

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

Civil Action No. 07-cv-02126-MSK-CBS

FREEDOM FROM RELIGION FOUNDATION, INC.;
JOHN DOE;
DOECHILD;
JOHN ROE;
MARY ZOE;
ROECHILD-1; A MINOR CHILD; and
ROECHILD-2, A MINOR CHILD,

Plaintiffs,

v.

CHERRY CREEK SCHOOL DISTRICT # 5; and
MONTE C. MOSES, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF SCHOOLS OF
CHERRY CREEK SCHOOL DISTRICT # 5,

Defendants.

THIRD AMENDED COMPLAINT

Certificate Under D.C.Colo.LCivR 7.1A

Counsel for the Plaintiffs has conferred with counsel for the Defendants by telephone to resolve this matter and advises the Court that the Defendants do not consent to the filing of this Third Amended Complaint.

COME NOW the Plaintiffs, by and through their undersigned attorney, and file the following Third Amended Complaint.

I. JURISDICTION

_____1. The claims for relief and causes of action alleged herein arise under the First and Fourteenth Amendments to the Constitution of the United States of America, and Article IV, Section 2 and Article IX, Section 8 of the Constitution of the State of Colorado. Declaratory and injunctive relief are sought pursuant to 28 U.S.C. §2201 and §2202 and 42 U.S.C. §1983. This Court has jurisdiction under 28 U.S.C. §1331 and 28 U.S.C. §1343(a)(3) and (4) and supplemental jurisdiction over Plaintiffs' state law claims pursuant to 28 U.S.C. §1367(a).

II. VENUE

2. This action properly lies in the United States District Court for the District of Colorado pursuant to 28 U.S.C. §1391(b)(1) and (2) because all Defendants are found in this judicial district and because a substantial part of the events or omissions which are the basis for this action occurred and are occurring in this judicial district.

III. PARTIES

3. Plaintiff Freedom From Religion Foundation, Inc. (hereinafter the "Foundation") is a non-profit corporation existing under the laws of the State of Wisconsin and authorized to do business in the State of Colorado. One of the Foundation's primary objectives is to promote the constitutional principle of separation of church and state and to take action on infractions of that principle. The Foundation's membership, which numbers in excess of 10,000, is constituted primarily of atheists and agnostics who object to the public school system being used as a vehicle for the promotion of religion. Plaintiffs John Doe and Mary Zoe are members of the Foundation.

4. Plaintiff John Doe is a citizen of the United States, of the State of Colorado, and is a

resident of Cherry Creek School District # 5¹. He owns property in the School District and pays taxes to support it. He is aggrieved by the acts and practices complained of herein because his son has been exposed to and influenced by Defendants' disregard for his constitutional rights as a father. This Plaintiff is a parent of and had legal custody of DoeChild while he was enrolled as a student in one of the School District's public schools. He is also married to Mary Zoe and lives in the same household as Mary Zoe and her two children, RoeChild-1 and RoeChild-2.

5. Plaintiff DoeChild is a citizen of the United States, of the State of Colorado, and is a resident of the School District. He is the son of Plaintiff John Doe and was enrolled as a student in one of the School District's public schools at the time this action was initiated.

6. Plaintiff Mary Zoe is a citizen of the United States, of the State of Colorado, is a resident of the School District, and pays taxes to support it. Plaintiff Mary Zoe is the mother and legal custodian of RoeChild-1, a minor, and RoeChild-2, a minor, who are enrolled as students in the School District's public schools.

7. Plaintiff John Roe is a citizen of the United States and of the State of Colorado. He is the father of RoeChild-1 and RoeChild-2 and has joint legal custody of those children.

8. Defendant Cherry Creek School District # 5 is the governing body of public schools in metropolitan Denver, Colorado and exists pursuant to the laws of the State of Colorado. At all times pertinent hereto, it was and is operating within the scope of its authority and under color of state law.

9. Defendant Monte C. Moses is the Superintendent of Schools of Cherry Creek School

¹ Hereinafter sometimes referred to as the "School District".

District # 5. The Superintendent is, among other things, responsible for the day-to-day operation of the School District's public schools, for carrying out the School District's policies and programs, and for insuring compliance with all pertinent legal requirements. Defendant Moses is sued in his official capacity as Superintendent of the School District. At all times pertinent hereto, he was and is operating within the scope of his authority and under color of state law.

IV. CLAIM FOR RELIEF

10. Defendant Cherry Creek School District #5 has adopted, promoted, endorsed, approved, and publicized a program known as the "40 Developmental Assets."² The alleged purpose of this program is to "provide a positive approach to helping youth grow into responsible, confident, and healthy young people who are able to realize their full individual and academic potential." (Appendix A, p. 3). In widely disseminated messages to parents and students, Defendant Superintendent Monte C. Moses has strongly endorsed these Assets and urges parents to "put them to work in your family, your school, and your community." (Appendix A, p. 2). Defendant Moses has intentionally engaged in fear-mongering by warning parents and children that asset-poor children risk death. (Appendix A, p. 2).

