



December 31, 2018

Via U.S. Mail & Electronic Mail

Dr. Mark K. Leidy, Superintendent  
Mechanicsburg Area School District  
1225 S. Market Street, Suite 1  
Mechanicsburg, PA 17055  
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Dear Dr. Leidy,

The leaders of the Christians in Action Student Club (Bible Club) at Mechanicsburg Area School District have contacted us again for assistance because of unconstitutional actions by a Mechanicsburg Area School District Principal.

By way of introduction, Independence Law Center (ILC) is a public interest law and educational civil rights law firm specializing in First Amendment issues. We provide representation and advice to individuals, as well as to school districts, related to matters similar to the one the students in the aforementioned club are experiencing.

### **I. Statement of Relevant Facts**

The Bible Club student leaders have informed us that their request to pass out Bibles to their friends during non-instructional time during the school day has been denied by the Principal, Mr. David Harris. Based on the information below, Mechanicsburg Area School District's refusal to permit the students to distribute Bibles to fellow students constitutes a violation of the First Amendment to the United States Constitution and the federal Equal Access Act (EAA). We trust this issue can be resolved amicably.

However, this behavior is not a one-time event. Mechanicsburg Area School District, as evidenced by the actions of Mr. Harris, is either severely misinformed as to the contours of student rights in schools or is purposefully hostile towards student religious speech. Earlier this school year, Mr. Harris denied the Bible Club's request to post their club flyer advertising the club's meeting times despite granting requests from other school clubs to post their flyers. He told them that they would only be permitted to post the flyers if they agreed to remove a Bible verse from the flyer. The students themselves urged Mr. Harris to reconsider that denial and gently informed him that their religious speech should be treated equally with non-religious speech, but Mr. Harris refused. It took our involvement and the involvement of your district's solicitor to instruct Mr. Harris that such censorship of religious speech is unconstitutional.

Mr. Harris, just a few months after the last unconstitutional actions, has again determined to affirmatively deny basic rights to the students in the Bible club. Mr. Harris wrote to the Bible Club's teacher advisor in response to the request for permission to hand out Bibles to friends during lunch and stated: "Please inform [them] that [they are] not permitted to handout Bibles during the school day." Mr. Harris then went even further, and stated that the students could not even hand out Bibles outside of the school day unless the school gave them permission first.

Mr. Harris' actions run contrary to the U.S. Constitution, the Pennsylvania Constitution, the Pennsylvania Code,<sup>1</sup> clear case law, and even the school's own policy 220, all of which uniformly protect students' right to freedom of speech including the right to distribute written materials, including Bibles, during the school day during non-instructional time.

## II. Statement of Relevant Law

The Supreme Court has made it clear that students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>2</sup> This issue has been litigated multiple times at the Supreme Court, in this Circuit, and in courts across the nation. And the consistent result in these cases is the same: schools may not restrict student expression at school absent specified circumstances. The "*Tinker* analysis"—named after the Supreme Court case that set the general rule for regulating student speech in schools—declares that while in school, a student "may express his opinions, even on controversial subjects . . . , if he does so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others."<sup>3</sup>

While the Court has carved out narrow exceptions for the prohibition of lewd, vulgar, or indecent speech,<sup>4</sup> speech that is school-sponsored,<sup>5</sup> and speech that encourages illegal drug use,<sup>6</sup> it has unmistakably held that "[s]peech falling outside of these categories . . . may be regulated only if it would substantially disrupt school operations or interfere with the right of others," and to regulate anything more violates students' First Amendment rights.<sup>7</sup>

The *Tinker* "material disruption" standard applies to all student oral expression and literature distribution during non-instructional time, regardless of religious content. School officials may not prohibit this expression out of fear that allowing religious speech will offend some members of the community. As the Supreme Court said, "in our

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<sup>1</sup> 22 Pa. Code 12.9

<sup>2</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>3</sup> *K.A. v. Pocono Mountain School District*, 710 F.3d 99, 106 (3d Cir. 2013) (quoting *Tinker*, 393 U.S. at 513).

