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Dear School Official:

The purpose of this letter is to set forth the free speech rights of students on their public school campuses, particularly the rights of students to engage in religious activities while at school. As part of our **National Students' Rights Project**, this letter is being sent for informational purposes to help clarify the legal issues surrounding this topic.

By way of introduction, the American Center for Law and Justice (ACLJ) is a not-for-profit public interest law and educational group. Our organization exists to educate the public and the government about the right to freedom of speech, particularly in the context of the expression of religious sentiments. I have served as lead counsel in two significant Supreme Court cases in this area: *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.,* 508 U.S. 384 (1993) and *Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226 (1990), and also in the Second Circuit Court of Appeals case of *Emily Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839 (2nd Cir. 1996), and the Eleventh Circuit Court of Appeals case of *Chandler v. James*, Nos. 97-6898, 97-6953, 1999 WL 493495 (11th Cir. July 13, 1999). Although some special interest groups would have you believe that allowing students to engage in religious activity in school is an unconstitutional act, a close look at Supreme Court jurisprudence belies that conclusion.

A government body, including a public school, may not suppress or exclude the speech of individual students for the sole reason that the speech is religious or contains a religious perspective. *Widmar v. Vincent,* 454 U.S. 263 (1981); *Lamb's Chapel,* 508 U.S. 384. As a result, students retain their constitutional rights of free speech and expression. Some examples of permissible student expression include the right to pray, the right to share personal beliefs, the right to complete school assignments from a religious perspective, and the right to distribute religious literature while on public school campuses. While these examples do not provide a comprehensive list of permissible student rights, they provide illustrations of student rights that school districts often misunderstand.

Students do not forfeit their First Amendment rights to free speech while attending school: "[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." *Tinker v. Des Moines Indep. Community Sch. Dist.,* 393 U.S. 503, 506 (1968). Accordingly, students are free to express their religious views while at school. A school official's decision to bar such discourse because of the religious content of the discourse cannot be sustained.

A school official may not censor religious expression unless the speech creates a material and substantial disruption to the school's ability to fulfill its educational goals. *Id.* at 509. The United

States Supreme Court has held such censorship to be unconstitutional where there has been "no finding and no showing that engaging [in the activity] would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Tinker*, 393 U.S. at 509 (quoting *Burnside v. Byars,* 363 F.2d 744, 749 (5th Cir. 1966)). This standard of "material and substantial disruption" cannot be met merely by the possibility of disruption. As the Supreme Court stated, "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508. In *Tinker*, public school students wore black armbands in school to protest the government's involvement in Vietnam. Despite the turbulent political climate at the time, the *Tinker* Court recognized that the possibility of disruption does not supersede the free speech rights of students. In *Tinker*, the Court held that prohibitions of students' pure speech can be supported only when they are necessary to protect "the work of the schools or the rights of other students." *Id.* at 509. Under this standard, student religious expression is constitutionally protected absent a material and substantial disruption.

In addition to Supreme Court precedent, President Clinton reiterated in a July 12, 1995 speech that "[t]he First Amendment does not convert our schools into religion-free zones." 1995 WL 410673, *8 (White House). President Clinton went on to directly address the issue of religious activity in schools: "If students can distribute flyers or pamphlets that have nothing to do with the school, they can distribute religious flyers and pamphlets on the same basis. **If students can wear T-shirts advertising sports teams, rock groups, or politicians, they can also wear T-shirts that promote religion**." 1995 WL 410673, *10 (White House) (emphasis added).

Due to misinformation, some school officials believe student-led and student-initiated religious activity on public school campuses is illegal. To the contrary, students' rights to engage in religious activities, including voluntary prayer on campus, were further bolstered by the Supreme Court's decision in *Mergens* which resulted in an 8-to-1 decision upholding the constitutionality of the Equal Access Act. The Act states that it is unlawful "for any public secondary school which receives federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within the limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings." 20 U.S.C. § 4071(a). The *Mergens* Court stated that "[t]he 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." *Mergens*, 496 U.S. at 248 (citing *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment)).

Schools officials often believe that allowing students to express religious views at school would be a violation of "the separation of Church and State" (Establishment Clause). This very argument has been reviewed and **rejected** by the United States Supreme Court. In *Mergens*, the Supreme Court stated, as a general proposition, that the activities of students in a public school do not present any Establishment Clause problem:

> Petitioners' 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 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.**

Mergens, 496 U.S. at 249-250 (emphasis added).

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 the School District). As Justice O'Connor 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 (emphasis in original). As a result, student religious expression, such as voluntary prayer or student-initiated religious discourse is treated as private speech and is protected from censorship.

In *Lamb's Chapel*, the Supreme Court invalidated a public school policy which discriminated against religious speakers. In striking down the exclusion of religious speech, 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.'" 508 U.S. at 394 (citing *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)). The *Lamb's Chapel* decision reinforces the rights of religious persons to express their views publicly.

The Establishment Clause of the First Amendment "requires the state to be a neutral in its relations with . . . religious believers and non-believers; it does not require the state to be their adversary." *Everson v. Board of Educ*., 330 U.S. 1, 18 (1947). On the contrary, "[s]tate power is no more to be used to handicap religions, than it is to favor them." *Everson,* 330 U.S. at 18.

Please feel free to share this informational letter with others in your community. Additionally, the ACLJ remains committed to defending the First Amendment rights of students, and we are available to answer any questions you may have regarding these issues.

Sincerely,

AMERICAN CENTER FOR LAW & JUSTICE
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