Constitutionally Protected Rights of Students and Teachers to Participate in Fields of Faith

Every October, students around the United States participate in Fields of Faith—a student-organized, student-led gathering at the school athletic field where students read the Bible, hear testimonies, worship, and pray for each other. Our government and courts have spoken: Students have a constitutional right to participate in Fields of Faith through prayer and worship activities. Furthermore, students have an individual constitutional right to inform their fellow students about the Fields of Faith event as long as they do not materially disrupt the academic process while doing so. In addition, if the school allows individual students or student clubs to advertise events through school bulletin boards, school PA systems, general posting of student flyers, or other means, the school cannot forbid the same means of advertising the Fields of Faith event. Here is a quick summary of students', teachers', and coaches' rights related to Fields of Faith.

SUMMARY

1. Religious student groups have the right to access an athletic stadium, field, and/or gym for *Fields of Faith* just like other community organizations.
2. Students have the right to pray, to read the Word of God, and to freely express their religious beliefs at *Fields of Faith*.
3. An outside speaker has the right to lead prayer, share the Word of God, and freely express his/her faith, and give an invitation to accept Christ.
4. Students have the right to distribute *Fields of Faith* brochures and posters to other students on the same terms as they are permitted to distribute other literature of community organizations.
5. Students have the right to wear clothing and accessories advertising *Fields of Faith* if clothing is permitted to contain other types of speech.
6. Students have the right to use religious words on the advertisements for *Fields of Faith*.
7. Coaches and teachers have the right to participate in *Fields of Faith* as private individuals. This includes praying, reading the Word of God, and freely expressing their religious beliefs.

and coaches to participate in Fields of Faith in more detail. Feel free to share this memo with school officials and to contact Alliance Defending Freedom (1–800–835–5233) if you believe your rights have been violated.

A. RELIGIOUS SPEECH IS PROTECTED BY THE FIRST AMENDMENT

It is a fundamental principle of constitutional law that government bodies—including public schools—may not suppress or exclude the speech of private parties—including public school students—just because the speech is religious or contains a religious perspective. *Good News Club*, *supra*; *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981). This principle cannot be denied without undermining the essential First Amendment guarantees of free speech and religious freedom. It is equally true that religious speech is protected by the First Amendment and may not be singled out for discrimination. As the Supreme Court has stated:

> Our 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 . . . . Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.

Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995).

Importantly, the Supreme Court stated that public schools cannot restrict religious speech simply because it may be perceived by some as "offensive" or "controversial." *Morse v. Frederick*, 127 S. Ct. 2618, 2629 (2007) ("Petitioners urge us to adopt the broader rule that Frederick's speech is proscribable because it is plainly "offensive" as that term is used in *Fraser*. We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of 'offensive.' After all, much political and religious speech might be perceived as offensive to some.") (emphasis added). As the Third Circuit Court of Appeals put it in summarizing Supreme Court case law, "The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it." *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001).

B. STUDENTS DO NOT ABANDON THEIR CONSTITUTIONAL RIGHTS OF FREE SPEECH WHEN THEY ATTEND PUBLIC SCHOOL

"It 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 (1969); *see also Shelton v. Tucker*, 364 U.S. 479, 487 (1967) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools"). The Supreme Court has squarely stated that a student's free speech rights apply "when [they are] in the cafeteria, or on the playing field, or on the campus during the authorized hours." *Tinker*, 393 U.S. at 512-13. This includes prayer: "nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the school day." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000) (emphasis added).

C. *TINKER'S* "MATERIAL AND SUBSTANTIAL DISRUPTION STANDARD" APPLIES HERE

The Supreme Court has held that student expressive activity—including religious speech and prayer—cannot be impeded by the public school unless the activity creates a material and substantial disruption to the school's ability to fulfill its educational goals. *See Tinker*, 393 U.S. at 509. Any attempt to restrict such speech is 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.'" *Id.* (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

Moreover, the Supreme Court has stated that the standard of "material and substantial disruption" cannot be met merely by the *possibility* of disruption. In the Court's words, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508.

> 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 expressions of those sentiments that are officially approved.

Id. at 511. This fundamental constitutional principle is applicable both inside and outside the classroom. As the *Tinker* Court noted, 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. The Fields of Faith event occurs in the evening after the end of the school day and is designed to avoid any sort of disruption.

