ACLJ
American Center for Law & Justice

August 10, 2007

James F. Notter, Interim Superintendent
Broward County Public Schools
600 SE Third Avenue
Fort Lauderdale, FL 33301

Broward County School Board
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Re: Ben Gamla Charter School
Constitutionality of Jewish Cultural Curriculum

Dear Superintendent Notter and Board members:

Recently, the constitutionality of the Ben Gamla Charter School's proposed curriculum came to the American Center for Law & Justice's ("ACLJ") attention. We reviewed the Americans United for Separation of Church and State's ("AU") August 7, 2007 letter to you. We respectfully disagree with AU's legal opinion, and by this letter, would appreciate the opportunity to present the ACLJ's position on the curriculum.

By way of introduction, the ACLJ is a not-for-profit, public interest law firm that focuses its work on protecting religious freedom in America. Our organization exists to educate the public and the government about the right to freedom of speech, particularly in the context of the expression of political and religious sentiments. Moreover, the ACLJ has directly represented various individuals and organizations in defense of accommodating practices that harmonize the

religious liberties of students with the government's ability to implement a structured and unified curriculum. Consequently, the ACLJ's legal staff is familiar with the governing principles and precedents relating to situations where conflicts arise between government-imposed curriculum and individual freedoms of students and their parents.

As we understand from public statements made by Ben Gamla officials and representatives, the curriculum will only contain lessons that pertain to Hebrew, Jewish culture and Jewish history, and that faculty will be forbidden from teaching Torah or prayer. Moreover, Ben Gamla will permit students to organize their own worship services.[1] AU, in its August 7, 2007 letter, asserts that the chosen text, *Ha-Yesod: Fundamentals of Hebrew*, crosses a constitutional barrier by including certain sentences for translation:

> "God will send (to) us blessings from heaven"; "God created (the) heaven and (the) earth"; "Our holy Torah is dear to us"; "The Torah teaches us that every son has to honor his parents"; "She served God with a heart full of love"; "Mount Moriah is a holy mountain because the Temple stood on it"' and "We shall celebrate Passover exactly two weeks from today."[2]

As we will explain, the ACLJ believes that such phrases are permissible so long as the context and teaching method do not inculcate religious beliefs. Students cannot understand the Jewish culture without discussing the appropriate religious tenets that define the culture. The Constitution cannot and does not require an extirpation of all things religious from public school curricula.

The ACLJ avidly supports the proposition that public schools may teach about religion, and may even use sacred religious texts as teaching tools. The "First Amendment does not forbid all mention of religion in public schools; it is the advancement or inhibition of religion that is prohibited."[3] For example, as the Supreme Court explained in *Stone v. Graham*, "the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like."[4] Under *Stone v. Graham* and *Abington Sch. Dist. v. Schempp*, historical studies of religious texts and traditions (for example, recognition of religious holidays) are constitutionally permissible. These studies are not only permissible, but because, "[t]he history of man is inseparable from the history of religion,"[5] a child's education is incomplete unless it includes a study of "the history of religion and its relationship to the advancement of civilization."[6]

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[1] Larry Luxner, *Florida Opens First Hebrew Public School*, JEWISH EXPONENT, Aug. 2, 2007, http://www.jewishexponent.com/article/13666/.

[2] Am. United for Sep. Church and State, Aug. 7, 2007 letter, at 3 (quoting LUBA UVEELER AND NORMAN M. BRONZNICK, HA-YESOD: FUNDAMENTALS OF HEBREW, 107, 124, 133, 148, 172, 209, 349 (1998)).

[3] *Committee of Public Educ. v. Nyquist*, 413 U.S. 756, 788 (1973).

[4] Stone v. Graham, 449 U.S. 39, 42 (1980) (citing *Abington Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963)).

[5] *Engel v. Vitale*, 370 U.S. 421, 434 (1962).

[6] *Abington Sch. Dist.*, 374 U.S. at 225.

Additionally, the United States Department of Education has issued guidelines addressing religious expression that reaffirm the Supreme Court's pronouncements in *Stone v. Graham* and *Abington Sch. Dist. v. Schempp*. Specifically, the Guidelines produced by the U.S. Department of Education in 1998, "Religious Expression in Public Schools," explained that,

> Public schools may not provide religious instruction, but they may teach about religion, including the Bible or other scripture: the history of religion, comparative religion, the Bible (or other scripture)-as-literature, and the role of religion in the history of the United States and other countries all are permissible public school subjects. Similarly, it is permissible to consider religious influences on art, music, literature, and social studies.[7]

In keeping with the First Amendment's mandate of government neutrality toward religion, any study of religion in a public school may be educational, although not devotional. These principles were reiterated in the Department of Education in 2003 guidelines as well.[8]

AU's use of *Jager v. Douglas County Sch. Dist.*[9] is taken out of context, and goes too far. AU asserts that it would be unconstitutional to use the "religiously themed Ha-Yesod instructional materials" to accomplish a secular purpose.[10] This position is contrary to constitutional precedent. Religious history and culture, and even references to what certain religions believe, may be included in public school curricula, especially considering that government may make such public acknowledgments itself. For example, the Supreme Court of the United States' Establishment Clause jurisprudence has permitted our Country's National Motto, "In God We Trust," to remain as an American cultural icon, acknowledging the best of the Nation's history and traditions.[11] Additionally, although the Court ruled against school prayer in *Engel v. Vitale*, the Court explained that the incorporation of religious history and tradition in public school would not violate the Establishment Clause:

