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**ALAN B. FORREST**

VIA LAWYERS SERVICE

December 8, 2005

Dr. C. Dan Blachford, Superintendent of Schools  
Mine Hill Canfield Avenue School  
42 Canfield Avenue  
Mine Hill, New Jersey 07803

RE: Constitutional Rights of Students, Teachers, and Public Schools to Seasonal  
Religious Expression

Dear Dr. Blachford:

Please be advised that I am writing you on behalf of the Legal Resource Council which is an advisory arm to the New Jersey Family Policy Council as well as the Alliance Defense Fund which are organizations dedicated to the preservation of religious expression in the public square. They are not-for-profit public interest law and educational groups which exist to educate the public and the government about important constitutional rights, particularly in the context of the expression of religious sentiments. When necessary, we litigate these issues. It is our hope that the following discussion will clarify this important area of the law and allow school districts and school officials to avoid needless litigation. It has come to my attention that your school district has ratified a policy banning and censoring seasonal religious expression regarding the Christmas Holiday. The purpose of this letter is to inform you of relevant law, so that you can take whatever steps are necessary to ensure that your school district is in compliance with the law in order to avoid court intervention.

Historically, students and teachers across America have celebrated the Christmas season by decorating classroom bulletin boards and Christmas trees, learning songs for the annual Christmas program, and exchanging Christmas cards and gifts with classmates. In recent years, secular groups have spread misconceptions about the legalities of Christmas celebration within public schools. As a result, many school officials have removed nearly all references to Christ

from Christmas and have begun a new “tradition” of violating the constitutional rights of students and teachers to seasonal religious expression within public schools.

While a recent poll reveals that ninety-six percent of Americans celebrate Christmas, many school officials prohibit students and teachers from celebrating any religious aspect of Christmas. Classroom decorations depicting snowmen and reindeer have replaced decorations such as nativity scenes and angels. In a New Jersey school, a third grade teacher canceled a class field trip to see the Broadway play “A Christmas Carol” because the ACLU contended that the play excluded certain aspects of the community. Some school officials have gone so far as to prohibit the common greeting “Merry Christmas” and, instead, insist that teachers and students merely say “Happy Holidays” and refer to the Christmas break as “Winter Break” or “Sparkle Season.” In many districts, school administrators have even banned students from distributing religiously-themed gifts and singing religious Christmas carols.

I understand that your school has used several means of censoring Christmas including the removal of any mention of the word “Christmas” (in fact, the “X” of the word Christ in your reference to the concert), the altering of words to traditional Christmas carols, and the discriminatory effect on the Christian aspect of the holiday. These actions are improper and violate the spirit and intent of the Constitution.

### **THE CONSTITUTION DOES NOT REQUIRE GOVERNMENT OFFICIALS TO CENSOR SEASONAL RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS**

The Constitution does not require school officials to obliterate religious observances and expression from public schools. No court has ever ruled that the Constitution demands school officials to censor Christmas carols, eliminate all references to Christmas, or silence those who celebrate Christmas. This leads one to ask, “What does the Constitution require?”

### **THE FIRST AMENDMENT PROTECTS RELIGIOUS SPEECH**

It is a fundamental principle of constitutional law that school officials may not suppress or exclude the speech of private parties simply because the speech is religious or contains a religious perspective. *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981). This principle cannot be denied without eviscerating the essential First Amendment guarantees of free speech and religious freedom. As the Supreme Court has stated:

Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. . . . Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince.

*Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

**THE “SEPARATION OF CHURCH AND STATE” DOCTRINE DOES NOT JUSTIFY  
OFFICIAL SUPPRESSION OF SEASONAL RELIGIOUS EXPRESSION**

Efforts to suppress Christmas celebrations demonstrate that many school officials mistakenly believe that allowing seasonal religious expression would violate “the separation of church and state” – a doctrine often cited in connection with the Establishment Clause of the First Amendment. As a result, school officials across our free nation have denied students and teachers their constitutional rights of religious speech and expression under the guise that the Constitution requires them to do so. While many school officials are merely misinformed, others have purposefully sought to eradicate the celebration, observance, or even the acknowledgement of the religious aspects of Christmas from public schools.