11. One of the Developmental Assets is Asset 19 which states as follows: "**Religious Community** – Young person spends one or more hours per week in activities in a religious institution." This Asset is prominently posted in the School District's public schools alongside the photo of a young child with her hands clasped as though in prayer under the title "Faith Community."

² The 40 Assets are listed in Appendix A, p. 3

(Appendix B). Asset 19 is promoted by the Defendants in the same fashion as are the other 39 Assets. The Assets are taught in the classroom by teachers who are employed by the Defendant School District. Students are required to remain in the classroom while the Assets are being taught and discussed. (Appendix C, p. 3). Students who do not believe in religion, who have parents who do not believe in religion, or whose parents are religious but nevertheless believe that Assets have no place in a public school system are compelled to listen to their teachers, authority figures who speak for the state, assert that the Assets are necessary for the students' well-being. This has the effect of causing and, in fact, is intended to cause some students to question the religious and moral values of their parents. It also constitutes an erroneous lesson in civics which will cause the students to accept the concept of religious instruction by government in conflict with the United States Constitution. Teachers in Defendant School District who are atheists or who are of the opinion that it is inappropriate to instruct the students on matters pertaining to religion are likely to accept the program and not question it rather than run the risk of retaliation either by the School District or by other parents or taxpayers who support the program.³

12. The 40 Developmental Assets were developed by an organization known as the Search Institute. The Search Institute was founded approximately fifty years ago by Dr. Merton P. Strommen, a noted Christian author and a devout Lutheran. The Institute was originally named The Lutheran Youth Group and focused on youth in religious settings and on the ministry. To the best of the Plaintiffs' information, knowledge, and belief, the Search Institute was and continues to be

³ Defendants also instruct parents on the alleged benefits of the Assets program so that they, too, can put pressure on their children to comply. (See Appendix D).

heavily financed by and through the Lutheran Brotherhood and has a history of actively promoting religion. The Search Institute has many members of religious organizations on its Board of Directors including representatives of the National Council of Churches, the National Federation for Catholic Youth Ministry, Outreach National Baptist, and National Network of Youth Ministries. The Search Institute is entangled with Defendants in that they have a close working relationship. The Institute communicates frequently with the Defendants about the value of the Assets, there is a board of parents and other interested parties which assists the Defendants in promoting and raising money for the Assets program, and there is an office in the Defendant School District with a staff which coordinates the program both internally and externally with the board and with the Search Institute. On information and belief, the Search Institute's President, Dr. Peter L. Benson, who introduced the Assets program to the Defendant School District is scheduled to visit the Defendant School District this coming May to promote the Assets.

13. Dr. Benson was most instrumental in developing the 40 Developmental Assets. The Assets were originally written for religious youth and each Asset has a specific biblical reference. (Appendix E, Exh. 1). Plaintiffs contend that the 40 Assets taken as a whole constitute a moral code for young people promulgated by the Lutheran religion or a sect thereof and that, as such, it constitutes a religious establishment in violation of the First Amendment to the United States Constitution. Plaintiffs further contend that Asset 19, taken separately, also violates the First Amendment as an unconstitutional religious establishment.

14. The Defendants maintain that scientific studies support the proposition that the 40 Developmental Assets, including Asset 19, are beneficial to students, and Defendants parrot this

assertion. (See Appendix E, Exhibit 2 which is an article that appeared in the Cherry Creek High School Newsletter, Home Herald, September 2008). Plaintiffs dispute this contention and assert that there is no reliable research to justify this conclusion.⁴ Therefore any contention that the Developmental Assets, either singly or as a whole, have a valid secular purpose is without merit.

15. Plaintiffs are irreparably injured by Defendants' promotion of the 40 Developmental Assets. Plaintiff parents are atheists and object to the Defendant School District usurping their parental rights to teach or not teach religious values to Plaintiffs' children. As stated above, all 40 Assets are objectionable because they constitute a moral code based on religion. Asset 19, which recommends that children attend a religious institution, directly contradicts Plaintiff parents' belief system and undermines the parents' right to control their children's religious training. Putting the School District's imprimatur on the Assets, and particularly on Asset 19, has the effect of diminishing the parental authority necessary to effectively mentor their children.

16. Defendants have posted the 40 Developmental Assets on the school premises. As stated above, Asset 19 is represented by a photo of a young girl with clasped hands in the act of prayer or worship. In these circumstances, Plaintiff children who are taught by their parents not to pray are likely to view themselves as outsiders and at odds with their classmates and peers, the majority of whom are likely to believe in a divinity and the power of prayer.

