



September 27, 2005

Stephen J. Nichol, Principal
Russell O. Brackman Middle School
600 Barnegat Blvd. North
Barnegat, New Jersey 08005
Via facsimile at (609) 689-7965

Re: Unconstitutional Censorship of Student Religious Expression

Dear Mr. Nichol:

Laura Tomsick, on behalf of her daughter Emily Tomsick, and Louis and Jennifer Wright, on behalf of their son Kenan Wright, students at Brackman Middle School ("School"), have requested that the Alliance Defense Fund ("ADF") notify you of a violation of their children's First Amendment rights. By way of introduction, ADF is a not-for-profit public interest law firm and education organization. We seek to resolve disputes through education of public officials of the constitutional rights of students. When necessary, we proceed to litigation to secure these rights.

RELEVANT FACTS

On September 21, 2005, Emily, Kenan, and another student, Mariel Dwyer, met at 7:30am by the school flagpole in order to participate in this year's See You At The Pole (SYATP) event. SYATP is a yearly, student organized event in which students across the country meet at the flagpole in the morning before school starts to pray for their classmates, their school, their community, their state, and their country. The students' youth group leader, Justin Delacruz, was to meet them there to pray with them, but he was running a few minutes late, so they began to pray alone. Approximately 5-10 minutes later, the students were approached by Mrs. Burgess. Mrs. Burgess announced that she was there on behalf of the principal and she and Mr. Nichol wanted to know what the students were doing because they looked "suspicious." While Mrs. Burgess was talking to them, the students saw Mr. Nichol watching the situation unfold from a distance. The students explained the SYATP event. Mrs. Burgess proceeded to tell them that this was a "sticky situation" because they were "mixing religion and school," and told them they needed to stop praying. She told them that next year, if they wanted to pray at a flagpole, they would need to go to City Hall or some other municipal building but they could not pray at school. She also told them that they could pray silently over their lunch if they want, but praying out loud as they were doing caused a "disturbance."

At this point, Mr. Delacruz arrived and immediately noticed from the looks on the students' faces that something was wrong. He asked Mrs. Burgess what the problem was and she gave him the same explanation. She told them to stop praying and to move somewhere else

where no one could see them. Not wanting to be disobedient, the students and Mr. Delacruz stopped praying and moved around the corner to a less visible spot.

The censorship of the students' prayer as part of the SYATP event is blatantly unconstitutional under firmly established law and is a violation of the students' First Amendment rights.

DISCUSSION OF THE LAW

It is a fundamental principle of constitutional law that a government body may not suppress or exclude the speech of private parties just because the speech is religious or contains a religious perspective.¹ This principle cannot be denied without eviscerating the essential First Amendment guarantees of free speech and religious freedom.

It is equally axiomatic that religious speech is protected by the First Amendment and may not be singled out for discrimination.² 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.³

Students do not “shed their rights to freedom of speech or expression at the schoolhouse gate.”⁴ This has been the unmistakable holding of the Supreme Court for at least **86 years**.⁵ Furthermore, student prayer is just as protected as other types of student speech. Students in the public school system have “the absolute right to pray silently to their God at any time. Moreover, “verbal prayer to the God of one's choice is protected speech under the first amendment.”⁶ Thus, children, while at school, have the constitutional right to verbally pray to their God. Generally, a student may verbally pray at school any time it would be appropriate for them to talk.⁷ For example, it is “usually appropriate for a teacher or child to pray before school, during

¹ *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).

² *Good News Club*, 533 U.S. at 108-10; *Widmar*, 454 U.S. at 269 (citing *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *Neimotko v. Maryland*, 340 U.S. 268 (1951); *Saia v. New York*, 334 U.S. 558 (1948)); see also, *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Board of Educ. of the Westside Community Sch. v. Mergens*, 496 U.S. 226 (1990)).

³ *Pinette*, 515 U.S. at 760.

⁴ *Tinker v. Des Moines Ind. Sch. Dist.*, 393 U.S. 503, 506 (1969).

⁵ *Id.*

⁶ *Jaffree v. James*, 544 F. Supp. 727, 733 (S.D. Ala. 1982).

⁷ *Id.*

class recess, at lunch, after school, and during the ride home in the school bus.”⁸ Simply put, student prayer must be treated on an equal basis with other student expression.

As with other forms of student expression, the only time verbal student prayer may be restricted is if it causes a material disruption of school activities. However, “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”⁹ The Supreme Court stated:

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, “it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. *Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained.*¹⁰

Schools and school officials often believe mistakenly that allowing students to engage in religious speech at school would violate “the separation of church and state” – a doctrine frequently cited in connection with the Establishment Clause of the First Amendment. However, this very argument has been reviewed and **rejected** by the United States Supreme Court. The Supreme Court has stated as a general proposition that the activities of students in a public school *do not* present any Establishment Clause problem, since they are not actions of the school itself, but rather of the individual students.¹¹

The Establishment Clause of the First Amendment merely “requires the state to be a neutral in its relations with . . . religious believers and non-believers; it does not require the state to be their adversary.”¹² Likewise, “[s]tate power is no more to be used to handicap religions, than it is to favor them.”¹³ Therefore, the Establishment Clause has no applicability to student speech in the SYATP context. Restricting or banning SYATP because it involves religious prayer and worship violates the constitutional requirement of neutrality.¹⁴

In short, the law is clearly established that public school students have a right to engage in religious speech, including verbal prayer, at school, and the school’s censorship of the students in this situation was patently unconstitutional.

⁸ *Id.*

⁹ *Tinker*, 393 U.S. at 508 (1969).

¹⁰ *Id.* at 509 (emphasis added).

¹¹ *Mergens*, 496 U.S. at 249-250 (emphasis added).

¹² *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947).

¹³ *Everson*, 330 U.S. at 18.

¹⁴ *See, e.g., Hedges v. Wauconda Community Sch. Dist.*, 9 F.3d 1295, 1299 (7th Cir. 1993).

DEMAND

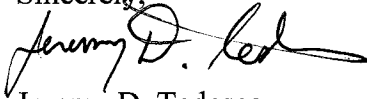
The students' right to free expression was blatantly violated on September 21, 2005. The violation of an individual's constitutional rights, even for a moment, results in "irreparable injury."¹⁵

To ensure that our clients' rights will be protected, we demand the following:

- A written statement from Mrs. Burgess and Mr. Nichol to be sent to our office, apologizing to each of the students for violating their rights, and including assurance to them that their right to religious expression will be respected in the future.
- Since the students were hindered from exercising their rights and prevented from participating in the SYATP event on September 21, they will be holding the event once again on October 19, 2005. We fully expect that this time there will be no hindrance or harassment from the school.

To avoid needless federal litigation and a subsequent award of costs and attorney fees, please advise this office in writing that the School will comply with the demands set forth above. Unless we receive such written confirmation by **noon (EST) October 10, 2005**, we will advise the Tomsicks and the Wrights of their rights to seek compliance in federal court.

Sincerely,



Jeremy D. Tedesco
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cc: Demetrios K. Stratis, NJ attorney
Laura Tomsick
Louis and Jennifer Wright

¹⁵ *Elrod v. Burns*, 427 U.S. 347, 373 (1976).