



# LIBERTY COUNSEL

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Reply to: Florida

March 30, 2017

**VIA FACSIMILE - (601) 928-5122**

Superintendent Inita Owen  
Stone County Public Schools  
214 Critz St.  
Wiggins, MS 39577

RE: Student Bible distribution during non-instructional time

Dear Superintendent Owen:

I write regarding an issue of student Bible distribution during non-instructional time, which has been brought to Liberty Counsel's attention by a concerned parent in your school district. Included with this letter setting forth the law is an offer by Liberty Counsel of free, *pro bono* representation for the Stone County Public Schools ("District"), should it be questioned for respecting student First Amendment rights.

By way of brief introduction, Liberty Counsel is a litigation, education and policy organization, with offices in Florida, Virginia, and Washington, D.C, as well as hundreds of affiliated attorneys across the nation, including Mississippi. Liberty Counsel specializes in First Amendment litigation, and we have successfully represented numerous government entities, including school districts, as well as numerous private organizations and individuals in federal court.

I understand that student members of Fellowship of Christian Athletes ("FCA") had sought permission, as a student club, to distribute Bibles to their fellow students during non-instructional time. FCA members had ordered Bibles for this personal, peer-to-peer distribution, which was to have taken place from a manned table in the lunch room, at which FCA members would have freely offered Bibles to willing recipients, without forcing them on anyone. The distribution date was to have been March 27, 2017.

However, school staff reportedly had concerns over whether this was legal, and placed it on hold. Staff shared with students a "FindLaw" memo regarding "Bible Distribution in the Public Schools" as authority for a directive that students may only leave Bibles unattended on a table for passersby, and may not personally distribute the Bibles.

I have reviewed the FindLaw memo,<sup>1</sup> attached for your ready reference. This memo does not apply to Stone County student clubs, but applies only to Bible distribution requests by outside organizations, such as the Gideons. See *Peck v. Upshur County Board of Ed.*, 155 F.3d 274 (4th Cir. 1998). In *Peck*, parents challenged a school board's decision allowing the Gideons to distribute Bibles at tables in common areas of elementary, middle, and high schools. The school board defended its policy as neutral toward religion, treating the Bible distributors the same as the 4-H Club or the Cub Scouts. The Fourth Circuit upheld the policy in the middle and high schools, finding that the schools had taken sufficient steps—including allowing a variety of community groups to distribute literature—to guard against students mistaking the distribution of Bibles as the schools' endorsement of religion. *Id.* at 287–88. The court did not, however, extend this finding to elementary schools, holding instead that allowing Bible distribution in elementary schools violated the Establishment Clause. *Id.* at 287–88.

The Fourth Circuit decided *Peck* before the Supreme Court issued its opinion in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). *Milford* rejected the age and impressionability of elementary school students as grounds for ruling that allowing a religious club to meet in school classrooms would violate the Establishment Clause. Given *Milford*, *Peck's* conclusions regarding older students also properly apply to elementary school students as well. See *Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Sch.*, 373 F.3d 589, 601–02 (4th Cir.2004); *Rusk v. Crestview Local Sch. Dist.*, 379 F.3d 418, 424 (6th Cir. 2004); but see *Doe v. S. Iron R-1 Sch. Dist.*, 498 F.3d 878, 882 (8th Cir. 2007) (any literature distribution policy should include safeguards guaranteeing government neutrality); *M.B. ex rel. Bedi v. Rankin Cty. Sch. Dist.*, No. 3:13CV241-CWR-FKB, 2015 WL 5023115, at \*12 (S.D. Miss. July 10, 2015) (school district should abide by its neutral “religion in schools” policy).

