Guidelines for Students Distributing Literature and Sharing the Gospel on School Grounds

Students' First Amendment rights include the right to distribute Gospel tracts during non-instructional time, the right to wear shirts communicating 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. In fact, school officials must allow students to read their Bibles during free time, even if that free time occurs during class. The standard that must be applied by the school is: Does the activity "materially or substantially disrupt schooldiscipline?" Unless a student is disruptive, the school must refrain from interfering with their religious activities.

The distribution of free religious literature is protected by the First Amendment. Religious and political speech are protected by the First Amendment.24 Furthermore, "[a]dvocacy and persuasive speech are included within the First Amendment guarantee if the speech is otherwise protected."25

The Supreme Court of the United States' consistent jurisprudence, for fifty years, has recognized that free distribution of literature is a form of expression protected by the Constitution of the United States.26 In Lovell v. City of Griffin, the Supreme Court of the United States put the case for constitutional protection of leaflets and pamphlets quite clearly:

The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated.27

The constitutional value of leaflets and pamphlets is not lessened by the fact that they address matters of religion.28 The role of religious leaflets and tracts is historic:

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.29

School officials may not lump a student's right to distribute free literature together with more disruptive forms of expression, such as solicitation. As the Supreme Court has explained, the experience of thousands of "residents of metropolitan areas [who] know from daily experience [that] confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information."30 Distribution of literature is inherently even less disruptive than spoken expression. As the Supreme Court stated, "[o]ne 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."31

The applicable standard - material and substantial disruption - is not met by an undifferentiated fear or apprehension of disruption. In other words, it is not enough for school officials to fear that allowing religious speech will offend some members of the community. "Undifferentiated fear or apprehension of

disturbance is not enough to overcome the right to freedom of expression."32 Where a student wishes to peacefully distribute free literature on school grounds during non-instructional time, there simply is nothing which "might reasonably [lead] school authorities to forecast substantial disruption of or material interference with school activities . . . ."33

School officials need not fear that leaflet distribution by students may be imputed to them, and that the Establishment Clause would thereby be violated. This very argument has been rejected by the Supreme Court of the United States. In Mergens, the Court stated that the activities of student evangelists in a public school do not present any Establishment Clause problems:

[P]etitioners 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 ready-made 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.34

Of course, Mergens merely reflects the Establishment Clause's intended limitation - not on the rights of individual students - but on the power of governments (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."35

END NOTES for Student Rights in the Public School

1. Throughout this booklet we refer to decisions made by the United States Supreme Court. With respect to the meaning of the United States Constitution and the application of federal laws, such as the Equal Access Act, decisions of the Supreme Court are the last word for the parties in a lawsuit. If decisions of the Supreme Court only affected persons involved in lawsuits, it would hardly be necessary to take account of those decisions. Under our Constitution, however, a decision by the Supreme Court regarding the meaning and application of the federal Constitution or federal laws controls on all federal appeals courts and trial courts as well as all state courts. By "controls," we mean that, after the Supreme Court has decided a question of federal law, all other courts are bound to apply the principles of law established by the Supreme Court in cases presenting similar facts and circumstances. In short, a decision of the Supreme Court is "the law of the land."

2. 393 U.S. 503 (1969).

3. Id. at 506.

4. For example, a Virginia statute states: "[E]very parent, guardian, or other person in the Commonwealth having control or charge of any child . . . shall . . . send such child to a public school or to a private, denominational or parochial school or have such child taught by a tutor or teacher of qualifications prescribed by the Board of Education and approved by the division superintendent or provide for home instruction of such child as described in § 22.1-254.1." Va. Code § 22.1-254.

5. Tinker, 393 U.S. at 511 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

6. Id. at 509 (quoting Burnside, 363 F.2d at 749).

7. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

8. Id.

9. Shelton v. Tucker, 364 U.S. 479, 487 (1960).

10. Tinker, 393 U.S. at 506.

11. "Public forum" is the phrase used by courts and lawyers to describe properties that are owned by a government body, yet in which it is normal and usual to find citizens freely expressing their views and opinions. Such properties always include streets, sidewalks, and parks. Other places such as auditoriums, meeting halls, and government buildings can be made into a "public forum" if the government owner of the property chooses to do so.

