

## **Student Rights Guaranteed Under the Constitution and Federal Law (from [www.aclj.org/Issues/Resources](http://www.aclj.org/Issues/Resources))**

Freedom to Meet with Other Students for Prayer, Bible Study, and Worship

Freedom to Wear Clothing Depicting Religious Messages and Symbols

Freedom to Express Religious Beliefs on Campus

Freedom to Share Religious Tracts on Campus

Freedom to Pray Voluntarily

Freedom to Carry a Bible or Other Religious Literature

Freedom to Prepare School Assignments and Projects From, and Expressing, a Religious Perspective

Freedom to Observe Religious Holidays on Campus

Freedom to Organize Religious Clubs

Freedom to Live According to Their Religious Beliefs While on Campus

FAQ:

Is my daughter allowed to choose the Bible for a reading assignment?

**Christina from Indiana asks:** My son is now in high school, but my daughter is now attending the same middle school that he attended. They are required to read a designated number of pages for literature class outside of class or at home and document the number of pages they read for that grading period. They could choose any book that was age-appropriate, but my son was told that the Bible was not an acceptable book for that assignment. Is this legal?

**Jay answers:** Christina, there's actually a [federal] Department of Education guideline right on this point. It says when there's a homework assignment and it's an open reading assignment, the students are allowed to utilize a religious text, including the Bible. So, Christina, let me get you in touch with our legal staff here at the American Center for Law & Justice. We're getting these cases resolved very quickly, without a lot of anxiety. In fact, 99.9 percent of the time we're getting these resolved literally in minutes. So, we'll make sure that your daughter can utilize the Bible as appropriate reading material.

FAQ:

Should my ninth-grade daughter be required to read a book about sex and drug abuse?

**Robin from California asks:** My stepdaughter is a Christian and goes to a public high school. Even though she's asked for alternatives, her ninth-grade lit teacher is requiring her to read a book called "Smack," which is about sex, heroin, running away, etc. She said she's learned things she never even knew how to do in this book. We want to step in and fight for her. My husband wants to call the school district. What would your advice be as far as how we deal with this? Don't we have some rights if this is objectionable material to us and to her?

**Jay answers:** I'll tell you one thing you need to do is call the school superintendent; there's no doubt about it. Your husband needs to calmly say that this is not appropriate reading material for your daughter and you want alternatives put in place. She has the right to opt out of this particular reading assignment, and the teacher has to give her an alternative reading assignment. They cannot insist on her reading something that violates her sincerely held religious beliefs.

I'm going to give you some legal help, but you need to go in to the school principal or the school superintendent, depending on the size of the school, and say you've got a problem with this particular book. You've reviewed the material, your daughter has reviewed the material, and she *wants* to opt out. She should not be required to complete the assignment. They should respect that, and we've had great success in that regard.

## Federal Constitutional Rights of Students

Little more than thirty years ago, students were suspended from school if they engaged in even the most non-disruptive forms of free speech in public schools. School officials suspended or expelled students even when their protests were silent and did not disrupt schools. That approach treated students as something less than a whole person endowed with rights, rights ultimately guaranteed under our Constitution, Bill of Rights, and Constitutional Amendments.

The Supreme Court of the United States 1 radically and abruptly changed this approach in *Tinker v. Des Moines Independent School District*.<sup>2</sup> In *Tinker*, the Supreme Court rebuked school officials for panicking in the face of a peaceful expression of protest - the wearing of black armbands to express disapproval of America's involvement in South Vietnam - and suspending students from school. The Court explained that neither "students [nor] teachers shed their constitutional rights . . . at the schoolhouse gate."<sup>3</sup> *Tinker* remains the leading case on students' constitutional rights in public schools.