The Fifth Circuit Court of Appeals, however, which has jurisdiction over Mississippi, has recently affirmed the practice of student-led prayer at school board meetings, rejecting many of the same arguments set forth in *Rankin County*, so much of the reasoning in *Rankin County* should be taken with a significant grain of salt. See *Am. Humanist Ass'n v. McCarty*, No. 15-11067, 2017 WL 1055571, at \*1 (5th Cir. Mar. 20, 2017). Thus, school districts in Mississippi may confidently permit Gideons and other outside groups to distribute literature pursuant to a properly drafted and applied policy, at least in middle and high schools, and arguably in elementary schools.

Regardless of any law relating to the Gideons or outside groups, neither the “FindLaw” memo nor *Peck v. Upshur* are applicable to the speech activities of student groups, student clubs, and individual students. Students and student clubs retain their right to undertake club activities on public school campuses, and may personally distribute Bibles to other willing students, subject to reasonable time, place and manner restrictions, during non-instructional time.

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<sup>1</sup> <http://corporate.findlaw.com/law-library/bible-distribution-in-the-public-schools.html>

The law is clear: students do not shed their constitutional rights at the school house gate. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Where speech is not attributable to the District, and is neither disruptive, obscene, lewd, sexually explicit, nor does it promote illegal drug use, the speech may not be prohibited or subjected to discriminatory treatment. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Morse v. Frederick*, 551 U.S. 393 (2007). The Constitution does not require hostility toward religion, but neutrality. *Abington School District v. Schempp*, 374 U.S. 203 (1963).

The United States Supreme Court has made clear that “private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.” *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). In the school context, specifically, the Supreme Court and various federal courts have confirmed that the speech - written or verbal - of religious students or organizations must be treated on equal terms and conditions with those speaking from a secular perspective. See *Hills v. Scottsdale Unified School District*, 329 F.3d 1044 (9th Cir. 2003), as well as *Child Evangelism Fellowship of Minn. v. Minneapolis Special Sch. Dist. No. 1*, 690 F.3d 996 (8th Cir. 2012); *Child Evangelism Fellowship v. Montgomery County*, 373 F.3d 589 (4th Cir. 2004); and *Good News Club v. Milford School District*, 533 U.S. 98 (2001).

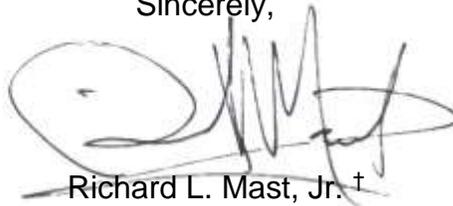
I understand the District permits other student clubs, including Key Club and HOSA, to promote their clubs by various means. The FCA wishes to be treated the same as other student clubs, in fulfilling its club’s vision of seeing “the world impacted for Jesus Christ through the influence of coaches and athletes,” and its mission of presenting “to coaches and athletes, and all whom they influence, the challenge and adventure of receiving Jesus Christ as Savior and Lord, serving Him in their relationships and in the fellowship of the church.” FCA has chosen the vehicle of Bible distribution to serve these ends, and may legally do so in a direct, personal manner during non-instructional time. FCA may, but is not required, to display a banner at its table, and its members may personally distribute the Bibles from that table.

Therefore, Liberty Counsel hopes that student-to-student Bible distribution by FCA, as outlined above, will be permitted by the District. The District may be confident that it is on solid legal footing in permitting student-led Bible distribution during non-instructional time. The District may even adopt a policy for literature distribution by outside groups, such as Gideons. The distribution of Bibles by Gideons may legally take place, pursuant to a policy such as the one set forth in the attached Model Policy.

Liberty Counsel is prepared to assist and defend the Stone County Public Schools for respecting First Amendment rights. If the District complies with the law, and takes action consistent with Liberty Counsel’s advice, Liberty Counsel stands ready to defend the District at no charge to the taxpayers.

Should you wish to discuss any of the points contained in this letter, I may be reached at 407-875-1776.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard L. Mast, Jr.", with a small dagger symbol (†) at the end. The signature is stylized and somewhat cursive.

