Appignani Humanist Legal Center

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September 16, 2019

Via Email
James D. Smith, Superintendent
Griffin-Spalding County School System
216 S 6th Street
Griffin, GA 30224
jim.smith@gscs.org

Lindy Pruitt, Principal
Spalding High School
433 Wilson Road
Griffin, GA 30224
lindy.pruitt@gscs.org

Re: Establishment Clause Violations

Dear Mr. Smith and Ms. Pruitt:

A concerned parent of a Griffin-Spalding County School System ("District") student has alerted our office to actions by District employees, specifically employees at Spalding High School ("SHS"), which violate the Establishment Clause of the First Amendment. These activities (discussed below) reflect a deep pattern of disregard for the Constitution, as well as strong favoritism toward Christianity within the District's football and softball programs, creating a coercive atmosphere that is hostile to both non-Christians and Christians. The purpose of this letter is to advise you that this activity must immediately cease.

The American Humanist Association ("AHA") is a national nonprofit organization with over 34,000 members across the country, including many in Georgia. The Appignani Humanist Legal Center, the AHA's legal arm, has litigated dozens of cases church-state separation cases in state and federal courts nationwide, including in Georgia.[1] The mission of AHA's legal center is to protect one of the most fundamental principles of our democracy: the constitutional mandate requiring separation of church and state.

It is our understanding that on August 23, 2019, the District permitted Griffin First United Methodist Church ("Church") to host a breakfast and sermon for SHS football players, at the school, ahead of a game scheduled for that evening. The District's Facebook account re-posted a post from the Church promoting the event with the caption, "Thank you First United Method

[1] See *Am. Humanist Ass'n, Inc. et al v. Hall County School District et al*, 2:14-cv-00288-WCO (N. D. Ga., 2015), (successfully settled in AHA's favor in case challenging school-endorsed prayers under the Establishment Clause).

Church!" Pictured in this post are Executive Pastor Andrew Covington and Senior Pastor Carter McInnis leading students in prayer." Furthermore, we understand that SHS softball coaches are leading students in prayer before games (see enclosed photos). Permitting the infiltration of religion into a public school—or, as here, publicly celebrating it on social media—is an affront to the Establishment Clause. It is particularly problematic given that this is a team atmosphere, where young people are under great pressure to conform to group expectations.

The First Amendment's Establishment Clause "commands a separation of church and state." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). It requires the "government [to] remain secular, rather than affiliate itself with religious beliefs or institutions." *Cty. of Allegheny v. ACLU*, *Greater Pittsburgh Chapter,* 492 U.S. 573, 610 (1989).

The Supreme Court "has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987). In "no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart." *McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948). "The State must be certain . . . that subsidized teachers do not inculcate religion." *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971). School districts must not permit any "of its teachers' activities [to] give[] the impression that the school endorses religion." *Marchi v. Board of Coop. Educ. Servs.*, 173 F.3d 469, 477 (2d Cir. 1999). *See also Holloman v. Harland*, 370 F.3d 1252, 1285 (11th Cir. 2004) (teacher's practice of initiating silent prayer with her students with "let us pray" and ending it with "amen" violated Establishment Clause); *Bishop v. Aronov*, 926 F.2d 1066, 1073 (11th Cir. 1991) ("a teacher's [religious] speech can be taken as directly and deliberately representative of the school").[2] In fact, even "permit[ting] [a teacher] to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause." *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994).

[2] *See also Borden v. Sch. Dist.*, 523 F.3d 153, 174 (3rd Cir. 2008) (coach silently bowing head and kneeling while team prayed violated Establishment Clause); *Doe v. Duncanville Indep. Sch. Dist*., 70 F.3d 402 (5th Cir. 1995) (school's practice of allowing coaches to participate in student prayers during athletic events violated Establishment Clause); *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 163 (5th Cir. 1993) (*Duncanville I*) (school officials' supervision of student-initiated and student-led prayers preceding basketball games violated Establishment Clause); *Roberts v. Madigan*, 921 F.2d 1047, 1056-58 (10th Cir. 1990) (a teacher's display of a Bible in his classroom "had the primary effect of communicating a message of endorsement of a religion"); *Steele v. Van Buren Public Sch. Dist.*, 845 F.2d 1492, 1493 (8th Cir. 1988) (permitting teachers to conduct prayer at school functions unconstitutional); *Bell v. Little Axe Indep. Sch. Dist*., 766 F.2d 1391, 1396-97 (10th Cir. 1985) (finding unconstitutional endorsement when teachers "participat[ed] in religiously-oriented meetings involving students"); *Doe v. Wilson Cty. Sch. System*, 564 F. Supp. 2d 766 (M.D. Tenn. 2008) (holding that principal and kindergarten teacher who bowed their heads during a non-school sponsored prayer event and wore 'I Prayed' stickers during instructional time endorsed the prayer event and thus violated Establishment Clause); *Carlino v. Gloucester City High Sch*., 57 F. Supp. 2d 1 (D.N.J. 1999), *aff'd*, 44 Fed. Appx. 599 (3rd Cir. 2002) (principal's involvement with a baccalaureate service unconstitutional); *Sease v. Sch. Dist*., 811 F. Supp. 183, 192 (E.D. Pa. 1993) ("Clearly, a school employee's participation in, or sponsorship of, a public school gospel choir during school hours would be a violation of the Establishment Clause."); *Quappe v. Endry*, 772 F. Supp. 1004 (S.D. Ohio 1991), *aff'd*, 979 F.2d 851 (6th Cir. 1992) (participation of teacher in religious club for students meeting in elementary school directly after close of school day established "symbolic nexus between the school and the club, thus providing the active government participation necessary to find a constitutional violation").

