

## **American Center for Law and Justice -**

**SHORT LEGAL BRIEF** - Public school students retain their constitutionally protected right to freedom of speech and expression – including the right to share their faith and witness at school.

The Supreme Court consistently has held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969). Students' First Amendment rights include the right to distribute Gospel tracts during non-instructional time, the right to wear shirts with overtly Christian messages and symbols, and the right to pray and discuss matters of religion with others. Further, schools may not prevent students from bringing their Bibles to school.

School officials can only restrict student speech if it will "materially or substantially disrupt school discipline." *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). "When [a student] is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions ...." *Id.* at 512-13.

Thus, students have the right to discuss religious beliefs, and even share religious materials, with their peers between classes, at lunch, and before and after school.

It is well settled that religious speech is protected by the First Amendment of the Constitution, even when that speech is taking place on the public school campus.

*Widmar v. Vincent*, 454 U.S. 263, 269 (1981). Supreme Court "precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). In fact, the right to persuade, advocate or evangelize a religious viewpoint, implicates the very reason the First Amendment was adopted. Accordingly, the Constitution forbids school officials from censoring student speech because of the religious content of that speech.

It is a constitutional axiom that the distribution of free religious literature is a form of expression protected by the First Amendment. *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981); *Lovell v. City of Griffin*, 303 U.S. 444 (1938). As the Supreme Court unequivocally held in *Murdock v. Pennsylvania*:

The hand distribution of religious tracts is an age old form of missionary evangelism -- as old as the history of printing presses. It has been a potent force in various religious movements down through the years. . . . It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits.

319 U.S. 105, 108-09 (1943) (footnotes omitted).

School officials may not lump a student's right to distribute free religious literature together with more disruptive forms of expression, such as solicitation. In reiterating the First Amendment's protection of literature distribution, the Supreme Court stated, "One need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand, but one must listen, comprehend, decide and act in order to respond to a solicitation." *United States v. Kokinda*, 497 U.S. 720, 734 (1990) (plurality). Moreover, school officials may not prohibit students from sharing their faith or distributing religious literature based on a fear that allowing religious speech will offend some members of the community. The Supreme Court has stated that "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right

to freedom of expression." *Tinker*, 393 U.S. 508. Where students wish to peacefully speak about their faith or distribute free literature on school grounds during non-instructional time, there simply is nothing which "might reasonably [lead] school authorities to forecast substantial disruption or material interference with school activities." *Id.* at 514.

In fact, several courts have held that the distribution of religious literature by high school students is protected speech under the First and Fourteenth Amendments. See *Hemry v. School Board of Colorado Springs School District 11*, 760 F. Supp. 856 (D. Colo. 1991); *Harden v. School Board of Pinellas County*, No. 901544-CIV-T-15A, Consent Decree and Order (M.D. Fla. 1991); *Nelson v. Moline School District No. 40*, 725 F. Supp. 965 (C.D. Ill. 1989); *Rivera v. East Otero School District R-1*, 721 F. Supp. 1189 (D. Colo. 1989); *Thompson v. Waynesboro Area School District*, 673 F. Supp. 1379 (N.D. Pa. 1987). As the Supreme Court clearly held in *Tinker*:

In our system, state-operated schools may not be enclaves for totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are persons under our Constitution. They are possessed of fundamental rights which the state must respect, just as they themselves must respect their obligations to the state. In our system, students may not be regarded as closed-circuit recipients of only that which the state chooses to communicate. They may not be confined to the expressions of those sentiments that are officially approved.

*Tinker*, 393 U.S. at 511.

Certainly, it is necessary to acknowledge that school officials have "important, delicate and highly discretionary functions" to perform. *West Virginia v. Barnette*, 319 U.S. 624, 637 (1943). These functions, however, must be performed "within the limits of the Bill of Rights." *Id.* at 637. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1967).

School officials need not fear that witnessing and distribution activities of students might be imputed to them, creating an Establishment Clause violation. This very argument has been reviewed and rejected by the Supreme Court. In *Board of Education v. Mergens*, the Supreme Court held, as a general proposition, that the activities of student evangelists in a public school do not present any Establishment Clause problems: stating that,

Petitioner's principal contention is that the Act has the primary effect of advancing religion. Specifically, petitioners urge that, because the student religious meetings are held under school aegis, and because the state's compulsory attendance laws bring the students together (and thereby provide a readymade audience for student evangelists), an objective observer in the position of a secondary school student will perceive official school support for such religious meetings. . . . We disagree.

496 U.S. 226, 249-50 (1990) (citation omitted).

Of course, *Mergens* merely reflects the Establishment Clause's intended limitation, not on the rights of individual students, but on the power of the government (including school officials). As the *Mergens* Court stated, "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.* at 250.

