

THE RUTHERFORD INSTITUTE

INTERNATIONAL HEADQUARTERS

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MEMORANDUM

TO: Public School Superintendents

FROM: John W. Whitehead, President

DATE: August 25, 2004

SUBJECT: Guidelines on Freedom of Religious Expression for Students 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 *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001). In that case, the United States Supreme 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 has helped to secure the vital free speech rights of students, The Rutherford Institute and its nationwide network of over six hundred volunteer attorneys have continued to see increased censorship of student religious expression by public school administrators. For example, a high school district in Punxsutawney, Pennsylvania refused to allow a Bible club to meet during the same non-instructional period as other student-led clubs, citing concerns over the separation of church and state. Institute attorneys filed suit in federal court on behalf of the club, and a federal appeals court ultimately held that the school district violated the federal Equal Access Act and the First Amendment by discriminating against the club on the basis of its religious viewpoint. *Donovan v. Punxsutawney Sch. Dist.*, 336 F.3d 211 (3d Cir. 2003).

In our letter sent to public school superintendents last year, we told you about Rachel Honer, a Wisconsin high school student who was selected by the school to perform the song of her choice at graduation. After school administrators reviewed the song's lyrics, they told Rachel that she would have to remove all references to the word "God." Institute attorneys successfully convinced the school to allow her to perform the song uncensored. Since then, The Rutherford Institute has taken on a similar case in Isle of Wight County, Virginia on behalf of Anna Ashby, a high school student who was also selected to perform the song of her choice at her graduation ceremony. Anna provided the school administration with a copy of the lyrics of the song she intended to perform, "The Prayer," as recorded by popular vocal artist Celine Dion. The song includes such phrases as "I pray you'll ... help us to be wise in times when we don't know," "when we lose our way lead us to the place, guide us with your grace to a place where we'll be safe," and "we ask that life be kind, and watch us from above." After reviewing the lyrics, school officials informed Anna that she would not be permitted to sing because of the song's religious references.

The Rutherford Institute filed suit against the school district in federal court, contending that the school's censorship of Anna's performance violates her First Amendment right to free expression and violates clear guidelines issued by the U.S. Department of Education prohibiting censorship of a student graduation speaker's personal religious viewpoint. This case is ongoing, most recently with a federal judge denying the school district's motion to dismiss.

Over the last year, Institute attorneys have continued to successfully defend the rights of religious students across the country. In Morrisville, North Carolina, school officials removed tiles from the school's Senior Tile Project that students had inscribed with religious messages. The Rutherford Institute advised the school that by excluding the students' tiles, the school violated their First and Fourteenth Amendment rights to free speech, free expression and free exercise of religion. The Institute also advised the school that since it had created a limited public forum, it was obligated to include religious viewpoints, as well as secular ones. The school board eventually agreed to restore the tiles. In Shoreline, Washington, a student-led Bible study group was denied the same access to the school's bulletin boards, public address system, yearbook and student group funding that was given to other non-curricular student groups. After Institute attorneys advised the school district that the First Amendment and the Equal Access Act require it to extend to the Bible study group the same privileges that other non-curricular student-initiated groups enjoy, the district agreed to recognize the group. The Institute also successfully protected the rights of students, teachers and clergy in Kansas, Washington, Michigan, California and Texas to promote and participate in their local "See You At The Pole" events. "See You At The Pole," which is a student-initiated and student-led annual prayer gathering held at local school flagpoles, has become an international day of public student prayer.

One of The Rutherford Institute's recent high-profile cases demonstrates how the lack of recognition of students' rights even extends to the elementary school levels. In Muskogee, Oklahoma, 11-year-old Nashala Hearn was suspended for wearing the traditional Islamic headscarf required by her religion because it violated the school's dress code, which prohibited various hats and head coverings.

After serving her suspension, Nashala continued to wear her headscarf and was subsequently suspended a second time. Institute attorneys filed suit in federal court, arguing that the policy violated Nashala's constitutional rights, and the Justice Department later joined on her behalf. Shortly thereafter, the school agreed to a settlement under which it would change its dress code to allow exceptions for religious reasons, implement a training program for all teachers and administrators about the new dress code and publicize the change.

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 of free expression of all schoolchildren, including those wishing to freely exercise their religion. As you are no doubt aware, these rights were reaffirmed by the U.S. Department of Education in its 2003 memorandum, "Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools," which is available on the internet at http://www.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html. This policy memorandum provides an excellent summary of the governing constitutional principles at issue and includes specific guidance with regard to particular contexts, including prayer during non-instructional time, organized prayer groups and activities, moments of silence, accommodation of prayer during instructional time, religious expression and prayer in class assignments, student assemblies and extracurricular activities, prayer at graduation and baccalaureate ceremonies.

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).

The aforementioned Department of Education Guidance institutes 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). Furthermore, 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 Educ. Ass’n v. 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, as the Supreme Court held in *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, censor speech solely on the basis of a student’s religious viewpoint. *Also see 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 Cent. Sch.*, 533 U.S. at 113; *Donovan v. Unxsutawney Sch. Dist.*, cited above.

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 DOE 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.