



**Re: ACLU of Tennessee's Know Your Rights Letter**

Dear Director:

You recently received a letter from the ACLU of Tennessee (“ACLU-TN”) purportedly providing you with a guide on Religion in Public Schools. The ACLU-TN makes blanket, across-the-board claims about the law while ignoring the importance that the particular facts and circumstances of a situation play in determining what is permissible at school. While the ACLU-TN pays lip-service to the First Amendment rights of students to express their religious beliefs at school, they would have schools implement restrictions that trample upon students’ rights. And the ACLU-TN completely ignores the rights of teachers and administrators to express their religious beliefs as well. The ACLU-TN’s “guide” on Religion in Public Schools can best be summarized as “Religious expression is permissible as long as it is neither seen nor heard.” The truth is that students, teachers, and administrators enjoy robust First Amendment rights at school, and school districts have nothing to fear in permitting the free exercise of those rights.

### **Prayer at School, Graduation, and Sporting Events**

While the ACLU-TN grudgingly acknowledges the right of students to pray at school (only in the second to last paragraph on the last page of the “guide”), it narrows the scope of students’ freedom to pray to only a few defined circumstances. In fact, since prayer is private speech, students may engage in it at school, as long as it would not appear that the school endorsed it. *See Adler v. Duval County Sch. Bd.*, 206 F.3d 1070, 1083 (11th Cir. 2000); *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 969 (5th Cir. 1992); *Chandler v. Siegelman*, 230 F.3d 1313, 1317 (11th Cir. 2000). Thus, students may pray at school on their own or in groups during non-instructional time so long as it is not disruptive or coercive. This includes praying as a team before a game or practice, as long as it is completely student-led and initiated. *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 405 (5th Cir. 1995) (noting that while coaches were not permitted to lead or participate in prayer, students could still do so).

The ACLU-TN erroneously states that “prayer – even nonsectarian or proselytizing prayer – at public school graduation ceremonies violates the Establishment Clause of the First Amendment.” However, private religious speech even at school-related functions such as graduation or sporting events is protected by the Constitution. Courts have held that school policies which equate all student religious speech with State speech go too far and actually violate an individual’s free speech rights. *Chandler*, 230 F.3d at 1316 (“The Free Exercise Clause does not permit the State to confine religious speech to whispers or banish it to broom closets. If it did, the exercise of one’s religion would not be free at all”). A school does not need to prohibit private religious speech in public places in order to avoid violating the Establishment Clause. *Id.* The test is whether the prayer is genuinely student-initiated and student-led, and not part of a school policy which encourages or endorses it.

Therefore, the constitutionality of a graduation message, including a religious message, hinges on whether it is considered private speech – or, in other words, whether an objective observer would view the message as a “state endorsement of prayer in public schools.” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000). A school policy containing the following elements should prevent any appearance of endorsement while protecting the First Amendment right of students to express their religious beliefs during a graduation speech:

- 1) The school creates a time at graduation for a student to speak on a matter of his or her own choosing;
- 2) Neutral criteria determine which student(s) is (are) allowed to speak during this time;
- 3) There is no involvement or prior review of the speaker’s message by the school or school staff; and
- 4) Students are instructed that their speech may not materially and substantially interfere with the graduation ceremony, or be vulgar, lewd or obscene.

*Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 509 (1969); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986). For an example of a constitutional graduation policy, see *Adler*, 206 F.3d at 1072. *But see Cole v. Niemeyer*, 228 F.3d 1092 (9th Cir. 2000) (the Ninth Circuit held that allowing a sectarian prayer and message at graduation would violate the Establishment Clause).

The same principles apply for religious messages at sporting events. Similar to the guidelines noted above for graduation, a school can allow a pre-game message to be given by a neutrally selected student, and the message chosen by the student, whether religious or not, should be permissible. This should prevent any appearance of endorsement regarding student messages, including those that may be religious in nature.

### **Baccalaureate Services**

While the ACLU-TN acknowledges that students are free to hold private baccalaureate services, it fails to inform you of the broad rights afforded to students, teachers and administrators to participate in such events. A school may permit a baccalaureate ceremony with religious content on school property when the event is sponsored and organized solely by private parties and when the school opens up its facilities to community groups generally. *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001). While many students choose to hold the baccalaureate service at a local church or community venue, the service can constitutionally be held on school property if the school allows its facilities to be used by other community groups, such as the Boy Scouts, Girl Scouts, or Rotary Club.

