

# THE RUTHERFORD INSTITUTE

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January 17, 2019

Via Email ([rjlewis@k12.wv.us](mailto:rjlewis@k12.wv.us); [jwhiston@k12.wv.us](mailto:jwhiston@k12.wv.us)) and Priority Mail

Dr. Robin Lewis, Superintendent  
Lewis County Schools  
239 Court Avenue  
Weston, West Virginia 26452

Mr. John Whiston, Principal  
Lewis County High School  
205 Minuteman Drive  
Weston, West Virginia 26452

## **Re: Lewis County High School Youth Alive Club**

Dear Dr. Lewis and Mr. Whiston:

The Rutherford Institute<sup>1</sup> has been contacted by students at Lewis County High School who are members and officers of the Youth Alive student club at the school and their parents. They have reported to us that on Monday January 6, 2020, on the first day of the second semester, school officials removed materials that the club had placed on a bulletin board that had been assigned to and used by the club to post information about the club's activities. While no written explanation was provided for removal of the bulletin board materials, the students received information that the basis was a complaint regarding the religious nature of the materials.

We believe that the removal and censorship of the club's materials from the bulletin board and restrictions imposed on the club's ability to communicate about its activities violates the club members' rights under the Equal Access Act, 20 U.S.C. §§ 4071 et seq., because it discriminates against the club on the basis of the religious nature of the club and its activities. Additionally, the removal based on the religious nature of the club's messages constitutes content- and/or viewpoint-based censorship in violation of the students' right to freedom of speech guaranteed by the First Amendment to the United States Constitution.

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<sup>1</sup> The Rutherford Institute is a non-profit civil liberties organization that provides free legal representation to individuals whose civil rights are threatened or infringed.

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On behalf of the students and their parents, we ask that the club be allowed to repost the materials that were ordered to be removed and that any new restrictions imposed on the club's use of the bulletin board be rescinded. The censorship and restrictions the club and its members have been subjected to constitute a serious and irreparable infringement of their federally-protected rights that must be promptly rectified.

### **Youth Alive Club**

Youth Alive is one of several duly-authorized student clubs (such as the Young Republicans, the Young Democrats, and Health Ambassadors) at Lewis County High School that meets during non-instructional time in one of the school's classrooms. The club is a Christian club and its purpose and mission is to provide religious fellowship among its members and to assist and build up others through Christian love. There are about 18 active members of the Youth Alive club at Lewis County High School

Like other student clubs at Lewis County High School, Youth Alive has been allowed the use of a bulletin board to post information about the club and allow other students at the school to learn about the purposes and activities of Youth Alive. The bulletin board is located in the hallway outside the room where Youth Alive holds its meetings.

Until Monday January 6, Youth Alive members had posted the message "Finding Help In the Bible" on their bulletin board, and had placed numerous 3-inch by 3-inch Post-It notes on the board. Each Post-It note had a different Bible passage hand-written on it. The passages were selected and written by Youth Alive club members and meant to be inspirational and helpful for students in dealing with life issues. The notes could be taken by any school student who might find that the passage was helpful or encouraging. Additionally, the passages were too small to be read in passing—a student would have to approach the bulletin board with the intention of finding a helpful passage on the notes in order to know what was on the note.

However, on January 6, the club was informed that the content on the bulletin board was being removed. The Youth Alive members understand that this was done in response to a complaint school official received about the religious content of the postings and were told the bulletin board was a violation of "church and state." At this time, the Youth Alive bulletin board is blank.

### **Removal of the Bulletin Board Material Violates the Equal Access Act**

Based on the information Youth Alive club members have provided us, the decision to remove the contents of the bulletin board violates the Equal Access Act (EAA). The EAA is a federal law enacted in 1984 that was specifically intended to eliminate discrimination against

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student clubs on the basis of the religious or political nature of the club.<sup>2</sup> That law provides in no uncertain terms that “[i]t shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.”<sup>3</sup> Because Lewis County High School allows noncurricular student clubs, such as Youth Alive, to meet and use school facilities during non-instructional time, the school has created the kind of open forum that makes the provisions of the EAA applicable to the school.<sup>4</sup>

