



December 9, 2015

**Via Facsimile and U.S. Mail**

Chairman Ege Cordell and Members of the Board  
Robert H. Malay, Superintendent  
New Hampshire School Administrative Unit 29  
193 Maple Avenue  
Keene, NH 03431  
Fax: 603-357-9012

**Re: Censoring The Word “Christmas” On Private Flyers**

Dear Members of the Board and Superintendent Malay:

A concerned parent of a child who attends Marlborough School contacted us regarding Superintendent Malay’s decision to censor the word “Christmas” from flyers announcing a Christmas Tree Lighting. We write to inform you that, given the facts, it appears that Superintendent Malay’s decision violates the United States Constitution. Furthermore, we believe that the policy for the distribution of flyers at New Hampshire School Administrative Unit 29 (SAU 29) is unconstitutional because it impermissibly singles out religious speech for unfavorable treatment. We hope that you will take swift action to correct these issues so that private flyers, such as the one referenced above, can be distributed in the future without SAU 29 unconstitutionally censoring religious speech and incurring additional risks of liability under 42 U.S.C. § 1983.

By way of introduction, Alliance Defending Freedom is an alliance-building legal organization that advocates for the right of people to freely live out their faith. We are committed to ensuring that religious individuals are free to exercise their First Amendment right to speak and associate on an equal basis with other members of the community.

The key facts, as we understand them, are as follows. SAU 29 created a forum to allow for the distribution of private flyers providing information about “non-school programs offered by non-profit organizations” that are

“deemed to have educational, recreational or social value to students.”<sup>1</sup> However, the policy establishing the forum requires that the flyers “must be secular.”<sup>2</sup> It also requires that all flyers contain a disclaimer indicating that the advertised event is not a school-sponsored activity.<sup>3</sup>

For many years, John Fletcher has been distributing flyers at Marlborough School to announce a beloved community Christmas Tree Lighting, complete with hot chocolate, donuts, gifts, and time with Santa and Mrs. Claus. Each year, the flyers he has distributed have been identical (except for the date of the event). This year, however, when Mr. Fletcher tried to distribute the flyers announcing the community event sponsored by the American Legion Family and the Monadnock Lions Club, he encountered resistance from SAU 29. Specifically, the flyers were originally entitled “Annual Christmas Tree Lighting,” but Superintendent Malay decided that the word “Christmas” must be replaced with the word “Holiday.” This decision was made even though the flyers bore a clear disclaimer stating that the event was “Not a School Sponsored Program.”

After public outcry regarding the censorship of this innocuous reference to what Congress has recognized as a “legal public holiday[],”<sup>4</sup> SAU 29 issued a statement suggesting that Superintendent Malay’s decision was prompted by concerns about violating the Establishment Clause. But the Establishment Clause requires no such thing.

Courts have long recognized that “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”<sup>5</sup> As one federal court stated, “no arm of government may discriminate against religious speech when speech on other subjects is permitted in the same place at the same time.”<sup>6</sup>

Here, the Christmas flyers clearly satisfy SAU 29’s requirements for inclusion in its literature distribution forum, as they promote a “non-school

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<sup>1</sup> <http://links.schoolloop.com/link/rd?href=736c5f6c696e6b66666303163633065623266687474703a2f2f73617532392d6e682e7363686f6f6c6c6f6f702e636f6d2f66696c652f313333353038373039383436352f313332373734303536363034332f313834383539373235363035333136373332302e706466>

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> 5 U.S.C. § 6103(a) (noting that “Christmas Day, December 25” is one of multiple “legal public holidays”).