⁴ All the so-called research is derived from the Search Institute which, as founder and sponsor of the program, has a self-serving interest to praise the program's results. However, as Affiant Barton G. Prieve notes, after having exhaustively explored the issue, none of the claims made by the Search Institute has been subjected to peer review and cannot be considered as supported by valid research. (Appendix E, pp. 4, 5).

17. The adoption, promotion, endorsement, approval, and publicizing by the Defendants of both the 40 Developmental Assets, and of Asset 19 alone, as stated above, constitute an establishment of religion in violation of the First Amendment to the Constitution of the United States as applied to state and local governments by the Fourteenth Amendment. Such activities violate each of the three criteria set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in that they create an excessive entanglement with religion, have the principal effect of advancing religion, and have no valid secular purpose. Such activities also favor religion and religious institutions to the exclusion of atheism, turn Plaintiffs into outsiders based on religion, place the Defendants' imprimatur upon religious institutions which teach dogma with which Plaintiffs disagree, spend Plaintiffs' tax dollars in promoting religion and religious institutions with which Plaintiffs disagree, promote the idea that attendance at religious institutions is essential to good citizenship – an idea which is offensive to Plaintiffs, and do not provide or assist in providing the benefits to students claimed by the Defendants.

18. The adoption, promotion, endorsement, approval, and publicizing of the 40 Developmental Assets, and of Asset 19 alone, by Defendants conflict with numerous published opinions of the United States Supreme Court, which has a tradition of protecting children in public schools from religious proselytizing. See *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000) (student-led prayer at sporting events); *Lee v. Weisman*, 505 U.S. 577 (1992) (graduation prayer); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (creation science); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (moment of silence/prayer); *Stone v. Graham*, 449 U.S. 39 (1980) (posting Ten Commandments); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (forbidding the teaching of evolution);

School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) (bible reading); and *McCullum v. Board of Education*, 333 U.S. 203 (1948) (religious instruction).

19. Defendants' policies, acts, and practices as stated above also violate Article IX, Section 8 of the Colorado Constitution which prohibits the teaching of sectarian tenets or doctrines. A public school which recommends that students attend a religious institution is *per se* engaged in sectarian instruction.

20. As a result of Defendants' policies, acts, and practices, Plaintiffs have suffered and are continuing to suffer because they are deprived of their constitutional right to a public school education free from religion and religious influence.

21. The Defendants are continuing to implement the policies, acts, and practices complained of herein.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs request the following Order and Judgment:

A. That this Court issue a Declaratory Judgment declaring that the Defendants and each of them violated Plaintiffs' constitutionally protected rights by adopting, promoting, endorsing, approving, and/or publicizing the 40 Developmental Assets.

B. That this Court issue a Declaratory Judgment declaring that the Defendants and each of them violated Plaintiffs' constitutionally protected rights by adopting, promoting, endorsing, approving, and/or publicizing Asset 19 or any other program which recommends or suggests that students attend or engage in activities in a religious institution.

C. That this Court issue an Order enjoining the Defendants from adopting, promoting,

endorsing, approving, and/or publicizing the 40 Developmental Assets.

D. That this Court issue an Order enjoining the Defendants from adopting, promoting, endorsing, approving, and/or publicizing Developmental Asset 19 or any other program which recommends or suggests that students attend or engage in activities in a religious institution.

E. That this Court issue an Order enjoining the teaching or discussing of the 40 Developmental Assets in the classroom or elsewhere during any function or activity authorized or sanctioned by the Defendant School District.

F. That this Court issue an Order enjoining the teaching or discussing of Developmental Asset 19 in the classroom or elsewhere during any function or activity authorized or sanctioned by the Defendant School District.

G. That this Court issue an Order enjoining the Defendants from posting photographs, pictorials, or other images of persons praying or worshiping in conjunction with the 40 Developmental Assets, or under any other circumstances, on property owned or under the control of the Defendant School District.

H. That this Court issue an Order requiring the Defendants to take remedial action including, but not limited to, retraction of its adoption, promotion, endorsement, approval, and publicizing of the 40 Developmental Assets and Asset 19 employing the same channels of communication as were previously employed in promoting and publicizing such Asset and that such retraction state that such acts, policies, and practices were unconstitutional.

I. That Court issue an Order requiring that the Defendants take appropriate steps to insure that Defendants' officers, employees, agents, and other persons or entities acting in concert with

them or under their control, comply with this Order and this Judgment.

J. That Plaintiffs be awarded costs and attorneys' fees pursuant to 42 U.S. C. §1988.

K. That this Court grant such other and further relief as it deems proper.

Respectfully submitted,

s/ Robert R. Tiernan

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Dated: September 16, 2008

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

rjbanta@bantahoyt.com

s/ Robert R. Tiernan

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