

## IN THE MATTER OF JOHN FRESHWATER

Mount Vernon City School  
District Board of Education

Employer,

AND

REFEREE: R. Lee Shepherd

John Freshwater

Teacher.

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### JOHN FRESHWATER'S CLOSING STATEMENT BRIEF

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#### I. INTRODUCTION

Everything in this case is about purpose, context<sup>1</sup> and intent with an ultimate goal of answering the question set forth in the opening statement<sup>2</sup> –

*“What makes sense?”* versus *“What does not make sense?”*

Shamefully and sadly, had the administration of the employer invested any zeal in investigative fact gathering to determine the basic:

“Who?, What?, Where?, When?, Why? and How?”

- legitimate answers could have been achieved both by the end of the last day of school in 2008, and before the employer's resolutions of June 20, 2008, and July 7, 2008.

Regrettably much zeal was invested at the onset of this matter to prove multiple predetermined conclusions which were festering holdover opinions formed about John Freshwater dating back to May 2003. Irrespective of any unwarranted personal opinions the

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<sup>1</sup> See Board Exhibit 116, an alleged Facebook page of John Freshwater. Superintendent Steve Short stated, “It was not his personal site, no.” Transcript Page 6285. Nefariously consistent to the end, representatives of the employer attempted to contort a website declaration attributable to John Freshwater but admitting that the website was not John Freshwater's website rather the Facebook page was created by somebody else without authorization by John Freshwater.

<sup>2</sup> There was only one opening statement in the hearing made by counsel for John Freshwater. David Millstone, counsel for the Mount Vernon City School District Board of Education, failed to make an opening statement as he stated, “We did not plan on making an opening statement.” Transcript p19.

most basic canon of employer investigations is to earnestly seek and determine fair, objective and accurate investigative results which ultimately answers every real investigator's reasoned analysis of "*What makes sense?*"

John Freshwater disputes the asserted facts gathered by the employer's "investigator"<sup>3</sup> which formed the basis of the voting board members resolutions to recommend termination.

Astoundingly, the facts discerned during cross-examination of the employer's witnesses buttressed and corroborated by the direct examination of witnesses summoned by John Freshwater present a set of objective facts honed by analysis of the basic, "*Who?, What?, Where?, When?, Why? and How?*" which are diametrically opposed to the investigator's conclusions made on behalf of the employer through a misnomered document titled as "Mount Vernon City Schools Independent Investigation Of A Complaint Regarding John Freshwater." Conclusions made by the employer prior to voting to approve an *Amended Resolution of Intent to Consider the Termination of the Teaching Contract(s) of John Freshwater* have been decisively shown to be incomplete<sup>4</sup>, inaccurate<sup>5</sup> and in some instances outright inflammatory<sup>6</sup> ("inflammatory" as admitted by Julia Herlevi who was part of the HR on Call, Inc. investigation).

Voting members of the employer, the board of education (hereinafter BOE), delegated their lawful responsibility to its superintendent and a private entity calling itself, HR on Call, Inc., which proclaimed itself as an "investigator". The then voting members of the BOE may have been sheepishly hoodwinked into a belief they received complete, competent, credible

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<sup>3</sup> "Investigator" is the word used in Article 402, Page 17, of the Mount Vernon City Schools, Master Contract Between the Mount Vernon Board of Education and the Mount Vernon Education Association, Effective July 1, 2005 Through June 30, 2008

<sup>4</sup> Transcript Page 1982-1983, testimony of Teacher Tamara Henry.

<sup>5</sup> "That would be inaccurate." Admission by Lynda Weston, in response to question asked, "So the statement in the investigative report indicated that you have 11 years worth of complaints would be an inaccurate statement?" Transcript Page 2491

<sup>6</sup> Admission by HR on Call, Inc. Investigator Julia Herlevi, Transcript Page 2762

information. During his only interview John Freshwater identified multiple witnesses for HR on Call, Inc. to interview so accurate information could be obtained for the investigation.<sup>7</sup>

(Superintendent Steve Short advised John Freshwater that HR on Call, Inc. cancelled a second scheduled interview with John Freshwater on May 27, 2008).<sup>8</sup> After consultation with Superintendent Short<sup>9</sup>, but contrary to the most basic, elementary investigative protocols, HR on Call, Inc., failed to interview witnesses identified by John Freshwater and those witnesses were not asked a single inquisitive or corroborating question.<sup>10</sup>

The BOE's resolution against John Freshwater was founded upon a misleading report that was not objective which has lead to a miscarriage of justice, wasteful expenditure of both public and private money and costing John Freshwater and the Mount Vernon, Ohio community valuable time.

The sum of the decision calculus in this matter will demonstrate John Freshwater prevails in this matter because:

1. Any and all matters related to John Freshwater's use of a Tesla Coil were adjudicated by Principal William White's letter to John Freshwater dated January 22, 2008.<sup>11</sup>
2. The Academic Content Standards were not applicable in the Mount Vernon City School District until the beginning of the 2004-2005 school year.<sup>12</sup>
- A. John Freshwater taught his 8<sup>th</sup> grade students exactly as he was required as evidenced by the only known assessment tool authorized in the State of Ohio; the Ohio Achievement Tests.

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<sup>7</sup> In Employee Exhibit 148, John Freshwater identified multiple witnesses to be interviewed.

<sup>8</sup> HR on Call, Inc. investigators scheduled, then cancelled, a second interview with John Freshwater despite the investigators receiving knowledge from MVEA Union Representative Jeff Kestner that John Freshwater would be providing a comprehensive written response to the complaint pursuant to the collective bargaining agreement Article 402. Employee Exhibit 148, Transcript of Freshwater interview with H.R. On Call Page 57-58. Transcript Page 4794, Line 11-12 and 21-23, and Page 5587, Line 21

<sup>9</sup> Transcript Page 2686-2687

<sup>10</sup> See in part testimony by Teacher Tamara Henry, Transcript Page 1982

<sup>11</sup> Board Exhibit 6, Attachment 18, Letter Dated January 22, 2008, from Principal William White to John Freshwater.

<sup>12</sup> Transcript 1389, 1390 and see Employee Exhibit 13

John Freshwater's students received proper instruction resulting in him being the only 8<sup>th</sup> grade teacher whose students achieved a proficient rating of seventy-seven (77%) percent on the Ohio Achievement Tests<sup>13</sup> despite his classes containing the most special education students.<sup>14</sup>

- B. Ten (10) eyewitness students, two (2) teachers<sup>15</sup> and one (1) principal<sup>16</sup> testified John Freshwater never instructed on the topics of creationism nor intelligent design.
- 3. John Freshwater complied with all of the known parameters as he facilitated, monitored and supervised the Fellowship of Christian Athletes (FCA).
  - A. Witness testimony from credible sources clearly demonstrates John Freshwater did not conduct nor lead any prayers during FCA meetings.
  - B. Witness testimony from credible sources clearly demonstrates John Freshwater never asked non-familial students to lead prayer in FCA meetings.
  - C. Witness testimony from credible sources clearly demonstrates John Freshwater did not exceed his role as facilitator, monitor and supervisor of the FCA.
- 4. John Freshwater exercised a constitutional right to have a personal Bible in his classroom on his desk.
  - A. John Freshwater removed all items he was lawfully asked to remove.
  - B. John Freshwater did not receive any instruction from Principal William White or anybody else to remove the patriotic poster, which was distributed through the Mount Vernon Middle School office, depicting former President George Bush and Colin Powell.

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<sup>13</sup> Employee Exhibit 57

<sup>14</sup> Employee Exhibit 57

<sup>15</sup> Teacher Andrew Thompson testified he had at least six hundred ninety-six (696) classroom interactions with John Freshwater. Teacher Carrie Mahan testified she has worked with John Freshwater since 1997 and never heard John Freshwater use the words, "intelligent design" or "I.D." Transcript Page 3743.

<sup>16</sup> Principal Tim Keib testified he never heard John Freshwater teach creationism during his approximate one hundred (100) classroom visits to Teacher Freshwater's classroom. Transcript Page 3626, 3631 and 3649

C. John Freshwater never intended or tried to “make a point”<sup>17</sup> by bringing additional religious articles into his classroom.

At the conclusion of this brief, John Freshwater will respectfully request the Referee to evaluate and find each of the employer’s allegations against John Freshwater as detailed in the *Amended Resolution of Intent to Consider the Termination of the Teaching Contract(s) of John Freshwater* to be **unsubstantiated**.

John Freshwater prays this Referee, after consideration of the evidence presented, and assessment of the testimony heard, will find the Board of Education (BOE) has failed to prove the charges set forth in the resolution to consider his termination originally dated June 20, 2008, but amended on July 7, 2008.

## **II. OVERVIEW OF BRIEF**

It is a tremendous undertaking to compile thirty-eight (38) days of witness testimony from over eighty (80) witnesses covering approximately three hundred fifty (350) exhibits and addressing numerous allegations. Evaluation of the evidence and passing judgment in this matter requires this Referee, or any BOE member who may read this brief, to answer the question posed during opening statement – “**What makes sense?**”

On behalf of John Freshwater, this closing statement brief persuasively outlines the relevant standards of law to include statutory, caselaw and burdens of proof. Other important evaluative criteria are presented with a thorough examination of the evidence supplemented with a prepared entry of determination. There does not exist a statutory standardized or specified format for closing briefs in matters examined pursuant to R.C. 3319.16. The following outline will serve as a guide:

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<sup>17</sup> Employee Exhibit 148, pgs. 45-46, the words “make a point” were never used by John Freshwater nor the inquisitioners from HR on Call, Inc.

- I. Introduction
- II. Overview Of Brief
- III. Statutory Authority For Job Action Against Ohio Public School Teacher
  - A. Step 1 – Determining Factual Basis Of Allegations Requires Clear And Convincing Evidence
  - B. Step 2 – Do The Determined Facts Constitute Any Of The Statutory Grounds For Termination: Willful And Persistent Violations Of Reasonable Regulations Of The Board Of Education; Or For Other Good And Just Cause
    - 1. “Willful And Persistent Violations Of Reasonable Regulations Of The Board Of Education”
    - 2. “Other Good And Just Cause”
      - a. Intent
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- IV. STATEMENT OF PROCEEDINGS
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  - A. Pawns
  - B. Motivations
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    - 2. Dr. Lynda Weston
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  - D. Incompetence
  - E. Character And Credibility
- VI. Argument
  - A. Tesla Coil
  - B. Academic Content Standards
  - C. FCA
  - D. Insubordination
- VII. Conclusion

**III. STATUTORY AUTHORITY FOR JOB ACTION AGAINST OHIO PUBLIC SCHOOL TEACHER**

Ohio Revised Code 3319.16, *Termination of contract by board of education*, states in

pertinent part:

*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 gross inefficiency or immorality; for willful and persistent violations of reasonable regulations of the board of education; or for other good and just cause.*

R.C. 3319.16 requires a BOE to initially present evidence of its allegation(s) and then permits the teacher to respond with evidence in their defense. Evidence is to be presented during testimony either directly to the BOE or before a referee. Either the teacher or the BOE can request a referee to preside over the hearing.

As a result of America's emerging culture of respect for the detached neutral's role in quasi-judicial proceedings during the 1960's leading into the 1970's, coupled with the United States Supreme Court decision in *Goldberg v. Kelly*,<sup>18</sup> the State of Ohio General Assembly interposed, or introduced, a referee into teacher contract termination disputes by legislative enactment in 1971. *Aldridge v. Huntington Local School District Board Of Education*, (1988), 38 Ohio St.3d 154. R.C. 3319.16 indicates a legislative intent to inject a neutral party into termination disputes. *Id.* at 157. The legislative intent is thwarted if the findings by a referee can be rejected without explanation by a school board which conducts no hearing and which does not see or hear any of the witnesses. *Id.* at 157.

"The decision to terminate a teacher's contract is comprised of two parts: (1) the factual basis for the allegations giving rise to the termination; and (2) the judgment as to whether the facts, as found, constitute.." any of the statutory grounds for termination. *Id.* at 157. In *Aldridge* the Supreme Court illuminated the distinction between the roles of the referee compared to the role of the BOE pursuant to R.C. 3319.16. *Id.* at 157. The steps to be followed are:

### **Step 1 – Determining Factual Basis of Allegations**

### **Step 2 – Do the Determined Facts Constitute Any of the Statutory Grounds for Termination**

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<sup>18</sup> The original most famous administrative due process case is the United States Supreme Court's opinion in *Goldberg v. Kelly*. [397 US 254 (1970)], wherein the Supreme Court ruled that the then-existing procedures for determining eligibility under the Aid to Families with Dependent Children program were inadequate, in part, because those procedures failed to provide the recipient an impartial decision maker, and a decision based entirely on the relevant legal rules and the evidence adduced at a hearing.

The *Aldridge* Court recognized in proceedings conducted pursuant to R.C. 3319.16 a tension exists between the role of the referee and the role of the BOE. *Id.* at 157. The Supreme Court of Ohio held a referee's primary duty is to ascertain facts thereafter producing a report consisting of both fact-findings and a recommendation. *Id.* at 158. Tension develops and exists as the BOE's primary duty is to interpret the significance of the facts. *Id.* at 158.

In *Aldridge* the Court held that in teacher contract termination disputes arising under R.C. 3319.16: (1) the referee's findings of fact must be accepted unless such findings are against the greater weight, or preponderance, of the evidence; (2) a school board has the discretion to accept or reject the recommendation of the referee unless such acceptance or rejection is contrary to law. *Id.* at 158.

The teacher in *Aldridge* eventually prevailed because the Court held the referee was the only one who saw and heard the witnesses. The referee found that the reasons given for the teacher's dismissal were not **established**. Without a proper factual basis, **unsubstantiated** allegations do not constitute grounds for dismissal so the teacher in *Aldridge* retained his teaching position.

"Unless a finding of fact by such referee is manifestly against the weight of the evidence, the board of education must sustain such finding of fact." *Id.* at 157.

It must be emphasized that the standard set in *Aldridge* has a limited purpose and applies only when a BOE evaluates a referee's findings of fact as noted in Justice Douglas' concurrence.

The "report and recommendation undertaken by the referee pursuant to R.C. 3319.16 must be considered and weighed by the board of education". *Graziano v. Amherst Exempted Village Bd. of Edn.*, (1987), 32 Ohio St.3d 289. Additionally, "due deference must be accorded to the findings and recommendation of the referee in this type of situation, especially where there



exist evidentiary conflicts, because it is the referee who is best able to observe the demeanor of the witnesses and weigh their credibility." Id. at 293.

The *Graziano* Court noted that the board is not bound by the recommendations rendered by the referee, but that the board "should, in the spirit of due process, articulate its reasons therefore" if a BOE rejects the recommendations. Id at 293. Considering former BOE member-witness Steve Hughes' statement to John Freshwater on January 19, 2010,<sup>19</sup> wherein Steve Hughes stated, "...I think it would depend upon what Sheppard (sic) says and how he says it." It is necessary for the undersigned to stress, as the point cannot be over emphasized, that the words chosen and manner of writing selected by this Referee are of the utmost importance.

On June 20, 2008, the BOE resolution was based upon the report by HR on Call, Inc. without further analysis, reasoning or contemplation. Former BOE member-witness Steve Hughes' statement<sup>20</sup> to John Freshwater on January 19, 2010, confirmed the BOE's resolution was based upon the incomplete<sup>21</sup>, inaccurate<sup>22</sup> and inflammatory<sup>23</sup> report. John Freshwater's teaching future, and retirement benefits earned as a teacher (and future employment direction), are in the balance of this Referee's decision. Accordingly, John Freshwater earnestly petitions the Referee for careful selection of the language to be used by the Referee in the findings and recommendation and render a decision that is clear, precise and leaves no room for manipulation.

R.C. 3319.16 provides that the contract of a teacher may be terminated for gross inefficiency or immorality; for willful and persistent violations of the reasonable regulations of the board of education; or for other good and just cause. Board Exhibit No. 1, the *Amended*

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<sup>19</sup> Employee Exhibit 229, Page 27, Steve Hughes conversation with John Freshwater, January 19, 2010.

<sup>20</sup> Employee Exhibit 229, Page 6, Steve Hughes conversation with John Freshwater, January 19, 2010. "And that is what we based our resolution off of."

<sup>21</sup> Transcript Page 1982-1983, testimony of Teacher Tamara Henry.

<sup>22</sup> "That would be inaccurate." Admission by Lynda Weston, in response to question asked, "So the statement in the investigative report indicated that you have 11 years worth of complaints would be an inaccurate statement?"

Transcript Page 2491

<sup>23</sup> Admission by HR on Call, Inc. Investigator Julia Herlevi, Transcript Page 2762

*Resolution of Intent to Consider the Termination of the Teaching Contract of John Freshwater*, does not specify any allegations that are labeled grossly inefficient or immoral. However testimony by Superintendent Steve Short is confusing, as on December 7, 2007, Mr. Short testified he believed John Freshwater acted with gross inefficiency when Teacher Freshwater used a Tesla Coil.<sup>24</sup> It is important to note John Freshwater was not charged with gross inefficiency, but rather quite the contrary as on January 22, 2008, Principal William White wrote a letter to Teacher Freshwater explaining, “*Subject to follow through on the above issues and no further incidences whereas anyone is being shocked with the machines this letter will not become part of your permanent record.*”<sup>25</sup> Principal White’s letter was reviewed by Superintendent Short as Principal White testified, “I checked with Mr. Short, talked to Mr. Short to make sure that the letter did say what I intended it to say.”<sup>26</sup> Despite the apparent lack of understanding by Superintendent Short, the charging document is limited to the statutory descriptions of willful and persistent violations of the reasonable regulations of the board of education; or for other good and just cause.

Following the two part steps set forth in *Aldridge*, before a referee can analyze the statutory grounds for terminating a public school teacher’s contract, the factual basis of the allegations must be determined. Justice Douglas alerted an important distinction in his concurrence of *Aldridge* when he emphasized that the standard set forth in *Aldridge* is the standard which must be used by a school board in evaluating a referee's findings of fact. Although the *Aldridge* decision appears to be evident in that the standard of proof or review articulated by the Court applies against the BOE in its decision making process whether to accept

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<sup>24</sup> Transcript Page 276, Line 23 – Page 277, Line 3.

<sup>25</sup> Board Exhibit 6, Attachment 18, Letter Dated January 22, 2008, from Principal William White to John Freshwater.

<sup>26</sup> Transcript Page 495

or reject the report of the referee, it is imperative a referee understand the *Aldridge* Court did not articulate a standard of review to be used by the referee when the referee balances the evidence to determine the factual basis of the allegations. The standard of proof required to determine the factual basis of the allegations against public school teachers' demands clear and convincing evidence.

**A. Step 1 – Determining Factual Basis Of Allegations Requires Clear and Convincing Evidence**

R.C. 3319.16 does not prescribe an exact standard of proof the BOE must satisfy in order to justify the termination of a teacher's contract. The Supreme Court of Ohio has not explicitly ruled on the standard of proof required to sustain an allegation from the resolution against the teacher.

In 1950, forty-four (44) years prior to the enactment of current R.C. 3319.16<sup>27</sup>, a common pleas court opined the burden of proof which must be satisfied by a BOE, in order to justify the termination of a teacher's contract, appeared to be a "preponderance of substantial, reliable and probative evidence".<sup>28</sup> However, the law and the legal landscape have undergone significant changes since the 1950's establishing an axiom that terminating a teacher's "property right" in a statutorily designed contract requires greater understanding as the legal climate today provides much higher protection for a public school teacher. It is clear that any standard of proof from 1950 does not apply today due to the changes in law emanating from The Supreme Court of the United States which created a "property right" for public school teachers in their employment.

Perhaps it was Justice Douglas' knowledge of the decision from 1950 that caused him to issue his cautionary, concurring opinion in *Aldridge*, which stated, "...I am concerned that the

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<sup>27</sup> The current version of R.C. 3319.16 became effective July 9, 1994.

<sup>28</sup> *Applebaum v. Wulff*, (1950) 58 OLA 260, 95 NE2d 19, Court of Common Pleas of Ohio, Cuyahoga County, No. 612303.

standard we set today may, in the minds of some, be confusing when considered or compared with the other standards enunciated. I fear that the standard set forth will be used to make unfair subjective decisions in determining what "weight" category to use in reviewing specific evidence. It should be emphasized that the standard set is the one which must be used by a school board in evaluating a referee's findings of fact.”<sup>29</sup> (Emphasis added)

Since 1950, much has changed in the legal landscape concerning school law in The United States and The State of Ohio with fundamental advancements made in favor of students and teachers regarding due process, freedom of speech, freedom of religion and the determination that statutorily created provisions concerning public teaching contracts have created a “property right” for existing government employment. The powers of a board of education in the dismissal of public school teachers are limited by the Fourteenth Amendment to The United States Constitution. *Mt. Healthy City School Dist. Board of Education v. Doyle*, 429 US 274, 50 L Ed 2d 471, 97 S Ct 568 (1977) Property interests are created and defined by understandings stemming from an independent source such as state law and consist of rules or understandings that secure certain benefits and support claims of entitlement to those benefits. *Perry v. Sindermann*, 408 U. S. 593, 599-603 (1972), *Board of Regents v. Roth*, 408 US 564, (1972) and *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). R.C. 3319.16 is a unique statute in that it creates a protected property interest for a public school teacher in continued employment requiring due process to deprive, but for which the proceedings are not governed by the rules of civil procedure or rules of evidence.

The dynamics and power structure of teacher contract termination procedures warrant exposition considering R.C. 3319.16 does not prescribe an exact burden of proof and because The Supreme Court of Ohio has not explicitly ruled upon the exact burden of proof required to

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<sup>29</sup> *Aldridge v. Huntington Local School District Board Of Education*, (1988), 38 Ohio St.3d 154

prove an allegation from the resolution against the teacher. Financially speaking, BOE's are at an advantage in the scheme of R.C. 3319.16 because BOE's have greater financial resources than a singular teacher and historically BOE's are more deeply funded beyond that of its adversary commonly known as the teacher's union. Most if not all BOE's have the financial capability to invest in legal counsel, typically from larger law firms, or as a benefit achieved through conglomeration with multiple BOE's and law firms. Without question, the seeming ability and resources of a BOE in comparison to that of a singular teacher in this context creates a resource gap between the teacher and BOE that is as vast as that of David versus Goliath. Because of the financial gap between BOE's and public school teachers, little, if any, research is invested in determining an exact standard of proof as teachers and their unions seemingly cannot afford to do such research.

To be sure, there is no binding state caselaw regarding the exact burden of proof a BOE must satisfy in order to justify the termination of a teacher's contract. But binding and persuasive materials abound in the form of decisions from The Supreme Court of the United States, decisions from other states supreme courts and importantly from analogous materials used in the State of Ohio.

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact-finding, is to "instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Addington v. Texas*, 441 U.S. 418, 423 (1979). A standard of proof serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision. *Id.* Generally speaking, the evolution of this area of the law has produced across a continuum three (3) standards or levels of proof for different types of cases. *Id.* At one end of the spectrum is the typical civil case involving a monetary

dispute<sup>30</sup> between private parties. *Id.* Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. *Id.* The litigants thus share the risk of error in roughly equal fashion. *Id.* In a criminal case, on the other hand,...our society imposes almost the entire risk of error upon itself...by requiring ...the state prove the guilt of an accused beyond a reasonable doubt. *Id.*

A standard of proof between “preponderance” and “beyond a reasonable doubt” is typically deemed the “clear and convincing” standard of proof which is an “intermediate standard, which usually employs some combination of the words "clear," "cogent," "unequivocal" and "convincing," is less commonly used, but nonetheless "is no stranger to the civil law." *Id.* at 424, and *Woodby v. INS*, 385 U. S. 276, 285 (1966). Cases employing this intermediate standard in civil cases involve allegations where the interests at stake “are deemed to be more substantial than mere loss of money, and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof. *Id.* at 424. In *Addington*, the Supreme Court affirmed it has used the "clear, unequivocal and convincing" standard of proof to protect particularly important individual interests in various civil cases. *Id.* at 424. Lastly, *Addington* held “(I)n cases involving individual rights, whether criminal or civil, "[t]he standard of proof [at a minimum] reflects the value society places on individual liberty." *Id.* at 425.

In the State of Ohio credentialed employees enjoy a higher standard of protection if they work within a system of licensure. The standard of proof required to affect the license or credentialed status of an employee in the State of Ohio is evidence which is “clear and convincing”. Employment property interests are defined by understandings from an independent source such as state law and consist of rules or understandings that secure certain benefits and

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<sup>30</sup> John Freshwater is not engaged in a monetary dispute with his employer.

support claims of entitlement to those benefits. R.C. Chapter 3319 creates a constitutional “property right” for Ohio public school teachers. Higher protection in the form of the “clear and convincing” standard is understood from analysis of the rules that protect other credentialed and licensed Ohio employees. Ohio school teachers are credentialed, or licensed, pursuant to Revised Code similarly as are funeral directors<sup>31</sup>, acupuncturists<sup>32</sup>, orthotists<sup>33</sup>, medical transporters<sup>34</sup>, emergency medical technicians<sup>35</sup>, respiratory care technicians<sup>36</sup>, anesthetists<sup>37</sup>, therapists<sup>38</sup>, chiropractors<sup>39</sup>, physician assistants<sup>40</sup>, pharmacists<sup>41</sup>, optometrists<sup>42</sup>, embalmers<sup>43</sup>, nurses<sup>44</sup>, and doctors<sup>45</sup>. Each of the credentialed licensees from funeral directors to doctors have the constitutional right that any adverse action taken against their license can only be done with evidence that is clear and convincing.

The Ohio State University is a leader in education in this state and across the nation. The Ohio State University maintains the “clear and convincing” standard as part of its faculty rules as stated in its, “Hearing Procedures For Complaints Against Regular Tenure-Track, Regular Clinical, Regular Research, And Auxiliary Faculty Members.”<sup>46</sup> Rule 3335-5-04, which applies to all faculty members, mandates that any complaint made by anybody against a teacher must be proved, first, by findings of an investigating committee, based on clear and convincing

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<sup>31</sup> R.C.4717.14

<sup>32</sup> R.C. 4762.13

<sup>33</sup> R.C. 4779.29

<sup>34</sup> R.C. 4766.11

<sup>35</sup> R.C.4765.112

<sup>36</sup> R.C.4752.09

<sup>37</sup> R.C. 4760.13

<sup>38</sup> 4757.361

<sup>39</sup> R.C.4734.20 and 4734.37

<sup>40</sup> R.C.4730.25

<sup>41</sup> R.C.4729.56

<sup>42</sup> R.C.4725.24

<sup>43</sup> R.C.4717.14

<sup>44</sup> R.C.4723.281

<sup>45</sup> R.C.4731.22

<sup>46</sup> RULES OF THE UNIVERSITY FACULTY - Faculty, Governance, And Committees, Chapter 3335-5, **General Matters, Rule 3335-5-04 Hearing Procedures For Complaints Against Regular Tenure-Track, Regular Clinical, Regular Research, And Auxiliary Faculty Members.**

evidence.<sup>47</sup> Even after the investigating committee’s work is done, any further determination by a convened hearing panel must again be based upon, balanced and evaluated by, clear and convincing evidence.<sup>48</sup>

The highest court making a ruling regarding the application of the clear and convincing standard when evaluating a licensed employee’s property interest was done in *Ongom v. State, Dept. of Health, Office of Professional Standards*, 159 Wn.2d 132, 148 P.3d 1029 (Wash. 2006), cert. denied, \_\_\_ U.S. \_\_\_, 127 S.Ct. 2115, (2007). *Ongom* applied the United States Supreme Court decisions from *Addington*<sup>49</sup> and *Mathews*<sup>50</sup> in evaluating the property interest of a low-level, licensed nursing home assistant. The exact issue for determination was whether proof by a preponderance of the evidence in a professional license disciplinary proceeding satisfies due process. *Id. at paragraph 12*. The *Ongom* Court concluded that due process requires “clear and convincing proof” and that the minimum constitutional standard of proof in a professional disciplinary hearing is clear and convincing evidence. *Id. at paragraph 12 and 23*.

*Ongom* recognized “[a] professional disciplinary proceeding subjects a medical doctor to grave concerns which include the potential loss of patients, diminished reputation, and professional dishonor.” *Id. at paragraph 14*. Furthermore, a doctor has a liberty interest in their license to preserve their professional reputation. *Id.* Although differences exist between the licenses of a doctor and a nursing assistant, each have an identical property interest in licenses that authorize them to practice their respective professions. *Id.* *Ongom* analyzed there was no difference in value between the liberty and property interest of a doctor versus a nurse’s assistant. *Id.* Founded upon *Addington* and *Mathews*, the Court in *Ongom* recognized the

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<sup>47</sup> *Id.* at Rule 3335-5-04(E)(2)

<sup>48</sup> *Id.* at Rule 3335-5-04(H)(7)

<sup>49</sup> *Addington v. Texas*, 441 U.S. 418, 60 L. Ed. 2d 323 (1979)

<sup>50</sup> *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)



importance of a liberty and or, property interest in employment transcends mere money and therefore is entitled to a higher standard of proof. *Id. at paragraph 15*. Furthermore, “[a]n increased burden of proof would not have the slightest fiscal impact upon the state, as it would not appreciably change the nature of the hearing per se.” *Id. at paragraph 20*. The *Ongom* Court preceded its final holding by relating the fundamental premise of the “ultimate government interest is best furthered by...disciplinary proceedings which reach an accurate and reliable result”. *Id. at paragraph 22*.

Striking similarities exist between *Ongom* and John Freshwater’s matter in that a mandated reporting requirement was not followed, *Ongom* presented exonerating witness statements in both testimonial and affidavit form, an elapse of time which challenged the complainant’s evidence and credibility and there is evidence challenging complainant’s veracity. Like *Ongom*, the allegations against John Freshwater jeopardize his reputation, present him with the prospect of professional dishonor, and affects his liberty interest in his educational teaching license.

John Freshwater has a right to have the allegations made against him be proven by the BOE to the standard of proof which requires clear and convincing evidence. The Supreme Court of the United States has held “clear and convincing” evidence requires “an abiding conviction that the truth of the factual contentions are highly probable.” *Colorado v. New Mexico*, 467 U.S. 310 (1984) Further, the “clear and convincing” standard of proof is found only if the evidence “offered instantly tilted the evidentiary scales in the affirmative when weighed against the evidence” presented in opposition. *Id. at 316*

**B. Step 2 – Do the Determined Facts Constitute Any Of The Statutory Grounds For Termination: Willful And Persistent Violations Of Reasonable Regulations Of The Board Of Education; Or For Other Good And Just Cause**

**1. “Willful And Persistent Violations Of Reasonable Regulations Of The Board Of Education”**

If a teacher’s contract termination proceeding is to be premised upon allegations that the teacher violated reasonable regulations adopted by the board of education, then the teacher’s actions must be deemed to have been willful, persistent and contrary to a reasonable regulation. A question immediately presented is what constitutes a “reasonable regulation” or policy? In order to determine a “reasonable regulation” or policy and whether a teacher’s actions were “willful”, and then “persistent”, necessary probative inquiry must be made concerning who has knowledge of the regulation or policy, what interpretative training or dialogue has occurred and whether the teacher has received the benefit of clarification of the policy. Inquiry and determination of the stated qualifiers is to be tempered by whether the teacher asserts “..the school board violated a statutory right or constitutional obligation..”<sup>51</sup>

Reported legal decisions regarding a teacher’s willful and persistent disregard of reasonable regulations of policy are sparse. Such decisions are limited to a teacher’s disregard for fire alarms<sup>52</sup>, degrading punishment of students<sup>53</sup>, failure to communicate with a board of education regarding extended absence<sup>54</sup>, and a former regulation that required a female teacher’s contract to terminate if she married.<sup>55</sup>

Tragically representatives of the BOE – Superintendent Short and Attorney Millstone – did not introduce a single Mount Vernon City School District policy into evidence. Failure to introduce a single policy is crucial as the very basis of R.C. 3319.16 requires as an element of the prima facie case evidence of a reasonable regulation. The failure is tragic considering vast

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<sup>51</sup> Bertolini v. Whitehall City School Dist. Bd. of Edn. (2000), 139 Ohio AppPage3d 595

<sup>52</sup> Calhoun v. Madison Board of Education 1989 Ohio AppPage Lexis 1054 (Richland 1989)

<sup>53</sup> Pyle v. Southwest Licking Local Board of Education, Case No. 90-S-87896 (Licking 1991)

<sup>54</sup> Wynne v. South Point Local School District Board of Education, 1992 Ohio AppPage Lexis 3850 (Lawrence 1992)

<sup>55</sup> Greco v. Roper, 145 OS 243 (1945)

amounts of time and resources have been expended in pursuit of the BOE's resolution but without reference to any specific Mount Vernon City School District policy.

John Freshwater's defense and response to the allegations contained specific references to Mount Vernon City School District policy and references to Ohio Revised Code all of which exonerate Teacher Freshwater's actions. Revelations of dire incompetence erupted when Mount Vernon City School District administrators were questioned about specific policies adopted by the BOE. Repeatedly administrators were asked basic interpretative questions about specific policies for which they had no reasonable answers. (See Diagram – Was there ever school policy training prior to in-service August 2009?)

Multiple highlights of contradiction occurred when considering alleged Mount Vernon City School District policy or reasonable regulations. Attorney Millstone failed to ask the so important health questions before staging a Tesla Coil demonstration despite the presence of then pregnant Attorney Jessica Philemond who was seated within arm's reach of the Tesla Coil.<sup>56</sup> Certainly rehearsals for the staged Tesla Coil demonstration did not include Teacher Bill Oxenford who inadvertently shocked himself with the Tesla Coil.<sup>57</sup> Furthermore, Attorney Millstone's inflammatory orchestration of igniting a piece of paper with the Tesla Coil in an unvented, public facility, a criminal act<sup>58</sup>, was never an action allegedly conducted by John Freshwater. It was neither an accurate portrayal of the Tesla Coil nor was it a comparable demonstration to ANY proposed use by John Freshwater in his classroom. Attorney Millstone's demonstration was a symbolic gesture hoping this Referee would conclude 'where there is smoke there is fire'. But as the late, great President John F. Kennedy observed, "Where there is smoke there may not always be fire; there may be a smoke making machine". Thus it is critical

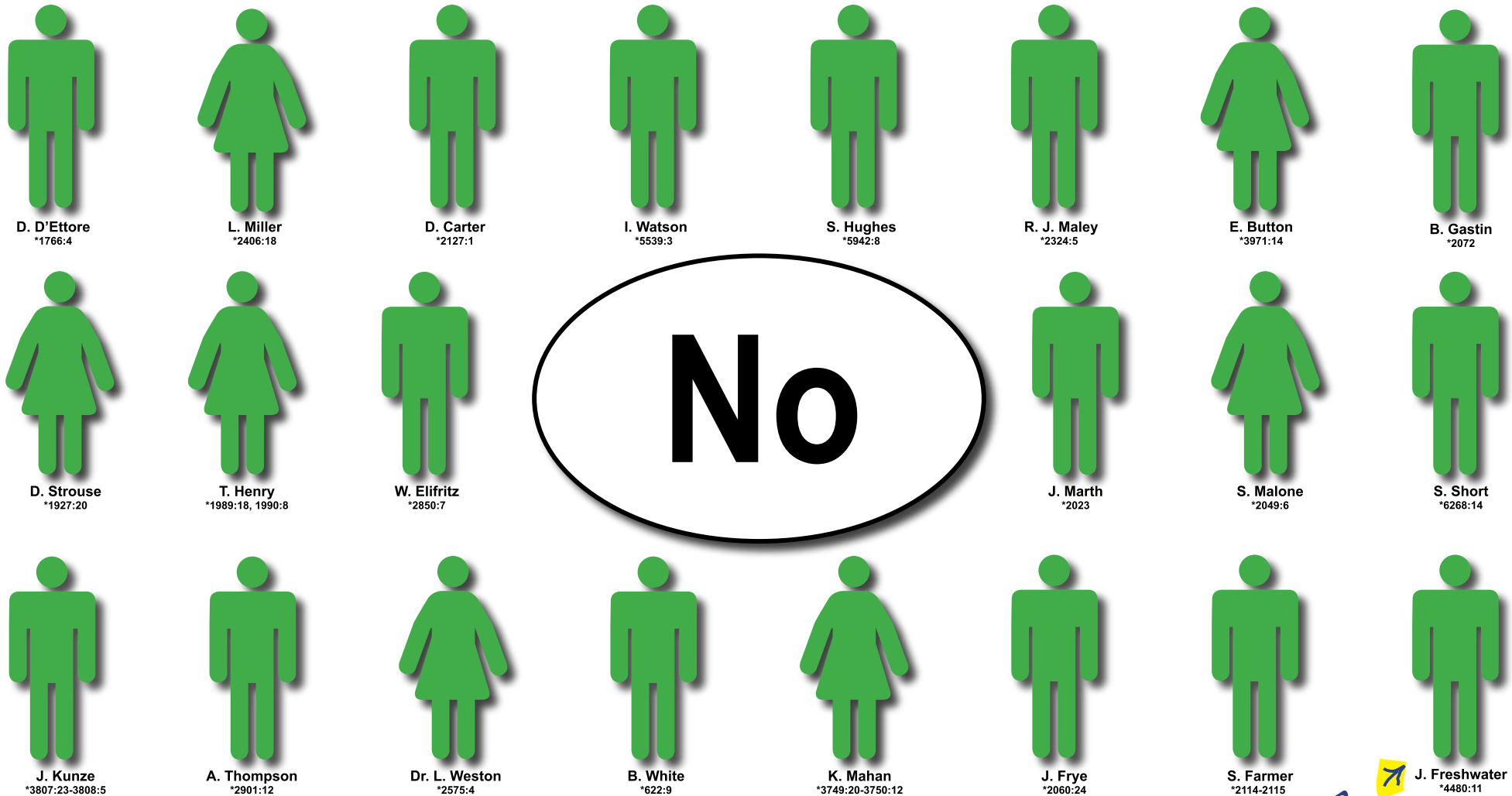
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<sup>56</sup> Transcript Page 1441

<sup>57</sup> Transcript Page 1443 and 1424

<sup>58</sup> R.C. 2903.03(A)(3) and 2909.07(A)(2) and prohibitions against opening burning without a valid permit.

# Was there ever school policy training prior to in-service August 2009?



**14 Teachers, 6 Administrators and 2 Board Members.**

\*Denotes Hearing Transcript

to differentiate the actions of John Freshwater and Attorney Millstone which centers upon Attorney Millstone's slight-of-hand because he had the benefit, and responsibility of reviewing instructions for use of the Tesla Coil, where Teacher Freshwater had not. (See Diagram – Tesla Coil - 1/22/08 letter)

Ironically when former board member-witness Ian Watson used a Tesla Coil on himself, he too failed to heed the important cautionary health advisory despite having access to the instructions for use of the Tesla Coil. Aside from disregarding known instructions for use of the Tesla Coil which prohibited touching human skin, witness Ian Watson not only used the Tesla Coil on his own skin, but compounded the hazard by using the Tesla Coil in the presence of Principal White who proclaimed he had an electrical implant in his body.<sup>59</sup> Ian Watson cannot hide behind his admission “It was not my shining moment,”<sup>60</sup> as it is a certainty Ian Watson had notice of the existence of Tesla Coil instructions as Steve Dennis testified Mr. Watson showed Mr. Dennis the result of Mr. Watson's Tesla Coil experiment “after”<sup>61</sup> Mr. Dennis “met with the Investigators.”<sup>62</sup> The Dennis Family met with investigators from HR on Call, Inc. prior to May 15, 2008. (See - Diagram – Tesla Coil - 1/22/08 letter)

Superintendent Steve Short's integrity and competence became suspect as he could scarcely articulate a direct answer which even remotely resembled any actual Mount Vernon City School District policy when asked to explain Mount Vernon City School District policy. The reality for the Mount Vernon City School District was that leadership failed to identify, train or otherwise make known existing policy regulations because management did not know the specific adopted policies themselves.

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<sup>59</sup> Transcript Page 556

<sup>60</sup> Transcript Page 5469, Line 16

<sup>61</sup> Transcript Page 3231

<sup>62</sup> Transcript Page 3231

Those Middle School Teachers who used the Tesla Coil  
in a manner **LATER** determined to be “misuse.”



J. Freshwater



S. Farmer  
\* 2109:1-2 & 2110



D. D'Ettore  
\*1747:2 & 1752



L. Miller  
\*2414:1 & 2417:8



D. Newcomer  
\*2131



J. George  
\*\*2415:20



B. Oxenford  
\* 1452:25

B Oxenford also testified he  
had not seen instructions,  
in fact in 1442:2-3 he says,

**“I pursued them  
at one point because  
WE NEVER HAD THEM.”**

He went on to say he pursued  
them in May of last year.

