The Pledge of Allegiance
in Washington Public Schools

Prepared by the ACLU of Washington
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Many public schools in the United States ask students to recite the Pledge of Allegiance. Some students object to the practice for reasons of conscience. Both the Washington Legislature and the courts have developed a common-sense solution to the conflict: a school may lead students in reciting the Pledge, but it must also respect the wishes of students who choose not to join. This has been the rule since the early 1940s. Nonetheless, some school officials impose school discipline or other punishments on students who refuse to recite the Pledge. Such actions violate state and federal law.

Washington's Statute

The right of a student to refrain from participating during the Pledge is part of Washington's law governing school districts. RCW 28A.230.140 says that school boards "shall cause appropriate flag exercises to be held." It also explains that an "appropriate" flag exercise is one where student participation is voluntary:

> Those pupils so desiring shall recite the following salute to the flag: "I pledge allegiance to the flag of the United States of America and to the republic for which it stands, one nation under God, indivisible, with liberty and justice for all." Students not reciting the pledge shall maintain a respectful silence.

Id. (emphasis added). This statute clearly indicates that student participation in the Pledge is optional. This does not mean that non-participating students have license to clown around or cause other disruptions while the rest of the class recites the Pledge. It does mean that if a student chooses to remain silent, the school must honor that decision.

Constitutional Sources for Washington's Statute

Washington's statute is written this way to avoid infringing upon students' freedom of belief, as guaranteed by the federal and state constitutions. Many years ago, in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), the U.S. Supreme Court ruled that a compulsory flag salute would violate students' First Amendment rights. The Court said:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

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Id. at 642. This decision was issued during World War II, when instilling the spirit of patriotism was considered particularly important. Nonetheless, the Court found that not even a war would be justification for breaching freedom of conscience: "If there are any circumstances which permit an exception" to the rule against coerced oaths, "they do not now occur to us." Id. Months before the U.S. Supreme Court ruling in Barnette, the Washington Supreme Court ruled that in this state, children cannot be punished for maintaining respectful silence during the Pledge.

The Court noted that true patriotism cannot be compelled, but must be felt from within:

> Of course, many people pay lip service to our national ensign, who have in their hearts no reverence for the flag or for the principles for which it stands, and an enforced gesture or word of respect is of no benefit to anyone. Acts of disrespect or insult must be punished, but we are not here concerned with any such question.

Washington ex rel. Bolling v. Superior Court for Clallam Cnty., 16 Wn.2d 373, 382, 133 P.2d 803, 807 (1943) (emphasis added).

No Punishments Allowed

The Federal Constitution and Washington State law require that students' recitation of the Pledge must be voluntary. As state statute puts it, participation is an available option for "those pupils so desiring." RCW 28A.230.140. Of course, the Pledge is not truly optional if a school imposes discipline or punishment on those who choose to refrain. Formal discipline like detentions or suspensions may not be imposed for non-participation, nor can other types of non-disciplinary penalties (such as reducing grades, requiring transfers to different classes, withholding letters of recommendation, denying ASB offices, and so on). "It is well established that a school may not require its students to stand for or recite the Pledge of Allegiance or punish any student for his/her failure to do so." Rabideau v. Beekmantown Cent. Sch. Dist., 89 F.Supp.2d 263, 267 (N.D.N.Y. 2000). Teachers must respect the decisions of students who choose not to recite the Pledge and not verbally chastise or humiliate them. Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1268–69 (11th Cir. 2004).

Standing, Sitting, and Leaving the Classroom

The right to express oneself by not participating in the Pledge includes the right to remain seated while others stand. In the famous case of Tinker v. Des Moines School Dist., 393 U.S. 503, 506 (1969), the U.S. Supreme Court upheld the right of students to silently protest by wearing black armbands. Remaining seated during the Pledge is a form of silent expression just like the black armbands in Tinker. A student may maintain "respectful silence" under RCW 28A.230.140 whether seated or standing. As Barnette noted, a school cannot enforce uniformity of thought "by word or act," 319 U.S. at 642, and standing is an act. Federal district courts have followed suit, saying in one instance that:

> The right to differ and express one's opinions, to fully vent his First Amendment rights,

> even to the extent of exhibiting disrespect for our flag and country by refusing to stand and participate in the pledge of allegiance, cannot be suppressed by the imposition of suspensions.

