FIRST LIBERTY

April 16, 2025

Amanda Clapp, President
Neola
3914 Clock Pointe Trail, Suite 103
Stow, OH 44224

***Sent via email*:** [redacted]

Re: Neola's Release Time Policy Increases Liability Potential

Ms. Clapp:

First Liberty Institute is the nation's largest law firm dedicated exclusively to defending and restoring religious liberty for all Americans. We represent LifeWise, Inc. ("LifeWise"). Please direct any further communications on this matter directly to my attention.

As an independent service provider, Neola deserves credit for attempting to assist school districts to comply with the requirements of Ohio's released time education law, Ohio Rev. Code Ann. § 3313.6030. Yet, Neola's recommendations go well-beyond the statute's instructions and, if adopted, greatly increase the risk exposure of the state's school districts as explained below. We write to recommend immediate changes to Neola's proposed policy on Ohio's release time programs. Further, we request the names of the school districts that have adopted Neola's proposed policy or those Neola has advised concerning the same that we might ensure compliance with Ohio's release time education law and the Constitutional considerations explained herein.

Rather than extend beyond, or contradict, Ohio Rev. Code Ann. § 3313.6030, Neola's policy should track closely with the base requirements of the statute itself and avoid inviting scrutiny under the First Amendment.

Neola's prohibition on distributing materials during release time education increases the liability of Ohio's school districts under the First Amendment.

Despite Ohio's release time statute's silence on the matter, the Neola proposed policy curiously requires "[a]ny private entity providing religious instruction during the school day must agree that it will not provide participating students with any materials, snacks, clothing, candies, trinkets, or other items for their return to the school." *See* Neola Release Time Policy. Nothing in Ohio Rev. Code Ann. § 3313.6022 gives Neola—or any school district—the permission to add to what the Ohio Legislature duly passed. Any concerns about students' receipt of materials, or the ability of providers of release time education to distribute them, is sufficiently covered by the parental consent provision provided in Ohio Rev. Code Ann. § 3313.6022. Anything more invites intrusion upon the

First Amendment rights of students and their parents, as well as the organizations providing release time education.

Neola's proposed policy violates free speech protections.

"The right of freedom of speech and press has broad scope," one which should be broadly protected by any proposed policy. *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143 (1943). Yet, Neola's proposed policy intentionally shrinks the scope of the First Amendment for students, parents, and providers of release time education. While we may be more accustomed to understanding First Amendment rights expressed in non-school settings, "neither students, nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). "The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 514 (2022).

Those proposing policies intersecting with education and core First Amendment activity must recall that "[t]his freedom embraces the right to distribute literature [] and necessarily protects the right to receive it." *Martin*, 319 U.S. at 143 (internal citations removed). Neola's policy arbitrarily, and without legal warrant, retracts the right of students and parents to receive literature that the providers of release time education have the inviolable right to distribute. And, that "privilege may not be withdrawn even if it creates the minor nuisance" of managing papers upon return to the school campus. *Id.* *See also TikTok Inc. v. Garland*, ___ U.S. ___, 145 S. Ct. 57, 65 (2025) (acknowledging that First Amendment scrutiny extends to government regulation of conduct that is not expressive, but asserts "a disproportionate burden upon those engaged in First Amendment activities."); *City of Ladue v. Gilleo*, 512 U.S. 43, 54–58 (1994) ("Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression."); *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 68 (2006) ("We have recognized a First Amendment right to associate for the purpose of speaking, which we have termed a 'right of expressive association.'").

Even if Neola's intent in precluding providers of release time education from providing materials to student participants as a condition of release is to guard the recipients of that information (or that of students not released), the proposed policy still extends far beyond (a) what is required by Ohio Rev. Code Ann. § 3313.6030 and (b) what the First Amendment will tolerate. The U.S. Supreme Court has been clear for half a century that, if the question is "whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients," then "the answer to this one is in the negative." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976). Thus, Neola's inclusion in policy of such a blatant

effort to suppress otherwise protected speech or activity adds liability to any Ohio school district who adopts the proposed policy, more so on those who dare enforce it.

Neola's proposed policy relies on outdated Establishment Clause concerns.

If what motivates Neola's proposed policy suppressing the distribution and receipt of materials from providers of release time education stems from a desire to avoid any conflict with the Establishment Clause, those concerns are outdated and misplaced: "[I]n no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights." *Kennedy*, 597 U.S. at 543. Neola's proposed policy, rather than respecting "the First Amendment's double protection for religious expression," would instead "preference secular activity." *Id.* at 540. This no school district in Ohio is permitted to do.

The speech Neola's proposed policy attempts to suppress is protected by the Constitution and cannot be so regulated by school districts even if it were taught by their own teachers. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."). The First Amendment, "does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *Bd. of Educ. v. Mergens*, 496 U.S. 226, 248 (1990) *quoting McDaniel v. Paty*, 435 U.S. 618, 641 (1978). Indeed, doing so establishes a hostility to religion that itself violates the Establishment Clause. *Good News Club v. Milford Central School*, 533 U.S. 98, 119 (2001) ("[W]e cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint . . . ."); *School District of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963) ("[T]he State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'" (*quoting Zorach v. Clauson*, 343 U.S. 306, 314 (1952)). If it cannot regulate the same speech or expression occurring in their own classrooms, it would only increase a school district's liability to adopt Neola's proposed policy in an attempt to regulate the speech or expression of release time education providers.