1/22/08 letter:

“If there should be  
another occurrence  
of misusing this  
equipment then this  
letter will be entered  
into your permanent  
record.”

Board Exhibit # 9

Those who knew, or should have known, the proper  
uses, yet intentionally “misused” the Tesla Coil  
**AFTER** the 1/22/08 letter.



T. Herlevi  
Investigator  
HR on Call  
\*1219:16

“...not the  
smartest thing...  
I've ever done...”



B. Oxenford  
At the direction  
of D. Millstone  
\*1441:16-20

“It was  
not my shining  
moment.”



I. Watson  
School Board President  
\*5469:12-14 5469:16

\*Denotes Hearing Transcript  
\*Denotes Derived from Testimony

## **2. “Other Good And Just Cause”**

It appears the BOE’s stated allegations against John Freshwater are a matter of first impression as the analysis relates to whether Teacher Freshwater’s action constitutes “good and just cause” to terminate his contract.

A teacher’s contract termination proceeding is to be premised upon allegations the teacher’s conduct fell below some standard of conduct deemed “other good and just cause”. It is important to grasp parameters of the category of “other good and just cause”. The statutory category is limited and not to be considered a catch-all classification. The Supreme Court of Ohio has held "other good and just cause" must involve a "fairly serious matter."<sup>63</sup>

Ohio courts have not ruled upon facts and circumstances as alleged against John Freshwater. Ohio courts have deemed “other good and just cause” against a teacher when the teacher has been indicted or convicted of a criminal offense<sup>64</sup>, if the teacher has been excessively absent<sup>65</sup>, has made sexually explicit statements to students<sup>66</sup>, failed to administer tests in accordance with board rules<sup>67</sup>, brought a loaded gun to school<sup>68</sup>, used their teaching position for financial advantage beyond the pay received for their teaching<sup>69</sup>, refused to participate in peer assistance review<sup>70</sup>, failed to submit to mental examination<sup>71</sup>, and failed to obtain teaching certificate<sup>72</sup>.

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<sup>63</sup> Hale v. Bd. of Edn., City of Lancaster, 13 Ohio St.2d 92, (1968)

<sup>64</sup> Kitchen v. Board of Education of the Fairfield City School District, 2007 Ohio 2846 (Butler 2007)

<sup>65</sup> Yarian v. Struthers City Schools Board of Education, 1988 Ohio AppPage Lexis 2643 (Washington 1988)

<sup>66</sup> Oleske v. Hilliard City School District Board of Education 2001 Ohio AppPage Lexis 4298 (Franklin 2001)

<sup>67</sup> Hopkins v. Indian Hill Board of Education 1986 Ohio AppPage Lexis 5263

<sup>68</sup> Ratini v. Windham, No. 2004P0043, 04-LW-5713 (Portage 2004)

<sup>69</sup> Spencer v. Vantage Board of Education, CV-90-8-80 (Van Wert 1991)

<sup>70</sup> Thomas v. Columbus Public Schools, 1991 Ohio AppPage Lexis 684 (Franklin 1991)

<sup>71</sup> Cephus v. Dayton Board of Education 1993 Ohio AppPage Lexis 5144 (Montgomery 1993)

<sup>72</sup> Antram v. Jonathan Alder Local School District, 92CV03-040 (Madison 1992)

Ohio has deemed “other good and just cause” was not apparent when a teacher used controversial teaching techniques.<sup>73</sup>

**a. Intent**

Unlike many areas of law where the elements of a claim or prosecution are definite and specific, none of the elements in any of the allegations against John Freshwater are definite and specific with a demonstrable prima facie case, but rather amorphous with an inexact target expectation. However, determining intent of the teacher is important. In a 2010 Ohio public school teacher case involving teacher Rick Stalder, a referee found teacher Stalder did not have any intent to harm a student when teacher Stalder threw a basketball at a misbehaving student. The BOE attempted to terminate Stalder’s teaching contact pursuant to the “other good and just cause” found in R.C. 3319.16 because the BOE alleged Stalder should not have thrown a basketball at a misbehaving student. Both the referee and the Court of Common Plea opined teacher Stalder’s attempt to knock the basketball from the misbehaving male student's hand clearly did not amount to a "fairly serious matter". More importantly, teacher Stalder did not manifest any intent to harm a student.

It is apparent the “other good and just cause” from R.C. 3319.16 involves a teacher’s mens rea. In the law, the state of one's mind at the time one carries out an action is the mens rea. The aim, or purpose, of a teacher’s action is their intent when they undertook an action for which Courts deem an important ingredient in the calculus of what constitutes “other good and just cause”.

Determining a teacher’s intent in proceedings pursuant to R.C. 3319.16 has been important since 1995 especially when the teacher engages in a controversial modality.<sup>74</sup> In 1995,

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<sup>73</sup> James v. Trumbull County Board of Education, 105 Ohio AppPage3d 392 (Ohio AppPage 11 Dist. 1995)

<sup>74</sup> James v. Trumbull County Board of Education, 105 Ohio AppPage3d 392 (Ohio AppPage 11 Dist. 1995)



Teacher Marianne James' used controversial modalities when teaching special education students and correcting unwanted student behavior which included teacher actions of putting hot sauce in the mouths of students, tipping seated student's chairs backwards and facial screening of students or putting a towel over the student's head. *Id.* The referee, and later the Court, found Teacher James' actions may not have been favored in the teaching community, and may not have followed practices and procedures advocated by others in the teaching profession. But because there was not a singular, proven or accepted 'standard of practice' in the field, Teacher James "did not intentionally or maliciously try to harm any student she taught". *Id.* Accordingly, the referee and Court found Teacher James' admitted use of aversives (the controversial techniques) did not provide a sufficient basis upon which to discharge her for "other good and just cause." *Id.*

It is significant to note the Court in Teacher James' case and the referee were persuaded to find for the teacher because the BOE failed to produce any written policy allegedly violated by Teacher James or cite a job description deficiency. It is imperative in John Freshwater's situation to recognize that the BOE's presentation of evidence did not include a single exhibit or reference to any written policy of the Mount Vernon City School District. It was painfully apparent that witnesses for the BOE avoided reference to the established board policies as to do so would demonstrate their incompetence about the policies coupled with the fact the policies actually exonerate John Freshwater. John Freshwater made reference to seven (7) BOE policies and three (3) Ohio Revised Code provisions that exonerate him. Sadly, not only did BOE's counsel fail to connect any of the allegations to a prohibition stated in an established policy, but BOE's counsel did not even ask any clarifying questions related to the BOE's policies introduced in John Freshwater's defense.

Exoneration for Teacher James resulted from the failure of the BOE to establish any intentional disregard for the safety or well-being of her students. Id. The Court and referee deemed that Teacher James may not have always used the best judgment but held where teachers work without clear guidelines in an educational area that is evolving and subject to differences of opinion, both statutory and case law require school boards to inform teachers of their expectations before terminating them." Id. (emphasis added)

Lastly, the Court said Teacher James' actions were not of the fabric which would constitute "a fairly serious matter" sufficient to prove a discharge under the statute. Id.

"Other good and just cause" must be related to some action taken by the teacher with an apparent "intent" by the teacher for the action to result in a prohibited outcome.

**b. Teaching Record**

Consideration for a teacher's record is important. Multiple Ohio cases have found a teacher's positive performance in the classroom instructing students should receive significant weight when determining "other good and just cause". Discretion was abused when a school board imposed "the most severe sanction" of termination upon the teacher without first "considering the teacher's employment record." *Katz v. Maple Heights City School Dist. Bd. of Edn.*, (1993), 87 Ohio.App.3d 256. The 2010 recent case of public school teacher Rick Stalder reinforces this important trend of recognizing a teacher's previous strong, worthy job performance when a Court emphasized, "...in considering whether there was good and just cause to terminate Stalder, the Board did not consider Stalder's exemplary teaching record or his evaluations, which complimented Stalder on his "strong discipline" and ability to maintain "control of his classroom" and described him as a "good role model." A board of education must consider a teacher's employment record prior to imposing a particular sanction. Importantly noted here, John Freshwater's performance evaluations can be characterized only as exemplary

when compared to accusatory witnesses Steve Short, Lynda Weston and even Richard Cunningham. Moreover, only one teacher - John Freshwater – has been documented in recent history of the Mount Vernon Middle School to have received two (2) distinguished service teaching awards nominated by and presented from Mount Vernon City School District school administrators in 2000-2001 and 2006-2007.

“Other good and just cause” has been an elusive definition because presently, it is not precisely defined by Ohio Courts as it relates to R.C. 3119.16. However, the parameters of “just cause” have been more clearly articulated in cases concerning unemployment-compensation appeals. The Ohio Supreme Court has recognized that “[t]here is, of course, not a slide-rule definition of just cause.” *Irvine v. Unemp. Comp. Bd. of Rev.* (1985), 19 Ohio.St.3d 15, 19. The *Irvine* Court went on to explain “just cause” has not been clearly defined in our case law. Essentially, each case must be considered upon its particular merits. Traditionally, “just cause”, in the statutory sense, is that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act.” *Id.*

It is appropriate to limit and consider each case reviewed pursuant to the “other good and just cause” standard from R.C. 3319.16 upon the situation’s particular circumstances. Similarly each unemployment compensation case must be considered upon its particular merits in determining whether there was just cause for discharge. *City of Warrensville Heights v. Jennings* (1991), 58 Ohio.St.3d 206, 207. The determination of just cause depends upon the “unique factual considerations” of a particular case and is therefore primarily an issue for the trier of fact. *Irvine* at 17.

**c. Notice**

The plainly perceivable design of R.C. 3319.16 is that the employing board shall furnish the teacher a written notice signed by its treasurer of its intention to consider the termination of

John Freshwater's contract with full specification of the grounds for such consideration. The termination hearing must be confined to the grounds given for such termination. Because the termination hearing is confined to the grounds contained in the specifications, it is important that the board exercise care in the preparation and drafting of such specifications. A bellwether for this matter should have been perceived by leadership with the BOE's first resolution of June 20, 2008, which erroneously cited the American Content Standards instead of the accurate Academic Content Standards.

John Freshwater was supposed to have to respond only to allegations in the BOE's resolution of July 7, 2008. Mr. Millstone, the BOE's legal counsel, continuously injected material into the record which was unrelated to the allegations in the BOE's July 7, 2008 resolution. The extraneous materials were intended to be inflammatory toward John Freshwater and created a changing nature to the proceedings presumptively aimed to keep John Freshwater guessing about what he might next have to defend. Generally speaking the test of whether the specifications are sufficiently complete appears to be whether or not the teacher is sufficiently apprised of the misconduct of which he is accused to enable him to properly prepare and present his defense. Statutorily John Freshwater is not required to respond to any extraneous allegations beyond the July 7, 2008, resolution which constitutes the charging document.

#### **IV. STATEMENT OF PROCEEDINGS**

The proceedings of this hearing are unprecedented in their scope and duration.

John Freshwater was in the second year of a three (3) year limited contract when the BOE resolved to consider terminating its contract with John Freshwater. Renewal of a limited contract is automatic if the BOE does not evaluate the teacher twice, once before January 15 and once between February 15 and April 1. John Freshwater was not evaluated during the statutorily mandated timeframe.

Hypocrisy abounded at the onset of this matter when the employer did not follow its established policy regarding public complaints. On December 7, 2007, the parents of 8<sup>th</sup> grade student Zach Dennis took photographs of their son's arm to Superintendent Steve Short alleging an injury occurred to Zach the day before during a science experiment in John Freshwater's 8<sup>th</sup> grade science class. Instead of following BOE *Policy – Public Complaints*<sup>75</sup> (Employee Exhibit 118) or following the law as detailed in R.C. 2151.421, Ohio's mandatory reporting requirement of abuse or neglect of a child, Steve Short made a hand-off to Principal William White who spoke to John Freshwater about the Tesla Coil science experiment. The details of Principal White's actions are sketchy. But it is known, again, another BOE administrator, Principal White, did not follow BOE Policy 9130 regarding public complaints by bringing together the teacher, John Freshwater, and the Dennis' parents to communicate about the exact nature of the science experiment. Instead, forty-three (43) days later Principal White resolved and adjudicated the matter by writing a letter instructing John Freshwater not to use the Tesla Coil again in a manner which involved student contact with the Tesla Coil.

Unbeknownst to John Freshwater and outside the requirements of BOE Policy 9130, it is apparent the Dennis' parents began contacting then BOE President Ian Watson and board member elect Jody Goetzman as early as January 2008. Details are scant regarding the exact purpose or complaint made by the Dennis' parents to either Watson or Goetzman. For certain Superintendent Short and Principal White did not speak to John Freshwater about the Tesla Coil again after Principal White's letter of January 22, 2008, solidifying the matter was adjudicated.

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<sup>75</sup>Policy 9130 – Public Complaints, states in part, "It is the desire of the Board to rectify any misunderstandings between the public and the District by direct discussions of an informal type among the interested parties. It is only when such informal meetings fail to resolve the differences, shall more formal procedures be employed." And further states in part, "At the same time, the Board of Education has a duty to protect its staff from unnecessary harassment".

Another certainty is Principal White again did not follow BOE Policy 9130 despite receiving complaints that John Freshwater was not obtaining permission slips for student attendance at Fellowship of Christian Athletes (FCA) meetings, had participated in a healing session and contacted a speaker for the FCA, and attempted to take students to an abortion clinic rally.<sup>76</sup> Despite Principal White's admission he could not "conclude"<sup>77</sup> John Freshwater acted as alleged, BOE Policy 9130 again was not followed.

Ultimately on April 14, 2008, a Dennis' family attorney<sup>78</sup> wrote to Superintendent Short "...in an effort to resolve these matters immediately so that no legal action is necessary".<sup>79</sup> Superintendent Short again inexplicably failed to use BOE Policy 9130 or communicate to John Freshwater the exact nature of the Dennis' family's complaint. (It does not appear Superintendent Short even advised the Dennis family he and Principal White resolved the Tesla Coil complaint with the January 22, 2008, letter to John Freshwater.) In fact, John Freshwater did not learn it was the Dennis' family who had complained until April 22, 2008, when during an in-person meeting with Principal White, John Freshwater learned from Principal White the Dennis family had been the singular source of any complaint.<sup>80</sup>

On April 22, 2008, during the meeting with Principal White and through the BOE's press release (Employee Exhibit 3), John Freshwater learned the BOE had relinquished its responsibility to make further inquiry into the Dennis' complaint and that he would be asked to speak with an investigator later learned to be from HR on Call, Inc. On May 15, 2008, John

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<sup>76</sup> Transcript Page 500

<sup>77</sup> Transcript Page 502, "I really couldn't conclude that Mr. Freshwater had done that within the text of what the allegation was with the parent. The conversation occurred within that setting of students, but I believe that it was probably student oriented."

<sup>78</sup> The Dennis' family had multiple attorneys present on their behalf throughout the hearing in this matter proximately sitting and collaborating with the BOE's counsel, David Millstone, at the same table opposite John Freshwater.

<sup>79</sup> Board Exhibit 6, Tab 1, letter from attorney Jessica Philemond to Superintendent Steve Short.

<sup>80</sup> Transcript Page 4482, 638, 222, 606, 677

Freshwater met with the witnesses from HR on Call, Inc., Thomas Herlevi and Julia Herlevi, a husband and wife duo.

Fortunately for John Freshwater, he audio-recorded the interaction between himself and the duo Herlevi's for if he had not, John Freshwater would not have been able to conclusively prove the substandard quality and talent of the Herlevi's. Witness Thomas Herlevi arrogantly proclaimed he documented "...the old fashioned way"<sup>81</sup> by using "A piece of paper and a pencil and wrote it down".<sup>82</sup> Witness Julia Herlevi was less confident about her skills admitting her husband, Witness Thomas Herlevi, was responsible for the findings<sup>83</sup> in Board Exhibit 6 even though Julia Herlevi signed the report as an owner<sup>84</sup> of HR on Call, Inc. Well beyond the bounds of her skill set Witness Julia Herlevi reluctantly and carefully wanted the definition of "investigator"<sup>85</sup> narrowed for her, as apparently she was uncomfortable with the customary definition attached to the word "investigator" as stated in Article 402 of the Master Contract Between The Mount Vernon Board Of Education And The Mount Vernon Education Association (Employee Exhibit 10, page 17).

Aside from witness Julia Herlevi's claim that her husband was "...doing the interviews"<sup>86</sup> she verified her involvement in the investigation by admitting "I conducted several interviews on my own with one of the union reps from the school system"<sup>87</sup>. HR on Call, Inc. breached professional investigative protocols by permitting a non-investigator to singularly interview witnesses as Thomas Herlevi testified he is the investigator for HR on Call, Inc.<sup>88</sup> In an interview witness Julia Herlevi conducted by herself of Teacher Dino Deotorre, she failed to

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<sup>81</sup> Transcript Page1073-1074

<sup>82</sup> Transcript Page1073-1074

<sup>83</sup> Transcript Page2676

<sup>84</sup> Transcript Page2676

<sup>85</sup> Transcript Page2675

<sup>86</sup> Transcript Page2715

<sup>87</sup> Transcript Page2671

<sup>88</sup> Transcript Page 1084, Line 4-5

abide by an elementary investigative protocol of including exculpatory information witness Deotorre provided in that Deotorre asserted he too used the Tesla Coil in the same manner as did John Freshwater.<sup>89</sup> Although witness Julia Herlevi admits she and her husband are not equal investigators<sup>90</sup> both Julia Herlevi and witness Thomas Herlevi were consistent in that they failed to identify or even acknowledge in their report (Board Exhibit 6) the clearly existing exculpatory information they learned. Duo Herlevi's hid the facts that John Freshwater did not commit a number of the allegations as alleged and the complainants, who were the primary witnesses, asserted many allegations which were demonstrably untrue.

Exculpatory evidence is information which frees somebody from blame, responsibility, obligation, or culpability. Exculpatory evidence is reflective and impacts upon the credibility of an accuser. During a lengthy exchange of questions and answers during cross examination of Thomas Herlevi it was learned the primary accuser, Zach Dennis, made many accusations which were deemed not credible, or worthy for inclusion in the report.<sup>91</sup> Any accusation an accuser makes which is deemed unworthy or not credible provides insight into and impacts the overall reliability of the accuser. As presented below, it will be conclusively shown Zach Dennis is an untruthful accuser as other classmates of Zach Dennis who were eyewitnesses in John Freshwater's classroom specifically contradict Zach Dennis' testimony both with written affidavits and sworn testimony which was not diminished during cross examination. However, there exists another form of evidence which demonstrates Zach Dennis is an unreliable accuser who lacks veracity based upon the number of accusations he initially made which were deemed unsubstantiated. Thomas Herlevi tried to prop up his plummeting credibility and lack of objective investigative intent evidenced by his failure to interview other students from John

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<sup>89</sup> Transcript Page 2723-2724

<sup>90</sup> Transcript Page 2676

<sup>91</sup> Transcript Page 1269-1275



Freshwater's class instead relying solely upon Zach Dennis when he self-servingly opined, "...especially when you talk with the students, I believe kids are pretty honest."<sup>92</sup> Thomas Herlevi does not know or understand the ancient Proverb which holds, "The first to present his case seems right, till another comes forward and questions him".

Zach Dennis made at least thirteen (13) accusations against John Freshwater immediately prior to or during the investigative stage. Although Thomas Herlevi would only commit that Zach Dennis made twelve (12) allegations during his investigation, Zach Dennis' testimony reveals Zach Dennis made an additional allegation which accused John Freshwater of holding a Bible in the air and stating, "earth is going to come to a fiery end".<sup>93</sup> Thomas Herlevi did not include this accusation in his report because,

*"Because I asked him(John Freshwater) about it. He stated that he had not done that. I got no other evidence through all the discussions that I had with anybody that would indicate he had, so I didn't include it in the report."*<sup>94</sup>

In reality Thomas Herlevi's only information about such an accusation came from Zach Dennis whose allegation could not be corroborated. Zach Dennis made five (5) other accusations against John Freshwater which could not corroborated or proven. Zach Dennis made thirteen (13) accusations against John Freshwater for which only seven (7) were deemed worthy, or credible enough to include in Thomas Herlevi's investigation. The five (5) additional incredible or unworthy accusations made by Zach Dennis were that John Freshwater, violated the newly implemented permission slip policy,<sup>95</sup> commented that FCA students were the "saved ones"

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<sup>92</sup> Transcript Page 1117

<sup>93</sup> Transcript Page 346

<sup>94</sup> Transcript Page 1272, Line 5-8

<sup>95</sup> Transcript Page 1273, Line 8

implying students who otherwise went to recess were going to Hell,<sup>96</sup> distributed Bibles,<sup>97</sup> prayed to remove Satan from Pastor Stephen Zirkle,<sup>98</sup> and encouraged students to break the law.<sup>99</sup> It is highly probative of Zach Dennis' propensity for untruthfulness for a trier of fact to consider the incredible accusations along with those deemed credible. The investigative report of HR on Call, Inc. did not objectively provide the full measure of evidence by excluding or failing to acknowledge the exculpatory nature of Zach Dennis' six (6) unproven, uncorroborated incredible claims which reflect upon the totality of his ability to be truthful. Shamefully, HR on Call, Inc. and Thomas Herlevi failed to include the reality of a fact that fully exonerated John Freshwater when HR on Call, Inc. purposefully excluded from revelation that Teacher's Aide, Ruth Frady, declared and admitted she was actually the person who uttered the word "Satan" during any prayer involving Pastor Zirkle.<sup>100</sup>

Moreover, in a ridiculous act of incompetence, Thomas Herlevi used the Tesla Coil upon himself.<sup>101</sup> But the most egregious aspect of Thomas Herlevi's reasoning is his arrogant lack of objectivity. Thomas Herlevi testified regarding his use of the Tesla Coil by stating:

*Q: You say he should not have used the Tesla coil upon another person based upon the instructions. Is that true?*

*A: Correct.*

*Q: Did you yourself use the Tesla coil upon yourself or the other investigator or anybody else during your investigation?*

*A: Yes. I used it on myself.*

*Q: But the instruction said not to, correct?*

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<sup>96</sup> Letter by Attorney Jessica Philemond dated April 14, 2008, included as Attachment 1 to Board Exhibit 6; and Transcript Page 1273, Line 223 – Page 1274, Line 1

<sup>97</sup> Transcript Page 1273, Line 17-21

<sup>98</sup> Transcript Page 1273, Line 12-16

<sup>99</sup> Transcript Page 1273, Line 22-23

<sup>100</sup> Transcript Page 5179, Line 21-23, Page 5186, Line 3-10; Employee Exhibit 192

<sup>101</sup> Transcript Page 1112-1113

- A: *I didn't have any instructions. I didn't have the instructions. I went ahead and used it.*
- Q: *So wait a minute. I want to make sure I understand it, Mr. Herlevi. That record over there is going to be very important to me in the future. Let me ask you this: When you used the Tesla coil upon you or anybody else, did you have instructions prior to doing so?*
- A: *No.*
- Q: *So you went ahead and used it anyway without instructions, correct?*
- A: *That's right.*
- Q: *Who all did you use it on?*
- A: *I used it on myself that same day.*

Just like Thomas Herlevi, John Freshwater did not have the instructions when he used the Tesla Coil during the previous 21 years prior to December 6, 2007. The difference between the use of a Tesla Coil by John Freshwater and that conducted by Thomas Herlevi was that Teacher Freshwater received training from a colleague in how to use the Tesla Coil in the manner that he used it. Further, in 21 years of use of the Tesla Coil by John Freshwater upon an estimated six hundred (600) students,<sup>102</sup> never once had Teacher Freshwater, or his colleagues, received any report of an alleged injury to anybody. When Thomas Herlevi applied the Tesla Coil upon himself, he at least had knowledge of an alleged injury supposedly caused by a Tesla Coil. Remarkably Thomas Herlevi does “make a point” with his use of the Tesla Coil upon himself: the BOE’s resolution against John Freshwater is based upon work by people who lack credentials, experience and the basic understanding of objective fairness.

But for all of Julia Herlevi’s involvement in this matter there was one begrudgingly truthful answer she did admit – her proofreading and editing<sup>103</sup> resulted in an “inflammatory”<sup>104</sup>

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<sup>102</sup> Transcript Page379

<sup>103</sup> Transcript Page2671

characterization toward John Freshwater whereby she assisted in depicting John Freshwater as trying to make a point or statement by having had a Bible checked out from the school's library in his classroom. John Freshwater spoke the truth during his sit-down with the Herlevi's and the true, accurate account of his interaction was captured by audio-recording which correctly avers John Freshwater was "curious" (Employee Exhibit 148, page 45) about the Bible in the library and lawfully, constitutionally, checked the book out to review. (See Diagram – Were you trying to "make a point"?)

HR on Call, Inc.'s "investigative" report can politely be deemed inaccurate but in the harsh reality of this matter is an outright deliberately biased, sloppily compiled defamatory document replete with hearsay which is untrue. (See Diagram – HR on Call's lack of accuracy, objectivity and fairness leads to more fabrication and unsubstantiated charges")

In relation to the "investigation" done at a minimum John Freshwater should have been afforded the second scheduled interview and permitted to contractually respond. The contractual requirements of Article 402 were discussed on May 15, 2008, as evidenced by the exchange between the Herlevi's, the union representative and John Freshwater. Employee Exhibit 148, the audio-recording (thankfully) made by John Freshwater makes clear witness Thomas Herlevi knew about the union contract as he stated he wanted "...to honor the process that's in the Union contract".<sup>105</sup> Furthermore, witness Thomas Herlevi continued, "Our goal is to be following up a discussion with you or anybody else we need to talk to. Following the Union Contract on the steps, you know".<sup>106</sup> Both John Freshwater and the union representative concurred and advised

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<sup>104</sup> Transcript Page2762

<sup>105</sup> Employee Exhibit 148, Page 1 and Page51

<sup>106</sup> Employee Exhibit 148, Page 51

## Were you trying to “make a point”? Board Exhibit #1

### HR on Call's Edited Misrepresentation:



**HR on Call highlights partial testimony inaccurately, out-of-context, and is admittedly “inflammatory,\*” in an attempt to establish that John Freshwater’s intent was to be insubordinate.**

\* As testified by HR on Call, Inc. investigator Julia Herlevi, Transcript 2762:17-21

### John Freshwater's Actual, Documented Response to HROC:

**“Yeah,** because when I opened it [the Bible] up I recognized it was bought with government money, and its been there [in the library], I obviously looked at the dates when it was stamped and actually I looked at some of the names on there it’s like oh I remember that kid, remember that kid, I actually kind a enjoyed looking at it, ah it dates back a long ways.

Employee Exhibit 148 p.46

**Clearly, there was no intent of insubordination in his full statement.**

# HR on Call's lack of accuracy, objectivity and fairness leads to more fabrication and unsubstantiated charges.


5/15/08 Audio Recorded Interview  
J. Freshwater and HR on Call

5/25/08 J. Freshwater Affidavits  
**IGNORED by HR on Call**


6/19/08 HR on Call  
Investigative Report

6/20/08 BOE  
Resolution


**Tesla Coil** HROC:  
"Are there any instructions  
that go with it?"  
JF:  
"... I have never seen any instructions."  
pg. 15


 "I never saw a box  
or any instructions with  
Tesla Coil."  
Affidavit - #7 Tesla Coil  
J. Freshwater


 "...complaining family's  
child's arm using an  
electrostatic device  
not designed for  
that purpose..."  
HROC summary  
of findings

 "Mr. Freshwater  
knew or should have  
known the  
manufacturer's advice  
regarding proper  
use of the science  
instrument..."  
pg. 1-1a

**Tesla Coil** HROC:  
"...you used a cross on the  
student and or on yourself?"  
JF:  
"No, it is not accurate."  
pg. 16


 "I have never seen any  
mark or anything on a student  
from a Tesla Coil."  
Affidavit - #7 Tesla Coil  
J. Freshwater


 "Mr. Freshwater did  
burn a cross..."  
HROC summary  
of findings

 "...to mark the shape of  
a cross into the arm of  
eighth grade students."  
pg. 1-1  
"The mark has lasted as  
long as 3-4 weeks on at  
least one student who  
described the area as  
'very painful'; and..."  
pg. 1-1b


**Tesla Coil** JF:  
"The science teacher that  
showed it to me, now retired,  
Jeff George, he showed it to  
me 21 years ago."  
pg. 9

 "How did I do the  
experiment with Tesla Coil?  
Just like Jeff did."  
Affidavit - #7 Tesla Coil  
J. Freshwater


 "Mr. Freshwater did  
improperly use a  
electrostatic  
device..."  
HROC summary  
of findings

 "Mr. Freshwater  
branded a religious  
symbol on the skin  
of some eight grade  
students."  
pg. 2-1b

**Easter** JF:  
"...and a student brought up that  
Easter is on Sunday, and what  
happened on Easter a kid brought  
up that's when Jesus rose..."  
pg. 52

 "Some student asked what  
Easter was or what it was  
about and another student  
answered."  
Affidavit - #4 Academic  
J. Freshwater Content Standard


 "Mr. Freshwater  
engaged in teaching  
of a religious  
nature..."  
HROC summary  
of findings

 "In 2008 discussing  
with students the  
meaning of Easter  
and Good Friday,  
including the  
resurrection;"  
pg. 3-2 (F)(i)


**FCA** HROC:  
"...what all does the leadership group do?"  
JF:  
"...phone calls, it's uh, phoning the  
speakers, the guest speakers."  
pg. 29


 "No, I don't initiate contact  
with FCA speakers to come in and  
speak when I am at school."  
Affidavit - #7 FCA  
J. Freshwater


 "...his involvement  
with (FCA) club  
exceeded the role of  
only being a  
monitor..."  
HROC summary  
of findings

 "Mr. Freshwater  
frequently went  
beyond his role as  
monitor and contacted  
guest speakers for  
FCA events..."  
pg. 3-3c


**FCA** HROC:  
"Have you ever led prayer?"  
JF:  
"Have I ever led prayer? No."  
pg. 34


 "No I don't pray with  
the students when they  
are in FCA."  
Affidavit - #10 FCA  
J. Freshwater Item 10 pg. 3


 "Mr. Freshwater  
engaged in prayer  
during FCA..."  
HROC summary  
of findings

 "Mr. Freshwater  
conducted and led  
prayer in the [FCA]  
meetings..."  
pg. 3-3a

**Bush/Powell Patriotic Poster:**  
  
Issue never raised by HROC

 No response  
documented because the  
issue was never raised.  
J. Freshwater

 "...but at least one poster  
not removed which  
Mr. Freshwater was again  
instructed to remove  
on 4-16-08 but did  
not do so..."  
HROC summary  
of findings

 "...was directed to  
remove or discontinue  
the display of all  
religious articles...  
including all posters...  
failed to comply."  
pg. 3-4

duo Herlevi's of John Freshwater's impending comprehensive written statements in the following exchange<sup>107</sup>:

Union: *I'm making an assumption that John's attorney's will likely give you some kind of written statement under the second paragraph of (inaudible) of the contract about giving him the opportunity to provide a comprehensive written response to the complaint if he chooses to do so, so, just in my brief discussion with him I'm assuming there going, they may want to do something in writing.*

JF<sup>108</sup>: *Oh, right.*

Yet for all of the commotion created by representatives of the BOE and Dennis family who after-the-fact, have desperately attempted to discredit John Freshwater's lawful use of his affidavits, created to be his "comprehensive written"<sup>109</sup> response to the allegations made against him, the undeniable fact is that John Freshwater put the BOE's delegate, duo Herlevi's, on notice and confided in the union representative prior to the affidavits' creation that the "comprehensive written" statement would be forthcoming.

Thankfully John Freshwater asked for a public hearing which presumptively kept an anonymous source informed enough to know that evidence removed from John Freshwater's classroom had not been disclosed. On January 14, 2010, John Freshwater received an anonymous letter revealing to him the documents contained in Employee Exhibit 178. Despite an outstanding request by subpoena dated January 12, 2009<sup>110</sup>, demanding documents and other tangible items taken from John Freshwater's classroom, representatives' of the BOE were not forthcoming with the materials. As a result of the anonymous letter, the undersigned demanded an immediate public records inspection which resulted in the revelation that Superintendent

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<sup>107</sup> Employee Exhibit 148, Page 1 and Page 57

<sup>108</sup> "JF" is the abbreviation John Freshwater assigned to himself in his transcription of the audio recording.

<sup>109</sup> Employee Exhibit 10, Article 402, Page 17, which states, "The person against whom the complaint is made will be given the opportunity to provide a comprehensive written response to the complaint if he/she chooses to do so".

<sup>110</sup> Employee Exhibit 177

Short failed to disclose the items for over one (1) year.<sup>111</sup> Two months later, in March 2010, John Freshwater and the undersigned were able to fully inspect the items retrieved from his classroom. The amount of materials totaled approximately seventeen (17) various sized boxes. Selected materials were then demanded via a public records request the contents of which are contained in Employee Exhibit 225. One notable document obtained from Employee Exhibit 225 was the training announcement from Mount Vernon Nazarene University detailing the “Religion in Schools” class instructed by Witness Dave Daubenmire. The training announcement provides details about the class John Freshwater attended that permitted him to learn from Employee Exhibit 70, a textbook titled, Finding Common Ground.

An anonymous source again dispatched materials to John Freshwater which resulted in Employee Exhibit 187 – “a black bag”. Documents inside Employee Exhibit 187 contained details of the 2003 Science Curriculum Committee which declared the BOE’s policy regarding controversial issues addressed and permitted John Freshwater’s then curriculum proposal. The exact language found on the document as written by Dr. Weston stated:

*“Board of education policy addresses controversial issues – Freshwater proposal is already addressed”.*

Combing the contents of Employee Exhibits 225 and 187 resulted in identifying students from John Freshwater’s eighth period 8<sup>th</sup> grade class. All members of the class were sought yielding ten (10) students who agreed to testify. The eyewitnesses from John Freshwater eighth period class are instrumental in determining issues of fact.

Anyone with an illusion that John Freshwater wanted this matter to consume as much calendar time as it has forgets Teacher Freshwater has been suspended without pay. John

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<sup>111</sup> Employee Exhibit 182



Freshwater cannot obtain a teaching position during the pendency of this hearing and has not been able to secure regular, full-time employment, therefore he is not earning wages.

The parties agreed to submit all evidence presented for consideration by the Referee.

**V. Evidentiary Considerations**

Lord Acton famously asserted “Power corrupts and absolute power corrupts absolutely.” Corrupted power is in part why this case came about. Part of the reason why this case developed is as old as the Bible and occurs in too many school yards across the nation. Part of this case is about bullies, about bullying, being bigger, stronger or having some kind of power that is misused. Superintendent Short and HR on Call, Inc., the delegates of the BOE, misused their power. They misused their power willfully, in part because of incompetence but also because of a lack of integrity. Evidence shows they misused their power intentionally and in some acts even maliciously in violation of BOE Policy 3361.01 – Threatening Behavior Toward Staff Member.

Superintendent Short’s bullying was not limited to exclusive use upon John Freshwater as Teacher Lori Miller felt the bully’s wrath. Teacher Miller spoke at a BOE meeting in August 2008. Approximately three weeks later when school began, Teacher Miller was summoned to Superintendent Short’s office and advised to bring a union representative. Superintendent Short began the meeting asking Teacher Miller about remarks she made during the BOE meeting and then asked Teacher Miller questions about a use of sick leave that occurred eleven (11) months prior. Superintendent Short portended Teacher Miller’s continued contract may be in jeopardy and requested medical verification of Teacher Miller’s use of sick leave. Teacher Miller never provided the requested medical verification and Superintendent Short did not further address the matter. Teacher Miller testified she felt threatened,<sup>112</sup> singled out<sup>113</sup> and thought it bizarre<sup>114</sup>

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<sup>112</sup> Transcript Page 2386, Line 21

<sup>113</sup> Transcript Page 2387, Line 2

Superintendent Short would discuss an eleven month old matter with her after she spoke at a BOE meeting.

Bullying is not limited to Superintendent Short and HR on Call, Inc. as Dr. Lynda Weston confronted Teacher Andrew Thompson about Teacher Thompson's statement to the BOE at the same meeting when Teacher Miller spoke. Teacher Thompson stated, "I felt like she was threatening my job from the standpoint that if I said the wrong thing, that I would lose my job".<sup>115</sup>

#### **A. Pawns**

Could it be that John Freshwater and Superintendent Short were pawns of a larger scheme for which they were simply game pieces to be moved around? It is inconceivable how Superintendent Short could schedule meeting in his office with John Freshwater in July 2008 to advise he was suspending John Freshwater without pay in part because John Freshwater had an alleged Bible verse posted in his classroom. Yet, even after the notoriety of John Freshwater's situation which was overseen and administered, at least in title, by Superintendent Short, Mr. Short still maintained on his office wall, available for anybody to see, a depiction of art which contained a Bible verse. Surely, Superintendent Short could not have reasoned his depiction of art which included a Bible verse was any different in quality or character compared to the George Bush/Colin Powell poster John Freshwater had in his classroom. Both Superintendent Short's and John Freshwater's art depicted a theme. Superintendent Short claimed his art piece was an "inspiration" created by his son.<sup>116</sup> John Freshwater testified his poster depicted a patriotic theme because John Freshwater's children attended separate military academies of The

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<sup>114</sup> Transcript Page 2379, Line 6

<sup>115</sup> Transcript Page 2956, Line 9-11

<sup>116</sup> Transcript Page 299-301

United States.<sup>117</sup> Only arrogance, incompetence, or, being a pawn explains how Superintendent Short committed such a contradictory gaffe. Revelations spring forth from Superintendent Short's testimony about the piece of art created by his son, an inspirational art which was so important to him he was moved to tears, but for which he could not remember the scripture verse. Superintendent Short mistakenly asserted the Bible verse on his son's artwork was from Romans 13:8, which states, "*Let no debt remain outstanding, except the continuing debt to love one another, for he who loves his fellowman has fulfilled the law*". In reality the inspirational artwork made by Superintendent Short's son contained a Bible verse cited from Romans 12:6, which reads, "*Having their gifts differing according to the grace that is given to us, let us use them,*".<sup>118</sup> Perhaps Superintendent Short made the scriptural mistake because he was contemplating the "debt" stated in Romans 13:8 as the debt he personally owed to John Freshwater for the egregious transgressions he and HR on Call, Inc. lead the BOE to take against John Freshwater.

Considering Superintendent Short to be a pawn in the scheme orchestrated against John Freshwater is bolstered by the fact Superintendent Short did not follow the law when presented with photographs taken by Jennifer Dennis allegedly depicting images of Zach Dennis' arm. R.C. 2151.421, - *Ohio's Mandatory Reporting Requirement of Abuse or Neglect of a Child* – states in pertinent part,

"No person described in division (A)(1)(b) of this section who is acting in an official or professional capacity and knows, or has reasonable cause to suspect based on facts that would cause a reasonable person in a similar position to suspect, that a child under eighteen years of age...has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child shall fail to immediately report that knowledge or reasonable cause to suspect to the entity or persons specified in this division.

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<sup>117</sup> Transcript Page 4637

<sup>118</sup> Transcript Page 6279

A school superintendent such as Superintendent Short unquestionably qualifies as a mandatory reporter pursuant to R.C.2151.421 as he is a **school teacher, school employee, and school authority**.<sup>119</sup> Again, it seems inconceivable Superintendent Short could consciously disregard the law stated in R.C.2151.421 but then assert John Freshwater violated the law by allegedly harming Zach Dennis.

John Freshwater cannot seek a Solomon style split as such is not authorized by R.C. 3319.16. Too often in employment matters an arbitrator, or referee in this instance, attempts to appease both labor and management by crafting a decision which grants only part of what each party desires. Given R.C. 3319.16's statutory limitation, the Referee's decision must be characterized as an all or nothing proposition for it to be of benefit to John Freshwater. The ramifications of the decision made by the Referee will permanently and conclusively affect the remainder of John Freshwater's life and career. Former BOE member-witness Steve Hughes' statement about how the Referee crafts his decision is exact. This hearing has become John Freshwater's day in court as the outcome in this case may preclude Teacher Freshwater from ever presenting his case again. Everything that happens in this case effects other pending and future litigation both for John Freshwater and other teachers. What happens as result of this case will affect John Freshwater's sense of justice in the American system for the rest of his life. The decision created by this Referee will affect John Freshwater's remaining teaching career, his retirement pension and his life. The Referee's decision is necessitated simply because some of

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<sup>119</sup> R.C. 2151.421 - Division (A)(1)(a) of this section **applies to** any person who is an attorney; physician, including a hospital intern or resident; dentist; podiatrist; practitioner of a limited branch of medicine as specified in section 4731.15 of the Revised Code; registered nurse; licensed practical nurse; visiting nurse; other health care professional; licensed psychologist; licensed school psychologist; independent marriage and family therapist or marriage and family therapist; speech pathologist or audiologist; coroner; administrator or employee of a child day-care center; administrator or employee of a residential camp or child day camp; administrator or employee of a certified child care agency or other public or private children services agency; **school teacher; school employee; school authority**;

those in power abused their power, did not know the policies of the board and abdicated the responsibilities of their position.