To dispel this notion, it is important to realize that the Supreme Court has never held that the Constitution “require[s] complete separation of church and state.” *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (holding that the display of a nativity scene by a city was constitutional because the city’s conduct was supported by a legitimate secular purpose). The Court has merely held that the Establishment Clause of the First Amendment requires the state to be neutral in its relations with religious believers and non-believers; it does not require the state to oppose religion or religious expression. *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). In fact, the Constitution “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.” *Lynch*, 465 U.S. at 673. “State power is no more to be used to handicap religions, than it is to favor them.” *Everson*, 330 U.S. at 18.

The Constitution has no applicability to private religious expression. The Supreme Court has noted 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.” *Board of Educ. of the Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 249-50 (1990). Therefore, it is unconstitutional for public officials to deny individuals the right to religious speech and expression by imposing on them a limitation intended for the government.

Needless acts of censorship violate the Constitution and hurt little children who sincerely want to share their faith with their friends. Public school officials can avoid violations if they understand a few basic rules about religious speech. The following discussion spells out what federal courts have said on these Christmas questions and dispels the extremist myths that have sadly prompted school officials and others to suppress religious expression unnecessarily.

**RELIGIOUS SPEECH IN PUBLIC SCHOOLS**

**Activities of Public Schools**

**PUBLIC SCHOOLS MAY HAVE STUDENTS SING RELIGIOUS  
CHRISTMAS CAROLS**

Religious Christmas carols may be sung in public schools without offending the Constitution. Religious Christmas carols may be sung by individual students or by a group of students during

school activities such as choir, Christmas programs, and other events. Although challenges have been brought, public schools have successfully defended their students' constitutional right to sing Christmas carols. *See, e.g., Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311, 1319 (8<sup>th</sup> Cir. 1980).

No court has ever ruled that public schools must ban the singing of religious Christmas carols. Courts often look to whether the school had a secular purpose for initiating religious expression in determining whether the school's conduct is constitutional. For example, the Eighth Circuit focused its attention on the policy and rules adopted by the board of education. The court approved the school's stated purpose of advancing "the students' knowledge of society's cultural and religious heritage, as well as the provision of an opportunity for students to perform a full range of music, poetry and drama. . . ." *Id.* at 1314. Other courts have reached similar results concerning singing religious songs in public schools. *See Bauchman v. West High Sch.*, 132 F.3d 542 (10<sup>th</sup> Cir. 1998); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5<sup>th</sup> Cir. 1995). These decisions are supported by prior Supreme Court rulings concerning religious expression. *See, e.g., McGowan v. Maryland*, 366 U.S. 420, 445 (1961) (holding that government involvement in an activity of unquestionably religious origin does not violate the Establishment Clause if its present purpose and effect is secular).

#### **SCHOOL OFFICIALS DO NOT VIOLATE THE CONSTITUTION BY CALLING A SCHOOL BREAK "CHRISTMAS VACATION"**

School officials may refer to the school break in December as "Christmas Vacation" without offending the Constitution. The Supreme Court has acknowledged with approval the fact that government has long recognized holidays with religious significance such as Christmas. *Lynch*, 465 U.S. at 676. For example, Congress has proclaimed Christmas to be a legal public holiday. 5 U.S.C.A. § 6103(a) (2003).

#### **PUBLIC SCHOOLS MAY CLOSE ON RELIGIOUS HOLIDAYS, SUCH AS CHRISTMAS AND GOOD FRIDAY**

School officials do not violate the Constitution by closing on religious holidays such as Christmas and Good Friday. While constitutional challenges have been brought against state recognition of religious holidays, a state may successfully defend its conduct by demonstrating that its actions pass the Supreme Court's three-prong *Lemon* test. *Bridenbaugh v. O'Bannon*, 185 F.3d 796, 802 (7<sup>th</sup> Cir. 1999), *cert. denied*, 529 U.S. 1003 (2000). Under the *Lemon* test, courts will inquire "whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion." *Lynch*, 465 U.S. at 679 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)).