12. Tinker, 393 U.S. at 512-13.

13. One federal court has explained the irrelevance of the public forum doctrine to the question of a student's free speech rights: "whether or not a school campus is available as a public forum to others, it is clear that the students, who of course are required to be in school, have the protection of the First Amendment while they are lawfully in attendance." Rivera v. E. Otero Sch. Dist. R-1, 721 F. Supp. 1189, 1193 (D. Colo. 1989). That view is consistent with Tinker's recognition that "personal intercommunication among the students" in high schools is an activity to which schools are dedicated. Tinker, 393 U.S. at 512 (and accompanying footnote).

14. Widmar v. Vincent, 454 U.S. 263, 269 (1981) (citations omitted); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981); Niemotko v. Maryland, 340 U.S. 268 (1951); Saia v. New York, 334 U.S. 558 (1948); Lovell v. City of Griffin, 303 U.S. 444 (1938).

15. Thomas v. Collins, 323 U.S. 516, 537 (1945).

16. 20 U.S.C. § 4071 et seq.

17. The Equal Access Act only applies to schools defined as secondary under state law. In turn, although secondary schools certainly include high school grades, that law and decision do not address the issue of student religious clubs and organizations in the junior high grades. One of the principle questions that led to the adoption of the Equal Access Act was whether high school students possessed sufficient maturity of thought to understand that a school was not endorsing religion by tolerating it. The Court found no reason to reject Congress' conclusion that high school students are sufficiently mature to understand this fact. So far, neither the Congress nor the Court have made a similar determination about the maturity of junior high school students.

18. 496 U.S. 226 (1990).

19. Various public interest groups expressed heated opposition to the enactment of the Equal Access Act. A key feature of opposition to the Act was the claim that Congress violated the "wall of separation between church and state" by imposing the duty of treating student religious organizations equally with other noncurriculum clubs. Too often, the "separation of church and state" phrase is allowed to take the place of any actual constitutional provision.

Simply put, the Constitution of the United States never mentions "separation of church and state." The "wall of separation" was first described by Roger Williams, the founder of the Rhode Island colony. A Baptist minister, Williams described the wall that separates the church from government intrusion as being protective, much like the wall that separates a garden from a wilderness. Later, writing to an association of Baptists, Thomas Jefferson borrowed the phrase. When he did so, however, in 1802, thirteen years had passed after the Bill of Rights had been drafted in Congress and sent to the states for ratification.

The actual provision of the Constitution that describes the proper relationship between the general government and religion is found in the First Amendment. That amendment begins: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]"

Moreover, as government officials relentlessly pursue "strict separation between church and state," the risk of becoming actively hostile to religion becomes great. "[I]f a State refused to let religious groups use

facilities open to others, then it would demonstrate not neutrality but hostility toward religion." Mergens, 496 U.S. at 248. Hostility to religion is just as bad, under the First Amendment. The Constitution does not demand that religion be kept out of our public schools; it only prohibits school sponsored religious activities. Free exercise of religion is our right under the Constitution.

20. Id. at 239-40.

21. Id. at 248.

22. Id. at 247.

23. Garnett v. Renton Sch. Dist. No. 403, 987 F.2d 641 (9th Cir. 1993); see also Hoppock v. Twin Falls Sch. Dist. No. 411, 772 F. Supp. 1160 (D. Idaho 1991) (students' rights to form religious club under federal law trumps state constitutional ban on use of school property by religious groups).

24. Lovell v. City of Griffin, 303 U.S. 444 (1938); Widmar v. Vincent, 454 U.S. 263, 269 (1981).

25. Rivera v. E. Otero Sch. Dist. R-1, 721 F.Supp. 1189, 1194 (D. Colo. 1989).

26. Lovell, 303 U.S. 444; Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640 (1981).

27. Lovell, 303 U.S. at 452 (emphasis added).

28. Id. at 448.

29. Murdock v. Pennsylvania, 319 U.S. 105, 108-09 (1943) (footnotes omitted).

30. United States v. Kokinda, 497 U.S. 720, 734 (1990) (plurality).

31. Id.; see also Lee v. Int'l Soc'y for Krishna Consciousness, 505 U.S. 672, 690 (1992) (O'Connor, J., concurring in judgment).