Furthermore, as the U.S. Department of Education has stated, teachers and administrators are permitted to attend and participate in baccalaureate services as long as they do so in their private capacities as citizens and not in their official capacities as school district employees. 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](http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html)); see also *Wigg v. Sioux Falls School Dist.*, 382 F.3d 807, 815 (8th Cir. 2004). In that capacity, they can pray,

speak, and otherwise actively participate in the baccalaureate service.

### **Community Organizations**

Many school districts allow school facilities to be used by community groups and organizations before and after school. Many also permit community groups to distribute informational materials that would be beneficial to students and their parents by sending home flyers with students in placing them on a literature distribution table at the school. If a school opens up the use of its facilities to community groups, it cannot prohibit religious organizations from having the same access to facilities or literature distribution programs at the school. *Good News Club*, 533 U.S. 98; *J.S. v. Holly Area Sch.*, 749 F. Supp. 2d 614, 628 (E.D. Mich. 2010) (school district “cannot permissibly deny [a community member] access to [the school’s literature distribute program] on the sole ground that she seeks to distribute materials promoting religious activities”); *Wright v. Pulaski County Special Sch. Dist.*, \_\_ F.Supp.2d \_\_; 2011 WL 1134965 (E.D. Ark. 2011) (striking down school policy that “permit[ted] almost any organization, with the exception of churches, to circulate material” to students).

Therefore, contrary to the ACLU-TN’s assertion that Gideon Bibles may never be distributed at school, members of The Gideons International are permitted to distribute Bibles, religious literature, and even set up displays at school if the school permits other community organizations to do so. *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274, 288 (4th Cir. 1998) (“[T]he state does not violate the Establishment Clause when it permits private entities to passively offer the Bible or other religious material to secondary school students”); *Doe v. Duncanville Independent School Dist.*, 70 F.3d 402, 408 (5th Cir. 1995) (parents lacked standing to challenge Bible distribution because the school did not “expend[] any funds on the Gideons’ Bible distribution,” “the Gideons themselves supply the Bibles and simply lay them on a table,” “the Gideons do not address the students, the school does not make any announcement informing the students about the Bibles, and no school district employees handle the Bibles”).

### **Student Clubs and Organizations**

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; *Prince v. Jacoby*, 303 F.3d 1074, 1091 (9th Cir. 2002). These clubs must be student-led and student-initiated.

The ACLU-TN misleadingly states that schools may not “promote during instruction time the religious activities of students clubs.” However, religious clubs must be given equal access to all school facilities, resources, and equipment that are available to other non-curriculum related clubs. *Board of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226, 247 (1990); *Prince*, 303 F.3d at 1085-90. This includes the right to organize and promote student events, post and distribute flyers, and make public announcements if these same benefits are given to other non-curriculum related clubs. Religious clubs are even permitted to invite community members (including local pastors and religious leaders) to speak at club meetings if other clubs are permitted to do so.

Some schools may require student-initiated clubs to have a teacher sponsor. Schools may require a sponsor of religious clubs only if the same requirements are imposed on secular clubs. A teacher or other school employee as the agent of the school may be present at a religious meeting in a “non-participatory” capacity. This “non-participatory” attendance means that the teacher or school employee should not actively lead or direct the group. 20 U.S.C. § 4071(c)(3).

### **See You at the Pole and National Day of Prayer**

Students have a constitutional right to participate in events such as See You at the Pole and the National Day of Prayer through prayer and worship activities. *Mergens*, 496 U.S. at 236. Furthermore, students have the right to inform their fellow students about such events as long as they do not materially disrupt the academic process while doing so. *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). And contrary to the ACLU-TN’s claim that “schools may not advertise or promote such events within the school either verbally or in writing,” 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 must allow the same means of advertising for the See You at the Pole, National Day of Prayer, or similar events. *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). Of course, students have the right to distribute flyers during non-instructional time at school. *Tinker*, 393 U.S. at 512-513; *M.B. ex rel. Martin v. Liverpool Central Sch. Dist.*, 487 F.Supp.2d 117 (N.D.N.Y. 2007); *J. S. v. Holly Area Schs.*, 749 F.Supp.2d at 624.

