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MEMORANDUM OPINION

TO: J. Paul Carland, II, General Counsel, The School District of Hernando County, FL

FROM: Daniel Woodring, Esquire
General Counsel

DATE: January 13, 2006

SUBJECT: Student Requests to be Excused from Certain Instruction in Florida Public Schools

QUESTION PRESENTED:

Upon the request of a parent or student, should a Florida public school excuse a student from the teaching of particular subject material?

SHORT ANSWER:

Yes, if the request is based upon a specific statutory opt-out or a sincere religious belief.

Public schools have a duty to carry out their statutory mandate to teach students in accordance with the Sunshine State Standards and to require student attendance, except as directed by other state law or court decisions. While state law provides only a few express rights for parents or students to opt-out of particular curriculum material, the Florida Religious Freedom Restoration Act, §761.03(1), Florida Statutes, likely requires a school to excuse a student from the instruction of particular subject material if that request is based upon a sincerely held religious belief. However, a school may deny excusal requests for other reasons.

DISCUSSION:

The instant question asks for general guidance that arises from a student's request to be excused from a science class during instruction related to the origin of the universe, Earth, and living organisms (hereinafter referred to as "origins instruction"). We do not know the motivation for the student's request.

Origins instruction recently has stirred a national debate and is an inherently sensitive topic for religious adherents, civil rights advocates, and school personnel alike. Our advice aims not to be drawn into that policy debate, but to give practical advice to schools based upon a strictly legal analysis.

The Sunshine State Standards require schools to instruct students regarding “various scientific theories on how the universe was formed” and “that Earth’s systems and organisms are the result of a long, continuous change over time.” Sunshine State Standards, Science, Grades 9-12. Florida law clearly expects school districts to educate students in accordance with the Sunshine State Standards, §1003.41, Florida Statutes (2005), except as otherwise defined or limited by the legislature or authoritative common law. The analysis is the same for any student request to be excused from the teaching of particular subject material in the public schools, in science or other contexts.

The Florida legislature has not provided an explicit opt-out right as regards origins instruction in science class or for most other instructional topics. If a statute provides for such an opt-out, for instance, like statutes allowing students to be excused from certain health/sex/disease and science instruction when there is experimentation or dissection of animals, then schools could address this issue as they do in those contexts.

The statutory analysis does not end here, however, as another provision—the Florida Religious Freedom Restoration Act (“FRFRA”), §761.03(1), Florida Statutes¹—may be implicated by an excusal request. The FRFRA prohibits government from substantially burdening acts (or refusals to act) that are “substantially motivated by a religious belief,” absent a compelling governmental interest. If a student or parent requests to be excused claiming a religious objection to particular instruction, then the FRFRA’s application will most likely determine whether a school must grant the request. Though again, we do not know the basis for the specific opt-out request at issue here, we find the FRFRA to be the only state statute that may require a school to grant the student’s opt-out request in the context of origins instruction.² A school is, therefore, free to deny a request to be excused

¹ The FRFRA provides that “the government shall not substantially burden a person’s exercise of religion, even if the burden results from a rule of general applicability, except . . . [if the] application of the burden to the person: (a) Is in furtherance of a compelling government interest; and (b) Is the least restrictive means of furthering that compelling governmental interest.” “Exercise of religion” is defined as “an act or refusal to act that is substantially motivated by a religious belief whether or not the religious exercise is compulsory or central to a larger system of religious belief.” §761.02(3), Florida Statutes.

² Though not determinative of the instant issue, we note that Florida law grants certain parental rights and expects significant parental involvement and collaboration in the public school education of children. *See e.g.*, Florida Statutes at §1003.04(3) (requirement for parents to be involved with schooling), §1002.20 (4) (parental right to receive, review, buy education materials), §1003.24 (parental responsibility for child’s school attendance), §1002(3)(e) (parental consent required before a student is referred to or offered school contraceptive services), §§1003.42(3) & 1003.47 (parental right for child to opt-out of certain science and health classes), §1002.20(2) (parental right to remove child for religious instruction and holidays), §1003.44(1) (parental right to excuse child from citing the pledge), §1003.421(4) (parental right to excuse child from reciting the Declaration of Independence).

from origins instruction, unless that request is specifically motivated by a sincere religious belief.