Richard L. Mast, Jr. †

CC:

**Via Facsimile: (601) 928-5122**

Stone County School Board Members:

Rodney Beech

Tasha Johnson

Nina Shaw

Doris Matthews

Jacob Smith

Sean Courtney, Board Attorney

# Bible Distribution in the Public Schools

In past years, public school districts have allowed groups such as the Gideons to distribute Bibles to students on school grounds. However, because of the attention focused on the First Amendment's prohibition against the "establishment of religion" by governmental entities, such as public schools, as well as a number of court decisions, many districts discontinued the practice. Some districts nevertheless continued to allow outside groups to distribute other types of materials to students in the public schools. Questions then arose as to whether this practice resulted in discrimination against religious groups. A recent ruling by the Fourth Circuit Court of Appeals, the federal circuit which includes South Carolina, gives districts guidance on this issue.

Peck v. Upshur County Board of Education, 155 F.3d 274 (4th Cir. 1998), arose in West Virginia and involved a policy adopted by the local school board prohibiting the distribution of religious materials to students in the district. The policy resulted from concerns over the district's past practice of allowing the Gideons to distribute Bibles and converse with students in the classroom. A number of years after the adoption of the policy, a request was made by a local minister to make Bibles "available" to secondary school students on a predetermined date, at a predetermined location in the schools. Concluding that making Bibles "available" was not the same as "distributing" them, the board agreed to the request, provided certain guidelines were followed by the individual or group wishing to make the Bibles available.

Specifically, the guidelines included the requirement that the individual or group making the Bibles available set up the display tables to be used. The tables were to be set up in locations where students normally congregate and where they would not feel they were being watched or pressured. A sign was to be placed on the table which read "Please feel free to take one," and the source of the Bibles was not to be identified. No announcement about the Bibles was to be made and no one was to stand by the tables to encourage students to take the Bibles. Additionally, no district employees were to participate in any way in the process. Finally, any Bibles remaining at the end of the day were to be collected by the those making the Bibles available.

Soon after these new procedures were announced, a group of individuals brought suit against the district, the superintendent, and others, asking the court to issue an injunction prohibiting the Bible placement. A preliminary injunction was issued, then lifted, and the request for a permanent injunction was denied. The court did, however, order the district to post a disclaimer on the table where the Bibles were to be placed, indicating that the district neither sponsored nor endorsed the materials being provided. The case was appealed to the Fourth Circuit Court of Appeals, which upheld the policy based on its neutrality toward religion.

ssing the neutrality requirements, the Fourth Circuit first looked at whether ad guidelines had been adopted for some purpose other than advancing religion. The court concluded that the policy and guidelines were promulgated for the purpose of creating an open forum in the schools and to avoid discrimination against religious groups. In effect, the guidelines affirmed the right of religious speakers to use the school forum in the same way that non-religious groups are allowed to use the forum. Additionally, the court noted that the guidelines adequately provided for the district to disassociate itself from religious speech by placing the disclaimer on the table where the Bibles were distributed and by taking additional steps to ensure that students were not encouraged to take the Bibles. The court compared the policy to the federal law known as the Equal Access Act, which allows student groups of a religious nature to meet on school grounds, if other non-curriculum related student groups are allowed to meet. The Equal Access Act only applies to secondary students, as does the Bible distribution in this case. The court reasoned that secondary students are capable of distinguishing between religious speech and actual sponsorship or endorsement.

It should be noted that a school district would be free to adopt a policy which prohibits any individual or group from distributing materials, or making them available, to students on school grounds. If a district does adopt such a policy, the district in effect creates a closed forum, not to create an open forum. However, if an open forum is created, then any group that wishes to distribute materials, or make them available, must be allowed to do so on the same terms as the guidelines are followed. For example, if an unconventional religious group is allowed to make information about the group available to students, the group would be entitled to the same privilege provided to a group wishing to make Bibles available.

