

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 03-B-1544 (PAC)

ZACHARY LANE, by his parent and next Friend, DAVID LANE;
ANNE ROSENBLATT, by her parent and next Friend, RICHARD ROSENBLATT; KEATY
GROSS, by her parent and next Friend, BARBARA GROSS;
SARAH BISHOP;
CHRISTIAN ERIKSEN;
SEAN GUARD;
JOLIE HENDRICKS;
ROD NOEL;
ALLEN POTTER;

Plaintiffs,

v.

BILL OWENS, in his official capacity as the Governor of the State of Colorado;
WILLIAM J. MOLONEY, in his official capacity as the Commissioner of Education of the State
of Colorado; ADAMS-ARAPAHOE 28J (AURORA) PUBLIC SCHOOL DISTRICT; CHERRY
CREEK 5 PUBLIC SCHOOL DISTRICT; DENVER COUNTY 1 PUBLIC SCHOOL
DISTRICT; JEFFERSON COUNTY PUBLIC SCHOOL DISTRICT R-1;

Defendants.

**BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY
RESTRAINING ORDER OR PRELIMINARY INJUNCTION**

Defendants Governor Bill Owens and Commissioner of Education William J. Moloney,
by and through their attorney, the Attorney General of the State of Colorado, hereby submit their
Brief in Opposition to Plaintiffs' Motion for Temporary Restraining Order or Preliminary
Injunction.

STANDARD OF REVIEW

A statute is presumed constitutional unless otherwise proven. The court will not invalidate a statute if there exists some “fairly possible” construction that confirms the measure’s constitutionality. Branson v. School Dist. RE-82 v. Romer, 161 F.3d 619, 636 (10th Cir. 1988).

The courts have not necessarily adopted a strict scrutiny standard when reviewing the constitutional rights of minors. In fact, the Supreme Court has adopted a standard akin to the intermediate scrutiny standard when deciding allegations that a law violates the fundamental rights of minors. “Given that the inherent differences between children and adults, both mental and physical, remain cause for concern, the Supreme Court has indicated that youth-blindness is not a goal in the allocation of constitutional rights.” Ramos v. Town of Vernon, 331 F.3d 315, 325 (2nd Cir. 2003). Thus, strict scrutiny is “too restrictive a test to address government actions that implicate children’s constitutional rights.” Id. Therefore, the appropriate test is whether the law serves important governmental objectives and the means are substantially related to the achievement of the objectives. Id. at 326. Finally, public schools do not offend the First Amendment so long as their actions are reasonably related to legitimate pedagogical concerns. Hazelwood School Dist. V. Kuhlmeier, 484 U.S. 260, 273, 108 S. Ct. 562, 571, 98 L.Ed.2d 592 (1988).

INTRODUCTION

This case is substantially different than West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). First, unlike the law in Barnette, § 22-1-106(2), C.R.S. does not compel the speech of any unwilling student. A student may be excused from saying the Pledge for any reason, merely upon the written statement of the

student's parent. Plaintiffs contend that the student should make the opt-out decision. However, parents clearly have the right and responsibility to control their children's instruction. Therefore, the General Assembly's involvement of the parent in the opt-out decision meets an important governmental objective. Second, unlike Barnette, § 22-1-106, C.R.S. should be construed as a part of a comprehensive civics curriculum. The General Assembly, exercising its plenary power over public education, placed the law amidst other statutes regarding the instruction of civics, citizenship and United States history. With regard to instructional content, schools may extensively regulate school-sponsored expression. Teachers are required to follow the state's curricular requirements. Therefore, § 22-1-106, C.R.S. does not impose any unconstitutional duty on any teacher.

I. THE ACT DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE IT DOES NOT COMPEL SPEECH BY THE STUDENTS.

In order to obtain a temporary restraining order or a preliminary injunction, the Plaintiffs must establish that there is a substantial likelihood of prevailing on the merits. The Plaintiff Teachers and Students cannot meet this requirement, since students or teachers who object to reciting the Pledge can opt out, and since the Defendant school districts have a legitimate pedagogical interest in the curricular program in question.