In *Bridenbaugh*, the State of Indiana successfully defended its recognition of Good Friday as a legal holiday by asserting that its purpose was to provide state employees with a three-day spring weekend. *Bridenbaugh*, 185 F.3d at 798. The Supreme Court explained that "the Establishment Clause does not prohibit Indiana from choosing Good Friday as the day for a legal holiday merely because that day coincides with what, to some, is a religious day." *Id.* at 801.

**PUBLICLY ACKNOWLEDGING CHRISTMAS DOES NOT REQUIRE PUBLIC OFFICIALS TO RECOGNIZE ALL RELIGIOUS HOLIDAYS**

It is a common misconception that it is only permissible to celebrate one religious holiday if equal time is allowed for celebration of all other religious holidays. But no Court has ever held that celebrating Thanksgiving and Christmas as religious holidays requires recognition of all other religious holidays. The Supreme Court has explained that governmental action is not unconstitutional merely because it confers an indirect, remote, and incidental benefit to one faith or religion, or to all religions. *Lynch*, 465 U.S. at 683. Government recognition of a holiday, which incidentally coincides with a religious holiday, is not unconstitutional. *Bridenbaugh*, 185 F.3d at 801.

Throughout our Nation's history, United States presidents have recognized religious holidays such as Thanksgiving and Christmas. On December 24, 1944, President Franklin D. Roosevelt addressed the Nation during a time of war:

Here, at home, we will celebrate this Christmas Day in our traditional American way- because of its deep spiritual meaning to us; because the teachings of Christ are fundamental in our lives; and because we want our youngest generation to grow up knowing the significance of this tradition and the story of the coming of the immortal Prince of Peace and Good Will.

WILLIAM J. FEDERER, *THE HISTORY OF SAINT NICHOLAS & CHRISTMAS HOLIDAY TRADITIONS* 116 (2002).

President George W. Bush has also recognized Christmas as a Christian holiday. In his December 21, 2002 radio address to the Nation, President Bush stated:

At this time of year, we appreciate all the blessings that fill our lives, especially the great blessing that came on a holy night in Bethlehem. The Christmas story speaks to every generation. It is the story of a quiet birth in a little town on the margins of an indifferent empire. Yet that single event set the direction of history and still changes millions of lives.

For over two millennia, Christmas has carried the message that God is with us, and because he is with us we can always live in hope. The world we live in is very different from the world of ancient Bethlehem. Our need for that hope is still unchanged. In all the challenges and dangers of our day, we still seek the promise of peace on Earth.

The White House, *Radio Address by the President to the Nation*, (Dec. 21, 2002), available at <http://www.whitehouse.gov/news/releases/2002/12/20021221.html>.

If the President of the United States may publicly acknowledge Christmas as a Christian holiday, without similarly acknowledging Ramadan and the Buddhist holiday Hana Matsuri, public schools may do so as well. The Constitution imposes no "equal time" provision on public schools.

## **FREE SPEECH INCLUDES THE RIGHT TO SAY “MERRY CHRISTMAS”**

School districts may not ban teachers and students from saying “Merry Christmas.” The Supreme Court has stated that teachers and students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (holding that the wearing of armbands by students to show disapproval of Vietnam hostilities was constitutionally protected speech). Under the direction of former President Clinton, U.S. Secretary of Education Richard Riley issued guidelines concerning religious discussion of students, which stated, “Students therefore have the same right to engage in . . . religious discussion during the school day as they do to engage in other comparable activity.” U.S. Dept. of Educ., *Religion and Public Schools*, Archived Information, Guidelines, available at <http://www.ed.gov/Speeches/08-1995/religion.html> (last modified Jan. 26, 2001).

Teachers also have the right to greet students with the words “Merry Christmas,” in spite of their role as agents of the state. In order to violate the Establishment Clause, a teacher would have to use her authority to promote religion to impressionable youth. See *School Dist. of Abington v. Schempp*, 374 U.S. 203 (1963). Saying a simple greeting that people commonly use in December does not rise to a state endorsement of religion.