Instead, Neola should encourage school districts to "teach [students] about the First Amendment, about the difference between private and public action, about why we tolerate divergent views . . . [in short,] to educate the audience rather than squelch the speaker . . . If pupils do not comprehend so simple a lesson, then one wonders whether the [] schools can teach anything at all." *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d

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

Neola's proposed policy fails to remain neutral.

Not only does Neola's proposed policy facially contradict Ohio's legislative decision, Neola's proposed policy unconstitutionally treads where it should not, interfering with parental consent, chilling core First Amendment activity thus, exposing those school districts who might adopt the proposed policy to increased liability. *See Carson, et. al., v. Makin*, 596 U.S. 767, 787 (2022) (stating that "the Free Exercise Clause forbids discrimination on the basis of religious status").

The Constitution requires that districts treat the providers of religious release time education neutrally. Neola's proposed policy targets them for approbation. School districts cannot ban these organizations from sending information home with students if it allows other external organizations to send information home with students. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458 (2017) ("The Free Exercise Clause protects religious observers against unequal treatment and subjects to the strictest scrutiny laws that target the religious for special disabilities based on their religious status.").

The release time statute recognizes that students can earn two units of credits for the release time program. According to the Ohio release time statute, the board is required to use secular criteria when evaluating the course. Ohio Rev. Code Ann. § 3313.6022(D). Specifically, the statute mandates that the course should be evaluated in the same manner as transfer credits from nonpublic schools. *Id.* Among other things, the board must evaluate the syllabus, materials used, and assessments in the course. It would be discriminatory to limit the materials that release time programs can provide to students when such materials are vital to students receiving credits for the course. Such discrimination is a violation of the Free Exercise Clause. *Trinity Lutheran*, 582 U.S. at 460 (stating that the Free Exercise Clause does not allow the government to "single out the religious for disfavored treatment.").

Neola's proposed policy contradicts, and unlawfully extends beyond, Ohio's release time law.

Neola's subjective background check requirement is not found in Ohio law.

Background checks ensure that students are being taught in a safe environment while receiving religious instruction. This is why LifeWise, as a matter of policy, is

committed to providing these background checks in all of its programs. But Neola's requirements are unnecessarily onerous. The background check requirements in Neola's proposed policy should be adjusted to remove unnecessary administrative hurdles to release time education.

Moreover, Neola's draft policy suggests that a "District will not release students to the private entity . . . should the Board determine that the private entity did not complete a satisfactory criminal background check[.]" Even if this somehow managed to make optional the mandate sent by the Ohio Legislature to permit release time education, school districts cannot use the subjective standard of a "satisfactory" background check as a means of banning release time programs altogether. Those who adopt such a subjective policy may be vulnerable to charges of religious discrimination due to the unlimited discretion, subjecting a school's district's action to the exacting standard of strict scrutiny. *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522, 523, 533 (2021) (stating that a policy is not generally applicable when the government has broad discretion to apply the policy, which triggers strict scrutiny). Neola's proposed policy should be revised and simplified.

A simplified approach to background checks avoids bureaucratic obstacles to complying with the mandatory release time education law.

School districts that would adopt Neola's proposed policy would either be buried in more bureaucracy or tempted to leverage the added layers of bureaucracy to reduce or eliminate access to the release time education the Ohio Legislature has mandated. We propose the following policy language:

> It is the responsibility of any private entity providing religious instruction during release time from the school day to annually submit to the Board an acknowledgment that it has completed criminal background checks on all instructors and volunteers engaged in a course in religious instruction and certifying that no such individual has a criminal conviction which would constitute an absolute bar offense under R.C. 3319.31(C).

This certification ensures organizations comply with the background check provision while also reducing the amount of information that the organizations must provide, and the district will have to review. The certification will still hold the organizations responsible for complying with the statute and be more efficient and better for all involved.

Neola's proposed policy attempts to exploit a loophole the legislature closed.

Neola's proposed policy would permit school districts to deny all release time programs in their entirety—directly contrary to the explicit direction of the Ohio Legislature. Ohio Rev. Code Ann. § 3313.6022(B) The Ohio legislature properly balanced the duties of the school district with the right of parents to pursue release time education for their children. Ohio Rev. Code Ann. § 3313.6022(B)(1)(6). Yet, Neola's proposed

policy states that "the Board deems all graded courses to be core curriculum." This additional restriction, without a mandate in Ohio Rev. Code Ann. § 3313.6022, would allow school districts to prevent release time programs altogether. But this is directly contrary to explicit intent of the Ohio Legislature. When the legislature speaks with the language of "shall adopt," policies crafted to carry that legislative intent into action must be careful not to undermine that clear legislative direction. Neola should delete this additional "graded courses" provision and require only that districts work with release time programs to find the most opportune time for students to participate in the programs, in accordance with the statute. Ohio Rev. Code Ann. § 3313.6022(C).

Conclusion

In light of these constitutional considerations, we hope Neola will remove from its proposed policy any prohibition on the distribution of materials during release time education and otherwise revise its release time policy as suggested herein. Please inform us in writing of Neola's intended actions in keeping with this letter within 30 days of receipt of this letter. Of course, you are welcome to discuss this matter with me any time at [redacted] or [redacted].

Sincerely,

Jeremy Dys,
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