

IN THE MATTER OF

THE TERMINATION OF EMPLOYMENT

OF JOHN FRESHWATER

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R. LEE SHEPHERD, REFEREE

POST-HEARING BRIEF FOR
MOUNT VERNON CITY SCHOOL DISTRICT

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Simply put, John Freshwater is not credible.¹ The conflicting and various stories and explanations Mr. Freshwater offers in response just do not make sense.

- Mr. Freshwater used a Tesla Coil on students, disregarding safety and, in at least one instance, burning a student and marking him with a cross.
- Mr. Freshwater, through his teaching, the maintenance of his room and his conduct endorsed religion in the Mount Vernon City Schools.
- Mr. Freshwater crossed the line as the monitor of the Fellowship of Christian Athletes, participating in prayer, leading meetings and contacting speakers.
- Mr. Freshwater engaged in multiple acts of insubordination.

Not only do these acts cumulatively justify termination of his employment, but any one of them provides good and just cause for the Board to terminate Mr. Freshwater’s employment contract.

APPLICABLE LAW

This matter is governed by O.R.C. Section 3319.16 as amended in 2009. While this hearing was proceeding, the Ohio Legislature amended Section 3319.16 removing the specific

¹ While not binding on the Referee, Judge Frost has issued an Opinion and Order in which he finds Mr. Freshwater’s testimony to be “incredible.” *Doe v. Mount Vernon City School Dist. Bd. of Educ., et al.*, Case No. 2:08-cv-575, Doc. # 120 – Opinion and Order at pp 7- 8 (S.D. Ohio, 2010) (copy attached as Attachment 1). He bases his opinion on conflicting testimony by Mr. Freshwater in his deposition (Board Exhibit 83 – hereinafter Board Exhibits will be referred to as “BX” and Employee Exhibits will be referred to as “EX”) about throwing the smashed Tesla Coil in the trash and then speculating it was in a garbage landfill and then, his testimony in front of the Judge that Attorney Hamilton’s wife placed the Tesla Coil in the family freezer. In this case the smashed Tesla Coil is in evidence as BX 94. The Judge also relied upon the testimony of Mr. Freshwater concerning the “five armloads” of material he received from Mr. Short about which he testified in the administrative hearing and his testimony concerning the definition of “pitch” as a further indication his testimony is not credible. (*Id.*)

bases for terminating a teacher's employment contract and replacing those specific reasons with the following:

“The contract of any teacher employed by the board of education of any city, exempted village, local, county, or joint vocational school district may not be terminated except for good and just cause.”

It is the responsibility of the Referee to determine the facts and make credibility determinations. Following that, the Referee makes a recommendation to the Board of Education.

STATEMENT OF FACTS

On December 6, 2007, John Freshwater used a Tesla Coil in his eighth period science class, burning a student, and setting in a motion a series of events that eventually led to an investigation of Mr. Freshwater's activities and to the Mount Vernon City School District Board of Education (the “Board”) adopting a resolution of its intent to consider the termination of Mr. Freshwater's employment.

A. The Use of the Tesla Coil

On December 6, 2007, Zach Dennis came home from school and showed his mother a mark he had on his arm from Science Class. He didn't complain and she didn't confront him about it because there were guests in the house and Zach had to rush to get ready to leave for hockey practice. (Z. Dennis, T. 341; J. Dennis, T. 363-364)² During hockey practice, Zach's arm began to hurt and his dad called his mother to find out if she had seen what was on his arm. (Z. Dennis, T. 342; J. Dennis T. 365) When they arrived home that night, Mrs. Dennis looked at Zach's arm observing what appeared to be a burn mark in the shape of a cross. (J. Dennis, T. 363, 3330) Zach was in such pain he had difficulty sleeping that night. (Z. Dennis, T. 342; J. Dennis, T. 365, 3342-43)

² The Transcript from the hearing will either be referred to with the Witness Name, T. page number or where the witness is obvious from the text of the brief, simply by T. page number.

The next morning Mr. and Mrs. Dennis went to see Interim Superintendent, Steve Short. They were concerned about what had happened to their son and (J. Dennis, T. 368; S. Dennis, T. 3204) they told Mr. Short they did not believe Mr. Freshwater intentionally caused harm to their son. They were not seeking to have his employment terminated or to have any criminal action brought against him, but wanted to know what had happened and insure it did not occur with any other student. (Short, T. 56; J. Dennis, T. 369) Mr. Short concurred in the belief Mr. Freshwater had not intentionally tried to injure their son. (T. 56, 59) Mr. and Mrs. Dennis gave Mr. Short copies of pictures Mrs. Dennis had taken the night before. (BX 7 and 8) Mr. Short told them he would find out what had happened.

Upon contacting Middle School Principal Bill White the following Monday morning, Mr. Short showed him the pictures and instructed him to find out if Mr. Freshwater had made marks on a student. He advised Mr. White the parents wanted to remain anonymous and did not tell him the student's name. (Short, T. 57; White, T. 493)

Mr. White met with Mr. Freshwater and Assistant Principal Brad Ritchey that same day. (White, T. 494) According to Mr. White, Mr. Freshwater initially denied anything occurred in his classroom but after some discussion admitted using an electrical device on students. (T. 494) Mr. Freshwater told Mr. White, if they did it to him, it had to be in the shape of a cross. (T. 494-95) Mr. White directed Mr. Freshwater to put the device away and not use it on students in the future. (T. 495) Mr. White reported his conversation back to Mr. Short. (Short, T. 58; White, T. 495, 554-555)

In October 2008, Mr. Freshwater testified he had removed the Tesla Coil from the school without any authorization to do so and stated it was in his possession. (T. 380-381) One year later, Mr. Freshwater testified during a deposition in the *Doe* case, that he destroyed the Tesla

Coil by smashing it and threw it away in a landfill. He claimed he was instructed to destroy the Tesla Coil by Mr. White in their December 10, 2008 meeting. He could not recall where he destroyed it or exactly how he destroyed it. (BX 83 pp. 168-170) Two months, Mr. Freshwater testified with “clarity” that he was told to destroy the Tesla Coil by Bill White, he put it in a bag and dropped a brick on it in the waste basket in his room at school. He took it out of the wastebasket and put it in his car and then gave it to his attorney, Kelly Hamilton. (T. 4315, 4326, 4908-4911) The affidavit used by his attorney to elicit his testimony in December understandably tracks his testimony. (EX 128) It later came out that Mr. Hamilton’s wife placed the Tesla Coil in the family freezer. *Doe v. Mt. Vernon City School Dist. Bd. of Educ., supra*, pp.7-8.

Contrary to Mr. Freshwater’s claim, both Mr. White and Assistant Principal Brad Ritchey states Mr. Freshwater was **not** told to destroy the Tesla Coil in their December 10 meeting. (White, T. 4141; Ritchey, T. 5945) The letter issued to follow up the December 2007 meeting makes no mention of destroying the Tesla Coil. (BX 9)

John Freshwater used the Tesla Coil in his science classes to charge gasses in a vacuum to permit students to identify those gasses by their color. After doing the experiment, he would then offer students the opportunity to experience an electric shock from the Tesla Coil on their arms. (EX 148, pp 8-13) Before doing so, he told students there would be a temporary mark (Conkel, T. 5229-30; Grumbaugh, T. 5298; Morris, T. 5334; Redman, T. 5140; Ruhl, T. 5255) or, according to Zach Dennis, “a temporary tattoo.” Mr. Freshwater also told Zach’s class, “those crosses are going to be there for a while.” (T. 339, 3086)

On December 6, 2007, when demonstrating the Tesla Coil on Zach Dennis, he passed the arc of the Tesla Coil up and down Zach’s arm and then back and across. (T. 337) It did indeed

leave a mark. (Z. Dennis, T. 340, Nielson, T. 2647; Ruhl, T. 5260) That mark was in the form of a cross. (BX 7 and 8) Other students also described the mark made by Mr. Freshwater with the Tesla Coil as a cross, both on students in the 2007-2008 school year and in prior school years. (Souhrada, T. 886, Nielson, T. 2645)

There is conflicting testimony about whether there was a mark on students' arms and just what the mark was. Mr. Freshwater has variously claimed he has "never, never branded or burned a person. . . . I have never branded, burned, or put a mark, a religious mark on my family. I have never done that to the alleged plaintiff" (T. 374, 376; BX 19 at 1:51 – 2:21); he put an "X" on Zach, not a cross (T. 403, 4786), the Tesla Coil does not leave a mark (T. BX 83 at p. 186); and the Tesla Coil will leave a small, temporary red mark. (T. 401) Contrary to some of Mr. Freshwater's testimony, students testified the Tesla Coil left a red mark, although the size, degree and shape of the mark varied from student to student. (Heck, T. 2173-74, Nielson, T. 2645) Not only did Zach Dennis testify, the Tesla Coil was used to make the shape of a cross, but Ben Nielson stated the mark "looked a lot like a cross" and Simon Souhrada, a student from an earlier year stated Mr. Freshwater made a cross when he marked students with the Tesla Coil. (Souhrada, T. 886, Nielson, T. 2645)

There is also conflicting testimony about how Mr. Freshwater applied the Tesla Coil. Zach Dennis testified he placed his arm on the overhead and Mr. Freshwater held his arm down while passing the Tesla Coil up and down and back and forth across his arm twice. (T. 337) Mr. Freshwater denies using the overhead or holding the arm down or even holding it at all. (T. 398-399) At least one other student corroborates Zach's version of what occurred indicating Mr. Freshwater had students place their arms on the overhead projector and held students' arms while applying the Tesla Coil. (Strack, T. 3866)

On December 6, 2007, there was also an incident with Justin Newland, a special education student. Zach Dennis indicates Mr. Freshwater asked Justin to pick up one of the vacuum tubes used in the experiment and that when Justin bent over to pick up the tube, Mr. Freshwater “zapped” Justin in the back with Tesla Coil. (T. 335, 3186) In August 2008, Steve Short interviewed Justin, a former student of Mr. Short when he had been an elementary principal. (T. 117) Justin told Mr. Short he was “zapped” from behind as he bent down to get a test tube, a story very consistent with what was heard from Zach Dennis in his testimony in October 2008. (T. 316)

Mr. Freshwater tells at least three different versions of the incident with Justin Newland. When he is first confronted with the incident at the hearing, Mr. Freshwater testifies, as follows:

“Justin was involved in that demonstration. He sits off . . . to the right. When he was going by me and **heading back to his seat**, inadvertently he was touched with the Tesla Coil. . . .” (T. 395-396 emphasis added)

Approximately one year later he testified in the *Doe* case, as follows:

“He’s [Justin Newland] located - - his seat’s located two steps from where - - two steps from where I’m standing. . . . he was standing up. . . . I went by, he was there in no time and it was applied to him. . . . It surprised me as much as it surprised him.

Q. What do you mean he was walking by you? . . .

A. Oh, **he was coming up to do a demo** on the vacuum tubes.”
(BX 83 at pp. 194 – 195, emphasis added)

At the time of his deposition, Mr. Freshwater indicated he did not know where he touched Justin with the Tesla Coil (BX 83 at p. 194, 197)

Less than two months later, on December 8, 2009, Mr. Freshwater had a vivid memory of what occurred. He testified, as follows:

And when I was moving backwards, [from the second vacuum tube], I bumped into something I never bumped into before. And what it was, it surprised me, so I kind of jerked this way to see what it was. And when I jerked, it knocked my

transparency onto the floor. It landed down here and came over top of No. 2 vacuum tube.

And when I looked to see who it was, it was Justin Newland. He was a special needs kid. He is high energy. Out of his seat a lot. He's a very interesting kid. As I want [sic] back to Justin, What are you doing out of your seat?

And Justin said, I didn't see No. 1.

So I said, Justin, pick up my overhead transparency.

He reached down to pick it up. I stepped down to take a look and see what No. 1 vacuum tube was. He grabbed that transparency and turned right back into me. And the Tesla Coil **arced off into his left side on his back side.** And it touched him.