To comply with the Establishment Clause, a government practice must pass the *Lemon* test,[3] pursuant to which it must: (1) have a secular purpose; (2) not have the effect of advancing or endorsing religion; and (3) not foster excessive entanglement with religion. *Allegheny*, 492 U.S. at 592. Government action "violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). In applying this test to public school activity,[4] the Supreme Court has emphasized that courts must defend the wall of separation with an even greater level of vigilance because "there are heightened concerns with protecting freedom of conscience from [even] subtle coercive pressure in the elementary and secondary public schools." *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

In addition to the *Lemon* test, in *Lee*, the Supreme Court formulated the separate "coercion test," declaring, "*at a minimum*, the [Establishment Clause] guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Id.* at 587 (emphasis added). In *Lee*, the Court held that a school's inclusion of a nonsectarian prayer in a graduation ceremony was unconstitutionally coercive even though the event was technically voluntary, and students were not required to participate in the prayer. 505 U.S. at 586. The Court reasoned that a school's "supervision and control of a . . . graduation ceremony places public pressure, as well as peer pressure" on students. *Id.* at 593. Students opposed to the prayer are placed "in the dilemma of participating . . . or protesting." *Id.* The Court concluded that a school "may not, consistent with the Establishment Clause, place primary and secondary school children in this position." *Id.*

Notably, in *Santa Fe*, the Supreme Court held that even student-initiated, student-led prayers at football games, which were *completely voluntary*, violated the Establishment Clause under the coercion test. 530 U.S. at 310. The school district argued that the policy was "distinguishable from the graduation prayer in *Lee* because it does not coerce students." *Id.* at 310. The Court rejected this contention, observing that even "if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present." *Id*. at 311-12.

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[3] The test is derived from *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

[4] The *Lemon* test remains binding within the Eleventh Circuit. The portions of the Supreme Court's opinion in *Am. Legion v. Am. Humanist Ass'n*, that criticized *Lemon* and proposed that courts "look[] to history for guidance"—Parts II-A and II-D—failed to garner a majority. 139 S. Ct. 2067, 2079-82; 2087-89 (2019). *See Id.* at 2094 (Kagan, J., concurring in part) ("I do not join part II-A."). And although Part II-B outlined four considerations that "counsel against efforts" to apply *Lemon* in certain cases and "toward application of a presumption of constitutionality," these words do not overrule *Lemon* or other Supreme Court cases requiring a governmental secular purpose. *Id.* at 2082-83. *See Fla. League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 462 (11th Cir. 1996) (holding that lower courts are "not at liberty to disregard binding case law that is . . . closely on point and has only been weakened, rather than directly overruled, by the Supreme Court."); *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997) (lower courts must not "conclude our more recent cases have, by implication, overruled an earlier precedent"). The plurality opinion in *Am. Legion* merely eschewed *Lemon* in a case involving a longstanding war memorial. The Court did not overrule *Lemon* in any other context. *See Am. Legion*, 139 S. Ct. at 2081 n.16. ("While we do not attempt to provide an authoritative taxonomy of the dozens of Establishment Clause cases that the Court has decided since [1947], most can be divided into six rough categories: (1) religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies; (2) religious accommodations and exemptions from generally applicable laws; (3) subsidies and tax exemptions; (4) religious expression in public schools; (5) regulation of private religious speech; and (6) state interference with internal church affairs. A final, miscellaneous category, including cases involving such issues as Sunday closing laws and church involvement in governmental decision-making might be added. We deal here with an issue that falls into the first category.") (internal citations omitted).

It is apodictic that schools cannot "sponsor the . . . religious practice of prayer." *Santa Fe*, 530 U.S. at 313. *See also Engel,* 370 U.S. 421 (1962). The Supreme Court in both *Santa Fe* and *Lee* ruled that including prayers school-sponsored events (such as varsity football games) unconstitutionally coerces students to participate in religious activity. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000); *Lee*, 505 U.S. at 590-92. And the Supreme Court more recently reiterated that "[o]ur Government is prohibited from prescribing prayers to be recited in our public institutions[.]" *Town of Greece v. Galloway*, 572 U.S. 565, 581 (2014) (citing *Engel,* 370 U.S. at 430). In the school context, the Court has held, "a religious invocation [i]s coercive as to an objecting student." *Id.* at 590 (citing *Lee,* 505 U.S. at 592-94).

In applying the first prong of *Lemon*, the Eleventh Circuit has made clear that whenever the government sponsors an "intrinsically religious practice," such as prayer, it "cannot meet the secular purpose prong" of the *Lemon* test. *Jager v. Douglas Cty. Sch. Dist*., 862 F.2d 824, 829-830 (11th Cir. 1989). *See also Kondrat'Yev v. City of Pensacola*, 903 F.3d 1169 (11th Cir. 2018) (Latin cross for Easter services); *ACLU v. Rabun Cty. Chamber of Commerce, Inc.,* 698 F.2d 1098 (11th Cir. 1983) (same). The court has specifically ruled that because "prayer is 'a primary religious activity in itself,'" a "teacher or administrator's intent to facilitate or encourage prayer in a public school is *per se* an unconstitutional intent to further a religious goal." *Holloman*, 370 F.3d at 1285 (teacher's practice of initiating silent prayer with her students violated Establishment Clause). *See also Jager*, 862 F.2d at 830 (11th Cir. 1989) (where school officials sponsor or participate in an "intrinsically religious practice," even if student-led, they have violated the First Amendment); *Jaffree v. Wallace*, 705 F.2d 1526, 1534-35 (11th Cir. 1983), *aff'd*, 472 U.S. 38 (1985); *Santa Fe*, 530 U.S. at 309 ("infer[ring] that the specific purpose of the policy" permitting but not requiring student-led prayers was religious thus failing the purpose prong).