**Federal Guidelines with ACLJ Summary: Religious Expression in Public Schools  
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ACLJ Summary**

In 1995, by order of the President of the United States, the United States Department of Education issued a set of written guidelines to every school district in the country. The guidelines set out the federal government's views regarding a variety of activities involving the intersection of public schools and religion. Those guidelines were modified and reissued in 1998 and again in 1999.

Although we do not agree with each and every point made in them, the positions taken by the federal government are substantially similar to ones we have defended in litigation and otherwise. The Guidelines can also be [obtained by visiting the web site](#) of the Department of Education. In the Guidelines, the Department of Education acknowledges that students have the right to:

- engage in prayer and religious discussion;
- participate in See You at the Pole, and other events before or after the school day;
- organize and conduct baccalaureate services and express religious sentiments when speaking in a private capacity;
- study about religion, including studying the Bible and other religious works, for purposes of instruction in history, literature, and religion;
- **express their religious views and address religious themes in the completion of assignments;**
- share with others copies of religious literature;
- be excused from school attendance as required by the teachings of their religion;
- be released from school for religious instruction, if such a program is permitted under state law;
- wear clothing and accessories mandated by their religion, or which depicts messages about their religion; and
- have equal access to the club program if there are other noncurriculum related clubs.

Federal Guidelines - [Available Department of Education website here.](#)

**UNITED STATES DEPARTMENT OF EDUCATION  
THE SECRETARY**

"...Schools do more than train children's minds. They also help to nurture their souls by reinforcing the values they learn at home and in their communities. I believe that one of the best ways we can help out schools to do this is by supporting students' rights to voluntarily practice their religious beliefs, including prayer in schools.... For more than 200 years, the First Amendment has protected our religious freedom and allowed many faiths to flourish in our homes, in our work place and in our schools. Clearly understood and sensibly applied, it works."

President Clinton

May 30, 1998

Dear American Educator,

Almost three years ago, President Clinton directed me, as U.S. Secretary of Education, in consultation with the Attorney General, to provide every public school district in America with a statement of principles addressing the extent to which religious expression and activity are permitted in our public schools. In accordance with the President's directive, I sent every school superintendent in the country guidelines on Religious Expression in Public Schools in August of 1995.

The purpose of promulgating these presidential guidelines was to end much of the confusion regarding religious expression in our nation's public schools that had developed over more than thirty years since the U.S. Supreme Court decision in 1962 regarding state sponsored school prayer. I believe that these guidelines have helped school officials, teachers, students and parents find a new common ground on the important issue of religious freedom consistent with constitutional requirements.

In July of 1996, for example, the Saint Louis School Board adopted a district wide policy using these guidelines. While the school district had previously allowed certain religious activities, it had never spelled them out before, resulting in a lawsuit over the right of a student to pray before lunch in the cafeteria. The creation of a clearly defined policy using the guidelines allowed the school board and the family of the student to arrive at a mutually satisfactory settlement.

In a case decided last year in a United States District Court in Alabama, (Chandler v. James) involving student initiated prayer at school related events, the court instructed the DeKalb County School District to maintain for circulation in the library of each school a copy of the presidential guidelines.

The great advantage of the presidential guidelines, however, is that they allow school districts to avoid contentious disputes by developing a common understanding among students, teachers, parents and the broader community that the First Amendment does in fact provide ample room for religious expression by students while at the same time maintaining freedom from government sponsored religion.

The development and use of these presidential guidelines were not and are not isolated activities. Rather, these guidelines are part of an ongoing and growing effort by educators and America's religious community to find a new common ground. In April of 1995, for example, thirty-five religious groups issued "Religion in the Public Schools: A Joint Statement of Current Law" that the Department drew from in developing its own guidelines. Following the release of the presidential guidelines, the National PTA and the Freedom Forum jointly published in 1996 "A Parent's Guide to Religion in the Public

Schools" which put the guidelines into an easily understandable question and answer format.

In the last two years, I have held three religious-education summits to inform faith communities and educators about the guidelines and to encourage continued dialogue and cooperation within constitutional limits. Many religious communities have contacted local schools and school systems to offer their assistance because of the clarity provided by the guidelines. The United Methodist Church has provided reading tutors to many schools, and Hadassah and the Women's League for Conservative Judaism have both been extremely active in providing local schools with support for summer reading programs.

The guidelines we are releasing today are the same as originally issued in 1995, except that changes have been made in the sections on religious excusals and student garb to reflect the Supreme Court decision in *Boerne v. Flores* declaring the Religious Freedom Restoration Act unconstitutional as applied to actions of state and local governments. These guidelines continue to reflect two basic and equally important obligations imposed on public school officials by the First Amendment. **First, schools may not forbid students acting on their own from expressing their personal religious views or beliefs solely because they are of a religious nature. Schools may not discriminate against private religious expression by students, but must instead give students the same right to engage in religious activity and discussion as they have to engage in other comparable activity.** Generally, this means that students may pray in a nondisruptive manner during the school day when they are not engaged in school activities and instruction, subject to the same rules of order that apply to other student speech. At the same time, schools may not endorse religious activity or doctrine, nor may they coerce participation in religious activity. Among other things, of course, school administrators and teachers may not organize or encourage prayer exercises in the classroom. Teachers, coaches and other school officials who act as advisors to student groups must remain mindful that they cannot engage in or lead the religious activities of students.