Because the BOE remains free to reject this Referee's report and recommendation "based upon a different interpretation of the significance of those facts,"<sup>120</sup> it is exceptionally important how this Referee's findings and recommendation are written. In another Ohio case, a referee's report deemed a public school teacher to be culpable; however, the referee recommended that the teacher's teaching certificate not be revoked for the following reasons: she had no active participation in the fraudulent scheme; the crime had no relation to her duties as a teacher. *Stelzer v. State Board of Education*, 72 Ohio App.3d 529 (Ohio App. 3 Dist. 1991). However, the referee in the *Stelzer* case made an impermissible recommendation in the teacher's favor that was in essence of no use to the teacher.

Because the Board is not required to follow the recommendations of the referee<sup>121</sup>, unless the Referee determines that termination of John Freshwater's teaching contract is disproportionate to any of the allegations and the BOE's resolution rises to the level of an abuse of discretion, the BOE and any reviewing court will not find a legitimate binding reason to follow the Referee's recommendation. It is enough to demonstrate the BOE's abuse of discretion through its representatives' lack of good faith, unfairness, arbitrary action and inflammatory bias to merit a favorable recommendation for John Freshwater. An oft quoted arbitration case cited for the proposition employment matters require fairness of investigation, consistent rule application, non-discrimination and a general sense of appropriateness, states in part:

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<sup>120</sup> Aldridge – need full cite

<sup>121</sup> *Graziano v. Amherst Village Bd. of Edn.* (1987), 32 Ohio St.3d 289, 293, 513 N.E.2d 282, 285

1. If management acts in good faith upon a fair investigation and fixes a penalty not inconsistent with that imposed in other like cases, an arbitrator should not disturb it.
2. If an arbitrator could substitute his judgment and discretion for the judgment and discretion honestly exercised by management, then the functions of management would have been abdicated, and unions would take every case to arbitration.
3. The only circumstances under which a penalty imposed by management can be rightfully set aside by an arbitrator are those where discrimination, unfairness, or capricious and arbitrary action are proved—in other words, where there has been abuse of discretion.

Stockham Pipe Fittings Co., 1 LA 160, 162 (1945).

HR on Call, Inc. and Superintendent Short have not acted in good faith and did not conduct a fair, complete and objective investigation. The differential treatment demonstrated between John Freshwater and others – Teachers Lori Miller, Andrew Thompson and Wes Ellifritz - reveals animus and illogical treatment.

Superintendent Short appears to have partnered with HR on Call, Inc. either willfully or by dupe through former BOE President Ian Watson to sway the balance against John Freshwater by presenting evidence that is without context or depth. In comparison, determining whether a person fired a fatal shot into another person is but one part of the inquiry, as the inquiry must also involve purpose, intentions and context coupled with opportunity to explain before a determination can be made whether the action was justified or unjustified. Representatives of the BOE definitely bullied a predetermined conclusion for the BOE's consideration failing to adhere to established BOE policies, re-interview the accused or find out why John Freshwater took action. This is not a case of simply deciding whether John Freshwater did or did not take a certain action as strict liability is not the measure for review. Founding Father Thomas Jefferson stated "Delay is preferable to error". Rather communication was required to determine reasons and rationale before being capable of making a factual determination. Superintendent Short supposedly knew how to conduct communication as he did with witness Teacher Lori Miller

when Superintendent Short inquired of Teacher Miller whether her “religious items” were part of a display.<sup>122</sup> However, in contrast to Superintendent Short’s capability to communicate and ask objectively, honest questions with Teacher Lori Miller, based upon Superintendent Short’s work performance evaluations, the issue becomes does Superintendent Short really want to achieve full disclosure or does he act to conceal a fact.<sup>123</sup>

Regarding Superintendent Short’s investigators from HR on Call, Inc. Teacher Tamara Henry deemed their effort an “inquisition” which resulted in a “very subjective, one-sided investigation”.<sup>124</sup> Teacher Henry explained, “I was really, really, really suspicious about the investigator because none of us -- the whole team was very suspicious. We did not understand why none of us were questioned, because we just -- I mean, we worked with John every single day. We saw his worksheets. We knew what his lesson plans were. We had the same students. I had the journal entries. That really surprised all of us, the whole team, that we weren't questioned. And it made all of us wonder why that was”.<sup>125</sup>

### **Motivations**

Another evidentiary consideration requires acknowledgement that this case represents many things to different people. Beginning with the complainants, to the Dennis Family, this case would seemingly be minimally about their son, Zach Dennis and his well being. Any reasonable parent would want to protect their child. A reasonable parent would respond to a child’s cry of injury with rapid customary medical attention. A reasonable parent would immediately report at the first instance of interaction with a school official any concern or

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<sup>122</sup> Employee Exhibit 232 and 233, Page 2 which reads in part, Superintendent Short “Is that part of your display? Is that part of the display you put up?” to which Teacher Lori Miller responded, “No”.

<sup>123</sup> Employee Exhibit 234, Summary of Evaluations from Board Members for Stephen Short as Superintendent, August 7, 2009, which in part reads, “Communication and follow-up skills need improvement; his faculty/employee record-keeping regarding evaluations is poor at times”.

<sup>124</sup> Transcript Page 1982

<sup>125</sup> Transcript Page 1982

allegation of physical harm to their child. A reasonable parent would have quickly brought to the attention of school officials the alleged harm to their child and continually reiterated the concern during each conversation with any leader of the school. A reasonable parent would expect their child to obey instructions which direct the child not to attend an event.

Perhaps a parent could feign concern for alleged injuries to their child because the parent readily knows the child was not really harmed. But why would a parent promote a false injury about their child? During cross-examination by Attorney Millstone Witness Dr. Patrick Johnston testified which lead to redirect questions by the undersigned. Witness Dr. Johnston explained his experience of why a parent would falsely represent an alleged injury to their child as he had “..come across it in parents who wanted to sue somebody and didn't want a physician to say it was a mild condition, so they took pictures, drummed up a history”.<sup>126</sup>

To Witness Dr. Lynda Weston, a former Director of Teaching and Learning for the Mount Vernon City School District, this case seems to be about personal motivations. To be certain, Dr. Weston formed opinions about John Freshwater based upon her perception of Teacher Freshwater’s respective church membership.<sup>127</sup> Further, Dr. Weston was not satisfied with former Assistant Principal Tim Keib’s investigation and resolution of any concerns presented to him during the 2006-2007 school year.<sup>128</sup>

Dr. Weston’s personal motivations caused her to allege during her interview with HR on Call, Inc. that “she has had to deal with internal and external complaints about” John Freshwater’s “failure to follow the curriculum for much of her 11 years at Mount Vernon”.<sup>129</sup> Although Dr. Weston self-proclaimed she was professionally known for her “thoroughness”,<sup>130</sup>

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<sup>126</sup> Transcript Page 5432

<sup>127</sup> Transcript Page 2766-271

<sup>128</sup> Board Exhibit 6, Page 5

<sup>129</sup> Board Exhibit 6, Page 5

<sup>130</sup> Transcript Page Page 2583, Line 22, “I'm pretty noted for my thoroughness”.



she had to admit her statement professing to have had “11 years” of complaints regarding John Freshwater was”painfully”<sup>131</sup> “inaccurate”,<sup>132</sup> “(b)ecause that 11 years got a big play in the report”.<sup>133</sup>

Dr. Weston’s personal motivations become more apparent when considering her assertion “I think I lead efficient meetings”.<sup>134</sup> Irrespective of Dr. Weston’s belief about her ability to lead meetings, her personal motivations intertwined with her perception regarding the substance of John Freshwater’s 2003 Science Curriculum Proposal to the then BOE. Dr. Weston asserts “..John brought the proposal to Jeff Maley to teach intelligent design.”<sup>135</sup> Momentarily set aside John Freshwater’s testimony declaring that he was not proposing to teach intelligent design, Dr. Weston’s personal motivations are evident as she cannot comport the illogical position of claiming John Freshwater’s proposal is “illegal”<sup>136</sup> but at the same time promoting the contradiction of “The board of education policy addresses controversial issues – Freshwater proposal is already addressed”.<sup>137</sup> Notably, Dr. Weston does agree that if, “There are multiple sides..” of a controversial issue, a Mount Vernon Middle School Teacher can teach both, or the multiple sides of an issue.<sup>138</sup>

Dr. Weston’s personal motivations are obvious in view of her contention John Freshwater “cannot separate science from teaching creationism/intelligent design”<sup>139</sup> considering she makes

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<sup>131</sup> Transcript Page 2492

<sup>132</sup> Transcript Page 2491 “That would be inaccurate”.

<sup>133</sup> Transcript Page 2491

<sup>134</sup> Transcript Page 2584

<sup>135</sup> Transcript Page 2508

<sup>136</sup> Transcript Page 2509, Line 4, and Employee Exhibit 187, Page 393

<sup>137</sup> Transcript Page 2509, Line 4-6; and Page 2538, Lines 15-23; and Employee Exhibit 187, Page 393

<sup>138</sup> Transcript Page 2601, Line 17 – p2602, Line 11

<sup>139</sup> Board Exhibit 6, p5

an admitted “assumption”<sup>140</sup> without any further proof. Dr. Weston admits, “I did not have communication with John”.<sup>141</sup>

Although Dr. Weston lacked any “rapport”<sup>142</sup> with John Freshwater she was clearly troubled, maybe even jealous, by the positive rapport Teacher Freshwater had with his students. Dr. Weston’s personal motivations toward John Freshwater prevented her from respecting the validity of the “OAT scores” (Ohio Achievement Tests) achieved by Teacher Freshwater and his students. Even though John Freshwater and his students achieved a remarkably high eighty-nine (89%) percent passage rate on the “Evolutionary Theory” portion of the OAT,<sup>143</sup> Dr. Weston’s contention defied the logical basis of the OAT as she asserted, “..I couldn't make a judgment as to what John's students had and hadn't learned about evolution as part of the eighth grade curriculum”.<sup>144</sup>

Former board member-witness Ian Watson’s interest in this matter was to be expected as he was the BOE president. But it seems Ian Watson’s interest went beyond just that of a BOE member considering he conducted his own “investigation”<sup>145</sup> and contacted the American Civil Liberties Union.<sup>146</sup> Ian Watson’s participation with HR on Call, Inc.’s investigation is evident and reveals involvement when examining the May 15, 2008, audio transcript of the interview HR on Call, Inc. conducted of John Freshwater. HR on Call, Inc.’s Thomas Herlevi stated to John Freshwater on May 15, 2008, in pertinent part:

*“ It is very possible, and the purpose of that is if we talk to some people to get some information, if there’s anything there that we feel you should have the opportunity to respond to, we want you to have that opportunity. Okay, rather then, you know, just, you don’t know and you never get a chance to respond. (inaudible) So therefore there will,*

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<sup>140</sup> Transcript Page 2519, Line 19-23

<sup>141</sup> Transcript Page 2585, Line 13

<sup>142</sup> Transcript Page 2520

<sup>143</sup> Transcript Page 2928 Line 25 – Page 2929, Line 7

<sup>144</sup> Transcript Page 2528, Line 8-10

<sup>145</sup> Transcript Page 5467

<sup>146</sup> Transcript Page 5511-5512

*and we'll let you know ah if we have that need, **and we'll certainly work with Ian as well** and it will be with a little bit of notice, you know, and we'll make sure it fits everybody's schedule, then again our goal is.”<sup>147</sup>*

Combine the “more than probably ten”<sup>148</sup> conversations Ian Watson had with Steve Dennis with the fact Mr. Watson and Dr. Weston attend<sup>149</sup> the same “..socially active church”<sup>150</sup> which is “..interested in social issues”<sup>151</sup> upon which Mr. Watson serves on the church’s board<sup>152</sup>, and an impression is made that Mr. Watson’s interest in this matter transcended his capacity as a BOE member.

Ian Watson crossed lines of objectivity considering he became involved in the matter as early as March 2008<sup>153</sup> when he began discussing the situation with Steve Dennis, with whom Mr. Watson and Mr. Dennis share a “business relationship” involving financial transactions for which they share clients<sup>154</sup> and because the meetings took place at Mr. Watson’s banking office.<sup>155</sup> Furthermore, although Ian Watson admitted he learned Dr. Weston “corrected”<sup>156</sup> her false assertion regarding her compilation of eleven (11) years of complaints regarding John Freshwater, Mr. Watson did nothing to correct the understanding of the BOE regarding Dr. Weston’s credibility which formed a significant portion of HR on Call, Inc.’s report. Is it possible this matter is less about John Freshwater but maybe a guise as the matter could serve dual ends in furthering a socially active church while providing a prospect for reaping funds

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<sup>147</sup> Employee Exhibit 148, Page 58

<sup>148</sup> Transcript Page 3238

<sup>149</sup> Transcript Page 5444

<sup>150</sup> Transcript Page 2570

<sup>151</sup> Transcript Page 2570

<sup>152</sup> Transcript Page 5443

<sup>153</sup> Transcript Page 5452

<sup>154</sup> Transcript Page 3238-3239 and Page 5449

<sup>155</sup> Transcript Page 3238-3239 and 5450

<sup>156</sup> Transcript Page 5557

from public coffers, or insurance proceeds, money seemingly nobody will miss? The only missing element of such a plan would be the necessity to create an outcast.

The BOE's resolution contains a preamble statement regarding objectivity which reads, *"Whereas, the Board retained counsel and requested a complete investigation of the charges against Mr. Freshwater by a neutral, outside party."*<sup>157</sup> Ian Watson's objectivity was comprised as he conducted his own investigation forming predetermined conclusions because he unilaterally desired to obtain pieces of information on his own<sup>158</sup> when the preferred course should have been as adopted by former BOE member-witness Steve Hughes' who wanted to give John Freshwater a "fair hearing" not influenced by information not vetted through an objective investigation.<sup>159</sup>

### **C. Disparate Treatment**

John Freshwater encountered disparate treatment as BOE representatives treated him differently than Teacher Lori Miller who was positioned in a similar situation. Simple examination of Superintendent Short's approach with Teacher Lori Miller epitomizes disparate treatment. This case would have been resolved on April 16, 2008, if Superintendent Short treated John Freshwater the same as Superintendent Short worked with Teacher Lori Miller.

During a meeting between Superintendent Short and Teacher Lori Miller the two discussed items of "display" which were "religious". Teacher Miller explained she had "special" items of "display" she kept on a bulletin board close to her desk. Specifically, Teacher Miller stated to Superintendent Short:

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<sup>157</sup> Board Exhibit 1, Page 1

<sup>158</sup> Transcript Page 5467

<sup>159</sup> Employee Exhibit 229, Page 6, Steve Hughes conversation with John Freshwater, January 19, 2010

*“Ones that are particularly special to me, I keep them on the bulletin board that’s closest to me. I also have some little things that kids have given to me that are simply up there.”*

Superintendent Short responded to Teacher Miller by referring to a discussion Teacher Miller had with Principal White, stating:

*“So getting back to yesterday I think Bill asked the staff to make sure that they have all displays and items were put away, that was his directive, they have an open house today at noon, so I’m going to direct the same thing that those things come down.”*

Superintendent Short continued elaborating and explaining what Teacher Miller was to understand when he said:

*“Items of display are what they’re asking for, okay, they should be brought down. Now I’m going to ask Bill and Deb to go up to the room and check, especially if they got open house today, (inaudible) people coming, alright.”*

Superintendent Short continued without pause during the same meeting with Teacher Lori Miller and explained:

*“My, my, I guess with the directive I’m asking today if you feel like this is wrong and in error, and goes against violates the contract or violates in anyway your contract that you would remove those items and then grieve, that would be, and I think that memo came out in the spring to MVA members, and I don’t know whether you saw it or not, okay. So, do you have a problem, are you going to be able to comply with that.”*

Superintendent Short ensured Teacher Miller was apprised of the contractual grievance process even though Teacher Miller had a union representative sitting immediately beside her.

Superintendent Short followed his verbal instruction with a written letter dated August 21, 2008<sup>160</sup>, clarifying his verbal instruction and advising Teacher Miller:

*“It was also suggested that when you received a directive that you believe violates your contractual rights, you follow the request and then grieve”*

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<sup>160</sup> Board Exhibit 66

John Freshwater did not receive any notice of the direction or opportunity to “follow the request and then grieve”. John Freshwater did not receive the same treatment. John Freshwater was not a member of the union. If Superintendent Short was to advise anybody of the grievance process he should have recommended the process to a non-union member who would otherwise be without benefit of knowing. Notably, Principal White also directed another teacher, Andrew Thompson, to file a grievance if he disagreed with an administrative decision.<sup>161</sup>

Teacher Miller responded to Superintendent Short by advising Mr. Short:

*“I, I don’t have any problem with the poster and with taking the scriptures down. I do have a problem with taking the Bible off my desk.”*

Superintendent Short’s reply was to ask Teacher Miller a clarifying question which inquired as to whether Teacher Miller’s personal, Bible, was part of a “display”:

*“Is that part of your display? Is that part of the display you put up”?*

To which Teacher Miller responded:

*“No”.*

Superintendent Short and the Mount Vernon City School District treated John Freshwater differently from his similarly situated fellow teacher by failing to apprise Teacher Freshwater of the grievance process, provide an open discussion with the superintendent regarding “display” and “religious items” and under color of law permitted Teacher Miller to take a stance to keep her personal Bible upon her public classroom desk but prohibit and subject Teacher Freshwater to discipline and potential termination for the same exact action.

It is fundamentally flawed to assert the situations of Teacher Miller and John Freshwater are different. Arguing a difference exists requires a stance upon logic that disavows an ancient axiom that what is right is right and what is wrong is wrong. If a teacher possessed marijuana or

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<sup>161</sup> Transcript Page 2877

a gun while at school the act of possession would be illegal with or without a complaint. If possession of a personal Bible were illegal the possession would be illegal without or without a complaint. Clearly, possession of a personal Bible in a teacher's workspace while in a public school classroom was completely legal in the Mount Vernon City School District otherwise Superintendent Short would have prohibited Teacher Miller from possessing the Bible. Extremity of law is extremity of wrong. Neither John Freshwater nor Teacher Miller were in violation of the law, but Teacher Freshwater was treated differently.

John Freshwater encountered further disparate treatment as BOE representatives treated him differently than Teacher Wes Ellifritz who was in a similar situation. Teacher Wes Ellifritz testified his Mount Vernon City School District classroom contained documents posted on the walls that he affixed which included a Bible verse from Psalms,<sup>162</sup> the Ten Commandments,<sup>163</sup> a poem written by Maya Angelou entitled "Christians",<sup>164</sup> and song lyrics.<sup>165</sup> Teacher Ellifritz also had a personal Bible on his Mount Vernon City School District classroom desk.<sup>166</sup> Teacher Ellifritz had each of these items in his classroom at the beginning of the 2008-2009 school year which was merely two (2) months after John Freshwater was suspended. Disparate treatment abounds considering that in the Fall of 2008, Principal Brad Ritchey, via email asked<sup>167</sup> Teacher Ellifritz to move the song lyrics he had affixed in his classroom. The song lyrics state (as centered on original):

*"Everlasting,  
Your light will shine when all else fades.  
Never ending,  
Your glory goes beyond all fame...  
And the cry of my heart is bring you praise..."*

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<sup>162</sup> Transcript Page 2828, Line 5

<sup>163</sup> Transcript Page 2828, Line 6

<sup>164</sup> Transcript Page 2828, Line 7-8

<sup>165</sup> Transcript Page 2828, Line 9

<sup>166</sup> Transcript Page 2823, Line 4-5

<sup>167</sup> Employee Exhibit 54

Considering the heightened sensitivity within the Mount Vernon City School District one would envision any request directed to Teacher Ellifritz would require taking the song lyrics down from their posted position. Amazingly, Teacher Ellifritz was directed to move the song lyrics – not out of the classroom – but rather to the proximate location where the other items were affixed to the classroom wall.<sup>168</sup> In directing Teacher Ellifritz to reposition the song lyrics in the vicinity of the Bible verse from Psalms, the Ten Commandments and the poem “Christians”, the Mount Vernon City School District acquiesced to the “display” of the total number of items, some of which are unmistakably “Christian” oriented.

Only after Teacher Lori Miller testified on March 25 and 26, 2009, was Teacher Ellifritz then directed to remove his “display” of the song lyrics, the Bible verse from Psalms, the Ten Commandments and the poem “Christians”.<sup>169</sup> Teacher Ellifritz testified he was not advised of any complaint<sup>170</sup> made by any party but simply that Principal White “stated it was just a difference in interpretation.”<sup>171</sup>

Teacher Ellifritz testified he was not directed to remove his personal Bible from his desk which remained on his classroom desk.<sup>172</sup>

John Freshwater encountered further disparate treatment as BOE representatives treated him differently than Teacher Andrew Thompson who was in a similar situation. On June 26, 2008, Teacher Thompson advised Superintendent Short during an in-person meeting that

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<sup>168</sup> Transcript Page 2824

<sup>169</sup> Transcript Page 2824, Line 9-10

<sup>170</sup> Transcript Page 2837

<sup>171</sup> Transcript Page 2837

<sup>172</sup> Transcript Page 2825, Line 7-8



Teacher Thompson had a Bible on his desk.<sup>173</sup> As of April 2, 2009, the date of Teacher Thompson's testimony, he maintained a Bible on his desk.

**D. Incompetence**

The vast gap between Superintendent Short's professional judgment and that of other public school officials<sup>174</sup> cannot be ignored. Each professional educator questioned affirmed, if an injury was truly presented, Superintendent Short should have reported any alleged injury done by John Freshwater to Zach Dennis. Superintendent Short violated the Licensure Code of Professional Conduct for Ohio Educators when he failed to obey the law. In part three of the licensure code regarding accurate reporting, educators shall accurately report information required by state or federal law. Failure to accurately report is grounds for conduct unbecoming. Conduct unbecoming includes as detailed in subsection (e) as intentionally failing to make a mandated report of any violation of state or federal law.

A charge of incompetence does not exclusively belong to Superintendent Short as Principal White also suffers. Principal White was the primary communication source between the Mount Vernon City School District and John Freshwater . Interpreting Principal White's letters of April 7 and 14, 2008, require a mind-reader or participation in personal conversation with him. Unmistakable is the confusion created by Principal White whereby in one sentence he writes "all religious items need to be removed from your classroom by the end of the day on Wednesday, April 16, 2008". But in the very next sentence states "Bibles and other religious DVD's, videos, etc. should also be placed out sight and access of students by this date". Using ordinary English translations one must wonder how to reconcile in one sentence all "religious"

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<sup>173</sup> Transcript Page 2872

<sup>174</sup> Expert Witness Michael Molnar, Transcript Page 5638-5673; Principal Tim Keib, Transcript Page 3663; Expert Witness Finn Laursen, Transcript Page 3901-3903; Superintendent Jeff Maley, Transcript Page 2293; Dr. Lynda Weston, Transcript Page 2526; Teacher Steve Farmer, Transcript Page 2114; Teacher Lori Miller, Transcript Page 2414 also 2515-2524; Teacher Tamara Henry, Transcript Page 2525

items need to be removed from the classroom but in the next sentence “religious” items should be placed out of sight. It is a certainty Principal White is confusing as his documented incompetence repeated when dealing with Teacher Lori Miller about her Bible on her desk. The irony of Principal White’s confusing incompetence cannot be overlooked considering his letter to John Freshwater occurred on April 14, 2008, and Teacher Lori Miller’s confrontation occurred on April 14, 2009 – exactly one year apart.

Shamefully neither Superintendent Short nor Principal White could articulate any reasonable interpretation when asked about Mount Vernon City School District policies. The weak links of this case are both Superintendent Short and Principal White as both evaded responsibility in leadership in that they backtracked upon their previous actions and could not articulate reasonable answers for their actions as both demonstrated ignorance in action.

#### **E. Character and Credibility**

John Freshwater testified on ten (10) different days during this hearing, once during an interview with HR on Call, Inc. and once in a federal deposition. John Freshwater’s time in the witness chair approximated sixty (60) hours. Can anyone reasonably attest they have seen a witness spend more time on the witness chair than John Freshwater?

John Freshwater has a distinct manner of communicating and explaining that is consistent whether he is in the classroom, in a witness chair or being social. It is true John Freshwater speaks while he is thinking and often before arriving at an answer he believes is responsive to a question, all the while wanting and expecting an opportunity to further clarify. John Freshwater is a school teacher who teaches 8<sup>th</sup> grade science, a topic abounding with unanswered questions in a classroom environment with inquiring students. It is unfair to condemn John Freshwater’s manner of communication and substantive answers taking into account he has been abused by the "fair investigative interview process" and had to endure scrutinizing hours of testimony

responding on multiple fronts (legal hearings) with an understandable gun-shy approach to the hearing and litigation process while responding to events having occurred long ago. Who among us can readily recall details of events from long ago without reflection and contemplation. When John Freshwater answered questions his natural approach to recall and response, both inside and outside of the classroom, was not evidence of deception but rather evidence of a mind processing, culling and sorting thousands upon thousands of frames from snapshots of daily interaction, requiring Teacher Freshwater to sift context, relationship and purpose to ultimately deliver a spoken answer all the whilst trying to sort through the countless number of student interactions he has had in 21 years of teaching. Astutely recognizing his challenge of recall compounded by his daily student interaction with hundreds of students is exactly why the collective bargaining agreement provided a measure for sorting communication by a teacher to the administration through Article 402's teacher right to submit a comprehensive written statement.

Initially, John Freshwater approached the investigation and this legal arena with a naïve expectation he would simply explain himself with his modest, aw shucks manner of speaking, and once having done so, he believed he would be back in the classroom. In fact, prior to his suspension, John Freshwater never contemplated he would be ejected from his 8<sup>th</sup> grade classroom.

It is predicted representatives of the BOE will mince and parcel John Freshwater's testimony attempting to discredit him. Resort to challenging the credibility John Freshwater became a necessity considering representatives of the BOE were caught red-handed having violated both contract and policy of the Mount Vernon City School District. If the BOE had an open and shut case this matter would not have progressed to the first day of hearing. If all people were clones or droids credibility would be easy to determine because we would all be the same.

But people are not the same. Some people handle pressure and inquiry better than others. What the opposition will levy as audacity because of John Freshwater's genuine communication style is actually authenticity not often seen in a court setting. Set aside any conclusions and consider it can be said your friends, associates and aficionados reveal more about you than you reveal about yourself. How did witnesses who really knew John Freshwater react upon seeing him during the hearing? Supervisors and colleagues alike spoke about John Freshwater's genuineness with both them and his students. Witness Deb Strouse, with tongue-in-cheek stated she was respectfully "jealous",<sup>175</sup> of John Freshwater because "He had excellent rapport with his students. Because he knew the kids. Not only the kids, he knew their families, what they did. He knew their sports, brothers and sisters. He knew these kids inside and outside, and I was jealous".<sup>176</sup> Witness Tamara Henry testified John Freshwater was very popular with the students and Teacher Freshwater won the student poll – a popularity contest – whereby the student body voted Teacher Freshwater as their favorite science teacher.<sup>177</sup>

Teacher Lori Miller testified to her experience with John Freshwater:

*"I think John has an absolute God-given talent to teach kids. I think he is just absolutely remarkable in the classroom. I think his -- he's a man of integrity. He's a man of character. I didn't realize how powerful John truly was as a teacher until when I switched rooms. It was really these last three years that I really got to see, you know, because John's door was usually open and my door was kind of catty-corner, so I could usually always hear John, and I would see him before every class period, every class period, outside in the hallway personally greeting every single student. I remember that just made such a huge impact on me. Before the beginning of the year, John would always come to me, and because I taught seventh grade, he would have me look through his classes. John never wanted to know is this an A student, is this a B student. He would say give me something I can relate to this kid with, give me something that I can hook this kid so I can build a connection with him. That was absolutely just amazing, because he did that with every single kid. Just so*

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<sup>175</sup> Transcript Page 1857

<sup>176</sup> Transcript Page 1857

<sup>177</sup> Transcript Page 1975

*many students that would come back to me and say, again, just share Freshwater stories so many times. The comments that I probably would hear most often is that Mr. Freshwater teaches us to use our brain and to think for ourselves. I used to be jealous, actually, to sit there and think gosh, I don't do that. Maybe I should."*

Teacher Ellifritz stated he perceived students reaction to John Freshwater as, "I could tell that the students really respected him as a teacher".<sup>178</sup>

Teacher Andrew Thompson possesses the most credible information concerning John Freshwater. Teacher Thompson was an 8<sup>th</sup> grade student in Teacher Freshwater's class. Teacher Thompson returned as an employee and spent two years as a colleague in John Freshwater's classroom during instruction time. Teacher Thompson calculated his time in John Freshwater's classroom to be approximately one hundred eighty (180) days as a student, three hundred sixty (360) days as a colleague and one hundred fifty-six (156) days in FCA meetings for a combined total of six hundred ninety-six (696) classroom interactions. Teacher Thompson described John Freshwater as:

"a dynamic teacher. Very passionate about what he does. I know that my first -- when I was there as an intervention specialist and working with those students, but at the same time I'm taking notes in all five of my classes, because I was blessed to be on a team with great teachers, I took away different ideas. Knowing I wanted to be a classroom teacher, I took away things from each class. One of the things that I took away from Mr. Freshwater was, he met every student at the door. They weren't to come in the classroom unless they passed through, and he wanted to hear something that was going on in their life. And I have nothing but high remarks to say about his level as a teacher. He knows the content inside and out. One of the top teachers, I will say, in the building that knows his content".<sup>179</sup>

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<sup>178</sup> Transcript Page 2858

<sup>179</sup> Transcript Page 2943-2944

John Freshwater has a pleasing character distinguished with genuineness. Even Teacher Brian Cook who agreed he and John Freshwater were like “oil and water”<sup>180</sup> confessed Teacher Freshwater was easy and well to get along with. John Freshwater was easy-going even with those who testified with information seemingly against him.

Comments from John Freshwater’s colleagues are enlightening for sure but more importantly tell of the relationship Teacher Freshwater shared with his students. It is John Freshwater’s relationship with his students which reflect an accurate barometer of his credibility and character. Student perceptions of their school teachers are straight-forward typically absent any pretense and rightfully so because the student and teacher interact for a significant amount of time. It is true an individual student may not care for their teacher and those motivations must be balanced by the collective consensus of a larger student population. Recall the students who 2 years after having John Freshwater as a teacher were still gushing praises upon him and even wanting to give him a hug or knuckles as they entered or exited the hearing. John Freshwater earned two (2) distinguished teaching awards because he is a distinguished teacher. John Freshwater taught students clearly and convincingly to say, “I love science Mr. Freshwater”.<sup>181</sup>

Those who spoke against John Freshwater did so with a vitriolic flavor indicating a deeper seated issue perhaps less related about Teacher Freshwater and more concerned with a social issue.

Issues of credibility certainly exist and cannot be overstated as many witnesses for the BOE assuredly removed John Freshwater’s action from context and failed to identify any purpose but their preconceived notion of his actions. Some witnesses even oozed contempt for John Freshwater revealing a motivation of bias and lacked any corroborating quality.

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<sup>180</sup> Transcript Page 2019

<sup>181</sup> Transcript Page 1706, 2858, 5073, 5080

Conversely many witnesses who testified in John Freshwater's case of defense corroborated relevant points in the defense.

Standard criteria for determining credibility involves witness demeanor, motivations to fabricate, consistency and corroboration all of which eventually yield to the opening question of, **“What makes sense?”**

In contrast to John Freshwater who was being asked questions about minute snapshots of time formed upon thousands and thousands of frames of interaction with hundreds of students, witnesses Lynda Weston, Thomas Herlevi and Julia Herlevi sardonically responded too often, bobbing and weaving to evade straight-forward answers to basic questions based upon interactions they had seeming ease to communicate in the “investigative” report labeled as Board Exhibit 6. Couple the verified confusing communications from Principal White with Teacher James Marth's testimony as to why he transferred schools after working under Principal White for one year. Teacher Marth , a 30 year teaching veteran, stated:

“Primarily, if I had to sum it up, I just didn't feel that the culture of the building was a good culture. I worked under various administrations all my career in the middle school between here and Lakewood, Ohio, and I just felt that I didn't want to work under that culture”.<sup>182</sup>

One could decide this case by setting aside any conflicting credibility concerns and evaluate the evidence without contemplating testimony provided by John Freshwater, Zach Dennis, Principal White or Superintendent Short. Evaluating the evidence without aid or hindrance from the primary parties one can convincingly conclude:

1. Ten (10) eyewitness students testified John Freshwater did not use a Tesla Coil arc to make any crosses upon any student nor did John Freshwater hold any student's arm against an overhead.

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<sup>182</sup> Transcript Page 2022

2. Five (5) teachers testified they too used a Tesla Coil arc during science classes and applied the same to student's skin and found it to be safe without any harm to a single student.
3. Academic Content Standards were not adopted by the Mount Vernon City School District until the 2004-2005 school year. Page 216 of Board Exhibit 37 details an academic benchmark for the topic of Scientific Ways of Knowing. The standard that states, "Explain why it is important to examine data objectively and not let bias affect observations". It is a fact that the Mount Vernon City School District has never provided any training to teachers instructing a specific or precise interpretation of the standard and its operative word, "bias". John Freshwater used a reasonably and customary interpretation of the word which resulted in his students' achievement of the highest scores on the standardized test called the OAT.
4. BOE Policy 2240 – Controversial Issues - mandates a permissive nature in the academic setting stating consideration of controversial issues has a legitimate place in the instructional program of the schools. If the policy is to mean anything it must include latitude for speaking about sensitive issues. A 2003 interpretation of the controversial issues policy demonstrates intelligent design or even creationism could be controversial topics available for discussion. Employee Exhibit 187, page 393 provide definite proof for the validity of this position.
5. FCA policies and constitutional protections provide that a teacher can serve as a facilitator, monitor and supervisor of the FCA and the limitation of the word, "primarily" provides latitude for teacher action.
6. John Freshwater was not insubordinate as demonstrated by Principal White's changing and contradictory letters from April 7 and 14, 2008. Insubordination requires a reasonable, lawful order. Principal White's order was not lawful considering the ultimate treatment of personal Bibles within the Mount Vernon City School District first by Superintendent Short in August 2008 and again by Principal White on April 14, 2009. Further, Principal White's undisputed communication to Teacher Lori Miller first demonstrates Principal White communicates confusion rather than clarity. Ultimately a personal Bible can remain on a teacher's classroom desk as demonstrated by the custom, policy and practice created by the Mount Vernon City School District.

The Dennis Family wants people to believe they did not complain about John

Freshwater's personal Bible on his classroom desk.<sup>183</sup> But the evidence demonstrates the Dennis

Family was the only party to complain about John Freshwater's personal Bible which sat on his

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<sup>183</sup> Transcript Page 3259 and 3376



classroom desk.<sup>184</sup> The Dennis Family parents, Jennifer and Steve, are not credible in their stance they did not complain about John Freshwater's personal Bible.

Jennifer Dennis did not demonstrate the concern of the usual and typical mother. When her child complained of harm, Jennifer Dennis took pictures in the middle of the night to show the superintendent the next day instead of taking her son to a doctor. Who, when truly concerned about their child's well-being, safety and welfare, gives an admonition to the school superintendent that they did not want the teacher, John Freshwater, to go to jail?<sup>185</sup> It makes absolutely no sense that a person would be more concerned about a school teacher who allegedly harmed their student-child than their child. Moreover, what kind of parent fails to confront a teacher whom they believe harmed their child? The Mother of Zach Dennis had no problem confronting Freshman Soccer Coach and Teacher, Scott Dapprich, when she complained about not receiving information regarding soccer schedules.<sup>186</sup> Teacher Dapprich testified he deemed Mother Dennis' actions as "rash",<sup>187</sup> meaning Teacher Dapprich characterized Mother Dennis actions as resulting from ill-considered haste or boldness. Ironically, Mother Dennis was complaining about "communication" between her and Teacher Dapprich.<sup>188</sup> It seems unreasonable a parent would be rash with a teacher about mere soccer schedules but not want to speak to the teacher their son claims harmed him. Perhaps Mother and Father Dennis did not want to follow the prescribed board policy<sup>189</sup> regarding complaints because they were still fabricating their concerns.

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<sup>184</sup> Transcript Page 677 Line 23 and 506 Line 6, and 5507-5508 referring to Employee Exhibit 147

<sup>185</sup> Transcript Page

<sup>186</sup> Transcript Page 2144

<sup>187</sup> Transcript Page 2145

<sup>188</sup> Transcript Page 2144

<sup>189</sup> Employee Exhibit 118

The Dennis' are not certain how long the alleged mark lasted on Zach Dennis' arm as they told HR on Call, Inc. the alleged mark remained for three to four weeks<sup>190</sup> but during cross examination Zach Dennis testified the alleged mark lasted, "About a week and a half, two weeks".<sup>191</sup> If the alleged injury lasted so long why not take your son to a doctor?

Moreover, what kind of parent tells their child not to attend the FCA but then tells the child to see if they can get into the meeting without a permission slip?<sup>192</sup>

The Dennis Family wanted the situation to be different than it really was. Why? Because the Dennis Family did not receive any respect from the Mount Vernon City School District through Superintendent Short or Principal White regarding their allegation of harm to their child. Essentially the Dennis Family's allegation of harm was seemingly deemed not credible from December 7, 2007, until their complaint in mid March 2008, when they alleged John Freshwater conducted a "healing session during the Fellowship of Christian Athletes meeting".<sup>193</sup> The Dennis Family further alleged John Freshwater "held his hands above the non-school speaker's head, had students in attendance circle the man, holding hands and praying, and Mr. Freshwater 'removed Satan' from the man".<sup>194</sup>

What is the value of an alleged injury for which there is no medical corroboration? The Dennis Family wanted to restore their lost sense of credibility and increase the value of their original complaint by increasing the frequency and caliber of their complaints with constitutional claims.

What kind of person awakes one morning after a night of concern about an injury to their child and goes to get film developed to show photographs to a school superintendent but not a

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<sup>190</sup> Transcript Page 1212

<sup>191</sup> Transcript Page 3110

<sup>192</sup> Transcript Page 3173, Line 14-16

<sup>193</sup> Board Exhibit 6, Attachment 1

<sup>194</sup> Board Exhibit 6, Attachment 1

doctor? What kind of people complain to the school board president ten (10) different times and talk to investigators which result in a publicly released report but fail to mention for eleven (11) months an alleged fact so important as that of their child's arm was held down against his will when a science experiment was allegedly exacted upon the kid? Amazingly, the parents take the eleven (11) month hidden allegation and announce it to the largest central Ohio newspaper in an interview arranged in their attorney's office the day before they were to testify in this very hearing. There is an accurate description for the kind of people who have behaved like the Dennis Family. They are unbelievable.

## **VI. ARGUMENT**

### **A. JOHN FRESHWATER'S APPROPRIATE USE OF THE TESLA COIL**

Any and all matters related to John Freshwater's use of a Tesla Coil were adjudicated by Principal William White's letter to John Freshwater dated January 22, 2008. Reliance placed solely upon this fact, any and all matters related to John Freshwater's use of the Tesla Coil should be **unsubstantiated**.