Thus, the District's actions here in permitting coaches to pray with students and allowing church representatives access to students at school-sponsored activities are plainly unconstitutional under the first prong of *Lemon*. *See Holloman*, 370 F.3d at 1285-86 (teacher's participation in silent prayer with students "during the school day" lacked secular purpose); *Peloza,* 37 F.3d at 522 (teacher's discussion of religion with students before and after class "would not have a secular purpose"); *Karen B v. Treen.*, 653 F.2d 897, 901 (5th Cir. 1981) *aff'd,* 455 U.S. 913 (no secular purpose in statute authorizing teacher-initiated prayer at the start of school day).[5]

Yet, regardless of the purposes motivating the prayers, the District's actions fail *Lemon's* effect prong. The "effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval [of religion]." *Wallace v. Jaffree*, 472 U.S. 38, 56 n.42 (1985) (quotation marks omitted). Even the "mere appearance of a joint exercise of authority by Church and State provides a significant symbolic benefit to religion," and, therefore, has the impermissible primary effect of advancing religion. *Larkin v. Grendel's Den*, 459 U.S. 116, 126-27 (1982) (emphasis added). A religious activity is school-sponsored, and therefore unconstitutional, if "an objective observer . . . w[ould] perceive official school support for such religious [activity]." *Bd. of Educ. v. Mergens*, 496 U.S. 226, 249-

[5] *See also N. C. Civil Liberties Union v. Constangy*, 947 F.2d 1145, 1150 (4th Cir. 1991) (finding religious purpose in judge's practice of opening court sessions with prayer, as it involved "an act so intrinsically religious"); *Collins v. Chandler Unified Sch. Dist*., 644 F.2d 759, 760-63 (9th Cir. 1981) ("the invocation of assemblies with prayer has no apparent secular purpose"); *Hall v. Bradshaw*, 630 F.2d 1018, 1020-21 (4th Cir. 1980) (state's inclusion of prayer on state map failed purpose prong).

50 (1990). *See, e.g.*, *Santa Fe*, 530 U.S. at 309-10 (broadcasting student-led prayers over the public address system at public high school football game unconstitutional).

Accordingly, school officials must refrain not only from initiating religious practices with student, but also from participating in religious activities led by students. Even *de minimis* participation may render the activity school-sponsored, and thus prohibited by the Establishment Clause. *See, e.g., Borden v. Sch. Dist.*, 523 F.3d 153, 174 (3rd Cir. 2008), *cert. denied*, 555 U.S. 1212 (2009) (coach silently bowing head and kneeling while team prayed violated Establishment Clause); *Holloman, v. Harland*, 370 F.3d 1252, 1285 (11th Cir. 2004) (teacher's practice of initiating silent prayer with her students with "let us pray" and ending it with "amen" violated Establishment Clause); *Doe v. Duncanville Indep. Sch. Dist*., 70 F.3d 402 (5th Cir. 1995) (school's practice of allowing coaches to participate in student prayers during athletic events violated Establishment Clause); *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 163 (5th Cir. 1993) (*Duncanville I*) (school officials' supervision of student-initiated and student-led prayers preceding basketball games violated Establishment Clause); *Doe v. Wilson Cty. Sch. System*, 564 F. Supp. 2d 766 (M.D. Tenn. 2008) (holding that principal and kindergarten teacher who bowed their heads during a non-school-sponsored prayer event and wore 'I Prayed' stickers during instructional time endorsed the prayer event and thus violated Establishment Clause).

The Eleventh Circuit has admonished that "facilitating any prayer clearly fosters and endorses religion over nonreligion, and so runs afoul of the First Amendment. *Holloman*, 370 F.3d at 1288. Whenever a prayer "occurs at a school-sponsored event . . . the conclusion is inescapable that the religious invocation conveys a message that the school endorses" it. *Jager*, 862 F.2d at 831-32. The policy challenged in *Santa Fe* allowed the senior class to elect students to deliver a "brief invocation and/or message" at football games. 530 U.S. at 296-97. Despite the fact that any message would be student-led and student-initiated, the Supreme Court found the policy unconstitutional as it "involves both perceived and actual endorsement of religion." *Id.* at 305, 310. In this context, "an objective observer" would inevitably "perceive [the prayers] as a state endorsement of prayer." *Id*. at 308 (internal quotation marks omitted).

In short, the District's practice of allowing church officials and coaches to lead or participate in prayer with students is plainly unconstitutional under *Lemon*. *See Herdahl v. Pontotoc Cty. Sch. Dist*., 933 F. Supp. 582, 591 (N.D. Miss. 1996).

Nothing more need be proven, but it bears worth mentioning that the District's actions also separately violate the coercion test under *Lee*. As in *Lee*, the "prayer exercises in this case" are "improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise." 505 U.S. at 598. The prayers are "state-directed" in light of the "school district's supervision and control" of the event. *Lee*, 505 U.S. at 593.

Promoting the Church's team breakfast, sermon and prayer via the District Facebook page promotes religion and prayer is equally violative of the Establishment Clause. Because the District Facebook page is government speech, its contents "must comport with the Establishment Clause."

Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009).[6] Promoting the Church breakfast and thanking the pastors for their prayers plainly violates this constitutional stricture.

AHA recently sued—and won—against a Florida police department that similarly promoted a prayer event using the department's official Facebook. *Rojas v. City of Ocala,* 315 F. Supp. 3d 1256, 1278 (M.D. Fla. 2018). Applying *Lemon*, the court held that the department's actions violated all three prongs of the test. "Given that the Facebook page posting by the Ocala Police Department asked Ocala's citizens to join in 'fervent prayer'— an undisputedly religious action, and that the Prayer Vigil consisted of chaplains offering Christian prayers and singing from the stage with responsive audience participation, a reasonable observer would find that the Prayer Vigil had a religious purpose" and is thus unconstitutional. *Id.*

Unconstitutional endorsement need not even be intentional. In *Granzeier v. Middleton*, 955 F. Supp. 741, 746-47 (E.D. Ky. 1997), *aff'd*, 174 F.3d 568 (6th Cir. 1999), the court held that a government sign depicting a small (4-inch) "clip art" cross violated the Establishment Clause—reasoning, "the sign could be, and was in fact, perceived by reasonably informed observers, to be a government endorsement of the Christian religion. The court accepts that this apparent endorsement was not intended, but this made no difference in the observer's perception."