### Fundamental Rights of Students

Throughout the United States, state laws compel children to attend school.<sup>4</sup> Although many families educate their children in church-affiliated schools or at home, the overwhelming majority of school-aged students attend public schools. As a result of attendance laws and the enforcement of them by truant officers and courts, students are coerced to attend public school. But the students carry constitutional and statutory rights with them on campus. Those rights

protect students in what could otherwise be a highly biased and selective program of indoctrination:

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They [have] fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views . . . . [S]chool officials cannot suppress "expressions of feelings" with which they do not wish to contend.<sup>5</sup>

### **Tinker and Disruptions**

Tinker removed any lingering doubt about students' rights to freedom of speech. But make no mistake about the ability of public schools to prohibit conduct that actually disrupts school order and discipline. The school officials in the Tinker case, however, had no basis for charging that the protesting students had caused a disruption of the school.

The students in Tinker did not disrupt the school day with their protest activity. They merely wore black armbands over their shirt-sleeves to show their disagreement with a policy of the United States government. They did not interrupt classes or walk out of them; they did not conduct a sit-in in the school's administrative offices. They did not block the hallways, allowing only those who expressed agreement with them to pass. Despite the peaceful, nonviolent nature of the activity, the school officials panicked and suspended students from school as though they had engaged in the sort of disruptive behavior mentioned above.

In Tinker, the Court criticized the school officials' panicked and thoughtless injury to the students' constitutional freedoms. The Court concluded that a proper respect for the constitutional rights of students serves to bar a principal from interfering with student speech on the grounds that he fears or believes that the school day will be disrupted, without any facts to suggest that the fear is a reasonable one. The Tinker Court concluded that fear of disruption was not sufficient, that students could not be treated like they had "materially and substantially interfere[d] with the requirements of appropriate discipline" on the basis of unsupported fears or beliefs.<sup>6</sup>

Certainly, it is necessary to acknowledge that school officials have "important, delicate and highly discretionary functions" to perform.<sup>7</sup> These functions, however, must be performed "within the limits of the Bill of Rights."<sup>8</sup> "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."<sup>9</sup>

As a consequence of Tinker and the many subsequent decisions of lower federal courts, teachers and administrators cannot justifiably stop students from discussing their religious beliefs in school so long as the students are not disrupting school order and discipline. Nor should school officials interfere with students who share religious materials with other students during breaks, between

classes, at lunch, on the school bus, or while on campus before and after school. This liberty of students is reflected in the Tinker decision:

It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of [the Supreme] Court for almost 50 years.<sup>10</sup>

In the more than thirty years after Tinker, the Supreme Court has relied on its decision in Tinker and that case continues to be the law of the land.

Occasionally, school officials claim that Tinker is a special case involving a "public forum."<sup>11</sup> But the result in Tinker did not depend on the school campus being a public forum. As the Court explained, when a student "is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions . . . ." <sup>12</sup> So it simply does not matter whether a school campus has been made into a public forum for anyone else.<sup>13</sup> Because students are required to attend these schools, they are entitled to enjoy the constitutional rights that they carry on campus with them.

### **Religious Speech is Constitutionally Protected Speech**

Unfortunately, bigotry against religion is real and continues to be exhibited by some courts and some school officials. One form of that bigotry is to treat religious speech - whether discussion of religious matters or prayer, worship, or other religious expression - as different than the kinds of speech protected by the First Amendment. That bigoted view is untenable in light of several Supreme Court decisions.<sup>14</sup> The First Amendment protects religious thoughts, ideas, religious worship, and prayer as components of free speech as well as the free exercise of religion. In fact, the right of religious persons to try to persuade others, to advocate the rightness of their beliefs, and to evangelize implicates the very purpose of the First Amendment:

[T]he protection [the Framers] sought was not solely for persons in intellectual pursuits. It extends to more than abstract discussion, unrelated to action. The First Amendment is state order for government, not for institutional learning. "Free trade in ideas" means free trade in the opportunity to persuade, not merely to the scrap facts.<sup>15</sup>

The fact that a school is owned by a state or local government does not warrant or justify the infringement of a student's constitutional rights. State and local government officials are duty-bound to respect the federal constitutional rights of students. There is no better way for a public school to teach students about the importance of the Constitution and our rights as citizens than to show respect for the constitutional rights of those students.

