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EVOLUTION CURRICULUM IN PUBLIC SCHOOLS

As a general principle, school officials are given broad authority to adopt and implement public school curricula, and to ensure that teachers teach the curriculum for which they were hired. *See Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675 (1986). Despite this general deference to school officials' judgment, courts, including the Supreme Court of the United States, have held that a requirement that creation or creation science be taught in the public school classroom violates the Establishment Clause. The Supreme Court has thus far struck down state statutes that forbade teaching evolution, *Epperson v. Arkansas*, 393 U.S. 97 (1968), or that required that creation science be taught alongside evolution, *Edwards v. Aguillard*, 482 U.S. 578 (1987). Other courts have struck down statutes that required a balanced treatment of creation science and evolution, *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1987), or that required oral or written disclaimers be made before evolution could be taught. *See Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337 (5th Cir. 1999) (oral disclaimer); *Selman v. Cobb County Sch. Dist.*, 390 F. Supp. 2d 1286 (N.D. Ga. 2006) (sticker disclaimer on textbooks), *vacated*, 449 F.3d 1320 (11th Cir. 2006); *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 708 (M.D. Pa. 2005) (disclaimer that listed Intelligent Design as an alternative to evolution). Further, the Seventh Circuit Court of Appeals has held that a teacher may not teach creation science because it would be "injecting religious advocacy into the classroom." *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1007 (7th Cir. 1990). The Ninth Circuit Court of Appeals has also ruled against a challenge that evolution constitutes a religious belief system. *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 517 (9th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995).

The common constitutional flaw courts have found in the various statutes has been the lack of a secular purpose. For example, in *Edwards*, the Court noted that "the preeminent purpose of the [Creationism Act] was clearly to advance the religious viewpoint that a supernatural being created human kind." *Edwards*, 482 U.S. at 592. In determining if the purpose was secular or religious, the courts will often look to the legislative hearings. In *Edwards*, the legislative history showed the Act's purpose was to change the science curriculum to give an "advantage to a particular religious doctrine," and the bill's sponsor was opposed to evolution because it was "contrary to his own religious beliefs." *Id.* Thus, because the statute's primary purpose was to endorse a particular religious doctrine, the Establishment Clause had been violated. *See also McLean*, 529 F. Supp. at 1264 (holding statute unconstitutional when Act "was simply and purely an effort to introduce the Biblical version of creation into the public school curricula").

Recently, a public school board was sued after mandating that Intelligent Design Theory be recognized as an alternative to evolution in its ninth grade biology classes. *Kitzmiller*, 400 F. Supp. 2d at 709. Citing *Edwards*, the federal district court held that a mandatory disclaimer statement regarding evolution, which included Intelligent Design as an alternate "explanation of

life," was an endorsement of religion. *Id.* at 724. The "unconstitutional" policy did not require Intelligent Design to be taught, only that the school teacher refer to it as a competing theory. *Id.* at 708. The case received significant attention and included expert witnesses both in favor of and against Intelligent Design Theory. *Id.* at 718-20. The court reasoned that the supernatural causation of the world is in itself an inherently religious concept. *Id.* at 736. Thus, "the belief that a supernatural creator was responsible for the creation of human kind is a religious viewpoint" and advances religious doctrine in violation of the Establishment Clause. *Id*. at 718 (citing *Edwards*, 482 U.S. at 591, 596). The court in essence held that even a bare reference to Intelligent Design violates the Establishment Clause if that reference is understood to endorse or have the primary purpose or effect of advancing religion. *Id*. at 727 n.7. According to the court, the board's supposed secular purposes were "a pretext" for its purpose of promoting religion. *Id.* at 763. The court issued a declaratory judgment against the school board. *Id*. at 766. The court also enjoined the school board from requiring a reference to Intelligent Design in any school within the District and awarded over $2,000,000 in attorney's fees to the plaintiffs. *Id.* Although *Kitzmiller* is not a binding precedent, this recent holding will likely provide persuasive authority for future interpretation of the law on this subject.

While a reference to creation science cannot be required in public schools, creation science need not be shut out and removed entirely from the discussion of the origins of life in public schools. The Supreme Court has opined that "teaching a variety of scientific theories about the origins of humankind to school-children might be validly done with the clear secular intent of enhancing the effectiveness of science instruction." *Edwards*, 482 U.S. at 594. The Fifth Circuit Court of Appeals, although striking down a disclaimer, "acknowledge[d] that local school boards need not turn a blind eye to the concern of students and parents troubled by the teaching of evolution in public classrooms." *Freiler*, 185 F.3d at 346. The court explained that "the dual objectives of disclaiming orthodoxy of belief [in evolution] and reducing student/parent offense are permissible secular objectives that the School Board could rightly address." *Id.* at 345.

Additionally, teachers have "the right to discuss alternate theories of the creation of life and to independently research such topics." *Freiler v. Tangipahoa Parish Bd. of Educ.*, 975 F. Supp. 819, 828 (E.D. La. 1997), *aff'd*, 185 F.3d 337 (5th Cir. 1999). Generally speaking, teachers represent the school in the classroom or at school-sponsored events and need to govern their behavior to avoid any Establishment Clause violations. *See, e.g., Marchi v. Bd. of Coop. Educ. Servs. of Albany*, 173 F.3d 469, 476 (2d Cir. 1999) (holding that "the scope of the employees' rights must sometimes yield to the legitimate interest of the governmental employer in avoiding litigation by those contending that an employee's desire to exercise his freedom of religion has propelled his employer into an Establishment Clause violation"); *Peloza*, 37 F.3d at 522 (holding that "[w]hile at the school, whether he is in the classroom or outside of it during contract time, [a teacher] is not just any ordinary citizen"). The Establishment Clause prohibits a public school from endorsing a religion or coercing students to participate in religious activity. *Lee v. Weisman*, 505 U.S. 577 (1992). Teachers, however, do have First Amendment rights that they may wish to exercise in their role as educators. As a general principle, teachers retain their First Amendment rights in public schools. The Supreme Court has held that "teachers [do not] shed their constitutional rights to freedom of speech or expression at the school house gate." *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969). However, teachers have a responsibility to teach the curriculum in the manner designated by their superiors. *LeVake v.*

Indep. Sch. Dist. No. 656, 625 N.W.2d 502, 509 (Minn. Ct. App. 2001). Furthermore, teachers may not refuse to teach a subject with which he or she disagrees when that subject is specifically prescribed by the curriculum the teacher has been hired to teach. *Peloza*, 37 F.3d at 521-22.