(T. 4282-4283, emphasis added)

There is no dispute Mr. Freshwater had never read the instructions nor warnings about the use of the Tesla Coil nor did he give any warnings or take any safety precautions with students prior to using the Tesla Coil. (Z. Dennis, T. 337-339, Freshwater, T. 401-02; BX 83 at pp. 171, 192-193)

Mr. Freshwater also used the Tesla Coil by having students link arms. He then holds the tip of the Tesla Coil and touches a student with his finger to see how far down the “daisy chain” the electric shock can be felt. (T. 400)

Dr. David Levy, Chairman of the Department of Emergency Medicine at St. Elizabeth Health Center in Youngstown, testified as an expert witness based upon his training and expertise in diagnosing and treating burns as an emergency room physician. He opined Zach Dennis received a thermal burn from the Tesla Coil that appeared to be a second degree burn. (T. 746-748) He also testified as to the dangers of using a Tesla Coil on individuals including causing subcutaneous burns in addition to surface burns, potentially disruption of the rhythms of the heart, and other types of risks. (T. 744-746, 751)

B. Religion in Mr. Freshwater's Classroom

Superintendent Short received complaints Mr. Freshwater had the Ten Commandments and other items of a religious nature posted in his room. (T. 70) After Principal White inspected

Mr. Freshwater's room, he reported back that in addition to the posters of a religious nature, there was a box of bibles in the back of the room and a Bible on Mr. Freshwater's desk. (Id.) Various other complaints were raised through a letter from the attorney for the Dennis family. In addition to the religious items displayed in Mr. Freshwater's room, the use of the Tesla Coil on their son, and matters relating to the Fellowship of Christian Athletes, the letter charged Mr. Freshwater was teaching his own religious beliefs and was referencing his beliefs from the Bible. (BX 3) Subsequently, a further issue was brought to Superintendent Short's attention that Mr. Freshwater, after having been talked to about the concerns of religion in his class proceeded to offer an extra credit assignment to see the movie "Expelled, No Intelligence Allowed", a movie believed to be associated with teaching Intelligent Design. (BX 4)

Because of the seriousness of the charges, the Board decided to have an independent investigation done by HR OnCall. Their report is in evidence as BX 6.

1. Mr. Freshwater's pursuit of his religious point of view in the classroom.

There are a number of areas identified where Mr. Freshwater pursued his religious point of view in the classroom.

a. The Bible and Religious Views in Mr. Freshwater's Classroom

Katie Beach, an Intervention Specialist in Mr. Freshwater's second period class during the 2007-2008 school year and in his eighth period class for part of that year, testified Mr. Freshwater brought his Bible and religion into classroom discussions. (T. 960-962) With regard to the Bible, Ms. Beach indicated Mr. Freshwater:

“referenced that the Bible was his truth, the truth that he believed, that it was a document that obviously has been supported for a few thousand years; that he believed that that's as far back as we can trace our earth and our planet, because it was from people forward. He did reference that the dating methods in science, such as radiometric or carbon dating were not accurate” (T. 963)

Ms. Beach gave several other examples about how Mr. Freshwater brought the Bible and his religion into his classroom. For example, when talking about the “Big Bang” Mr. Freshwater indicated it could not explain how such a complex world was created and advised students as an alternative, to look in the Bible. (T. 962) He urged the use of a “catch” word (“here”) when things were not 100% true and couldn’t be absolutely proven. (Id.)

Zach Dennis’ testimony supported what was described by Ms. Beach. He gave an example of how Mr. Freshwater told the class “the earth is going to come to a fiery end. . . . I know this because I read the book” and then Mr. Freshwater lifted his Bible for the class to see. (T. 346) He gave examples of that Mr. Freshwater would relate things to a “higher being” when talking about such things as the “Big Bang” theory. (T. 344) Mr. Freshwater also talked about carbon dating and the age of the earth using various examples as to why it is not as old as scientists say. (T. 345-46)

Zach also pointed out Mr. Freshwater had students use the word “here” when a fact was in the text book but not necessarily proven. (T. 349)

Jim Stockdale, a substitute teacher in Mr. Freshwater’s class in 2006-2007, also provided testimony concerning Mr. Freshwater’s reference to the Bible and his religious views. When Mr. Freshwater’s class was starting a unit on the origin of the universe, Mr. Freshwater told the students he wanted to give the students an example of how scientists and information in the textbooks can be incorrect. He then proceeded to tell the students about a story in *Time Magazine* where scientists “had found a genetic link to homosexuality”. (T. 4153) Mr. Stockdale went on to describe how Mr. Freshwater had told the students the scientists were “wrong because the Bible states that homosexuality is a sin, so anyone who chooses to be a homosexual is a sinner; and that, therefore, science can be wrong, scientists can be wrong.” (Id.)

He used the example to indicate “material in the textbook in that particular unit could be incorrect.” (Id.)

There was objective support for the testimony about Mr. Freshwater’s use of religion in the answers to surveys Bonnie Schutte, a ninth grade science teacher, used at the beginning of each school year with her students. (BX 30 and 32) A representative sample of some questions and answers in her survey from students who were in Mr. Freshwater’s classes, include:

Questionnaire Topic:	Sample Response:	Sample Response:
What are some topics that you enjoyed studying last year (and why?)	Evolution and religion- I find those topics very interesting	Cells, because they couldn't have happened on their own
What was the most important concept that you learned in science last year?	The most important was learning about theories on how the world began. We debated on the Earth’s creation (God or Big Bang)	There is no proof that the big bang theory is true I guess how many things are said as fact when theory scientific things are simply theories.

(BX 32)

b. Discussion of Easter and Good Friday

Zach Dennis testified Mr. Freshwater discussed the meaning of Easter and Good Friday in class. According to Zach, Mr. Freshwater asked the class “What Good Friday was.” (T. 345) After Zach answered, Mr. Freshwater said “it should be called the greatest Friday or the best Friday ever.” (Id.) At the same time, Mr. Freshwater asked about the meaning of Easter. (Id.) He indicated this occurred during a discussion of the results of an assignment the students had been given to determine when Easter would occur “due to the moon and the calendar.” (Id.)

On April 9, 2008,³ Mr. Short and Mr. White met with Mr. Freshwater to investigate the complaint raised about his discussion of Easter in the classroom. After first denying there was any such discussion, Mr. Freshwater acknowledged that he may have spent one or two minutes talking about Easter and what it means to Christians. Mr. White had a clear recollection of Mr. Freshwater saying: “Well, yeah, I probably did, I talked about Easter a little bit, talked about the resurrection, I talked about Good Friday”. (T. 620) Mr. Short indicated that was one or two minutes too long. (Short, T. 74, White, T. 620)

Katie Beach testified Mr. Freshwater gave an extra credit assignment for students to determine how the dates for Easter and Good Friday actually were determined (as part of the astronomy section). (T. 964) When he continued discussions about Easter and Good Friday beyond the way in which the dates were determined, she felt it was inappropriate and it made her uncomfortable and so she left the room to do special education paper work. (Id.)

Mr. Freshwater tells a different story, actually a couple of different stories. When Mr. Freshwater testified in October, 2008, he acknowledged there was a discussion as to how the dates for Easter were determined but first denies it was an assignment for students, extra credit or otherwise and then indicates he cannot recall whether or not it was an assignment. (T. 450) He acknowledges they discussed this in most of his classes and but gives three different answers as to whether a discussion of the meaning of Easter and Good Friday was included:

Q. Now, but beyond that, do you recall a discussion about the meaning of Easter?

A. Did a student bring it up about Easter? The meaning of Easter?

Q. Well, my first question was, do you recall whether there was a discussion about the meaning of Easter?

³ Mr. Freshwater claims to have prepared contemporaneous notes of meetings. (T. 4337) He shows no notes for a meeting on April 9 with Mr. Short, but indicates a meeting on April 2 when Easter was discussed (EX. 133) Mr. Short could not have had a meeting on April 2 as he was in Columbus that day. He testified the meeting occurred on April 9. (Short, T. 72-73, 6248-49; White, T. 619-620) This is another example where Mr. Freshwater’s credibility is in question. If he could not get the date (or all the subjects) of a meeting correct in a “contemporaneous” note, was he truthful when he said the notes were all prepared at the time meetings are shown?

A. Yes.

Q. Did that occur in only one classroom or did it occur in more than one classroom last year?

A. I would have to say probably in most of them, because we were talking about the moon. We were talking about Easter, Thanksgiving, Christmas. So did I talk about Easter? Yes.

Q. So you talked about the meaning of Easter?

A. The meaning?

Q. Yes.

A. No.

Q. That was my question.

A. I apologize.

Q. Was there a discussion about the meaning of Easter in each of your classrooms or in more than one classroom?

A. I don't remember about the meaning of Easter, but, yes, we talked about Easter.

Q. Do you recall a discussion about the meaning of Easter in Zach's class, the eighth period?

A. Yes.

(T. 450-451)

When Mr. Freshwater was interviewed by HR OnCall he stated: "I talked about it [Easter] objectively, what happened on that day and why we celebrate it." (EX 148 at p. 52) In the affidavit purported to have been prepared in May 2008, Mr. Freshwater indicates a student asked a question about the meaning of Easter and another student answered. He does not indicate he had any participation in that discussion. (EX 153) In December 2009, Mr. Freshwater denies he told Mr. Short he had any discussion about the meaning of Easter and Good Friday or that Mr. Short even asked him if he had any such discussion in his classroom. (T. 4479-80) Mr. Short confirmed his earlier testimony that Mr. Freshwater had acknowledged talking about Easter and Good Friday when he met with Mr. Short and Mr. White. (T. 6249-50)

c. Answers In Genesis

John Freshwater acknowledged assigning approximately a dozen students in his class to go to the *Answers in Genesis* website (www.answersingenesis.org). (T. 471-72) He also testified he went to the *Answers in Genesis* website in his classroom in conjunction with his

standards on bias. (T. 455) Zach Dennis indicated Mr. Freshwater had him go to the *Answers in Genesis* website to research dinosaurs. (T. 347) Mr. Freshwater acknowledged he had done so. (T. 455)

Subsequent to his original testimony, Mr. Freshwater denied ever sending Zach to do research at the *Answers In Genesis* website stating Zach asked Mr. Freshwater if he could do research there. (BX 83 at pp. 278–79) In December 2009, Mr. Freshwater testified that when he had previously testified about assigning a dozen students to do research on the *Answers In Genesis* website he was actually referring to taking adults in a van to the *Answers In Genesis* museum in Kentucky. (T. 4615) This conflicts with his earlier testimony that he assigned Zach and other students to do research at the website consistent with his standards and that he went to the website in class consistent with his standards for teaching science.

Superintendent Short found a memorandum to Mr. Freshwater among the materials from his classroom from Principal Jeff Kuntz written in 1994 prohibiting Mr. Freshwater from distributing a pamphlet about an *Answers in Genesis* seminar which was the dissemination of information about a religious seminar. (T. 6222-24; BX 84) In the memorandum, Mr. Kuntz advised Mr. Freshwater it was impermissible to offer extra credit to students for attending the seminar. (BX 84) Mr. Short spoke with Mr. Kuntz who did not remember the incident but confirmed it was his initials in the upper right hand corner of the document. He also confirmed the note in the corner meant he had delivered the note to Mr. Freshwater on the date shown. (T. 6224) Mr. Freshwater denied ever receiving or seeing the memorandum. (T. 4808-09)

The *Answers In Genesis* website is a Christian apologetics website which describes itself:

"*Answers in Genesis* is an apologetics (i.e., Christianity-defending) ministry, dedicated to enabling Christians to defend their faith and to proclaim the gospel of Jesus Christ effectively. We focus particularly on providing answers to questions surrounding the book of Genesis, as it is the most-attacked book of the Bible. We

also desire to train others to develop a Biblical worldview, and seek to expose the bankruptcy of evolutionary ideas, and its bedfellow, a 'millions of years old' earth (and even older universe)." (BX # 23)

Answers In Genesis is an organization with a website that promotes creationism.
(Princehouse 1544-45)

d. The Watchmaker Video

There is an allegation Mr. Freshwater showed a video in his class **and** at an FCA meeting called "The Watchmaker." (Z. Dennis, T. 343, 3128; BX 17) Kerry Mahan, a special education teacher who was sometimes in Mr. Freshwater's classroom during the 2007-08 school year, testified he showed the video "The Watchmaker" in his "class." (T. 1005-06) She testified a second time on behalf of Mr. Freshwater, and tried to help Mr. Freshwater's case. She acknowledged she had seen the video but could not recall whether she had seen it during his class or during FCA. (T. 3733-34) She testified she saw it in his classroom was seated in her normal seat. The class looked full. (T. 3732-33) On cross examination, she acknowledged she did not think she had gone to an FCA meeting in 2007-2008 although she had been to a few, "not very many" over time. (T. 3774-75) She did not attend Leadership meetings although she would pop in to ask Mr. Freshwater an academic question, but would not stay. (T. 3775) the only FCA meetings held in Mr. Freshwater's classroom was Leadership meetings.

