



September 20, 2007

Via UPS Overnight Delivery and Electronic Mail (arainwater@madison.k12.wi.us)

Mr. Arthur L. Rainwater, Superintendent
Madison Metropolitan School District
545 West Dayton Street
Madison, WI 53703-1995

Re: Offer of assistance regarding flier distribution policy controversy

Dear Mr. Rainwater:

Alliance Defense Fund has become aware of a recent letter sent to your District from the Freedom From Religion Foundation ("FFRF") regarding your District's policy permitting pre-approved fliers from outside community organizations to be sent home with students in their backpacks. Based on ADF's current understanding of the situation, we write to assure you that altering your flier distribution policy as a result of the FFRF letter would be a drastic measure that is both unnecessary and inadvisable. The actions of FFRF represent merely another attempt to censor or prohibit religious speech. In fact, based on our knowledge of recent media accounts, and as described herein, we believe your policy, which permits religious fliers along with other appropriate community fliers, not only passes constitutional muster, but is also constitutionally required. For these reasons, ADF is offering to defend, *pro bono*, the Madison Metropolitan School District in the event that the flier distribution policy is challenged in court.

By way of introduction, the Alliance Defense Fund is a legal alliance defending the right to hear and speak the Truth through strategy, training, funding, and litigation. Our organization exists to educate the public, as well as government officials, about important constitutional rights – especially the freedom of religious expression. In this role, ADF has been called upon to assist and successfully defend numerous public officials nationwide.

As we understand your present situation, your flier distribution policy allows for community nonprofit and for-profit organizations to (i) submit fliers to school officials for approval, and (ii) to then have the school-approved fliers distributed to students at the end of the day. In accordance with this policy, students routinely receive a variety of fliers from local organizations promoting or advertising numerous events and activities, including martial arts lessons, sports camps, picnics, Valentine parties, and Christmas parties. Most recently, a flier from Grace Lutheran Church promoting a "Back to Sunday School" rally was given to students pursuant to the policy. And, from what we can tell, it is this flier which has drawn the ire of, and prompted a letter from, FFRF. We also understand your policy to require that every document submitted for approved by the school, and then given to students, contain a statement

indicating that the advertised program, activity, or event is not a school-sponsored activity, and that the District does not approve, endorse, or support the program, activity, or event.

Based on the above, we believe that your flier distribution policy is not only constitutionally defensible under established First Amendment jurisprudence, but is constitutionally required. To alter your policy at FFRF's urging would implicate well-settled constitutional rights to freedom of expression. Indeed, a school policy which operates to censor or ban distribution of religious materials to students, while simultaneously permitting non-religious groups to distribute similar materials, would violate the First Amendment rights of religious organizations desiring equal access to the flier distribution forum (*i.e.*, the "limited public forum" to which you refer in the media articles). The letter sent by FFRF advising you otherwise is legally inaccurate, lacking solid grounding in the law.

Many cases have addressed this principle of equal access and have held that it is impermissible to discriminate based on the content and/or viewpoint of religious speech in a public forum. *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111-12 (2001) ("[W]e reaffirm our holdings in *Lamb's Chapel* and *Rosenberger* that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint"); *Widmar v. Vincent*, 454 U.S. 263, 273-76 (1981) (exclusion of religious groups from university's open forum policy whereby university facilities were made open to activities of registered student groups held to violate First Amendment); *Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Twp. School Dist.*, 386 F.3d 514, 526-31 (3d Cir. 2004) (holding that school district engaged in impermissible viewpoint discrimination by treating a religious organization differently than other community organizations with respect to the posting and distribution of materials in connection with a back-to-school event); *Child Evangelism Fellowship of Md., Inc. v. Montgomery County Public Schools*, 457 F.3d 376 (4th Cir. 2006) (holding that a school district's flier distribution program violated the First Amendment where it permitted distribution of fliers from secular organizations, but prohibited distribution of fliers from religious organizations due to the religious content of the fliers). This principle of equal access cannot be denied without eviscerating significant First Amendment guarantees of free speech and religious freedom.

Please do not hesitate to contact us if ADF can provide additional information or assistance, or if we may help respond to any challenge or threat of litigation with respect to your flier distribution policy. Again, as a not-for-profit organization, our legal services are provided *pro bono*.

Sincerely,



David A. Cortman, Esq.
Senior Legal Counsel