



April 7, 2014  
*Via Email and U.S. Mail*

Mr. Brian Whiston, Superintendent  
Dearborn Public Schools  
18700 Audette St.  
Dearborn, MI 48124

***Re: The Distribution of Religious Literature in Public Schools***

Dear Mr. Whiston:

It has come to our attention that local media reports have questioned Dearborn Public Schools' neutral practice of allowing religious community groups to distribute flyers to students on the same terms as their secular counterparts. We write to commend the District's refusal to discriminate against religious speech, clarify that the First Amendment does not permit public schools to exclude churches from literature distribution fora, and correct misstatements of the law popularized by Americans United for Separation of Church and State and other secularist groups.

Our understanding of the facts is as follows. A local Dearborn church submitted an Easter "Eggstravaganza" flyer for distribution to students at three elementary schools. The flyer indicated that children could register to participate in an Easter egg hunt, relay race, and egg toss. Following a neutral practice of distributing flyers from community groups that may be of interest to students and their parents, the District rightly passed the church's flyers on to students who were free to keep or discard them as they saw fit. This practice upset some parents and a secularist group who mistakenly believes that the First Amendment requires a complete wall of separation between church and state.

As the United States Court of Appeals for the Sixth Circuit, which has jurisdiction over the State of Michigan, has explained the "separation of church and state" is an "extra-constitutional construct [that] has grown tiresome. The First Amendment does not demand a wall of separation between church and state." *ACLU of Ky. v. Mercer Cnty.*, 432 F.3d 624, 639 (6th Cir. 2005). Government in general, and public schools in particular, cannot discriminate against private speech because it is religious, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 n.2 (2001) (explaining "the exclusion of [a speaker] on the basis of its religious perspective constitutes unconstitutional viewpoint discrimination"), or because it comes from

religious people or groups, *Mitchell v. Helms*, 530 U.S. 793, 827 (2000) (plurality opinion) (prohibiting “special hostility for those who take their religion seriously”).

The Sixth Circuit has already recognized this fact in the context of a school literature distribution forum like the one operated by the District. In *Rusk v. Crestview Local School District*, 379 F.3d 418, 420 (6th Cir. 2004), a parent claimed that a public school district’s distribution of flyers advertising religious activities violated the Establishment Clause. The Sixth Circuit rejected that claim because “parents must be deemed aware that [the school] distribute[d] flyers advertising both religious and nonreligious community events.” *Id.* at 421. Consequently, “no reasonable observer could conclude” that the school was endorsing religion. *Id.* The *Rusk* Court made clear that “students’ possible misperceptions of endorsement are an insufficient basis for finding an Establishment Clause violation,” *id.*, and that uniquely refusing to distribute flyers related to religious activities would unconstitutionally “disapprove[] of religion,” *id.* at 423. See also *J.S. v. Holly Area Sch.*, 749 F. Supp. 2d 614, 629 (E.D. Mich. 2010) (enjoining a school district from infringing the plaintiffs’ “First Amendment right to distribute religious materials to students and their parents, whether through non-disruptive student-to-student delivery or through submission to the flyer forum”).

It is unfortunate that rather than investigating what the law actually says on this subject, local media has chosen to criticize the school district for following the law, question churches’ motives for inviting all students to community events, and turn to a secularist group for legal advice. We commend the school district for respecting citizens’ freedom of speech and for properly teaching students to tolerate opposing views. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969) (“Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk.”). Our hope is that the District will take this opportunity, as the Sixth Circuit has recommended, see *Rusk*, 379 F.3d at 422, to teach about the First Amendment, including the principle that a neutral literature distribution forum “does not send a message of disfavor to students who do not attend ... advertised religious activities,” *id.* at 423.

Please do not hesitate to contact us with any legal questions you may have. If the District is sued for complying with its constitutional obligation to respect private religious expression, we would be happy to defend it free of charge.

Sincerely,



Rory T. Gray, Litigation Staff Counsel  
Jeremy D. Tedesco, Senior Legal Counsel  
J. Matthew Sharp, Legal Counsel