Another student in the 8th period science class also indicated she remembered seeing the video. (Wayne, T. 5268) She testified she was not part of the FCA Leadership group that met in Mr. Freshwater's room and had attended one FCA meeting, but someplace other than Mr. Freshwater's classroom. (T. 5269) In spite of the attempt to make her affidavit appear as though she did not see the video in Mr. Freshwater's class, her testimony made clear she did not know whether or not she saw it in Mr. Freshwater's class. (T. 5177-78; EX 196)

Mr. Freshwater denies showing the video in his class and claims his daughter showed it during an FCA meeting. (T. 453) Mr. Freshwater received the video in an email from Ms. Mahan and they watched it together in his room with his daughter on his computer before school. (Freshwater, T. 453; Mahan, T. 3731) Ms. Mahan does not recall Mr. Freshwater's daughter suggesting they show it at an FCA meeting. (T. 3731)

Dr. Patricia Princehouse is a Fellow at the Institute for the Science of Origins at Case Western Reserve University and holds her Ph.D. from Harvard, a Masters from Yale University and her Bachelor's Degree from Kent State University. She has published in scientific journals on evolution and has expertise in the history of Creationism. (BX 56) Dr. Princehouse viewed the "Watchmaker" video and testified it is not science, but promotes Intelligent Design which is nothing more than Creationism. (T. 1540-41, BX 60)

e. Debate on Evolution and Creationism

Mr. Freshwater acknowledges holding a debate concerning creationism and evolution in his science classes in 2007-2008. (T. 460) The record establishes he did so in prior years. Joe Barone, a former student testified that when he was in Mr. Freshwater's class, there was a debate on the validity of evolution versus creationism or intelligent design. (T. 1330) Mr. Freshwater told students "he felt uncomfortable because he did not believe in evolution." (T. 1331) As the student who took the side of evolution, Mr. Barone was accused by other students during the debate of not being a "real Christian" and felt persecuted and unsupported by Mr. Freshwater. (T. 1340-42)

f. Expelled

While Mr. Freshwater was being investigated for classroom proselytizing, he assigned the following extra credit project:

EXTRA CREDIT

Watch and exam the file “Expelled- Ben Stein” and explain why it is important to examine this film objectively and not let bias affect your observations.

(EX 43)

Mr. Freshwater had touted the movie during his speech at Public Square on April 16, 2008. (BX 105) During the speech he indicated the film was a documentary dealing with the subject of viewpoint discrimination and discussed that discrimination against religious and religious views was un-American. (Id.)

During the hearing, he tried to justify the assignment stating it related to the bias standard and was full of data. (T. 4481-82, 4867-68)

Dr. Rissing explained how the movie was not consistent with the bias standard and brought in a creationist view and argument. He specifically stated it would “not be appropriate in a science class.” (T. 6153-54)

g. The Souhrada Complaint

In 2006, a complaint was filed against Mr. Freshwater by parent Paul Souhrada for the use of a handout entitled “Darwin Theory of Evolution-The Promise and the Problem.” (BX 33) In this complaint, Mr. Souhrada challenges the use of Religious Advocacy in Mr. Freshwater’s classroom and expresses concern over Mr. Freshwater’s use of religious material.⁴

Mr. Souhrada, an editor at the *Columbus Dispatch*, researched the document and conclude it had its origins in a website sponsored by All About God Ministries. (T. 869; BX 33)

The document uses the term “irreducibly complex” in describing how the world of biochemistry has dispelled Darwin’s basic theory. (BX 33) Mr. Freshwater attempted to justify his use of the document by submitting a lesson plan which included references to “Irreducible

⁴ Mr. Souhrada describes his complaint as “a persistent issue in Mr. Freshwater’s class.”

Complexity” and “Specified Complexity”, as well as to “Peppered Moths.” (EX 26) Irreducible Complexity and Specified Complexity of those concepts are part of the mantra of Creationism and Intelligent Design. (Princehouse, T. 6026, 6031-31) Similarly, peppered moths are one of the areas of evolution challenged in *Icons of Evolution* and *Survival of the Fakest*, Creationist manifestos. (Princehouse, T. 1551)

h. The Religious Display in Mr. Freshwater’s Classroom

Mr. Freshwater’s room contained multiple items of a religious nature. In the front of his room there is a bulletin board that had two neon banners from the Cross Club, a poster of the Ten Commandments, a poster of the President and his Cabinet in prayer (the “Bush/Powell” poster) and a poster announcing the Will Graham Celebration, an evangelical event. (BX 25 and 27; Beach, T. 969) There were posters on the cupboards around the room on cabinet doors that contained both character statements and Biblical verses. (Mahan, T. 3780-81; Ritchey, T. 5950; BX 26, 106, 107, 108) Three copies of the Ten Commandments adorned the windows next to the front door. (BX 28) Mr. Freshwater’s Bible rested on his desk and starting April 14, 2008, a second bible and the book *Jesus of Nazareth* were on the lab table. (BX 29, 45, 47)

D. Fellowship of Christian Athletes

Mr. Freshwater was the monitor for the 8th grade Fellowship of Christian Athletes. Mr. Freshwater testified he understood the necessity of his non-participatory role (T. 409; BX 83 at pp 286-87). Mr. Freshwater testified that he understood this prohibition existed in order to protect the constitutional rights of his students. (BX 83 at pp. 284; 287) Mr. Freshwater also asserts he never received training on how to monitor the FCA prior to the 2007-2008 school year. (T. 375; 405) While Mr. Freshwater categorically denies prior training by former principal Jeff Kuntz, (Freshwater, T. 4483), his testimony was directly contradicted by his own witness:

Q. Would it surprise you to hear that Mr. Freshwater said that he never received any guidance or guidelines concerning what he could do as monitor of FCA until he got that in the fall of 2007-2008?

A. That would surprise me.

Q. Why would that surprise you?

A. I gave John a handout on a couple of occasions that spoke to an advisor's responsibility. . . . that you were an advisor and that you were to be nonparticipatory; that it was students that attended; that it was to be purely voluntary; that it was to be student-led, student-initiated; that it was to be during noninstructional time with the students.

(Kuntz, T. 3828) These Equal Access Act guidelines were reviewed with Mr. Freshwater at least "on two occasions." (T. 3828)

E. Insubordination

Mr. Freshwater was directed to remove his religious display from his room and to take his Bible off the desk and keep it out of sight when students were in the room. . (Short T. at 75, Freshwater T. at 442-43, White T. at 506) He was first directed to do so on April 7, 2008. (White, T. 504-506, BX 12) Mr. Freshwater failed to comply with that directive.

Mr. White met with him again on April 11, 2008 and nothing had been removed from his classroom or concealed in his classroom. (Freshwater, T. 4409-10) Mr. White met with him about his need to remove the religious objects and comply with the directive of April 7. (White, T. 506-12) Mr. White had the contents of room documented over the weekend. (BX 25, 26, 27, 28, 106, 107 and 108)

When Mr. White next met with Mr. Freshwater on April 14, 2008, not a single item had been removed or stored. As a result, Mr. White set a specific deadline for compliance. (T. 512-513; BX 13)

By April 16, Mr. Freshwater removed many of the religious materials, but he refused to comply with the directive to take his Bible off his desktop when students were present. He first announced his decision at a press conference on Mount Vernon's Public Square. (BX 105)

After he made the announcement publicly, he gave his employer notice that he would not comply with the directive he was given. (BX 14)

Mr. Freshwater checked out two books from the Middle School Library: “The Oxford Annotated Bible” and “Jesus of Nazareth” by Harry Emerson Fosdick. (Freshwater, T. 444-47; Short, T. 6257; BX 102, 103) He did so on April 14, 2008, two days before the final deadline for removal of the materials from his room. (BX 102, 103) He placed those two books in his classroom on the lab table, next to his desk and his personal Bible. When asked by HR OnCall if he checked them out to make a statement, Mr. Freshwater responded “Yea” (EX 148, pp 45-46)

Mr. Freshwater left the two bibles and book out on his desk and lab table through the end of the school year and also left up a poster showing President Bush and his Cabinet in prayer. (BX 45, 46, 47)

Mr. White advised Mr. Freshwater the failure to remove his Bible from his would be insubordination. (White, T. 513; Freshwater, T. 447-48)

ARGUMENT

A. Tesla Coil

WHEREAS, in December 2007, Mr. Freshwater used a high frequency generator, Model BD10A manufactured by Electro-Technic Products, Inc., to make the shape of a cross into the arm of eighth grade students; at least one of which received red welts, blistering, swelling and blanching in the surrounding area; (a) The instructions for Model BD10A clearly indicate one should “[n]ever touch or come in contact with the high voltage output of this device” and Mr. Freshwater knew or should have known the manufacturer’s advice regarding proper use of the science instrument; and (b) Mr. Freshwater branded a religious symbol on the skin of some eighth grade students. The mark has lasted as long as 3-4 weeks on at least once student who described the area as “very painful.”

The “truth” is Mr. Freshwater **burned** multiple students. Mr. Freshwater acknowledges he has used the Tesla Coil on 500-600 students during his twenty-one years at Mount Vernon

and he used it during the 2007-2008 school year on Zach Dennis and several other students. (Freshwater, T. 379, 403)

Mr. Freshwater asserts he should be absolved of any responsibility for his use of the Tesla Coil because he did not apply the Tesla Coil to any students after receiving the January 22, 2008 written reprimand; Zach Dennis' claims of injury are false; other teachers do it so why should he be punished; he was never given any instructions on the use of the Tesla Coil; and he has used it in the past and no one has been injured. None of these excuses pardon Mr. Freshwater from injuring students or from using the Tesla Coil in a dangerous manner, nor do they preclude the termination of his employment. In his capacity as a public school teacher, Mr. Freshwater is required to use reasonable care to protect the welfare, health and safety of his eighth grade students. *Baird et al. v. Hosmer*, 46 Ohio St. 2d 273, 278 (1976); *Guyten v. Rhodes*, 65 Ohio App. 163 (1940). His blatant misuse of the Tesla Coil is a clear "breach" of his duty.

Mr. Freshwater's misuse of the Tesla Coil constitutes good and just cause for termination of employment for a number of reasons.

1. The January 22, 2008 Letter

When the January 22 letter was issued, the Superintendent was under the impression it was an isolated incident involving a single student. Subsequently, he learned Mr. Freshwater had used the Tesla Coil on multiple students **and** had used it on a special education student who had not "volunteered".⁵ (Short, T. 61-62) Further, as other information about Mr. Freshwater's activities in his classroom came to light, the significance of his making a religious mark on students took on a greater significance.

2. Zach Dennis Was Burned by the Tesla Coil

⁵ Any concept that an eighth grade student can consent to be injured by volunteering to be shocked, particularly without full disclosure of the possible harm is sadly misplaced.

Throughout the hearing, Mr. Freshwater's counsel tried to cast doubt as to the validity of the photographs of Zach's arm. Without providing a scintilla of evidence he claimed the pictures were "photoshopped" or doctored in some way, such as with a marker (Levy, T. 755-56; Z. Dennis, T. 3097) The testimony of Mr. and Mrs. Dennis and Zach consistently indicate the photos were taken within nine to twelve hours after the Tesla Coil had been applied to Zach's arm. (J. Dennis, T. 366-67; Z. Dennis, T. 3092-95; S. Dennis, T. 3202) The photos were produced the next morning to Superintendent Short. (J. Dennis, T. 368; S. Dennis, T. 3204) At no point has Mr. Freshwater offered any credible evidence for his bold assertion that Zach "use[d] a marker," or that his injury or pictures of his arm were faked, forged or exaggerated.⁶ Such a blatantly unsubstantiated allegation is a shameful way to address the harm experienced by this thirteen year old boy.

There were repeated suggestions by Mr. Freshwater's counsel that Zach was not injured. That suggestion is contrary to the evidence.