## **Students Distributing Literature and Sharing the Gospel on School Grounds**

Students' First Amendment rights include the right to distribute Gospel tracts during non-instructional time, the right to wear shirts communicating Christian messages and symbols, and

the right to pray and discuss matters of religion with others. ***Further, schools may not prevent students from bringing their Bibles to school. In fact, school officials must allow students to read their Bibles during free time, even if that free time occurs during class.*** The standard that must be applied by the school is: Does the activity "materially or substantially disrupt school discipline?" Unless a student is disruptive, the school must refrain from interfering with their religious activities.

The distribution of free religious literature is protected by the First Amendment. Religious and political speech are protected by the First Amendment.<sup>24</sup> Furthermore, "[a]dvocacy and persuasive speech are included within the First Amendment guarantee if the speech is otherwise protected."<sup>25</sup>

The Supreme Court of the United States' consistent jurisprudence, for fifty years, has recognized that free distribution of literature is a form of expression protected by the Constitution of the United States.<sup>26</sup> In *Lovell v. City of Griffin*, the Supreme Court of the United States put the case for constitutional protection of leaflets and pamphlets quite clearly:

The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated.<sup>27</sup>

The constitutional value of leaflets and pamphlets is not lessened by the fact that they address matters of religion.<sup>28</sup> The role of religious leaflets and tracts is historic:

The hand distribution of religious tracts is an age-old form of missionary evangelism - as old as the history of printing presses. It has been a potent force in various religious movements down through the years . . . . It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits.<sup>29</sup>

School officials may not lump a student's right to distribute free literature together with more disruptive forms of expression, such as solicitation. As the Supreme Court has explained, the experience of thousands of "residents of metropolitan areas [who] know from daily experience [that] confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information."<sup>30</sup> Distribution of literature is inherently even less disruptive than spoken expression. 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."<sup>31</sup>

The applicable standard - material and substantial disruption - is not met by an undifferentiated fear or apprehension of disruption. In other words, it is not enough for school officials to fear that

allowing religious speech will offend some members of the community. "Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."<sup>32</sup> Where a student wishes to peacefully distribute free literature on school grounds during non-instructional time, there simply is nothing which "might reasonably [lead] school authorities to forecast substantial disruption of or material interference with school activities . . . ."<sup>33</sup>

School officials need not fear that leaflet distribution by students may be imputed to them, and that the Establishment Clause would thereby be violated. This very argument has been rejected by the Supreme Court of the United States. In *Mergens*, the Court stated that the activities of student evangelists in a public school do not present any Establishment Clause problems:

[P]etitioners urge that, because the student religious meetings are held under school aegis, and because the state's compulsory attendance laws bring the students together (and thereby provide a ready-made audience for student evangelists), an objective observer in the position of a secondary school student will perceive official school support for such religious meetings . . . . We disagree.<sup>34</sup>

Of course, *Mergens* merely reflects the Establishment Clause's intended limitation - not on the rights of individual students - but on the power of governments (including school officials). As the *Mergens* Court stated, "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."<sup>35</sup>

## **Student's Rights Legal Briefing**

### **The Federal Constitution**

Students are vested with two distinct sets of rights in the public school setting. First, all students retain their constitutionally protected right to freedom of speech and expression. Second, the federal Equal Access Act guarantees high school students the right to have Bible clubs on campus.

The Supreme Court has addressed the right of students to express their opinions on their public school campuses. Specifically, the Court has held that students and teachers do not "shed their constitutional rights . . . at the schoolhouse gate." [FN1] This principle means that students rightfully on a public school campus have First Amendment rights that cannot be denied without reason. It is important to note that the 8th Circuit in *Mergens* held that students have a First Amendment right and an Equal Access Act right to hold a student-initiated Bible club meeting on campus. [FN2] Thus, even in the event that a school has not allowed any noncurriculum clubs to meet, the *Tinker* rule would still require that students be allowed to associate with other students in Bible clubs. School officials must be very careful about abridging the rights of students who are rightfully on campus.