And the right of religious expression in school does not include the right to have a "captive audience" listen, or to compel other students to participate. School officials should not permit student religious speech to turn into religious harassment aimed at a student or a small group of students. Students do not have the right to make repeated invitations to other students to participate in religious activity in the face of a request to stop.

The statement of principles set forth below derives from the First Amendment. Implementation of these principles, of course, will depend on specific factual contexts and will require careful consideration in particular cases.

In issuing these revised guidelines I encourage every school district to make sure that principals, teachers, students and parents are familiar with their content. To that end I offer three suggestions:

First, school districts should use these guidelines to revise or develop their own district wide policy regarding religious expression. In developing such a policy, school officials can engage parents, teachers, the various faith communities and the broader community in a positive dialogue to define a common ground that gives all parties the assurance that when questions do arise regarding religious expression the community is well prepared to apply these guidelines to specific cases. The Davis County School

District in Farmington, Utah, is an example of a school district that has taken the affirmative step of developing such a policy.

At a time of increasing religious diversity in our country such a proactive step can help school districts create a framework of civility that reaffirms and strengthens the community consensus regarding religious liberty. School districts that do not make the effort to develop their own policy may find themselves unprepared for the intensity of the debate that can engage a community when positions harden around a live controversy involving religious expression in public schools.

Second, I encourage principals and administrators to take the additional step of making sure that teachers, so often on the front line of any dispute regarding religious expression, are fully informed about the guidelines. The Gwinnett County School system in Georgia, for example, begins every school year with workshops for teachers that include the distribution of these presidential guidelines. Our nation's schools of education can also do their part by ensuring that prospective teachers are knowledgeable about religious expression in the classroom.

Third, I encourage schools to actively take steps to inform parents and students about religious expression in school using these guidelines. The Carter County School District in Elizabethton, Tennessee, included the subject of religious expression in a character education program that it developed in the fall of 1997. This effort included sending home to every parent a copy of the "Parent's Guide to Religion in the Public Schools." Help is available for those school districts that seek to develop policies on religious expression. I have enclosed a list of associations and groups that can provide information to school districts and parents who seek to learn more about religious expression in our nation's public schools.

In addition, citizens can turn to the U.S. Department of Education web site (<http://www.ed.gov>) for information about the guidelines and other activities of the Department that support the growing effort of educators and religious communities to support the education of our nation's children.

Finally, I encourage teachers and principals to see the First Amendment as something more than a piece of dry, old parchment locked away in the national attic gathering dust. It is a vital living principle, a call to action, and a demand that each generation reaffirm its connection to the basic idea that is America -- that we are a free people who protect our freedoms by respecting the freedom of others who differ from us.

Our history as a nation reflects the history of the Puritan, the Quaker, the Baptist, the Catholic, the Jew and many others fleeing persecution to find religious freedom in America. The United States remains the most successful experiment in religious freedom that the world has ever known because the First Amendment uniquely balances freedom of private religious belief and expression with freedom from state-imposed religious expression.

Public schools can neither foster religion nor preclude it. Our public schools must treat religion with fairness and respect and vigorously protect religious expression as well as the freedom of conscience of all other students. In so doing our public schools reaffirm the First Amendment and enrich the lives of their students.

I encourage you to share this information widely and in the most appropriate manner with your school community. Please accept my sincere thanks for your continuing work on behalf of all of America's children.

Sincerely,

Richard W. Riley, U.S. Secretary of Education

## RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS

**Student prayer and religious discussion:** The Establishment Clause of the First Amendment does not prohibit purely private religious speech by students. Students therefore have the same right to engage in individual or group prayer and religious discussion during the school day as they do to engage in other comparable activity. For example, students may read their Bibles or other scriptures, say grace before meals, and pray before tests to the same extent they may engage in comparable nondisruptive activities. Local school authorities possess substantial discretion to impose rules of order and other pedagogical restrictions on student activities, but they may not structure or administer such rules to discriminate against religious activity or speech.

Generally, students may pray in a nondisruptive manner when not engaged in school activities or instruction, and subject to the rules that normally pertain in the applicable setting. Specifically, students in informal settings, such as cafeterias and hallways, may pray and discuss their religious views with each other, subject to the same rules of order as apply to other student activities and speech. Students may also speak to, and attempt to persuade, their peers about religious topics just as they do with regard to political topics. School officials, however, should intercede to stop student speech that constitutes harassment aimed at a student or a group of students.