In view of these authorities, it is clear that the District is in violation of the Establishment Clause. This letter serves as an official notice of the unconstitutional activity and demands that Griffin-Spalding High School and the District terminate this and any similar illegal activity immediately.

We demand a written reply within two weeks of receipt of this letter setting forth the steps you will take to rectify this constitutional infringement. While we prefer to leave it up to school administrators to determine the actions it will take to correct Establishment Clause violations, we offer the following steps that, if implemented, would resolve this matter from our perspective:

1. Adopt a written policy prohibiting teachers, coaches and other school officials from leading, endorsing, facilitating, and participating in prayer with students; or inviting church clergy to do the same;

2. Eliminate the practice of authorizing church leaders to host breakfast sermons or like event for any other school-sponsored function;

3. Enforce said written policies by monitoring athletic program events and by sanctioning school officials for non-compliance with the penalties assessed for similar school code violations.

[6] Government-run social media accounts are clearly government speech, not private speech. *See Knight First Amendment Inst. at Columbia Univ. v. Trump,* 928 F.3d 226, 239 (2d Cir. 2019); *see also Davison v. Randall,* 912 F.3d 666 (4th Cir. 2019) (holding that a county official who maintained a "Chair Phyllis J. Randall" Facebook page had acted under color of state law); *Hawaii v. Trump*, 859 F.3d. 741, 773 n. 14 (9th Cir. 2017) (noting that the President's personal Twitter feed is comprised of "official statements by the President of the United States.").

4. Adopt a written policy restricting the use of any District social media account for the purpose of promoting religion.

We also remind you that any actions that might be considered punitive or retaliatory toward those raising concerns about the matters described herein would be unlawful as well. Thank you for your attention to this important matter.

Sincerely,
Monica L. Miller
Legal Director and Senior Counsel
American Humanist Association

(Enclosed Photos)

The Griffin-Spalding County School System, Griffin GA

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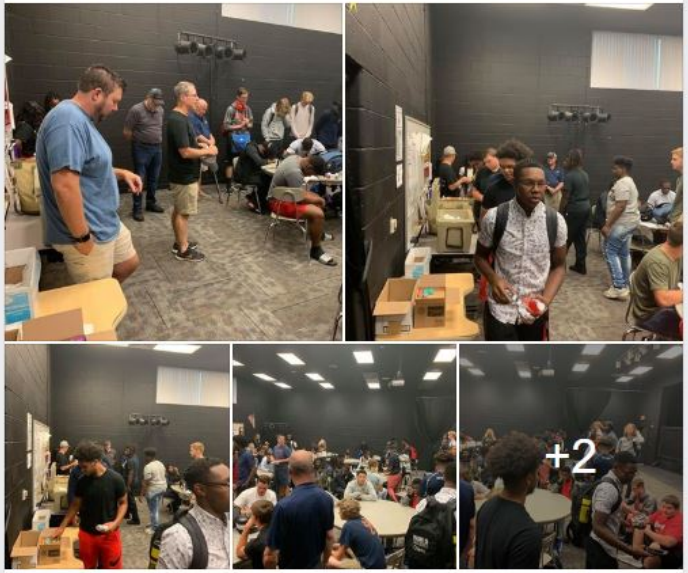
The Griffin-Spalding County School System, Griffin GA
August 23 at 3:37 PM ·

Thank you First United Methodist Church! #SpaldingStrong



Andrew Covington checked in to Spalding High School (Griffin, GA) with Fay Godard Cobb and 4 others.
August 23 at 8:58 AM · Griffin, GA

What an honor it was to cook and serve breakfast this morning to the Spalding High School (Griffin, GA) football team! (We even had the opportunity for pastor Carter McInnis to share a word with them and pray over them)

It was awesome for our Griffin First United Methodist Church men to invest in the lives of these young men and women!

**A side note to all our Griffin High Bears out there we didn't forget you guys! We will be heading your way with dinner for the team in just a couple of weeks!

#lovegriffin

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The Griffin-Spalding County ...

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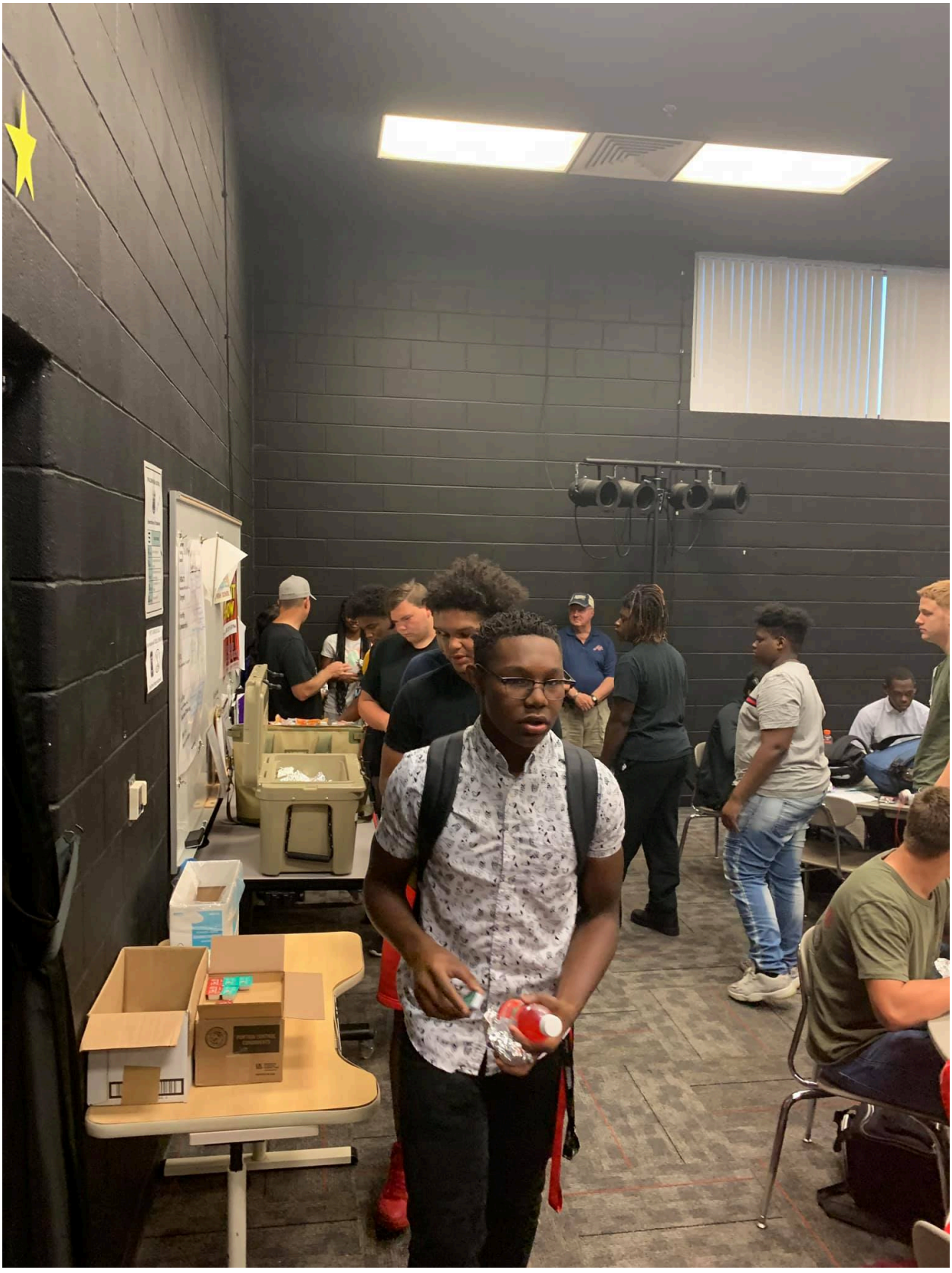

