Constitutionally Protected Rights of Students to Promote and Participate in See You at the Pole

Every September, students around the United States participate in *See You at the Pole (SYATP)*- a student-organized, student-led gathering at the school flagpole where students pray for their school, friends, teachers, government, and nation. Our government and courts have spoken: Students have a constitutional right to participate in SYATP through prayer and worship activities.

Furthermore, students have an individual constitutional right to inform their fellow students about the SYATP 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 SYATP event. It is our hope that the following discussion will clarify this important area of the law and allow school districts and school officials to avoid needless litigation.

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*, 551

U.S. 393, 409 (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 explained 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. Cmty. 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 schoolday." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000) (emphasis added).

Indeed, in *Daugherty v. Vanguard Charter School Academy*, 116 F. Supp. 2d 897, 910-11 (W.D. Mich. 2000), a federal district court rejected a legal challenge to SYATP, holding that student prayer at the school flagpole was entirely permissible.

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

The Supreme Court has held that student expressive activity—including prayer—cannot be impeded by public schools unless the activity materially and substantially disrupts 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)); *see also C.H. v. Bridgeton Bd. of Educ.*, No. 09-5815, 2010 WL 1644612, at *4 (D.N.J. Apr. 22, 2010) ("[I]f student speech is not lewd, school-sponsored, or advocating drug use, the speech can only be prohibited if it is likely to cause a disruption.").

Moreover, the Supreme Court has stated that the standard of "material and substantial disruption" cannot be met merely by the *possibility* of disruption. *See K.A. v. Pocono Mtn. Sch. Dist.*, No. 3:11-CV-417, 2011 WL 5008358, at *5 (M.D. Penn. Oct. 20, 2011) (noting that "vague concerns over possible disruption" are not sufficient to satisfy "the *Tinker* test"). In the Court's words, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. 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 SYATP event usually occurs before the beginning of classes and is designed to avoid any sort of disruption.

D. THE SO-CALLED "SEPARATION OF CHURCH AND STATE" CANNOT JUSTIFY OFFICIAL SUPPRESSION OF THE SYATP 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. Sch. 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 SYATP 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 SYATP speech is private student speech.

E. STUDENTS MAY DIRECTLY ADVERTISE THE SYATP EVENT TO FELLOW STUDENTS.

Just as the SYATP event itself is protected, so too is student expression advertising the SYATP event. *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 is simply 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 is protected speech under the First and Fourteenth Amendments. *See 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 SYATP event.

F. 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 SYATP 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 alterations 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 SYATP events from advertising in the same way.

CONCLUSION

This annual event is an opportunity for school officials to exemplify constitutional conduct by protecting the ability of SYATP participants to properly exercise their First Amendment rights. Any student who believes that their rights to participate in SYATP have been violated should promptly call Alliance Defending Freedom so that our attorneys may review the matter and potentially provide free legal representation to resolve it. Since each legal situation differs, the information provided above should only be used as a general reference and should not be considered legal advice.[1] If you think that your rights have been violated as a result of participating in "See You at the Pole," please contact our Legal Intake Department so that we may review your

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situation and possibly assist you. You can reach us via telephone at 1-800-835-5233, or you can visit our website at www.ADFlegal.org and select the "Request Legal Help" button to submit a request for legal assistance.

Alliance Defending Freedom is an alliance-building legal ministry that advocates for the right of people to freely live out their faith. We seek to resolve disputes through education of public officials regarding the constitutional rights of our clients. When necessary, we litigate to secure these rights. 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 students' religious speech).