Students who object to reciting the Pledge can opt out of participation at any time and for any reason. Indeed, a student opting out need not give any explanation for why he or she is not participating. Plaintiffs' arguments are based entirely on the premise that the First Amendment bars compelled speech, but ignore the provision of § 22-1-106, C.R.S. that prevents those who do

not want to recite the Pledge from being compelled to do so. In the absence of compelled speech, there is no constitutional violation. If an individual voluntarily recites the Pledge, it can hardly be termed compelled speech.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) and the cases citing it, are distinguishable from the present case because of the statute's opt-out provisions. In Barnette, the Board of Education required that every teacher and pupil without exception participate in a "stiff arm" salute, the "saluter" to keep his right hand raised with palm turned up, while repeating the Pledge of Allegiance. Failure to conform was defined as "insubordination" dealt with by expulsion, and readmission was denied by statute until compliance. Meanwhile, the expelled child was truant and could be prosecuted as delinquent, and his parents or guardians were liable for prosecution. Barnette, 319 U.S. at 627. Plaintiffs in the case sought to enjoin enforcement of these regulations against Jehovah's Witnesses. It was in this context that the Court found that such compulsion of a flag salute violated the First Amendment. Id. at p. 642.

By contrast, no such regimented compulsion is present here. Rather, § 22-1-106(2)(a), C.R.S. merely contemplates recitation aloud of the Pledge. Any student can opt-out of the Pledge with parental permission, and any teacher may opt-out on religious grounds. Thus, Barnette is inapplicable to the present case.

The 7th Circuit in Sherman v. Community Consol. School Dist. 21 of Wheeling Tp., 980 F.2d 437 (7th Cir. 1992), upheld a statute that required all pupils to recite the Pledge and contained no opt out provisions. The court held that the statute, even though mandatory,

required all willing pupils to recite the Pledge of Allegiance but permitted those who objected to the Pledge to refrain from reciting, stating:

...so long as the school does not compel pupils to espouse the content of the Pledge as their own belief, it may carry on with patriotic exercises. Objection by the few does not reduce to silence the many who want to pledge allegiance to the flag “and to the Republic for which it stands.”

Id. at p. 445 (emphasis in original). The statute at issue here permits students who object to the Pledge to be excused from reciting it, and therefore does not violate the First Amendment.

In Bauchman for Bauchman v. West High School, 132 F.3d 542 (10th Cir. 1997), plaintiff student sued her high school and school district alleging that the teacher’s choice of explicitly Christian music for performance in the high school’s choir violated her rights under the Free Exercise and Free Speech clauses of the First Amendment. Plaintiff student was given the choice of not participating in the singing of songs she found offensive and was told that nonparticipation would not adversely affect her choir grade. Id. at 557. Under these circumstances, the 10th Circuit Court of Appeals held that “the fact that Ms. Bauchman had a choice whether or not to sing songs she believed infringed upon her exercise of religious freedom, with no adverse impact on her academic record, negates the element of coercion and therefore defeats her Free Exercise claim.” Id. On the same ground, the Court rejected the plaintiff’s argument that the performance of Christian music as part of the choir curriculum deprived her of her free speech right to refrain from speaking, finding that because she could opt out of the songs without penalty; “we conclude that her complaint fails to allege facts sufficient to show she was coerced or compelled to engage in any Choir activities (practicing or performing songs she found offensive in venues she found offensive) against her will.” Id. at p.

558. Likewise, there can be no compulsion here, where the Plaintiff Students and Teachers can freely opt out of reciting the Pledge without penalty.

There are no restrictions on the student's ability to opt out beyond the requirement that a parent or guardian file a written objection with the principal of the school. §22-1-106(2)(b), C.R.S. The requirement that a student obtain a note from a parent or guardian before being exempted does not violate the Constitution. The fundamental right of a parent to guide a child's upbringing and education is well established. See e.g. Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534-35, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) ("We think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control..."). Requiring parents to be involved in a decision to opt out of the Pledge recitation is simply a recognition of the parent's role. "[P]arental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make important decisions." Bellotti v. Baird, 443 U.S. 622, 640, 99 S.Ct. 3035, 3046, 61 L.Ed.2d 797 (1979). In Colorado, the age of majority is statutorily defined as age twenty-one. § 2-4-401(6), C.R.S.; In re Marriage of Plummer, 735 P.2d 165, 166 (Colo. 1987). Persons, including students, are only deemed to be of full age at the age of eighteen for certain, specific statutorily-defined purposes, none of which are applicable here. See § 13-22-101 – 106, C.R.S. There is no allegation that the parents of the Plaintiff Students have declined to provide the written objection and, by virtue of their advancing claims on behalf of their children, the parents make clear their support for their children's opposition to the Pledge.