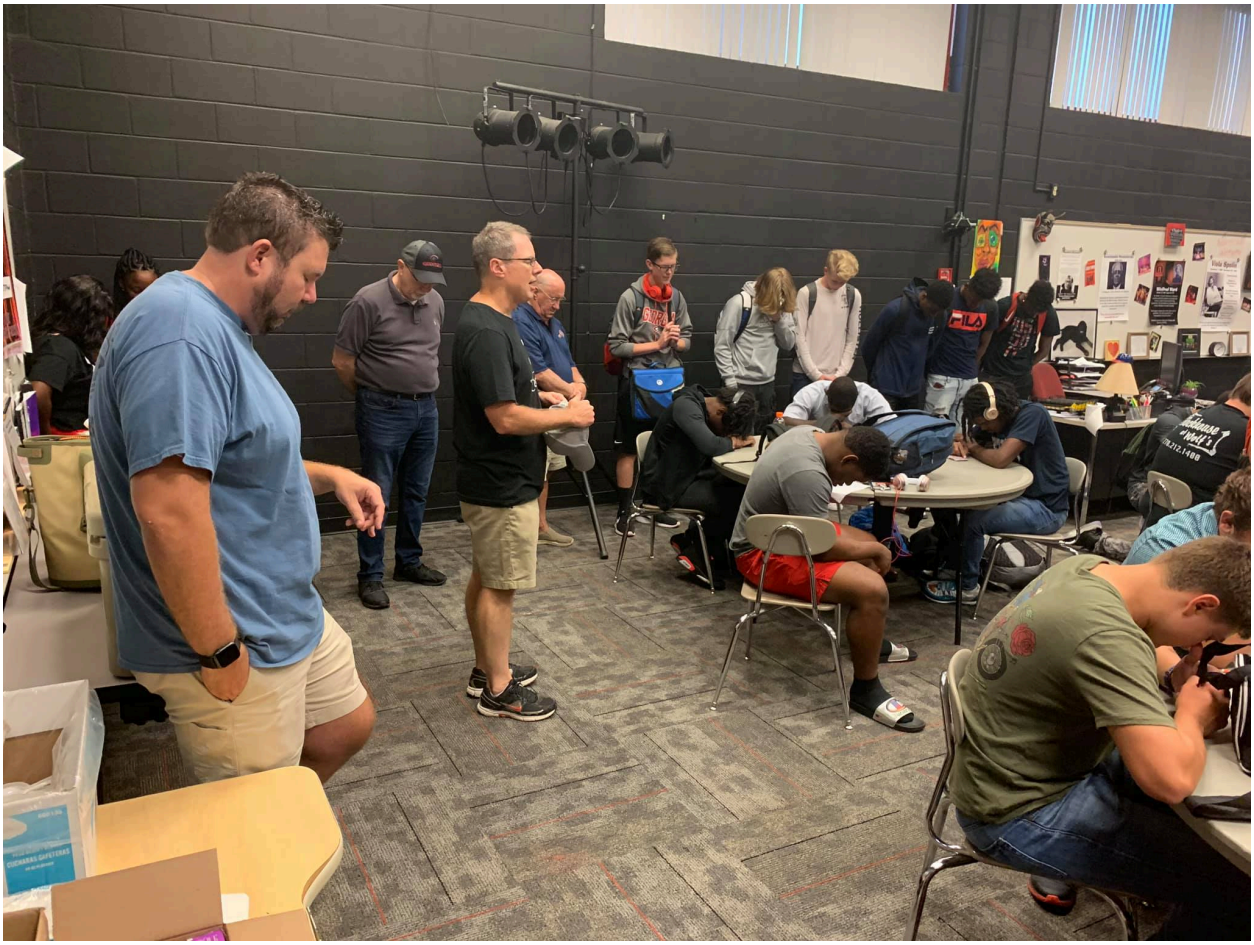
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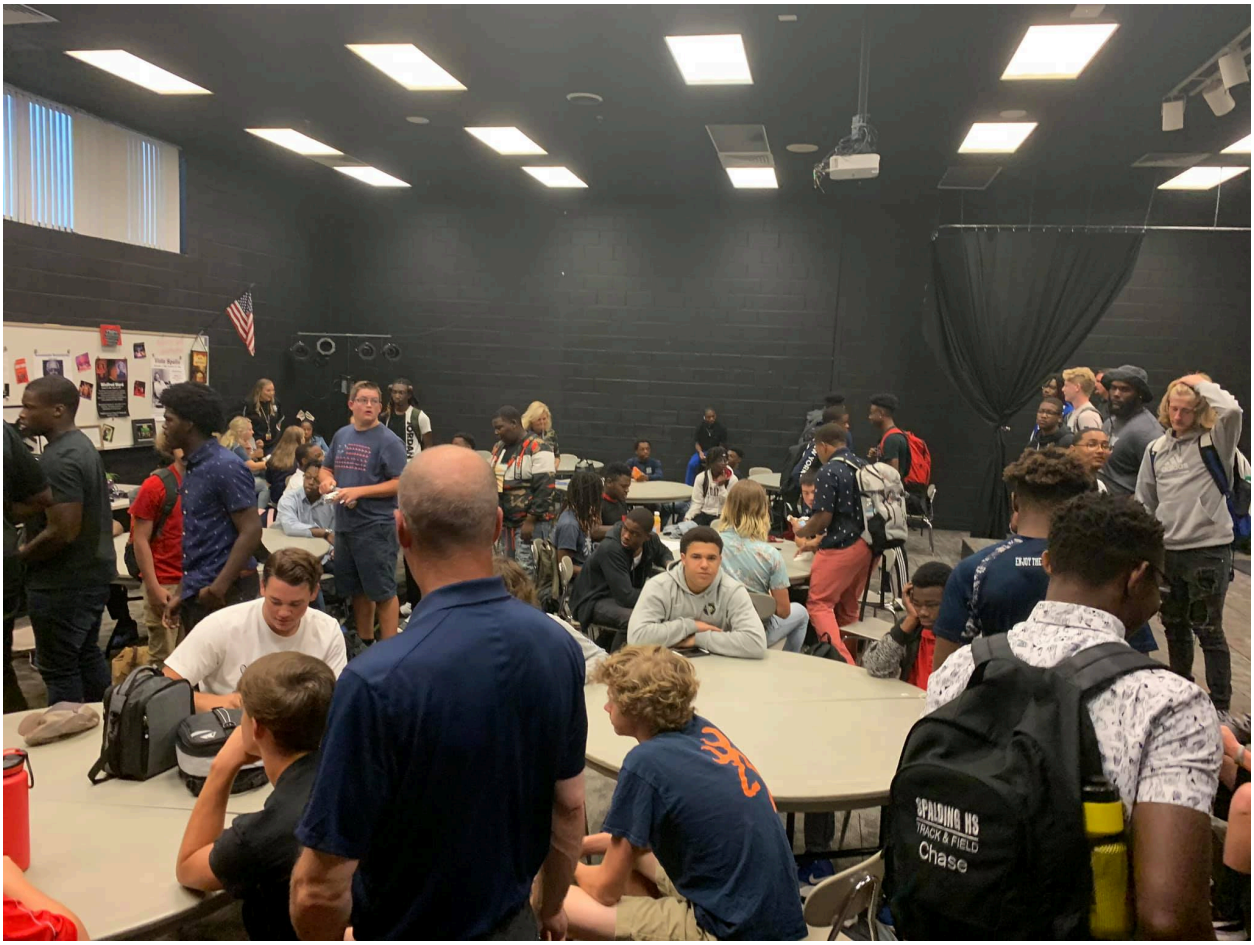