Zach complained to his father that his arm was bothering him during hockey practice . (Z. Dennis, T. 342) There were red blotches and welts that appeared to be like blisters on his arm. (S. Dennis, T.3222) When Zach got home, he was in pain and had difficulty sleeping. (Z. Dennis, T. 342; J. Dennis, T. 365, 3328, 3342-43) Mrs. Dennis gave him Tylenol and used a cool wash cloth to help relieve the burning. (T. 3332) The mark was still on his arm when he woke the next morning and remained for about two to three weeks. (Z. Dennis, T. 3110)

⁶ There was an attempt to have testimony from Ben Neilson that when he saw the picture of the arm in the newspaper with the identification of Zach Dennis that it could not have been Zach Dennis' arm based upon what he had seen. (Neilson, T. 2646-52) That testimony must fail as it was allegedly in the Columbus Dispatch and research by Steve Short into all articles appearing in the Columbus Dispatch and Mount Vernon News revealed there was never a photograph of the arm published in the papers after the identification of Zach Dennis. (Short, T. 6255-56) Mr. Nielson recalled seeing the pictures in the paper when school was in session and they did not offer them. (Nielson, T. 2663; Short, T. 6255-56)

Dr. Levy, Chairman of the Department of Emergency Medicine at St. Elizabeth Health Center in Youngstown, reviewed the photographs of Zach's arm and opined to a reasonable degree of medical certainty the Tesla Coil caused a thermal burn that appeared to be a second-degree burn. (Levy, pp 746-748)

The evidence clearly establishes Zach Dennis was injured as a result of Mr. Freshwater's use of the Tesla Coil, even if Mr. Freshwater did not anticipate such an injury would occur.

3. The Hazards of the Tesla Coil

Mr. Freshwater acknowledged, confirmed by Zach Dennis, that Mr. Freshwater gave no warnings before using the device on students (BX 83 at pp. 171-72 and 192-93; Z. Dennis, T. 338-39; Freshwater, T. 402), nor did he take steps to insure students were properly grounded before using it. (T. 401-02) While Mr. Freshwater did not have instructions to the device, as a science teacher he should have been aware of the hazards in the use of such an electrical device.

Instructions for the Tesla Coil were available online at the manufacturer's website. (BX 6, Att. 17; Herlevi, T. 1068) The instructions to the Tesla Coil make clear what should **not** be done with the device:

- One should not come in contact with it or items it is energizing,
- It should not be used by pregnant women without consulting a physician,
- It should not be used by someone with a pacemaker without consulting a physician.

(BX 6, Att. 17, p. 3)

Dr. Levy explained the dangers of a burn from an electrical device indicating what can be seen is only "the tip of an iceberg because it can cause underlying damage that isn't seen." (T. 744) In describing the danger of the Tesla Coil to a 13 or 14 year old child, Dr. Levy testified "It has potential to cause significant damage...[as] [c]hildren are generally considered to have lesser resistance to current flow than adults" (Id.) Dr. Levy went on to describe various

dangers from the use of the Tesla Coil on a person including putting the heart into a “chaotic rhythm,” causing “subdermal burns,” thermal injury and cardiac injury. (Levy, T. 744-46, 751)

Mr. Freshwater acknowledged knowing the risk the Tesla Coil could cause subcutaneous burns, yet continued to use the Tesla Coil on students throughout his employment at Mount Vernon. (T. 384)

Mr. Freshwater has put students in danger by his use of the Tesla Coil. He has done so repeatedly for a number of years. By doing so, he has breached his duty of exercising due care to protect students in his charge from unreasonable risk of harm. *See Palace Hotel Co. v. Medart*, 123 Ohio St. 565 (1931). It is reasonably foreseeable that applying a high frequency, high voltage generator to the arm of a thirteen year old child will result in an unreasonable risk of harm. Just as in *Brownfield v. Warren Local School Dist. Bd. Of Educ.*, 1990 Ohio App. LEXIS 3878 (4th App. Dist. 1990) (Attachment 2), by failing to take appropriate safeguards and subjecting students to a risk of injury or even death, the Board has good and just cause to terminate Mr. Freshwater’s employment.

4. Mr. Freshwater Used the Tesla Coil on a Special Education Student

Zach Dennis provides one clear recitation of the December 6, 2007 incident when Mr. Freshwater used the Tesla Coil on Justin Newland, a special education student. Justin was asked by Mr. Freshwater to pick up one of the vacuum tubes used in the demonstration and when he bent over to pick it up Mr. Freshwater “shocked him in the back.” (T. 335, 3046, 3052) Justin relayed a similar story to Superintendent Steve Short indicating he got “zapped by Mr. Freshwater from **behind as he bent down to get a test tube.**” (Short, T. 61-62 emphasis added)⁷

⁷ Lori Hubbell’s recollection of what Justin told Mr. Short was different. She testified Justin said he got zapped in the back when he and Mr. Freshwater both bent over to pick up some paper and they bumped heads. (Hubbell, T.

Mr. Freshwater testified that shocking Justin was inadvertent, but had different versions of what occurred:

Date	12/10/07	5/15/08	5/25/08 ⁸	10/28/08	10/14/09	12/3/09
Description	No mention	No mention	Justin shocked when returning to his seat from looking at the tubes when he collided with Mr. Freshwater.	Justin shocked when going past Mr. Freshwater returning to his seat.	Justin shocked when coming up to do a demo with the tubes.	Justin shocked when he picked up a transparency from the floor.
Citation	White, T. 494-95, 554-55, 567-68, 582-86	EX 148	EX 128, ¶ 13	Freshwater, T. 395-96	BX 83, pp 194-96	Freshwater, T. 4282-83

Mr. Freshwater testified he did not know where he touched Justin with the Tesla Coil in October 2009 (BX 83 at p. 194); however, by December 2009, Mr. Freshwater had a clear recollection of where he touched Justin and offered the following:

He reached down to pick it up. I stepped down to take a look and see what No. 1 vacuum tube was. He grabbed that transparency and turned right back into me. And the Tesla Coil arced off into his **left side on his back side**. And it touched him.

(Freshwater, T. 4283) (emphasis added).

5033, EX 181¶ 7) However, on cross examination she acknowledged a number of inconsistencies between both her affidavit and testimony and what actually happened. She also indicated she was uncertain exactly what was said because it had been a long time ago, but that is what **she** told Mr. Hamilton – they bumped heads. (Hubbell, T. 5041)

⁸ There are serious questions as to whether the affidavits were actually completed on May 25, 2008 but for purposes of this section, the date shown is the date on the affidavit.

Laurie Hubbell recalled Justin told Superintendent Short Mr. Freshwater was just “playing with him” when he shocked him with the Tesla Coil. (Hubbell, T. 5042) That clearly suggests it was an intentional act. However, whether purposeful or inadvertent, Mr. Freshwater allowed the Tesla Coil to be in such a position that Justin Newland was burned. Ms. Hubbell saw the mark on his back two days after the incident. (Hubbell, T. 5039-40) This act is, at best, gross negligence on the part of an educator and at worst an intentional shock.

5. Mr. Freshwater Marked Students with a Cross

Shortly after issuing the January 22 letter, the Superintendent began fielding complaints about Mr. Freshwater’s presentation of religion in the curriculum; about exceeding his role as a monitor of the Fellowship of Christian Athletes; and about a pervasive display of religious articles on continuous display in his classroom. In light of that, the fact of Mr. Freshwater marking students with a cross became more significant.

Mr. Freshwater tells a number of different stories including, that the Tesla Coil does not leave a mark (BX 83, p. 186); that he did mark students, but only with an “X”. (Freshwater, T. 403, 4786) Zach Dennis not only testified the mark was a cross, but that Mr. Freshwater stated “it was a temporary tattoo and those crosses are going to be there for a while.” (Z. Dennis, T. 339) Some students did not recall or believe the mark to be a cross but some did. (Heck, T. 2173; Nielson, T. 2645; Ruhl, T. 5260) Perhaps most significantly, Simon Souhrada testified Mr. Freshwater made a cross with the Tesla Coil when he was in his class. (S. Souhrada, T. 886, 806-97) Looking at the pictures of Zach Dennis’ arm, the mark clearly appears to be a cross and not an “X”.

B. Religion in the Classroom

“[T]here were posters all around the classroom about Christianity and the Ten Commandments posted on the wall and . . . Then I started getting uncomfortable with just what I

was learning. And because we were learning things that were based out of Christianity, I didn't like being in that classroom and being Jewish.” (Hoefgen, T. 663) James Hoeffgen's experience in the 2004-2005 school year was no different than what students experienced in other years, including in the 2007-2008 school year. There was a vast array of religious materials posted in the room and Mr. Freshwater used his bible and religion to teach his science class.

Mr. Freshwater engaged in the religious indoctrination of his eighth grade students by using his science classroom as a pulpit for Christianity. Under the Establishment Clause of the First Amendment of the United States Constitution and the Mount Vernon School District Bylaws and Policy, a teacher may not: (1) interject his personal faith or religious materials into the school curriculum; (2) promote or denigrate any particular religion; or (3) interfere with a student's religious beliefs or practices. (EX 9) Mr. Freshwater has actively engaged in all three prohibited activities, as recently as the 2007-2008 school year.

1. Mr. Freshwater Taught Creationism and Intelligent Design

Answers in Genesis, “The Watchmaker”, debating evolution versus creationism or intelligent design, Biblical alternatives to “Big Bang” and evolution, the “Hydrosphere” theory, “here”, “Expelled – No Intelligence Allowed”, Dinosaur, Giraffe, Woodpecker, Angler Fish, “Survival of the Fakest” handouts, Legos and a myriad of other items all are part of the campaign Mr. Freshwater waged annually in teaching his students creationism and intelligent design and bringing “truth”, as he sees it, to them.

a. Answers in Genesis

With *Answers in Genesis*, Mr. Freshwater has chosen a website dedicated to creationism to make assignments to pupils and to use in his classroom. Which story told by Mr. Freshwater does one believe? On the one hand he testified he made assignments to approximately a dozen

students, including Zach Dennis, at the website and that he visited the website during his class periods. On the other hand, he later testified Zach asked to go to the website and he never assigned any students, he was confused by the question and was referring to taking a vanload of adults to the *Answers in Genesis* creationist museum in northern Kentucky. The two stories do not reconcile with one another and Mr. Freshwater should be found to lack credibility.

Zach Dennis should be given credibility – he tells of being assigned to do research by Mr. Freshwater on the *Answers in Genesis* website. When first confronted with that testimony, Mr. Freshwater acknowledges it as true and tries to justify it as part of his teaching standards. As his story evolves, the standards become irrelevant because he claims to never have made any assignments. What makes sense?

Dr. Joseph Faber, an assistant professor in Biology at the Ohio University and who served as a science consultant to the Ohio Department of Education where he helped develop model curriculum based upon the standards, reviewed the *Answers in Genesis* website. He looked at whether the materials there would fit the science standards, including specifically the “bias” standard on page 216 of BX 37 and found nothing on the website that would related to the science standards for 8th grade. (T. 1376-77) Dr. Faber noted the ideas developed on the *Answers in Genesis* website were not developed in a scientific manner, nor were they true alternatives to scientific theory. Dr. Faber testified *Answers in Genesis* encourages alternatives to science, which are non-scientific. (T. 1409)

Dr. Princehouse testified *Answers in Genesis* is a website supporting Biblical creationism. (T. 1545) By its own description, the website “seek[s] to expose the bankruptcy of evolutionary ideas, and its bedfellow, a million of years old earth” (BX 23)

Mr. Freshwater knew he was not supposed to assign or use *Answers in Genesis*. He had been warned in 1994 about *Answers in Genesis*' religious seminar and impermissibility of passing out their material or giving extra credit for attending. (BX 84) He had been warned about complying with the District's Religion policies in his evaluation in 2003. (BX 16) Yet, in spite of that, he still assigned students research at *Answers in Genesis* and used it in his classroom for all students.

By using *Answers in Genesis* in class and making assignments to research at the website, Mr. Freshwater engages in teaching creationism/intelligent design and in teaching his religious views, conduct that is prohibited. That act alone constitutes good and just cause for the termination of his employment.

b. "The Watchmaker"

The issue is again one of credibility. Was this video shown in Mr. Freshwater's science class? He says no, it was only shown at FCA by his daughter, Jordan. Zach Dennis specifically recalls it being shown in class and his recollection is corroborated by Kerry Mahan. Ms. Mahan indicated she was unsure whether it was shown during science class or at FCA. However, she testified when she saw it in his classroom, it was a full classroom and she was in her usual space. She also testified she did not stay for FCA leadership meetings, the only FCA meetings held in Mr. Freshwater's classroom, but only popped in and then out after asking Mr. Freshwater an academic question. Since the video was shown at a leadership meeting, she could not have seen it there, but must have seen it in the science class.