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for country by reciting historical documents such as the Declaration of Independence *which contain references to Deity or by singing officially espoused anthems which contain the composer's professions of faith in a Supreme Being, or*

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[7] Letter from Richard W. Riley, U.S. Secretary of Education, on Religious Expression in Public Schools to American Educators (May 1998), http://www.ed.gov/Speeches/08-1995/religion.html.
[8] Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools, 68 Fed. Reg. 9645, 9646 (Feb. 28, 2003).
[9] 862 F.2d 824, 830 (11th Cir. 1989) (citing *Karen B. v. Treen*, 653 F2d 897, 901 (5th Cir. 1981)).
[10] Am. United for Sep. Church and State, Aug. 7, 2007 letter, at 3.
[11] *See Engel v. Vitale*, 370 U.S. 421 (1962); s*ee also County of Allegheny v. ACLU,* 492 U.S. 573, 603-04 (1989) (Justice O'Connor expressed belief that national motto posed no Establishment Clause problems); *Gaylor v. United States*, 74 F.3d 214 (10th Cir.), *cert. denied,* 116 S.Ct. 1830 (1996) (no Establishment Clause violation in the use of the national motto and its reproduction on United States currency).

> *with the fact that there are many manifestations in our public life of belief in God*. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.[12]

As Justice Douglas observed, it is only through government's acknowledgement of religion's central role in society that government can "follow the best of our traditions" and "respect the religious nature of our people."[13] Mere acknowledgment of God by the government or government officials, even through public school curriculum, cannot be said to constitute an "establishment of religion," such that it would violate the Establishment Clause of the United States Constitution. As the Supreme Court explained in *Lynch v. Donnelly*, "there is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789."[14]

Such acknowledgement is what the Supreme Court had in mind when deciding *Stone v. Graham.* Including ancient historical or religious texts in a language class or one that teaches history and culture falls well within the parameters of an appropriate study of history, civilization, ethics, comparative religion, or the like. This is the secular purpose or framework that the Court had in mind. The fact that religious scriptures may occasionally be used for translation purposes or to explain a tradition or belief that exists does not *per se* transform a school lesson into a religious activity. As Justice Goldberg explained in *Abington Sch. Dist. of Abington Twp. v. Schempp*, "untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a *brooding and pervasive devotion to the secular and passive, or even active, hostility to the religious*."[15]

There is a distinct difference between explaining about religion on the one hand, and inculcating those religious tenets and beliefs in public school students on the other. What matters with regard to constitutional constraints is the purpose and manner in which ancient religious texts are used. As the court explained in *Herdahl v. Pontotoc County Sch. Dist.*,[16] a case analyzing a Bible course taught in public school,

> The issue currently before the court is not whether it is appropriate for public schools to teach the Bible, rather, it is the method of that instruction that is in question. Both parties agree that the study of the Bible in public schools is not per se unconstitutional.[17]

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[12] *Engel v. Vitale*, 370 U.S. at 435 n.21 (emphasis added).
[13] *See Zorach v. Clauson*, 343 U.S. 306, 314 (1952).
[14] *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984).
[15] *Abington*, 374 U.S. at 306 (Goldberg, J., concurring).
[16] 933 F. Supp. 582 (N.D. Miss. 1996).
[17] *Id.* at 592.

The court further recognized that much of the "Establishment Clause analysis must necessarily rely on a fact-sensitive approach."[18]

Similarly, the court in *Jager v. Douglas County Sch. Dist.* (a decision addressing invocations before school football games, and not public school curricula), looked to the school's purpose in instituting an "equal access plan" that permitted all school clubs and organizations to designate members to give invocations.[19] The particular facts of the case determined the outcome where one of the school district's stated purposes for the invocation was to "'satisfy the genuine, good faith wishes on the part of a majority of the citizens of Douglas County to publicly express support for Protestant Christianity.'"[20] The court noted that the school district's stated secular purposes could have been fulfilled with "wholly secular inspirational speeches about sportsmanship, fair play, safety, and the values of teamwork and competition."[21]

Such is not the case regarding the Ben Gamla curricula, as we understand from Ben Gamla officials' statements regarding their intentions and the protective monitoring measures that the Broward County School District intends to institute. As we understand, there is no plan for prayer recitation, or memorization of sacred texts. Context and teaching methodology is the key to a constitutional curriculum. The mere inclusion of sacred texts in public school curricula is not a *per se* violation of the Establishment Clause of the First Amendment. That kind of constitutional construction forces the government to create a "brooding and pervasive devotion to the secular" that clearly is not warranted under the Establishment Clause.

Sincerely,

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[18] *Id*. at 593.
[19] *Jager*, 862 F.3d at 827.
[20] *Id*. at 829.
[21] *Id*.