Students may also participate in before or after school events with religious content, such as "see you at the flag pole" gatherings, on the same terms as they may participate in other noncurriculum activities on school premises. School officials may neither discourage nor encourage participation in such an event.

The right to engage in voluntary prayer or religious discussion free from discrimination does not include the right to have a captive audience listen, or to compel other students to participate. Teachers and school administrators should ensure that no student is in any way coerced to participate in religious activity.

**Graduation prayer and baccalaureates:** Under current Supreme Court decisions, school officials may not mandate or organize prayer at graduation, nor organize religious baccalaureate ceremonies. If a school generally opens its facilities to private groups, it must make its facilities available on the same terms to organizers of privately sponsored religious baccalaureate services. A school may not extend preferential treatment to baccalaureate ceremonies and may in some instances be obliged to disclaim official endorsement of such ceremonies.

**Official neutrality regarding religious activity:** Teachers and school administrators, when acting in those capacities, are representatives of the state and are prohibited by the establishment clause from soliciting or encouraging religious activity, and from participating in such activity with students. **Teachers and administrators also are prohibited from discouraging activity because of its religious content, and from soliciting or encouraging antireligious activity.**

**Teaching about religion:** Public schools may not provide religious instruction, but they may teach about religion, including the Bible or other scripture: the history of religion, comparative religion, the Bible (or other scripture)-as-literature, and the role of religion in the history of the United States and other countries all are permissible public school subjects. Similarly, it is permissible to consider religious influences on art, music, literature, and social studies. 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.

**Student assignments:** Students may express their beliefs about religion in the form of homework, artwork, and other written and oral assignments free of discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance, and against other legitimate pedagogical concerns identified by the school.

**Religious literature:** Students have a right to distribute religious literature to their schoolmates on the same terms as they are permitted to distribute other literature that is unrelated to school curriculum or activities. Schools may impose the same reasonable time, place, and manner or other constitutional restrictions on distribution of religious literature as they do on nonschool literature generally, but they may not single out religious literature for special regulation.

**Religious excusals:** Subject to applicable State laws, schools enjoy substantial discretion to excuse individual students from lessons that are objectionable to the student or the students' parents on religious or other conscientious grounds. However, students generally do not have a Federal right to be excused from lessons that may be inconsistent with their religious beliefs or practices. School officials may neither encourage nor discourage students from availing themselves of an excusal option.

**Released time:** Subject to applicable State laws, schools have the discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation or penalize those who do not attend. Schools may not allow religious instruction by outsiders on school premises during the school day.

**Teaching values:** Though schools must be neutral with respect to religion, they may play an active role with respect to teaching civic values and virtue, and the moral code that holds us together as a community. The fact that some of these values are held also by religions does not make it unlawful to teach them in school.

**Student garb:** Schools enjoy substantial discretion in adopting policies relating to student dress and school uniforms. Students generally have no Federal right to be exempted from religiously-neutral and generally applicable school dress rules based on their religious beliefs or practices; however, schools may not single out religious attire in general, or attire of a particular religion, for prohibition or regulation. Students may display religious messages on items of clothing to the same extent that they are permitted to display other comparable messages. Religious messages may not be singled out for suppression, but rather are subject to the same rules as generally apply to comparable messages.

## **THE EQUAL ACCESS ACT**

The Equal Access Act is designed to ensure that, consistent with the First Amendment, student religious activities are accorded the same access to public school facilities as are student secular activities. Based on decisions of the Federal courts, as well as its interpretations of the Act, the Department of Justice has advised that the Act should be interpreted as providing, among other things, that:

**General provisions:** Student religious groups at public secondary schools have the same right of access to school facilities as is enjoyed by other comparable student groups.

Under the Equal Access Act, a school receiving Federal funds that allows one or more student noncurriculum-related clubs to meet on its premises during noninstructional time may not refuse access to student religious groups.

Prayer services and worship exercises covered: A meeting, as defined and protected by the Equal Access Act, may include a prayer service, Bible reading, or other worship exercise.

Equal access to means of publicizing meetings: A school receiving Federal funds must allow student groups meeting under the Act to use the school media -- including the public address system, the school newspaper, and the school bulletin board -- to announce their meetings on the same terms as other noncurriculum-related student groups are allowed to use the school media. Any policy concerning the use of school media must be applied to all noncurriculum-related student groups in a nondiscriminatory matter. Schools, however, may inform students that certain groups are not school sponsored.

Lunch-time and recess covered: A school creates a limited open forum under the Equal Access Act, triggering equal access rights for religious groups, when it allows students to meet during their lunch periods or other noninstructional time during the school day, as well as when it allows students to meet before and after the school day.

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