While a number of students did not recall seeing the video, there was much of what went on in Mr. Freshwater's class they failed to recall. However, one student, Maggie Wayne, also recalls seeing the video. She does not know whether she saw it in Mr. Freshwater's class or

elsewhere. However, she only attended one FCA meeting and it was not in Mr. Freshwater's room. (T. 5269) It stands to reason that if the video was shown at an FCA leadership meeting in Mr. Freshwater's room, she did not see it at the leadership meeting, but rather in science class.

The video is based on historic creationist arguments, according to Dr. Princehouse. (T. 1537-40) The website that displays the video indicates the Watchmaker is the "God of the Old and New Testaments of Scripture and has revealed Himself in the Person of Jesus Christ." (BX 59) It is the object of the video to have people acknowledge "there is one true Creator God". (Id.)

By showing "The Watchmaker", Mr. Freshwater is both teaching creationism and teaching his religious beliefs in the classroom, a violation of the Establishment Clause and Board policy. Showing the video constitutes good and just cause for the termination of his employment.

c. Evolution v. Creationism Debate

Mr. Freshwater had students debate creationism and evolution in the 2007-2008 school year, just as he had done in prior years. Joe Barone testified when Mr. Freshwater had them debate the issue in 2001-2002, the subject essentially turned on whether evolution was valid. (T. 1330) Katie Beach testified in 2007-2008, Mr. Freshwater offered creationism as one option or alternative to evolution. (T. 1002)

This testimony demonstrates a preconceived topic of discussion and the deliberate engagement of a prohibited topic of study. It is not permissible to offer creationism or intelligent design as scientific alternatives to evolution, in a public school classroom. *Edwards v. Aguillard*, 482 U.S. 578, (1987); *Weshegesic v. Bloomington Public Schools*, 33 F. 3d 679 (6th Cir. 1994).

Dr. Faber testified there is no curriculum standard in the eighth grade that would support a student debate on creationism vs. evolution. (T. 1373) A debate of this sort would not be a fruitful approach for learning about evolution, at this stage of student maturity. (Id) Further, he clarified that such a debate would not fall under the terms of the eighth grade “bias” standards so often invoked by Mr. Freshwater. (T. 1374) Creationism is an inherently religious concept. Moreover, Intelligent Design has been held to be a re-creation of creationism and is equally prohibited from being touted as a scientific alternative to evolution. *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 709 (M.D. Pa. 2005). Mr. Freshwaters’ presentation of creationism and intelligent design, as debatable “options” to evolution stand in direct conflict with the U.S. Supreme Court and the Mount Vernon School Policy. (EX 9) *Edwards v. Aguillard*, 482 U.S. 578 (1968).

d. Biblical “Alternatives” to “Big Bang” and Evolution

Mr. Freshwater acknowledges he offers students many alternatives to scientific theories – one specific example he gave was the “hydrosphere” theory as an alternative theory. He indicated “there’s a lot of different theories out there.” (T. 456-57)

Kerry Mahan testified Mr. Freshwater presented different alternatives and theories to evolution. (T. 3375) She testified he talked about the “hydrosphere” theory and that men and dinosaurs lived on earth together. (T. 3375-76) Like Ms. Mahan, Ms. Beach was in Mr. Freshwater’s classroom assisting students and she gave a specific example of Mr. Freshwater talking about the Big Bang theory not being able to explain how complex the world was and that **an alternate explanation can be found in the Bible!** (T. 961-62) She indicated his discussion of the “hydrosphere” was clearly a reference to Noah’s Flood and both she and the students understood he was talking about Noah’s Flood. (T. 965-67)

Students also testified about how Mr. Freshwater has offered alternatives to Evolution and the Big Bang over the years. Mr. Hoeffgen testified Mr. Freshwater showed videos indicating evolution was false. (T. 660) Simon Souhrada testified Mr. Freshwater discredited evolution and made it seem like it was something he did not want to teach. Mr. Souhrada indicated he would indicate what was wrong with evolution and showed a video to discredit it. (T. 881-82) Mr. Barone testified Mr. Freshwater actually told students he did not believe in evolution and discussed Intelligent Design. (T. 1331, 1333) Kate Button testified Mr. Freshwater talked about creationism and intelligent design. (1009-11) She indicated he tried to make out evolution as less than a scientific theory. (T. 1014-15) Taylor Strack recalled they talked about evolution and creation in Mr. Freshwater's class. (T. 3363)

The objective evidence of questionnaires filled out by Bonnie Schutte's students who had taken science from Mr. Freshwater indicate a variety of areas where they learned about religion and alternative theories to Big Bang and Evolution. (T. 779-96; BX 6, att. 11, 12, 13 and 14; BX 32)

All of this evidence runs counter to Mr. Freshwater's claim that he only teaches evolution; he has never target creationism intelligent design.

The theories espoused by Mr. Freshwater were religious theories. Teaching religious theories as alternatives to scientific theories in a science class is a violation of the Establishment Clause of the First Amendment of the U.S. Constitution and of Board Policy. *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971); *Edwards v. Aguillard, supra*. By teaching non-scientific alternatives to the Big Bang theory and to Evolution theory, Mr. Freshwater may have his employment terminated by the Board for good and just cause.

e. "Here"

Mr. Freshwater taught students to use the phrase “here” to question the accuracy of information in the textbook, particularly issues concerning scientific dating methods. As Ms. Beach pointed out, Mr. Freshwater explained in class the Bible has been support for a few thousand years, as far back as people have been found and that is all that can be known for sure. (T. 963) Ms. Schutte pointed out the difficulty in teaching students in the ninth grade when it came to things such as scientific dating because of what Mr. Freshwater had taught them – “The have a misunderstanding about accuracy of dates in science.” (T. 783)

That age of the earth is a pivotal concern in Mr. Freshwater’s personal belief system has been demonstrated in a couple of ways. First, by his own acknowledgement that he goes to the *Answers in Genesis* Museum in Northern Kentucky combined with the mission of *Answers in Genesis* to bring “truth” about the age of the earth is me. The other is the statement reported by Katie Beach that the Bible has supported what occurred for a few thousand years “and that’s as far back as we can trace the earth.” (T. 963)

Providing a specific example of Mr. Freshwater’s teaching strategy, Deb Strouse, the monitor in his classroom after April 22, 2008, relayed an incident that occurred on May 6, 2008: “Mr. Freshwater presented the following material on “Cell Theory” to his class:”

All living things are made up of one or more cells. Book says cells come from existing cells. Where is a red flag on this one? Where did the first cell come from? The first cell came from a rock. So did it come from another cell? No. So, is the cell theory correct? No. Look in your book, do you see why the cell theory is wrong? Evolution theory red flag amino acids form cells. That should be a question mark in your book, we do not know where the first cell came from.”

(EX 15)

Disclaimers regarding the theory of evolution as the only explanation for the development of humankind have been found to be unconstitutional. *Frelier v. Tangipahoa Parish Board of Education*, 185 F.3d 337 (5th Cir. 1999). The use of the term “here” as a means

of espousing his religious beliefs provides good and just cause for the termination of Mr. Freshwater's contract.

f. Expelled – No Intelligence Allowed

Mr. Freshwater offered students extra credit for attending the movie entitled *Expelled: No Intelligence Allowed*. (BX 6, Att.7) The film seeks to “expose the scientific community and universities around the world for discriminating against any scientist who wishes to explore the possibility of **Intelligent Design “as an alternative to Darwin's theory of evolution.”**”⁹ The movie implies the understanding of evolution inevitably or necessarily leads to a rejection of religious belief. Thus, the assignment whether voluntary or mandatory is impermissible and is simply a form of John Freshwater's religious advocacy.

Mr. Freshwater made clear in his Speech on April 16 why he wanted people to see the movie – “This brilliant documentary speaks directly and powerfully to the subject of viewpoints of discrimination in American schools today. . . . Discrimination against religious and religious views as un-American. . . .” (BX 105) Mr. Freshwater lays down his “viewpoint discrimination” flag during the administrative hearing when he attempts to plead ignorance of the films religious connotations and of the films blatant attack on evolutionary theory. Mr. Freshwater attempts to classify the extra credit assignment as derivative of an eighth grade standard addressing experimental reproduction, aka the “bias standard”. (T. 4481-82)

The personal bias identified by Mr. Freshwater is a mischaracterization of this curriculum indicator. More faithfully, Dr. Rissing testified *Expelled* would be antagonistic to Indicator 2 of Benchmark B of Scientific Ways of Knowing: “The point, as I understand it, of *Expelled* is that there's been bias against creationists in the academic world. What we're talking about here is

⁹ <http://www.expelledthemovie.com>.

bias in the way you go about posing and answering scientific questions within the realm of science. *Expelled* is bringing in a creationist view and the argument that we should not limit ourselves just to natural explanations. . . . It's been repeatedly determined to **not be appropriate in a science class**. There's risks involved in trying to substitute that for science." (T. 6153-54 emphasis added).

Promoting a religious based movie as an extra credit assignment is impermissible.

g. Mr. Freshwater's Lesson Plan for April 4, 2006 (EX 26).

In his attempt to justify the distribution of the worksheet, "Darwin Theory of Evolution-The Promise and the Problem," Mr. Freshwater submitted his lesson plan for the week of April 4, 2006. The lesson plans included a discussion of "Specified Complexity" and "Irreducible Complexity," topics connected only with Intelligent Design.

Irreducible complexity is the key term of "intelligent-design" creationism. (Princehouse, T. 6026) By its terms, Irreducible complexity states that certain biological systems are too complex to have evolved from simpler or "less complete" predecessors, through natural selection. It is not a scientific concept that exists in literature, nor has it been peer reviewed. (Id) Dr. Princehouse testified the irreducible complexity is a "hot-button ter[m]" in the ID field; however, it is not biology. Dr. Princehouse opines that "[e]ven if it was biology somehow, it would not speak to the [bias indicator], it would not speak to the benchmark." (Princehouse, T. 6151)

Specified Complexity is an argument intended to indicate a "kind of irreducible complexity that fits a previously seen pattern" This is "an old creationist argument [that is] embodied in the Watchmaker video/website." (Princehouse, T. 6031-32)

Even Mr. Freshwater's lesson plan contradicts his testimony and indicates he has been teaching Intelligent Design over the past several years and after the Board rejected his proposal in 2003. His actions provide good and just cause for the termination of his employment.

h. Other Materials

There are a myriad of other materials that are in evidence showing Mr. Freshwater's attempt to teach creationism and intelligent design, including his use of Legos in his classroom (something he denied at the hearing but stated he did as experimentation in his class on a radio interview with Dr. Johnston) (BX 89); his use of worksheets for the Giraffe, the Woodpecker and the Angler Fish, all of which ask if ID is involved (BX 38, 39, 40, 41, 49, 50, 53); teaching about the Flood and Tower of Babel as part of his Tall Towers project (BX 90, 91); and having students read materials like "Survival of the Fakest" (BX 24), "Dragon History" or "Dinosaur Fossils – Age Old Debate" from All About God Ministries¹⁰ or "Dinosaur Extinction" or "Dinosaur Extinction – Compelling New Theory" (BX 6, Att. 9, BX 57) or "Darwin's Theory of Evolution – The Premise and Problem", also from All About God Ministries. (BX 6, Att. 10)

All of these materials are evidence Mr. Freshwater has taught Intelligent Design or Creationism and he has taught it for years.

2. In Addition to Bringing Religion Into the Classroom By Teaching Intelligent Design and Creationism, Mr. Freshwater Impermissibly Brought Religion Into His Classroom.

a. Mr. Freshwater Taught His Beliefs About Homosexuality and Sin

Jim Stockdale credibly testified about how Mr. Freshwater used a news story about a "gay gene" being discovered by scientists to tell students scientists are not always factual and the textbook is not always factual because homosexuality is a sin according to the Bible. He used this to discredit information about the creation of the earth and the universe in the 2006-2007

¹⁰ <http://www.allaboutcreation.org/dinosaur-fossils.htm>

school year. He referenced his Bible. Zach Dennis corroborates Jim Stockdale's testimony when he tells how Mr. Freshwater talked about magnets and related them to humans – "opposites attract, and it should be the same with humans." (T. 350) Clearly, Mr. Freshwater was talking about homosexuality.