### **Religious Expression by Teachers, Coaches, and Administrators**

While the ACLU-TN entitles its document as “A Guide for Administrators and Teachers,” it completely ignores the constitutional rights of school employees to objectively teach about religion and express their religious beliefs. As the Supreme Court correctly pointed out that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker*, 393 U.S. at 506.

While a teacher may not use the classroom to indoctrinate students, a teacher may disseminate information about religion in an objective manner so long as the information is reasonably related to the curriculum. The Supreme Court recognized that “the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.” *Abington Township v. Schempp*, 374 U.S. 203 (1963). Indeed, many subjects cannot be thoroughly taught without some discussion of religion. For example, in art class, the teacher may overview religious art along with secular art. Religious literature can be read and studied so long as it is objectively taught along with secular literature. The Supreme Court has long ago acknowledged that “[m]usic

without sacred music, architecture minus the cathedral, or painting without the Scriptural themes would be eccentric and incomplete, even from a secular view.” *McCollum v. Bd. of Educ.*, 333 U.S. 203, 236 (1948) (Jackson, J., concurring).

Some schools allow teachers to utilize a classroom or a lounge to meet with other teachers. If the school allows teachers to use its facilities for non-curriculum related matters such as lunch, socialization and entertainment, then teachers should also be able to use the same facilities for Bible study and prayer. U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645, 9647 (Feb. 28, 2003). In such situations, only teachers should be in the meeting, not students.

Finally, faculty and staff have the constitutional right to participate in community-sponsored religious activities before and after their contracted work times. This includes the right to participate in events such as See You at the Pole and even community Bible clubs that meet after-school at school facilities. *Wigg*, 382 F.3d at 811. When school employees participate in such activities, they should make it clear that they are participating in their individual capacities as citizens and not in their official capacities as employees of the school district. U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645, 9647 (Feb. 28, 2003). But when doing so, faculty and staff are free to pray, read the Bible, and engage in other religious speech during the event.

### **Religious Holidays**

The constitutional requirements regarding teaching about religious holidays, symbols, music, art, drama, or literature can be satisfied by mixing the secular and the sacred. In other words, if a public school teacher displays or presents a secular aspect along with the religious -- holiday, symbol, music, art, drama, or literature -- then the display or the presentation should be constitutional. Contrary to the ACLU-TN’s blanket statement that “crosses and nativity scenes...may not be displayed in public schools,” a teacher may display these and other religious symbols during the Christmas season so long as they are displayed within the same context as secular symbols of the holiday, such as Santa Claus, reindeer, etc. Absent a purely religious motive, including the secular aspect along with the religious aspect should be considered an objective presentation and consequently places the school district in a neutral position.

Just as objectively teaching about religion is permissible, teaching about a religious holiday is permitted if it is part of a program of education which is presented objectively, and does not have the effect of advancing or inhibiting religion. *See, e.g., Florey v. Sioux Falls School District 49-5*, 619 F.2d 1311 (8th Cir. 1980), *cert. denied*, 449 U.S. 987 (1980). For example, a teacher may explain that Easter is a religious holiday celebrated by Christians who believe that the person of Jesus Christ was raised from the dead. Historically, Easter celebrates the resurrection of Christ, whom Christians believe to be God. Done in an objective and educational manner, teachers can speak about religious holidays.

Religious Christmas carols may be sung in public schools without offending the Constitution. These carols may be sung by individual students or by a group of students during school activities such as choir, Christmas programs, and other events. Christian Christmas songs

such as “Silent Night, Holy Night” may be sung along with secular songs of the holiday. A school Christmas program may include religious songs so long as they are presented “in a prudent and objective manner and as a traditional part of the cultural and religious heritage of the particular holiday.” *Id.* at 1314. There is no magic formula in achieving a balance between the secular and the religious songs, but it is clear that there must not be a religious purpose for including the religious songs.

### Conclusion

We hope this information has been helpful in understanding the true extent of the First Amendment rights of students, teachers, and administrators and to dispel the inaccurate and incomplete information contained in the ACLU-TN’s letter. If you would like more information or assistance about a particular situation, please feel free to contact us at the Alliance Defense Fund at 1-800-TELL-ADF.

Sincerely,

A handwritten signature in black ink that reads "David Cortman". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

David Cortman, ADF Senior Counsel

A handwritten signature in black ink that reads "Robert M. Pautienus III". The signature is highly stylized and cursive, with a prominent loop at the end.

Robert M. Pautienus III, ADF-TN Allied Attorney

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