SPALDING HS
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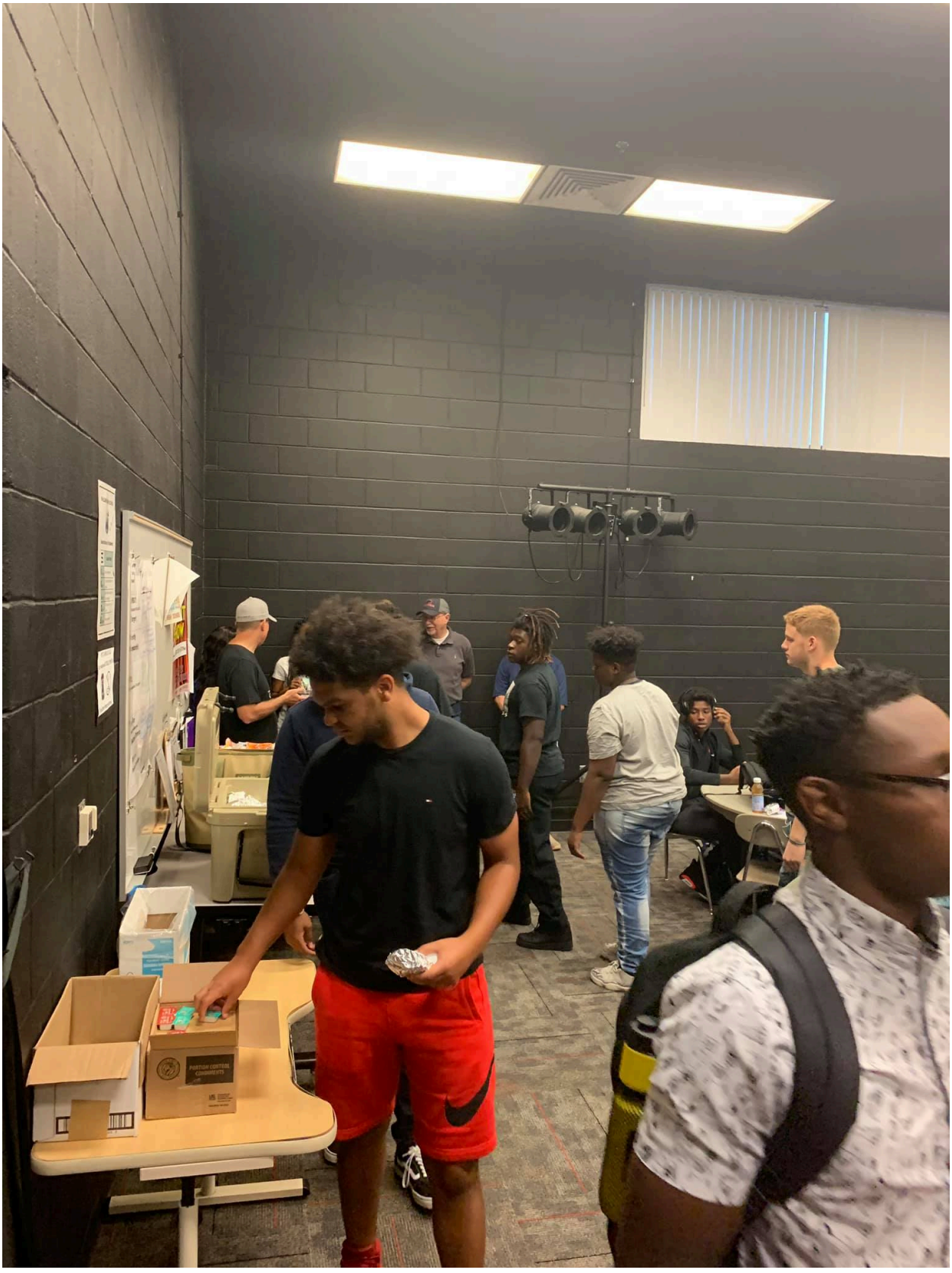

