THE AMERICAN CENTER FOR LAW AND JUSTICE

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Dear School Official:

The purpose of this correspondence is to set forth the rights of students to initiate and participate in Bible Clubs or Prayer Groups on their public school campuses pursuant to the Equal Access Act and the First Amendment. Unfortunately, almost ten years after the Supreme Court upheld the constitutionality of the Equal Access Act in *Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), students are still being denied their right to initiate and participate in Bible Clubs and Prayer Groups on public school campuses. The continued denial of these constitutionally protected rights cannot be tolerated.

The American Center for Law and Justice, has successfully represented literally hundreds of students seeking redress for a violation of their constitutionally protected rights to obtain equal access for Bible Clubs or Prayer Groups on their campuses. In fact, Jay Sekulow, Chief Counsel for the American Center for Law and Justice, was lead counsel and presented oral arguments before the Supreme Court in *Mergens.* This letter is being sent to you to help resolve the confusion that still exists.

Students' rights to initiate and participate in voluntary Bible Clubs or Prayer Groups was unequivocally resolved by the Supreme Court's decision concerning the Equal Access Act, *Westside Community Schools v. Mergens.* In an 8 to 1 decision, the *Mergens* Court upheld the constitutionality of the Equal Access Act which requires public schools to allow Bible Clubs or prayer groups equal access to meet on campus.

Congress enacted the Equal Access Act to cure pervasive anti-religious confusion exhibited by public secondary schools in the aftermath of the Supreme Court's school prayer cases: "[T]he Act was intended to address perceived widespread discrimination against religious speech in public schools." *Mergens,* 496 U.S. at 239. Congress stated the purpose of the Equal Access Act in paragraph (a) of the Act: "[Schools may not discriminate against] any students who wish to conduct a meeting...on the basis of religious, political, philosophical, or other content of the speech at such meetings." 20 U.S.C.A. Sec. 4071(a). Congress intended this Act to protect the right of students to gather on public secondary school campuses.

Clearly, religious groups must be allowed to meet on campus without censorship of their religious beliefs or statements. In an 8 to 1 decision, the Supreme Court, in *Mergens,* held that the Equal Access Act was constitutional because allowing equal access to religious clubs does not violate the Establishment Clause. In fact, Justice O'Connor, in *Mergens,* explained that anything short of equal access would not square with the Establishment Clause's mandate that government be a neutral with respect to religion:

> [I]f a state refused to let religious groups use the facilities open to others, then it would demonstrate not neutrality but hostility toward religion. The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.

Id. at 248 (quoting *McDaniel v. Paty,* 435 U.S. 618, 641 (1978)).

The factors that determine whether the Equal Access Act is triggered are: does the school receive federal funds, is the school a public secondary school, and does the school allow any non-curriculum clubs to meet on campus. If the answer to these questions is yes, then the Equal Access Act applies. The crucial factor in triggering the Equal Access Act is whether a school district allows other non-curriculum clubs to meet on campus. The Court in *Mergens* provided the following definition of what constitutes a non-curriculum club:

> "Non-curriculum related student group" is best interpreted broadly to mean any student group that does not directly relate to the body of courses offered by the school....[A] student group directly relates to a school's curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit.

Id. at 239-40. This means that if a school has clubs that are allowed to meet on campus that are not directly related to a particular class being taught, then the school must allow a Bible Club or prayer group to meet as well.

The *Mergens* Court noted that "Congress' intent [was] to provide a low threshold for triggering the Act's requirements." *Id.* Therefore, it only takes one non-curriculum group to cross the Equal Access Act threshold. Clubs such as the chess club, Interact, Zonta, 4-H, or service clubs such as the Key Club or the Optimist Club all are considered non-curriculum clubs under the *Mergens* Court's analysis. School officials cannot claim to have a closed forum in hopes of circumventing the Equal Access Act. The *Mergens* Court was very explicit concerning such an attempt to discriminate against student speech:

> To define "curriculum related" in a way that results in almost no schools having limited open fora, or in a way that permits schools to evade the Act by strategically describing existing student groups, would render the Act merely hortatory....As the court below explained: "Allowing such a broad interpretation of `curriculum-related' would make the [Act] meaningless. A school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal. At the same time the administration could arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content. This is exactly the result that Congress sought to prohibit by enacting the [Act]. A public secondary school

> cannot simply declare that it maintains a closed forum and then discriminate against a particular student group on the basis of the content of the speech of that group.

Mergens, 496 U.S. at 244-45 (quoting *Mergens v. Westside Community Schools*, 867 F.2d 1076, 1078 (8th Cir. 1989)(emphasis added).