## **Material or Substantial Disruption: The Heart of Tinker**

Under the *Tinker* decision, a principal cannot prohibit student speech simply because he believes there will be a disruption of the educational process. In fact, he can only restrict student speech if it will "materially or substantially disrupt school discipline." [FN3] Students have the right to discuss religious beliefs, and even share religious materials, with their peers between classes, at break, at lunch, and before and after school. As the Court declared:

- *It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. [FN4]*

In the nearly 25 years since *Tinker*, the Supreme Court has continued this holding. It has now been the Court's holding for almost 75 years.

*Tinker's* holding did not depend on a finding that the school was a public forum. The Court emphasized, instead, that "[w]hen [a student] is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions...." [FN5] Therefore, whether or not a school campus constitutes a public forum for nonstudents, it is clear that the students who are required to attend have the protection of First Amendment Free Speech guarantees.

## **Fundamental Rights of Students**

Our educational system requires students to attend schools. This coercion gives students the legal right to be on campus. As Justice Fortas noted:

- *In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. As Judge Gewin speaking for the Fifth Circuit, said, school officials cannot suppress "expressions of feelings with which they do not wish to contend." [FN6]*

## **Student Rights On Campus After Tinker**

After *Tinker*, the law regarding the First Amendment rights of students is well-established. Student speech cannot be restricted because of the content of that speech. School administrators can only prohibit protected speech by students when it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school." [FN7]

It is well settled that religious speech is protected by the First Amendment of the Constitution, even when that speech is taking place on the public school campus.[FN8] In fact, the right to persuade, advocate or evangelize a religious viewpoint, implicates the very reason the First Amendment was adopted. As the Supreme Court held in *Thomas v. Collins*:

- [T]he protection [the Framers] saw was not solely for persons in intellectual pursuits. It extends to more than abstract discussion unrelated to action. The First Amendment is a charter for government, not for an institution of learning. Free trade in ideas means free trade and the opportunity to persuade, not merely to describe facts.[FN9]

The nature of public schools does not justify the forfeiture of Constitutional rights. In fact, the public nature of such schools enhances the Constitutional rights of students. The school is the best place to teach students how the laws of the land apply.

## **Student Rights Legal Briefing**

### The Federal Constitution

Students are vested with two distinct sets of rights in the public school setting. First, all students retain their constitutionally protected right to freedom of speech and expression. Second, the federal Equal Access Act guarantees high school students the right to have Bible clubs on campus.

The Supreme Court has addressed the right of students to express their opinions on their public school campuses. Specifically, the Court has held that students and teachers do not "shed their constitutional rights . . . at the schoolhouse gate." [FN1] This principle means that students rightfully on a public school campus have First Amendment rights that cannot be denied without reason. It is important to note that the 8th Circuit in *Mergens* held that students have a First Amendment right and an Equal Access Act right to hold a student-initiated Bible club meeting on campus. [FN2] Thus, even in the event that a school has not allowed any noncurriculum clubs to meet, the *Tinker* rule would still require that students be allowed to associate with other students in Bible clubs. School officials must be very careful about abridging the rights of students who are rightfully on campus.

### Material or Substantial Disruption:

#### The Heart of *Tinker*

Under the *Tinker* decision, a principal cannot prohibit student speech simply because he believes there will be a disruption of the educational process. In fact, he can only restrict student speech if it will "materially or substantially disrupt school discipline." [FN3] Students have the right to discuss religious beliefs, and even share religious materials, with their peers between classes, at break, at lunch, and before and after school. As the Court declared:

It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. [FN4]

In the nearly 25 years since *Tinker*, the Supreme Court has continued this holding. It has now been the Court's holding for almost 75 years.