Nor, given the fact that § 22-1-106, C.R.S. is part of an overall curricular program, are the individual students' free speech rights violated by this requirement. Although students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), the Constitution does not compel "teachers, parents, and elected school officials to surrender control of the American public school system to public school students." Bethel Sch. Dist. No. 403 v. Frasier, 478 U.S. 675, 686, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986). The constitutional rights of public school students "are not automatically coextensive with the rights of adults in other settings," Frasier, 478 U.S. at 682, and a school need not tolerate speech that is inconsistent with its pedagogical mission, even though the same speech would be entitled to a higher degree of protection outside of the schoolhouse. See Hazelwood Sch. Dist. V. Kuhlmeier, 484 U.S. 260, 266, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988). See also Poling v. Murphy, 872 F.2d 757, 762 (6th Cir. 1989) ("Limitations on speech that would be unconstitutional outside the school house are not necessarily unconstitutional within it."); Henerey ex rel. Henerey v. City of St. Charles, School Dist., 200 F.2d 1128 (8th Cir. 1999) ("A school may exercise greater control over student speech uttered during participation in a school-sponsored activity than that expressed during an independent activity..."). Thus, given the state's compelling interest in recognizing the parents fundamental right to guide a child's upbringing and education, and the right of public schools to exercise greater control over student speech that implicates its pedagogical mission, the requirement that a student obtain a note from a parent or guardian before being exempted does not violate the Constitution.

Finally, it is clear that § 22-1-106(2), C.R.S. does unconstitutionally discriminate on the basis of the students' viewpoints. Courts must interpret statutory language by first looking to the plain meaning, then to the objective of the General Assembly, giving a sensible, yet harmonious effect to the language of the statute. Matter of Title, Ballot Title and Submission Clause, and Summary for 1997-98 No. 62, 961 P.2d 1077 (Colo. 1998). Here, construing § 22-1-106(2)(b) as a whole, it is clear, first, that “nothing in this subsection (2) shall be construed to require a teacher or a student to recite the Pledge of Allegiance ... if the teacher or student objects to the recitation of the Pledge of Allegiance on religious grounds.” The statute goes on to provide that “[a] student shall be exempt from reciting the Pledge of Allegiance if a parent or guardian of the student objects in writing to the recitation of the Pledge *on any grounds* and files the objection with the principal of the school”. (Emphasis added). A reasonable construction of this provision is that, although nothing in this section requires a student or teacher to recite the Pledge if they object on religious grounds, as to a student, an exemption will be provided if the parent or guardian objects in writing on any grounds, including religious ones. Thus, for a student, parental consent is required for the exemption on any grounds, including those based on religion. The specific inclusion of the religious exemption is explained by the fact that the only previous Colorado case dealing with the issue held that a student could not be expelled from school for refusing to recite the Pledge of Allegiance based on religious belief. Zavilla v. Masse, 112 Colo. 183, 147 P.2d 823 (1944).

II. SCHOOL DISTRICTS HAVE A LEGITIMATE PEDAGOGICAL INTEREST IN MAINTAINING FLAG SALUTE PROGRAMS; THEREFORE PLAINTIFFS CANNOT ESTABLISH A SUBSTANTIAL LIKELIHOOD OF PREVAILING ON THE MERITS IN THIS CASE.

Teachers have no First Amendment right to ignore the directives of duly appointed educational authorities so long as those directives are reasonably related to a legitimate pedagogical interest. See Hazelwood School Dist. V. Kuhlmeier, 484 U.S. 260, 273, 108 S. Ct. 562, 571, 98 L.Ed.2d 592 (1988). Plaintiffs would have this Court review § 22-1-106(2)(a) in isolation. In fact, § 22-1-106, C.R.S. comprises part of a comprehensive statutory scheme that mandates instruction in the history and civil government of the United States, including the history, culture, and contributions of minorities, § 22-1-105, C.R.S., information as to honor and use of the flag, § 22-1-106, C.R.S., and regular instruction in the Constitution of the United States, § 22-1-108, C.R.S. The portion of this statutory scheme at issue here was enacted by the Colorado General Assembly this year, and requires each teacher in each classroom in each public elementary, middle, and junior high school to begin each day by reciting aloud the Pledge of Allegiance to the flag of the United States of America. § 22-1-106(2)(a), C.R.S. Significantly, nothing in this section shall be construed to require a teacher or student to recite the Pledge of Allegiance if the teacher or student objects to the recitation on religious grounds. § 22-1-106(2)(b), C.R.S. Teachers who are not United States citizens are also not required to recite the Pledge. § 22-1-106(2)(b), C.R.S. The establishment and maintenance of the public school system are matters of state law within the sound discretion of the legislature. See Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1026 (Colo. 1982) (Erickson, J., concurring) ("the legislature is granted plenary power in the field of public education"). Therefore, it lies within the sound discretion of the legislature in this case to enact such a statewide curricular requirement.