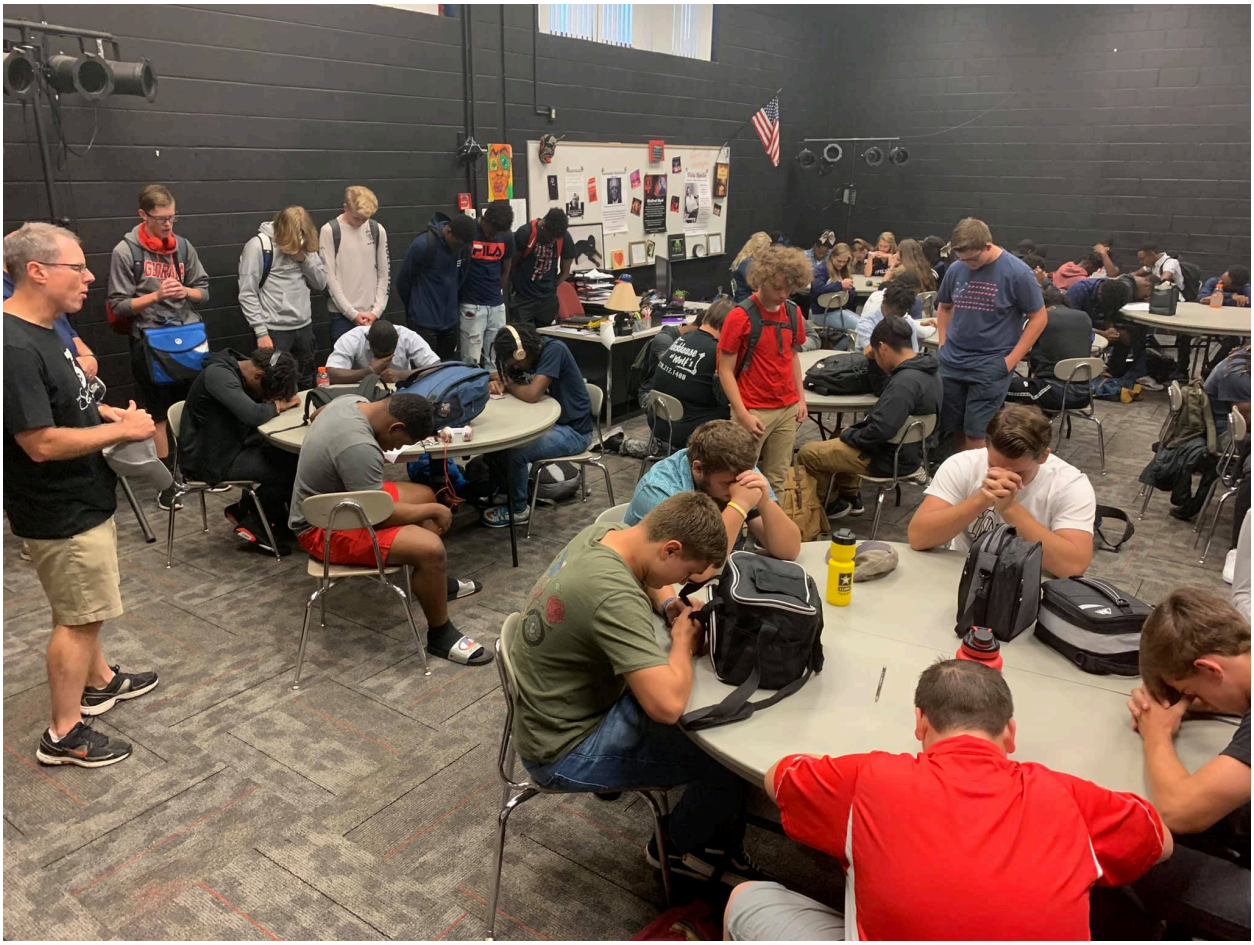

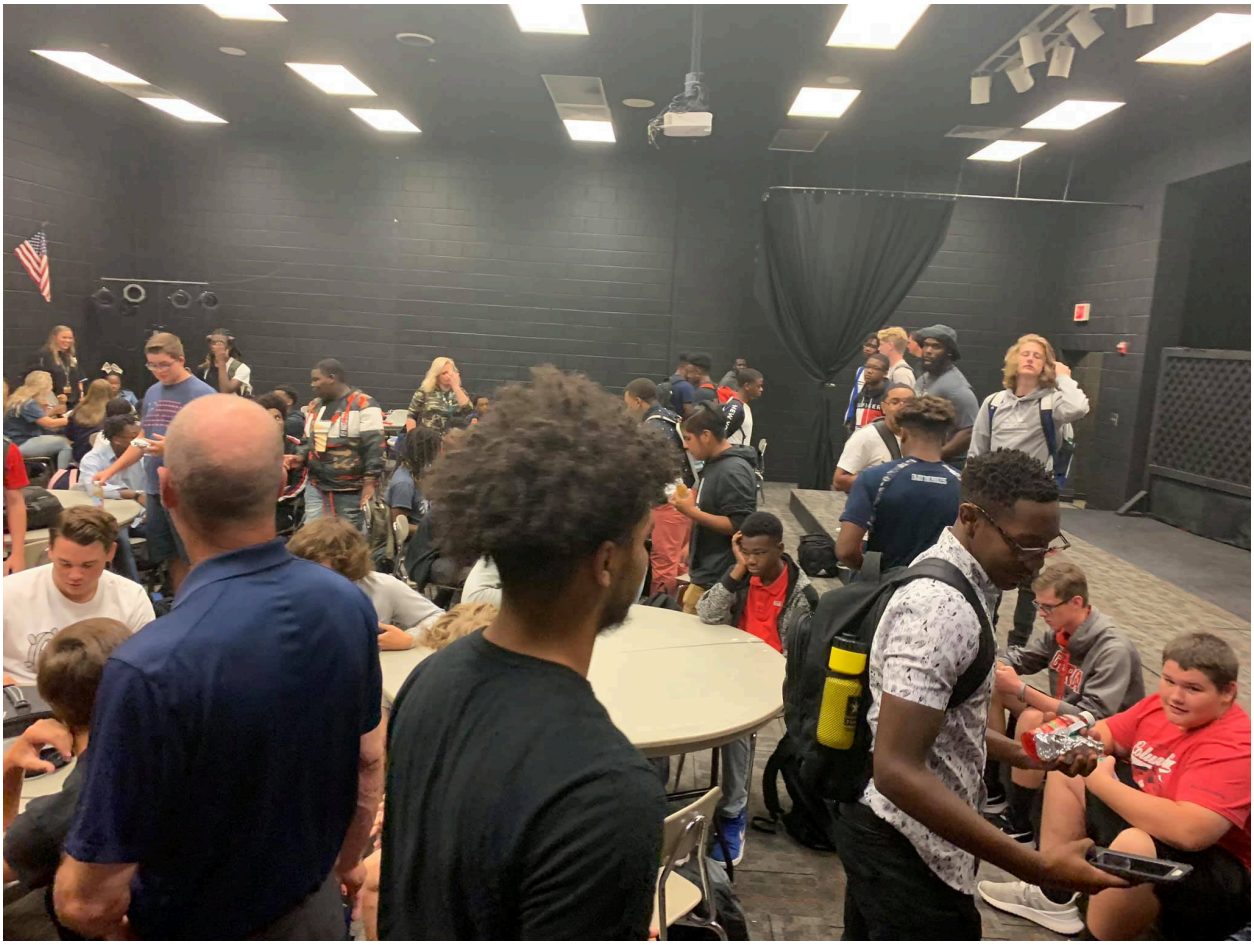

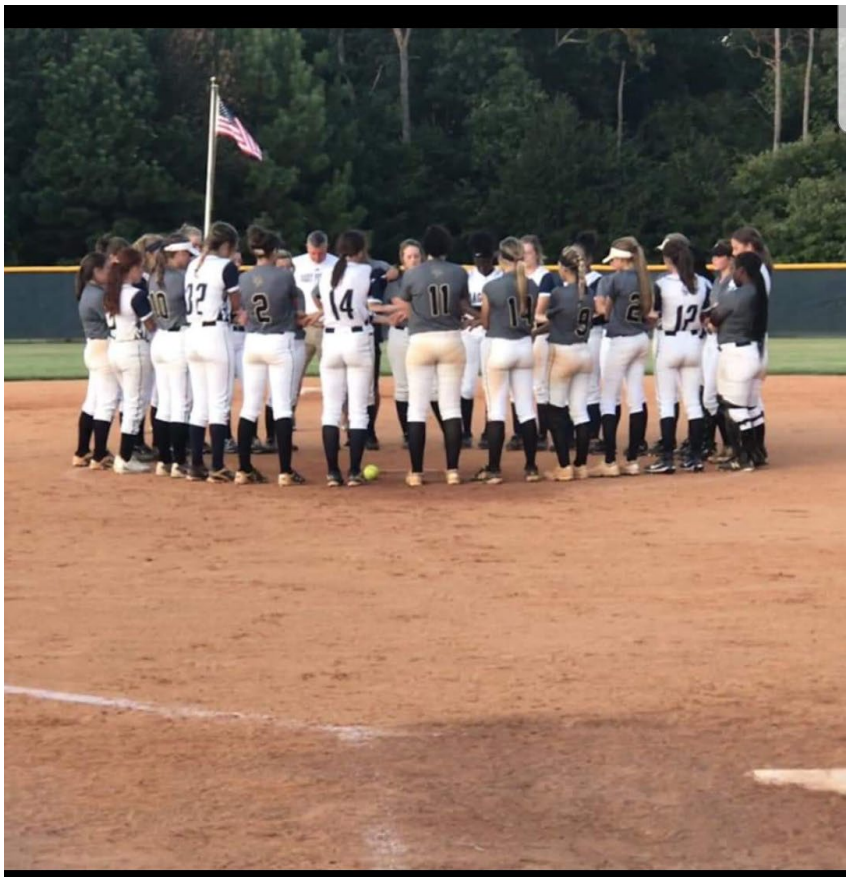

Spalding High Softball
SEP 6 AT 10:51 AM

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