



Northern  
California

November 16, 2022

Principal Lori DiSanto  
Village Elementary School  
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Santa Rosa, CA 95405  
[ldisanto@rvusd.org](mailto:ldisanto@rvusd.org)

Dear Principal DiSanto:

We are writing on behalf of Rincon Valley Union School District (RVUSD) students who have a constitutional right to abstain from standing or otherwise participating in the Pledge of Allegiance (the “Pledge”). It has been brought to the attention of the American Civil Liberties Union of Northern California (“ACLU”) that school staff have asked that students stand during the Pledge. We understand that, on occasion, staff may have also asked students who did not wish to stand to leave the room and thereafter demanded that students explain their reasons for not standing. We have also been made aware of a newly implemented award-focused assembly that recognizes students for “model student behavior,” and which seems to reward those who “show respect” by standing for the flag.

For the reasons discussed below, each of these practices is unlawful. Students have a First Amendment right to abstain from participating in the Pledge. Pursuant to long-settled case law, school officials violate this constitutional right whenever they seek to compel a student to stand, demand an explanation about the desire not to stand, retaliate against a student for failing to stand, or, conversely, reward students for standing.

### **I. Federal Courts of Appeal Uniformly Hold that Students Have the Right Not to Stand or Otherwise Participate in the Pledge**

It is well-established that students in public schools cannot be compelled to stand or recite the Pledge. In the seminal case *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), the U.S. Supreme Court held that compelling public school students to salute the flag and recite the Pledge “transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.” *Id.* at 642; *see also Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969) (recognizing that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”).

Relying on *Barnette*, courts across the country have held that even compelling a student to stand silently during the Pledge violates students’ free speech rights. In *Lipp v. Morris*, 579 F.2d 834, 835-36 (3d Cir. 1978), for example, the Third Circuit Court of Appeals held that a rule compelling students to stand during the Pledge, but allowing them to remain silent, still

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amounted to an unlawful compulsion of a student’s “implicit expression.” *Id.* at 836. The *Lipp* Court also relied on *Banks v. Board of Public Instruction of Dade County*, 314 F. Supp. 285 (S.D. Fla. 1970)<sup>1</sup> and *Goetz v. Ansell*, 477 F.2d 636 (2d Cir. 1973)—two post-*Barnette* cases that reaffirm the unconstitutionality of a standing requirement. In *Banks*, the Fifth Circuit held that standing is “no less of a [patriotic] gesture” than saluting the flag or reciting the Pledge. 314 F. Supp. at 296. In *Goetz*, the Second Circuit similarly concluded that “the act of standing is itself part of the pledge.” 477 F.2d at 637.

The Ninth Circuit affirmed similar principles in *Newdow v. Rio Linda Union School District*, 597 F.3d 1007 (9th Cir. 2010). Although that case considered an establishment-clause challenge to the Pledge, the *Newdow* Court upheld a school’s Pledge policy for reasons that bear on the present analysis: because recitation of the pledge was “purely voluntary.” In particular, the court approvingly observed:

Students can choose not to recite the Pledge for any personal reason and to keep that reason to themselves. No student is required to recite or even to hear the recitation of the Pledge, nor can any student be disciplined for refusing to participate. Students can also participate in the recitation of the Pledge and simply omit the words “under God” without fear of discipline. Thus, the free speech claim that was involved in *Barnette*, where the students were forced to say the Pledge, is not at issue in this case.

*Newdow*, 597 F.3d at 1038 n.33.

More recently, the Supreme Court revisited students’ free speech rights in *Mahanoy Area School District v. B. L.*, 141 S. Ct. 2038, \_\_\_ U.S. \_\_\_ (June 23, 2021). The *Mahanoy* Court specifically construed “America’s public schools a[s] the nurseries of democracy.” *Id.* at 2046. And it ruled that schools must protect the full “marketplace of ideas” and especially provide “protection of unpopular ideas, for popular ideas have less need for protection.” *Id.* If it is safe to assume that students who abstain from standing are in the minority amongst their peers, it is all the more necessary for faculty to protect what may be seen as an unpopular expression. Thus, it is not enough to say that RVUSD staff may not compel students to stand for the Pledge. Rather, it is more accurate to say that staff have a responsibility to protect students who choose not to stand.