## **PUBLIC SCHOOLS MAY HAVE STUDENTS STUDY THE RELIGIOUS ORIGINS OF CHRISTMAS AND READ THE BIBLICAL ACCOUNTS OF THE BIRTH OF CHRIST**

The religious origins of Christmas may be studied in the classroom without offending the Constitution. The Supreme Court has stated that “the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.” *Stone v. Graham*, 449 U.S. 39, 42 (1981) (holding that a state statute requiring the permanent posting of the Ten Commandments in public school classrooms violated the First Amendment because the legislature did not have a secular purpose). A federal appeals court has defined “the term ‘study’ to include more than mere classroom instruction; public performance may be a legitimate part of secular study.” *Florey*, 619 F.2d at 1316. Therefore, school officials may constitutionally present Christmas passages from the Bible, such as Matthew 1:18-2:22 and Luke 2:1-20, with a variety of teaching methods.

In addition, the Supreme Court has noted, “[I]t might well be said that one’s education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization.” *School Dist. of Abington*, 374 U.S. at 225. The Supreme Court has explained that the “study of the Bible or of religion, when presented objectively as part of a secular program of education,” is constitutional under the First Amendment. *Id.*

## **PUBLIC SCHOOLS MAY EXHIBIT RELIGIOUS SYMBOLS**

Public school officials may display religious symbols such as a crèche or nativity scene without offending the constitution if they have an educational reason for doing so. The Supreme Court has held that the display of a nativity scene is constitutional if it is displayed for legitimate secular purposes, such as to celebrate the holiday and to depict the origins of the holiday. *Lynch*,

465 U.S. at 681. Lower federal courts have also allowed public schools to include religious and Christian symbols in Christmas displays, school calendars, and holiday programs. *See, e.g., Sechler v. State Coll. Area Sch. Dist.*, 121 F. Supp. 2d 439 (M.D. Pa. 2000); *Clever v. Cherry Hill Township Bd. of Educ.*, 838 F. Supp. 929 (D. N.J. 1993). In a recent case, a court held that the school's holiday display and song program, which contained religious symbols, books, and songs, did not violate the Establishment Clause. *Sechler*, 121 F. Supp. 2d at 453. The court noted that the display "sends a message of inclusion and celebrates freedom to choose one's own beliefs." *Id.*

### **STUDENTS HAVE A CONSTITUTIONAL RIGHT TO BE EXEMPT FROM ACTIVITIES WITH A RELIGIOUS COMPONENT**

All students have a constitutional right to opt out of activities, such as a Christmas program or a concert with a religious song, which conflict with the individual beliefs of the students or their parents. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that parents and guardians have a constitutional right to direct the upbringing and education of their children).

Where the religious activity does not violate the Establishment Clause, as explained above, the school is not required to prohibit the activity even though it creates conflict with or offends some students or parents. *Florey*, 619 F.2d at 1318. However, the school may not force "any person to participate in an activity that offends his religious or nonreligious beliefs." *Id.* A student with an objection to some school activity containing religion (e.g., a school concert containing a religious song or a field trip to a museum containing religious art) does not empower the student to censor the expression or block the activity. The Constitution permits the student to opt out of participation, not to silence others.

### **Rights of Students and Other Individuals To Religious Expression**

#### **THE CONSTITUTION DOES NOT REQUIRE GOVERNMENT OFFICIALS TO SILENCE SOMEONE FOR TALKING ABOUT HIS OR HER FAITH IN GOD AND RELIGIOUS BELIEFS**

It is well established that the Constitution protects the religious speech of private individuals under the First Amendment. *See, e.g., Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Saia v. New York*, 334 U.S. 558 (1948). Because of this, the Constitution prohibits governmental entities from suppressing or excluding the speech of private individuals solely because their speech is religious or contains a religious perspective. *Id.*

#### **STUDENTS HAVE A CONSTITUTIONAL RIGHT TO EXPRESS THEIR FAITH AND RELIGIOUS IDEAS IN A PUBLIC SCHOOL**

The private religious speech of students is protected under the First Amendment. *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that a University that has opened its facilities for use by student groups cannot exclude groups because of the religious content of their speech).