<sup>5</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

<sup>6</sup> *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1297 (7th Cir. 1993).

program[] offered by [a] non-profit organization[]” that has “educational, recreational or social value to students.” Yet SAU 29 objected to the flyers because they included the word “Christmas” and barred them until it was removed. SAU 29’s actions impermissibly target religious speech for censorship and constitute illegal viewpoint discrimination. In fact, SAU 29’s policy explicitly singles out religion in a forbidden manner, stating that flyers “must be secular.” This fosters “a pervasive bias or hostility to religion [that] undermine[s] the very neutrality the Establishment Clause requires.”<sup>7</sup>

It is firmly established that school officials may not suppress private speech simply because it is religious or contains a religious perspective.<sup>8</sup> Rather, the Constitution “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”<sup>9</sup> One court, in addressing a policy governing the rental of school facilities that excluded organizations that wished to use the facilities to promote religious messages, noted that “some might think that excluding religion while permitting all else ‘would demonstrate not neutrality but hostility towards religion.’”<sup>10</sup>

Furthermore, the Establishment Clause only restricts government speech, not private speech. “[T]here 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>11</sup> Therefore, it is unconstitutional for public officials to deny private individuals the right to religious speech and expression by imposing on them a limitation intended for the government. Thus, it is not surprising that 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.<sup>12</sup>

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<sup>7</sup> *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 846 (1995).

<sup>8</sup> *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98, 112 (2001) (“[S]peech discussing otherwise permissible subjects cannot be excluded . . . on the ground that the subject is discussed from a religious viewpoint.”); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993) (recognizing there is no “realistic danger” of an endorsement of religion where a variety of private speech is permitted); *Widmar v. Vincent*, 454 U.S. 263, 274 (1981) (“[A]n open forum . . . does not confer any imprimatur of state approval on religious sects or practices.”).

<sup>9</sup> *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

<sup>10</sup> *Grace Bible Fellowship, Inc. v. Me. Sch. Admin. Dist. No. 5*, 941 F.2d 45, 48 (1st Cir. 1991) (quoting *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 248 (1990)).

<sup>11</sup> *Mergens*, 496 U.S. at 250.

<sup>12</sup> See, e.g., *Bauchman v. W. High Sch.*, 132 F.3d 542, 556 (10th Cir. 1997); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 408 (5th Cir. 1995); *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311, 1316 n.5 (8th Cir. 1980).

The flyers at issue here are private speech. To avoid any confusion regarding that question, the flyers included an explicit notation that the advertised event was *not* school sponsored. There is no legitimate basis to fear violating the Establishment Clause by allowing the flyers, with the express disclaimer, to be distributed under the facts involved here. But there is a very real violation of the Free Speech and Free Exercise Clauses of the First Amendment, which strongly protect religious expression.<sup>13</sup>

Furthermore, even if the flyers were the speech of the school, it would be unnecessary to remove the word “Christmas.” The Supreme Court has held that the display of a nativity scene—which is much more religious in nature than the simple use of the word “Christmas”—is constitutional when displayed along with secular symbols for legitimate secular purposes, such as to celebrate the holiday and to depict the origins of the holiday.<sup>14</sup> Moreover, lower federal courts have also allowed public schools to include both religious and secular symbols in Christmas displays, school calendars, and holiday programs.<sup>15</sup> Simply put, using the word *Christmas* in a flyer advertising a *Christmas* tree lighting and the appearance of Santa Claus is only sensible and plainly not unconstitutional.

Given this information, we ask that you amend the policies of SAU 29 to no longer restrict religious expression in an unconstitutional manner. Failure to do so is not only antithetical to our nation’s principles, but it also exposes SAU 29 to potential liability under 42 U.S.C. § 1983.

Sincerely,



Jeremy D. Tedesco, Senior Counsel

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<sup>13</sup> *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (“[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected . . . as secular private expression.”).

<sup>14</sup> *Lynch*, 465 U.S. at 681.

<sup>15</sup> See, e.g., *Sechler v. State Coll. Area Sch. Dist.*, 121 F. Supp. 2d 439 (M.D. Pa. 2000); *Clever v. Cherry Hill Twp. Bd. of Educ.*, 838 F. Supp. 929 (D.N.J. 1993).