



September 2008

Dear Concerned Citizens:

The purpose of this letter is to update you regarding free speech rights on public school campuses, particularly the right to engage in religious expression at *See You at the Pole* events.

*See You at the Pole*TM is a student-led, student-initiated movement of prayer that revolves around students praying together on the fourth Wednesday of September, usually before school and usually at the school's flagpole. It involves students in elementary schools, middle/junior high schools, high schools, and colleges/universities all over the world. Adults often pray in support of the students on campus by gathering nearby, at their places of work or worship, or at city halls.¹

By way of introduction, the American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in many significant cases involving the freedoms of speech and religion.² This letter will answer questions that are commonly asked regarding student, teacher, and parent participation in *See You at the Pole* events.

I. Student Participation.

The Supreme Court has consistently upheld the rights of students to express themselves on public school campuses, even within group contexts similar to *See You at the Pole*. In 1969, the Supreme Court held in *Tinker v. Des Moines Independent Community School District* that students have the right to speak and express themselves on campus.³ The Court later held in *Board of Education v. Mergens* that Bible clubs and prayer groups have the right to meet on public secondary school campuses.⁴ The Court interpreted the Equal Access Act⁵ to insure that

¹ *See You at the Pole*, FAQ: "What is *See You at the Pole*?", <http://www.syatp.com/info/faq/index.html> (last visited Aug. 28, 2008).

² *See, e.g., McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors enjoy the protection of the First Amendment); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987) (unanimously striking down a public airport's ban on First Amendment activities).

³ 393 U.S. 503, 514 (1969).

⁴ 496 U.S. at 247.

⁵ 20 U.S.C. §§ 4071, *et seq.*

high school students were not discriminated against in public schools because of their religious beliefs. The Act provides that public secondary schools that receive federal funding must allow Bible clubs to meet on campus during non-instructional time to the same extent that non-curricular clubs are permitted to meet on campus.⁶ It should extend to student prayer groups as well as Bible clubs that organize *See You at the Pole* or similar events. As Justice O'Connor explained, writing for the Court in *Mergens*, "if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion."⁷

Almost all public secondary schools receive federal funding. Thus, if such schools permit non-curricular clubs such as Interact, Zonta, 4-H, Chess Club, and other service-type clubs to meet and hold events on campus, those schools must also permit *See You at the Pole* events to the same extent. In sum, student Bible clubs and prayer groups must be given equal access.

A. Students May Participate in *See You at the Pole* Even if the Event is Not Sponsored by An Officially Recognized Club.

As the Supreme Court made clear in *Tinker*, students have substantial rights under the First Amendment. So long as student conduct does not "materially or substantially interfere with school discipline,"⁸ a student may gather with other students on campus for prayer even if no Bible Club has been officially recognized.

Student prayer is a protected form of speech that cannot be banned by school officials, including prayer at *See You at the Pole* events. A school official who refuses to allow students the right to pray on their campus is engaging in censorship in violation of the First Amendment. Additionally, a public school that receives federal funding must certify "that it has no policy that prevents, or otherwise denies participation in constitutionally protected prayer in public schools" as set forth in the U.S. Department of Education Secretary's *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*.⁹ A school that receives federal funding, yet fails to make such a certification or makes the certification in bad faith, could lose its federal funding "until the recipient [school] comes into compliance."¹⁰

The *Guidance* promulgated by Secretary of Education Rod Paige on February 7, 2003 specifically addressed events such as *See You at the Pole*:

Organized Prayer Groups and Activities

Students may organize prayer groups, religious clubs, and "see you at the pole" gatherings before school to the same extent that students are permitted to organize other non-curricular student activities groups. Such groups must be given the

⁶ Non-curricular clubs include those clubs not part of or directly related to a particular class. *See Mergens*, 496 U.S. at 239-40.

⁷ *Id.* at 248.

⁸ 393 U.S. at 504 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (1966)).

⁹ U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools* 68 F.R. 9646 (Feb. 28, 2003) (hereinafter "Guidance"), available at, http://www.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html (last visited Aug. 28, 2008).

¹⁰ *Id.* (citing Section 9524 of the Elementary and Secondary Education Act of 1965 as amended by the No Child Left Behind Act of 2001).

same access to school facilities for assembling as is given to other non-curricular groups, without discrimination because of the religious content of their expression. School authorities possess substantial discretion concerning whether to permit the use of school media for student advertising or announcements regarding non-curricular activities. However, where student groups that meet for nonreligious activities are permitted to advertise or announce their meetings—for example, by advertising in a student newspaper, making announcements on a student activities bulletin board or public address system, or handing out leaflets—school authorities may not discriminate against groups who meet to pray. School authorities may disclaim sponsorship of non-curricular groups and events, provided they administer such disclaimers in a manner that neither favors nor disfavors groups that meet to engage in prayer or religious speech.¹¹

As the Eleventh Circuit Court of Appeals explained in *Chandler v. Siegelman*,

[s]o long as the prayer is genuinely student-initiated, and not the product of any school policy which actively or surreptitiously encourages it, the speech is private and it is protected: Permitting students to speak religiously signifies neither state approval nor disapproval of that speech. The speech is not the State's—either by attribution or by adoption. The permission signifies no more than that the State acknowledges its constitutional duty to tolerate religious expression. Only in this way is true neutrality achieved.¹²

B. Students May Share Their Faith At *See You at the Pole* Events.

Public school students may share their faith on their campuses. The Court's decisions in *Mergens* and *Tinker* fully protect students' rights to share their faith. School officials cannot control or censor student speech solely because it is religious. Students also have the right to pass out pamphlets and tracts about Christ to their peers on campus.¹³ So long as students do not disrupt school discipline, school officials must allow them to be evangelists.¹⁴ *Mergens* was a great victory for Christian students because the Court rejected the argument that allowing students to meet on campus and evangelize would violate the Establishment Clause of the First Amendment.¹⁵

C. Students May Bring Their Bibles and Wear Religious Clothing at *See You at the Pole* Events.

Students may bring their Bibles and even wear Christian t-shirts at *See You at the Pole*. No law or school board policy may prohibit a student from bringing a Bible on campus; the

¹¹ *Id.* at 9647.