## II. California Law Protects the Right to Student Free Expression

As with federal law, California recognizes that students’ free speech rights are paramount. Pursuant to Education Code § 48907, public school students have the right to exercise freedom of speech subject to reasonable time, place, and manner restrictions. The only exemptions set forth by § 48907 are for obscene, libelous, or slanderous expression in official publications, inciting material that creates a clear and present danger, and speech that causes a substantial

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<sup>1</sup> *vacated by* 401 U.S. 988 (1971), *reinstated without published opinion by dist. ct. and aff’d*, 450 F.2d 1103 (5th Cir. 1971).

disruption to the classroom. *See id.* § 48907(a). Silently abstaining from the Pledge cannot be construed as falling into any of these exemptions, and thus such conduct receives the fullest protection under law.

### III. Students Should Not be Punished for Failing to Stand or Participate in the Pledge

As a corollary to students' right not to stand for the Pledge, it follows that schools cannot punish students for failing to participate in the Pledge. What is punitive in nature is often dependent on context.<sup>2</sup> It is clear, however, that students should not be asked to leave the room upon refusal to stand for the Pledge and that they have the right to remain in the room with their peers.

Returning to *Goetz*, the court held that asking a student to leave the room is impermissible under the First Amendment because the context of such exclusion can be seen as punishment despite benign motives of the school. *Goetz*, 477 F.2d at 638; *see also Abington School District v. Schempp*, 374 U.S. 203, 292 (1963) (Brennan, J., concurring) (“[T]he excluded pupil loses caste with his fellows, and is liable to be regarded with aversion, and subjected to reproach and insult.”); *Frain v Baron*, 307 F. Supp. 27, 33-34 (E.D.N.Y. 1969) (enjoining school from excluding students from their classrooms during the Pledge).

Although RVUSD faculty may not intend to ostracize or punish students by asking them to leave the room during recitation of the Pledge, case law demonstrates that such a request is problematic and punitive by its very nature. Being asked to leave a classroom or space due to certain behaviors is very rarely, if ever, a good thing. Such actions are usually spurred by disciplinary motives and often reinforce to other students that such behavior is “bad.” The ACLU condemns any “othering” of students who abstain from standing for the Pledge. Instead, we urge faculty to allow students to remain in the same space as their peers.

Nor does the law permit school officials to question students about their participation in the Pledge. In *Frain*, the court not only enjoined the school from excluding non-participating students from their classrooms, but also enjoined them “from treating any student who refuses for reasons of conscience to participate in the Pledge in any different way from those who participate.” 307 F. Supp. at 33-34. Questioning students for their non-participation is undoubtedly different treatment, as one can assume that participating students at RVUSD are not asked to explain why they do participate in the Pledge. One can clearly see the coercive nature of such questioning given the power imbalance between a student and a faculty member.

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<sup>2</sup> *See, e.g., Spence v. State of Wash.*, 418 U.S. 405, 412 (1974) (holding that a college student cannot be punished “for failing to show proper respect for our national emblem”); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1274, 1277–82 (11th Cir. 2004) (holding that school officials are not entitled to qualified immunity when they violate a student’s “clearly established” right to “expressive conduct” by punishing that student for remaining seated and silent during the pledge); *Sheldon v. Fannin*, 221 F. Supp. 766, 775 (D. Ariz. 1963) (holding that students may not be disciplined by excluding them from attendance for simply choosing not to stand during the national anthem); *Rabideau v. Beekmantown Cent. Sch. Dist.*, 89 F. Supp. 2d 263, 267 (N.D.N.Y. 2000) (holding that it is well-established that schools cannot punish any student for failing to participate in the Pledge).

Lastly, students should not be rewarded for participating in the Pledge as this can be seen as punitive towards students exercising their right not to participate. During your schoolwide assemblies, we are especially concerned about the implications for non-participating students given that the content of these assemblies is reportedly to award “model student behavior.” If there are any explicit or implicit connotations that a “model student” is one who stands for the Pledge, the ACLU wholeheartedly condemns such a punitive and retaliatory award system. We urge the school district to take measures to ensure that such connotations do not exist and are not perceived by assembly attendees.

#### IV. CONCLUSION

As the foregoing demonstrates, any requirement to stand for the Pledge contravenes both the First Amendment and the tenets of public school education articulated in *Mahanoy*. Students of RVUSD not only have the right to abstain from standing for the Pledge but should be protected by faculty while doing so.

We understand that many people in the United States, including faculty at RVUSD, have a high degree of respect for the Pledge and our flag. But so too must the school respect rights enshrined in the Constitution as they embody the American principles of freedom. “To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds.” *Barnette*, 319 U.S. at 641.

We urge all RVUSD faculty to refrain from compelling students to stand for the Pledge. We also urge them to refrain from any behavior that can seem contextually punitive. Failure of faculty to act accordingly can expose the district to liability. We would be happy to discuss this matter with you further or answer any questions you may have. Thank you very much for your time.

Sincerely,



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