*Tinker*'s holding did not depend on a finding that the school was a public forum. The Court emphasized, instead, that "[w]hen [a student] is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions...." [FN5] Therefore, whether or not a school campus constitutes a public forum for nonstudents, it is clear that the students who are required to attend have the protection of First Amendment Free Speech guarantees.

#### Fundamental Rights of Students

Our educational system requires students to attend schools. This coercion gives students the legal right to be on campus. As Justice Fortas noted:

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. As Judge Gewin speaking for the Fifth Circuit, said, school officials cannot suppress "expressions of feelings with which they do not wish to contend." [FN6]

#### Student Rights On Campus After *Tinker*

After *Tinker*, the law regarding the First Amendment rights of students is well-established. Student speech cannot be restricted because of the content of that speech. School administrators can only prohibit protected speech by students when it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school." [FN7]

It is well settled that religious speech is protected by the First Amendment of the Constitution, even when that speech is taking place on the public school campus.[FN8] In fact, the right to persuade, advocate or evangelize a religious viewpoint, implicates the very reason the First Amendment was adopted. As the Supreme Court held in *Thomas v. Collins*:

[T]he protection [the Framers] saw was not solely for persons in intellectual pursuits. It extends to more than abstract discussion unrelated to action. The First Amendment is a charter for government, not for an institution of learning. Free trade in ideas means free trade and the opportunity to persuade, not merely to describe facts.[FN9]

The nature of public schools does not justify the forfeiture of Constitutional rights. In fact, the public nature of such schools enhances the Constitutional rights of students. The school is the best place to teach students how the laws of the land apply.

-----

#### The Equal Access Act

The Supreme Court held, in *Widmar v. Vincent*, that when colleges allowed student groups to use their facilities they could not discriminate against student religious groups. [FN10] In other words, Christian students have to be allowed to use a meeting room on campus with the same restrictions applied to any other student group. The Establishment Clause of the First Amendment is not violated when a government entity, such as a public university, treats all groups the same, without attempting to censor religious speech. The Mergens Court quoted from *Widmar* extensively as they explained why secondary students have the right to have religious clubs on their campus.

Congress enacted the Equal Access Act to cure pervasive antireligious bigotry exhibited by public secondary school officials in the aftermath of the Supreme Court's school prayer cases. Three factors determine whether the Equal Access Act compels official recognition of a Bible club by school officials: 1) does the school receive federal funds; 2) is the school a public secondary school; and 3) does the school allow any noncurriculum clubs to meet on campus?

When these factors are satisfied, federal law compels school officials to provide equal access to students who want to organize and conduct Bible clubs and student prayer groups. In *Garnett v. Renton School Dist. No. 403*, a Federal Court of Appeals ruled that the Equal Access Act must be complied with even in the face of a state constitutional provision to the contrary.[FN11]

#### *Westside Community Schools v. Mergens*

The United States Supreme Court upheld the constitutionality of the Equal Access Act in *Westside Community Schools v. Mergens (Mergens)*. [FN12] According to the Mergens Court, the above-mentioned factors should be employed in a standard three-prong analysis, as follows:

1. **Federal Funding.** Does the school receive any federal funds at all? This question is answered, simply, yes or no. If the answer is no, the Equal Access Act does not apply. If the answer is yes, it is necessary to examine the next prong of the Mergens-Equal Access Act test.
2. **Secondary Schools.** Is the school in question a secondary school as defined by state law? This information should be available from the local State Board of Education. If the school in question is classified as a secondary school, it is then necessary to examine the third prong of the Mergens-Equal Access Act test. While it

varies from state to state, most states classify a secondary school as grades nine through twelve.