Public schools do not offend the First Amendment so long as their actions are reasonably related to legitimate pedagogical concerns. Hazelwood School Dist. V. Kuhlmeier, 484 U.S. 260, 273, 108 S. Ct. 562, 571, 98 L.Ed.2d 592 (1988). The First Amendment is not a license for uncontrolled expression at variance with established curricular content. Clark v. Holmes, 474 F.2d 928, 931 (7th Cir. 1972). Courts have repeatedly upheld the principle that an individual teacher has no right to ignore the directives of duly appointed educational authorities. Webster v. New Lenox School Dist. No. 122, 917 F.2d 1004, 1008 (7th Cir. 1990) (“Given the school board’s important pedagogical interest in establishing the curriculum and legitimate concern with possible establishment clause violations, the school board’s prohibition on the teaching of creation science to junior high students was appropriate.”); Edwards v. California University of Pennsylvania, 156 F.3d 488, 491 (3rd Cir. 1998) (“a public university professor does not have a First Amendment right to decide what will be taught in the classroom”); Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1176 (3rd Cir. 1990) (“no court has found that teacher’s First Amendment rights extend to choosing their own curriculum or classroom management techniques in contravention of school policy or dictates”); Kirkland v. Northside Independent School Dist., 890 F.2d 794, 800 (5th Cir. 1989) (“Although the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon teachers the control of public school curricula.”).

The Hazelwood line of cases set forth above have been expressly adopted by the Colorado Supreme Court:

As Hazelwood and its progeny demonstrate, the First Amendment allows extensive regulation of school-sponsored expression. Such expression includes that which “may fairly be characterized as part

of the school curriculum.” Hazelwood, 484 U.S. at 271, 108 S.Ct. 562. As used in this context, “curriculum” refers to those activities bearing the “imprimatur of the school” that are “supervised by faculty members and designed to impart particular knowledge or skills to student participants.”

Board of Educ. of Jefferson County School Dist. R-1 v. Wilder, 960 P.2d 695, 701 (Colo. 1998)

(holding that teacher had no First Amendment right to use non-approved controversial learning resources in his classroom without following district’s policy). See also Miles v. Denver Public Schools, 733 F. Supp. 1410, 1413 (D. Colo. 1990) (quoting Hazelwood that “the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.”).

Should one of the Plaintiff Teachers or Students refuse to avail themselves of the opt-out provision, the school district could legitimately require that the Teacher lead the class in the Pledge, since the Pledge, in the statutory context of Colorado law, is part of a comprehensive curriculum including the history and civil government of the United States, information as to the honor and use of the flag, and the United States Constitution. In Sherman v. Community Consol. School Dist. 21 of Wheeling Tp., 980 F.2d 437 (7th Cir. 1992), the Seventh Circuit Court of Appeals upheld a state statute requiring recitation of the Pledge in public elementary schools. In so holding, the Court noted that:

[W]e are treating the Pledge as a patriotic expression... Patriotism is an effort by the state to promote its own survival, and along the way to teach those virtues that *justify* its survival. Public schools help to transmit those virtues and values. Separation of church and state does not imply separation of state from state. Schools are entitled to hold their causes and values out as worthy subjects of approval and adoption, to persuade even though they cannot compel, and even though those who resist persuasion may feel at odds with those who embrace the values they are taught.

Sherman, 980 F.2d at 444 (emphasis in original).

Thus, recitation of the Pledge is part of the educational mission of our public schools. For this reason, even those cases recognizing that students and teachers must be given the option of opting out of mandatory recitation of the Pledge have recognized the state's strong educational interest in requiring a healthy respect for our national symbols, and the broad discretion of school authorities to prescribe curriculum and set classroom standards. In Russo v. Central School Dist. No. 1, Towns of Rush, et al., 469 F.2d 623 (2nd Cir. 1972), cited by Plaintiffs in their brief, the Court found that:

Schools, of course, have a substantial interest in maintaining flag salute programs... It is a proper, and appropriate function of our educational system to instill in young minds a healthy respect for the symbols of our national government. School officials, therefore, may enforce regulations whose purpose is to give effect to this legitimate state aim. But such regulations must be narrowly drawn for "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms."