Although the EAA speaks in terms of prohibiting discrimination against students in the conduct of a “meeting,” court decisions make clear that the requirement that schools treat religious clubs equally extends to the use of other school facilities. Thus, the United States Supreme Court wrote in one EAA decision that the “equal access” that schools must provide to religious clubs “carries with it access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair” that are provided to other student clubs.<sup>5</sup> Following this ruling, other courts have found that a school violates the EAA if it restricts a religious student club from using school bulletin boards or public address systems that are made available to other student clubs.<sup>6</sup>

By removing the materials Youth Alive had posted on its bulletin board, school officials have violated the EAA. Youth Alive has been deprived of access to a school facility, bulletin boards, that is made available to other Lewis County High School student clubs. Moreover, the apparent basis for the decision to remove the material is that it was religious in nature. Discrimination on the basis of the religious expression of a student club is precisely the kind of action forbidden by the EAA. As such, Youth Alive and its student members have been and continue to be deprived of rights protected by federal law.

### **Removal of the Bulletin Board Material Violates the First Amendment**

Additionally, Youth Alive and its members have been deprived of their right to freedom of speech protected by the First Amendment to the United States Constitution. It is well-established that students do not lose their constitutional rights when they enter the schoolhouse, and the right to freedom of expression is one students retain even while on school grounds.<sup>7</sup>

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<sup>2</sup> *Board of Education of Westside Community Schools 66 v. Mergens*, 496 U.S. 226, 235 (1990).

<sup>3</sup> 20 U.S.C. § 4071(a). Lewis County Schools Policy 5.3 acknowledges a school’s obligations under the EAA when noncurricular student groups are allowed to form and meet at the school.

<sup>4</sup> 20 U.S.C. § 4071(b); *Donovan ex rel. Donovan v. Punxsutawney Sch. Bd.*, 336 F.3d 211, 220-21 (3d Cir. 2003).

<sup>5</sup> *Mergens*, 496 U.S. at 247.

<sup>6</sup> *Prince v. Jacoby*, 303 F.3d 1074, 1086-87 (9th Cir. 2002); *Pope by Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244 (3d Cir. 1993); *Krestan v. Deer Valley Comm. Sch. Dist.*, 561 F. Supp. 2d 1078, 1086 (D. Ariz. 2008).

<sup>7</sup> *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503 (1969).

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Indeed, Lewis County High School has acknowledged the First Amendment rights of students and student clubs by allowing them access to bulletin boards to communicate about their purposes and activities.

However, the removal of Youth Alive's postings from its bulletin board because of the subject matter are religious in nature is an act of censorship that violates the First Amendment. By making bulletin boards available to student clubs to communicate with other students, the school created a forum for expression. Absent some compelling interest, the school may not deny access to that forum on the basis that the speech has a religious viewpoint. Thus, courts have held that schools violate the First Amendment when they deny a religious student club the use of school facilities that are available to other student clubs because of the religious nature or purpose of the club and its speech.<sup>8</sup>

The removal of Youth Alive's material is not justified by any fear or belief that the presence of that material within the school violates legal restrictions on the endorsement of religion by public schools. Again, the Supreme Court has rejected the idea that by treating religious school clubs equally in their ability to communicate about their activities and beliefs a school thereby violates constitutional restrictions on government support or endorsement of religion:

[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the [First Amendment's] 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.<sup>9</sup>

Therefore, the school's desire to avoid violating the Establishment Clause is not a valid reason, much less a compelling interest, for censoring Youth Alive's constitutionally protected expression on its bulletin board.<sup>10</sup>

For the reason set forth above, the decision to remove the materials from Youth Alive's bulletin board violates the constitutional and statutory rights of the club and its members. The decision is not justified any governmental interest in avoiding a violation of the Establishment Clause, but constitutes discrimination on the basis of Youth Alive's religious expression. On behalf of the club, its members and their parents, we ask that the decision forbidding the posting of the materials be rescinded and that the club be allowed to repost the materials.

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<sup>8</sup> *Prince*, 303 F.3d at 1091-92

<sup>9</sup> *Mergens*, 496 U.S. at 250.

<sup>10</sup> *Prince*, 303 F.3d at 1092; *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274, 284 (4<sup>th</sup> Cir. 1998).

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Because the affected students are suffering irreparable harm to their fundamental constitutional and statutory rights, we must receive a response to this letter by the close of business Thursday January 23, 2020.

Sincerely,

A handwritten signature in black ink that reads "Douglas R. McKusick". The signature is written in a cursive style with a large, looped initial "D".

Douglas R. McKusick  
Senior Staff Attorney

Cc: Lewis County Board of Education (via Priority Mail)