Banks v. Bd. of Pub. Instruction, 314 F. Supp. 285, 296 (S.D. Fla. 1970), aff'd 450 F.2d 1103 (5th Cir. 1971) (emphasis added). See, e.g., Rabideau, 89 F.Supp.2d at 267; Lipp v. Morris, 579 F.2d 834, 836 (3d Cir. 1978) (standing during the pledge "is an unconstitutional requirement that the student engage in a form of speech"); Goetz v. Ansell, 477 F.2d 636, 638 (2d Cir. 1973) (standing for the pledge "can no more be required than the pledge itself"). Cf. Sheldon v. Fannin, 221 F.Supp. 766, 775 (D. Ariz. 1963) (student may not be disciplined for choosing not to stand during the National Anthem).

For the same reason, it is improper to require a student to leave the classroom while other students recite the Pledge. Removal from the classroom is a form of punishment, and a student's nondisruptive exercise of free speech rights cannot be the basis for punishment. See Frain v. Baron, 307 F.Supp. 27, 33–34 (E.D.N.Y. 1969) (school is enjoined from "excluding [students] from their classrooms during the Pledge of Allegiance, or from treating any student who refuses for reasons of conscience to participate in the Pledge in any different way from those who participate.") Ushering students in and out of the classroom is also counterproductive, because it draws attention to the dispute and takes time away from instruction.

Parental Permission

Some schools improperly ask students if they have parental permission to refrain from the Pledge. All people, including students, have an individual right of conscience not to recite oaths with which they disagree. Because the right to sit quietly during the Pledge is a personal right of each student, it is not for the parent or the guardian to grant or deny permission. See Circle Sch. v. Phillips, 381 F.3d 172, 181 (3d Cir. 2004). But see Frazier ex rel. Frazier v. Winn, 535 F.3d 1279, 1285–86 (11th Cir. 2008) (upholding state statute requiring parental permission).

Washington's statute allows students to "maintain respectful silence" whether or not they have parental permission. The Pledge is to be recited by "those pupils so desiring," not those pupils whose parents are so desiring. RCW 28A.230.140. Schools cannot add additional requirements, such as parental permission, to the state statute.

Reasons for Non-Participation

Barnette arose from the religious objections of a Jehovah's Witness, but the rule is not limited to students who are religiously motivated. See Street v. New York, 394 U.S. 576, 593 (1969). For example, the students in Frain and Goetz objected to saying the Pledge because they believed the nation did not yet have "liberty and justice for all." Students' right to free expression is protected by the constitution whatever the source of the students' beliefs. Maryland v. Lundquist, 278 A.2d 263, 274 (Md. 1971) (school must allow any student to refrain from saying the Pledge, not just students with religious objections).

On a practical level, it is counter-productive to quiz students about whether they have a good enough reason to sit out the Pledge. Most schools would never question students who recite the Pledge about whether they "really mean it." The same applies to students who opt out.

Teachers and the Pledge

Where freedom of belief is concerned, teachers and students share the same constitutional rights. As the U.S. Supreme Court said in Tinker, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. at 506. Later courts have relied on Tinker and Barnette to find that it violates the First Amendment rights of teachers to fire them or take other adverse employment action for exercising their right to maintain respectful silence during the flag salute. See Op. of the Justices, 363 N.E.2d 251, 254 (Mass. 1977); Russo v. Cent. Sch. Dist. No. 1, 469 F.2d 623, 633 (2d Cir. 1972); Lundquist, 278 A.2d at 274; Hanover v. Northrup, 325 F. Supp. 170, 172 (D. Conn. 1970).

Enforcement

Because the right not to recite the Pledge flows in part from the First Amendment to the U.S. Constitution, school districts and individual employees that impose punishment on non-participating students may be sued under a federal law that prohibits state employees from infringing on federal constitutional rights. 42 U.S.C. § 1983. If liable, the defendants could face an injunction and pay damages, costs, and attorney's fees.