Russo, 469 F.2d at 632 (quoting NAACP v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405 (1963)). In its holding, the court carefully indicated that through its holding it did not mean to limit the traditionally broad discretion that has always rested with local school authorities to prescribe curriculum. Russo, 603 F.2d at 633. In Russo, the local school district's requirement that each teacher recite the Pledge contained no opt-out provision, and was not statutorily tied to a general curricular program of history and civil government. Here, by contrast, the Pledge instructional requirement is tied to a general curricular requirement of instruction, and the opt-out provision serves to narrowly tailor this provision by allowing any teacher with a religious objection to recitation of the Pledge.

Public school officials have control of the curriculum of the school irrespective of teachers' First Amendment rights. Newton v. Slye, 116 F.Supp.2d 677, 684 (W.D.Va. 2000). Those authorities charged by state law with curriculum development have the right to require the obedience of subordinate employees, including the classroom teacher. In Palmer v. Board of Ed. of City of Chicago, 603 F.2d 1271 (7th Cir. 1979), the issue presented to the Court was whether a public school teacher is free to disregard the prescribed curriculum concerning patriotic matters when to conform to the curriculum would conflict with her religious principles. The portions of the curriculum the teacher objected to included the Pledge of Allegiance, the singing of patriotic songs, and the celebration of certain national holidays. Id. at p. 1272. In rejecting the teacher's First Amendment challenge, the Court found that:

Plaintiff in seeking to conduct herself in accordance with her religious beliefs neglects to consider the impact on her students who are not members of her faith. Because of her religious beliefs, plaintiff would deprive her students of an elementary knowledge and appreciation of our national heritage... Parents have a vital interest in what their children are taught. Their representatives have in general prescribed a curriculum. There is a compelling state interest in the choice and adherence to a suitable curriculum for the benefit of our young citizens and society. It cannot be left to individual teachers to teach what they please.

Id. at p. 1274. Thus, the Court held that the teacher had no constitutional right to require others to submit to her views and to forego a portion of their education they would otherwise be entitled to enjoy. Id.

Plaintiffs cite the 10th Circuit case of Cary v. Board of Ed. of Adams-Arapahoe School Dist. 28-J Aurora, Colo., 598 F.2d 535 (10th Cir. 1979) for the proposition that the Pledge must be distinguished from curriculum. Plaintiffs' Brief at p. 12. In Cary, an action was brought by

five high school teachers who asserted that their rights were violated when the board of education banned ten books from use in the teachers' language arts classes. In rejecting this claim, the Court held that "[i]t is legitimate for the curriculum of the school district to reflect the value system and educational emphasis which are the collective will of those whose children are being educated and who are paying the costs." Id. at p. 543. Although in dicta the court did attempt to characterize the holding in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) as drawing a distinction between school curriculum and recitation of the Pledge, the actual holding of the case is in harmony with the cases cited above; authorities charged by state law with curriculum development have the right to require the obedience of subordinate employees, including the classroom teachers, in curricular decisions.

Barnette is also distinguishable as to the teachers because the Court never formally distinguished the compulsory salute at issue from the curriculum. Given the sanctions and compulsion present in Barnette, up to and including potential criminal penalties, the Court treated that scheme differently than the statute's mere inclusion of the Pledge as part of an overall curriculum including among its components the history and civil government of the United States, honor and use of the flag, and the United States Constitution.

Given the constitutionally recognized compelling state interest in the choice and adherence to a suitable curriculum for the benefit of our young citizens and society, § 22-1-106, C.R.S. passes constitutional muster. Recitation of the Pledge is consistent with the educational mission of our public schools. § 22-1-106, C.R.S. does not stand alone, but comprises part of a comprehensive statutory scheme that mandates instruction in the history and civil government of

the United States, including the history, culture, and contributions of minorities, § 22-1-105, C.R.S., information as to honor and use of the flag, § 22-1-106, C.R.S., and regular instruction in the Constitution of the United States, § 22-1-108, C.R.S. This comprehensive statutory scheme is narrowly tailored to comport with the First Amendment through inclusion of opt-out provision for teachers voicing religious objections to recitation of the Pledge, and for Students for any reason at all. For those Teachers or Students who choose not to use the opt-out provision, public school officials have control of the curriculum of the school irrespective of teachers' First Amendment rights, and those authorities charged by state law with curriculum development have the right to require the obedience of subordinate employees, including the classroom teachers. The First Amendment does not leave it to individual teachers to teach what they please.

CONCLUSION

For the foregoing reasons, Defendants Governor Bill Owens and Commissioner of Education William J. Moloney request that this court deny Plaintiffs' Motion for Temporary Restraining Order or Preliminary Injunction.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION** upon all parties herein by facsimile transmission to the fax numbers indicated for each party, and by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this ____ day of _____ 2003 addressed as follows:

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