Students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker*, 393 U.S. at 506. The Supreme Court has stated that a student’s free speech rights apply “when [they are] in the cafeteria, or on the playing field, or on the campus during the authorized hours. . . .” *Id.* at 512-13. The Supreme Court has warned school officials not to trample the rights of students in public schools:

[S]tate-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 obligation 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.

*Id.* at 511.

### **THE CONSTITUTION DOES NOT REQUIRE SCHOOL OFFICIALS TO PERMIT DISRUPTIVE SPEECH WHEN IT IS RELIGIOUS**

While the First Amendment protects students’ religious speech rights, school officials may prevent student speech that creates a material and substantial disruption to the school’s ability to fulfill its educational goals. *Id.* This is a narrow limitation, however, because the mere fear or apprehension of a disruption is not sufficient to enable the school to prohibit speech. *Id.* at 508.

### **STUDENTS HAVE THE RIGHT TO DISTRIBUTE IN PUBLIC SCHOOLS RELIGIOUS MATERIALS, SUCH AS CHRISTMAS CARDS CONTAINING BIBLE VERSES**

The First Amendment protects the right to express ideas through the distribution of literature. *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (holding that a city ordinance prohibiting the distribution of literature without city permission violated the rights of freedom of speech and the press). Because the Supreme Court has stated that the constitutional rights of students accompany them throughout the school day, students have the right to express ideas through the distribution of literature while at school. *Tinker*, 393 U.S. at 506; *see, e.g., Westfield Sch. L.I.F.E. Club*, 249 F. Supp. 2d 98, 114 (D. Mass. 2003).

Specifically, students have a right to distribute religious materials at school on the same terms as they are permitted to distribute other material. *See Mergens*, 496 U.S. 226, 247-249; *but see Walz v. Egg Harbor Township Bd. of Educ.*, 342 F.3d 271 (3<sup>rd</sup> Cir. 2003) (holding that the First Amendment was not violated when school prevented elementary school student from distributing candy canes with attached religious message *in the classroom* because school had a valid educational purpose). The Supreme Court has noted that First Amendment rights must be “applied in light of the special characteristics of the school environment.” *Tinker*, 393 U.S. at 506. Therefore, school officials may continue “to establish reasonable time, place, and manner regulations” on the exercise of students’ free speech rights. *Widmar*, 454 U.S. at 276.

**STUDENTS HAVE THE RIGHT TO EXPRESS RELIGIOUS VIEWPOINTS IN SCHOOL ASSIGNMENTS, READING MATERIALS AND CLOTHING**

First Amendment rights, such as the rights of freedom of speech and expression, accompany each student throughout the school day both inside and outside the classroom. *Tinker*, 393 U.S. at 512-13. In addition, the Supreme Court has held that the Constitution “affirmatively mandates, accommodation, not merely tolerance, of all religions, and forbids hostility toward any.” *Lynch*, 465 U.S. at 673. “[T]he State may not establish a ‘religion of secularism’ in the sense of affirmatively opposing or showing hostility to religion, thus ‘preferring those who believe in no religion over those who do believe.’” *Abington*, 374 U.S. at 225 (citing *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)).

School officials must permit students to convey religious sentiments through their school assignments, selection of reading materials, and clothing that conveys a religious message through words or symbols. *Tinker*, 393 U.S. at 512-13, *cf. Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (school officials may exercise editorial control over student newspaper supervised by journalism teacher).

**Conclusion**

The Constitution does not require government officials to obliterate religious observances and expression from public schools. It is the hope of the New Jersey Family Policy Council and the Alliance Defense Fund that this letter will help dispel the extremist myths about the Establishment Clause that have prompted tragic and unnecessary acts of government censorship of religious speech. I would be happy to discuss this matter in further detail should you have any questions and I trust that you will take this opportunity to reconsider your policy and reverse it. Otherwise, we will proceed with any legal remedies necessary to enforce the law.

Very truly yours,

Demetrios K. Stratis

DKS:dp

CC: Gina Pappa, Assistant Principal (Via Lawyers Service)  
Mr. Breda, President, Board of Education (Via Lawyers Service)  
Mrs. Battaglia (Via Lawyers Service)  
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