32. Tinker, 393 U.S. at 508.

33. Id. at 514. Several courts have held that the distribution of religious literature by high school students is protected speech under the First and Fourteenth Amendments. See Rivera v. E. Otero Sch. Dist. R-1, 721 F. Supp. 1189 (D. Colo. 1989); Thompson v. Waynesboro Area Sch. Dist., 673 F. Supp. 1379 (M.D. Pa. 1987); Nelson v. Moline Sch. Dist. No. 40, 725 F. Supp. 965 (C.D. Ill. 1989). Hemry v. Sch. Bd. of Colo. Springs School Dist. 11, 760 F. Supp. 856 (D. Colo. 1991). In Hemry, school officials ultimately conceded that students had the right to distribute the religious material on campus both inside and outside the building. Hemry v. Sch. Bd. of Colo. Springs, No. 90-S-2188, Stipulation for Dismissal (D. Colo. Nov. 12, 1991) (unpublished). Accord Harden v. Sch. Bd. of Pinellas County, No. 90-1544-CIV-T-15A, Consent Decree and Order (M.D. Fla. 1991) (students permitted to distribute religious newspaper on campus).

34. Mergens, 496 U.S. at 249-50 (citation omitted) (emphasis added).

35. Id. at 250.

36. 505 U.S. 577 (1992)

37. Id. at 586-87.

38. 120 S. Ct. 2266 (2000).

39. Widmar v. Vincent, 454 U.S. 263, 269 (1981) (citing Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981); Niemotko v. Maryland, 340 U.S. 268 (1951); Saia v. New York, 334 U.S. 558 (1948).

40. Tinker, 393 U.S. at 509.

41. Widmar, 454 U.S. 263.

42. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

43. Tinker, 393 U.S. at 506.

44. Mergens, 496 U.S. at 248. Accord Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Grace Bible Fellowship, Inc. v. Main Sch. Admin. Dist. #5, 941 F.2d 45 (1st Cir. 1991); Gregoire v. Centennial Sch. Dist., 907 F.2d 1366 (3d Cir.), 1990 cert. denied, 498 U.S. 899 (1990); Concerned Women for America v. Lafayette County, 883 F.2d 32 (5th Cir. 1989).

45. Shumway v. Albany County Sch. Dist. No. 1, 826 F. Supp. 1320 (D. Wyo. 1993); Randall v. Pegan, 765 F. Supp. 793 (W.D.N.Y. 1991); Verbena United Methodist Church v. Chilton County Bd. of Educ., 765 F. Supp. 704 (M.D. Ala. 1991).

46. 472 U.S. 38 (1985).

47. See Wallace, 472 U.S. at 62 ("I agree fully with Justice O'Connor's assertion that some moment-of-silence statutes may be constitutional, a suggestion set forth in the Court's opinion as well") (Powell, J., concurring) (citation and footnote omitted).

48. 472 U.S. at 40 n.1.

49. Id. at 59-61.

50. Id.

51. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

52. United States Deparment of Education Guidelines, Richard W. Riley, Page 5.

53. Florey v. Sioux Falls Sch. Dist. 49-5, 619 F.2d 1311, 1317 (8th Cir. 1980).

54. 619 F.2d at 1314.

55. 374 U.S. 203 (1963).

56. Id. at 225.

57. 449 U.S. 39 (1980).

58. Id. at 42.

59. Cf. Gibson v. Lee County Sch. Bd., 1 F. Supp. 2d 1426 (M.D. Fla. 1998) denying injunction against implementation of curriculum of instruction on Old Testament; granting injunction against implementation of curriculum of instruction on New Testament). Cf. Herdahl v. Pontotoc County Sch. Dist., 933 F. Supp. 582 (N.D. Miss. 1996) (school district violated Establishment Clause by having Bible class that went beyond providing objective information to proselytizing for fundamentalist Christianity); Doe v. Human, 725 F. Supp. 1499 (W.D. Ark. 1989) (same).

60. Lamb's Chapel, 508 U.S. 384.

61. Id. at 394.

62. See Lynch v. Donnelly, 465 U.S. 668, 675, 680 (1984); see also Clever v. Cherry Hill Township Bd. of Educ., 838 F. Supp. 929 (D.N.J. 1993) (school district policy requiring classrooms to maintain calendars depicting religious and other holidays and permitting seasonal displays that include religious symbols did not violate the Establishment Clause).