Principal White possessed the requisite authority to write the letter dated January 22, 2008.<sup>195</sup> Superintendent Short was sent a copy of the letter in addition to having input to author the letter. Principal White testified, "I checked with Mr. Short, talked to Mr. Short to make sure that the letter did say what I intended it to say."<sup>196</sup> Forty-three (43) days elapsed between December 7, 2007 and January 22, 2008, during which time John Freshwater received two instructions from Principal White on December 7, 2007: first, destroy the Tesla Coil<sup>197</sup> used by John Freshwater; and second, do not use the Tesla Coil again to shock students.<sup>198</sup> If John Freshwater complied with Principal White's direction and there were "no further incidences

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<sup>195</sup> Board Exhibit 6, Attachment 18

<sup>196</sup> Transcript Page 495

<sup>197</sup> Transcript Page 4326

<sup>198</sup> Board Exhibit 6, Attachment 18

whereas anyone is being shocked with the machines this letter will not become part of your permanent record. If there should be another occurrence of misusing this equipment then this letter will be entered into your permanent record along with all supporting documentation.”<sup>199</sup>

John Freshwater did not use the Tesla Coil ever again. Principal White’s letter adjudicated this matter as the specification identified in section (1) one of the resolution specifies and is limited to the timeframe of December 2007. (See Diagram – Tesla Coil - 1/22/08 letter)

If there was any culpable party that party name would be Superintendent Short. Three (3) school administrator experts and one doctor each testified Superintendent Short should have investigated the Dennis Family allegation. Witnesses Tim Keib<sup>200</sup>, a former Mount Vernon Middle School Principal and current public school principal, Michael Molnar<sup>201</sup>, a current public school principal, and Finn Laursen<sup>202</sup>, a school administrator expert, each testified Superintendent Short failed to perform as would be expected and required by Ohio Revised Code. Dr. Patrick Johnston testified he would be highly suspicious of the scant evidence provided by the Dennis Family.<sup>203</sup>

It is highly suspect whether on December 7, 2007, the Dennis Family even alleged that any mark on their son resembled a cross or that the student’s arm was held down by John Freshwater. Principal White’s letter does not reference any alleged making of a cross or the holding of a student’s arm. Surely, even unreasonable people can objectively understand the incongruence that such an allegation of making a religious symbol upon a student by holding their arm down would create. It strains believability to assert two administrators, Superintendent Short and Principal White, would let allegations such as those made by the Dennis Family escape

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<sup>199</sup> Board Exhibit 6, Attachment 18

<sup>200</sup> Transcript Page 3605-3609

<sup>201</sup> Transcript Page 5367-5375

<sup>202</sup> Transcript Page 3901-3905

<sup>203</sup> Transcript Page 5421-22, 5432

scrutiny or at least a mention in the letter dated January 22, 2008. Expert Michael Molnar testified doubt is cast as to the validity of the Dennis Family allegation as he would have expected Principal White's letter of January 22, 2008, to contain reference to any alleged holding down of a student's arm.<sup>204</sup> Again, the only culpable party here would be Superintendent Short for permitting such a fabrication to continue. Superintendent Short defies logic and reasonable sense by asserting he would not be surprised if John Freshwater made a religious cross on a student's arm.<sup>205</sup> Making such an assertion but then concluding the situation with the letter dated January 22, 2008, indicates Superintendent Short is beyond obtuse or that he takes the rest of us for fools.

John Freshwater was surprised when during his interview with HR on Call, Inc. he was asked any questions about his use of the Tesla Coil as he thought the matter was resolved based upon Principal White's January 22, 2008, letter.<sup>206</sup> Momentarily set aside John Freshwater's testimony regarding the Tesla Coil and this matter can clearly and convincingly be deemed **unsubstantiated**.

Multiple teachers testified they had used the Tesla Coil as did John Freshwater in that they permitted students to experience the experiment. Teachers Lori Miller, Bill Oxenford and Dino D'Ettore testified they too touched students with the arc of a Tesla Coil without any report of harm or reason to believe the experiment was unsafe.<sup>207</sup> Each teacher testified they had never received or reviewed any written instructions concerning operation of the Tesla Coil.<sup>208</sup> Teacher D'Ettore testified he did not see any need to search for Tesla Coil instructions because there had

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<sup>204</sup> Transcript Page 5385

<sup>205</sup> Transcript Page 273

<sup>206</sup> Transcript Page 4675, Line 9-19

<sup>207</sup> Transcript Page 2376, 2414, 1432, 1743

<sup>208</sup> Transcript Page 2415, 1442, 1747

been no problems.<sup>209</sup> Teacher Steve Farmer had the same opinion regarding not recognizing any need to look for Tesla Coil instructions because he knew how to use the Tesla Coil.<sup>210</sup> Mount Vernon City School District teachers testified they were trained to use the Tesla Coil by other school personnel who had since retired<sup>211</sup> or through their collegiate training.<sup>212</sup> (See Diagram – Have you touched students with a Tesla Coil arc and found it to be safe?) Teacher Elle Button revealed she found instructions for the Tesla Coil in a retired teacher’s classroom drawer and gave them to Principal White.<sup>213</sup> Principal White stated he did not recall receiving the Tesla Coil instructions from Teacher Button.<sup>214</sup> Eventually Attorney Millstone explained Superintendent Short found the instructions “inadvertently clipped to other papers that he had received”<sup>215</sup> despite an outstanding request by subpoena for the materials served on January 12, 2009.<sup>216</sup> It is important to note that the Tesla Coil instructions contained in Employee Exhibit 116 does not contain any cautionary note about touching human skin.

The Tesla Coil has been used in the Mount Vernon City School District since before John Freshwater even knew how to use one. John Freshwater learned how to use the Tesla Coil from the same person Teacher Lori Miller learned from: retired Jeff George.<sup>217</sup> Employee Exhibit 161 denotes two important items revealing the history of the Tesla Coil. On page 23 of Employee Exhibit 161, John Freshwater wrote “Good Time for Tesla Coil Demo.” (sic) which corroborates that Teacher Freshwater had been using the Tesla Coil for many years without incident. On page 32 of Employee Exhibit 161, John Freshwater wrote, “Use Wimhurst -

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<sup>209</sup> Transcript Page 1759

<sup>210</sup> Transcript Page 2112

<sup>211</sup> Transcript Page 2415

<sup>212</sup> Transcript Page 1747

<sup>213</sup> Transcript Page 3996-3997

<sup>214</sup> Transcript Page 4117

<sup>215</sup> Transcript Page 4118

<sup>216</sup> Employee Exhibit 177

<sup>217</sup> Transcript Page 4558 and 2415

Question regarding the use of a Tesla Coil by other Mount Vernon Middle School Science Teachers:

**Have you touched students with a Tesla Coil arc and found it to be safe?**

**Fellow Mount Vernon Middle School Science Teacher Responses:**



**S. Farmer**  
\*2109:1-2 & 2110



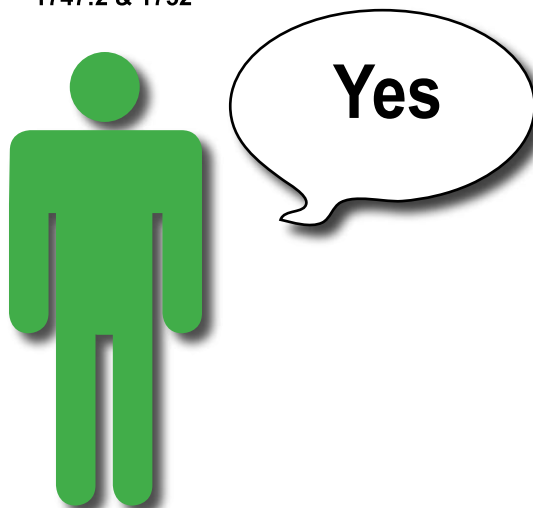
**D. D'Ettore**  
\*1747:2 & 1752



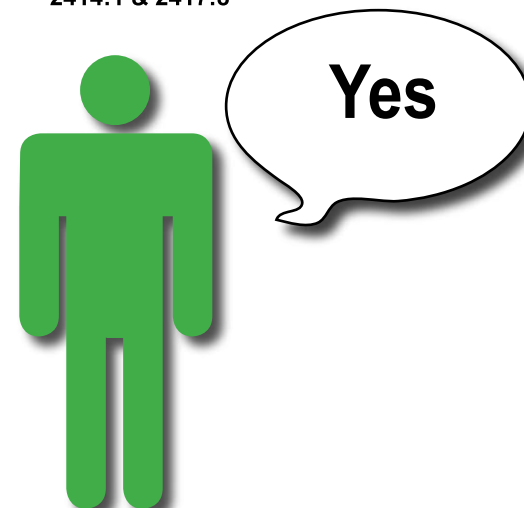
**L. Miller**  
\*2414:1 & 2417:8



**J. George**  
\*\*2415:20



**B. Oxenford**  
\*1432:16 & 1460:6



**D. Newcomer**  
\*2131

\*Denotes Hearing Transcript  
\*\*Denotes derived from testimony

George room, machine” which again corroborates that Teacher Freshwater obtained tools from retired teacher Jeff George to demonstrate electricity.<sup>218</sup> By his use of the Wimhurst machine, retired teacher Jeff George knocked five students to the ground with an electrical demonstration. Id. Employee Exhibit 92 is performance evaluation of John Freshwater authored by former principal Jeff Kuntz on October 8, 1999. The science experiment described by Principal Kuntz occurred on the same day, involving the same curriculum content during which John Freshwater used the Tesla Coil. John Freshwater is adamant that Principal Kuntz observed the full use of the Tesla Coil to include application by Teacher Freshwater on the skin of students.<sup>219</sup> Definite corroboration was made connecting the Tesla Coil and Principal Kuntz after review of Employee Exhibit 225, page 5629. Page 5629 was a photocopy of the “bell work” inventory, whereby John Freshwater listed the three questions referenced by Principal Kuntz in Employee Exhibit 92, which were only used by Teacher Freshwater when he used the Tesla Coil to touch the skin of students.<sup>220</sup>

Carrie Mahan estimated John Freshwater’s use of the Tesla Coil as “probably used that every year” since they have worked together.<sup>221</sup>

The Tesla Coil was so popular in the Mount Vernon Middle School that Teacher Sara Malone asked John Freshwater to demonstrate its use on her for which she testified it was not painful and it did not leave any marks.<sup>222</sup>

In response to the identified specification of the charge listed in the BOE’s resolution, as required and limited by R.C. 3319.16, balanced by the clear and convincing standard or any other, John Freshwater was not willfully nor persistently in violation of any identified reasonable

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<sup>218</sup> Transcript Page 4578

<sup>219</sup> Transcript Page 4550-4560

<sup>220</sup> Transcript Page 5789-5793

<sup>221</sup> Transcript Page 3757

<sup>222</sup> Transcript Page 2054



regulation of the BOE; nor do any of his actions constitute other good and just cause based upon the requisite intent. Therefore, the specifications in section (1)(a) of the BOE's *Amended Resolution of Intent to Consider the Termination of the Teaching Contract(s) of John Freshwater* must be deemed **unsubstantiated**.

Board Exhibit 1, section (1)(b) asserts in part John Freshwater branded a religious symbol on the skin of some eight grade students. Only one student, Zach Dennis, was presented for testimony by the representatives for the BOE regarding this specification. Clearly and convincingly ten (10) classroom eyewitnesses testified, each of whom shared the same class with Zach Dennis, and each denied any mention of crosses (religious symbols) or making of crosses occurred by the mouth or hand of John Freshwater. The ten (10) eyewitnesses include students Corbin Heck, Miranda Baer, Kayla Wells, Tokayla Redman, Angelita Conkel, Allison Ruhl, Maggie Wayne, Joshua Grubaugh, Aaron Morris and Jake Stotts. (See Diagram – Did John Freshwater mark students in the shape of a “cross”?) Each of the ten (10) classroom eyewitnesses denied Zach Dennis’ claim that his arm was held down on an overhead during the Tesla Coil experiment. (See Diagram – Did John Freshwater hold down Zach Dennis’ arm?) How can Zach Dennis be believed regarding any of his allegations if ten (10) classroom eyewitnesses testify Zach Dennis is “lying”<sup>223</sup> or is a “liar”<sup>224</sup> or is being untruthful<sup>225</sup>? Even Principal White testified he learned Zach Dennis had been dishonest with his parents as reported to Principal White by the Dennis parents.<sup>226</sup>

Board Exhibit 1, section (1)(b) asserts in part the alleged religious symbol lasted as long as 3-4 weeks. Only one student, Zach Dennis, was presented for testimony regarding this

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<sup>223</sup> Transcript Page 5289, 5127, 5128

<sup>224</sup> Transcript Page 5309, Employee Exhibit 116

<sup>225</sup> Transcript Page 5243

<sup>226</sup> Transcript Page 587 Line 22 – Page 588, Line 11

# Did John Freshwater mark students in the shape of a “cross”?

## Eyewitness Testimony:

“...especially when you talk with the students, I believe kids are pretty honest.”

T. Herlevi, HR on Call Investigator 1117: 3-4



Miranda Baer  
\*5081:7-13



Kayla Wells  
\*5102:7-16



Tokala Redman  
\*5128:7-10



Maggie Wayne  
\*5271:1-3



Angelita Conkel  
\*5217:24 - 5218:7



Allison Ruhl  
\*5242:12 - 5243:4



Joshua L. Grubaugh  
\*5289:3-6



Aaron Morris  
\*5325:15-19



Jake Stotts  
\*5345:11-19



Corbin Heck  
\*2178:2-4



12-7-07



4-14-08

Zach Dennis  
\*336:13-14

Allegation of mark being a “cross”  
was **NOT** mentioned until **5 MONTHS**  
**AFTER** the incident.

Board Exhibit #6, Attachment 1

\*Denotes Hearing Transcript

# Did John Freshwater hold down Zach Dennis' arm?

## Eyewitness Testimony:

"...especially when you talk with the students, I believe kids are pretty honest."

T. Herlevi, HR on Call Investigator 1117: 3-4



Miranda Baer  
\*5079:14-24



Kayla Wells  
\*5101:13 - 5102:13



Tokala Redman  
\*5124:6-16



Maggie Wayne  
\*5271:10-11



Angelita Conkel  
\*5217:24 - 5218:9



Allison Ruhl  
\*5241:15-20



Joshua L. Grubaugh  
\*5288:22 - 5289:2



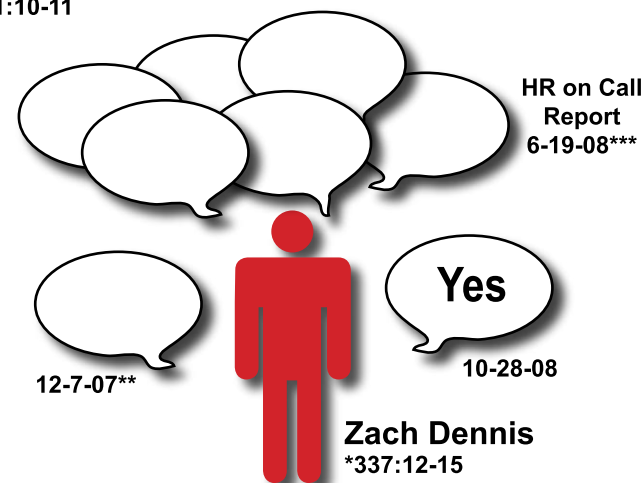
Aaron Morris  
\*5325:22-24



Jake Stotts  
\*5345:11-19



Corbin Heck  
\*2182:25 - 2183:1



Allegation of arm being held down was **NOT** mentioned until **10 MONTHS AFTER** the incident. \*337:12-15

\* Denotes Hearing Transcript

\*\* **NOTHING REPORTED.**

\*\*\* Despite **MULTIPLE OPPORTUNITIES**, **NOTHING REPORTED.**

specification. Zach Dennis testified the alleged mark lasted “about a week and a half, two weeks”,<sup>227</sup> despite the conflicting allegation received by HR on Call, Inc. from the Dennis Family which HR on Call, Inc. wrote in its report as “three or four weeks”.<sup>228</sup> Dr. Patrick Johnston testified regarding the importance of history in making a medical diagnosis, stating, “It's extremely important”.<sup>229</sup> Dr. David Levy agreed.<sup>230</sup> In response to examining Board Exhibits 7 and 8, the photographs provided by the Dennis Family depicting an alleged injury to Zach Dennis, Dr. Patrick Johnston testified, “Because this rash could be one of hundreds of different options. Without the history, you can't tell what it is. This could be poison ivy. This could be self-inflicted. This could be child abuse.”<sup>231</sup> Dr. Patrick Johnston continued, “Without the history, you can't tell what it is”.<sup>232</sup> History of the alleged medical concern and the subjective reaction by parents lead Dr. Patrick Johnston to conclude he would be suspect of the motives of the parents, “Especially if they're concerned enough to take a picture and not concerned enough to get a physician to look at it, I'd be suspect”.<sup>233</sup> Dr. Patrick Johnston emphasized part of relevant history would include learning whether others were similarly injured.<sup>234</sup> Dr. Patrick Johnston testified Board Exhibits 7 and 8 are “worthless” and continued his expert opinion by stating:

*“..unless I've interviewed the patient. I want to see the physician's notes. I want to make a consultation and speak with the parents to find out the history and see if it matches with the complaint. And these are just photographs. Not even sure this is on the person that claimed to have them. I would need to see the person. So it's hard to make claims. I can say what I think it is and say what it's not, and it's not a second-degree burn based upon the history if it's accurate as I've heard it. And this*

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<sup>227</sup> Transcript Page 3110

<sup>228</sup> Transcript Page 1212 and Board Exhibit 6, page 9, Line 8

<sup>229</sup> Transcript Page 5421

<sup>230</sup> Transcript Page 757, Line 6-8

<sup>231</sup> Transcript Page 5421, Line 18-21

<sup>232</sup> Transcript Page 5421, Line 19

<sup>233</sup> Transcript Page 5425

<sup>234</sup> Transcript Page 5431

*person willingly -- unless he's a Navy seal and skilled in torture techniques and will allow somebody to hold his arm down while torturing him, this is not a severe burn."*

Witness Tim Keib also testified about the importance of viewing the child first hand when he said "I want to talk to the kid eyeball to eyeball".<sup>235</sup> Tim Keib explained the importance of viewing the alleged injury:

*And, frequently, when a child -- and I'm not referring to this case. I'm just referring to what I do on a daily basis -- their version of why they got into trouble when they tell it to their parents is -- you know, has some of the same facts, but it's seldom what actually took place. And so there's variances of the truth.*

Former Superintendent Jeff Maley testified he would only report an injury as required by law if, "It would depend whether I believe the actions occurred."<sup>236</sup> School administrator expert Michael Molnar also testified speaking to the child with the alleged injury would be his first interview.<sup>237</sup>

Regarding the assertion that Board Exhibits 7 and 8 depicted a second degree burn as alleged by the BOE Dr. Patrick Johnston testified, "...this could be a first-degree burn. This could be a poison ivy rash."<sup>238</sup> But that "... if it were a second-degree burn...this patient would need some pain medication, narcotics, probably your narcotic analog like Tramadol until the symptom is resolved, with close follow-up to make sure he's not developing hypertrophic scarring."<sup>239</sup>

Zach Dennis and the Dennis Family never even visited a doctor.<sup>240</sup>

Zach Dennis told fellow schoolmate Ben Nielson the only time he felt anything as a result of the Tesla Coil was when he was sweating and his arm was covered by hockey pads.<sup>241</sup>

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<sup>235</sup> Transcript Page 3662

<sup>236</sup> Transcript Page 2298

<sup>237</sup> Transcript Page 5368

<sup>238</sup> Transcript Page 5431

<sup>239</sup> Transcript Page 5434

<sup>240</sup> Transcript Page 3093

<sup>241</sup> Transcript Page 2646

Zach Dennis confirmed he spoke with Ben Nielson the next day and that he did indeed tell Student Nielson any alleged mark did not hurt.<sup>242</sup> Moreover, Zach Dennis admitted the hockey equipment that covered his arm made his arm feel bad and the alleged mark from the Tesla Coil look worse.<sup>243</sup>

Both Student Nielson and another Student, Allison Ruhl, testified Zach Dennis had presented the underside of his right forearm as the place Zach Dennis identified where he received the Tesla Coil application.<sup>244</sup> Both Student Nielson and Student Ruhl reported a similar reaction when they viewed an alleged depiction of Zach Dennis' arm in locally published newspapers. Student Nielson exclaimed to his father, Witness Mark Nielson,

*'And I just said no, that's not his arm, because I know -- I knew for a fact it wasn't, because I just could tell there was the bump in the wrist and that would have been the top part of the arm. I remember specifically it was the under part of the arm that I saw'.*

Student Nielson's father, Mark Nielson, testified with the following on direct examination:

*Q: Mr. Nielson, on the day that the newspaper presented a picture of the alleged injuries to Zack Dennis, were you around your son on that particular date?*

*A: I was reading the newspaper. I was eating my breakfast. He walked out. I said Benjamin, look at this picture. The first thing he said, That is not the arm.*

*Q: So he made a statement to you indicating that the picture he saw there in the newspaper*

*MR. MILLSTONE: Objection.*

*MR. HAMILTON: I didn't hear objection. I just heard an um.*

*THE COURT: Basis?*

*MR. MILLSTONE: He's asking for hearsay as to what his son told him.*

*THE COURT: It would seem to me to fall under the excited utterance exception, if not other possible exceptions, considering the circumstances that he's described.*

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<sup>242</sup> Transcript Page 3110, Line 20-25 and 3111, Line 1-6

<sup>243</sup> Transcript Page 3108

<sup>244</sup> Transcript Page 2649 and 5260 and Employee Exhibit 194

*MR. HAMILTON: Thank you, sir.*

*Q: When you heard your son say the statement that – what was the exact statement he said again that you recall?*

*A: Word for word, I just know that he was pretty emphatic and believed full heartedly that that was not Zack's arm.*

*Q: Now, did he make the statement as soon as he saw the picture in the paper?*

*A: Yep.*

*Q: Did he wait until -- to tell you later in the day, or did it happen pretty immediate?*

*A: It happened pretty immediately.*

*Q: Okay. Did you believe your son when he made that statement?*

*A: I have no reason not to believe Benjamin.*

*Q: Okay. And it's your impression, based upon Benjamin's statement, that he was conveying to you he did not believe that the mark as depicted in that picture was a mark that was seen on Zack Dennis's arm. Is that your understandings?*

*A: Correct. That was not the same mark that he had seen.*

Student Ruhl reported a similar reaction when she first saw the alleged depiction of Zach Dennis' arm in locally published newspapers. Student Ruhl averred by affidavit written in her own hand:

*"I was surprised when I saw it in the paper and did not see how it could look that bad when it seemed to be fading on the bus".<sup>245</sup>*

Until January 14, 2010, John Freshwater could not remember who had been in his Eighth (8<sup>th</sup>) Period, Eighth (8<sup>th</sup>) Grade Science Class. As the result of an anonymous letter<sup>246</sup> delivered to John Freshwater on January 14, 2010, a chain of events occurred which lead to the revelation Superintendent Short had been in possession of items from Teacher Freshwater's classroom.

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<sup>245</sup> Employee Exhibit 194

<sup>246</sup> Employee Exhibit 178

Previous efforts to obtain the items removed from John Freshwater's classroom by subpoena<sup>247</sup> had been unsuccessful. Fortunately, the anonymous letter resulted in the undersigned's demand for an immediate public records inspection which resulted in the discovery that Superintendent Short had secreted materials from review despite the previous subpoena demand. One section of items taken from John Freshwater's classroom contained the seating chart and student roster from Teacher Freshwater's Eighth (8<sup>th</sup>) Period, Eighth (8<sup>th</sup>) Grade Science Class.

Obtaining the seating chart for the first time after a public records inspection and demand which occurred in March 2010, the undersigned finally had names of students from the same class as Zach Dennis. Following the mandates of Article 402 from the collective bargaining agreement, written statements in the form of affidavits were obtained from students who testified. Article 402 states in pertinent part",

*After interviewing the complainant and the teacher against whom the complaint is made, the investigator will interview all witnesses each party identifies and, if possible, obtain a written statement from each witness interviewed.*

The undersigned immediately began searching for and locating all of the students who would talk to him resulting in testimony from ten (10) students and one (1) student's parent on April 29 and 30, 2010.

Fellow students Joshua Grubaugh, Aaron Morris and Jake Stotts participated in the very same Tesla Coil experiment in the very same class with Zach Dennis. Students Grubaugh, Morris and Stotts each identified the level of pain they experienced from participation in the Tesla Coil experiment.

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<sup>247</sup> Employee Exhibit 177



Student Grubaugh completed the pain scale by describing his perceived sensation from the Tesla Coil and he circled the “smiley face” description which included the words “No Hurt”.<sup>248</sup> Student also testified and averred by affidavit his belief that “Zach Dennis is a liar”.<sup>249</sup>

Student Morris completed the pain scale by describing his perceived sensation from the Tesla Coil and he circled the “smiley face” with the words, “Hurts Little Bit” (sic).<sup>250</sup> Student Morris further testified, “It didn't hurt at all.”<sup>251</sup> Student Morris said he could see the room well and drew a seating diagram for John Freshwater’s science class.<sup>252</sup> Student Morris also stated he would have helped a student get away from John Freshwater if he thought the student was getting hurt.<sup>253</sup>

Student Stotts also completed the pain scale by describing his perceived sensation from the Tesla Coil and he too circled the “smiley face” description which included the words “No Hurt”.<sup>254</sup> Student Stotts also stated, “I picked zero because it didn't hurt at all.”<sup>255</sup> Student Stotts also believed Zach was “lieing” (sic).<sup>256</sup> Student Stotts also testified John Freshwater was his “favorite teacher” because Teacher Freshwater was “cool” and that “He knew how to explain it”.<sup>257</sup> Student Stotts proclaimed about John Freshwater “He was laid back and not as strict. If you did something wrong, he would just explain it to you and not flip out on you like a lot of teachers”. *Id.* Contrary to allegations by Lynda Weston that John Freshwater hurt the advancement of curriculum, Student Stotts stated that the information Student Stotts learned in eighth grade from Teacher Freshwater helped Student Stotts in the ninth and tenth grade, “Yeah.

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<sup>248</sup> Employee Exhibit 200 and Transcript Page 5290

<sup>249</sup> Employee Exhibit 199 and Transcript Page 5289

<sup>250</sup> Employee Exhibit 206

<sup>251</sup> Transcript Page 5327, Line 23

<sup>252</sup> Transcript Page 5325 and Employee Exhibit 205

<sup>253</sup> Employee Exhibit 204 and Transcript Page 5326

<sup>254</sup> Employee Exhibit 209

<sup>255</sup> Transcript Page 5344, Line 20-21

<sup>256</sup> Employee Exhibit 207 and Transcript Page 5346

<sup>257</sup> Transcript Page 5348-5349

He helped me out with the OGTs - Ohio Graduation Test”. Id. Some examples of the curriculum Student Stotts found helpful from the eighth grade include “like, atoms and, like, everything, like evolution and stuff”. Id.

Student Maggie Wayne signed an affidavit attesting “I did not observe anyone being hurt by the Tesla Coil”.<sup>258</sup> Despite Zach Dennis’ claim that fellow student Maggie Wayne participated in the Tesla Coil experiment,<sup>259</sup> Student Wayne provided contrary testimony that she did not participate in the Tesla Coil experiment and did not have the arc from the Tesla Coil applied to her.<sup>260</sup> Student Wayne also confirmed the authenticity of page 410 from Employee Exhibit 187 as her handwriting which was reproduced in a more legible form in Employee Exhibit 197. According to Student Wayne, John Freshwater’s 8<sup>th</sup> grade science class instruction apparently once incorporated a snake brought in by a fellow student. Id. Student Wayne diagramed a seating chart which showed where she sat and she affirmed she would have seen any harmful event.<sup>261</sup>

Superintendent Short deceptively tried to bootstrap misleading testimony by asserting Student Justin Newland was somehow purposely harmed by John Freshwater’s use of the Tesla Coil<sup>262</sup>. Student Justin Newland was incapable of testifying for himself as his caseworkers from Moundbuilders Guidance Center, Emily Higgins and Miranda Conkle, asserted by sworn affidavit in Employee Exhibit 180. Witness Lori Hubbell, Justin Newland’s stepmother, testified Student Newland was incapable of testifying but that she was at the meeting where Superintendent Short tried to talk to Student Newland. Lori Hubbell testified and attested in a sworn affidavit that Justin Newland responded to Superintendent Short’s question about whether

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<sup>258</sup> Employee Exhibit 196 and Transcript Page 5272

<sup>259</sup> Transcript Page 3083

<sup>260</sup> Transcript Page 5272

<sup>261</sup> Transcript Page 5271 and Employee Exhibit 198

<sup>262</sup> Transcript Page 315-316

Justin thought John Freshwater purposely tried to hurt Justin. Lori Hubbell was clear that Justin responded to Superintendent Short by stating, “Mr. Freshwater would never hurt me.”<sup>263</sup>

Student Kayla Wells testified in person and averred by affidavit that no student complained about being hurt by either the Tesla Coil or John Freshwater.<sup>264</sup> Student Wells also confirmed the authenticity of page 409 from Employee Exhibit 187 as her handwriting which was reproduced in a more legible form in Employee Exhibit 188. Student Wells authored the handwriting because she liked John Freshwater.<sup>265</sup>

Student Tokayla Redman testified in person and averred by affidavit that no student was hurt by either the Tesla Coil or John Freshwater.<sup>266</sup> Student Redman also confirmed the authenticity of page 187 and 188 from Employee Exhibit 187 as her handwriting which was reproduced in a more legible form in Employee Exhibit 190. Student Redman authored the handwriting because John Freshwater was her favorite teacher. Employee Exhibit 191 was a seating chart created by Student Redman demonstrating her position in the classroom which gave her a clear view of the classroom activities. Student Redman testified she would have seen and perceived if John Freshwater had hurt another student.<sup>267</sup> Regarding Zach Dennis credibility and whether he was injured by the Tesla Coil or John Freshwater, Student Redman testified and attested by affidavit about a cellular phone text message exchange she had with Zach Dennis, whereby Student Redman testified,

*“So I texted him and I asked if he really did that, and he said yeah. And he asked if I hated him. And I said I guess not; I just can't believe you'd do that. And he said his parents blew it all out of proportion.”*

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<sup>263</sup> Employee Exhibit 181

<sup>264</sup> Employee Exhibit 186 and Transcript Page 5099

<sup>265</sup> Transcript Page 5104

<sup>266</sup> Transcript Page 5123 and Employee Exhibit 189

<sup>267</sup> Transcript Page 5124

Student Allison Ruhl presented evidence that her seat in John Freshwater's classroom permitted her to see the classroom well and that she did not see anybody harmed or forced to participate.<sup>268</sup> Student Ruhl also rode the same bus as Zach Dennis after school on the day the Tesla Coil was used and testified she "was good friends with Zach and the people on the bus".<sup>269</sup> Student Ruhl corroborated Student Nielson's statement that whatever evidence of any Tesla Coil application she observed on Zach Dennis' arm was viewed to be located on his underarm not the top of his arm as depicted in Board Exhibit 7 and 8.<sup>270</sup>

Student Cody Smith testified in person and by affidavit that he did not see anybody in any pain from the Tesla Coil or witness anybody's arm placed on the overhead.<sup>271</sup> Student Smith's classroom seat permitted him to see well.<sup>272</sup> Student Smith deemed Zach Dennis a "liar".<sup>273</sup> Student Smith wrote in his affidavit by his own hand,

*"Mr. F was the best and funniest (sic) teacher I have ever had and when I needed help he would always help".*

Student Angelita Conkel testified in person and by affidavit that she did not see anybody in any pain or complain about the Tesla Coil.<sup>274</sup>

Student Corbin Heck testified in person and by affidavit that he did not see anybody get hurt by the Tesla Coil. Further Student Heck stated the Tesla Coil experiment felt like a tickle. Student Heck attested, "I never saw Zach wince or cry and I had no sense Zach had been hurt".<sup>275</sup>

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<sup>268</sup> Employee Exhibit 195 and 194 and Transcript Page 5254

<sup>269</sup> Transcript Page 5261

<sup>270</sup> Transcript Page 5260

<sup>271</sup> Employee Exhibit 203 and Transcript Page 5310

<sup>272</sup> Employee Exhibit 203

<sup>273</sup> Transcript Page 5309

<sup>274</sup> Employee Exhibit 193 and Transcript Page 5223

<sup>275</sup> Employee Exhibit 23 and Transcript Page 2183

Student Taylor Strack testified in person and by affidavit that she did not see anybody get hurt and that Zach Dennis was “lying” if he claimed to have had his arm held down by John Freshwater.<sup>276</sup> Student Strack attested I think this “whole thing is pretty stupid because no one else got hurt but supposedly Zach Dennis”.<sup>277</sup>

Student Miranda Baer testified in person and by affidavit that she did not see anybody in any pain or complain about the Tesla Coil and would have seen if such occurred.<sup>278</sup> Student Baer wrote in her affidavit by her own hand,

*“I love (sic) science Mr. Freshwater”.*<sup>279</sup>

The specification identified in section (1)(b) one of the resolution specifies and is limited to an allegation John Freshwater branded a religious symbol on the skin of some eight grade students which lasted as long as 3-4 weeks and one student described the area as ‘very painful’. Clearly and convincingly, ten (10) classroom eyewitnesses denied any mention or making of the religious symbol termed a “cross” was done by John Freshwater. Further, Zach Dennis himself did not claim any alleged mark lasted 3-4 weeks nor did anybody else make such a claim. Lastly, absolutely nobody claimed the Tesla Coil experiment was “very painful”. Any allegation that John Freshwater committed any act or caused any condition described in section (1)(b) must be deemed **unsubstantiated**.

In response to the identified specification of the charge listed in the BOE’s resolution, as required and limited by R.C. 3319.16, balanced by the clear and convincing standard or any other, John Freshwater was not willfully nor persistently in violation of any identified reasonable regulation of the BOE; nor do any of his actions constitute other good and just cause based upon

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<sup>276</sup> Employee Exhibit 101 and Transcript Page 3850

<sup>277</sup> Employee Exhibit 101

<sup>278</sup> Employee Exhibit 184, 185, Transcript Page 5084

<sup>279</sup> Employee Exhibit 184

the requisite intent. Therefore, the specifications in section (1) one of the BOE's *Amended Resolution of Intent to Consider the Termination of the Teaching Contract(s) of John Freshwater* must be deemed **unsubstantiated**.

**B. JOHN FRESHWATER'S APPROPRIATE USE OF THE ACADEMIC CONTENT STANDARDS**

Section (2) of the BOE's *Amended Resolution of Intent to Consider the Termination of the Teaching Contract(s) of John Freshwater* is an unwieldy, repetitive combination of items that translate to the issue of did John Freshwater teach what he was supposed to teach. Before the individual specifications can be addressed herein, the testimony deduced at trial demonstrates the threshold points of contention must focus upon the assessment tool used by the State of Ohio to determine student learning (the OAT's); and the importance of a singular Academic Content Standard (Page 216 – "bias") which was overlooked, or completely ignored by representatives of the BOE.

Any and all matters related to John Freshwater's actions in section (2) of the BOE's resolution are resolved in favor of John Freshwater based upon the liberties provided by BOE Policies 2240, 2270, 3218, 2510, 8800 and 8800B and the Academic Content Standards. Reliance upon established BOE policies and the failure of the BOE to specifically identify any policy allegedly violated by John Freshwater, any and all matters related to John Freshwater's actions in the course of instruction should be **unsubstantiated**.

**1. John Freshwater Did Adhere to the Established Curriculum**

Any and all matters related to John Freshwater's delivery of curriculum in the Mount Vernon City School District are resolved in favor of exonerating him as credible witness testimony and objective documentation review demonstrates Teacher Freshwater adhered to the Academic Content Standards for 8th grade and demonstrably proved he empowered his students

to excel and achieve beyond the State of Ohio's minimally acceptable standards in a way and manner not accomplished by his peers. Clearly and convincingly any allegation that John Freshwater violated any known or unknown parameter for his role as a teacher must be deemed **unsubstantiated**.

Any and all matters related to any specification that John Freshwater violated willfully or persistently any identified reasonable regulation of the BOE, or, that his actions constitute other good and just cause based upon the requisite intent, are to be resolved in Teacher Freshwater's favor and deemed **unsubstantiated** because:

1. Results of the Ohio Achievement Tests (OAT) taken by 8<sup>th</sup> grade students demonstrate Teacher Freshwater's reasonable interpretation of the Academic Content Standards was legitimate, accurate and benefitted his students despite any formal training regarding the application of the Academic Content Standard<sup>280</sup>.
2. Teacher Freshwater reasonably interpreted, applied and successfully taught the Academic Content Standard as listed on Page 216, which requires 8<sup>th</sup> grade students to, "Explain why it is important to examine data objectively and not let bias affect observations".<sup>281</sup>

## **2. OAT Scores Reflect what is being Taught in the Classroom**

The Ohio Achievement Test is the metric by which student and teacher performance is measured in the State of Ohio. The fact is that John Freshwater's class OAT scores not only surpass state requirements, but outpace the scores of the other Mount Vernon Middle School 8<sup>th</sup> grade science teachers, who, we note without prejudice, failed to meet the overall state requirements (See Diagram – John Freshwater EXCEEDS the state proficiency threshold and CONSISTENTLY taught the Academic Content Standards curriculum). The OAT test scores

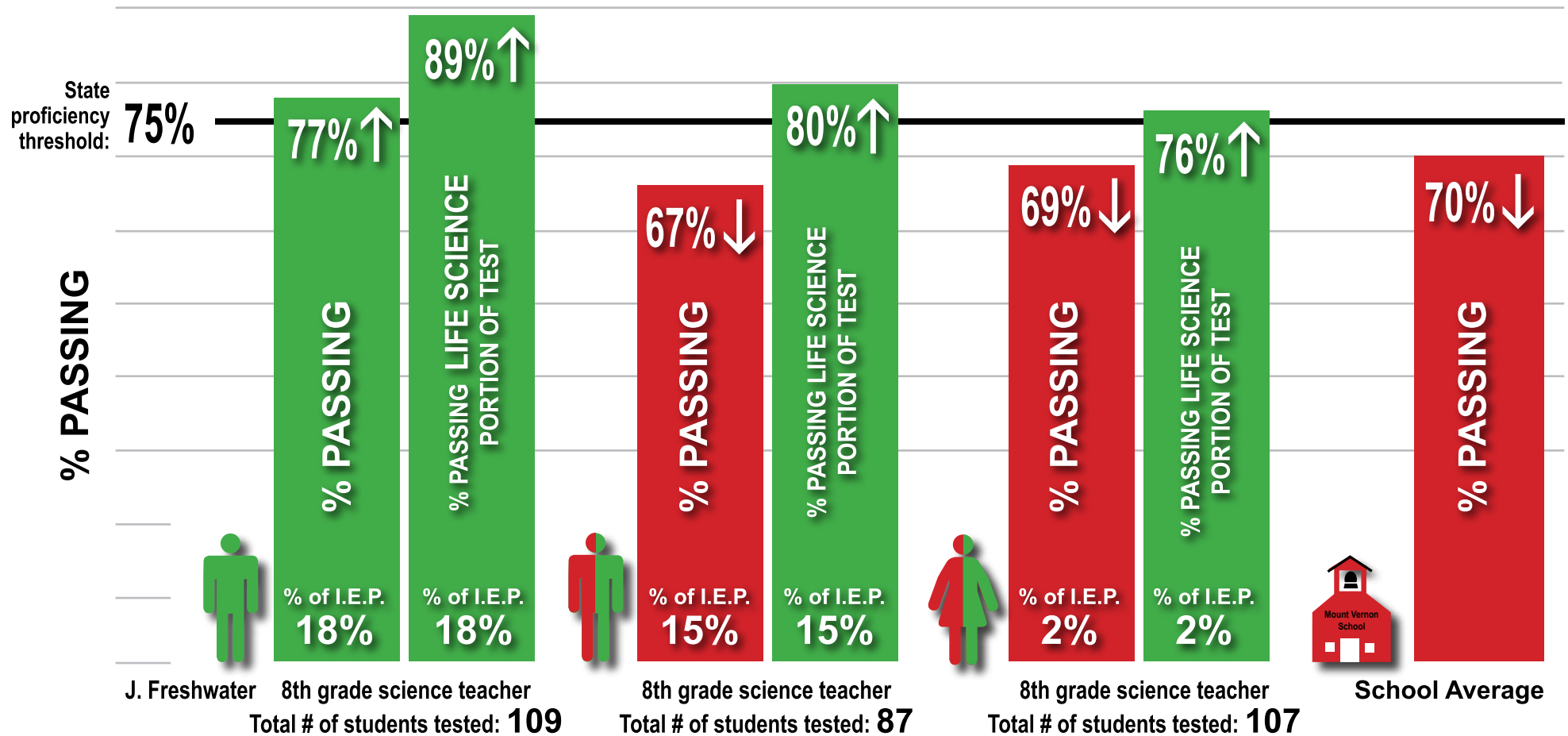
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<sup>280</sup> Transcript Page 3578, Principal Tim Keib affirmed other teachers may be more technical but John Freshwater teaches students to be lifelong learners.

<sup>281</sup> Board Exhibit 37, Page 216

# John Freshwater EXCEEDS the state proficiency threshold and CONSISTENTLY taught the Academic Content Standards curriculum.

Achievement Test Scores for the three 8th grade Science Teachers at Mount Vernon Middle School 2007-2008



## Board Policy 5408 Academic Acceleration

“In accordance with the belief that all children are entitled to an education commensurate with their particular needs, students who can exceed the grade-level indicators and benchmark set forth in the standards must be offered the opportunity and be encouraged to do so.”



demonstrate that the allegation specifications are just as what they appear to be: utter nonsense. Far from being excoriated, John Freshwater should be emulated so that *all 8<sup>th</sup> grade classes will pass state requirements as well.*<sup>282</sup> In actuality, it is the students who *were NOT* in John Freshwater's science class who were academically harmed.

