, data culture, and data use, with a particular focus on how teachers can apply



Professional development can help familiarize staff with components of the data system, data culture, and data use.

data to their daily work to improve instructional planning, teaching, and learning.

WHAT PRINCIPALS SAY

Principals can see how these actions are implemented in schools by viewing these web-based interviews with teachers and specialists:

[Supporting Teachers in Understanding and Using Data](#)

[Supporting a Culture of Data Use](#)

[Data Afternoons](#)

[Visualizing Data in the Progress Pad](#)

[It's Not Something That's Static](#)

[Breaking It Down](#)

TOOLS

The following tools and templates are designed to help principals and teachers implement these best practices in their school. Each tool is a downloadable document that principals can adapt to serve their particular needs.

[Professional Development and Training Expectations](#): Sample material list outlining professional development topics and participation.

[Classroom Instructional Plan](#): Planning template for instructional changes.

Develop and maintain a districtwide data system.

To meet the needs of a wide range of audiences, a district data system advisory council comprising a variety of stakeholders should be involved in determining the district's requirements and selecting and implementing the new system. Districts and schools need to secure financial and human resources to develop data protection safeguards and ensure that data are timely,

relevant, and useful to educators.

ACTIONS

Involve a variety of stakeholders in selecting a data system.

The advisory council members can solicit feedback from their respective groups and meet frequently to discuss user concerns and ways to improve the system.

Clearly articulate system requirements relative to user needs.

By working with representatives of school data teams, the district advisory council can align their suggested system requirements to school-level needs. To ensure that the system remains effective as user needs evolve, requirements need to be reviewed and revised at least annually.

Plan and stage the implementation of the data system.

To guide data system implementation, the advisory council and district leaders can develop a written plan outlining the staged implementation process, professional development sessions, strategies to identify and solve problems, and anticipated needs for maintenance and enhancements. During early implementation, arranging staged rollouts or pilot tests allows staff to adjust to the new system and provides time to modify the system in response to user feedback.

WHAT PRINCIPALS SAY

Principals can see how these actions are implemented in schools by viewing these web-based interviews with teachers and specialists:

[What Makes a High-Quality Districtwide Data System](#)

[Immediate Feedback](#)

[District Supports for Data Use](#)



School leaders can develop a written plan outlining the staged implementation process, professional development sessions, strategies to identify and solve problems.

TOOLS

The following tools and templates are designed to help principals and teachers implement these best practices in their school. Each tool is a downloadable document that principals can adapt to serve their particular needs.

[Stakeholder Perspectives on Data System](#)

Use: Sample overview of how stakeholders participate and access a districtwide data system.

Protocols to Support Data Use: Four meeting protocols to guide staff as they collaborate to systematically use data.

Conclusion

Good data make for good decisions. How student achievement data are collected and implemented will determine how well that data support the instructional decision making by principals and teachers. The guidelines are clear: data must be made part of the ongoing cycle of instructional improvement; students must be taught to examine their own data and set their own learning goals; principals must establish a clear vision for schoolwide data use; schools need to foster a data-driven culture; and school districts must develop and maintain districtwide data systems.

SITE PROFILES

Thompson Elementary School (TX): A supportive culture of trust is the centerpiece of Thompson's data cycle.

MacArthur Ninth Grade School (TX):

MacArthur's three- and six-week assessments regularly check students' skill mastery.

River Ridge Elementary School (KY): River Ridge staff and its Student Assistance Team collaborate on data-based intervention plans.

Shotwell Middle School (TX): Shotwell's principal and administrative team have high expectations for staff data use.

Jacob Hiatt Magnet School (MA): Even the youngest students at Jacob Hiatt are involved in data review and analysis.

Related Links

Doing What Works: Preschool Language and Literacy: Review the unabridged content related to this best practice.

3-D Data-Driven Decision Making Center: An initiative to help K-12 technology leaders build a data culture.

Achieving With Data: How High-Performing School Systems Use Data to Improve Instruction for Elementary Students (PDF)

Assessment for Learning: Classroom Assessment to Improve Student Achievement and Well-Being (PDF)

Data-Driven Decision Making: Vision to Know and Do (PDF)

Data Quality Campaign: A national collaborative effort to improve availability of education data.

Data Use Drives School and District Improvement (PDF)

Issue Brief: Using Data—The Math's Not the Hard Part (PDF)

The Ohio Success Website: Information on Ohio's achievement and graduation tests

Rennie Center for Education Research and Policy: Data-Driven Teaching—Tools and Trends

State Education Technology Directors Association (SETDA): Data-Driven Decision Making



Student Self-Evaluation: What Research Says
and What Practice Shows

U.S. Department of Education:

Implementing Data-Informed Decision
Making in Schools

Use of Education Data at the Local Level:
From Accountability to Instructional
Improvement

Use of Education Data at the Local Level
From Accountability to Instructional
Improvement (PDF)

School Performance: A Brief Guide to
Building Systems for Data-Driven
Instruction