D. THE SO-CALLED "SEPARATION OF CHURCH AND STATE" CANNOT JUSTIFY OFFICIAL SUPPRESSION OF THE FIELDS OF FAITH EVENT

Schools and school officials often mistakenly believe that allowing students to engage in religious speech at school would violate the so-called "separation of church and state"—a doctrine often cited in connection with the Establishment Clause of the First Amendment. 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 students' private religious expression within a public school does not present any Establishment Clause problem:

> [P]etitioners 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.**

Bd. of Educ. of Westside Cmty. Schools v. Mergens, 496 U.S. 226, 249-50 (1990) (emphasis added).

The Establishment Clause of the First Amendment merely "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. Bd. of Educ.*, 330 U.S. 1, 18 (1947). Likewise, "[s]tate power is no more to be used so as to handicap religions, than it is to favor them." *Id.* Therefore, the Establishment Clause has no applicability to stop student speech in the Fields of Faith context.

The Supreme Court in *Mergens* explained that a policy of equal access for religious speech conveys a message "of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." *Mergens*, 496 U.S. at 248. *Accord Good News Club*, 533 U.S. at 110-19 (student religious speech does not violate the Establishment Clause).

As the Supreme Court has said, "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." *Santa Fe*, 530 U.S. at 302 (quoting *Mergens*, 496 U.S. at 250). Private student speech does not violate the Establishment Clause. *Id.* Student speech at the Fields of Faith event is private student speech.

E. STUDENTS MAY DIRECTLY ADVERTISE FIELDS OF FAITH TO FELLOW STUDENTS.

Just as the Fields of Faith event itself is protected, so too is student expression advertising Fields of Faith. *See, e.g.*, *C.H.*, 2010 WL 1644612, at *9 ("[S]peech (leafleting) is described as the essence of the first amendment."). The *Tinker* "material disruption" standard applies to all student oral expression and literature distribution during non-instructional time, regardless of religious content. School officials may not prohibit this expression out of fear that allowing religious speech will offend some members of the community. As the Supreme Court said, "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. If a student wishes to peacefully distribute free literature on school grounds during non-instructional time, there simply is nothing which "might reasonably [lead] school authorities to forecast substantial disruption of or material interference with school activities." *Id.* at 514. In fact, distribution of literature is inherently less disruptive than spoken expression. *United States v. Kokinda*, 497 U.S. 720, 734 (1990). As the Supreme Court stated, "[o]ne 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." *Id.*

Several courts have held that the distribution of religious literature by students of any grade level is protected speech under the First and Fourteenth Amendments. *See K.A. v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 111 (3d Cir. 2013) (ruling against a school district that prohibited an elementary student from handing out written invitations to a church event because "elementary school students retain certain First amendment rights of expression"); *Morgan v. Swanson*, 659 F.3d 359, 396 (5th Cir. 2011) (en banc) (recognizing that students, regardless of grade level, have "the First Amendment[] right … to express a religious viewpoint to another student without fear"); *J.S. ex rel. Smith v. Holly Area Schools*, 749 F.Supp.2d 614, 623 (E.D. Mich. 2010) (issuing preliminary injunction against "school district's outright prohibition upon [elementary school student's] distribution of religious flyers to his classmates"); *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp.2d 98, 114 (D. Mass. 2003) ("It is now textbook law" that students carry rights of expression, including the right to distribute literature); *Clark v. Dallas Indep. Sch. Dist.*, 806 F. Supp.

116, 119 (N.D. Tex. 1992) ("It is well settled that written expression is pure speech. . . . It is equally true that the guarantee of free speech encompasses the right to distribute written materials peacefully"); *Baughman v. Freienmuth*, 478 F.2d 1345, 1348 (4th Cir. 1973) ("The regulation complained of reaches the activity of pamphleteering which has often been recognized by the Supreme Court as a form of communication protected by the first amendment"); *Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280, 288 (E.D. Pa. 1991) ("It is axiomatic that written expression is pure speech," and that "the guarantee of freedom of speech that is enshrined in the first amendment encompasses the right to distribute peacefully"). Thus, school officials may not prohibit the peaceful dissemination of information by students about the Fields of Faith event.