If a school district wishes to allow for religious materials to be made available to students, the district must first adopt a policy which allows for the same access to any group who wishes to make information available to students. The policy also should address how information of a religious nature will be made "available," as opposed to information of a non-religious nature which can be "distributed." Additionally, specific steps should be outlined, such as those adopted in the Peck case, to ensure neutrality. These steps include limiting the availability of the forum to secondary students, who presumably are capable of understanding the difference between neutrality toward religion and endorsement of religion. Finally, the policy should provide for the discretion to deny requests to distribute or make information available. However, the district may not arbitrarily deny requests because the district disagrees with the content of the materials. Denials normally would need to be based on neutral criteria, such as the illegality of an activity being promoted in the material.

**DISTRIBUTION OF NON-CURRICULAR MATERIALS AND LITERATURE TO  
STUDENTS**

- A. Any non-school group, organization, corporation, individual, club or association that wishes to distribute any non-curricular printed material may do so once each semester, subject to the following conditions:
1. All proposed printed material must be submitted to the Superintendent or his designee no later than seven (7) working days prior to the requested time of distribution.
  2. If the Superintendent or his designee does not respond to the request within four (4) working days of receipt of the request, the request is deemed approved and material may be distributed.
  3. The Superintendent or his designee shall state in writing the reason(s) under Section B of this Policy for any denial of a request to distribute printed materials to students.
  4. If a request is approved, the material may be distributed to students at a table provided by the District either immediately outside or inside the cafeteria entryway, at the option of the distributing party. The approved material shall not be distributed from any other location. The table shall have a sign with the following text prominently featured: "THE FREE MATERIALS ON THIS TABLE ARE OFFERED BY [INSERT NAME OF DISTRIBUTING PARTY]. THESE MATERIALS ARE NOT AUTHORED OR ENDORSED BY THE SCHOOL DISTRICT."
  5. If a request is approved, the material may be distributed before and after the school day, before and after classes, and during lunch time, at the option of the distributing party. Approved material shall not be distributed at any other times.
  6. No student may in any way be compelled or coerced to accept any materials being distributed by any person distributing such materials or by any school official.
  7. No school official, staff member or employee of the District may apply to distribute printed material under this Policy nor may any school official, staff member or employee of the District in any way participate with any person or group in the distribution of printed material that has been approved for distribution under this Policy. Nothing in this Policy shall in any way be applied to prohibit the distribution of materials that are part of the curriculum of the District.
  8. Notwithstanding paragraphs 4 and 7, above, approved one page materials of non-profit organizations offering programs, classes and/or activities to District students and consisting solely of notices, program descriptions and/or registration forms may also be distributed, at the option of the distributing party, via classroom distribution by District staff to elementary school students for take home or via placement in a literature rack or other central distribution point for

middle and high school students.

- B. All requests to distribute non-curricular printed material shall be approved unless the material:
1. Is libelous, invades the privacy of others, infringes on a copyright or is in any way prohibited by state or federal law.
  2. Is obscene, pornographic or lewd, vulgar or indecent.
  3. Primarily consists in advertisements for sale or solicitations for business.
  4. Endorses a particular candidate for public office, other than a candidate for student elective office.
  5. Promotes alcohol, tobacco, drugs or other illegal activity.
  6. Is likely to cause substantial disruption to the school and its activities or likely to materially interfere with the proper and orderly operation of the school and its activities.
- C. For good cause shown, the Superintendent may allow distribution more than once per semester, but in no case shall the number of distributions exceed three (3) per semester.
- D. This policy shall not apply to students who may wish to distribute printed materials to fellow students.
- E. All appeals must be submitted in writing to the Board of Education. The Board shall hear the appeal at the next regularly scheduled Board Meeting. The Board shall approve a request to distribute material that is appealed to the Board unless the material falls within the prohibitions under Section B of this Policy. The Board shall issue its decision on an appeal in writing within five (5) working days following the hearing.