Teachers, administrators, and expert witnesses agree that the OAT scores reflect what is being taught in the classroom. In the HR on Call, Inc. report overview paragraph 1, Linda Weston, director of teaching and learning, and two unnamed others say "they teach to the standards and test to the standards (OAT tests)...[T]heir school is measured by how students perform on the tests."<sup>283</sup> This would mean that Dr. Weston and two others place a very high value on these test results; so, much emphasis should be placed on John Freshwater's test scores despite arguments from testimony that OAT scores are not helpful in gaining an accurate picture of the classroom. During her HR on Call, Inc. interview, Dr. Weston was asked about John Freshwater's OAT scores. She told investigator Herlevi that John Freshwater's students scored as well as or higher than other students, but "you can't easily compare one class to another class because some classes have ...disadvantaged students".<sup>284</sup> In so saying, she implied that John Freshwater's class did well only because he did **not** have disadvantaged students. But that is just the opposite of reality; John Freshwater had the same number of disadvantaged students with an overall larger class portion, and they *still* did better than the other classes. In fact, while other teaching teams had the solidly average career-based (CBI) students, John Freshwater's team had *all* of the

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<sup>282</sup> Transcript Page 3597-3598, Principal Tim Keib stated John Freshwater's higher achieving OAT scores when compared to his colleagues would have resulted in Principal Keib explaining how he would use a Teacher like Freshwater, "Let me tell you what I do. In my building, when I have a teacher whose scores are significantly statistically higher than their peers, they put on professional development for their peers". Principal Keib added, "I get them subs and they sit down for a day with their peers and they go through item analysis on the test and they show here's the question on the test, here's the standard that you were supposed to teach, here's the lesson plan and how I taught it. Here's how I knew that prior to the end-of-the-year exam my kids knew it. That's the kind of thing, and we do that currently".

<sup>283</sup> Board Exhibit 6, Page 3

<sup>284</sup> Transcript Page 1152-1153

learning disabled and cognitively disabled students.<sup>285</sup> John Freshwater's students did well because John Freshwater is a very good teacher.

Teacher Andrew Thompson says OAT scores do show how well teachers are doing at teaching the Academic Content Standards in the classroom.<sup>286</sup> Deb Strouse, administrative monitor, says, "The best measure to know if they were taught or not is how the students do on the OAT."<sup>287</sup> Kathy Kasler, high school principal, agrees that OAT scores reflect the instruction students receive from their teachers.<sup>288</sup> Former Principal Keib uses several methods to know what is actually being taught in a classroom. One of those methods is looking at OAT scores.<sup>289</sup> Jeff Maley, former superintendent, thinks YES, scores do tell what kids are achieving, and what John Freshwater is actually teaching.<sup>290</sup> Expert witness Finn Laursen says achievement tests are the measure used to determine whether or not a teacher is teaching the required curriculum, because the board's curriculum has been created around the material which will be tested.<sup>291</sup> If there is any doubt whether John Freshwater succeeded in teaching his students, one need only to look at the emphasis administration has placed on OAT test scores and the exceptional scores that John Freshwater's students have achieved.

**3. John Freshwater Reasonably and Contextually Used the Academic Content Standard As Listed On Page 216, Which Requires 8<sup>th</sup> Grade Students to Examine "Bias"**

The Academic Content Standards do not require exclusivity or prescribe one singular uniform manner for instruction. "Bias" is a significant concept in understanding and balancing the "Scientific Method" as evidenced by the prominence "bias" is given in the curriculum related

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<sup>285</sup> Transcript Page 1819

<sup>286</sup> Transcript Page 2924

<sup>287</sup> Transcript Page 1957

<sup>288</sup> Transcript Page 715-716

<sup>289</sup> Transcript Page 3463

<sup>290</sup> Transcript Page 2342

<sup>291</sup> Transcript Page 3906

to “Scientific Ways of Knowing”.<sup>292</sup> Board Exhibit 37 does not contain any further instruction or explanation regarding how to teach or instruct students about the concept of “bias” other than the plainly worded statement in which “bias” is noted in the curriculum objective. Inquiry in this matter should be immediately halted if the teacher charged with instructing upon this concept can provide a reasonable explanation for their understanding and application. John Freshwater instructed his students using the customary meaning of the word “bias” and its use in this Academic Content Standard.

Representatives of the BOE introduced “expert” witnesses who were not 8th grade teachers in an attempt to illuminate the meaning of “bias” in relation to the Academic Content Standard. The simplest way to discredit an expert witness is to prove their opinion is not based upon training or experience. BOE Representatives introduced biology and curriculum expert Dr. Joe Faber. While Dr. Faber may hold an advanced degree and be very well versed in biology curriculum, he was a “student teacher” for “two months” in “2002”<sup>293</sup> which means he is not qualified to serve as an expert in relation to how to teach the 8th grade Academic Content Standard concerning “bias”.

However, Dr. Faber opined outside the parameters of an 8th grade science teacher when he used his vastly greater understanding<sup>294</sup> and articulated that the existing, plainly stated Academic Content Standard on Page 216 about bias was not intended to refer to personal bias, but bias in the data.<sup>295</sup> Dr. Faber admitted he was not aware of any training that has been provided to assist 8th grade science teachers in grasping a definition of “bias” other than the

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<sup>292</sup> Board Exhibit 37, Page 216

<sup>293</sup> Transcript Page 1384-1385

<sup>294</sup> Transcript Page 1388

<sup>295</sup> Transcript Page 1407

plain and ordinary meaning.<sup>296</sup> Dr. Faber finally conceded his advanced understanding of the word “bias” is not shared by all people during the following exchange on cross-examination:

Q: *But does it say anywhere the way it's intended to be interpreted?*

MR. MILLSTONE: *Objection.*

THE COURT: *Overruled.*

A: *Does it say how it's supposed to be interpreted? Again, to me it's fairly clear, yes. If you look back at the overarching standard, the standard says that students realize that the current body of scientific knowledge must be based on evidence, be predictive, logical, subject to modification and limited to the natural world.*

Q: *To you it's fairly clear, correct?*

A: *Yeah.*

Q: *Would you agree that it may not be fairly clear to some others?*

A: *I could agree with that, I suppose.*<sup>297</sup>

Dr. Faber admitted that during his short two months as a student teacher serving under the tutelage of a veteran teacher he came to understand that a real 8th grade teacher has to field questions from students who may be biased.<sup>298</sup> In regards to an 8th grade student's ability to cognitively differentiate between abstract bias and concrete bias Dr. Faber admitted each student will be different as it “Depends on their level of development”<sup>299</sup> adding, “at that age, they're all over the place. You have some that can reason concretely and you have some that can reason abstractly”.<sup>300</sup> Dr. Faber confirmed there is “a continuum between the two” referring to the difference between an 8th grade student's concrete versus abstract cognitive ability.<sup>301</sup> Dr. Faber said, “Yes”, 8th grade students bring a personal bias into their science class.<sup>302</sup> John Freshwater did not neglect the intended meaning of the plainly stated word, “bias”, and he worked within the varied cognitive abilities of his diverse student group.

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<sup>296</sup> Transcript Page 1392

<sup>297</sup> Transcript Page 1413-1414

<sup>298</sup> Transcript Page 1409

<sup>299</sup> Transcript Page 1408

<sup>300</sup> Transcript Page 1408

<sup>301</sup> Transcript Page 1409

<sup>302</sup> Transcript Page 1408

Expert witness Dr. Patricia Princehouse, pleasant and intelligent as she was, is not qualified to serve as an expert in relation to how to teach the 8th grade Academic Content Standard concerning “bias”. Unlike Dr. Faber who at least spent two months shadowing another veteran teacher seven years earlier, in six (6) questions we learn everything about Dr. Princehouse that is necessary to make a determination as to whether she will be helpful in determining any issue in this matter:

MR. HAMILTON:	Ms. Princehouse, have you ever taught in a public school classroom at the 8th grade level?
DR. PRINCEHOUSE:	No, sir.
MR. HAMILTON:	Have you ever taught in the public classroom --
DR. PRINCEHOUSE:	Just a second. I might have given a talk or made a presentation to a class. Sometimes we --
MR. HAMILTON:	What kind of talk or presentation might you have done?
DR. PRINCEHOUSE:	On the aspects of science, things like that. I don't specifically remember an 8th grade class, but I don't want to --
MR. HAMILTON:	Have you ever taught science at the sixth, seventh, or 8th grade?
DR. PRINCEHOUSE:	No.
MR. HAMILTON:	Have you ever taught any kind of science classes at the high school level, grades nine through 12?
DR. PRINCEHOUSE:	No, sir.
MR. HAMILTON:	Thank you.

Nonetheless, somewhere throughout the PowerPoint presentation that Dr. Princehouse read verbatim, she was able to work away from her prepared presentation and elaborate that she also had an issue with the word “bias” as it is used in the 8th grade Academic Content Standard indicator as she said the word, “It’s so vague as to be misleading”.<sup>303</sup> Dr. Princehouse also thought the word “bias” could be referring to racism (in an 8th grade science class?!)<sup>304</sup>

Dr. Princehouse was verbose during her first appearance but her second appearance was more objectionable as representatives of the BOE called her a second time during rebuttal. Established caselaw instructs that it is improper to call upon rebuttal a witness, an expert such as

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<sup>303</sup> Transcript Page 1622 and 1624  
<sup>304</sup> Transcript Page 1624

Dr. Princehouse, who's already previously testified, to testify about the same or similar matters. *State v. Hawn*, (2000) 138 Ohio App.3d 449. Furthermore, Dr. Princehouse revealed an underlying motivation for her participation when she revealed the drafters of Board Exhibit 37 rejected her proposed lesson plans prior to publication.<sup>305</sup> Dr. Princehouse answered that her proposed lesson plans were rejected by the science committee because:

*“The feeling was that the materials needed to come from the creationist side, and that anything that the proposed science side proposed would be instantly rejected, and were when we did, actually. I also -- I didn't mention I also critiqued four lesson plans that were ultimately rejected in the midst of the one that was accepted”*<sup>306</sup>.

According to her testimony Dr. Princehouse actually had five (5) proposed lesson plans rejected by the Academic Content Standards publishing committee. While testifying in this matter may have been good for Dr. Princehouse's vitae padding, based upon her lack of expertise, her rejected lesson plans and duplicative attempt during rebuttal, she is not qualified to serve as a witness in this matter.

Dr. Steven W. Rissing should similarly be disqualified as an expert witness as it is impermissible to call a second expert witness under the guise of rebuttal to testify about the same or similar matters that were presented during the case in chief. *State v. Hawn*, (2000) 138 Ohio App.3d 449. As with Dr. Faber, BOE representatives introduced an unqualified expert in Dr. Rissing, who by his own admission is an “ant” man, studying “social insect colonies, ant colonies, in the desert, where I did my dissertation”.<sup>307</sup> While Dr. Rissing may also have earned a doctorate - albeit studying ants - he has not earned any experience working with 8th grade students or the Academic Content Standards, and therefore, he is not qualified to serve as an expert in relation to how to teach the 8th grade Academic Content Standard concerning “bias”.

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<sup>305</sup> Transcript Page 1618-19

<sup>306</sup> Transcript Page 1618-1619

<sup>307</sup> Transcript Page 6136

Nonetheless, aside from confirming that Dr. Princehouse won the Hugh Hefner Playboy Foundation Award First Amendment Award<sup>308</sup>, Dr. Rissing was able to also confirm that context is important in determining what a document intends to communicate.<sup>309</sup>

Dr. Rissing's students provided him with information which they had accumulated. Dr. Rissing actually manipulated and altered the form of his students information and formatted the data in a manner that presented accepted scientific conclusions in contrast and comparison to non-scientific concepts.<sup>310</sup> Similarly, a former student of John Freshwater's provided him non-scientific data in the form of Board Exhibits 38, 39, 40 and 41, separately titled by the student as, "The Giraffe" and "The Woodpecker". However, whereas Dr. Rissing manipulated and changed the format of his student's information, John Freshwater did not alter the form of his student's self-initiated work.

Dr. Rissing testified when he used Slide 13, from Board Exhibit 113, his intent was to "introduce terms here in this form and follow a particular pedagogical style."<sup>311</sup> Dr. Rissing agreed the terms on his worksheet depicted as Slide 13 contained non-science-related terms.<sup>312</sup> The non-science related terms included a hypothesis that "...apparently there was some sort of disruption in the force involving the devil there to cause the plague".<sup>313</sup> It is important to review the analysis of Dr. Rissing as his action with his students is exactly as that done by John Freshwater with Board Exhibits 38, 39, 40 41, with the noted exception that Teacher Freshwater did not alter the document provided to him by the student. Dr. Rissing testified as follows from Transcript Pages 6180-6183. (Emphasis added for clarity)

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<sup>308</sup> Transcript Page 6161-6162

<sup>309</sup> Transcript Page 6179 - 6182

<sup>310</sup> Board Exhibit 113, Slide 13

<sup>311</sup> Transcript Page 6179

<sup>312</sup> Transcript Page 6180

<sup>313</sup> Transcript Page 6180 and 6156

- Q. Well, right here under "hypothesis (historic)" for diseases such as the plague, yellow fever, typhoid, smallpox, leprosy and cholera, there was a hypothesis presented that apparently there was some sort of disruption in the force involving the devil there to cause the plague. Is that what I'm seeing?
- A. This is one of the ideas that was suggested that my students found when they went out and searched sources to explain what ideas people had in the 1300s to explain the spread of the plague through Europe.
- Q. Well, why are we worrying about the 1300s? If you're teaching biology now in the 2000s, is it proper to talk to the biology students about hand of God and God's wrath and sin and fumes and, again, the devil doing something there?
- A. I'm repeating what my students told me here. But the Ohio State University has, I think it's, four main learning objectives that any course that students take to satisfy their requirement for general education or distributional requirements in science include a discussion of the history of disease. There's the separate learning objective that it talks about the impact of science on society and society on science. Somewhere in there there's also one about the interplay of technology with science. And all of this on the left side is before microscopes, so, yes, the history of science. There was a time when explanations for disease included all of those things that my students located in the literature, as I have too.
- Q. And, in fact, you located in your literature search as it relates to documents called "The Woodpecker + Giraffe," which are at least Board Exhibits No. 39 and 41, you testified that you found some of that information upon those Board Exhibits 39 and 41 in a book that was published in 1982. Is that what I remember seeing up there?
- A. I said I found it on a Web site that referenced a book published in 1982. I was not able to locate the book.
- Q. Now, you said your students gave you the information that is depicted here in your Slide No. 13. Correct?
- A. Correct.
- Q. Now, what if I told you that one of John Freshwater's students gave him information that's depicted in handouts called "The Giraffe" and "The Woodpecker" represented here at least by Board Exhibit 39 and 41? Would it be proper for him to talk about those?
- A. It would depend on the context.
- Q. Oh, so context, you would agree, is very important in understanding what a particular teacher may have done in their classroom. Would you agree?
- A. The original form of this table was developed in recitation sections where my students actually entered these phrases into these cells themselves and then I engaged them in a discussion where I asked them to compare and contrast the columns on the left and the columns on the right. They generated and I put on the terms "nonscientific" and "scientific," and then I introduced the term and the concept of methodological naturalism.
- Q. You're stating that you put in the terms "scientific" and "nonscientific." Is that my understanding?
- A. I wrote them down after my students stated them. This is me talking to a group of 250 students assembled in a large lecture hall at Ohio State.
- Q. If all you did here was repeat information, much like John Freshwater has asserted he just repeated information, and you say that you compared and contrasted that information that your students repeated to you, based upon your understanding, can an



- 8th grade science teacher in the public school system in the state of Ohio compare and contrast information that a student gave to them?**
- A. *Could? I believe your question said "could" they.*
- Q. **Yes, they could.**
- Q. **And in that comparison and that contrast, Doctor, they [an 8th grade teacher] could point out the difference between nonscientific information versus what may be real scientific information in that 8th grade public school classroom?**
- A. *Could they?*
- Q. *Absolutely, sir, yes.*
- A. **Yes.**
- Q. **And in doing so, if they[an 8th grade teacher] did that, would then they be able to emphasize the difference between something that is nonscientific versus that which is scientific?**
- A. *Would they be able to do it?*
- Q. *Yes, sir.*
- A. **Yes, they would be able to do that.**

Although Dr. Rissing should be disqualified as an expert witness in this matter, his testimony fully exonerates John Freshwater for using Board Exhibits 38, 39, 40 and 41, as Teacher Freshwater's intent was to use the documents in a context to "compare and contrast"<sup>314</sup> with an intent to "point out the difference between nonscientific information versus what may be real scientific information in that 8th grade public school classroom".<sup>315</sup>

Merely speaking about the differences between two points of view does not mean a person has to accept or believe either point of view. Similarly it is unfair to assume a person is promoting one point of view over another simply because discussion occurs about differences in those views. It has been well developed through testimony that 8th grade students develop cognitively at different rates and are emerging into the capability to reason abstractly versus concretely. Navigating through the various cognitive abilities of 8th grade students requires context for success. Dr. Rissing agrees that overcoming "bias" of an 8th grade student requires an understanding of "context" in order to succeed and determine if another person acted appropriately:

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<sup>314</sup> Transcript Page 6182, Line 13

<sup>315</sup> Transcript Page 6183, Line 9-11

- Q. How do you overcome that student's bias at the 8th grade level if they have a bias towards science?*
- A. I'm sorry? You said how do I overcome that bias at the college level if they have a bias towards science?*
- Q. Specifically, I want to know, how do you overcome the bias at the 8th grade level if that 8th grade student has a bias?*
- A. A bias about?*
- Q. About science. I'm sorry, sir.*
- A. A bias about science? Usually, if I'm talking to an 8th grader and they indicate -- actually, you said bias towards science. I assume you mean bias against science. I recognize there are a lot of misconceptions, and it really would depend upon the context of the discussion I was having with an 8th-grader.*
- Q. So context, again, would be important in trying to overcome that 8th grade student's bias against science. Correct?*
- A. Yeah. Yes.*

Representatives of the BOE invested significant amounts of time and money in prosecuting John Freshwater. Why could the BOE not find an “Expert 8<sup>th</sup> Grade Science Teacher” to competently testify about the Academic Content Standard on Page 216 as it relates to the proper instruction of “bias” in teaching the standard which requires an 8th grade teacher to “Explain why it is important to examine data objectively and not let bias affect observations”? The reason is simply why Attorney Millstone and Superintendent Short could not find an “Expert 8<sup>th</sup> Grade Science Teacher”; because one does not exist that will conclusively verify that there is only one, exclusive, uniform application to teach the standard. Furthermore, there does not exist a singular technical application for the interpretation of the word “bias” in this Academic Content Standard or otherwise.

Based upon the same analysis of context, purpose and intent, the multiple specifications listed in section (2) of the resolution cannot be proven by clear and convincing evidence and will be shown to be **unsubstantiated**.

#### **4. (2)(a). John Freshwater Taught the Academic Content Standards**

The first of the second set of specifications leveled against John Freshwater in the resolution are that he harmed his students academically by teaching contrary to the Academic

Content Standards (Academic Content Standards). A number of sub-specifications are leveled under this rubric: teaching more advanced topics, or beyond 8<sup>th</sup> grade material; substituting the subjects of Creationism and Intelligent Design for evolution; teaching intolerant religious beliefs; and training the students to reject non-Biblical perspectives. Such an inflammatory list was intended to smear the reputation of John Freshwater. These specifications can be answered with one fact: OAT scores.

## **5. Bonnie Schutte**

It appears the animus of the allegation specifications originate from two sources, Dr. Lynda Weston and Mount Vernon High School 9<sup>th</sup> grade Teacher Bonnie Schutte. The 8<sup>th</sup> grade science curriculum in the Mount Vernon City School District is supposed “...to teach our students to think, to act, to question, to observe as scientists, teaching them scientific ways of knowing, scientific inquiry...”: that is the goal of the science teacher.<sup>316</sup> Thinking, acting, and questioning are exactly what John Freshwater’s students have learned. And one high school science teacher is not pleased.

At the outset of each school year, 9th grade science teacher Bonnie Schutte gives her incoming students a questionnaire survey on their likes and dislikes from science class the previous year. Many of John Freshwater’s promoted students share answers that *disturb* Teacher Schutte. Each year, she registers the same complaints with her principal. Each year, Teacher Schutte’s complaints go through the chain of command to the middle school principal. More than one principal has heard the concerns, yet not one has caused John Freshwater to cease these *disturbing* topics.

What are John Freshwater’s former students writing on their surveys that their new science teacher is so concerned about? Students write that they enjoyed learning about the big

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<sup>316</sup> Transcript Page 1491

bang theory, and evolution; they liked learning the periodic table because it was easy to memorize; they were glad to have discussions and to be able to say what they think; they thought it was fun to participate in a debate and hear different opinions; and they appreciated going beyond the textbook.<sup>317</sup> All of these “concerns” show that the students enjoyed science and enjoyed John Freshwater.<sup>318</sup>

Why are these positive descriptions a concern for Bonnie Schutte? She says she is concerned about students failing the standardized tests,<sup>319</sup> and must “reteach” some areas of the curriculum.<sup>320</sup> In light of John Freshwater’s class OAT scores, this is a specious claim. Principal Kasler, high school principal, says students needed to be re-taught, not because they did poorly on the OAT or OGT, but because “they would question”.<sup>321</sup> But questioning means that students are thinking for themselves; it does not mean that they don’t know the material. What are the students questioning? According to the report by HR on Call, Inc. unnamed high school science teachers said, “When we bring up evolution there is challenge and argumentation from students who have had John Freshwater”.<sup>322</sup> And Bonnie Schutte thinks that John Freshwater is the instigator of that challenge. (See Diagram – Bonnie Schutte States: Science is not guesswork)

## **6. What does “RETEACH” Mean?**

In the HR on Call, Inc. report, Teacher Schutte is quoted as saying, “I find it unfair to have to start each school year reteaching students...”<sup>323</sup> When Teacher Schutte says John Freshwater’s students need to be “retaught”, she is purposefully implying that they were taught *wrong*

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<sup>317</sup> Transcript Page 779-788

<sup>318</sup> Transcript Page 789

<sup>319</sup> Transcript Page 842

<sup>320</sup> Board Exhibit 6, Page 6

<sup>321</sup> Transcript Page 716

<sup>322</sup> Transcript Page 824

<sup>323</sup> Board Exhibit 6, Page 6

**Bonnie Schutte states: “Science is not guesswork.”**

\*779:23

**Yet, her testimony, allegations, interpretations and implications are merely her own personal guesses.**

Bonnie Schutte’s responses:

**A:** My **guess** is that that was coming from... \*782:1  
...these are just **my interpretations** of what they are saying.\*782:2  
So I’m **guessing** that that’s the beginning of a life.\*782:3

**A:** ...the **implication** is that [this student’s statement] is from Mr. Freshwater.  
That’s why I raised the concern with my administrator. \*824:25 - 825:1

**A:** I would **guess** I’ve spoken to Mr. Maley about this and Dr. Weston. \*819:8

**A:** Because the front of the questionnaire is where they put the name of the person [teaching]. I don’t think these showed it. \*789:4-5  
...I’m **guessing** they’re talking about their class. \*825:19-20

**Q:** So it is open to multiple **interpretations**, right? \*832:20

Bonnie Schutte’s response:

**A:** **Yes.** \*832:20

**Q:** You’re right. You are **guessing**, correct?

Bonnie Schutte’s response:

**A:** **Yes.** \*825:21-22

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**Furthermore, Tom Herlevi turned these “non-scientific” interpretations into a bedrock for the HR on Call report.**

Question to T. Herlevi, HR on Call Investigator:

**Q:** So you automatically took the information provided by Bonnie Schutte to be determinative of John Freshwater not teaching as he was supposed to?

**A:** **Yes.** \*1118:18

\*Denotes Hearing Transcript

*information* the first time, and now she has to teach them the right information. But follow-up questions and testimony from others, such as Thomas Herlevi, reveal that what “reteach” means is that John Freshwater’s students have to “hear it all again” or “be taught the same thing as last year” and be idle while the others *catch up to them*.<sup>324</sup> For example, Thomas Herlevi thinks that the periodic table caused problems for 9th and 10th grade teachers because John Freshwater had his students memorize the table, while the “others had no exposure” to it, and “this causes difficulty in having to reeducate them”.<sup>325</sup> Thomas Herlevi continues, “The teachers felt that his method of teaching the periodic tables (sic) wasn’t helpful either”.<sup>326</sup> But students thought otherwise, and three of them testified how memorizing the table did help them.<sup>327</sup>

While she might think it unfair that she has to start each year “reteaching” students, Bonnie Schutte is not the only teacher to have to review; but she is the only one complaining. Fellow 9th grade Teacher John Frye testified, “I taught ...a fourth of the freshmen... and I retaught them all. I think that’s what we do. I don’t remember reteaching any of John’s [Freshwater’s] kids”.<sup>328</sup> If students needed any remediation, the remedial group would be the entire 8th grade class as Teacher Frye indicated all students needed some review; but students of Teacher Freshwater did not need any special remediation.<sup>329</sup>

It is astounding that a high school teacher is upset that students want to learn about the periodic table, that they are thinking for themselves and asking questions, not believing everything they read. It seems that, in Bonnie Schutte’s opinion, the students need to be retaught how to be robots and accept all a teacher gives them without question.<sup>330</sup> Not a single witness

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<sup>324</sup> Transcript Page 851- 852 and 1153- 1154

<sup>325</sup> Transcript Page 1153-1154

<sup>326</sup> Transcript Page 1154

<sup>327</sup> Transcript Page 2660, 5078 and 5121

<sup>328</sup> Transcript Page 2063

<sup>329</sup> Transcript Page 2064

<sup>330</sup> Transcript Page 716

was able to produce any evidence whatsoever that John Freshwater's students had initially been taught incorrectly.

## **7. John Freshwater Succeeds in Proper Instruction**

"There's no indication that John's students are lacking in any way".<sup>331</sup> Teacher Andrew Thompson did an analysis of OAT scores of all the 8th grade science teachers, and found that there was no evidence of John Freshwater's students needing to be retaught. Teacher Thompson's study analysis proved the opposite that John Freshwater's students had learned very well.<sup>332</sup> Teacher Thompson compiled data from OAT scores of the 8th grade science students, categorized by teacher. John Freshwater's students' overall scores were above the state goal, while the other teachers' students' scores were lower than the state minimal goal.<sup>333</sup> Teacher Thompson separated the scores for only the life science portion of the test, which is the portion of the test that includes evolutionary theory. Eighty-nine percent (89%) of John Freshwater's students passed that portion.<sup>334</sup> Even though John Freshwater had the most students on the Individualized Education Plan (IEP) - whose scores are expected to be, and typically are, lower than the general student population – John Freshwater's students scored better than the students of the other two teachers. In the area of the test results report where the state writes its recommended corrective actions for the teacher, John Freshwater had no comments on the life sciences portion, proving that Teacher Freshwater's teaching caused students to meet state requirements. There was no indication that John Freshwater's students needed to be re-taught the evolution material.<sup>335</sup>

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<sup>331</sup> Transcript Page 2925

<sup>332</sup> Transcript Page 2939

<sup>333</sup> Transcript Page 2928

<sup>334</sup> Transcript Page 2928-2929

<sup>335</sup> Transcript Page 2929-2939

Principal Kasler says that John Freshwater's students did well on the OAT,<sup>336</sup> and even Zach Dennis and James Hoeffgen, another student called to testify for the Board, did well on their OAT. One Hundred percent (100%) of Teacher Schutte's science students had passed the OAT the previous year.<sup>337</sup> When her own teaching ability was questioned, Teacher Schutte assessed her teaching as good, because "my [standardized test] scores are pretty decent".<sup>338</sup> Using the same metric Teacher Schutte applied to her, John Freshwater must be good, also, because his OAT scores were more than "decent." When Administrative monitor Strouse's attention was drawn to the 77 percent passing rate of John Freshwater's students, she said, "He did teach the indicators".<sup>339</sup> It is illogical to argue that John Freshwater did not teach the required indicators when his student's scores were proficient.

The problem Teacher Schutte claims she has with any mention by John Freshwater of the periodic table, the big bang theory and evolution is that these topics are not in the 8th grade curriculum standards. Although she lacks scientific empirical proof, Teacher Schutte asserts she has a gut-hunch, or maybe a hypothesis whereby she believes teaching extra indicators in 8th grade will set students up to fail the standardized test.<sup>340</sup> But, to the contrary, students did well on the test, even though Teacher Schutte did not re-teach the 8th grade indicators, but rather only taught 9th grade indicators.<sup>341</sup> Teacher Schutte merely makes a guess that John Freshwater neglected 8th grade indicators in order to teach 9th grade indicators, but admits "I don't know that he *didn't* teach other indicators".<sup>342</sup>

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<sup>336</sup> Transcript Page 715

<sup>337</sup> Transcript Page 777

<sup>338</sup> Transcript Page 817

<sup>339</sup> Transcript Page 1952

<sup>340</sup> Transcript Page 842

<sup>341</sup> Transcript Page 842

<sup>342</sup> Transcript Page 853



Former Principal Tim Keib relates one year the high school staff voiced their concerns to him about John Freshwater teaching upper level standards. While hearing testimony from Bonnie Schutte seemed to indicate her concern for students' academic welfare, Principal Keib had a different analysis. He did not see a problem with John Freshwater's teaching. Principal Keib contends that, for the high school teachers, their concern was not John Freshwater's neglect of his own (8th grade) standards, but "it was that he was also teaching some of their standards".<sup>343</sup> It is important to note, Principal Keib ratified John Freshwater's actions by having knowledge but not determining any need for correction. The manner in which John Freshwater was teaching was not the issue.<sup>344</sup> It stands to reason the high school teachers were not concerned that the students had a *faulty* understanding, or that the students came to Teacher Schutte with a "bad taste"<sup>345</sup> for the subject. The emergence of Teacher Schutte's winnowing "bad taste" guess refutes her own testimony about her speculation in encountering difficulty teaching the periodic table to students who already knew it but now did not like chemistry.<sup>346</sup> Teacher Schutte simply resented John Freshwater for teaching chemistry better than she did.

#### **8. It is Permissible to Teach Beyond the Academic Content Standards**

Teacher Schutte 's complaint, as analyzed by Principal Keib, is that John Freshwater has been stepping on her toes and teaching her standards in addition to his own.<sup>347</sup> Teacher Schutte did not appreciate John Freshwater's good faith efforts to challenge his students but Teacher Freshwater did not act against school policy as there was no policy prohibiting his action, as demonstrated by Principal Keib's ratification.

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<sup>343</sup> Transcript Page 3673

<sup>344</sup> Transcript Page 3673

<sup>345</sup> Transcript Page 781

<sup>346</sup> Transcript Page 781

<sup>347</sup> Transcript Page 3615-3616

John Freshwater created an opportunity to challenge his students as permitted by Board Policy 5408, which states in pertinent part,

*The Board believes that all students, including advanced learners, should be challenged and supported to reach their full potential. (emphasis added)*

Some teachers fully endorse this practice, with qualifiers, while others refer to unwritten expectations. Teacher Chuck Adkins agrees there does not exist a written prohibition against teaching beyond the Academic Content Standards.<sup>348</sup> Teaching *below* the grade standards is acceptable,<sup>349</sup> and teachers are permitted to go beyond the bounds of the Academic Content Standards.<sup>350</sup> Because the 9th grade indicator related to the periodic table does not include the memorization of the table<sup>351</sup>, John Freshwater's teaching would not be interfering with any 9<sup>th</sup> grade indicator, since Teacher Schutte does not teach her students to memorize the periodic table nor do the Academic Contents Standards require memorization of the periodic table. No written policy governs whether teachers may or may not go beyond their assigned goals. Principal White assumes that teachers should just know his expectations.<sup>352</sup>

Principal White agrees, "...teachers are expected to teach to the Academic Content Standards of that grade level. Certainly, any teacher, after they've completed the Academic Content Standards, might have some lessons that would fit into other areas..."<sup>353</sup> The important part of teaching beyond the standards is to first make sure the required standards are met. Teacher Tammy Henry agrees, even using the same language as Board Policy 5408: "As long as I am still covering my standards, I can challenge [the students]".<sup>354</sup>

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<sup>348</sup> Transcript Page 1498

<sup>349</sup> Transcript Page 1499; 8<sup>th</sup> grade teachers are allowed to review 6<sup>th</sup> grade materials.

<sup>350</sup> Transcript Page 1501

<sup>351</sup> Board Exhibit 37, Page 227

<sup>352</sup> Transcript Page 535-536

<sup>353</sup> Transcript Page 534

<sup>354</sup> Transcript Page 1996

Principal Tim Keib says sometimes you have to teach beyond the standards in order for them to make sense.<sup>355</sup> When asked why it would be important to explain the basics in regard to atoms, John Freshwater made the same argument as Principal Keib when Teacher Freshwater explained:

*“There are some basic things in science that you just -- that never made sense to me how I could teach a kid science without them having a basic knowledge of atoms and elements. And they really don't get a solid atom instruction into they get into high school, and, to me, that's absurd. I mean, I can't teach a student without -- I can't -- I can hardly teach without saying the word "atom.”*

“We’re encouraged to ... use supplementals and not be tied just to the textbook,” Teacher Andrew Thompson testified.<sup>356</sup> Teacher Thompson testified he learned from Dr. Weston and assistant principals that no textbook is going to have everything you need in it, but that the sign of a good teacher is one who lets the textbook be a resource.<sup>357</sup> Expert witness Finn Laursen testified,

*“Part of the teaching art ... is to go above and beyond the curriculum. Curriculum is mandated; it’s required. I think the good creative master teacher brings in resources from outside and expands what’s there, makes it exciting”.*<sup>358</sup>

## **9. Other Teachers DO Teach Beyond**

Teaching beyond the Academic Content Standards does not put students at a disadvantage; on the contrary, it gives students an advantage. Some teachers appreciate this. Seventh grade teacher Lori Miller was teaching beyond the Academic Content Standards, something from the 8th grade standards.<sup>359</sup> She challenges students after she covers the necessary parts of her own

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<sup>355</sup> Transcript 3644

<sup>356</sup> Transcript Page 2916

<sup>357</sup> Transcript Page 2916

<sup>358</sup> Transcript Page 3906

<sup>359</sup> Transcript Page 2422 and 2475

standards, because that's what good teachers do.<sup>360</sup> Teacher Miller says that when a kid asks a question, you consider that a teachable moment and answer it, without taking time to evaluate if this is under one of your standards or not.<sup>361</sup> When Teacher Miller advised Teacher Wiles, who was teaching the next higher grade, about her teaching an 8<sup>th</sup> grade Academic Content Standard, he was not disgruntled as Bonnie Schutte was with John Freshwater. Teacher Wiles reacted positively, "so they're not totally clueless" when students enter his class.<sup>362</sup>

Teacher Dino D'Ettore brings in materials not provided by school or textbook because he wants students to learn.<sup>363</sup> Teacher Charles Adkins uses materials which are not from the textbook publisher as there is no official process to receive permission to use other material.<sup>364</sup> Former Superintendent Maley says supplemental materials are fine.<sup>365</sup>

Teacher Richard Cunningham, high school science department head, teaches beyond the Academic Content Standards.<sup>366</sup> Teacher Sara Malone says, "we're constantly making connections to both things previously taught and what they will be taught in the future. ...we're expected to make those connections".<sup>367</sup> And teacher James Marth will teach beyond the Academic Content Standards "if it's relevant to the content standards and the students are capable of understanding that".<sup>368</sup>

## **10. John Freshwater Taught in Relation to the Cognitive Development of His Students**

From April 23, 2008 to the end of the school year, Administrator Deb Strouse sat as a monitor in John Freshwater's classroom, all day every day. Administrator Strouse had only good

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<sup>360</sup> Transcript Page 2423

<sup>361</sup> Transcript Page 2471

<sup>362</sup> Transcript Page 2475

<sup>363</sup> Transcript Page 1769

<sup>364</sup> Transcript Page 1501

<sup>365</sup> Transcript Page 2262

<sup>366</sup> Transcript Page 940

<sup>367</sup> Transcript Page 2056

<sup>368</sup> Transcript Page 2040

things to say about John Freshwater's rapport with students as well as his ability to relate everything to science.<sup>369</sup> Administrator Strouse sometimes wondered, "is this in the standards? ...And I went and looked. It was in the life cycles [standard] and it all relates".<sup>370</sup> Administrator Strouse was impressed with how John Freshwater would deal with student's questions. She says that John Freshwater would not answer the question himself, but he would tell the students to research that question, then tell about what they discovered at the next class. The students enjoyed this and did good research. This happened more than once, and the diligent students received extra credit for their work.<sup>371</sup> Administrator Strouse's testimony regarding student's actions in John Freshwater's class demonstrates the students were willing and capable beyond the Academic Content Standards, even on their own; they wanted to expand their knowledge beyond the textbook. John Freshwater created an advantage for students by teaching beyond the standards. What the students learned in John Freshwater's class was commensurate with their cognitive abilities as Teacher Freshwater challenged them to go beyond, and students rose to that challenge.

At least three students testified that their interests were not at all superseded by learning outside the 8th grade standards. Student Ben Nielson says that learning the periodic table helped him in 9th grade, as did learning several other "beyond" topics.<sup>372</sup> The study of plate tectonics and the periodic table helped Student Miranda Baer in 9th grade.<sup>373</sup> Student Tokala Redman appreciated learning the periodic table because the way John Freshwater taught it made it easy.<sup>374</sup>

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<sup>369</sup> Transcript Page 1861

<sup>370</sup> Transcript Page 1862

<sup>371</sup> Transcript Page 1847

<sup>372</sup> Transcript Page 2660

<sup>373</sup> Transcript Page 5078

<sup>374</sup> Transcript Page 5121

## **11. John Freshwater Helped Students by Teaching Beyond Academic Content Standards**

Witness testimony demonstrates that the allegation in specification (2)(a) is not valid. The BOE resolution makes a hasty generalization that John Freshwater neglected to teach the Academic Content Standards because he had taught other topics. As proven through testimony detailed in the preceding paragraphs, teaching beyond the Academic Content Standards is expected, beneficial, and in fulfillment of Board Policy 5408. The claim that John Freshwater disadvantaged his students is conclusively disproved by the OAT scores.

Further specifications identified in section (2)(a) of the resolution specify and are limited to an allegation John Freshwater taught thermodynamics, the periodic table, the big bang theory and the creation of the universe.

## **12. Thermodynamics**

Although the *Amended Resolution of Intent to Consider the Termination of the Teaching Contract(s) of John Freshwater* asserts that John Freshwater taught thermodynamics, representatives of the BOE failed to present any evidence regarding this specification. On December 11, 2009, this hearing had been proceeding for over one year. At that time John Freshwater was asked, “Have you heard any testimony about any allegation that you taught thermodynamics?” The answer at that time was, “NO”.<sup>375</sup> From December 11, 2009, to the end of the hearing, representatives of the BOE failed to provide any testimony about John Freshwater teaching thermodynamics. The only source thermodynamics was ever mentioned was in the HROC report: “one other 8th grade science teacher ...indicated she... did not teach...thermodynamics”.<sup>376</sup> Thomas Herlevi fell victim to the “irrelevant thesis,” and failed to

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<sup>375</sup> Transcript Page 4669

<sup>376</sup> Board Exhibit 6, Page 7

ask John Freshwater any questions about thermodynamics. The language in the board's resolution was taken from Thomas Herlevi's sloppy investigation implications. However, there is no evidence whatsoever that John Freshwater taught thermodynamics, either. It seems whereas Thomas Herlevi failed to acknowledge the exculpatory nature of Zach Dennis' six (6) unproven, uncorroborated, incredible claims which reflect upon the totality of his ability to be truthful, in this instance, representatives of the BOE could not maintain their once quickened pace to sully John Freshwater with yet another baseless allegation. Or, could this specification be yet another previously unaccounted for unproven, allegation which in turn becomes exculpatory and now the score would now be 7-7: fourteen (14) allegations made by Zach Dennis for which seven (7) were definitely, one hundred (100%) percent without credibility.

### **13. Periodic Table of the Elements**

You can't teach a student science without the student having some basic knowledge of atoms and elements, asserts John Freshwater. "I can hardly teach without saying the word[s] 'atom'...and 'element' and 'matter'".<sup>377</sup> It is helpful to introduce the student to the periodic table.

