ACLJ
American Center
for Law & Justice

MEMORANDUM

These issue summaries provide an overview of the law as of the date they were written and are for educational purposes only. These summaries may become outdated and may not represent the current state of the law. Reading this material DOES NOT create an attorney-client relationship between you and the American Center for Law and Justice, and this material should NOT be taken as legal advice. You should not take any action based on the educational materials provided on this website, but should consult with an attorney if you have a legal question.

Student Free Speech Rights

More than any other area, the ACLJ receives numerous inquiries about students' free speech rights. The fact is, however, from the moment they step onto the public school campus to the moment they graduate, public school students enjoy substantial rights to free speech, free press, assembly and religion.

All students have a right to free speech guaranteed by the First Amendment. The Supreme Court has held that students and teachers do not "shed their constitutional rights . . . at the schoolhouse gate." *Tinker v. Des Moines Indep. Sch. Dist.,* 393 U.S. 503, 506 (1969). In *Tinker*, the Supreme Court criticized school officials for panicking in the face of a peaceful expression of protest—students wearing black armbands to express disapproval of America's involvement in South Vietnam—and suspending students from school. *Id.* at 504. A student's speech may only be restricted if such speech will "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). Thus, students have the right to discuss religious beliefs, and even share religious materials, with their peers between classes, at break, at lunch, and before and after school.

The Supreme Court has also clearly established the right of students to organize and participate in Bible clubs. *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226 (1990). The *Mergens* Court upheld the constitutionality of the Equal Access Act which allows Bible clubs or prayer groups to meet on public school campuses. *Id.* at 236. The Court

interpreted the Equal Access Act which Congress passed in 1984 to ensure that high school students were not discriminated against in public schools because of their religious beliefs. As Justice O'Connor held speaking for the Court in *Mergens*, "[I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." *Id.* at 248. If a public school has clubs that are allowed to meet on campus that are not a part of a class that is being taught, or are not directly related to a school class, then the school must allow a Bible club the same privilege. In other words, the school must treat the Bible club or prayer group as equals to the other student clubs and groups on campus.

The Establishment Clause requires government neutrality toward religion. The Supreme Court has repeatedly held that the First Amendment requires public school officials to be neutral in their treatment of religion, showing neither favoritism toward nor hostility against religious expression such as prayer. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 115 (2001). Accordingly, the First Amendment forbids religious activity that is sponsored by the government but protects religious activity that is initiated by private individuals, and the line between government-sponsored and privately initiated religious expression is vital to properly understanding the First Amendment's scope.

Following this current interpretation of the First Amendment, teachers and other public school officials may not lead their classes in prayer, devotional readings from the Bible, or other religious activities. *Engel v. Vitale*, 370 U.S. 421 (1962) (invalidating state laws directing the use of prayer in public schools); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (invalidating state laws and policies requiring public schools to begin the school day with Bible readings and prayer); *Mergens*, 496 U.S. 226 (1990) (plurality opinion) (explaining that "a school may not itself lead or direct a religious club"). Nor may school officials attempt to persuade or compel students to participate in prayer or other religious activities. *Lee v. Weisman*, 505 U.S. 577, 589 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985). Such conduct is "attributable to the State" and thus violates the Establishment Clause. *Lee*, at 587.

However, teachers may take part in religious activities where the overall context makes clear that they are not participating in their official capacities. Before school or during lunch, for example, teachers may meet with other teachers for prayer or Bible study to the same extent that they may engage in other conversation or nonreligious activities. Similarly, teachers may participate in their personal capacities in privately sponsored baccalaureate ceremonies.

Although the Constitution forbids public school officials from directing or favoring prayer, the Supreme Court has made clear 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). Moreover, not all religious speech that takes place in the public schools or at school-sponsored events equals governmental speech. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (explaining that "not every message" that is "authorized by a government policy and take[s] place on government property at government-sponsored school-related events" is "the government's own"). Further, the *Santa Fe* court stated that "nothing in the Constitution . . . prohibits any public school student from voluntarily praying at any time before, during, or after the school day." *Id.* at 313.

Local school authorities possess substantial discretion to impose rules of order and academic restrictions on student activities. In *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683–86 (1986), the Supreme Court held that the school district acted entirely within its permissible authority in imposing sanctions upon a student in response to his offensively lewd and indecent speech.

However, authorities may not structure or administer such rules to discriminate against students' prayer or religious speech. For instance, where schools permit students' expression on the basis of genuinely neutral criteria and students retain primary control over the content of their expression, student religious speech, including prayer, is not attributable to the state and therefore may not be restricted because of its religious content. *Rosenberger v. Rector*, 515 U.S. 819 (1995); *Good News Club*, 533 U.S. 98; *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Santa Fe*, 530 U.S. at 304.

In addition, in circumstances in which students are entitled to pray, public schools may not restrict or censor their prayers on the ground that others may deem the prayers "too religious." The Establishment Clause prohibits state officials from making judgments about what constitutes an appropriate prayer, and from favoring or disfavoring certain types of prayers over others. The Supreme Court has explained that "one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services. . . ." *Engel v. Vitale*, 370 U.S. 421, 429 (1962). Furthermore, "neither the power nor the prestige" of state officials may "be used to control, support or influence the kinds of prayer the American people can say," and that the state is "without power to prescribe by law any

particular form of prayer." *Id.* at 429–30. In sum, school officials must respect students' Constitutional and statutory rights to express their private religious views.