3. Noncurriculum Clubs on Campus. Does the school allow noncurriculum clubs to meet on campus? Here the Mergens Court was very specific. Schools cannot misrepresent the nature of clubs that are permitted to meet. The Court explicitly examined the intent of Congress concerning noncurriculum-related clubs:

[W]e think that the term 'noncurriculum related student group' is best interpreted broadly to mean any student group that does not directly relate to the body of courses offered by the school. In our view, a student group directly relates to a school's curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit. . . . This . . . definition . . . is consistent with Congress' intent to provide a low threshold for triggering the [Equal Access] Act's requirements. [FN13]

Thus, the nature of the clubs currently meeting at the school is key. Service clubs, for example, such as the Key Club, the Lions Club, Zonta and Interact are not considered curriculum-related.

Additionally, clubs such as the Chess Club do not relate to the curriculum under normal circumstances. For example, only when a school teaches chess as an academic subject, for which students received a grade, would a Chess Club be considered related to the curriculum. The school district's argument, in Mergens, that chess was curriculum related because it enhanced logical thinking and the performance of mathematical calculations was rejected by the Supreme Court.

In Mergens, Justice O'Connor noted that "if a state refused to let religious groups use the facilities open to others, then it would demonstrate not neutrality but hostility toward religion. The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." [FN14] When a public high school official refuses to allow student-initiated Bible clubs treatment equal to that given other noncurriculum clubs meeting on campus, it treats those students as second-class citizens. This attitude is precisely the one which the Equal Access Act prohibits.

#### Bible Clubs Must Receive Official Recognition

Official recognition means that the Bible club must be treated the same as other clubs meeting on campus. "Official recognition allows student clubs to be part of the student activities program and carries with it access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair." [FN15] Under that view, Bible clubs are allowed to advertise on campus. Types of advertisement could include, but are not limited to: flyers distributed among other students, posters displayed on the school walls, notices in the school newspaper and announcements

included during the morning or afternoon announcements. It is important to note that the Bible club is not responsible to make sure the students know that the club is student-initiated. Rather, this is a responsibility of school officials.

Once the Equal Access Act is triggered, the school must provide a room for the Bible club. The school must also make its resources available to the Bible club in the same way that those resources are made available to other clubs. Additionally, the Bible club must be allowed to meet at any time other clubs are allowed to meet. If there is a club period, the Bible club must be allowed to meet during that period.

If other clubs are allowed to have school-wide assemblies to espouse their views, then the Bible club must be allowed the same privilege. Secondary school officials are not allowed to discriminate against a student group because of its message. Neither is a secondary school official allowed to censor the speech of the Bible Club by requiring it to delete references to Christianity from the club's constitution, announcements, or other materials.

#### Sponsors v. Custodians: Faculty/Staff

The only difference between a Bible club and any other club allowed to meet on the school campus is the use of faculty members as club sponsors. The Equal Access Act specifically allows for a faculty/staff custodian as compared to a normal club sponsor. This means that the faculty/staff custodian does not have control of the Bible club. He or she is only there to ensure that the Bible club does not violate school policies.

The Bible club must be student-initiated. This means that students must create and lead the club. It does not mean that they cannot have outside speakers. It only means that a non-student cannot lead the club. Community leaders and others can be invited to speak occasionally.

---

#### Literature Distribution

Students' First Amendment rights include the right to distribute Gospel tracts during non-instructional time, the right to wear shirts with overtly Christian messages and symbols, and the right to pray and discuss matters of religion with others. Further, schools may not prevent students from bringing their Bibles to school. In fact, school officials must allow students to read their Bibles during free time, even if that free time occurs during class. The standard that must be applied by the school is: Does the activity "materially or substantially disrupt school discipline?" Unless a student is participating in activities that are disruptive, the school must allow them to continue.