F. IF THE SCHOOL ALLOWS STUDENT GROUPS TO USE SCHOOL FACILITIES FOR MEETINGS AND ACTIVITIES, IT MUST ALLOW RELIGIOUS STUDENT GROUPS TO USE FACILITES IN THE SAME FASHION.

Under the federal Equal Access Act (and the First Amendment), secondary school students may form religious clubs and meet on campus if the school receives federal funds and the school allows other non-curriculum related clubs to meet during non-instructional time. 20 U.S.C. § 4071 (2005); *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 238 (1990) ("[T]he purpose of granting equal access is to prohibit discrimination between religious or political clubs on the one hand and other noncurriculum-related student groups on the other…."). Moreover, religious clubs must be given equal access to all school facilities, resources, and equipment that are available to other non-curriculum related clubs. *Prince v. Jacoby*, 303 F.3d 1074, 1091-92 (9th Cir. 2002) (the school has established a limited public forum by choosing to grant access to school equipment, and therefore "cannot deny access to some student groups because of their desire to exercise their First Amendment rights"). As a result, to the extent that the school allows other student groups to use the school field, classrooms, audio-visual equipment, and other facilities and equipment owned by the school, it must give the same access to religious student groups for events like Fields of Faith.

G. IF THE SCHOOL ALLOWS STUDENTS AND STUDENT CLUBS TO ADVERTISE EVENTS ON SCHOOL BULLETIN BOARDS, PA SYSTEMS, OR OTHER MEANS, THEY MUST ALLOW STUDENTS TO ADVERTISE FIELDS OF FAITH IN THE SAME FASHION.

It is also well settled that the government may not discriminate against private religious speech when private secular speech is permitted in the same time, place, and manner. *Good News Club*, 533 U.S. at 111-12 ("[W]e reaffirm our holdings in *Lamb's Chapel* and *Rosenberger* that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint"); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("In the realm of private speech or expression, government regulation may not favor one speaker over another"); *Wright v. Pulaski Cnty. Special Sch. Dist.*, 803 F. Supp. 2d 980, 983 (E.D. Ark. 2011) ("[T]he prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." (quotation omitted)). Again, this principle applies with equal force to religious expression engaged in by students. *See, e.g., Good News Club*, 533 U.S. at 111-12; *Riseman v. Sch. Comm. of City of Quincy*, 439 F.2d 148 (1st Cir. 1971) (striking down an absolute prohibition of student literature distribution at school under First Amendment); *Good News/Good Sports Club v. Sch. Dist. of City of Ladue*, 28 F.3d 1501, 1505-1507 (8th Cir. 1994) (ban

on religious expression by student club in junior high school is unconstitutional where student secular expression was allowed).

Any possible misperceptions that the school is "endorsing religion" are cured by the school's ability to require student club posters to contain disclaimers. *Pinette*, 515 U.S. at 769 ("If Ohio is concerned about misperceptions, nothing prevents it from requiring all private displays in the Square to be identified as such"); *id.* at 776 ("the presence of a sign disclaiming government sponsorship or endorsement on the Klan cross, would make the State's role clear to the community.") (O'Connor, J., concurring); *id.* at 784 (disclaimer cures confusion over misperceptions of endorsement) (Souter, J., concurring in part and concurring in judgment). Several Circuits have adopted this position in the school context:

> [I]t is far better to teach students about the first amendment, about the difference between private and public action, about why we tolerate divergent views. The school's proper response is to educate the audience rather than squelch the speaker. Schools may explain that they do not endorse speech by permitting it.

Hills v. Scottsdale Unified Sch. Dist., 329 F.3d 1044, 1055 (9th Cir. 2003) (quoting *Hedges v. Wauconda Cmty. Sch. Dist.*, 9 F.3d 1295, 1299-1300 (7th Cir. 1993) (internal quotations and brackets omitted)).

Thus, if the school generally allows students or student clubs to advertise events by posting flyers on school walls or bulletin boards, having announcements read over the school's PA system, or using some other method, the school cannot prohibit student organizers of Fields of Faith from advertising in the same way.