The FRFRA Likely Requires Deference to Parent or Student Opt-out Requests

The FRFRA was enacted to counter a decision by the U.S. Supreme Court that appeared to change the standard for evaluating First Amendment, Free Exercise claims. In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)³, the Court held that government may enforce neutral, generally applicable laws that infringe religious free exercise rights, without showing a compelling governmental interest. This decision departed from previous rulings that government must show a compelling interest in balancing the Free Exercise Clause against generally applicable laws. See e.g., *Sherbert v. Verner*, 374 U.S. 398, 407-08 (1963); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987).

The *Smith* decision sparked an uproar among advocates of religious liberties. In response, Florida, the U.S. Congress, and several other states enacted religious freedom restoration acts to restore the pre-*Smith* test, effectively preventing government from substantially burdening religious belief or actions without a compelling governmental reason. In Florida's case, it enacted a provision with religious exercise protection that is

broader than that afforded by the [free exercise] decisions of the United States Supreme Court for two interrelated reasons. First, the FRFRA expands the free exercise right . . . because it reinstates . . . [the compelling interest test]. Second, under the FRFRA, the definition of protected "exercise of religion" subject to the state compelling interest test includes any act or refusal to act *whether or not compelled by or central to a system of religious belief*.

Warner v. City of Boca Raton, 887 So.2d 1023, 1032 (2004) (emphasis in original).

In *Warner*, the seminal case construing the FRFRA, the Florida Supreme Court established a test for bringing a claim under the FRFRA. A religious adherent must first show that a sincere religious belief has been implicated. *Id.* at 1032; see also *Freeman v. Dep't of Highway Safety and Motor Vehicles*, 2005 WL 2108094 (Fla.App. 5 Dist.) at 6 (Sept. 2, 2005). Once a sincere religious belief is established, a court will scrutinize the government's action to determine whether it constitutes a substantial burden on the adherent's practice. *Id.* at 1035. If these two tests are met, the burden shifts to the government to establish that its regulation furthers a compelling interest and is the least restrictive means to further its interest.

³ The *Smith* case addressed whether employees fired for using peyote during religious services had a right to collect unemployment benefits. The two discharged employees were fired and denied unemployment compensation, because they ingested peyote as part of sacramental services, which was deemed work related "misconduct." The employees sued, arguing that the decision violated their right to freely exercise their religion under the First Amendment. Ultimately, the U.S. Supreme Court disagreed with their argument for the above-discussed reason.

The Florida Supreme Court in *Warner* considered whether the FRFRA protected the rights of grave plot owners to erect vertical, religiously-decorated, cemetery plot markers in a city cemetery. The city's policy allowed only horizontal markers and not vertical ones for the most part. The Court found the plaintiffs' decisions to erect vertical religious decorations on grave markers (*e.g.*, crosses and stars of David) to be the sort of sincere religiously-motivated acts given protection by the FRFRA. However, it concluded that the City's regulation "merely inconvenience[d]," but did not substantially burden plaintiffs' religious exercise. *Id.*

In reaching this result, the Court closely considered the City's manner of regulating the plot owners' religious exercise. Adopting the trial court's reasoning, the Court explained that the plot owners' religious exercise had been merely inconvenienced because (1) the City did not altogether prohibit marking graves or decorating them with religious symbols—horizontal markers and decorations were always allowed, (2) the City regulated merely the form of decoration—only vertical markers were prevented, and (3) the City regularly allowed vertical markers for limited periods of time, *e.g.*, immediately after the date of burial and after certain holidays. *Id.*

Reaching a similar result, Florida's Fifth District Court of Appeal in *Freeman* recently considered the claim of a Muslim motorist who had her driver's license cancelled after she refused to have her identification picture taken without her veil. *Freeman v. Dep't of Highway Safety and Motor Vehicles*, 2005 WL 2108094 (Fla.App. 5 Dist.) at 6 (Sept. 2, 2005). Ms. Freeman brought action under the FRFRA seeking permission to wear a veil in the picture. The trial court denied her FRFRA claim. The appeals court affirmed, concluding that her free exercise right had been merely inconvenienced. Similar to the *Warner* court's analysis, the appeals court closely evaluated whether the DHSMV's rule and practice altogether foreclosed Ms. Freeman's religiously-motivated practice:

Freeman's deposition testimony [stated that] she must be veiled only in the presence of men unrelated to her. Importantly, she agreed that her veiling belief did not mean that she could never be photographed without her veil. The Department's existing procedure would accommodate Freeman's veiling beliefs by using a female photographer with no other person present. Thus, the burden to accommodate Freeman's religious beliefs would be placed upon the Department.