Such conversations have no place in the classroom and are a reflection of Mr. Freshwater's religious point of view. If an isolated incident, one could warn him and move on. However, Mr. Freshwater repeatedly brings his religion into the classroom and should have his employment terminated for good and just cause.

b. The Discussion of Easter and Good Friday

With the varied and inconsistent stories Mr. Freshwater has told about what happened in his classes regarding Good Friday and Easter, his testimony cannot be found to be credible. Is it credible that students brought up the same issue and provided all of the answers in all of his classes as Mr. Freshwater suggests? His admission to Superintendent Short and Principal White that he discussed the meaning of Good Friday and Easter, but only for one or two minutes probably understates what occurred. Katie Beach and Zach Dennis both provide an unbiased account of what occurred – simply, that Mr. Freshwater discussed the meaning of Easter and Good Friday with his classes. Katie Beach believed Mr. Freshwater was going too far and felt uncomfortable and left the room. By stating Good Friday should be considered the "Greatest or Best Friday of All" or words to that effect, Mr. Freshwater is not teaching about religion, he is promoting religion. That is impermissible. See, *Abington Township v. Schempp*, 374 U.S. 203, 224 (1962); *Edwards v. Aguillard*, *supra*.

c. The Anabolic Outlaw

Mr. Freshwater invited Dennis Bates to speak to his eighth grade science class. Mr. Freshwater also acknowledged that he had copies of *Anabolic Outlaw*, “laying around” in his classroom. (Freshwater, T. 5860, 5887-89) *Anabolic Outlaw* is a book which tracks the spiritual testimony and journey of Mr. Bates and how he overcame an addiction to drugs and alcohol. (Bd. Ex. 104). The book begins with a quote from Revelation 12:11 “and they overcame him by the blood of the Lamb, and by the word of their testimony; and they loved not their lives unto the death,” and concludes with “The Invitation;” which provides an opportunity for the reader to “confe[ss] to God that I am a sinner, and belie[ve] that the Lord Jesus Christ died for my sins on the cross and was raised for my justification...” (Board Exhibit 104). Tokala Redman testified she received one of these books as a student in Mr. Freshwaters’ classroom. (T. 5123) Mr. Freshwater does not contest that he provided the booklet to Ms. Redman; however, he asserts the book is not religious in nature. (T. 5888) This goes beyond simply a challenge to Mr. Freshwaters’ credibility; it suggests Mr. Freshwater may be unable to understand it is impermissible to hand out the “salvation message” to public school students. This presents a frightening glimpse into what else Mr. Freshwater may have presented to his eighth grade students, without any understanding of the detriment associated with violating a students Constitutional rights.

d. Using Material from Ministry Websites Is Impermissible

As discussed above, Mr. Freshwater sent students to the *Answers in Genesis* website, passed out material from the All About God website and showed a video from the kids 4 truth website. Each of those websites is a ministry website. Their mission is to proselytize.

Answers in Genesis is “an apologetics (i.e. Christian defending) ministry” which seeks to proselytize concerning creation as set forth in Genesis. All About God is sponsored by its

ministry “based on solid, fundamental Christian doctrine.”¹¹ Kids 4 Truth runs a website “to inspire and equip God’s people to reach boys and girls worldwide with . . . teaching of God-focused truth.”¹²

The “truth” Mr. Freshwater would deliver is the word of his god. Proselytizing in the public schools is impermissible and justifies the termination of Mr. Freshwater’s contract for good and just cause.

e. Mr. Freshwater Impermissibly Promoted a Will Graham Celebration

In describing Mr. Freshwater’s classroom activity in conjunction with a Will Graham evangelical event that was trying “to reach a younger generation”, Ms. Beach indicated Mr. Freshwater had a poster of the event in his room with the dates of it, had pens with information about the event; and “told the students the event was happening and where and that it was free.” (T. 969-70)

After the event, he discussed the event and asked the students who attended if they enjoyed it. (T. 970)

Will Graham is the nephew of world famous evangelist Billy Graham. Operating under the umbrella of Billy Graham Evangelistic Association (BGEA), Will Graham conducts evangelistic “Celebrations” where the primary objective is to “bring uncommitted individuals into a personal relationship with Jesus Christ and firmly establish them in a local church.” In 2007, Will Graham and BGEA held a “Greater Knox County Will Graham Celebration” at Kenyon College, where Mr. Freshwater served as the *Student Ministries Director*. (Bd. Ex. 116; Short, T. 6247, Kline, T. 2792)

¹¹ <http://www.allaboutgod.com/faith-statement.htm>

¹² <http://kids4truth.com/about.aspx>

This is just another example of how Mr. Freshwater used the platform of his classroom in an attempt to proselytize the impressionable students in his charge. It provides further good and just cause for the termination of his employment.

f. Mr. Freshwater Had an Extensive Religious Display in His Classroom

Mr. Freshwater had an extensive display of religious materials in his classroom. A display of religious symbols, texts, or artwork on school property that is not integrated into appropriate secular curriculum is per se a violation of the Establishment Clause. *Stone v. Graham*, 449 U.S. 39, 42 (1980); *ACLU of Kentucky v. McCreary County*, 354 F. 3d 438 (6th Cir. 2003). Since it cannot be asserted that Mr. Freshwaters' cacophony of religious posters, texts, banners and Bibles have an educational function, their permanent display in a public school classroom stands in direction violation of the First Amendment to the U.S. Constitution.

Not only did Mr. Freshwater have posters of the Ten Commandments covering the windows looking into his classroom, but he had at least one copy on the bulletin board in the front of his room. The Ten Commandments may not be displayed in a public school unless integrated into the school curriculum. *Stone v. Graham*, 449 U.S. 39, 42 (1980).

Mr. Freshwater had posters on cabinets around his room with motivational sayings and Bible text references. Even if Freshwater argues that the motivational statements have meaning to all religions, or that the posters are not inherently a symbol of Christianity, the Bible is central only to Christians.¹³ Thus, the verses cited from that text have a proselytizing, affirming effect that some non-believers may find deeply offensive. "While these may seem *de minimis* to others, particularly those raised in the Christian faith and those who do not care about religion, a few see it as the government favoring one religious group and downplaying others. It is the rights of these few that the Establishment protects." *Edwards v. Aguillard, supra* at 583-584.

¹³ The Old Testament will also be recognized by Jews.

Mr. Freshwater seeks to justify the “Bush/Powell” poster as patriotic. However, it has no relevance to the school sponsored curriculum in Mr. Freshwater’s classroom and, therefore, is a representation of religious faith, in clear violation of the Establishment Clause of the First Amendment.

Mr. Freshwater’s placement of his Bible, either alone or together with the library Bible and the *Jesus of Nazareth* book, are inappropriate and, in this case, a violation of the Establishment clause. It is particularly problematic because of the charges and evidence Mr. Freshwater refers to the Bible in teaching his science class. It is not part of the curriculum. The Tenth Circuit has directly considered a Bible on the desk of a public school teacher, holding that government neutrality is compromised in the case of such a biblical display. *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990).

Mr. Freshwater did remove a portion of his religious display when directed to do so, but the maintenance of the remainder of the display and the addition to the display become an impermissible part of his endorsement of religion and violation of the Establishment Clause in his teaching efforts.

C. FCA

WHEREAS, Mr. Freshwater was the monitor for the Fellowship of Christian Athletes at the Middle School and exceeded the statutorily imposed limitations of that position in the following manner: (a) Mr. Freshwater conducted and led prayer in the Fellowship of Christian Athletes (FCA) meetings, exceeding his mandatory non-participatory role; (b) Mr. Freshwater has asked students to lead prayer in FCA meetings;(c) Mr. Freshwater frequently went beyond his role as monitor and contacted guest speakers for FCA events or recommended speakers to students.

Mr. Freshwater exceeded the limitations on his role as a monitor of the Fellowship of Christian Athletes (“FCA”) in three ways:

- he controlled the activities of the student group by leading FCA meetings;

- he contacted guest speakers; and
- he initiated and engaged in active prayer with FCA students and directed FCA students to pray.

Each of the violations listed above constitutes a separate and direct infringement of the Equal Access Act (20 U.S.C.S. § 4071).

Under the Equal Access Act (the “Act”) a school provides a fair opportunity for access to a student group if such a school uniformly provides access where, among other things:

- (1) The meeting is voluntary and student-initiated;
- (2) There is no sponsorship of the meeting by the school, the government, or its agents or employees;
- (3) Employees or agents of the school or government are present at religious meetings only in a non-participatory capacity;

20 U.S.C.A. § 4071(c)(1-3). Mr. Freshwater’s participatory role as an FCA “monitor” particularly violates the listed elements. Mr. Freshwater’s testimony regarding his conduct with the FCA is contradictory and deliberately misleading. The consistency of Mr. Freshwater’s contradictory and misleading behavior stretches his credibility beyond repair.

A. Mr. Freshwater Initiated Activities within the FCA

Zach Dennis testified Mr. Freshwater initiated multiple activities within the FCA.

Specifically, Zach indicated Mr. Freshwater:

- selected and played videos to FCA students, including “Obsession” and “The Watchmaker”;
- encouraged FCA students to call local movie theatres in order to promote the movie Expelled and to attend a showing of the movie;
- directed FCA students not the see the movie “the Golden Compass”;
- participated in, led and assigned students to pray at the FCA; and
- picked some of the guest speakers.

(Z. Dennis, T. 350-56, 3157, 3186-87) While Mr. Freshwater denied each of these assertions, the facts, and occasionally his own testimony show otherwise. (J. Freshwater, T. 421, 429, 478; EX 148 p. 36, BX 83 pp 289, 291-92).

Mr. Freshwater tried to assign his inappropriate conduct to actions by his daughter. Mr. Freshwater attempts to bypass clear legislative prohibitions by abdicating his responsibility as an educator and claiming religious freedom, as a parent. This strategy is both flawed and demonstrative of his lack of credibility. Mr. Freshwater asserts that he never showed “Obsession,” an anti-Muslim film, to the FCA, nor does he acknowledge any responsibility for showing “The Watchmaker”; however, in both instances Mr. Freshwater received or sought out copies of the videos¹⁴, he testified providing Jordan copies of the films and facilitating their presentation. (T. 432, 453; BX 83 at pp 294-95) Moreover, there has been testimony offered that Mr. Freshwater often failed to “act through Jordan,” and opted to show the videos himself. (Z. Dennis, T. 351) Mr. Freshwater cannot accomplish through his daughter what he is prohibited from doing on his own. At home, Mr. Freshwater may ask his daughter to pray, to show a movie, to not see a movie or direct her conduct in countless other ways. As a monitor of the FCA, charged with protecting the Constitutional freedoms of all other FCA participants, he cannot.

Mr. Freshwater admitted encouraging FCA students to call the local movie theatre to promote the movie “Expelled”. He admitted telling students not to see the movie, “Golden Compass”. (Freshwater, T. 478). Whether as a monitor of the FCA or as a public school science teacher, Mr. Freshwater is expressly prohibited from discussing his personal religious views with his students.

B. Mr. Freshwater Improperly Contacted Guest Speakers for FCA

Mr. Freshwater admitted contacting FCA speakers, in violation of the Equal Access Act. (J. Freshwater p. 421). During his interview with HR On call, Mr. Freshwater stated that “maybe

¹⁴ For example, Mr. Freshwater testified he received “The Watchmaker” video via email from Keri Mehan. He watched the video with his daughter and had exclusive possession of it, prior to its presentation to the FCA. Jordan’s only access to the video was through her father’s computer. (BX 83 at pp 293, 294).

he talked with them.” (EX 148 at pp 33, 42). However, by his October 2009 deposition in a parallel federal matter, Mr. Freshwater denied contacting guest speakers unless he saw them in the community. (EX 83 pp 289-90). He begins a pattern of using his daughter to justify his conduct. Mr. Freshwater may not play puppeteer with his daughter, in order to direct the conduct of the FCA. For example, Mr. Freshwater changed his testimony to suggest that while he did not initiate contact with speakers, he knew most of them and saw them in the community. (Freshwater, T. 4490). Mr. Freshwater testified he would direct Jordan to call speakers, at home; and Mr. Freshwater testified that if speakers returned Jordan’s call at his home, or if he ran into them in the community, he may speak with them. (Freshwater, T. 4490-92). Mr. Freshwater attempts to muddy the water to a very simple issue.

On several occasions, guest speakers of the FCA testified Mr. Freshwater contacted them directly. Reverend Turner said John Freshwater contacted him to speak at the middle school. Reverend Turner clearly stated his experience in being contacted by Mr. Freshwater was unique and had never occurred during his engagement with the high school FCA. (T. 1037). Mr. Freshwater denied contacting Reverend Turner and claimed he had Reverend Turner contacted by a high school student. (T. 424-26) Apparently, Mr. Freshwater routinely had high school students contact guest speakers. (T. 426-27)

Mr. Freshwater categorically denied making the initial contact with Father Hammond or any other speaker. (T. 421, 428). Father Hammond contradicted Mr. Freshwater’s testimony, clearly indicating Mr. Freshwater was the only person who contacted him to speak at the middle school FCA. (T. 6066-67).