H. SCHOOL COACHES AND TEACHERS HAVE THE RIGHT TO PARTICIPATE IN RELIGIOUS ACTIVITIES LIKE FIELDS OF FAITH WHEN DONE SO IN THEIR PRIVATE CAPACITIES AS CITIZENS

A school's teachers, coaches, and staff members have a constitutional right to participate in private, religious events like Fields of Faith in their personal capacities without violating the Establishment Clause. As mentioned above, the Supreme Court has recognized 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." *Mergens,* 496 U.S. at 250 (emphasis added). Applying this principle, courts have repeatedly held that a school's faculty and staff have the constitutional right to participate in community-sponsored religious activities before and after their contracted work times because their participation is constitutionally protected private speech.

In *Wigg v. Sioux Falls School Dist.*, 382 F.3d 807 (8th Cir. 2004), the school district prohibited an elementary teacher from participating in an after-school Bible club that was held at the school where she taught and that was attended by students in her class. The school district claimed to be concerned "that her participation in the organization might be perceived as an establishment of religion." *Id.* at 811. The Court ruled that "Wigg's participation in the after-school Club constitutes private speech," and such "private speech occurring at non-school functions held on school grounds" is entitled to constitutional protection. *Id.* at 815. The court further held that the school district's policy violated the teacher's right to free speech:

> SFSD's policy of prohibiting all employees-even on their own time-from participating in any religious-based programs held on school grounds is an overly-broad remedy. In an effort to avoid an establishment of religion, SFSD unnecessarily limits the ability of its employees to engage in private religious speech on their own time. . . . As such, **SFSD's Religion Policy preventing SFSD employees from participating in religious-based activities is viewpoint discriminatory and, thus, per se unconstitutional.**

Id. at 814 (emphasis added).

The right of school officials to engage in private, religious speech was further upheld in *Doe v. School Dist. of City of Norfolk*, 340 F.3d 605 (8th Cir. 2003), where a school board member recited a prayer at the school-sponsored graduation despite specific instructions prohibiting prayer at the ceremony after the school district was threatened with a lawsuit by the ACLU. The court ruled that even though the board member "was given access to the podium as a result of the School Districts' past practice of allowing School Board members, whose children were part of the graduating class, to address the students and the audience," *id.* at 608, his recitation of the Lord's Prayer was private speech protected by the First Amendment.

> [Board Member] Scheer undeniably took advantage of his School Board membership to gain access to a forum in which he could espouse his personal views. However, private speech is constitutionally protected, even though it occurs at a school related function …. [T]he lack of involvement in Scheer's conduct on the part of the School District requires a determination that the recitation of the Lord's Prayer constituted private speech.

Id. at 613.

The U.S. Department of Education has likewise recognized the right of school employees to participate in religious activities on school grounds in their personal capacities.

> Teachers may, however, take part in religious activities where the overall context makes clear that they are not participating in their official capacities. . . . Similarly, teachers may participate in their personal capacities in privately sponsored baccalaureate ceremonies.

U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645, 9647 (Feb. 28, 2003) (available at http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html).

It is clear that a school's coaches, teachers, and staff have the constitutional right to participate in religious activities like Fields of Faith and their participation in them does not cause the school to violate the Establishment Clause. It is advisable for any school employees who exercise their right to participate in religious activities and expression to clearly indicate that they are participating in their private capacities as citizens and not as representatives of the school. Doing so will allow the school employees to freely exercise their right to religious freedom while preventing any confusion among parents or students over whether the employee is acting in his or her private capacity as a citizen.

CONCLUSION

This annual event is an opportunity for school officials to exemplify constitutional conduct by protecting Fields of Faith participants' ability to properly exercise their First Amendment rights. Any student or staff member who believes that their rights to participate in Fields of Faith have been violated should promptly call Alliance Defendant Freedom at 1-800-835-5233, or visit our website at www.ADFlegal.org and select the "Request Legal Help" button to submit a request for legal assistance. Since each legal situation differs, the information provided above should only be used as a general reference and should not be considered legal advice.

Alliance Defending Freedom is an alliance-building, non-profit legal organization that advocates for the right of people to freely live out their faith. Alliance Defending Freedom frequently assists students, teachers, and public schools in understanding their rights and responsibilities concerning seasonal religious expression. Alliance Defending Freedom has participated in many of the recent court decisions governing students' religious and free speech rights in public schools, including *Good News Club v. Milford Central School District*, 533 U.S. 98 (2001) (recognizing that the First Amendment protects student religious speech).

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