The Supreme Court held that student-initiated Bible Clubs or Prayer Groups must be given official recognition on campus in order to satisfy the requirements of the Equal Access Act. Official recognition means that Bible Clubs or Prayer Groups must be treated the same as other clubs meeting on campus.

> Official recognition allows student clubs to be part of the student activities program and carries with it access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair. Given that the Act explicitly prohibits denial of "equal access...to...any students who wish to conduct a meeting within [the school's] limited open forum" on the basis of the religious content of the speech at such meetings, § 4071(a), we hold that Westside's denial of respondents' request to form a Christian club denies the "equal access" under the Act.

Id. at 247.

As a result of the holding by the *Mergens* Court, Bible Clubs or Prayer Groups are allowed to advertise on campus in the same manner other clubs are allowed to advertise on campus. Ultimately, the school must afford the Bible Club the same privileges as other clubs, such as use of the public address system, use of school bulletin boards, access to the school newspaper, the opportunity to participate in club fairs, and any other media available to the other clubs to spread their message to the rest of the school. It is important to note that Bible Clubs or Prayer Groups are not responsible to make sure the rest of the student body knows that the club is student-initiated, that is the responsibility of school officials. Neither are school officials allowed to censor the Bible Club or Prayer Group's speech by requiring them to delete references to Christianity from the club announcements and fliers.

The *Mergens* Court rejected the school board's argument that Bible Clubs or Prayer Groups on campus violate the Establishment Clause of the First Amendment. The Court held that "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." 496 U.S. at 250. Clearly, there is no church-state violation when school administrators allow students to collectively and voluntarily meet together on campus.

It is important to note that the Eighth Circuit, in *Mergens*, held that students have a First Amendment right as well as an Equal Access Act right to hold a student-initiated Prayer club meeting on campus. Restrictions on private student religious speech in a forum otherwise opened for speech activity constitute unlawful content and viewpoint based discrimination and must be justified by a compelling state interest.

It is well settled that religious speech is protected by the First Amendment of the Constitution. *Widmar v. Vincent,* 454 U.S. 263, 269 (1981), (citing *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981)); *Westside Community Schools v. Mergens,* 496 U.S. 226 (1990), *Niemotko v. Maryland, 3*40 U.S. 268 (1951), and *Saia v. New York*, 334 U.S. 558 (1948). In fact, the right to persuade or advocate a religious viewpoint implicates the very reason the First Amendment was adopted.

With respect to the First Amendment free speech rights of students, the United States Supreme Court announced a landmark decision in 1969. In *Tinker v. Des Moines Independent School District*, 393 U.S. at 506, the Supreme Court held that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." This principle means that students who are rightfully on campus, have First Amendment rights that cannot be denied. The *Tinker* Court emphasized that students' free speech rights apply "when [a student] is in the cafeteria, or on the playing field, or on campus during the authorized hours...." 393 U.S. at 512-13. Under the *Tinker* standard, school administrators can only prohibit student speech if it "materially and substantially interfere[s] with appropriate discipline." 393 U.S. at 513 (citing *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 19)). Under this standard, a student-initiated and student-led Bible Club or Prayer Group is clearly constitutional. In other words, school administrators are in danger of violating the Constitution if they forbid, censor, or inhibit the Bible Clubs or Prayer Groups in any manner.

Our educational system requires students to attend schools. This coercion gives students the legal right to be on campus and, as Justice Fortas noted, they do not surrender their constitutional rights by virtue of their position as students:

> In our system, state-operated schools may not be enclaves of 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 expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. As Judge Gewin, speaking for the Fifth Circuit, said, school officials cannot suppress "expressions of feelings with which they do not wish to contend."

Tinker, at 511 (emphasis added).

Jay Sekulow, Chief Counsel for the American Center for Law and Justice, served as lead counsel and presented the oral arguments before the Supreme Court in *Lamb's Chapel v. Center Moriches Unified School District,* 113 S.Ct. 2141 (1993). In refusing to uphold a religious exclusion the *Lamb's Chapel* Court stated that "[t]he principle that has emerged from our cases is that the First Amendment forbids the government to regulate speech in ways that favor some

viewpoints or ideas at the expense of others.'" 113 S.Ct. 2141, 2147-48 (1993). The *Lamb's Chapel* decision reinforces the rights of religious persons to express their views publicly.

It is imperative that the Constitutional and statutory rights of students to initiate and participate in Bible Clubs or Prayer Groups be protected by school officials. The American Center for Law and Justice is committed to defending the rights of students on their public school campus. Because of our commitment, we are available to answer any questions you might have concerning this letter. Please feel free to copy and share this letter with your superintendent, your school board, and their attorney.

Sincerely,

AMERICAN CENTER FOR LAW & JUSTICE
Jay Alan Sekulow
Chief Counsel