The periodic table is in the 8th grade textbooks.<sup>378</sup> John Freshwater is not teaching a 9th or 10th grade standard if the material is in the 8th grade textbooks. If "the cognitive development of an adolescent is not sufficient"<sup>379</sup> to understand these topics, then why is it in the 8th grade textbooks? Why did students ask questions about it? At least four students - Ben Nielson, Taylor Strack, Miranda Baer and Tokayla Redman – testified they found memorizing the periodic table enjoyable and helpful.<sup>380</sup>

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<sup>377</sup> Transcript Page 4464

<sup>378</sup> Transcript Page 4465 and Employee Exhibit 112, Page 182-183, Employee Exhibit 113, Page 202-203

<sup>379</sup> Board Exhibit 6, Page 3

<sup>380</sup> Transcript Page 2660, 3856, 5078 and 5121

For more than ten years, Teacher Schutte had been complaining that John Freshwater teaches the periodic table. Teacher Schutte took her complaints to Principal Kasler who took them to Mount Vernon Middle School principals. It is evident that proper authorities found Teacher Schutte's complaints lacking, because John Freshwater was never directed to stop.<sup>381</sup> There is no board policy which prohibits teaching certain subjects that are included in the assigned textbook, nor is there a board policy which prohibits teaching higher standards.

#### **14. Big Bang Theory**

John Freshwater testified and identified where "The Big Bang Theory" was prominently highlighted as a leading section under the Chapter Title, "The Universe Beyond: Formation of the Universe".<sup>382</sup> John Freshwater is not teaching 9th or 10th grade Academic Content Standards if the "The Big Bang Theory" is a section of BOE's 8th grade textbook. If "the cognitive development of an adolescent is not sufficient",<sup>383</sup> to understand these topics, then why is it in the 8th grade text?

There is no board policy which prohibits teaching certain subjects that are included in the assigned textbook, nor is there a board policy which prohibits teaching higher standards. Interventionist Beach, intervention specialist who sat in John Freshwater's class one period a day, alleges that John Freshwater told the class that Big Bang can't explain how a complex world was created, but that students could look in the Bible and do their own research to see how it's explained in there.<sup>384</sup> John Freshwater and students from his 8<sup>th</sup> grade class – former 8<sup>th</sup> grade student from 2001, Lori Hubbel,<sup>385</sup> Kayla Wells,<sup>386</sup> Tokalya Redman,<sup>387</sup> Angelita Conkel,<sup>388</sup>

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<sup>381</sup> Transcript Page 821 and 828

<sup>382</sup> Employee Exhibit 112, Page 114-115 and Transcript Page 4464

<sup>383</sup> Board Exhibit 6, Page 3

<sup>384</sup> Transcript Page 962

<sup>385</sup> Transcript Page 5036-5037

<sup>386</sup> Transcript Page 5105

<sup>387</sup> Transcript Page 5131



Allison Ruhl,<sup>389</sup> Maggie Wayne,<sup>390</sup> Joshua Grubaugh,<sup>391</sup> Cody Smith,<sup>392</sup> and Jake Stotts<sup>393</sup> - all testified John Freshwater never made any reference to a Bible during class. And Teacher's Aide Ruth Frady testified she never heard John Freshwater even reference the Bible during FCA meetings.<sup>394</sup> Teacher Andrew Thompson, the one person who has spent the most amount of time in and around John Freshwater while Teacher Freshwater was either teaching or acting as the facilitator, monitor, supervisor of the FCA, testified he never saw or heard Teacher Freshwater teach or preach from a Bible.<sup>395</sup>

It is curious why Intervention Specialist Beach did not report any concern she had when the alleged incident occurred. If Intervention Specialist Beach perceived a problem she should have immediately reported her concern. While the allegation by Intervention Specialist Beach may at first glance appear to be encouraging religion, contextually, it is permissible pursuant to Board Policy 2270, Religion in the Curriculum, which in pertinent part states:

*"An understanding of religions and their effects on civilization is essential to the thorough education of young people and to their appreciation of a pluralistic society. To that end, curriculum may include as appropriate to the various ages and attainments of the students, instruction about the religions of the world. The Board acknowledges the degree to which a religious consciousness has permeated the arts, literature, music, and issues of morality. The instructional and resource materials approved for use in the District's schools frequently contain religious references or concern moral issues that have traditionally been the focus of religious concern. That such materials may be religious in nature shall not, by itself, bar their use in the District. The Board directs that professional staff members employing such materials be neutral in their approach and avoid using them to advance or inhibit religion in any way. The Board recognizes that religious traditions vary in their perceptions and doctrines regarding the natural world and its processes. The curriculum is chosen for its place in the education of the District's students, not for its conformity or*

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<sup>388</sup> Transcript Page 5223

<sup>389</sup> Transcript Page 5245

<sup>390</sup> Transcript Page 5272

<sup>391</sup> Transcript Page 5287

<sup>392</sup> Transcript Page 5312

<sup>393</sup> Transcript Page 5347

<sup>394</sup> Transcript Page 5172

<sup>395</sup> Transcript Page 2871

*nonconformity to religious principles. Students should receive unbiased instruction in the schools, so they may privately accept or reject the knowledge thus gained, in accordance with their own religious tenets.”*

At most, John Freshwater did with his class similarly what Professor Rissing, did in his class: a discussion tangentially touched upon non-scientific explanations in order to solidify the nature of scientific inquiry versus other forms of inquiry. In the administrative hearing, Professor Rissing showed an example from his own teaching that would be an acceptable use of concepts from the Bible.<sup>396</sup> Professor Rissing’s students were to research the history of perceptions of causes of illness, such as “the wrath of God”. It was acceptable because it was clear that the Biblical concepts were distinct from the scientific ones; yet Professor Rissing certainly did encourage his students to look in the Bible and see how the topic of their discussion was presented there as a means of separating and defining “scientific inquiry” from “non-scientific inquiry”.<sup>397</sup> If Intervention Specialist Beach is accurate in her perception of what occurred despite the voluminous testimony as to John Freshwater’s actual teaching method which did not reference any Bible, Teacher Freshwater did and used the exact same teaching technique as used by Professor Rissing, resulting in nothing more than reinforcing the Academic Content Standard on Page 216 of Board Exhibit 37 as that standard relates to the topic of “bias”. Kerri Mahan, another intervention specialist in a different class period who has worked with John Freshwater since 1999, says she did not recall Teacher Freshwater ever suggesting any alternate theories to The Big Bang Theory.<sup>398</sup>

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<sup>396</sup> Board Exhibit 113, Slide 13

<sup>397</sup> Transcript Page 6179-6181

<sup>398</sup> Transcript Page 1003

## **15. Creation of the Universe**

There is a section in the 8th grade textbook about the formation of the universe.<sup>399</sup> The title of the textbook chapter is, “The Universe Beyond: Formation of the Universe.”<sup>400</sup> John Freshwater is not teaching an Academic Content Standards which is solely in an exclusive domain limited to the 9th and 10th grade if the information content is printed in the BOE approved 8th grade textbook. Again, if “the cognitive development of an adolescent is not sufficient” to understand these topics, then why is it in the 8th grade text?<sup>401</sup>

There is no board policy which prohibits teaching certain subjects that are included in the assigned textbook, nor is there a board policy which prohibits teaching higher standards.

## **16. Subjects not Science-Related**

Concerns were raised in testimony about John Freshwater teaching subjects “once or twice a week”<sup>402</sup> that were not related to science. Such instructional time is perfectly acceptable pursuant to R.C. 313.601 which states,

*“No board of education shall prohibit a classroom teacher from providing in the teacher’s classroom reasonable periods of time for activities of a moral, philosophical, or patriotic theme.”*<sup>403</sup>

R.C. 3313.601 would cover a wide variety of subjects, including reading short selections from *Chicken Soup for the Teenage Soul* which Kate Button, former student, implied showed that John Freshwater neglected teaching science.<sup>404</sup> Teacher Carrie Mahan testified about reading stories from books such as *Chicken Soup for the Teenage Soul* that teachers were, “...were told to do it” by the administration as part of the activity period which was to include topics “...that dealt

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<sup>399</sup> Transcript Page 4464

<sup>400</sup> Employee Exhibit 112, Page 114-115

<sup>401</sup> Board Exhibit 6, Page 3

<sup>402</sup> Transcript Page 101

<sup>403</sup> Employee Exhibit 80

<sup>404</sup> Transcript Page 1008

with integrity and kindness and different things like that, different, you know, generic values that are useful in school”.<sup>405</sup> Testimony revealed and was corroborated by documents from John Freshwater’s classroom which were compiled onto Employee Exhibit 225 demonstrating an “Advisory Period” was created by Mount Vernon Middle School leadership as early as September 10, 1998<sup>406</sup> “...to work with the kids with morals and values and self-esteem”.<sup>407</sup> Employee Exhibit 225 contained photocopies of previously distributed copies of an advisory book totaling twenty (20) pages.<sup>408</sup> John Freshwater had advisory books dating back to November, December, March, May, January, all from calendar year 2000.<sup>409</sup> Page 15 of Employee Exhibit 225 demonstrated one student made a written request that he would like to be read to by Mr. Freshwater these kinds of books: Adventure books, mysteries, *Chicken Soup*”.<sup>410</sup> *The Mount Vernon Middle School has an established history of reading books like, Chicken Soup for the Soul*, and many other non-curriculum related items and activities. It is sad that former Student Button did not grasp the intent of her teachers to incorporate reasonable periods of time for activities of a moral, philosophical, or patriotic theme when John Freshwater performed pursuant to law.

Several teachers, including Teacher D’Ettore, said that it was not unusual for teachers to show movies unrelated to academic content as rewards at the end of a grading period.<sup>411</sup> Teacher Wes Ellifritz testified he showed a “...movie called *Radio* when I’m teaching about tolerance and a movie called *Supersize Me* and a couple movies on tobacco information and marijuana”.<sup>412</sup>

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<sup>405</sup> Transcript Page 3753-3756

<sup>406</sup> Transcript Page 5715 and Employee Exhibit 225, Page 15

<sup>407</sup> Transcript Page 5113

<sup>408</sup> Transcript Page 5713-5714

<sup>409</sup> Transcript Page 5714

<sup>410</sup> Transcript Page 5715

<sup>411</sup> Transcript Page 1771

<sup>412</sup> Transcript Page 2855

Former student James Hoeffgen said that John Freshwater talked about abortion.<sup>413</sup> Student Hoeffgen can't remember who introduced the abortion topic, or if it was a debate, or if it was related to science.<sup>414</sup> As Student Hoeffgen does not have a clear recollection of the event, it is likely the topic of abortion was first introduced as a result of the school-wide broadcast of "Channel 1", a news oriented youth television production which routinely presented controversial topics.<sup>415</sup> Discussion about topics presented on Channel 1, some of which were "controversial" subjects<sup>416</sup>, routinely "would carry over"<sup>417</sup> into subsequent class periods. Student Hoeffgen could also be remembering an abortion debate in Teacher Wes Ellifritz's class, where students had to choose a side to debate. John Freshwater knows this debate took place because he went to see his daughter Jordan debate when it was her turn.<sup>418</sup> Teacher Ellifritz most recently let students debate the topic of "whether contraceptives should be distributed to high school students".<sup>419</sup>

Teacher Andrew Thompson testified that during the 2008-2009 school year, the Mount Vernon Middle School "school environment" required teachers to present "character education" in the first few minutes of class, where they talk about "life issues, on getting along with people and things like that".<sup>420</sup> Although "character education" was "...not part of my academic content standards..it is part of the whole school environment".<sup>421</sup> Teachers are allowed, encouraged, perhaps even required to teach areas not related to their content standards.

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<sup>413</sup> Transcript Page 662

<sup>414</sup> Transcript Page 668-669

<sup>415</sup> Transcript Page 5731-5735

<sup>416</sup> Transcript Page 5734 and 478

<sup>417</sup> Transcript Page 5735

<sup>418</sup> Transcript Page 4458

<sup>419</sup> Transcript Page 2855

<sup>420</sup> Transcript Page 2915

<sup>421</sup> Transcript Page 2915

Even though there were activities, such as “brain puzzles” to help kids critically think, which were done that did not directly relate to the current science topic, monitor Administrator Strouse found those activities to be appropriate.<sup>422</sup> Administrator Strouse testified that before the OAT test date, John Freshwater gave a pep talk, encouraging students to eat breakfast.<sup>423</sup> Administrator Strouse confirmed John Freshwater’s teaching effort which was beyond the Academic Content Standards was nonetheless positive because, “That’s good teaching practice”,<sup>424</sup> which emphasizes the truism that in her administrative professional opinion, not everything done in the classroom must be done right out of the textbook. The position of the BOE’s resolution cannot reasonably be that all words emanating from a teacher’s mouth must be exactly correlated to an Academic Content Standard. Otherwise there would be no need for BOE policies related to controversial issues<sup>425</sup>, religion<sup>426</sup> or a teacher’s academic freedom.<sup>427</sup> By taking a few minutes out of science class time, John Freshwater was fulfilling his duty to present material of a moral, philosophical or patriotic theme.

In response to the identified specification of the charge listed in the BOE’s resolution, as required and limited by R.C. 3319.16, balanced by the clear and convincing standard or any other, John Freshwater was not willfully nor persistently in violation of any identified reasonable regulation of the BOE; nor do any of his actions constitute other good and just cause based upon the requisite intent. Therefore, the specifications in section (2)(a) of the BOE’s *Amended Resolution of Intent to Consider the Termination of the Teaching Contract(s) of John Freshwater* must be deemed **unsubstantiated**.

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<sup>422</sup> Transcript Page 1843

<sup>423</sup> Transcript Page 1849

<sup>424</sup> Transcript Page 1848-1849

<sup>425</sup> Employee Exhibit 2240

<sup>426</sup> Employee Exhibit 9, 168 and 169

<sup>427</sup> Transcript Page Employee Exhibit 84

### **17. (2)(b) John Freshwater Did Not Teach Creationism**

John Freshwater categorically denies that he taught either Creationism or Intelligent Design by declaring “Absolutely not”.<sup>428</sup> The Board failed to prove that John Freshwater taught these subjects.

The accusation in (2)(b) that John Freshwater taught Creationism or Intelligent Design provides the basis for two other specifications, those in 2(c) and 2(e), and is closely related to 2(d), where an attempt is made to portray the alleged teaching as a violation of a specific, though unnamed, policy. The Board attempted, and failed, to prove this assertion because there were no eyewitness accounts of actual instruction specifically promoting either creationism or intelligent design.

There are no direct eyewitnesses who can support this specification as they rely merely on conjecture which takes any alleged statement out of context. Zach Dennis is not credible as the source for this allegation as he has manifestly discredited himself. Any secondary witnesses, never directly observed John Freshwater’s teaching, and were able only to report their own opinions, which are not factual and therefore carry no weight.

All of the board witnesses – except Zach Dennis – who were called to testify and asserted that John Freshwater taught creationism, relied on words such as “hinted”<sup>429</sup> and “implied”<sup>430</sup> to describe the method by which they subjectively thought John Freshwater imparted his beliefs. Hints are not proof, and each person can perceive any “hint” they choose but that “hint” does not rise to clear and convincing evidence. These eyewitnesses are Zach

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<sup>428</sup> Transcript 4670

<sup>429</sup> Transcript Page 663

<sup>430</sup> Transcript Page 1319

Dennis, Joseph Barone, Kate Button, J Hoeffgen, Simon Souhrada, Interventionist Beach, Substitute Stockdale, and Teacher Cunningham.

Zach Dennis was very specific about John Freshwater's allegedly teaching creationism. He remembers hearing that coal at Mt St Helens formed quickly, and that the moon has significantly less dust than would be expected, demonstrating that the earth and moon may not be millions of years old.<sup>431</sup> Zach Dennis alleged he heard about the hydrosphere theory of a water vapor canopy that collapsed and caused a flood.<sup>432</sup> When asked if the implication of the alleged hydrosphere theory was in relation to a "great flood" and "Noah", Zach Dennis admitted John Freshwater did not use words to connect the hydrosphere theory to the Biblical flood involving Noah's Ark, but the Zach Dennis revealed his deceptive plan by stating, "He didn't say that, but I took it that way".<sup>433</sup> No one at all, except Zach Dennis, testified about moon dust. Zach Dennis' assertions that he used these lessons to teach Creationism or Intelligent Design are not corroborated.

Regarding the coal formation, John Freshwater testified he received the information contained in Employee Exhibit 222, a document titled, "A New Model for Quicker Coal Formation", from a former student. Employee Exhibit 222 contains handwritten information along with a news article about a doctoral candidate's dissertation. The information contained in the article was reliable, newsworthy taken out of purpose and context by Zach Dennis as the article speaks for itself.<sup>434</sup> When questioned what she learned in class about how coal formed, student Taylor Strack says coal was formed "over millions and millions of years" from decaying trees.<sup>435</sup> Student Strack described uniformitarian geology, not creationism.

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<sup>431</sup> Transcript Page 346-347

<sup>432</sup> Transcript Page 347

<sup>433</sup> Transcript Page 348

<sup>434</sup> Transcript Page 5622

<sup>435</sup> Transcript Page 3864



The Board's eyewitnesses are guessing. Former Student Button made a bold assertion for which her words rung hollow by stating, "We [students] would know what [John Freshwater] was talking about, but he would never outright say it".<sup>436</sup> Student Button may guess about whatever she may like but she cannot guess what her fellow classmates or what John Freshwater may have said without them making a declaration. Guessing does not provide clear and convincing evidence.

"John Freshwater heavily implied the textbook was wrong on how the universe was created" says Observer Stockdale in his written statement. Observer Stockdale sat in John Freshwater's class "only on one occasion, one class".<sup>437</sup> Observer Stockdale's credibility is weak as he would have others believe that in one class he was offended but he did not report the concern until two years later. Furthermore Observer Stockdale has a relationship with witness Katie Button from which Observer Stockdale admitted he was concerned for her. However, Katie Button's mother and colleague of John Freshwater was standing in the immediate vicinity during which Observer Stockdale claims John Freshwater harassed Katie Button. Observer Stockdale does not provide any clear and convincing evidence other than that he is hypersensitive considering Elle Button, Katie's mother did not report any such interaction during her testimony.

James Hoeffgen, a former student, says that John Freshwater did not say, "ID" [intelligent design], but he hinted at a creator,<sup>438</sup> even though Hoffgen admits John Freshwater did not use word creationism.<sup>439</sup>

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<sup>436</sup> Transcript Page 1010

<sup>437</sup> Transcript Page 4150

<sup>438</sup> Transcript Page 663

<sup>439</sup> Transcript Page 669

Barone, presented “notes”<sup>440</sup> that he took during 8th grade science class in the 2001-2002 school year.<sup>441</sup> It is critical to comprehend that in school year 2001-2002, the current Academic Content Standards were not in effect (adopted during the 2004-2005 school year) and John Freshwater had not yet made any curriculum proposal (which did occur in May 2003) . Student Barone states the class discussed “three” theories to explain different species: “Darwin, natural selection, Wallace, and ID”. Student Barone admits, “I’m not really sure. I would think that it was probably something that he said, but not necessarily with regards to it being invalid”.<sup>442</sup> Notwithstanding what may have been said or written by Student Barone, it is clear the BOE has not pointed to any policy then existing in school year 2001-2002 which would have prohibited any such discussion as the Academic Content Standards were not in effect and the existing policies regarding Religion in the Curriculum<sup>443</sup> and Controversial Issues<sup>444</sup> were not adopted until January 2003. Moreover, Student Barone’s credibility is suspect as he is the son of Paula Barone with whom the Dennis Family created a website about this matter along with Paula’s Huband, Sam Barone.<sup>445</sup>

Exactly zero middle school teachers, who were in John Freshwater’s classroom and around his students on a daily basis, noticed a problem or heard from anyone else that there was a problem with John Freshwater’s teaching. Teacher Oxenford, fellow science teacher, had no concerns, nor had he heard any concerns from others.<sup>446</sup>

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<sup>440</sup> Board Exhibit 49

<sup>441</sup> Transcript Page 1330

<sup>442</sup> Transcript Page 1333

<sup>443</sup> Employee Exhibit 9

<sup>444</sup> Employee Exhibit 81

<sup>445</sup> Transcript Page 3307, 1284, 1269

<sup>446</sup> Transcript Page 1472

Student Ben Nielson says John Freshwater did not speak about creationism during class.<sup>447</sup> None of the classmates of Zach Dennis who testified asserted that John Freshwater taught Creationism or Intelligent Design.

In response to the identified specification of the charge listed in the BOE's resolution, as required and limited by R.C. 3319.16, balanced by the clear and convincing standard or any other, John Freshwater was not willfully nor persistently in violation of any identified reasonable regulation of the BOE; nor do any of his actions constitute other good and just cause based upon the requisite intent. Therefore, the specifications in section (2)(b) of the BOE's *Amended Resolution of Intent to Consider the Termination of the Teaching Contract(s) of John Freshwater* must be deemed **unsubstantiated**.

**18. (2)(C)John Freshwater Adhered to the Academic Content Standards as Adopted for the 2004-2005 School Year**

The plain meaning of the words contained in Employee Exhibit 5, John Freshwater's 2003 curriculum proposal, are entitled to the ordinary meaning of the words. The specific proposal to "critically examine the evidence both for and against evolution" was not adopted by the BOE. Therefore, notwithstanding the content of the plainly spoken words, the proposal was not adopted.

In hindsight, too much time was invested disputing the contents of the plainly stated proposal as the information contained in Employee Exhibit 187, on Page 393, readily resolves the dispute. Dr. Weston's notes from the science committee that analyzed John Freshwater's proposal deemed that the BOE's policy regarding controversial issues, Policy 2240, already made provision for Teacher Freshwater's proposal. The essence of the decision was that while John

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<sup>447</sup> Transcript Page 2654

Freshwater cannot actively promote critical analysis of evolutionary arguments, based upon the policy, discussion may occur.

Policy 2240 makes clear what the BOE's resolution and case in chief failed to present: the Board of Education believes that the consideration of controversial issues has a legitimate place in the instructional program of the schools. Furthermore, properly introduced and conducted, the consideration of such issues can help students learn to identify important issues, explore fully and fairly all sides of an issue, weigh carefully the values and factors involved, and develop techniques for formulating and evaluating positions. For purposes of this policy, a controversial issue is a topic on which opposing points of view have been promulgated by responsible opinion. Try as they did, representatives of the BOE cannot hide from the existence of Policy 2240. In response to the identified specification of the charge listed in the BOE's resolution, as required and limited by R.C. 3319.16, balanced by the clear and convincing standard or any other, John Freshwater was not willfully nor persistently in violation of any identified reasonable regulation of the BOE; nor do any of his actions constitute other good and just cause based upon the requisite intent. Therefore, the specifications in section (2)(c) of the BOE's *Amended Resolution of Intent to Consider the Termination of the Teaching Contract(s) of John Freshwater* must be deemed unsubstantiated.

**19. (2)(d)(i) John Freshwater Made Use of Handouts Appropriately**

The plain meaning of the words contained in Employee Exhibit 81, Policy 2240 The Controversial Issues policy, and Board Exhibit 37, the Academic Content Standards, confirm that the handouts made an issue in (2)(d)(i) predate any applicable policy or Academic Content Standards and are therefore not properly a subject for discipline herein.

Moreover, there was absolutely no testimony that John Freshwater has used Board Exhibits 38, 39, 40 and 41 at anytime since 2003. Teacher Carrie Mahan testified that Board

Exhibits 38, 39, 40 and 41 had not been used by John Freshwater since the 2002-2003 school year.<sup>448</sup> There was absolutely no testimony that Board Exhibits 38, 39, 40 and 41 were found as part of John Freshwater's classroom materials. In fact, Teacher Mahan testified that these documents were likely taken from her classroom materials.<sup>449</sup> Most importantly, Teacher Mahan provided context and purpose for any use of Board Exhibits 38, 39, 40 and 41. Teacher Mahan confirmed that Board Exhibits 38, 39, 40 and 41 could be used as tools that John Freshwater used to help students understand the difference between concrete thinking and abstract thinking. Specifically, Teacher Mahan confirmed that the documents demonstrate "an activity to think outside the box".<sup>450</sup> John Freshwater's instruction about the scientific method, "...was the thread in everything that he did. He was always going back to that.", said Teacher Mahan.<sup>451</sup> Unlike the disqualified experts presented by representatives of the BOE, Teacher Mahan is an 8<sup>th</sup> grade teacher who knows and understands by experience the importance of the Academic Content Standards and the concept of "bias".

None of the handouts were used in the classroom for the 2007-2008 school year; only material from the text publisher was distributed that year.<sup>452</sup>

In response to the identified specification of the charge listed in the BOE's resolution, as required and limited by R.C. 3319.16, balanced by the clear and convincing standard or any other, John Freshwater was not willfully nor persistently in violation of any identified reasonable regulation of the BOE; nor do any of his actions constitute other good and just cause based upon the requisite intent. Therefore, the specifications in section (2)(d)(i) of the BOE's *Amended*

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<sup>448</sup> Transcript Page 3730

<sup>449</sup> Transcript Page 3730

<sup>450</sup> Transcript Page 3742

<sup>451</sup> Transcript Page 3743

<sup>452</sup> Transcript Page 983

*Resolution of Intent to Consider the Termination of the Teaching Contract(s) of John Freshwater*  
must be deemed **unsubstantiated**.

**20. (2)(d)(ii) John Freshwater Made Use of Handouts Appropriately**

There are four (4) documents at issue here with focus upon the difference between the third and fourth document being critical. There was significant dispute as to the validity of HR on Call, Inc.'s assertion that the document obtained by Thomas Herlevi was authentic. On page 4 of Board Exhibit 6, the following statement was made by HR on Call, Inc.:

*“A former student had a copy of the “Dinosaur Extinction” handout she received from Mr. Freshwater that included the full document with references to God and the Bible in the parts that had been deleted. (Copy as Attachment 9)”*

Katie Button was the former student referenced by HR on Call, Inc. on page 4 as noted above. In relation to the Katie Button testified,

- Q. And is it your understanding that your mom was handed these documents by John Freshwater or you handed these documents to your mom for John Freshwater?
- A. Which ones are you talking about?
- Q. Any of the three.
- A. Well, the ones that I have said were probably mine, the ones with the underlines or the circles I would have given her. **The last document, which only has the circle around the seven and the Bible, no, I did not give her these.** John Freshwater would. Sometimes she wouldn't be in her room and he would lay them on her desk or say make sure she gets these and hand them to me, but I would never be the one giving them to her. It would be him for this last document.<sup>453</sup>

The difference between the third document and fourth document is critical because the third document has redacted the words “God” and “Bible” whereas the fourth document does not.

Thomas Herlevi originally testified<sup>454</sup> and definitely wrote in the report by HR on Call, Inc. that the fourth document, the document which was not redacted, came from Katie Button, an 8<sup>th</sup> grade student during the 2002-2003 school year. Thomas Herlevi then recanted his testimony that Katie Button provided the fourth document, the document which was not redacted. Thomas

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<sup>453</sup> Transcript Page 1026

<sup>454</sup> Transcript Page 1300-1301

Herlevi admitted he was “misleading” and that his testimony “could have been clearer” and “it wasn't as clear as it should have been” in regards to document number four, the document not redacted, but yet erroneously attributed as having been distributed to a classroom of students by John Freshwater.<sup>455</sup>

To be sure, any document attributable to John Freshwater depicted from Attachment 9 of Board Exhibit 6, was redacted to conceal the words “God” and “Bible”.

The plain meaning of the words contained in Employee Exhibit 81, Policy 2240 The Controversial Issues policy, and Board Exhibit 37, the Academic Content Standards, confirm that the handouts made an issue in (2)(d)(ii) predate any applicable policy or Academic Content Standards and are therefore not properly a subject for discipline herein. Additionally, in all respects the redacted documents would be appropriate pursuant to the now existing standard on page 216 of Board Exhibit 37, as the documents can rationally and reasonably be related to “bias” and the need to overcome “bias”.

Furthermore, BOE Policy 3218 - Academic Freedom Of Teachers, permits teachers,

*“The freedom to speak and share ideas is an inherent precept of a democratic society governed by the will of the majority. Teachers and students need to be free to discuss and debate ideas.*

*When ideas that may be controversial are introduced, teachers, while having a right to their opinion on the subject, shall state it as such and they should be objective in presenting various sides of issues.”*

Similarly, Policy 2510 Adoption of Textbooks, requires that the staff should continually research new sources and types of supplementary text materials and explore their innovative use.

It cannot be clearly and convincingly proven by the available evidence that John Freshwater used the documents at issue in section (2)(d)(ii) during a prohibited timeframe. Most importantly, any allegation of prohibition fails to harmonize with the liberties granted and provided for teachers to

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<sup>455</sup> Transcript Page 1300-1301

be innovative with new materials, denies academic freedom, and disavows the BOE's controversial issue policy. Merely because a document may reference Biblical events does not make the document prohibited when considering the BOE's policies related to religion.

None of the handouts were used in the classroom for the 2007-2008 school year ; only material from the text publisher was distributed that year.<sup>456</sup>

In response to the identified specification of the charge listed in the BOE's resolution, as required and limited by R.C. 3319.16, balanced by the clear and convincing standard or any other, John Freshwater was not willfully nor persistently in violation of any identified reasonable regulation of the BOE; nor do any of his actions constitute other good and just cause based upon the requisite intent. Therefore, the specifications in section (2)(d)(ii) of the BOE's *Amended Resolution of Intent to Consider the Termination of the Teaching Contract(s) of John Freshwater* must be deemed **unsubstantiated**.

**21. (2)(d)(iii) John Freshwater Has Obeyed the Parameters of the June 8, 2006, Letter from then Superintendent Jeff Maley**

The allegation specified in (2)(d)(iii) was adjudicated on June 8, 2006. The exact parameters of the directive from June 8, 2006, instructed John Freshwater to delete the material from your supplemental resources; and to refrain from using materials that the source or author cannot be readily identified.<sup>457</sup>

There has been absolutely no testimony in this matter demonstrating that John Freshwater either failed to delete the offending material for which that matter remains resolved, or that he has since that time used a single item for which the source or author cannot be readily identified.

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<sup>456</sup> Transcript Page 983

<sup>457</sup> Board Exhibit 6, Page 5



Superintendent Maley's letter of June 8, 2006, did not provide any discipline and found only that the material in question cannot be attributed to a particular author or source.

Superintendent Jeff Maley's 2006 letter did not prohibit using supplemental materials, but only those whose source or author cannot be readily identified.<sup>458</sup> Superintendent Maley did not mention in his testimony or in the document that the problem with this particular handout was teaching creationism.<sup>459</sup> It is unclear, even from testimony, whether another concern was that this particular handout did not pass scientific review, or that all future materials must pass scientific review.<sup>460</sup> When Principal Tim Keib reviewed the document, he did not perceive it to be teaching creationism, but that "it was to show that there are conflicting reports, and... don't take everything at face value"; it had to do with the scientific method.<sup>461</sup>

It is also unclear from Superintendent Maley's testimony whether he himself considered the handout to be outside of Academic Content Standards established curriculum; the most direct answer seems to be "No" he did not consider it to be outside of Academic Content Standards.<sup>462</sup> and his summary of the letter is, "It was in an effort to make sure that the next time, all material that went into the classroom could be sourced".<sup>463</sup> Superintendent Maley said, "To me, the core was sourcing the material to understand where it was".<sup>464</sup>

None of the handouts were used in the classroom for the 2007-2008 school year ; only material from the text publisher was distributed that year.<sup>465</sup>

In response to the identified specification of the charge listed in the BOE's resolution, as required and limited by R.C. 3319.16, balanced by the clear and convincing standard or any

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<sup>458</sup> Transcript Page 1121

<sup>459</sup> Transcript Page 2245

<sup>460</sup> Transcript Page 2248-2249

<sup>461</sup> Transcript Page 3636-3627

<sup>462</sup> Transcript Page 2250

<sup>463</sup> Transcript Page 2253

<sup>464</sup> Transcript Page 2258

<sup>465</sup> Transcript Page 983

other, John Freshwater was not willfully nor persistently in violation of any identified reasonable regulation of the BOE; nor do any of his actions constitute other good and just cause based upon the requisite intent. Therefore, the specifications in section (2)(d)(iii) of the BOE's *Amended Resolution of Intent to Consider the Termination of the Teaching Contract(s) of John Freshwater* must be deemed **unsubstantiated**.

## **22. (2)(d)(iv) John Freshwater Appropriately Provided an Extra Assignment**

John Freshwater's action in providing a voluntary extra credit opportunity is the most clear cut example of appropriately applying the Academic Content Standards, specifically the standard on page 216, which states,

*"Explain why it is important to examine data objectively and not let bias affect observations"*

One of the most important things the 8th grade science class was to learn involved Indicator 2 under Ethical Practices: "explain why it is important to examine data objectively and not let bias affect your observations." John Freshwater wanted to give an opportunity for all students to earn extra credit. When a science documentary came to the big screen in Mount Vernon, John Freshwater was excited to make use of it.

The criteria for earning the extra credit was to "Watch and examine the film *Expelled*, and explain why it is important to examine this film objectively and not let bias affect your observations".<sup>466</sup> The language for the extra credit is almost word-for-word the same as the indicator.

The goal for the extra credit was for students to better understand this indicator. Principal Tim Keib says, "I think that the fact that [John Freshwater] is...designing an extra credit assignment that is similar to the content standards will teach the kids how to become proficient in

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<sup>466</sup> Transcript Page 2596

that standard.... [T]hat is an example of... going outside of the curriculum and it being acceptable...”.<sup>467</sup>

“Extra credit” means that it is above and outside of regular required class work. It is not an assignment, which implies requirement. The extra credit was optional and there was no penalty if a student chose not to do the work. Without testimony concerning the movie, it is a mischaracterization to say that this “assignment” is “related to intelligent design.” The Dennis family complained about this opportunity taking issue with the movie because, Steve Dennis says, “I think it went along with what was probably being taught in the classroom”.<sup>468</sup> Steve Dennis makes another uninformed, subjective, self-serving statement because he was not in John Freshwater’s classroom.

Teacher Andrew Thompson considered the *Expelled* extra credit opportunity as one source among many other sources of science-related news stories, which students looked at and gave a summary on, in relation to the standard ‘examine data objectively and not let bias affect observations’.<sup>469</sup>

To mischaracterize and condemn the use of this resource without consideration of the actual assignment, and without even viewing the movie, is disingenuous. It is also a violation of Board Policy 9130, “Matters Regarding Instructional Materials.” Other BOE policies which provide guidance and relief for John Freshwater are policies 2240, 3218 and R.C. 3313.601. In response to the identified specification of the charge listed in the BOE’s resolution, as required and limited by R.C. 3319.16, balanced by the clear and convincing standard or any other, John Freshwater was not willfully nor persistently in violation of any identified reasonable regulation of the BOE; nor do any of his actions constitute other good and just cause based upon

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<sup>467</sup> Transcript Page 3661

<sup>468</sup> Transcript Page 3258

<sup>469</sup> Transcript Page 2973

the requisite intent. Therefore, the specifications in section (2)(d)(iv) of the BOE's *Amended Resolution of Intent to Consider the Termination of the Teaching Contract(s) of John Freshwater* must be deemed **unsubstantiated**.

### **23. John Freshwater Did Not Teach Creationism or Intelligent Design:**

The specification stated in 2(e) fails because as in specification (2)(b), the BOE failed to prove that John Freshwater taught Creationism or Intelligent Design. Since he didn't teach these subjects, the issue of making them a *challenge* to evolution is moot. John Freshwater denies ever making a direct challenge to evolution by using Creationism or Intelligent Design.<sup>470</sup>

In response to the identified specification of the charge listed in the BOE's resolution, as required and limited by R.C. 3319.16, balanced by the clear and convincing standard or any other, John Freshwater was not willfully nor persistently in violation of any identified reasonable regulation of the BOE; nor do any of his actions constitute other good and just cause based upon the requisite intent. Therefore, the specifications in section (2)(e) of the BOE's *Amended Resolution of Intent to Consider the Termination of the Teaching Contract(s) of John Freshwater* must be deemed **unsubstantiated**.

### **24. John Freshwater Did Not Teach Religious Beliefs**

First, we note that, even if true, the accused action is neither illegal nor contrary to board policy. To the contrary, the Supreme Court has made it clear that "study about religion in public schools is constitutional".<sup>471</sup> Board policy 2270, Revision 1/6/03, states,

*"An understanding of religions and their effects on civilization is essential to the thorough education of young people and to their appreciation of a pluralistic*

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<sup>470</sup> Transcript Page 4672

<sup>471</sup> Employee Exhibit 70, Page 70

*society. To that end, curriculum may include as appropriate to the various ages and attainments of the students, instruction about the religions of the world.*

*The Board acknowledges the degree to which a religious consciousness has permeated the arts, literature, music, and issues of morality. The instructional and resource materials approved for use in the District's schools frequently contain religious references or concern moral issues that have traditionally been the focus of religious concern. That such materials may be religious in nature shall not, by itself, bar their use in the District. The Board directs that professional staff members employing such materials be neutral in their approach and avoid using them to advance or inhibit religion in any way."*

A teacher is restricted in his address of religious issues by the injunction against "devotional exercises or displays of a religious character," and against the "advance[ment] or inhibit[ion of] any particular religion." The amended resolution does not accuse John Freshwater of either advancing or inhibiting any particular religion, or of teaching in a devotional exercise.

A statement issued by a coalition of seventeen (17) major religious and educational organizations, declared,<sup>472</sup>

*Because religion plays a significant role in history and society, study about religion is essential to understanding both the nation and the world. Omission of facts about religion can give students the false impression that the religious life of humankind is insignificant or unimportant. Failure to understand even the basic symbols, practices, and concepts of the various religions makes much of history, literature, art, and contemporary life unintelligible.*

*Study about religion is also important if students are to value religious liberty, the first freedom guaranteed in the Bill of Rights. Moreover, knowledge of the roles of religion in the past and present promotes cross cultural understanding essential to democracy and world peace.*<sup>473</sup>

The only fine distinction that may be asserted is if John Freshwater advocated his *own* beliefs, which appears only in accusation 2(f)(iii), but even this action is permissible pursuant to Board Policy 3218.

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<sup>472</sup> Employee Exhibit 70, Page 73

<sup>473</sup> Employee Exhibit 70, 103, 104 and 105

Hearing testimony shows that many Mount Vernon school teachers are uninformed, untrained, or misinformed about the religion policy.<sup>474</sup> After Attorney Millstone conducted an in-service work day for teachers regarding religion in the classroom, teachers were even more confused. “Several teachers asked specific questions about specific situations, and they weren’t answered. There were many times Mr. Millstone reportedly said, ‘You know what? I’m not sure’. ...[T]here were many teachers that... left [the in-service saying], ‘well, we still don’t know exactly what the policy is...’ I think many of us left still feeling very, very vague”.<sup>475</sup>

**25. (2)(f)(i). Easter & Good Friday**

This accusation simply alleges that a discussion occurred. Absent from the resolution, but included in the HR on Call, Inc. report, is the context of the discussion. According to board policy 2270 and testimony, this event is of the type that *should be taught*, and the administrators erred when they told John Freshwater that the “one or two minute” discussion was “one or two minutes too long.”<sup>476</sup>

Board policy 8800 states,

*“Acknowledgement of, explanation of, and teaching about religious holidays of various religions is encouraged”.*

Accusation 2(f)(i) alleges that John Freshwater obeyed the Board’s exhortation to teach about the religious holidays of Easter and Good Friday.

Board policy 8800B states,

*“Although public schools may teach about religious holidays, including their religious aspects, and may celebrate the secular aspects of holidays, schools may not observe holidays as religious events or promote such observance by students”.*

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<sup>474</sup> Transcript Page 2114, 2406, 2143, 1990, 925, 2049, 2060 and 2072

<sup>475</sup> Transcript Page 3948-3949

<sup>476</sup> Board Exhibit 6

Accusation 2(f)(i) alleges that John Freshwater obeyed Board Policy 8800B. No witness has suggested that John Freshwater attempted to “observe” or “promote such observance” of these holidays.

Anyone familiar with astronomy and the Christian calendar knows the relationship between the Good Friday and Easter holidays and the solar / lunar cycle, and it is therefore important to teach to 8th-grade science students. There is no evidence that John Freshwater taught or advocated his personal beliefs, nor proselytized the students, neither have any corroborating witnesses appeared to support such allegations.

The only source for this allegation is the discredited Zack Dennis.<sup>477</sup> It was the complaint by the Dennis family in April 2008 that prompted the administrators to unnecessarily restrict John Freshwater’s teaching in this area, in contravention of the encouragement of Board Policy 8800.

The point of board policy 2270 is that teachers may and should teach *about* religions, but may not *proselytize*. Thus, even if John Freshwater taught the meaning of Easter while discussing its annual schedule in relation to astronomy, he was acting in fulfillment of board policies 2270, 8800, and 8800B, not against it. John Freshwater acknowledged that he could not recall whether or not he, himself, told the meaning of the holiday; but the discredited Zach Dennis admitted that he, Zach Dennis, told what both Good Friday and Easter commemorate.<sup>478</sup> Acting as though Easter and Good Friday do not exist is non-neutral, and is a violation of board policy 2270: the administrators, Steve Short and Bill White, violated board policies 2270, 8800, and 8800B by rebuking John Freshwater for allegedly teaching about Easter and Good Friday

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<sup>477</sup> Transcript Page 1197

<sup>478</sup> Transcript Page 333,345

and their relationship to astronomy. They also violated board policy 9130 in their inept handling of this complaint from the Dennis family.

