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Administrative Letter A035

Religious Speech in Public School

Administrative Letter #35 - Approved 08/2000; Updated 08/23/2013, 07/07/2017

DATE: Reviewed and Updated July 2017 – Lyle Cox

FROM: Jay Alan Sekulow, Chief Counsel, The American Center for Law and Justice

REGARDING: Religious Speech in Public Schools

Dear School Superintendent or School Administrator:

The purpose of this letter is to update you regarding free speech rights on public school campuses, particularly the right to engage in religious expression. This letter is being sent for informational purposes to help clarify the legal issues surrounding religious expression, including events such as *See You at the Pole*, in light of the Supreme Court's recent decision in *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S.Ct. 2266 (2000).

The American Center for Law and Justice (ACLJ) is a not-for-profit public interest law and educational group. Our organization exists to educate the public and the government about the right to freedom of speech, particularly in the context of the expression of religious sentiments. I have served as lead counsel in three significant Supreme Court cases in this area: *Santa Fe Indep. Sch. Dist. v. Doe*, *Lamb's Chapel v. Center Moriches Unified Sch. Dist*., 508 U.S. 384 (1993), and *Bd. of Educ. of the Westside Community Sch. V. Mergens*, 496 U.S. 226 (1990). This letter will succinctly answer questions that are commonly asked regarding religious speech in the schools.

Can Students Participate in Bible Clubs on Campus?

Yes. Students have the right to hold religious meetings or events pursuant to the Equal Access Act ("EAA"), 20 U.S.C. § 4071, *et. seq.* The Supreme Court upheld the EAA in *Mergens* and made clear that students have the right to form a religious club with "the same privileges and meet on the same terms and conditions as other [school] student groups." 496 U.S. at 232. This includes, of course, access

to school advertising, announcements, publications, and events, such as Club fairs. *Id.* at 247. These student rights of access have been confirmed in Guidelines President Clinton directed the Secretary of Education to send to every public school district across the country which state: "A meeting, as defined and protected by the Equal Access Act, may include a prayer service, Bible reading, or other worship exercise." Richard W. Riley, United States Department of Education Guidelines ("Guidelines"), p. 6 (1998).

The decision in *Santa Fe* did nothing to alter the rights of Bible Clubs. In fact, the Court in *Santa Fe* cited *Mergens* in support of the proposition that the Religion Clauses of the First Amendment "[b]y no means… impose a prohibition on all religious activity in our public schools. Indeed, the common purpose of the Religion Clauses 'is to secure religious liberty.'" *Santa Fe*, 120 S.Ct. at 2281 (internal citations omitted).

Can Students Participate in Events Such as See You at the Pole on Campus?

Yes. On September 20, 2000, students in your school district will be participating in *See You at the Pole* – a national student prayer rally that occurs before the school day begins. The right to gather for such an event is supported by Supreme Court precedent holding that a student's free speech rights apply "when he is in the cafeteria, or on the playing field, or on the campus during the authorized hours. …" *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969). As the *Santa Fe* Court confirmed, "nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the school day." Id. at 2281. The Education Guidelines also recognize the legality of *See You at the Pole*, p. 4:

> Students may also participate in before or after school events with religious content, such as "see you at the flag pole" gatherings, on the same terms as they may participate in other noncurriculum activities on school premises. School officials may neither discourage nor encourage participation in such an event.

Can Religious Organizations Use School Facilities After Hours?

Yes. In fact, the *Santa Fe* opinion cites with approval the Supreme Court decision in *Lamb's Chapel*, where the Court ruled that once a school district opens up its facilities to community groups, it must allow religious groups access on an equal basis. In *Lamb's Chapel*, the Court held that the school district violated the First Amendment by excluding a church from renting school facilities after hours to show a film series on parenting. The Court ruled that because the school had "repeatedly been used by a wide variety of private organizations," the denial of the church use was unconstitutional. 508 U.S. at 395. The Court stated that "[t]he principle that has emerged from our cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." Id. at 394 (internal citation omitted).

Can Students Pray at School Football Games?

Yes. The recent case of *Santa Fe* did not question the protected status of genuinely private student religious speech at school events. Its holding is narrowly limited to the Court's factual determination that the school district had taken affirmative steps to create a vehicle for prayer to be delivered at the school assembly. The Court struck the policy at issue because it determined that it did

not involve private religious speech, but rather government sponsored prayer. The *Santa Fe* Court reiterated the distinction that "there 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." Id. at 2275 (quoting *Mergens*, 496 U.S. at 250 (emphasis in original)). Therefore, private student prayer before sporting events is permissible provided that the prayer is not sponsored or endorsed by the school and does not utilize the school's public address system. Students are free to pray individually or in groups on the same terms and conditions as they may engage in any other private speech.

Consequently, the *Santa Fe* decision does not affect the right of students to engage in religious expression where students are otherwise already free to select the content and viewpoint of their expression (e.g., talent shows, class assignments, show-and tell, oratorical competitions, message-bearing clothing or jewelry). Nor does *Santa Fe* affect the right of students to engage in religious expression through Bible clubs, one-on-one discussions, literature distribution, student-initiated activities such as *See You at the Pole*, and a myriad of other channels of communication, including private prayers.

School officials may not prevent students from gathering together for prayer or religious discussion on school grounds, provided that students do so in a non-disruptive manner, during non-instructional time, either before or after school, at lunchtime, or any other "free" time when students are permitted to talk and mingle with peers on campus. The recent *Santa Fe* case has no bearing on such private speech. Rather, it reaffirms the constitutional protection afforded such speech.

The American Center for Law and Justice is committed to seeing the constitutional rights of students protected on their public school campuses. Because of our commitment, we are available to answer any questions you might have concerning this letter

(Letter retyped for copy clarity.)