Mr. Freshwater attempted to introduce testimony and rely on “records” suggesting Father Hammond was contacted by either Jordan Freshwater, his daughter, or Ben Nielson (T. 427-28; BX 21); however, Father Hammond made short work of these false assertions:

Q. Now, were you ever contacted by Jordan Freshwater to come and speak at FCA?

A. No, sir.

Q. Do you know who Jordan Freshwater is?

A. I’m sorry, I don’t, sir.

Q. Okay. Were you ever contacted by Ben Nielson?

A. No, sir.

Q. Do you know who Ben Nielson is?

A. No, sir.

Q. Were you ever contacted by any student to come and speak?

A. Not that I recall, sir.

(T. 6067).

Ricky Warren was contacted to speak by Mr. Freshwater through his email account. (BX 22) While John Freshwater, Jordan Freshwater and Ricky Warren all try to claim the email had been doctored and could not have been to or from John Freshwater (Freshwater, T. 4658-59; Jordan Freshwater, T. 1685-86; Warren, T. 4690-94), a forensic expert reviewed the server and the emails and concluded there had been no tampering. (Liptak, T. 5986-95) The only conclusion can be Mr. Freshwater contacted Ricky Warren and Mr. Warren responded to him concerning his availability to speak.

Further evidence of Mr. Freshwater’s role in selection and contacting of speakers is his conversation with Marsha Orsborn. When Ms. Orsborn asked Mr. Freshwater about bringing Father Hammond in to speak, Mr. Freshwater responded:

He told me that he would have to check his Bible. And I said, what would you bible say about a Catholic priest coming to FCA? He said, I’d have to check, because I’m not sure you’re a Christian!”

(Orsborn, T. 6011).

The clear implication is Mr. Freshwater decided who would and who would not speak at FCA.

Mr. Freshwater's contact of FCA speakers or direction to students as to whom contact is *per se* impermissible under the terms of the Equal Access Act, it is participation in the activities of FCA.

C. Mr. Freshwater Prayed with FCA Students; Directed FCA Students to Lead Prayer; and Participated in a Group Prayer over Pastor Zirkle

Mr. Freshwater admitted he prayed at FCA meetings. (EX 148 at 34-35). Any attempt to recast that admission as "arrow prayers," or "Nehemiah prayers," is a last ditch effort to escape responsibility for his impermissible actions. (Freshwater, T. 4401, 4492-94). Such conduct calls Mr. Freshwater's testimony directly into question.

Similarly, students interviewed by the HR OnCall reported Mr. Freshwater initiated prayer and, also, participated in prayer. (BX 6 at p. 11, BX 68 and 70).

Mr. Freshwater admitted to participating in a group prayer over Pastor Zirkle. (Ritchie, T. 5945-46); however, by the time Mr. Freshwater testified in the administrative hearing he attempted to rehabilitate his prior statement by denying participation and by asserting physical therapy would have prohibited him from raising his arms in collaborative prayer. (EX 140) Further, his claim he was unable to lift his arms is directly contradicted by former assistant principal Brad Ritchey. Mr. Ritchey, now principal at Normandy High School in Parma, testified when Mr. Freshwater met with Mr. Ritchey and Mr. White, he was asked if he participated in a prayer. Mr. Freshwater stated he "may have put my hands up." (Ritchey, 5945-46) Mr. Ritchey further testified Mr. Freshwater physically raised his arms as he made the statement. (Id.) Similarly, Ruth Frady stated Mr. Freshwater may have raised his arms during the prayer over Pastor Zirkle. (T. 5193)

Mr. Freshwater may have invited students to pray for Pastor Zirkle when he wasn't feeling well. (Frady, T. 5193)

If Mr. Freshwater had not participated in the healing session, his response to White and Ritchey would have reflected that “truth.” Instead, Mr. Freshwater couched his admission by asserting that he “may have” put his hands up. Whether at this healing prayer or at other FCA functions, it is clear that Mr. Freshwater has engaged in “hand raising” to participate in prayer during an FCA event.

Mr. Freshwater directed students to lead prayer at FCA meetings. Specifically, Mr. Freshwater testified that he told his daughter to lead prayer on multiple occasions. (Freshwater T. 790). The direct conflict that John Freshwater attempts to exploit is the very reason his actions as an FCA monitor are limited by federal statute. While Mr. Freshwater has an absolute right to dictate the actions of his family; his limitations in the FCA may not be superseded by parental privilege. The Constitutional rights of the other students involved with the FCA will not permit the dilution of their rights.

Mr. Freshwater’s actions violate the Mt. Vernon City Schools Administrative Guidelines regarding official neutrality toward Religious Activity:

Teachers and school administrators, when acting in those capacities, are representatives of the State and are prohibited by the establishment clause from soliciting or encouraging religious activity and from participating in such activity with students. Teachers and administrators are prohibited from discouraging activity because of its religious content and from soliciting or encouraging anti-religious activity.

(EX 9)

In *Doe v. Duncanville Ind. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995) a school district permitted teachers and coaches to pray with students during instructional and noninstructional time and were found to have violated the Establishment Clause as a result. The Court said the school district was obligated to prevent its employees from participating in student-initiated prayers, and prohibiting such participation does not violate employees’ rights. 70 F.3d at 406.

Concurring in *Doe*, Judge Edith Jones said, “I do not doubt that the Supreme Court would hold that DISD coaches and other school employees may be taken to represent the school if they actively join in student-initiated prayers.” 70 F.3d at 410. “A teacher’s [religious] speech can be taken as directly and deliberately representative of the school.” *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir.1991). Therefore, permitting teachers to participate in student religious groups sends the message that the school endorses or supports the views expressed, and a school cannot purport to endorse religion over non-religion nor one religion over another.¹⁵ Allowing teachers to engage in such activity would constitute a clear Establishment Clause violation.

Mr. Freshwater received a letter dated April 7, 2008 from White reemphasizing the requirements of the Equal Access Act and stressing that Mr. Freshwater’s role cannot be participatory in his dealing with the FCA. (BX 12)

D. Insubordination

[I]n April 2008, Mr. Freshwater was directed to remove or discontinue the display of all religious articles in his classroom, including all posters of a religious nature, and whereas, Mr. Freshwater has failed to fully comply with that directive and, further, has brought additional religious articles into this classroom to “make a point” in direct acts of insubordination.

Mr. Freshwater purposefully and deliberately refused to remove his personal bible from his classroom desk: “my family and *I have made the decision, with much soul-searching, that I cannot remove the [Bible] from my desk.*” (BX 105 at 2:23-2:29) (Emphasis added). While this action alone constitutes blatant insubordination, Mr. Freshwater went further and obtained the “The Oxford Annotated Bible” and “Jesus of Nazareth” from the school library, *after* he was

¹⁵ “However, we note that neither the Establishment Clause nor the district court’s order prevent DISD employees from treating students’ religious beliefs and practices with deference and respect; indeed, the constitution requires this. Nothing compels DISD employees to make their non-participation vehemently obvious or to leave the room when students pray in, for example, a *Mergens* style setting. However, if while acting in their official capacities, DISD employees join hands in a prayer circle or otherwise manifest approval and solidarity with student religious exercises, they cross the line between respect for religion and endorsement of religion. *Doe*, 70 F.3d at 406, n.4.

directed to remove all religious displays from his classroom. (Freshwater 444-45; BX 102, 103). Mr. Freshwater's decision to supplement his religious display with two new religious books clearly demonstrates he engaged in calculated disobedience of an express order.

Mr. Freshwater's actions are consistent with the definition of insubordination offered in Black's Law Dictionary: "1. A willful disregard of an employer's instructions, esp. behavior that gives the employer cause to terminate a worker's employment. 2. An act of disobedience to proper authority; esp., a refusal to obey an order that a superior officer is authorized to give." Black's Law Dictionary 639 (abr. 7th ed. 2000). In an interview on April 25, 2009, Mr. Freshwater explained his decision to ignore an express directive of his supervisor:

They chose to tell me last year April 9th that I needed to remove my bible from my desk. And when April 16th came along that was the d-day, I said, I wrote a nice letter up gave it to the principal and said I will comply with some of the other orders that they had because I had some other things in my room some posters and some other things and I said yeah, I'll be glad to and the Ten Commandments and some FCA materials because I was the supervisor of FCA and I removed those **but the Bible I have chosen that I am going to leave that on my desk** cause that's my inspiration. And uh, they when the principal . . . said you need to remove your bible. I said "**I'm going to choose not to do that.**" Very polite I wasn't making any I just said "Its going to stay right there sir." And that's when it all began.

(BX 89 at 25:28-25:56) (Emphasis added).

Board Policy 2270 prohibits "displays of a religious character. . . ." (EX 9) Mr. Freshwater's failure to adhere to Board policy and the express directives of his Principal, constitute insubordinate conduct and is good and just cause for termination of his contract.

Not only is a refusal to cooperate with an administrator's reasonable request just cause for employment termination under Ohio law and O.R.C. 3319.16, but it is grounds for termination in other jurisdictions. *Myers v. Bd. of Educ. of the Waverly City Sch. Dist.*, No. 380, 1985 Ohio App. LEXIS 6927 (July 12, 1985) (Attachment 3); *Atherton v. Ashland Civil Service Commission, et al.*, 1988 Ohio App. LEXIS 4149 (October 4, 1988) (Attachment 4); *Thomas v.*

Columbus Pub. Sch., aka Columbus Bd. of Educ., No. 90AP-649, 1991 Ohio App. LEXIS 684 (Feb. 12, 1991); *Yarian v. Struthers City Sch. Bd. of Educ.*, No. 87 C.A. 95, 1988 Ohio App. LEXIS 2643 (June 29, 1988); *Oleske v. Hillard City School District Board of Education*, 146 Ohio App. 3d 57, (September 25, 2001); *Lewis v. Board of School Commissioners of Mobile County*, 419 F. Supp. 476 (S.D.Ala.1976); *Forstner v. City & County of San Francisco*, 243 Cal.App.2d 625, 52 Cal.Rptr. 621 (1966).

Mr. Freshwater was given a simple and clear directive to remove his personal bible from his desk when students were present in his classroom and to remove all other religious displays in his classroom. (Short T. at 75, Freshwater T. at 442-43, White T. at 506; BX 12 and 13). The standard rule is to work now and grieve later. *How Arbitration Works*, Elkouri and Elkouri (Alan Miles Reuben, editor)(Bureau of National Affairs, 2003) at p. 262. Mr. Freshwaters' unwillingness to satisfy this direct order, combined with the obstinate display of additional religious materials obtained from the school library, exceed the definition of insubordination under Ohio law, demonstrate a clear lack of cooperation with an express directive, and provide good and just cause for termination of his employment.

1. Mr. Freshwater Received a Direct Order to Remove the Bible from his Desktop and to Remove the Ten Commandments Display from his Classroom on April 7, 2008.

On April 7, 2008 Mr. Freshwater's direct supervisor, Principal Bill White, met with him and instructed him to remove a collage containing the Ten Commandments from his classroom and ordered that he remove his personal bible from his desktop, when students were present. (White, T. 504-506). As a follow up to that conversation, Mr. Freshwater was provided with a letter detailing Mr. White's directive:

With regard to religious materials in your classroom, it has been brought to my attention that you have a Bible out on your desk and that the "collage" on your classroom window includes the 10 commandments. While you certainly may read

your bible on your own, duty free time [i.e. during lunch], **it cannot be sitting out on your desk when students are in the classroom** and when you are supposed to be engaged in your responsibilities as a teacher. As for the 10 commandments, that part of your collage must be taken down and replaced with something that is not religious in nature. . . . Unless a particular discussion about religion or religious decorations or symbols is part of a Board approved curriculum¹⁶, **you may not engage in religious discussions with students while at school or keep religious materials displayed in the classroom.**

(BX 6, Att. 19) (emphasis added).

2. Principal White Addresses Mr. Freshwaters' Inaction and Additional Items in the Religious Display Are Identified on April 11, 2008.