Principal White presents a confusing and absurd misunderstanding of board policy in this area. He states, “There’s a policy that would prevent a teacher from going in depth with some of those types of questions where you would have the possibility of sharing your own beliefs”.<sup>479</sup> There is no restriction on “depth,” only on “advance[ing] or inhibit[ing]”. The absurdity of Principal White’s “policy” is that teachers are presumably free to share about a particular religion only if they don’t personally believe it. Following his logic, a student’s questions about Christianity should be answered by the Buddhist, and the questions about Buddhism should be answered by the Hindu.

Furthermore, his statement is in direct opposition to Board Policy 3218, Academic Freedom of Teachers. Teachers have a right to express their own opinions, and must simply “state it as such.” By not using the board policy, Principal White is arbitrary, and in this case, reduced to absurdity.

Thomas Herlevi, principal investigator for HR on Call, Inc., while claiming to have read the policies,<sup>480</sup> evidently still did not comprehend them. His position is that a teacher is not permitted to discuss Good Friday and Easter with the students, contrary to Board Policies 2270, 8800, and 8800B.

In response to the identified specification of the charge listed in the BOE’s resolution, as required and limited by R.C. 3319.16, balanced by the clear and convincing standard or any other, John Freshwater was not willfully nor persistently in violation of any identified reasonable regulation of the BOE; nor do any of his actions constitute other good and just cause based upon

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<sup>479</sup> Transcript Page 516

<sup>480</sup> Transcript Page 1172



the requisite intent. Therefore, the specifications in section (2)(f)(i) of the BOE's *Amended Resolution of Intent to Consider the Termination of the Teaching Contract(s) of John Freshwater* must be deemed **unsubstantiated**.

**26. (2)(f)(ii). Homosexuality is a sin**

This allegation is unsubstantiated as there are no corroborating witnesses, and John Freshwater denies this charge.

We take this opportunity to point out flaws in this part of the charging document. Even if this event had occurred, the board fails to indicate *why* this would be wrong. To the contrary, in light of board policies 2270, 8800, and 8800B, informing students of what the Bible teaches is not prohibited. It is commonly known, and even acknowledged within the Bible itself, that the Bible's teachings are offensive to many. Perhaps theologians will debate the accuracy of the teaching represented in this accusation, but board policy does not prohibit it.

Lastly, the accusation merely suggests that the alleged act "may have created a hostile environment for some students." No such students were identified either in the charging document, HR on Call, Inc. investigation, or hearing testimony.<sup>481</sup> Without identified students, the concern is irrelevant.

This allegation is made by only one person, Observer Jim Stockdale. Despite his assertion that the offensive words were uttered in a classroom full of students, the board has not produced even one corroborating witness. Observer Stockdale did not document the event at the time, and did not write his account, nor apparently even tell anyone, until at least two years later. In response to the identified specification of the charge listed in the BOE's resolution, as required and limited by R.C. 3319.16, balanced by the clear and convincing standard or any other, John Freshwater was not willfully nor persistently in violation of any identified reasonable

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<sup>481</sup> Transcript Page 4173

regulation of the BOE; nor do any of his actions constitute other good and just cause based upon the requisite intent. Therefore, the specifications in section (2)(f)(ii) of the BOE's *Amended Resolution of Intent to Consider the Termination of the Teaching Contract(s) of John Freshwater* must be deemed **unsubstantiated**.

**27. (2)(F)(iii). Noah's Ark**

It is noted that this accusation doesn't take issue with something called a "flood theory," but only with said theory "as it relates to Noah's Ark."

This accusation includes the assertion that John Freshwater taught *his own* religious beliefs regarding a flood as it relates to Noah's Ark. Board Policy 3218, Academic Freedom of Teachers, fully endorses his right to do this, provided that when he expresses his own opinion, he "shall state it as such."<sup>482</sup>

There are no direct witnesses that clearly and convincingly make this allegation. Indeed, if this is accurate, John Freshwater very properly expressed his own opinion under Board Policy 3218, along with the announcement that it was such.

Therefore, this accusation does NOT ALLEGE A VIOLATION of Board Policy, and is therefore moot.

Some witnesses inferred that John Freshwater was alluding to Noah's Ark. Some also presumed to know what John Freshwater's religious beliefs are. Even if the students were to ask John Freshwater of his personal religious beliefs, he would certainly be able to answer according to Board Policy 3218. No student claims that they have heard directly from John Freshwater what his beliefs are. But allusion is not the same as direct teaching, and is subject to a hearer's interpretation, and presumption does not prove a thesis.

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<sup>482</sup> Transcript Page 966

In response to the identified specification of the charge listed in the BOE's resolution, as required and limited by R.C. 3319.16, balanced by the clear and convincing standard or any other, John Freshwater was not willfully nor persistently in violation of any identified reasonable regulation of the BOE; nor do any of his actions constitute other good and just cause based upon the requisite intent. Therefore, the specifications in section (2)(f)(iii) of the BOE's *Amended Resolution of Intent to Consider the Termination of the Teaching Contract(s) of John Freshwater* must be deemed **unsubstantiated**.

## **28. The Context "Here"**

It has been alleged "John Freshwater taught his students to use the code word, 'here' when the textbook would contradict religious or Biblical perspectives". This accusation is another example of a gross misrepresentation of an actual event removed from the actual context and purpose. Before explaining how the actual event is, in truth, a praiseworthy teaching technique, worthy of emulation in other classes, we first point out the absurdity in the accusation and the section of the HR on Call, Inc. report on which it is based.

First observe that the accusation, if true, doesn't violate any board policy. The board doesn't even suggest why it would be wrong to identify contradictions between a textbook statement and "religious or Biblical perspectives." For comparison, rebuttal witness Dr. Rissing assigned his own students an in-depth study that identified differences between explanations scientific and non-scientific, including religious or superstitious justifying it as appropriate pedagogy.<sup>483</sup>

Secondly, the accusation presumes that the students know religious or Biblical perspectives. That may be so, and would be a laudable quality of good citizenship, but this is not what was reported by HR on Call, Inc. This may be an attempt by the board to improve the

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<sup>483</sup> Transcript Page 6180

obviously flawed allegation on page 6 of the HR on Call, Inc. report, which requires students to read John Freshwater's mind on a continual basis! The report echoes Bonnie Schutte stating: "‘Here’ from John Freshwater's students’ means that anytime he was telling them something out of the textbook that was wrong from his perspective they were to say, ‘Here.’"<sup>484</sup> This statement is absurd because it assumes that students know what John Freshwater's perspective is, an impossibility. Bonnie Schutte has never been in John Freshwater's classroom while he was teaching, so this accusation is, at best, her interpretation.

If the report simply mis-communicates by faulty grammar, and the intended meaning is that a student uses “here” to indicate when the *student* disagrees, there is no accusation at all. What does a teacher do to keep the class moving when students want to argue? When evolution is presented in class and creationist students argue, Bonnie Schutte blames the previous science teacher for teaching creationism. When John Freshwater is teaching evolution and students argue with him, he institutes the use of the word “here”.

John Freshwater testified to the HR on Call, Inc. investigators, and in the hearing that he actually taught the students to exercise discernment, and indicate it with the word, “here.” This testimony is corroborated by eight other witnesses, including the discredited Zach Dennis and his mother, Jennifer Dennis.

John Freshwater explains that the teaching strategy behind using the word ‘here’ is “for the students to get a better understanding of abstract and concrete,”<sup>485</sup> one of the major indicators in the Academic Content Standards for 8th grade science. John Freshwater was asked during the

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<sup>484</sup> Employee Exhibit 48

<sup>485</sup> Transcript Page 4505

hearing to give an example, so he read from one of the 8<sup>th</sup> grade textbooks the following paragraph<sup>486</sup>:

*'In your journey to the bottom of the Grand Canyon, you can see layers of Earth that are over 1 billion years old. These layers are from Precambrian time. Precambrian time began when the Earth originated 4.6 billion years ago, and continued until about 540 million years ago. During this time life began and transformed the planet.'*<sup>487</sup>

John Freshwater went on to explain, "This could be a time that a student would say 'here' because there was no eyewitness there. That could be an abstract thought. It's extrapolated information in order to get that date...."

John Freshwater began to use this technique around 1998-99, for two students who were adamantly opposed to evolution, due to teaching they had received from home, church, or other sources they personally respected. Though sincere, these students' interruptions to the class were having a negative impact on the teaching schedule. John Freshwater asked them to use the word "here," and in return he committed to the students that he would acknowledge the students' objections, or deal with it quickly, or even to spend some time discussing it. The result was that the students were liberated to voice their opinions or questions, and greatly set at ease regarding the perceived conflict between teaching authorities, knowing that John Freshwater respected them, and might even divert class time to answer them.<sup>488</sup>

It is important to point out that errors do appear in textbooks, despite the best efforts of authors and publishers, and it is not inconceivable that a *student* might be the first to detect it! This, according to testimony, is another use of the word "here."<sup>489</sup>

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<sup>486</sup> Transcript Page 4505

<sup>487</sup> Transcript Page 4509

<sup>488</sup> Transcript Page 4511

<sup>489</sup> Transcript Page 2428-2429

The board has completely failed in presenting corroborated eyewitness testimony for this accusation. The only sources they have for this accusation are Jennifer Dennis and Thomas Herlevi, both of whom are providing only their own second-hand interpretation and opinion. John Freshwater concludes that this accusation is without merit, and we further encourage the board to promote this positive teaching technique throughout the middle and high school science classes, and even to other subjects.

In response to the identified specification of the charge listed in the BOE's resolution, as required and limited by R.C. 3319.16, balanced by the clear and convincing standard or any other, John Freshwater was not willfully nor persistently in violation of any identified reasonable regulation of the BOE; nor do any of his actions constitute other good and just cause based upon the requisite intent. Therefore, the specifications in section (2)(g) of the BOE's *Amended Resolution of Intent to Consider the Termination of the Teaching Contract(s) of John Freshwater* must be deemed **unsubstantiated**.

## **29. Section (2) Conclusion**

"A generation of kids are missing out because John Freshwater is not teaching".<sup>490</sup>

Why is this "man of integrity"<sup>491</sup> absent from his classroom? It is because of one untruthful student's opportunistic parents, and an incompetent administration's handling of the lies. Jealous colleagues, who had been waiting for years for an occasion against the students' favorite teacher,<sup>492</sup> eagerly aided investigators. Add to the mix arbitrary enforcement of non-existent policies and a lack of communication, and here is a recipe for a stellar teacher's destruction. Put John Freshwater back in the classroom where he belongs, and let's have another generation of kids shouting, "I love science!"

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<sup>490</sup> Transcript Page 3625

<sup>491</sup> Transcript Page 2425

<sup>492</sup> Transcript Page 1975

### C. FCA

Any and all matters related to John Freshwater's role as the monitor for the FCA are resolved in favor of exonerating him as credible witness testimony demonstrates Teacher Freshwater did not conduct nor lead any prayers during FCA meetings, never asked non-familial students to lead prayer in FCA meetings and did not exceed his role as facilitator, monitor and supervisor of the FCA. Clearly and convincingly any allegation that John Freshwater violated any known or unknown parameter for his role as facilitator, monitor and supervisor of the FCA must be deemed unsubstantiated.

The only standard or definition for John Freshwater's role as the appointed FCA faculty advisor is found in the FCA Handbook for Public Schools.<sup>493</sup> The FCA Handbook was provided to John Freshwater by the administration during the 2007-08 school year for the purpose of guidance, although without anything that could be rightly characterized as "training".<sup>494</sup> The FCA Handbook defines the faculty role as "monitor, facilitate, or supervise".<sup>495</sup>

The act of monitoring FCA students' activities means to scrutinize or check systematically, with a view to collecting certain specified categories of data and to keep watch over, or supervise.

The act of supervising FCA students' activities means to direct and inspect the performance of their actions. The purpose for this supervisory role is to ensure that the school's policies for students regarding conduct and safety are followed by the students, including activities as varied as submitting the proper paperwork from the club to administration, and ensuring that the club's activities did not interfere with the instruction schedule. *"Schools also have the right to 'maintain order and discipline on school premises, to protect the well-being of*

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<sup>493</sup> Employee Exhibit 1

<sup>494</sup> Transcript Page 64, 497, and 4345

<sup>495</sup> Employee Exhibit 1

*students and faculty, and to assure that attendance of students at meetings is voluntary.”*<sup>496</sup>

(FCA Handbook, page 1)

The third component of John Freshwater’s role was to facilitate the FCA students’ activities. Facilitate means to make easier a task that may be difficult. In other words, John Freshwater was present at FCA meetings to serve as a resource for the students to gain access and benefits of school facilities that are enjoyed by all Qualified Student Clubs.<sup>497</sup> The access and benefits may include audio/visual equipment, meeting place, storage place, telephone services, and even bulletin board space. John Freshwater’s responsibility was to provide access to all these resources. Furthermore, the students have the right to receive outside guests, and John Freshwater’s responsibility extended to ensuring that the invited guests interfaced properly with the school visitor policies (where to park, sign in at office, etc.), and instruction schedule (when to arrive). Note that the students had a right to have any willing outside visitor to their meetings; the willingness was established by student initiative, but the details of logistics properly fall upon the facilitator, monitor and supervisor due to the relative immaturity of the eighth-grade students and the need to interact with the school in ways that are outside the knowledge of the students.

Note that it would properly be within the responsibilities of the facilitator, monitor and supervisor to maintain storage of club possessions.<sup>498</sup> Due to the transient nature of the student club, the leadership team was completely new from year to year, without significant overlap. Therefore, the facilitator, monitor and supervisor can transmit knowledge to the students about the available resources and property available from one year to the next. Simply informing a

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<sup>496</sup> Employee Exhibit 1

<sup>497</sup> Employee Exhibit 1

<sup>498</sup> Transcript Page 3818 and Employee Exhibit 100



new leadership team of how things were done in the past cannot reasonably be construed as “leading” or “participating” in club activities.

The last two sentences on Page of Employee Exhibit 1, The FCA Handbook for Public Schools reads as follows:

*However, the activities of the meetings must be primarily led by students. It is up to the school officials, not the students, to make clear that the club is student-led.*

These two sentences are very instructive in interpreting the role of a facilitator, monitor and supervisor of the FCA. The word primarily totally supports John Freshwater’s actions in facilitating the FCA meetings. Although the FCA meetings are to be student-led as set forth in the FCA Handbook, there is guidance in the use of the word, “primarily”, which is an instructive qualifier to the exclusive nature and import of the words stated in the Equal Access Act.<sup>499</sup> John Freshwater can rely upon the qualifying nature of the word “primarily” noting that any fear of mistaken inference of endorsement by school officials is largely self-imposed because the school itself has control over any impressions it gives students.<sup>500</sup> A review of the testimony below will demonstrate the students who were truly and honestly involved with the FCA perceived and understood they were in control of the student led group as did other teacher and guest speakers.<sup>501</sup>

The specification identified in section (3)(a) one of the resolution specifies and is limited to an allegation John Freshwater “conducted and led prayer” in the FCA meetings held at the Mount Vernon Middle School. The singular source of the allegation was Zach Dennis for which there was no corroborating evidence to support his allegation. Only one specifically referenced

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<sup>499</sup> 20 U.S.C. §4071 (2005)

<sup>500</sup> Bd. Of Education of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 251 (1990)

<sup>501</sup> See testimony of Ben Nielson, Jordan Freshwater, Pastor Stephen Zirkle,

alleged prayer was cited as having been conducted or led by John Freshwater and that situation involved Pastor Stephen Zirkle, Teacher's Aide Ruth Frady and Student Ben Nielson.

Clearly and convincingly Pastor Stephen Zirkle, Teacher's Aide Ruth Frady and Student Ben Nielson provide the only reliable and credible evidence in response to Zach Dennis' claim that John Freshwater "conducted and led prayer" during an FCA meeting. A confluence of Pastor Zirkle, Aide Frady and Student Nielson conclusively occurred on March 18, 2008,<sup>502</sup> whereby each attended an FCA meeting held at the Mount Vernon Middle School.<sup>503</sup> Student Nielson testified in person and by affidavit that did not think Zach Dennis was in attendance at the March 18, 2008, FCA meeting when Pastor Zirkle spoke.<sup>504</sup> Following the mandates of Article 402 from the collective bargaining agreement, written statements in the form of affidavits were obtained from Pastor Zirkle, Aide Frady and Student Nielson, each of also testified in person.

Pastor Zirkle was not interviewed by HR on Call, Inc. and he characterized this fact as "odd".<sup>505</sup> The undersigned interviewed Pastor Zirkle on Sunday, March 29, 2009, in his office at his church.<sup>506</sup> Pastor Zirkle stated in his affidavit,

*"I did attend an FCA meeting where during the meeting I did share a lesson from the Bible Book of Daniel. I had a doctor's appointment the day before on Monday and had been tested for cancer. I was leading a devotional about Daniel in the lion's den and so I talked to the students about some medical testing that was going on in my life. I did not give the students any specifics I was very vague. Basically I was encouraging them with my life story to put their trust in GOD no matter what comes their way or tests and trials they may have. This occurred at the end of my devotion lesson. After I shared this lesson Ben Nielson wanted to pray and they had this time of "popcorn prayers". The only two prayers I can remember were Ben's and Ruth's. I know Ben Nielson and Ruth Frady because they both attend my church and I know their voices. I do not*

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<sup>502</sup> Transcript Page 2790, Line 16, Page 5180 - 5181

<sup>503</sup> Transcript Page 2790, Line 16, Page 5180 - 5181, Page 2656

<sup>504</sup> Transcript Page 2656, Line 16-19

<sup>505</sup> Transcript Page 2788 and 2809-2810

<sup>506</sup> Transcript Page 2786-2787

*remember any other person praying. The bell rang and we ended and everybody went.”*<sup>507</sup>

Refuting the most incredible and nefarious aspect of the allegations made by Zach Dennis, it is clear that John Freshwater did not conduct any exorcism, “healing session” nor hold his hands above Pastor Zirkle’s head while in the act of prayer.<sup>508</sup> Pastor Zirkle, Aide Frady and Student Nielson all deny any such crazy behavior occurred. HR on Call, Inc. conveniently sidestepped this allegation by failing to fully address the matter either through interviewing Pastor Zirkle or asking John Freshwater fully about the allegation. To be certain, Zach Dennis is caught red-handed in his most notorious lie as documented medical proof demonstrates John Freshwater suffered a medical condition which prevented him from raising his hands and arms into the air.<sup>509</sup> Medical records from the Knox County Community Hospital totaling fourteen (14) pages provide irrefutable medical evidence that John Freshwater was undergoing therapy for a shoulder injury. Amazingly, John Freshwater’s therapy started on March 17, 2008: one day before Pastor Zirkle’s appearance at the FCA meeting of March 18, 2008. How can Zach Dennis be believed regarding any of his allegations if ten (10) classroom eyewitnesses testify Zach Dennis is “lying”<sup>510</sup> or is a “liar”<sup>511</sup> or is being untruthful<sup>512</sup> and now there is medical proof to conclusively refute his outrageous claim that John Freshwater conducted a “healing session”?

Pastor Zirkle elaborated by affidavit and during testimony that Student Nielson initiated a prayer in support of Pastor Zirkle and his recently revealed medical situation, specifically stating,

*“I remember Ben asking if we could pray and him getting up and some students placed their hands on me and had a prayer with me. It was Ben’s idea to pray and to pray around me. Ben was probably two rows away*

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<sup>507</sup> Employee Exhibit 52

<sup>508</sup> Board Exhibit 6, Attachment 1 and Transcript Page 354

<sup>509</sup> Employee Exhibit 140

<sup>510</sup> Transcript Page 5289, 5127, 5128

<sup>511</sup> Transcript Page 5309, Employee Exhibit 116

<sup>512</sup> Transcript Page 5243

*from me and he just had to move a chair to come toward me but did not have to walk to the end of the row to get around the chairs. It was my sense Ben took great joy and privilege at the opportunity to pray for me at this time. I bowed my head and closed my eyes when Ben's prayer began and raised my head and opened my eyes when Ruth ended the prayer. I felt more than one person's hands placed upon my body but I did not feel enough hands to account for everybody in the meeting. When the prayer was over everybody was heading to the door. During the prayer and after the prayer people were positioned in front of me toward the door. I only remember Ruth being behind me. John was not close to me at the point when the prayer ended. John would typically stand in the back of the room by a gray shelf where the p.a. was. John would watch and sometimes listen. I never sensed that John was trying to lead the meeting or direct the meeting. It was always my sense that when I was there I was directing the meeting. Ruth prayed an encouraging prayer to not be discouraged. After the bell had rung and the meeting ended I spoke to Ruth about specifics of what I was going through.”<sup>513</sup>*

Pastor Zirkle's testimony makes certain that John Freshwater was not the person who initiated, lead or even conducted prayer on March 18, 2008. Pastor Zirkle further stated, “John never asked for any prayer requests. John never directed any kid to pray”.<sup>514</sup>

Aide Frady testified in person and by affidavit and confirmed Pastor Zirkle's testimony. Aide Frady stated, “My impression was that John was a facilitator in that he kept the room in order and acted as the timekeeper. John did not teach class during FCA.”<sup>515</sup> Aide Frady testified if she thought John Freshwater had done anything inappropriate she would have reported her concern to the principal.<sup>516</sup> Aide Frady remembers the March 18, 2008, meeting and stated,

*“When Pastor Zirkle was there I remember my eyes were closed when the bell had rung ending that period of time. John made a vocal effort to conclude the meeting because he had to get those kids out of there. John's words were not a faith healing session nor were his words anything of a spiritual content. When I heard John's words my eyes were closed and his voice seemed far away to my left. I did pray for Stephen and my prayer was the last prayer for him. I remember thinking I was disappointed that*

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<sup>513</sup> Employee Exhibit 52

<sup>514</sup> Employee Exhibit 52

<sup>515</sup> Employee Exhibit 192

<sup>516</sup> Transcript Page 5168-5169 and 5186

*more students did not pray for Stephen. About five seconds passed between the end of my prayer and when John said "Amen". John may have said other words but I do not recall. Any words John would have said had a tone of you're done with this to indicate and end of the meeting. I only remember a student named Ben praying for Stephen. I was late to my next class."*<sup>517</sup>

Aide Frady concludes that John Freshwater did not pray for Pastor Zirkle and words used by Teacher Freshwater were to respectfully usher the students to their next class. As the FCA facilitator, monitor and supervisor, John Freshwater was expected to oversee the duties and functions of the FCA and ensure students abided by the rules, one of which was to attend regularly scheduled classes. Aide Frady affirmed there was a substantial period of time between the last words of her prayer and when John Freshwater made students stop and leave:

*"Oh, it was a long time ago, but from the time I was done and waiting for other people, I can't tell you how long elapsed. The bell rang, and it seemed like a real long time. But I'd say from the time I stopped until John spoke there were about five to ten seconds, which seemed longer, because I had to get up to the second floor and every second counts".*<sup>518</sup>

Student Nielson proudly proclaimed, "I lead the prayer for Pastor Steve and was excited to do so"<sup>519</sup> because, "Pastor Steve is my youth pastor and he had just come from a doctor's appointment and needed some kind of surgery".<sup>520</sup> It is clear and without doubt Student Nielson and Aide Frady lead and conducted prayer for the support and benefit of Pastor Zirkle.

Clearly and convincingly Student Nielson initiated the prayer and he, along with Aide Frady, prayed a meaningful spiritual petition seeking protection and well-being for one of their church's pastors. Aide Frady confirmed as did John Freshwater that Teacher Freshwater said,

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<sup>517</sup> Employee Exhibit 192

<sup>518</sup> Transcript Page 5184

<sup>519</sup> Employee Exhibit 45

<sup>520</sup> Employee Exhibit 45

“Amen”.<sup>521</sup> Aide Frady described the word uttered by John Freshwater as, “It was not a prayer, but it indicated -- the tone was very much you need to leave”.<sup>522</sup>

“Other good and just cause” must consider the “intent” of a teacher’s action. John Freshwater was not expressing approval or consent but rather using a word to clearly denote the prayerful activity being conducted by the FCA members had to conclude because the school bell had rung, officially ending the time period designated for that particular FCA meeting.

The intent expressed by John Freshwater was not to make any spiritual petition or request on behalf of Pastor Zirkle. In fact, neither Pastor Zirkle nor Aide Frady considered John Freshwater to have participated in the spiritual act of prayer. John Freshwater testified the motivation for his intent was,

*“There were students getting noisy in the hallway and I knew FCA had to get out of the bandroom. FCA needed to be over. I did not want at teacher to complain because a student was late. I had to get to my class and greet my students at the door like I usually did”.*<sup>523</sup>

The exact definition of the FCA supervisory, monitoring and facilitating role included the task of ensuring the club’s activities did not interfere with the school’s instruction schedule.

John Freshwater’s intent was about respect. John Freshwater wanted to be respectful to the sensitive emotions of Pastor Zirkle, Aide Frady, Student Nielson and the others attending FCA but at the same time exercise his duty as the facilitator, monitor and supervisor of FCA. The FCA handbook does not provide any clear or discernible direction for a facilitator, monitor and supervisor who found themselves in the position John Freshwater was on March 18, 2008. John Freshwater used his best judgment to balance the competing needs of respect and decorum for members of the FCA versus the necessity to abide by the school’s class schedule. John

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<sup>521</sup> Employee Exhibit 192 and 157

<sup>522</sup> Transcript Page 5184 and 5188

<sup>523</sup> Employee Exhibit 157

Freshwater was asked “17 years ago” by then Principal Jeff Kuntz to become the FCA leader as two students wanted to start the group.<sup>524</sup> Principal Kuntz asked John Freshwater to become the facilitator, monitor and supervisor of the FCA because Teacher Freshwater would be respectful to the needs of the school and the FCA. John Freshwater testified,

*“I did not want to be disrespectful to the students or Pastor Zirkle so I said ‘Amen’ as to get the students going and to clear out the FCA kids from the bandroom. At about the same time I said ‘Amen’ a student said ‘Amen’ to close the prayer”.*<sup>525</sup>

Training provided by the FCA Handbook, and forwarded to John Freshwater by Superintendent Short, demonstrates by use of the word, “primarily”, provides latitude to the facilitator, monitor and supervisor of the FCA to operate within the dynamic environment that is a student led club. The FCA Handbook did not provide training that inserted words like “totally” or “completely” as the intent of the Equal Access Act lest the school lose its ability to effectively facilitate, monitor and supervise the FCA. Moreover if the words of training did include absolute words as encompassing as “totally” or “completely” there would be no reason to even have a facilitator, monitor and supervisor of the FCA

The Constitution permits latitude in recognizing religion, so it only stands to reason that an FCA group would fall under the same guidelines. And, further, anything incidental is permissible. How much latitude is afforded a facilitator, monitor and supervisor of the FCA?

It is without question that when John Freshwater gave a directive to the students to disperse by stating “Amen”, he dismissed the March 18, 2008, FCA meeting because the student meeting had exceeded its permissible timeframe. Although the club was student led such quality does not permit the students to come-and-go as they please and they were still under the authority of a teacher who appropriately communicated in a term that would be readily

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<sup>524</sup> Transcript Page 4404-4405

<sup>525</sup> Employee Exhibit 157

understood, but respectful of the sensitive situation. John Freshwater acted appropriately as the facilitator, monitor and supervisor of the FCA at all times, and especially on March 18, 2008.

Upon careful, balanced evaluation of the purpose and context surrounding the intent of John Freshwater's respectful navigation through the emotionally charged prayer initiated by Student Nielson and joined by Aide Frady, the specification identified in section (3)(a) which specifies Teacher Freshwater "conducted and led prayer", is clearly and convincingly false based upon the credible testimony of disinterested witnesses and must be **unsubstantiated**.

The specification identified in section (3)(b) of the resolution specifies and is limited to an allegation John Freshwater "asked students to lead prayer". Once again, the singular source of the allegation was Zach Dennis for which there was no corroborating evidence to support his allegation.<sup>526</sup> Zach Dennis did not provide context for this allegation other than in relation to FCA. Zach Dennis' allegation is closely related to the specification identified in section (3)(a). In addition to the testimony cited in response to (3)(a), both Ben Nielson and Pastor Stephen Zirkle assert that Mr. Freshwater never asked for prayer requests or directed / made any student to pray.<sup>527</sup> Not only, then, is ZD's testimony uncorroborated, but is directly refuted by two witnesses in addition to the below listed witnesses.

Student Cody Smith testified "Mr. F never prayed at FCA or in class".<sup>528</sup> Student Smith also affirmed John Freshwater did not hold his arms up and pray that Satan or the devil would leave somebody.<sup>529</sup>

Student Maggie Wayne testified John Freshwater did not pray during FCA.<sup>530</sup>

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<sup>526</sup> Transcript Page 352 and 3187

<sup>527</sup> Transcript Page 2658 and 2813

<sup>528</sup> Transcript Page 5305

<sup>529</sup> Transcript Page 5311

<sup>530</sup> Transcript Page 5629



Student Tokala Redman testified John Freshwater never led prayer, adding “It was the preachers that came and spoke to the kids”.<sup>531</sup>

Student Corbin Heck testified John Freshwater did not pray in class.<sup>532</sup>

Student Riley Swanson testified John Freshwater did not pray in class.<sup>533</sup>

Principal Tim Keib testified he never saw John Freshwater pray during class or leading any prayers with students.<sup>534</sup>

Aide Ruth Frady testified “Certainly, I have never heard John preach or teach from any Bible”.<sup>535</sup>

Most persuasive are the facts depicted in the attached Diagram titled, “Middle School FCA Speakers Survey”. Eight speakers invited to the FCA each affirmed that John Freshwater did not pray. FCA speakers Major Robert Bender, Jeff Cline, David Daubenmire, Father Mark Hammond, Darcy Miller, Pastor Dennis Turner, Ricky Warren and Stephen Zirkle each confirm John Freshwater did not pray at the FCA.

There was no allegation of wrongdoing regarding John Freshwater speaking to his daughter, Jordan Freshwater, regarding prayer. However, it is worth noting that nowhere in the FCA Handbook was there any prohibition listed regarding a public school teacher speaking to their child about prayer before, during or after school. John Freshwater’s constitutional right to freely associate with his daughter would prevent any prohibition. Jordan Freshwater affirmed student leaders of FCA would lead the prayers during FCA<sup>536</sup> and that her dad did not lead any

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<sup>531</sup> Transcript Page 5131

<sup>532</sup> Transcript Page 2187

<sup>533</sup> Transcript Page 2220

<sup>534</sup> Transcript Page 5131 and 3600

<sup>535</sup> Employee Exhibit 192

<sup>536</sup> Transcript Page 1664

# Middle School FCA Speakers survey

100% (8 out of 8) of the speakers who testified stated that John Freshwater did not violate FCA Handbook rules.

## Did John Freshwater...

GUEST SPEAKERS  
WHO TESTIFIED

	MAKE INITIAL CONTACT?	GIVE SPECIFIC TOPIC?	LEAD THE MEETING?	PRAY?	WHERE DID J.F. STAND/SIT?
Major R. Bender	<b>NO</b> 3722:14	N/A	<b>NO</b> 3723:18	<b>NO</b> 3723:5-6	NOT PRESENT 3722:24-25
J. Cline	<b>NO</b> 2778:4	N/A	<b>NO</b> 2770:8-10	<b>NO</b> 2770:5-6	BACK 2770:20
D. Daubenmire	<b>NO</b> 3434:25	N/A	N/A	<b>NO</b> 3444:8	BACK 3436:14
Father M. Hammond	DNR 6074	<b>NO</b> 6075:13-6076:2	N/A	<b>NO</b> 6076:8-13	N/A
D. Miller	<b>NO</b> 3707:13	N/A	<b>NO</b> 3711:1-18	<b>NO</b> 3716:3-6	BACK 3712:4-5
Pastor D. Turner	N/A	<b>NO</b> 1037:20	N/A	<b>NO</b> 1048:16	N/A
R. Warren	<b>NO</b> 4695:15-4696:15	N/A	<b>NO</b> 4697:10-11	<b>NO</b> 4697:10-11	NOT PRESENT 4697:10-11
Pastor S. Zirkle	<b>NO</b> 2791:18	<b>NO</b> 2798:20-23	<b>NO</b> 2794:1-2	<b>NO</b> 2800:22 & 2801:5-7	BACK 2796:10

N/A = question not addressed in testimony

DNR = does not recall

\*Denotes Hearing Transcript

prayers during FCA.<sup>537</sup> Lastly, Jordan Freshwater confirmed her dad did not ask other students to pray.<sup>538</sup>

Clearly and convincingly, sixteen (16) classroom eyewitnesses confirmed John Freshwater did not ask “students to lead prayer”. John Freshwater denies asking any student to pray while at an FCA meeting.<sup>539</sup> Any allegation that John Freshwater committed any act or caused any condition described in section (3)(b) must be deemed **unsubstantiated**.

The specification identified in section (3)(c) of the resolution specifies and is limited to an allegation John Freshwater “frequently went beyond his role as monitor and contacted guest speakers for FCA events or recommended speakers to student”. Once again, the singular source of the allegation was Zach Dennis. The BOE must prove John Freshwater did an act “frequently”, meaning the proof must be that Teacher Freshwater engaged in a prohibited action often or at close intervals, indicating habit or regularity.

Zach Dennis alleged John Freshwater would call speakers, and that “He gave me two names to call. That’s what I consider a suggestion”.<sup>540</sup> Student Jordan Freshwater testified her father did not contact FCA speakers to invite them to speak at the meetings.<sup>541</sup> Student Ben Nielson testified student leaders invited FCA speakers to the meetings.<sup>542</sup>

Zach Dennis, the school administration, and HR on Call, Inc. failed to recognize the responsibility of an FCA Advisor, as the facilitator, monitor and supervisor, was to care for the logistical arrangements with visiting guest speakers. Among the FCA guest speakers who testified in this hearing Pastor Dennis Turner, Ricardo Warren, Pastor Stephen Zirkle, Major Robert Bender, Father Hammond, Dave Daubenmire, Jeff Cline, not one of them could

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<sup>537</sup> Transcript Page 1667

<sup>538</sup> Transcript Page 1668

<sup>539</sup> Employee Exhibit 157

<sup>540</sup> Transcript Page 352, 352, 3187

<sup>541</sup> Transcript Page 1687

<sup>542</sup> Transcript Page 2655

positively state that Mr. Freshwater made the initial invitation contact, and most of them could identify a student individual who actually did the initial contact. Only two of them did, indeed, testify that Mr. Freshwater contacted them at some point in his role as facilitator, monitor and supervisor to confirm the logistics of the visit. See Diagram titled, “Middle School FCA Speakers survey after page 144, which provides a clear depiction of the reality that John Freshwater clearly and convincingly did not make initial contact with any FCA speaker.

Pastor Dennis Turner, Superintendent Short’s very own church pastor<sup>543</sup>, testified John Freshwater, as the FCA facilitator, monitor and supervisor, would call to confirm speaking engagements, arrival time, and logistics.<sup>544</sup> Pastor Turner affirmed his impression was that John Freshwater was simply trying to complete his duties as the facilitator, monitor, and supervisor of the FCA.<sup>545</sup>

Teacher Andrew Thompson, now a colleague and a former student participant in the FCA when the FCA was facilitated, monitored and supervised by John Freshwater, testified his experience both as employee of the BOE and as a former student was that the group was student led.<sup>546</sup> Teacher Thompson testified that in 156 meetings he attended with John Freshwater, Teacher Freshwater did not lead a single meeting.<sup>547</sup> In fact, Teacher Thompson stated he did not perceive John Freshwater as a presence during the FCA meetings he attended as a student.<sup>548</sup>

FCA Speaker Ricky Warren testified Student Jordan Freshwater contacted him to speak at the FCA despite the appearance of Board Exhibit 22, an email to Speaker Warren.<sup>549</sup> Speaker Warren was very clear in his testimony that John Freshwater did not contact him to speak at the

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<sup>543</sup> Transcript Page 1043-1044

<sup>544</sup> Transcript Page 1037

<sup>545</sup> Transcript Page 1039

<sup>546</sup> Transcript Page 2889

<sup>547</sup> Transcript Page 2868 and 2890

<sup>548</sup> Transcript Page 2889

<sup>549</sup> Transcript Page 4695

FCA.<sup>550</sup> In regards to the validity of Board Exhibit 22, Speaker Warren also testified, ““I feel like this email is not exactly how I wrote it.”<sup>551</sup>

Any assertion that John Freshwater made initial contact with Father Mark Hammond has to overcome two hurdles: first, Teacher Freshwater has a constitutional right to freely associate with others; and determining a teacher’s intent is critical when evaluating “other good and just cause”.

Father Hammond affirmed he did not know John Freshwater prior to meeting him at a Care Net function.<sup>552</sup> Father Hammond testified that when he and John Freshwater spoke, the location of their conversation was, “definitely away from the school building” and that Teacher Freshwater was not in his classroom.<sup>553</sup> Father Hammond also confirmed John Freshwater did not tell Father Hammond what to speak about at FCA.<sup>554</sup> Board Exhibit 21, the required “Resource Speaker Request” form required by the Mount Vernon Middle School demonstrates three (3) students were involved in inviting Father Hammond to speak at the FCA meetings. Student Doug Reitsma completed the “Resource Speaker Request” form dated April 1, 2008, and Students, Ben Nielson and Jordan Freshwater, completed the form dated April 4, 2008. Each form was approved first by, John Freshwater, and seconded by Principal White. Both Students Ben Nielson and Jordan Freshwater testified they contacted Father Hammond to speak at the FCA.<sup>555</sup> Father Hammond testified it was possible the students did contact him.<sup>556</sup>

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<sup>550</sup> Transcript Page 4697

<sup>551</sup> Transcript Page 4697

<sup>552</sup> Transcript Page 6066

<sup>553</sup> Transcript Page 6072

<sup>554</sup> Transcript Page 6075

<sup>555</sup> Transcript Page 2663 and 1687

<sup>556</sup> Transcript Page 6070

John Freshwater testified he met Father Hammond at a Care Net fundraising dinner.<sup>557</sup>

John Freshwater testified it was his understanding fellow Teacher, Marcia Orsborn, had already contacted and spoke to Father Hammond when Teacher Freshwater met Father Hammond at the Care Net dinner.<sup>558</sup> Teacher Marcia Orsborn testified,

*“I don't know what transpired after I made the initial call to Father Hammond in which I did not speak to him, but I left a note for him to call back. Not me. I said, I'm not the person that schedules; call Mr. Freshwater. So I wouldn't know what transpired after that, but I wouldn't have any reason to not believe that. I didn't talk to anyone after that initial call.”*<sup>559</sup>

Teacher Orsborn admits she made the initial contact with Father Hammond not John Freshwater. But Teacher Orsborn also admits she left John Freshwater's contact information for Father Hammond. Communication between Teacher Orsborn and John Freshwater was described as collegial “heckling”.<sup>560</sup> Teacher Orsborn described that during the “heckling” style of communication between herself and John Freshwater that she revealed to Teacher Freshwater a rumor regarding Catholics not having spoken at FCA meetings. When John Freshwater met Father Hammond it was not the intent of Teacher Freshwater to invite Father Hammond to speak but rather to coordinate the logistics of his speaking based upon Teacher Freshwater's impression that other people had already spoken to Father Hammond.

Consider that the best predictor of future performance is one's past performance. John Freshwater testified he did not make initial contact with FCA speakers but only followed up with invited speakers to confirm logistics with them. Pastor Dennis affirms John Freshwater's practice of confirming logistics. Six (6) other FCA speakers confirmed John Freshwater's past

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<sup>557</sup> Transcript Page 4561-4563

<sup>558</sup> Transcript Page 4787-4788

<sup>559</sup> Transcript Page 6016

<sup>560</sup> Transcript Page 6017

practice of confirming logistics with them prior to their speaking at the FCA.<sup>561</sup> Two students confirmed that the student leaders contacted and invited the guest speakers (Ben Nielson and Jordan Freshwater). Despite the confusion surrounding the invitation to Father Hammond it is clear John Freshwater's intent was not to invite Father Hammond but to introduce himself and confirm the logistics of speaking at the FCA. John Freshwater's verified past performance strongly demonstrates his interaction with Father Hammond was intended to facilitate, monitor and supervise FCA activities. John is an outgoing, "people person" and as such his natural inclination is to introduce himself and initiate a conversation. In a setting like the CareNet banquet, where John's wife plays an active role, it would be very appropriate for John to speak to Father Hammond and find common ground. Not having met Father Hammond previously, it was appropriate that John Freshwater would find that common ground and discuss his pending FCA appearance. Furthermore, John Freshwater's actions were protected as a result of a constitutional right to freely interact and associate with others outside of school.