<sup>4</sup> *Id.* at 107; *see also J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 927 (3d Cir. 2011) (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683, 685 (1986)).

<sup>5</sup> *K.A.*, 710 F.3d at 107; *see also Blue Mountain Sch. Dist.*, 650 F.3d at 927 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)).

<sup>6</sup> *K.A.*, 710 F.3d at 107; *see also Blue Mountain Sch. Dist.*, 650 F.3d at 927 (citing *Morse*, 551 U.S. at 408).

<sup>7</sup> *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001).

system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.” *Tinker*, 393 U.S. at 508. If a student wishes to peacefully distribute free literature on school grounds during non-instructional time, there is simply nothing which “might reasonably [lead] school authorities to forecast substantial disruption of or material interference with school activities.” *Id.* at 514. In fact, distribution of literature is inherently less disruptive than spoken expression. *United States v. Kokinda*, 497 U.S. 720, 734 (1990). As the Supreme Court stated, “[o]ne need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone’s hand, but one must listen, comprehend, decide and act in order to respond to a solicitation.” *Id.*

Several courts have held that the distribution of religious literature by students is protected speech under the First and Fourteenth Amendments. *See Morgan v. Swanson*, 659 F.3d 359, 396 (5th Cir. 2011) (en banc) (recognizing that students, regardless of grade level, have “the First Amendment[] right . . . to express a religious viewpoint to another student without fear”); *J.S. ex rel. Smith v. Holly Area Schools*, 749 F. Supp. 2d 614, 623 (E.D. Mich. 2010) (issuing preliminary injunction against “school district’s outright prohibition upon [elementary school student’s] distribution of religious flyers to his classmates”); *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); *Clark v. Dallas Indep. Sch. Dist.*, 806 F. Supp. 116, 119 (N.D. Tex. 1992) (“It is well settled that written expression is pure speech. . . . It is equally true that the guarantee of free speech encompasses the right to distribute written materials peacefully”); *Baughman v. Freienmuth*, 478 F.2d 1345, 1348 (4th Cir. 1973) (“The regulation complained of reaches the activity of pamphleteering which has often been recognized by the Supreme Court as a form of communication protected by the first amendment”); *Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280, 288 (E.D. Pa. 1991) (“It is axiomatic that written expression is pure speech,” and that “the guarantee of freedom of speech that is enshrined in the first amendment encompasses the right to distribute peacefully”). Thus, school officials may not prohibit the peaceful dissemination of Bibles by students to fellow students.

### III. Resolving the Matter

The District must take immediate steps to remedy the constitutional infirmities created by its actions.

If the District is serious about reforming its policies without the need for legal action, we ask that you provide a **written confirmation by January 7 of 1) your intention to permit students to distribute Bibles during non-instructional time in the future from the Superintendent and/or School Board; and 2) that you have distributed the information below to administrators and teaching staff.** Any response can be directed to our address below, or via email to [jsamek@indlawcenter.org](mailto:jsamek@indlawcenter.org).

“We have recently had some problems with protecting student’s free speech rights in school. Earlier this year, an administrator denied the Bible Club’s request to advertise their meeting times on flyers because the posters contained a Bible verse and asked them to remove the verse in order to receive permission. This denial was a violation of board policy 220 as well as a violation of law. Recently, students in the Bible Club were told they could not hand out Bibles during the school day, again in violation of board policy 220 and the law. We wish to clear up any confusion. Students have the right to distribute religious and nonreligious material at school during non-instructional time. Of course, we do not permit students to distribute material that materially and substantially interferes with the operation of the school, or infringes on the rights of other students. Bibles are not “Unprotected Student Expression” as defined in Mechanicsburg Area School District Policy 220. We must not ban student literature distribution outright nor may we restrict student speech or distribution based on its religious content or viewpoint. For example, during lunch, parties, in hallways between classes, and other non-instruction time, we should not be barring students from distributing Bibles to fellow classmates – which is considered private speech. Furthermore, student religious speech and non-religious speech must be treated equally. Student religious speech does not violate the Establishment Clause.

Sincerely,

*Jeremy L. Samek*

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