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MEMORANDUM

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Sharing Your Faith/Witnessing at School

Public school students enjoy free speech rights—including the right to share their faith with their classmates. The First Amendment and the federal Equal Access Act confer important liberties on public school students that no school official may abridge unless the exercise of those rights materially and substantially interferes with school discipline.

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 Indep. Cmty. Sch. Dist.*, 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. *See Widmar v. Vincent*, 454 U.S. 263, 268–69 (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 Review & 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. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (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. at 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, e.g.*, *Hemry v. Sch. Bd. of Colorado Springs*, 760 F. Supp. 856, 859–60 (D. Colo. 1991); *Nelson v. Moline Sch. Dist.*, 725 F. Supp. 965, 972 (C.D. Ill. 1989); *Rivera v. E. Otero Sch. Dist.*, 721 F. Supp. 1189 (D. Colo. 1989); *Thompson v. Waynesboro Area Sch. Dist.*, 673 F. Supp. 1379 (M.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*. "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 (1960).

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 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.

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.