Id. Because the DHSMV policy's accommodative posture as to the prohibitions of Ms. Freeman's religion, the appeals court ruled that her religious practice was not substantially burdened. *Id.*

FRFRA Applied in the Instant Fact Scenario

If the opt-out request in the instant factual scenario is motivated by a sincere religious belief, we believe a court would affirm the existence of a legitimate religiously-motivated practice, threshold issue #1, just as it did in *Warner* and *Freeman*. It seems completely believable that a sincere religious belief in

creationism might motivate an adherent, for example of Christianity or Judaism, to excuse oneself or to request excusal from government-sponsored instruction and discussion of a contrary theory of origins.⁴

Different from *Warner* and *Freeman*, however, we think a Florida court is unlikely to find a “mere inconvenience” (threshold issue #2), where a student is barred altogether from leaving a religiously offensive class, or parents’ requests for excusals are summarily denied by a school. Both the *Warner* and *Freeman* precedents are instructive here. In both, plaintiffs’ religious exercise was not altogether suppressed. Each court made much of the government’s explicitly accommodative policies that differed from plaintiffs’ desired result only as to the degree of accommodation requested (*i.e.*, religiously decorative gravemarkers were allowed in *Warner*, and a non-offensive mode of picture-taking was provided in *Freeman*). That the plaintiffs desired even more accommodation of their convictions, was deemed to be merely an inconvenience to their religious exercise. Presumably, these courts would have ruled differently if plaintiffs’ religious expressions were altogether suppressed by government actions, for example, if the City of Boca Raton had mandated that all crosses and/or stars of David be removed from gravemarkers, or if the DHSMV had made no effort to accommodate Ms. Freeman’s religious prohibition against unveiling in the presence of men.

Where a student requests to opt out from instruction on a particular topic for religious reasons, there appears to be no reasonable accommodation short of excusing the student. Because of the FRFRA’s explicitly broad protection of religiously-motivated exercise and Florida courts’ concern for protecting religious liberties thereunder, a court is likely to strictly scrutinize any school’s decision to compel classroom attendance or participation in the face of a student’s or parent’s religious objection.⁵

It is important to note that this analysis does not involve a student’s request for wholesale curriculum change, a broader curriculum opt-out for a student, or request to be excused from test-taking requirements, but, rather, is limited to a narrower content objection scenario, *e.g.*, opt-out of a particular class lesson(s), school program, or reading assignment. In fact, Florida courts are likely to take a dim view of a student’s request for a broader degree of accommodation, as in the above FRFRA cases, *e.g.*, if a student requests to be excused not only from a particular class lesson, but from an entire course or testing requirement, or if a student’s request involves being given credit for work not completed or requirements not satisfied.

⁴ The Christian and Jewish Scriptures address a God-ordained origin of life in their very first words.

⁵ *See also Lee v. Weisman*, 505 U.S. 577, 592-93 (1992), in which the U.S. Supreme Court recognized peer pressure in the school environment to be a viable threat to student’s freedom of conscience: “we think the State may not, consistent with the Establishment Clause, place primary and secondary school children [in the dilemma of participating, with all that implies, or protesting]. Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.”

Schools may craft individual solutions that may be workable both to accommodate a student's religious exercise and a school's educational requirements. For instance, a school could require a student that requests to opt-out of particular instruction to complete a different or additional assignment such that the learning requirement could be satisfied, *e.g.*, in place of a religiously-offensive book in a literature course, assign an alternate one for a student to read and write a report.