As a preliminary matter, it is a constitutional axiom that the distribution of free religious literature is a form of expression protected by the First Amendment. Religious and political speech are protected by the First Amendment. [FN16]

Furthermore, "advocacy and persuasive speech are included within the First Amendment guarantee if the speech is otherwise protected.[FN17]

The United States Supreme Court's consistent jurisprudence, for over 50 years, recognizes the free distribution of literature as a form of expression protected by the United States Constitution.[FN18] In *Lovell*, the United States Supreme Court put the case for constitutional protection of leaflets and pamphlets quite clearly:

The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated.[FN19] Of course, the constitutional value of leaflets and pamphlets is not lessened by the fact that they address matters of religion. The materials at issue in *Lovell* were "a pamphlet and magazine in the nature of religious tracts. . . ."[FN20] Just five years after *Lovell*, in *Murdock v. Pennsylvania*, the United States Supreme Court said:

The hand distribution of religious tracts is an age old form of missionary evangelism -- as old as the history of printing presses. It has been a potent force in various religious movements down through the years. . . . It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. [FN21]

School officials may not lump a student's right to distribute free literature together with more disruptive forms of expression, such as solicitation. In a recent decision, a plurality of the Supreme Court noted the experience of thousands of "residents of metropolitan areas [who] know from daily experience [that] confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information." [FN22] In fact, distribution of literature is, inherently, even less disruptive than spoken expression. 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." [FN23]

The applicable standard - material and substantial disruption - is not met by an undifferentiated fear or apprehension of disruption. In other words, it is not enough for school officials to fear that allowing religious speech will offend some members of the community. As the Supreme Court said, "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." [FN24] Where a student wishes to peacefully distribute free literature on school grounds during non-instructional time, there simply is nothing which "might

reasonably [lead] school authorities to forecast substantial disruption or material interference with school activities. . . ."[FN25]

In fact, several courts have held that the distribution of religious literature by high school students is protected speech under the First Amendment and Fourteenth Amendment. [FN26] Note that in Hemry school officials ultimately conceded that students had the right to distribute the religious material on campus both inside and outside the school building. [FN27]

As the Supreme Court clearly held in Tinker:

In our system, state-operated schools may not be enclaves for totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are persons under our Constitution. They are possessed of fundamental rights which the state must respect, just as they themselves must respect their obligations to the state. In our system, students may not be regarded as closed-circuit recipients of only that which the state chooses to communicate. They may not be confined to the expressions of those sentiments that are officially approved. [FN28]

While school officials may seek to distinguish Tinker as inapplicable by arguing that a public school is not a traditional public forum, such assertions are unavailing because "[t]he holding in Tinker did not depend upon a finding that the school was a public forum." [FN29] As the Tinker Court noted, when a student "is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions. . . ." [FN30]

Further, as the Rivera court noted, "whether or not a school campus is available as the public forum to others, it is clear that the students, who of course are required to be in school, have the protection of the First Amendment while they are lawfully in attendance." [FN31] The Tinker Court also recognized that "personal intercommunication among students" in high schools is an activity to which schools are dedicated. [FN32]

Certainly, it is necessary to acknowledge that school officials have "important, delicate and highly discretionary functions" to perform. [FN33] These functions, however, must be performed "within the limits of the Bill of Rights." [FN34] "The vigilant protection of constitutional freedoms is nowhere more vital than in a community of American schools." [FN35]

School officials need not fear that distribution activities of students may be imputed to them, and that the Establishment Clause would thereby be violated. This very argument has been reviewed and rejected by the United States Supreme Court. In Mergens, the Supreme Court stated, as a general proposition, that the activities of student evangelists in a public school do not present any Establishment Clause problem:

Petitioner's principal contention is that the Act has the primary effect of advancing religion. Specifically, petitioners urge that, because the student religious meetings are held under school aegis, and because the state's compulsory attendance laws bring the students together (and thereby provide a readymade audience for student evangelists), an objective observer in the position of a secondary school student will perceive official school support for such religious meetings. . . . We disagree. [FN36] Of course, Mergens merely reflects the Establishment Clause's intended limitation - not on the rights of individual students - but on the power of governments (including school officials). As the Mergens Court stated, "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." [FN37]