¹² 230 F.3d 1313, 1316-17 (11th Cir. 2000).

¹³ *See Murdock v. Pennsylvania*, 319 U.S. 105, 108-09 (1942) (“[D]istribution of religious tracts is an age-old form of missionary evangelism 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.”).

¹⁴ *Mergens*, 496 U.S. at 249-50.

¹⁵ *Id.*

student is only bound by an obligation not to “materially or substantially interfere” with school discipline.¹⁶ A school cannot force a student to remove a religious t-shirt unless the clothing violates a reasonable school dress code or unless the school can show that the language or graphics on the t-shirt somehow “materially or substantially interfere” with school discipline.¹⁷ Even in the rare case when a school can make a showing of material or substantial interference, the student should be able to wear a different shirt proclaiming a religious message that does not raise the same concerns about school discipline. *Mergens* clarifies that student speech cannot be discriminated against on campus because of its content, and religious t-shirts and Bibles are a form of free speech protected by the First Amendment.

D. Permissible Regulations for Prayer Events.

While school officials may not prohibit students from engaging in protected religious expression unless it causes a material or substantial disruption of school order, they may impose reasonable regulations that govern the time, place, and manner of student activities.¹⁸ Such regulations cannot target the religious content of the student activity. In addition, any restriction must be narrowly tailored to serve a significant government interest; it must also leave open other alternative forms of communication. Students may participate in events with religious content that take place before or after school, such as *See You at the Pole* gatherings, on the same terms as they may participate in other non-curriculum activities on school premises. School officials may neither discourage nor encourage participation at such an event. On-campus distribution of materials may be reasonably limited by time and location.

II. Teacher or Administrator Participation.

As a general principle, teachers retain their First Amendment rights in public schools. The Supreme Court has held that “teachers [do not] shed their constitutional rights . . . at the school house gate.”¹⁹ However, public schools have broad authority to safeguard against Establishment Clause violations. Generally speaking, teachers represent the school when in the classroom or at school-sponsored events and, therefore, should take care to avoid Establishment Clause violations.²⁰ Supreme Court precedent interpreting the Establishment Clause prohibits a state entity like a public school from endorsing religion or coercing students to participate in religion.²¹ Distilling multiple court decisions, the U.S. Department of Education’s *Guidance*, mentioned above, addresses the position that teachers and administrators should take:

When acting in their official capacities as representatives of the state, teachers, school administrators, and other school employees are prohibited by the Establishment Clause from encouraging or discouraging prayer, and from actively

¹⁶ *Tinker*, 393 U.S. at 504.

¹⁷ *Id.*

¹⁸ *See, e.g., Chandler*, 230 F.3d at 1317 (government “may neither prohibit genuinely student-initiated religious speech, nor apply restrictions on the time, place, and manner of that speech which exceed those placed on students’ secular speech.”).

¹⁹ *Tinker*, 393 U.S. at 506.

²⁰ *See, e.g., Marchi v. Bd. of Coop. Educ. Servs.*, 173 F.3d 469, 476 (2d Cir. 1999); *Pelozo v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994).

²¹ *See Lee v. Weisman*, 505 U.S. 577 (1992).

participating in such activity with students. Teachers may, however, 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.²²

Thus, public school teachers, when in communication with their students in their official capacity, should take care to avoid religiously coercive situations. Teachers in their capacity as school officials may not actively participate in or lead a student religious meeting. However, teachers and administrators may also violate the Establishment Clause by discouraging activity because of its religious content, or by soliciting or encouraging anti-religious activity.

To determine if a teacher has a right to attend events such as *See You at the Pole*, several factors, including the time of day and manner of participation, must be taken into consideration. If the event occurs during “non-contract” time, teachers should be able to participate in the event without violating the Establishment Clause so long as they make it clear that they are present in their roles as citizens rather than in their official capacities. This may necessitate that teachers wishing to attend the event take affirmative steps to prevent any confusion among students concerning their participation.

III. Parent or Other Adult Participation.

Parents and other adults should be allowed to participate in *See You at the Pole* events to the same extent that adults may attend on-campus events held by other student groups. Parents and other adults should be sure to comply with the school’s policies regarding visitors. Schools are usually granted broad discretion to develop such policies so long as they do not discriminate on the basis of religion. For example, school officials often require non-student visitors to check in when they enter campus for student safety purposes. Even though *See You at the Pole* is usually held before school hours and is usually held outside the school building, parents should still follow school visitor policies. School officials have a legitimate interest in regulating a visitor’s presence on campus at any given time. Thus, due to the early hour of *See You at the Pole*, parents may need to notify school officials of their planned participation ahead of time.

In sum, we hope that this informational letter has clarified the ability of students, teachers, and parents to participate in *See You at the Pole* events on public school campuses.

Sincerely,

**AMERICAN CENTER FOR
LAW AND JUSTICE**

²² U.S. Dept. Educ., *supra* note 9, at 9647.