Clearly and convincingly the BOE resolution alleging John Freshwater "frequently went beyond his role as monitor and contacted guest speakers for FCA events or recommended speakers to students" did not prove accurate in any other testimony and even if the allegations were construed otherwise, the situation with Father Hammond would not indicate any "frequency". Even if all the evidence were to be evaluated and measured against John Freshwater in regards to his interaction with Father Hammond, a singular occurrence does not make Teacher Freshwater's intent rise to the level of a pattern, or having occurred in close intervals indicating a pattern or regularity. John Freshwater denies his actions were intended but for any cause related to his duty to be a facilitator, monitor and supervisor of the FCA. In response to the identified specification of the charge listed in the BOE's resolution, as required

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<sup>561</sup> See Diagram No. Middle School FCA Speakers survey

and limited by R.C. 3319.16, balanced by the clear and convincing standard or any other, John Freshwater was not willfully nor persistently in violation of any identified reasonable regulation of the BOE; nor do any of his actions constitute other good and just cause based upon the requisite intent. Therefore, the specifications in section (3)(c) of the BOE's *Amended Resolution of Intent to Consider the Termination of the Teaching Contract(s) of John Freshwater* must be deemed **unsubstantiated**.

**D. INSUBORDINATION**

*Insubordination* is the deliberate (*willful*) disobedience of a *lawful* order.<sup>562</sup> The specification accuses John Freshwater of specific, direct acts of insubordination by 1) failure to *fully* comply with a directive, and 2) *new acts* against that directive. The truth is that John Freshwater *promptly and respectfully* obeyed what he knew, and *respectfully* appealed what he perceived as a violation of the Free Exercise Clause of the First Amendment to the United States Constitution. The Administration ignored the appeal, made no corrective efforts, and made a duplicitous commitment to John Freshwater. By pretending that their responsibilities were finished, the administrators, in effect, “framed” John Freshwater for the charge of Insubordination.

Much has been made about what constitutes a religious display,<sup>563</sup> the lack of uniform application of policies,<sup>564</sup> arbitrary and confusing directives<sup>565</sup>, and the violation of policies and guidelines by the administration.<sup>566</sup> This malfeasance by the administrators is very serious and worthy of examination and appropriate action by the Board. However, they have been rendered *irrelevant* to this accusation *because of the respectful obedience of John Freshwater*.

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<sup>562</sup>Transcript Page 5376

<sup>563</sup>Transcript Page 2876, 5532, 2367

<sup>564</sup>Transcript Page 2388

<sup>565</sup>Transcript Page 2837, 3937

<sup>566</sup>Transcript Page 5558



For at least the two decades John Freshwater has taught in the Mount Vernon City School District has maintained a policy, practice, and custom of giving teachers discretion and control over the messages displayed on their assigned classroom walls. Teachers in the Mount Vernon City School District have been and are permitted to display in their classrooms various messages and items that reflect the individual teacher's personality, opinions, and values, as well as messages relating to matters of political, social, and religious concerns so long as these displays do not materially disrupt school work or cause substantial disorder or interference in the classroom. Because of this *policy, practice, and custom*, teachers have used their classroom walls as an expressive vehicle to convey non-curriculum related messages.”<sup>567</sup> (See Diagram – Administrator/Staff/Teacher identified as having a Bible on their desk or other “religious item” in their rooms) Eighteen other school personnel were identified as having a Bible on other “religious item” in their classrooms.

Notwithstanding this *policy, practice, and custom*, on Monday, April 7, 2008, John Freshwater received verbal and written directives from Principal White to remove “religious materials”.<sup>568</sup> This directive was directly precipitated by the Administration's violation of Board Policy 9130, Public Complaints. Rather than fulfilling its “duty to protect its staff from unnecessary *harassment*” by following the protocol in this policy, the Administrators *harassed* John Freshwater with this arbitrary and ambiguous directive. When the Dennis family complained about the 10 Commandments and Bible on the desk in March/April 2008,<sup>569</sup> the Administrators were obligated to begin the 9130 protocol at the First Level (A):

*“If it is a matter specifically directed toward a professional staff member, the matter must be addressed, initially, to the concerned staff member who shall*

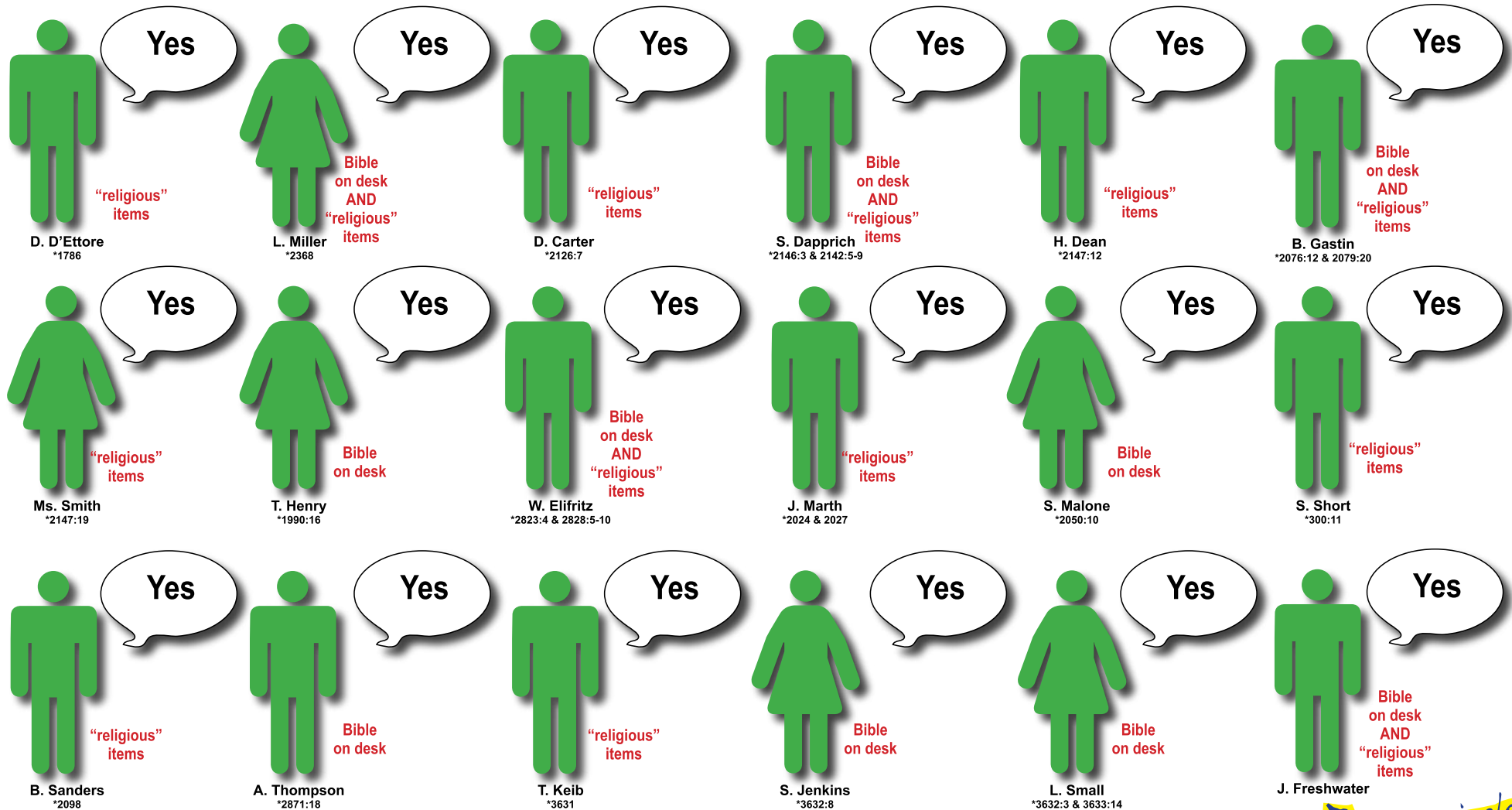
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<sup>567</sup>Transcript Page 2828

<sup>568</sup> Board Exhibit 12

<sup>569</sup> Transcript Page 505-506; 587; 677

# Administrators/Staff/Teachers identified as having a Bible on their desk or other “religious” items in rooms.



According to testimony, **18 out of 28** (nearly 2/3) Administrators/Staff/Teachers have a Bible on their desk and/or “religious” item(s) in their room

Only one singled out.

\*Denotes Hearing Transcript

*discuss it promptly with the complainant and make every effort to provide a reasoned explanation or take appropriate action within his/her authority and District administrative guidelines.*

*This level does not apply if the matter involves suspected child abuse, substance abuse, or any other serious allegation which may require investigation or inquiry by school officials prior to approaching the professional staff member. As appropriate, the staff member shall report the matter and whatever action may have been taken to his/her supervisor”.*

None of the exceptions in this Level applied to the complaint, so there was no legitimate reason to skip levels. Instead, the Administrators recklessly abandoned the process altogether. Mr. Daubenmire’s rhetorical question seems to be more truth than fiction, “...do you administer according to the latest phone call?”<sup>570</sup> This conflict, and many others, might well have been avoided by *following the policy*, which provides opportunity for the parties to “provide a reasoned explanation”<sup>571</sup>, including *purpose and context*.

There were no other witnesses when the verbal directive was given. The written directive instructed John Freshwater that he may not “keep religious materials displayed in the classroom,” and that his “personal bible (sic) ... cannot be sitting out on your desk when students are in the classroom....” Principal White admitted in testimony that he had not clearly defined the “religious materials” in the letter.<sup>572</sup> The directive was *arbitrary* in that it applied only to John Freshwater, and it was *ambiguous* because of the undefined language. To John Freshwater, the verbal directive conflicted with the written directive;<sup>573</sup> so he sought an opportunity to obtain clarification from Principal White.

John Freshwater found Principal White in the copy room on Friday, April 11, 2008, where John Freshwater initiated a conversation and asked for clarification. Acknowledging the

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<sup>570</sup> Transcript Page 3440

<sup>571</sup> Employee Exhibit 118

<sup>572</sup> Transcript Page 613

<sup>573</sup> Transcript Page 4392

lack of specificity of his April 7 letter, Principal White characterized this meeting in his timeline given to HR on Call, Inc., “met with John Freshwater to identify items.” [HR on Call, Inc. investigation Notes with Bill White, 5/21/08] There were no other witnesses to this meeting, either. As a result of this meeting, John Freshwater believed he had received clarification that his *personal* Bible could stay on his desk, but that a nondescript box of Bibles owned by the FCA and some religious DVDs must be removed from the room.<sup>574</sup>

Principal White followed up the conversation with a written directive dated Monday, April 14, 2008. (Board Exhibit 13) While this letter is still ambiguous, not defining key terms, John Freshwater believed he understood Principal White’s intent based on the April 11 conversation. The letter, in its entirety, states:

*“This letter is to follow up on the letter you were given on April 7 and our conversation on April 11 concerning the removal of religious items from your classroom.*

*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.*

*Your prompt attention to this matter is appreciated”.* (emphasis added)

The key terms, “*all religious items*” and “*Bibles*”, are not defined within the document itself. As heard in testimony, “religious items” is highly subjective.<sup>575</sup> Many witnesses were asked in the hearing if the Bush / Powell poster is *religious*. Many said ‘no’, some ‘yes’.<sup>576</sup> The highly subjective nature of the concept of “religious items” is further illustrated by the occasion when Mr. Ellifritz was asked by Principal White to relocate an object in his room not because it *was*

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<sup>574</sup> Transcript Page 4412

<sup>575</sup> Transcript Page 2024, 2027

<sup>576</sup> Transcript Page 2396, 2874, 5382, 3911, 2089, 286, 1261

religious, but because it *might* be perceived that way.<sup>577</sup> The April 14<sup>th</sup> letter can **only** be clearly understood in light of the April 11 conversation. (See Diagram – Inconsistent Directives Given by Principal Bill White).

During the April 11, 2008, meeting between Principal White and John Freshwater, clarification was sought by Teacher Freshwater and received from Principal White regarding which “..bible..” (sic) was the focus of the April 7, 2008, letter. Regarding his conversation with Principal White, John Freshwater testified,<sup>578</sup>

*“What he said and what the letter says, the document states. He told me the Bible needed to be removed out of my classroom, and the letter that he gave me was different.”*

John Freshwater further testified describing his interaction with Principal White on April 11, 2008,<sup>579</sup>

*“We met. And I wanted clarity, so I thought this is a good time to get some clarity on what he said verbally and what he said in his document that he gave me. So I was talking to him about the -- my personal Bible on my desk. And I said something to him about are you referring or are you talking about the FCA Bibles in the back of the room in the box in the back. And when I -- the discussion went into that area. I just remember seeing a look on his face that was, I thought, rather interesting. It was a look of, I guess, surprise. We continued talking, and we were discussing the time periods in complying with the April 7th. And I asked when they needed to be out, and the decision was made for that following Wednesday, April 16th. And then we got back to the aspect of my personal Bible, and he goes, Oh, you may keep your personal Bible there, but you need to remove the FCA Bibles. So I walked out, and I think -- my clarity was much better. I remember asking again, and the clarity was much better. So I remember walking out of that meeting thinking, Okay, that's clearer”.*

John Freshwater received clarity from Principal White which distinguished Teacher Freshwater’s personal “..bible..” (sic) from the “Bibles” which belonged to the FCA

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<sup>577</sup>Transcript Page 527, 2833

<sup>578</sup>Transcript Page 4392

<sup>579</sup>Transcript Page 4406-4407

# Inconsistent Directives Given by Principal Bill White

## **Bill White's April 7th, 2008 letter**

As directed by Steve Short  
and reviewed by Board Attorney

To Mr. Freshwater:

Specific items mentioned to be removed

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- Bible on Desk
- 10 Commandments

Board Exhibit 12

## **Bill White's April 14th, 2008 “clarification” letter**

To Mr. Freshwater:

Specific items mentioned to be removed

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- FCA Bibles
- Videos

Board Exhibit 13

club. John Freshwater left the April 11, 2008, meeting with a distinct declaration made by Principal White between the singular “bible” (sic) and the plural “Bibles”. The distinction between the singular and the plural is of critical importance as the contrast between Principal White’s April 7 and April 14 letter reflects John Freshwater’s understanding and corroborates his belief that his personal “..bible..” (sic) denoted in the April 7, 2008, could stay in his classroom, but that the FCA “Bibles” denoted in the April 14, 2008, letter had to leave the classroom.

The fact of Principal White’s communication to John Freshwater is corroborated by the change in his letters from the singular to the plural in his description of a Bible. Principal White further corroborated John Freshwater’s belief regarding the singular versus the plural when on April 16, 2008, during an inspection of Teacher Freshwater’s classroom, Principal White stated in response to Teacher Freshwater’s notation of his personal Bible sitting on his desk, “I’ll have to get back with you on that”.<sup>580</sup> If Principal White had previously told John Freshwater that his personal Bible had to be removed, there would be no reason to “have to get back with you on that” as Principal White would have simply reiterated his alleged previous direction without need to check with Superintendent Short. (See Diagram – What is John Freshwater to conclude about his personal Bible?)

Principal White’s confusing communications were not limited to having only occurred with John Freshwater. Exactly one year to the day from April 14, 2008, Principal White again was the creator of a confusing message regarding a teacher’s Bible when Teacher Lori Miller sought clarification on April 14, 2009. Two weeks previous to April 14, 2009, Principal White told Teacher Miller items of religious display had to be removed from the sight of students.<sup>581</sup>

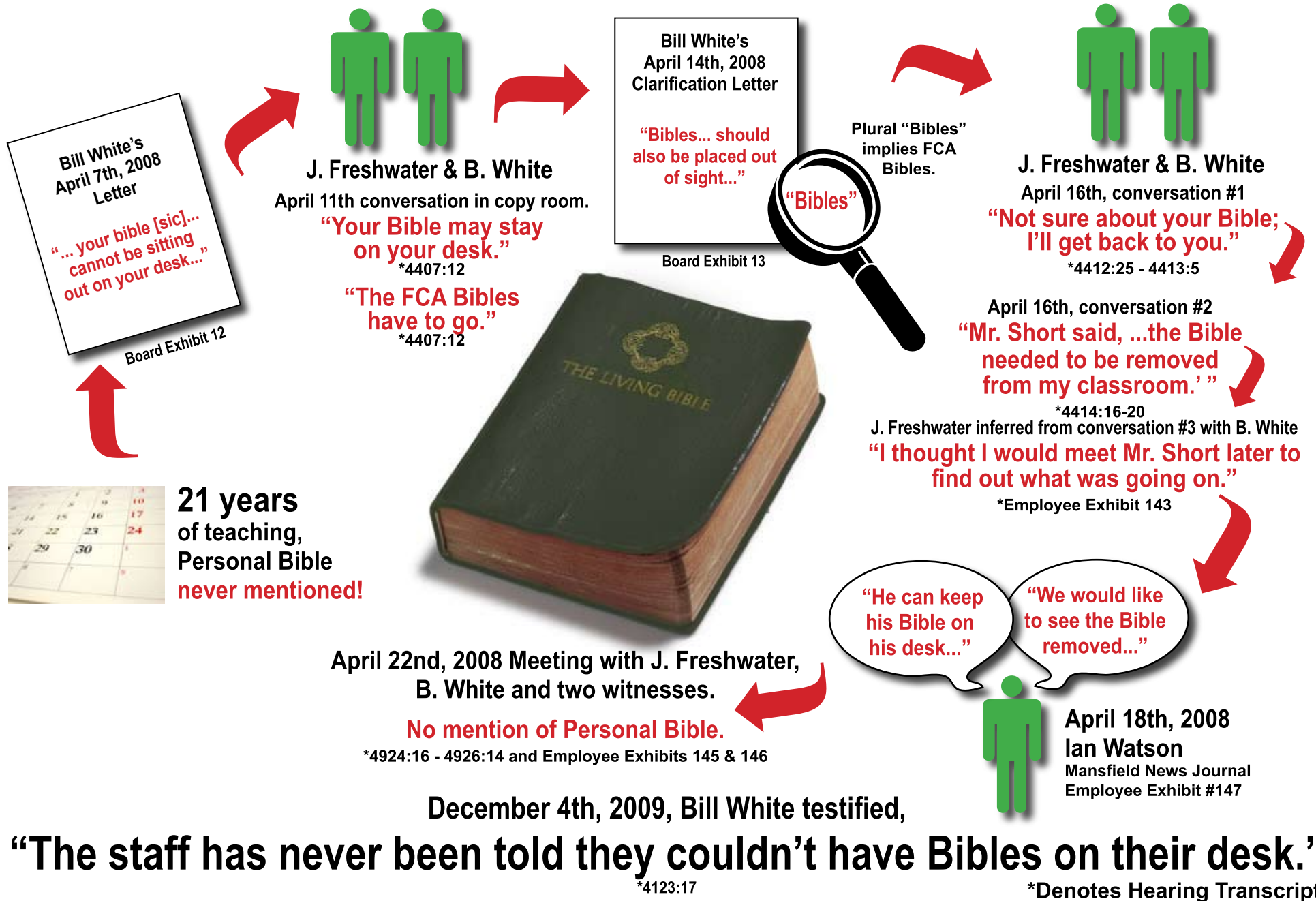
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<sup>580</sup> Transcript Page 4412

<sup>581</sup> Employee Exhibit 106

# What is John Freshwater to conclude about his personal Bible?

## Inconsistent messages given to John Freshwater by Administration:





When Teacher Miller sought clarification on April 14, 2009, she audio-recorded her conversation and learned from Principal White that she could in fact keep her personal Bible on her desk, but that other items had to be removed. The clarifying question posed by Principal White was whether Teacher Miller's personal Bible was part of a "display", to which she replied "No". (See Diagram – What is Lori Miller to conclude about her personal Bible?)

John Freshwater was never asked if his green, personal Bible was part of a display. John Freshwater has at all times maintained that his personal Bible was never a display for anybody else but rather was his personal inspiration, a fact upon which his training permitted him to rely.<sup>582</sup>

In *prompt, respectful obedience*, John Freshwater fully complied with the directive as he understood it by removing all items that were specified in the verbally-informed written directive: 10 Commandments, DVDs and videos, box of FCA Bibles, and motivational statements.<sup>583</sup> (Only some of the motivational statements had Bible verses, but all of them were removed.) Administrators agree that these articles were removed in a timely fashion.<sup>584</sup>

John Freshwater also offers a *reasoned explanation* of the context and purpose of bringing the school library materials into the classroom on April 15, 2008 (characterized in the Amended Resolution as "additional religious articles"). We observe that Principal White did not direct the removal of these books on the April 16 inspection, neither did he report them to Superintendent Short.<sup>585</sup> John Freshwater testified that he was greatly concerned by the administrators' vacillation on whether or not he could keep a Bible on his desk, and worried that they might reverse themselves again, and remove it themselves from his desk.<sup>586</sup> On Tuesday, April 15,

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<sup>582</sup> Transcript 4402, Employee Exhibit 70

<sup>583</sup> Transcript Page 4419

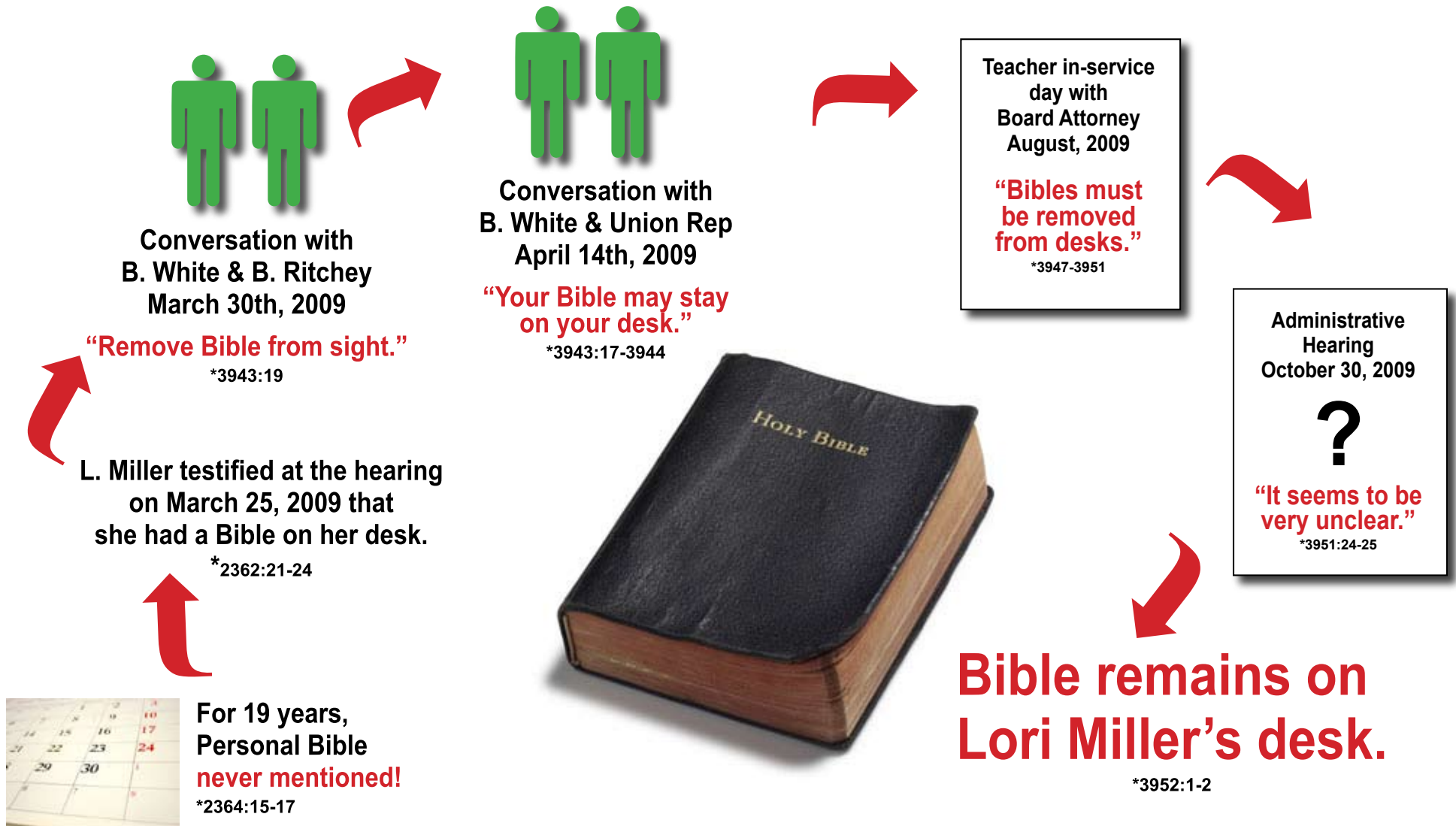
<sup>584</sup> Transcript Page 76

<sup>585</sup> Transcript Page 75-77

<sup>586</sup> Transcript Page 445, 447

# What is Lori Miller to conclude about her personal Bible?

## Inconsistent messages given to Lori Miller by Administration:



December 4th, 2009, Bill White testified,

**"The staff has never been told they couldn't have Bibles on their desk."**

\*4123:17

\*Denotes Hearing Transcript

2008, he went to the publicly-funded school library, found a publicly-funded school Bible and another publicly-funded school book titled *Jesus of Nazareth*, checked them out and returned to his publicly-funded school classroom. After perusing the names of the students who had checked them out in past years he placed the publicly-funded school books on his publicly-funded school desk in his publicly-funded school classroom.

HR on Call, Inc. and others try to say that putting these books out on his desk was an act of defiance, as if they were the same kinds of material as those which were directed to be removed. But John Freshwater did not view them as the same. That is why he checked them out: because he was curious and to compare them. He would have found that the content of the Bibles was the same, but because one was bought with school funds and could be freely accessed by students, and the other was personal and students may not see it, there must be some difference in the two Bibles. John Freshwater tried to understand what the difference was, but was having trouble, so he asked Carrie Mahan to explain it to him. She was unable to clarify<sup>587</sup>. But, it is evident that John Freshwater believed the administration viewed the personal material as fundamentally different from publicly-funded material. He was trying something different that would meet his need for inspiration and at the same time comply with administration's directive. The library books were similar enough in content to his personal Bible that they could serve as a substitute for his inspiration, should he discover it missing from his desk one morning; but they were different enough in some way – perhaps source of funding, John Freshwater was not sure how – that he believed them to be acceptable to the administration.<sup>588</sup> Far from being a rebellious act, John Freshwater was striving to reach a solution to *help* the administrators achieve their unstated goals while maintaining his desire to keep a Bible on his desk. Investigators Tom

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<sup>587</sup>Transcript Page 4394

<sup>588</sup>Transcript Page 445, 447

and Julia Herlevi grossly mischaracterized this act with admittedly inflammatory language, as making a “statement,” in order to wrongly imply a rebellious spirit. (Employee Exhibit 148, p 46) The Amended Resolution further mischaracterizes it as “mak[ing] a point” in a *new act* of insubordination.

Principal White came in to John Freshwater’s room on Wednesday, April 16, 2008 to inspect for compliance with the directives.<sup>589</sup> (John Freshwater testified that **Principal White approved**. When John Freshwater asked for specific confirmation regarding the Bible on his desk, Principal White *did not know* the answer, and promised to return later with a firm answer. Principal White disputes this account).<sup>590</sup>

Principal White told the HR on Call, Inc. investigators that he instructed John Freshwater that the Colin Powell poster needed to come down (April 14<sup>th</sup> or 16<sup>th</sup>), but that John Freshwater gave no response. (It is irrelevant as to whether Principal White is attempting to conceal an error of his with a falsehood, or he is accurate in his report: he is admitting to his own *ineffective communication with John Freshwater to remove the Powell poster*. John Freshwater cannot *willfully* disregard a directive he *did not receive*.)

Superintendent Short, Principal White, and Mr. Herlevi are all assuming that John Freshwater, as they, considered the Bush poster to be religious, and that he refused to take it down in spite of a clear directive to remove it. The whole charge of insubordination regarding this item rests on the administration’s assumption that John Freshwater’s perception of his poster was identical to their perception of it. There are two glaring mistakes here: (1) John Freshwater did not consider the Bush poster to be religious, but patriotic, and John Freshwater is supported

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<sup>589</sup> Transcript Page 513

<sup>590</sup> Transcript Page 4412

by Superintendent Maley, Principal Molnar and Superintendent Laursen<sup>591</sup> and (2) there was NO SPECIFIC DIRECTIVE given to remove that particular poster, so John Freshwater did not understand that it needed to come down. John Freshwater did not categorize the Bush poster as a “religious item”, and therefore saw no need to remove it. Teacher Wes Elifritz testified that he never saw or even knew there was a Bible verse upon the Bush poster until he arrived at the hearing.<sup>592</sup> John Freshwater testified the Bush poster had long been covered with other hanging papers at the top edge effectively concealing the portion where any words could be seen.<sup>593</sup>

At the end of the April 16, 2008 school day, the only outstanding directive was to *remove the Bible from the desk*, and, unknown to John Freshwater, *the Bush / Powell poster*. No explicit directive had been issued to remove *the publicly-funded school Bible and Jesus of Nazareth* (Superintendent Steve Short said that only the personal Bible and the George Bush poster remained).<sup>594</sup> John Freshwater, having never been a member of the union, was unaware of the grievance process for appealing to Administration. Superintendent Short failed in his responsibility to uphold the contract for all teachers pursuant to Board Policy 1230, paragraph A. John Freshwater sought outside help in defending the constitutionality of keeping the Bible on his desk.<sup>595</sup> Mr. Daubenmire and Mr. Cline arranged a public forum on the public square in Mount Vernon that afternoon.<sup>596</sup> John Freshwater read a statement, and distributed a press release wherein he publicly and respectfully *appeals* to the Board to reconsider the directive (Board Exhibit 14):

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<sup>591</sup> Transcript Page 5403, 3911

<sup>592</sup> Transcript Page 2827

<sup>593</sup> Transcript Page 4661

<sup>594</sup> Transcript Page 292

<sup>595</sup> Transcript Page 4415, 4417

<sup>596</sup> Transcript Page 3473

*“...My question today is if Congress can make no law prohibiting the ‘free exercise’ of my faith, from where does the Mt. Vernon City Schools obtain the power to restrict it?  
Until the Mount Vernon City Schools can demonstrate to me how I can remove the Bible from my desk without sacrificing my own God-given right to free exercise of my faith, I cannot in good-conscience comply with the directive. I do not forfeit my right to free expression of my faith when I walk into the school and because I strongly object to the “Christian censorship” being promoted in our schools I respectfully reject the request to remove the Bible”.*<sup>597</sup> (emphasis added)

This appeal was also received by Superintendent Short. (Although John Freshwater’s appeal was not read at the square; it was present in the press release, and more importantly, in the document received by Superintendent Short.) This is in addition to two *verbal* appeals, when John Freshwater expressly pointed out his Bible to Principal White on April 16<sup>th</sup>, asking for confirmation that it was still permissible<sup>598</sup>, and when John Freshwater later pointed out the publicly-funded school Bible and book to Administrator Mrs. Strouse, again asking for confirmation that it was permissible.<sup>599</sup>

This appeal *was never answered* by the Board or the Administration. If the administrator was dissatisfied with the form of the appeal, it was the administration’s responsibility to John Freshwater of the process for grievance as they did with Teacher Lori Miller.<sup>600</sup> During the next six weeks that remained of the school year, the administration neither *repeated* the directive in any way, nor exercised their power to *physically remove* the allegedly offensive items. We note that it is *incumbent* upon the superior to acknowledge partial fulfillment of directives, and highlight incomplete tasks (“corrective support”).<sup>601</sup> Principal Keib indicated that there are many innocent factors that may lead to incomplete compliance, and that superiors bear the

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<sup>597</sup> Transcript Page 76

<sup>598</sup> Transcript Page 4414

<sup>599</sup> Transcript Page 1899

<sup>600</sup> Board Exhibit 66

<sup>601</sup> Transcript Page 3641-3642; 3900

responsibility for searching this out.<sup>602</sup> The Administration's **inaction** effectively created a new *policy, practice, and custom* permitting a Bible to be kept on a teacher's desk, and specifically permitting John Freshwater to keep his Bible on his desk (and the Bush / Powell poster on the wall).

Furthermore, the Administration made a commitment to take upon itself responsibility for any religious content in John Freshwater's classroom. On April 21 or 22, 2008, Principal White met with John Freshwater and two other witnesses, Administrator Debe Strouse and Teacher Lori Miller. Principal White gave new directives to John Freshwater covering a wide range of topics, and for the first time informed him of some of the wild allegations against him. Neither the Bible on the desk, nor the school library Bible and book, nor the Bush / Powell poster were mentioned. Principal White was reading from his notes, a document titled "Bullet Points for Meeting with John Freshwater on 4/21/08," a copy of which was provided to John Freshwater only at his request. Key in this discussion is the last bullet point:

*"Finally, Debe Strouse, will be monitoring your classroom to ensure you do not teach religion or promote your religious beliefs with students". (emphasis added)*

Superintended Steve Short confirmed this language in testimony, "The monitor was to monitor and make sure that – to make sure that John Freshwater followed board policy." *Ensure* means "to make sure, certain, or guarantee." More than a threat, which has no place in a professional workplace, and would be an act in gross violation of Board Policy 3362.01 Threatening Behavior Toward Staff Members, this is a statement that the Administration will exercise its power to *make certain*, or *guarantee* that religious beliefs are not promoted with students. Principal White's April 7, 2008 letter explicitly connected "promotes ... a particular religion" with "keep religious materials displayed." Hence, the premise for removing the "religious articles" was that

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<sup>602</sup> Transcript Page 3641-3642

their very presence *promoted* religious beliefs. This bullet point is an explicit statement that shifts responsibility onto the Administrators for *making sure* that “teaching” or “promoting” religion does not occur. The power vested in the administration includes the power to physically remove items from a classroom, as High School Principal Kathy Kasler has done.

From April 23, 2008, until the end of the school year in June, Mrs. Strouse was physically present in every science class period for the entire class period. In the entire duration she found no act of teaching religion or act of promoting his religious beliefs.<sup>603</sup> Based on the instructions she received from her superiors, she came into the room *expecting* to witness the “religious articles” actually used or referred to during the lessons, but never once saw anything like this. She even observed an occasion where there was “an opportunity for something to have happened [to violate directives or policies], and it didn’t.” When she reported this exculpatory evidence, Principal White told her “Just keep your notes”.<sup>604</sup> Alerted by her supervisors to seek specific articles, her notes identify a number of articles, including John Freshwater’s personal Bible, the publicly-funded school Bible and *Jesus of Nazareth*, the Bush-Powell poster, a bag containing a few Bibles and some religious books that appeared for a short time in the back of the room and later disappeared. [Employee Exhibit 15] *At no time during this period did the Administration either physically remove the articles, or direct John Freshwater to remove or conceal the articles.* Therefore, if the articles were offensive, it was the Administration’s responsibility to address them as often as they detected them to *ensure* and *guarantee* that religion is neither taught nor promoted. It is manifestly ***unjust*** to attempt to call John Freshwater to account for something for which his *superiors* volunteered responsibility.

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<sup>603</sup> Transcript Page 1831-1834

<sup>604</sup> Transcript Page 1891



Instead, the Administration's duplicitous commitment is seen in that Mrs. Strouse's notes were used to incriminate John Freshwater rather than *guarantee* that students were protected from the *promotion* of religious beliefs. Mrs. Strouse, who seems to harbor no ill will toward John Freshwater, testified that it wasn't "her job" to bring any perceived violations to John Freshwater's attention. This is worse than **unjust**: it is abuse of power.

It is impossible to overemphasize the obligation that the Superintendent and Administration have to ***ensure*** that all aspects of District operation comply with State laws and regulations as well as Board contracts and policies, (Board Policy 1230), and to ***enforce*** the statutes of Ohio, rules of the State Board, and the policies of this Board. R.C. 3319.01. (Board Policy 0132). To **guarantee** that all aspects of District operation comply at all times, the Administrators, and Superintendent Short, are *obligated* to **enforce** policies and *directives* issued under the authority of the Board upon *every observance* of violations. The undisputed fact that Mrs. Strouse, as an administrator and reporting directly to Principal White, was present all day every day for six weeks, was an hourly and daily eyewitness to the violations alleged herein, yet was instructed by her superiors to say *nothing* to John Freshwater about these alleged violations, constitutes gross dereliction of duty by Superintendent Steve Short and Principal William White under Board Policies 1230 and 0132. The undisputed fact that Superintendent Short and Principal White made *NO corrective efforts* from April 23, 2008 until the last day of classes in June 2008, despite having a continual presence in the room in the person of Ms. Strouse, gives the lie to the charge of Insubordination.<sup>605</sup> The Administrators' dereliction of duty cannot be justly twisted to impute *insubordination* upon John Freshwater.

John Freshwater complied *promptly* with all directives that were effectively communicated to him, with the exception of the Bible on his desk which he publicly *appealed*.

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<sup>605</sup> Transcript Page 3900, 5386

The appeal was never answered, and the Administration's inaction created a *policy, practice and custom* that permitted the Bible on his desk, permitted the Bush / Powell poster, and permitted the publicly-funded school Bible and *Jesus of Nazareth* books to be in the room. Pursuant to the April 21 Bullet Points, the Administration took upon itself responsibility for "religious articles" in his room, but duplicitously exploited the opportunity to *suborn insubordination*.

In response to the identified specification of the charge listed in the BOE's resolution, as required and limited by R.C. 3319.16, balanced by the clear and convincing standard or any other, John Freshwater was not willfully nor persistently in violation of any identified reasonable regulation of the BOE; nor do any of his actions constitute other good and just cause based upon the requisite intent. Therefore, the specifications in section (4) of the BOE's *Amended Resolution of Intent to Consider the Termination of the Teaching Contract(s) of John Freshwater* must be deemed **unsubstantiated**.

## **CONCLUSION**

The sum of the decision calculus in this matter has now demonstrated that John

Freshwater prevails in this matter because:

1. Any and all matters related to John Freshwater's use of a Tesla Coil were adjudicated by Principal William White's letter to John Freshwater dated January 22, 2008.
2. The Academic Content Standards were not applicable in the Mount Vernon City School District until the beginning of the 2004-2005 school year.
  - A. John Freshwater taught his 8<sup>th</sup> grade students exactly as he was required as evidenced by the only known assessment tool authorized in the State of Ohio; the Ohio Achievement Tests. John Freshwater's students received proper instruction resulting in him being the only 8<sup>th</sup> grade teacher whose students

achieved a proficient rating of seventy-seven (77%) percent on the Ohio Achievement Tests despite his classes containing the most special education students.

B. Ten (10) eyewitness students, two (2) teachers and one (1) principal testified John Freshwater never instructed on the topics of creationism nor intelligent design.

3. John Freshwater complied with all of the known parameters as he facilitated, monitored and supervised the Fellowship of Christian Athletes (FCA).

A. Witness testimony from credible sources clearly demonstrates John Freshwater did not conduct nor lead any prayers during FCA meetings.

B. Witness testimony from credible sources clearly demonstrates John Freshwater never asked non-familial students to lead prayer in FCA meetings.

C. Witness testimony from credible sources clearly demonstrates John Freshwater did not exceed his role as facilitator, monitor and supervisor of the FCA.

4. John Freshwater exercised a constitutional right to have a personal Bible in his classroom on his desk.

A. John Freshwater removed all items he was lawfully asked to remove.

B. John Freshwater did not receive any instruction from Principal William White or anybody else to remove the patriotic poster, which was distributed through the Mount Vernon Middle School office, depicting former President George Bush and Colin Powell.

C. John Freshwater never intended or tried to “make a point” by bringing additional religious articles into his classroom.

John Freshwater has a right to have the allegations made against him be proven by the BOE to the standard of proof which requires clear and convincing evidence. The BOE has failed to establish any of the specifications against John Freshwater by clear and convincing evidence.

John Freshwater prays this Referee, after consideration of the evidence presented, and assessment of the testimony heard, will find the Board of Education (BOE) has failed to prove the charges set forth in the resolution to consider his termination originally dated June 20, 2008, but amended on July 7, 2008.

In response to each of the identified specifications of the charges listed in the BOE's resolution, as required and limited by R.C. 3319.16, balanced by the clear and convincing standard or any other, John Freshwater was not willfully nor persistently in violation of any identified reasonable regulation of the BOE; nor do any of his actions constitute other good and just cause based upon the requisite intent. Therefore, all specifications in the BOE's *Amended Resolution of Intent to Consider the Termination of the Teaching Contract(s) of John Freshwater* must be deemed **unsubstantiated**.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing John Freshwater's Closing Statement Brief was delivered this \_\_\_\_\_ by counsel to:

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