Despite Mr. White's verbal and written instruction, by April 11, 2008, Mr. Freshwater had not removed or concealed a single religious item from his classroom. (Freshwater, T. 4409-10). Mr. White again approached Mr. Freshwater about the religious items still actively displayed in his classroom and about his failure to comply with the April 7 directive. (White, T. 506-12). In addition, Mr. White had Brad Ritchey, the assistant principal, take photographs of the religious displays identified in Mr. Freshwater's classroom. (White, T. 508; BX 25, 26, 27, 28, 106, 107, 108)

3. Mr. Freshwater Is Directed a Third Time to Remove All Religious Displays from His Classroom.

Mr. Freshwater still had not complied with Mr. White's directive by April 14, 2008. In fact, not a single religious item had been stored, removed or replaced in Mr. Freshwaters' classroom. (White, T. 512-13). In light of this inaction, Mr. Freshwater was provided with a second letter detailing a specific deadline for the removal of all religious displays. (BX 13)

Instead of immediately removing the items, Mr. Freshwater went to the middle school library and checked out two books: "The Oxford Annotated Bible" and "Jesus of Nazareth" by Harry Emerson Fosdick. (Freshwater, T. 444-47; Short, T. 6256-57; BX 102, 103).

¹⁶ Mr. Freshwater has never asserted that his personal bible has been a part of, or used for Board approved curriculum in his eighth grade science class.

Mr. Freshwater prominently displayed the two new religious texts on the lab table not far from his personal bible. (Freshwater, T. 445-47; White, T. 513-14; Short, T. 6257).

Mr. Freshwater offers a myriad of explanations as to why he displayed the library books; however, it is clear that no matter what the explanation, his actions stood in direct violation of the directives from the administration. A clear pattern emerges when considering the variety of explanations offered by John Freshwater and how they correlate to the development of his defensive strategy.

When Mr. Freshwater was interviewed by HR OnCall, he clearly stated he used the Oxford bible and Jesus of Nazareth book to make a “statement”. (EX 148, pp 45-46). He made a point to indicate the books were purchased with government money. (EX 148, p. 46)

However, when Mr. Freshwater testified on October 28, 2008, he no longer remembered trying “to make a statement,” but admitted to using the religious books in defiance of White’s instruction to remove all religious items from sight: “I thought that someday, after the 16th and on, that my Bible would be removed out of my classroom, so I would have the Oxford from the school library there. And my thinking was they're not going to remove the school library bible.” (Freshwater, T. 447).

Third, by December 2009, over a year and a half after the Oxford Bible and Jesus of Nazareth book had been placed on his desk, Mr. Freshwater offered an affidavit alleged to have been signed on May 25, 2008 claiming he simply went to “see if the library had a Bible” (EX 152, ¶4). He also stated he wanted it in case his Bible was removed from his classroom after April 16. (Id.)

Mr. Freshwater’s stories just do not make sense, particularly when considered along with other pieces of testimony. Mr. Freshwater stated his belief Mr. White was only referring to the

FCA bibles on April 14 and not his personal bible and that he did not know until his lunch period on April 16 he actually had to remove his personal Bible from his desk. (BX 83, pp. 94-6) Yet, after getting the letter on April 14, Mr. Freshwater goes to the library to check out the Oxford bible. (BX 102, 103) Further, his explanations fail to account for the Jesus of Nazareth book. As Tom Herlevi of HR OnCall testified, “The insubordination aspect was pretty cut and dry in my opinion. He was given an instruction. He didn't follow it, and, in fact, refused. That's pretty straightforward in my mind.” (Herlevi, T. 1088-89) He concluded further that checking out the bible and the Jesus of Nazareth demonstrate “an act of defiance.” Herlevi went on to testify, “I've dealt with insubordination for 40 years. . . . when your boss tells you to do something, you do it. And if you don't, it's insubordination. In this case, it was compounded by he even brought in -- this is my view based on the evidence --he brought in another Bible and another religious document” (Herlevi Transcript 1069- 70; 1188).

Taking any of Mr. Freshwaters' explanations as true, they all offer a common admission that Mr. Freshwater engaged in an intentional, deliberate and calculated act of defiance.

4. Freshwater Deliberately Failed to Meet the April 16, 2008 Deadline

On April 16, 2008, Bill White surveyed Mr. Freshwaters' classroom and found the following items actively displayed: (1) his personal Bible, (2) the Oxford Bible, (3) the book entitled Jesus of Nazareth; and (4) the Presidential prayer poster. (White, T. 513-14).

Before advising his supervisor of whether he would comply with the directives, Mr. Freshwater made a speech in Mount Vernon's Public Square on April 16, 2008 stating: “[M]y family and I have made a decision, with much soul searching, that I cannot remove the book [his Bible] from my desk.” (BX 105, 2:23-2:29) Subsequently, he gave the Schools a

portion of his statement made on the public square.¹⁷ (76; BX 14) That statement does not square with his testimony that he only knew at lunch that day his personal Bible had to be removed. When and how much “soul searching” could he do with his family before going to the Square after school?

Five months later, Mr. Freshwater appeared on Fox News, *Showdown* with Larry Elder, where he provided the following recitation of his actions:

Larry Elder: Were you ever asked to remove [the Bible]? (5:03)

Freshwater: No, not until April 10, 200[8]¹⁸ (5:08)

* * *

Larry Elder: You said you were very submissive to authority but did the school board not tell you to remove the bible and did you not refuse to remove it. (6:10)

Freshwater: I did ref...***I did not remove my bible, that is where I am standing.*** That bible has been with me 21 years on that desk, it's been in my pocket when I used to smoke jump out in Idaho, it was with me when I was over in China for a year...the bible was with me...that's what gives me my...that's how I am able to teach...it gives me my inspiration...it's me...

Larry Elder: If I'm the school Board I might argue we should have stopped you 21 years ago, and for 21 years we have allowed you to have a Bible there, we shouldn't have allowed you to have a bible there, you went further by putting up the 10 commandments and biblical verses, and so you crossed the line...

Freshwater: All I want to do is keep my Bible on my desk. (7:13). (BX 20)

At no point from April 7, 2008 to the end of the 2007-2008 school year, did John Freshwater ever remove his personal bible from the top of his desk. In fact, when he left school at the end of the school year, he left his “inspiration” in the classroom and did not recover it until Steve Short returned it to him with other personal items on August 15, 2008. (Short, T. 6228-30, 6234-35; BX 115)

¹⁷ The conclusion it did not occur until after the speech on the square on April 16 is based upon Mr. Freshwater's testimony, he did not see the text of his speech until he was in the parking lot before he gave his speech. (Freshwater, T. 4415-6) The statement was an excerpt from that speech.

¹⁸ It is clear that Mr. Freshwater must have been referring to either the April 7, 2008 or April 9, 2008 discussions. No testimony whatsoever supports the contention that Mr. Freshwaters' classroom was discussed on April 10, 2008.

5. Mr. Freshwaters' Alleged Confusion over Mr. White's Directive is, at Best, Disingenuous

In light of Mr. Freshwaters' deliberate conduct and numerous public admissions regarding his personal bible; an eleventh hour allegation of "confusion" is, at best, disingenuous. More aptly, Mr. Freshwaters' feign of confusion is an insulting and obvious attempt to draw attention away from his two year media blitz and the blatantly insubordinate conduct.

Mr. Freshwater acknowledges that on April 7, 2008 "Mr. White definitely told me my personal Bible had to be out of the room. I took notes on it right after the meeting when I got back to my classroom¹⁹." While this statement is not supported by *any other statement offered by Mr. Freshwater*, prior to December 2009, it is also immaterial to Mr. Freshwaters' insubordinate behavior. Whether Mr. Freshwater was told to remove the bible from his desktop or from his classroom- **he did neither**. Moreover, if Mr. Freshwater believed Mr. White's direction to be in error, he had a remedy available, file a grievance.²⁰ At no point from April 7, 2008 to present day, has Mr. Freshwater filed a grievance over Mr. White's request.

Mr. Freshwater alleges confusion over which bible(s) had to be removed from "his classroom." (EX 143). This statement is patently absurd for two reasons; Mr. Freshwater received two clear directives on April 7, 2008 and April 14, 2008, one addressing his personal bible and the second addressing all religious displays in his classroom. There had been a separate discussion on April 9 with Superintendent Short about the inappropriateness of the FCA bibles in his room. (Short, T. 72-75) Moreover, Mr. Freshwaters' own testimony provides the

¹⁹ Needless to say, any "notes" taken by Mr. Freshwater in April 2008 have never been produced in their original form, nor were they ever identified prior to December 2009.

²⁰ Under the terms of the Master Contract between the Mount Vernon Board of Education and the Mount Vernon Education Association (effective July 1, 2005 through June 30, 2008), a grievance may be filed for "a disagreement involving a work situation in which a teacher...believe[s] there has been a violation, misinterpretation, or misapplication of: (1) The written Master Contract...; or (2) Rules, regulations, and procedures of the administration and the Board. Employee Ex. 10.

necessary facts to illustrate why both letters were necessary, Mr. White was not aware of the box of bibles in the back of Mr. Freshwaters' classroom until after the April 7, 2008 letter was written. (J. Freshwater, T. 4406-07).

While you certainly may read **your bible** on your own, duty free time [i.e. during lunch], it cannot be sitting out on your desk when students are in the classroom and when you are supposed to be engaged in your responsibilities as a teacher.

(BX 12).

As per our conversation *all religious items need to be removed* from your classroom by the end of the day on Wednesday April 16, 2008. **Bibles and other religious DVD's, videos, etc should also be placed out of sight and access** of students by this date.

(BX 13).

A more accurate recitation of the facts establishes that Mr. Freshwater understood Mr. White's April 7, 2008 directive and deliberately refused to remove his personal bible in contravention of school policy and the express order of his principal. In addition, Mr. Freshwater was admittedly aware that his failure to remove the bible from his desk would amount to insubordination:

Q. Do you recall him [Bill White] telling you that if you did not remove your Bible it would be insubordination?

A. I think I can say yes on that. Yes.

(Freshwater, T. 447).²¹

Of course, Mr. Freshwater once again changes his story in December 2009 when he testified he thought Mr. White was referring to the need to cooperate with the investigation or he would be insubordinate. (T. 4366) That just does not make sense.

The legal standard of insubordination is clearly met by Mr. Freshwaters' conduct. The refusal to cooperate with an administrator's reasonable request has often been found just cause

²¹ Bill White also testified he told Mr. Freshwater the failure to remove his bible from his desktop would be insubordination. (White, T. 513)

for termination. See e.g. *Myers v. Bd. of Educ. of the Waverly City Sch. Dist.*, supra; *Cephus v. Dayton Bd. of Educ.*, No 13884, 1993 Ohio App. LEXIS 5144 (Oct. 27, 1993) (Attachment 7); *Atherton v. Ashland Civil Service Commission, et al.*, supra.

Likewise, Mr. Freshwaters' blatant refusal to comply with not one, but multiple requests to remove his personal bible from sight is by definition, insubordination. *Lewis v. Board of School Commissioners of Mobile County*, 419 F. Supp. 476 (S.D.Ala.1976); *Forstner v. City & County of San Francisco*, 243 Cal.App.2d 625, 52 Cal.Rptr. 621 (1966); See e.g. *Thomas v. Columbus Pub. Sch., aka Columbus Bd. of Educ.*, No. 90AP-649, supra; *Yarian v. Struthers City Sch. Bd. of Educ.*, supra; *Oleske v. Hillard City School District Board of Education*, 146 Ohio App. 3d 57 (10th App. Franklin Cty.) 2001.

In light of Mr. Freshwaters' deliberate and public acts of defiance and his blatant disregard for Mr. White's written and verbal directives, Mr. Freshwaters' insubordinate conduct provides sufficient *good and just cause*, to terminate his employment.

CONCLUSION

At the outset of the hearing, Mr. Freshwater's Counsel proclaimed the Referee would have to analyze credibility and what needs to be looked at is: "What makes sense" (T. 20, 32)

In this brief, we have only gone through some of the inconsistencies and different stories by Mr. Freshwater. his story evolved and changed during the hearing process. A number of things he admits when meeting with Mr. Short and Mr. White or HR OnCall or even during his testimony in October 2008 began to evolve during the hearing process and as he is lead through the script of his story by his counsel. The stories don't match up. Not all of his stories can be

true. As we said at the outset, John Freshwater is not credible. What he says does not make sense.

To quote Judge Jones in *Kitzmiller v. Dover Area School Dist.*, *supra*:

“It is ironic that several of these individuals, who so staunchly and proudly touted their religious convictions in public, would time and again lie to cover their tracks and disguise the real purpose”

Respectfully submitted,

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