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MEMORANDUM

TO: Public School Superintendents

FROM: John W. Whitehead, President
The Rutherford Institute

DATE: August 15, 2003

RE: United States Department of Education Guidelines on Prayer in Public Schools

The Rutherford Institute is a nonprofit civil liberties legal and educational organization that specializes in defending the freedoms of speech and religion as guaranteed by the First Amendment to the United States Constitution. Institute attorneys have represented students and their parents in many key public school cases, including, most recently before the United States Supreme Court, *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). There, the Court affirmed the right of Bible Clubs to meet on public school campuses after hours when school officials have opened a limited public forum for community use of school facilities.

Although this decision secured the vital free speech rights of students, The Rutherford Institute and its nationwide network of over six hundred volunteer attorneys have recently seen an increase in instances of censorship of student religious expression by public school administrators. For example, in Punxsutawney, Pennsylvania recently, a high school district refused to allow a Bible club to meet during the same time as other student-led clubs, citing concerns over church-state separation. Rutherford Institute attorneys filed suit in federal court on behalf of the club and its members, and a federal appeals court ruled in favor of the club last month, holding that the school district violated both the federal Equal Access Act and the First Amendment by discriminating against the club on the basis of its religious viewpoint. *Donovan v. Punxsutawney School Dist.*, 2003 U.S. App. LEXIS 14185 (3rd Cir. 2003).

Similarly, in Winnecone, Wisconsin, Institute attorneys recently assisted Rachel Honer in

securing her right to religious expression. After Rachel was selected by the school's graduation
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committee to sing at graduation, the committee asked for the lyrics of the song she intended to sing. Rachel provided the committee with the words to "He's Always Been Faithful," a song by a Gospel recording artist. The principal then called Rachel into his office and told her she would not be allowed to sing the song unless she changed the word "God" to "He," "Him," or "His" wherever it appeared in the song. Rachel refused and contacted The Rutherford Institute.

Rutherford Institute staff corresponded with Winnecone school officials and their legal counsel in an attempt to resolve the controversy. When school officials held to their position that no "references to religion" were permitted at graduation exercises, Institute attorneys filed a lawsuit on Rachel's behalf in a Wisconsin federal court. As our attorneys were preparing to file for a preliminary injunction against Winnecone's policy, school officials changed course and decided to permit Rachel to sing the song without censorship.

In the last several months, Rutherford Institute attorneys have also successfully defended the rights of religious students in Truman, Minnesota, Washington County, Maryland, and Fayette County, West Virginia. In the Minnesota case, a high school salutatorian was informed that she could not quote a Bible verse in her address. After Institute staff counsel discussed the student's rights with the district superintendent and informed the state Superintendent of Education of the situation, officials reversed their decision and allowed the student to quote the verse. In the Maryland and West Virginia cases, graduation speakers were directed not to include religious references in their addresses. After intervention by Institute attorneys, school officials corrected their decisions in both cases and permitted the students to express their religious faith without censorship.

This lack of recognition of students' rights appears to cut across all academic levels, as Rutherford Institute attorneys are litigating cases not only on behalf of secondary school students but also on behalf of kindergartners and elementary school students. For example, our attorneys are representing Daniel Walz, a New Jersey student who was ordered not to pass out candy canes and pencils inscribed with religious messages in both his kindergarten and first grade years. And in upstate New York, the Institute represented Kayla Broadus, a kindergartner who was told she could not say grace before her snack with her friends. In that case, we won a settlement upholding her right to do so.

Because of the urgency of this issue, and in order to ensure that the rights of religious public school students are respected and affirmed in the coming school year, The Rutherford Institute is sending this letter to all public school superintendents in the United States to remind them of their obligation to respect the constitutional rights to free expression of all schoolchildren, including religious students. As you are no doubt aware, these rights have recently been reaffirmed by the United States Department of Education. On February 7, 2003, the Department of Education issued its "Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools," which is available on

the Department of Education's
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website at http://www.ed.gov/inits/religionandschools/prayer_guidance.html. It states, in pertinent part:

Prayer at Graduation

School officials may not mandate or organize prayer at graduation or select speakers for such events in a manner that favors religious speech such as prayer. Where students or other private graduation speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression, however, that expression is not attributable to the school and therefore may not be restricted because of its religious (or anti-religious) content. To avoid any mistaken perception that a school endorses student or other private speech that is not in fact attributable to the school, school officials may make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker's and not the school's.

School districts that allow censorship of student religious expression in contravention of the DOE Guidance jeopardize their federal education funding under the Elementary and Secondary Education Act of 1965. 20 U.S.C. § 7904(b). As a condition of receiving funds under this Act, local education agencies are required to certify in writing to their state educational agency that they have no policies that prevent or deny participation in constitutionally protected prayer, as detailed in the Guidance. 20 U.S.C. § 7904(b).

Moreover, the Department of Education Guidance mirrors what the federal courts have said on the constitutional rights of religious students. It is well settled that the First Amendment fully protects the free speech rights of students. "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. Sch. Dist.*, 393 U.S. 503, 506 (1969). Moreover, the Supreme Court has emphasized that religious speech is entitled to the same protections as secular speech under the First Amendment.

[P]rivate 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 & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995). Consequently, when a school has opened a forum for student speech by its tradition or policy of permitting students to speak and sing at graduation exercises, even content-based restrictions on that speech must be "narrowly

drawn to effectuate a compelling state interest.” *Perry Education Ass’n. v. Memorandum Re: U.S. Dept. of Educ. Guidelines on Prayer in Public Schools*
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Perry Local Educators’ Ass’n., 460 U.S. 37, 46 (1983). Moreover, whether or not a school has opened a forum for speech, it may not censor speech solely on the basis of the student’s religious viewpoint. *See Perry*, 460 U.S. at 46; *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

Nor may school officials rely upon a false concern that they may violate the Establishment Clause of the First Amendment when they permit students to express their personal religious views at appropriate times and places. As the Supreme Court has said,

[T]here 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. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.... The proposition that schools do not endorse everything they fail to censor is not complicated.

Bd. of Educ. of Westside Comm. Sch. v. Mergens, 496 U.S. 226, 250 (1990); *see also Good News Club v. Milford Central School*, 533 U.S. at 113 (doubting whether the government’s interest in avoiding an Establishment Clause violation could justify viewpoint-based discrimination against religious speech); *Donovan v. Punxsutawney School Dist.*, *supra* (rejecting as “unpersuasive” school district’s argument that exclusion of religious student club from “activity period” was necessary to avoid Establishment Clause violation).

Of course, nothing in this letter should be read to offer legal advice to school officials with respect to local policies or specific situations. However, in view of the federal government’s Guidance to state and local educators and the Supreme Court precedent on religious expression, it is clear that school districts have an affirmative obligation to understand and respect the rights of all their students, including religious students. The Rutherford Institute recognizes that most public school officials strive to do this. Where they fail to live up to their constitutional responsibility, however, The Rutherford Institute and its attorneys are ready and willing to assist students and their families in securing their rights through the legal system.

Should you have any questions or if The Rutherford Institute can be of assistance to you in respecting the rights of religious students, feel free to contact us.

I would also encourage you to visit our website, www.rutherford.org, for more detailed resources on the rights of students and teachers in the classroom.