---

Next Page | Table of Contents

---

#### E N D N O T E S

1. *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969).
2. *Westside Community Schools v. Mergens*, 867 F.2d 1076 (1989),
3. *Tinker* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).
4. *Tinker*, at 506.
5. *Id.*, at 512-13.
6. *Tinker*, at 511 (quoting *Burnside*, at 749).
7. *Id.*, at 509.
8. *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (citing *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981)); *Westside Community Schools v. Mergens*, 496 U.S. 226 (1990); *Niemotko v. Maryland*, 340 U.S. 268 (1951); and *Saia v. New York*, 334 U.S. 558 (1948).
9. *Thomas v. Collins*, 323 U.S. 516, 537 (1945) (emphasis added)
10. *Widmar*, 454 U.S. 263 (1981)
11. *Garnett v. Renton School Dist. No. 403*, 987 F.2d 641 (9th Cir. 1993)
12. *Westside Community Schools v. Mergens*, 496 U.S. 226 (1990)
13. *Id.*, at 239-40.
14. *Id.* (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment)).
15. *Id.*, at 247.
16. *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Widmar*, 454 U.S. 263, 269 (1981).
17. *Rivera v. East Otero School District R-1*, 721 F. Supp. 1189, 1194 (D.Colo. 1989) (citation omitted).
18. *Lovell*, 303 U.S. 444; *Heffron v. International Society for Krishna Consciousness*,

- 452 U.S. 640 (1981).
19. Lovell, 303 U.S. at 452 (emphasis added) (citations omitted).
  20. Lovell, 303 U.S. at 448.
  21. Murdock, 319 U.S. at 108-09 (1943) (footnotes omitted).
  22. United States v. Kokinda, 497 U.S. 720, 734 (1990) (plurality).
  23. Id.
  24. Tinker, 393 U.S. 508.
  25. Id., at 514.
  26. See Rivera v. East Otero School District R-1, 721 F. Supp. 1189 (D. Colo. 1989); Thompson v. Waynesboro Area School District, 673 F. Supp. 1379 (N.D. Pa. 1987); Nelson v. Moline School District No. 40, 725 F. Supp. 965 (C.D. Ill. 1989); Hemry v. School Board of Colorado Springs School District 11, 760 F. Supp. 856 (D. Colo. 1991).
  27. Hemry v. School Board of Colorado Springs, No.90-S-2188, Stipulation for Dismissal (D. Colo. Sept. 1991) (unpublished). Accord Harden v. School Board of Pinellas County, No. 901544-CIV-T-15A, Consent Decree and Order (M.D. Fla. 1991) (students permitted to distribute religious newspaper on campus).
  28. Tinker, 393 U.S. at 511.
  29. Rivera, 721 F. Supp. at 1193.
  30. Tinker, 393 U.S. at 512-13.
  31. Rivera, at 1197.
  32. See Tinker, 393 U.S. at 512. Also, Hemry does not contravene this proposition. The Hemry court clearly stated that the facts of the case before it were distinguishable from the facts in Rivera. Hemry at 859. Because the school in Hemry did not ban literature, but only enforced reasonable time, place, and manner restrictions, the court did apply a forum analysis. Nonetheless, Tinker and Rivera still stand for the proposition that literature distribution cannot be banned in public schools, regardless of what type of forum they constitute. As noted above, the final disposition of Hemry resulted in a Stipulation for Dismissal which allowed unregulated personal distribution of literature and mass distribution subject only to reasonable time, place, and manner restrictions. Stipulation for Dismissal (D. Colo. Nov. 12, 1991) (unpublished).
  33. West Virginia v. Barnette, 319 U.S. 624, 637 (1943).
  34. Id., at 637.
  35. Shelton v. Tucker, 364 U.S. 479, 487 (1967).
  36. Mergens, at 249-50 (citation omitted) (emphasis added).
  37. Mergens, at 250 (emphasis in original).