A court's application of strict scrutiny to a policy requiring a student's participation in particular instruction is certain to be fatal to the policy. Under a strict scrutiny analysis, the FRFRA would require a school to demonstrate that a student's participation in the instruction is necessary to advance a compelling governmental interest in the least restrictive manner—a virtually impossible test. Courts have noted that strict scrutiny is the most stringent legal test. *See e.g., Wisconsin v. Yoder*, 406 U.S. 205 (1972), (a state's interest in requiring schooling through age 16 was not sufficiently compelling to overcome Amish religious objections to educating children over age 13); *Sherbert v. Verner*, 374 U.S. 398 (1963) (state interest in making availability for Saturday work a prerequisite for receiving unemployment benefits ruled not compelling where a Seventh Day Adventist's belief did not permit Saturday work); *but see Bob Jones Univ. v. U.S.*, 461 U.S. 574 (1983) (preventing racial discrimination is a compelling interest, such that government may forbid such discrimination even where it conflicts with religious beliefs). Even if the school's interest was determined to be compelling, it would be required to implement its policy in the least restrictive manner. *See e.g., Gratz v. Bollinger*, 539 U.S. 244 (2003) (a university's policy of distributing admission credits to every single "underrepresented minority" applicant solely because of race, was not narrowly tailored to the state's compelling interest of achieving educational diversity).

Florida law already explicitly allows excused opt-outs from science lessons dealing with animal experiments and dissection with a parent's request. § 1003.47, Florida Statutes. If the school districts can fulfill their objectives while granting excused absences from science class animal experiments and dissections for indeterminate reasons, it would be difficult to successfully argue that schools have a compelling interest in forcing students to participate in every other science class lesson. Likewise, it might be difficult for a court to accept that a forced attendance policy is implemented in the "least restrictive" manner, so long as some science class opt-outs are allowed, just not religiously-based ones.

Federal First Amendment, Free Exercise Considerations Support an Opt-out

Federal Constitutional analysis appears to support permitting student opt-outs in this scenario. The legal interpretation of two fundamental rights—religious free exercise and parental rights—are implicated here. State and federal law provide broad (but not limitless) rights for their citizens to believe and practice religion free of government interference—rights that are not "checked at the door" of public schools. Also, parents have significant rights to direct their child's schooling. *See e.g., Wisconsin v. Yoder*, 406 U.S. 205 (1972) (parental "liberty" to direct the education of their children is "fundamental"); *Lofton v. Department of Children and*

Family Services, (11th Cir. 2004) (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000), “Supreme Court precedent has long recognized . . . ‘the fundamental right of parents to make decisions concerning the care, custody, and control of their children’”).

As earlier discussed, the U.S. Supreme Court in *Employment Division v. Smith*, 494 U.S. 872 (1990), appeared to curtail historic, FRFRA-like free exercise protections where the government enforces a neutral or generally applicable rule. The Court in *Smith* distinguished two exceptions based on past precedents, however, where the rule would remain subject to heightened scrutiny: (1) a “hybrid rights” exception—when a free exercise claim is coupled with some other constitutional claim, and (2) an “individualized exemption” exception—if a state’s facially neutral rule contains a system of individualized exemptions, then a state may not refuse to extend that system to cases of religious hardship without a compelling reason. *Id.* at 881-84 (citing past Court decisions that involved hybrid-rights and individualized exemption exception claims). Our facts appear to implicate both *Smith* exceptions.

Hybrid Rights Exception

In *Smith*, the Court explained that when a parent’s fundamental interest in directing their child’s education was combined with a First Amendment free exercise of religion claim, the burden of the state was heightened to show a FRFRA-like compelling reason for any policy infringing these rights. *Id.* at 881 (citing its ruling in *Wisconsin v. Yoder*). While the Court has not exhaustively defined the application or limits of hybrid-rights claims, Florida and other courts have recognized hybrid rights claims, especially in the context of claims involving parental and First Amendment free exercise rights combinations. *Johnson v. Dade County Public Schools*, 1992 WL 466902 (S.D.Fla.,1992) (recognizing a hybrid claim to exist where First Amendment parental and free exercise rights were intermingled in a challenge to a school’s telephone counseling services); *see also*, *Brown v. Hot, Sexy and Safer Productions*, 58 F.3d 525 (1st Cir. 1995), *cert. denied*, 116 S.Ct. 1044 (1996); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 473 (8th Cir. 1991); *American Friends Service Comm. v. Thornburgh*, 961 F.2d 1405, 1407-08 (9th Cir. 1991); *but see Kissinger v. Board of Trustees*, 5 F.3d 177 (6th Cir. 1993) (refusing to recognize hybrid-rights claims until further clarification of the issue by the Supreme Court).

Under the Fourteenth Amendment, the U.S. Supreme Court has held that, “the custody, care and nurture of the child must reside first in the parents,” *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), and declared this right to be fundamental, *Troxel v. Granville*, 530 U.S. 57, 66 (2000). *See also*, *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (first recognizing right of parents “to control the education of their own” children). While some federal appeals courts have narrowly defined parental rights in the public school education context, the instant facts concern a lesser expression of parental rights than at issue in those cases.⁶ For instance, the Ninth

⁶ Various federal appeals court rulings (not from the 11th Circuit) have ruled there to be relatively narrow parental rights vis-à-vis public schools. *See e.g.*, *Swanson v. Guthrie Indep. Sch.*

Circuit in *Grove v. Mead School Distr. No. 354*, 753 F.2d 1528, 1535 (9th Cir.1985), would not enjoin the use of a book that parents found offensive to their religious beliefs, but noted that the student was not forced to read the book or be present or participate during classroom discussions relating to the book.

The Individualized Exemption Exception

The *Smith* Court ruled that where a state’s facially neutral rule contains a system of individualized exemptions, a state may not refuse to extend that system to cases of religious hardship without a compelling reason. *Id.* at 881-84 (citing past decisions that involving individualized exemption claims); *see also Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 542 (1993). The Court’s concern is the prospect of the government’s deciding that secular motivations are more important than religious motivations. *See Lukumi*, at 542 (“All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice.”). The Court has not yet explained what constitutes a “system” of individualized exceptions, and like the hybrid rights exception, courts and commentators are split on the question. Perhaps the best example of such a system is the one in which this exception originated—an unemployment benefits system which required claimants to show “good cause” as to why they were unable to find work. In *Sherbert v. Verner*, 374 U.S. 398 (1963), a Seventh Day Adventist was fired because she refused to work on Saturdays, which her faith did not permit. Sherbert applied for unemployment benefits, but was denied for failing to demonstrate “good cause” for her unemployment. The Court held that the denial of benefits violated the Free Exercise Clause, because it forced Sherbert “to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.” *Id.* at 404.

Another court recently applied a free exercise, individualized exemptions-based claim in the context of education. In *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004), the Tenth Circuit considered the case of a woman admitted to an actor training program at the University of Utah. During her first semester, she refused to say the word “f***” or take God’s name in vain during class assignments. Her professors ultimately refused to allow her to alter or change assigned scripts, demanding that she read assigned scripts as written. The court concluded there to be a genuine issue of material fact as to whether the University had a system of individualized exemptions because a Jewish student was exempted from a curricular requirement because of a religious holiday and, at times, Axson-Flynn herself was exempted from curricular requirements. The court concluded that if there was an

Dist.No. I-L, 135 F.3d 694 (10th Cir. 1998) (parents have no right to pick and choose which curriculum-required classes their children will attend); *Brown v. Hot, Sexy and 11 Safer Prods., Inc.*, 68 F.3d 525 (1st Cir. 1995) (a parent may not preclude a school from teaching subjects or putting on programs that they find offensive because of the sexually explicit material presented); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (a parent may not for religious reasons exclude a child from participating in a school district’s multi-level reading program). Notably, none of these precedents involved the application of a post-*Smith*, state religious freedom act.

exemption system, the system must be extended to cases of religious hardship. *Id.* at 1299.

The instant scenario raises similar issues, insofar as Florida statutorily allows excused opt-outs from particular classroom instruction, including from its science curriculum.⁷ As earlier discussed, Florida law excuses students from biology instruction in which animal experiments or dissection takes place. See § 1003.47, Florida Statutes. Because Florida schools have a practice of allowing science lesson opt-outs for students for indeterminate reasons, they may be required to demonstrate a compelling interest to deny religiously-motivated requests to be excused from different lessons in those same classes.

CONCLUSION:

Under Florida law, where a student or parent requests to be excused from instruction, a program, or other teaching on a particular subject, a school should determine:

- (1) whether Florida law or district policies allow an explicit right to opt out of that instruction (*e.g.*, animal dissection/experimentation, reproductive health or HIV/AIDS instruction), with which the school must comply; or
- (2) whether the request is substantially motivated by a student's sincere religious belief, in which case the school is on firmest legal ground if it grants the opt-out request.

If neither (1) nor (2) is applicable, then a school has broad authority to refuse the request and to require a student to attend.

⁷ Additionally, individual school districts in Florida have discretion and may have policies that allow students to opt out of additional subjects of classroom instruction.