ACLJ
American Center
for Law & Justice

February 17, 2012

VIA FEDERAL EXPRESS and ELECTRONIC MAIL
[redacted]

Dr. Joseph Sheehan, Superintendent
Sheboygan Area School District
[redacted]

Dr. Matt Driscoll, Principal
James Madison Elementary School
[redacted]

Re: Sheboygan Area School District's Violation of Dexter Thielhelm's First Amendment Rights

Dear Drs. Sheehan and Driscoll,

The American Center for Law and Justice ("ACLJ") represents Melissa Wolf on behalf of her minor son, Dexter Thielhelm, regarding the Sheboygan Area School District's decision to prohibit Dexter from passing out Valentine's gifts containing a religious message to his second-grade classmates. The purpose of this letter is to inform you that the District's actions violated Dexter's right to free speech, protected by the First Amendment to the United States Constitution, and to demand that the District cease its viewpoint-discriminatory treatment of religious student speech.

By way of introduction, the ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech and religion. *See, e.g., Pleasant Grove City v. Summum*, 129 S. Ct. 1523 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept counter-monuments when it has a war memorial or Ten Commandments monument on its property); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors enjoy the protection of the First Amendment); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987) (unanimously striking down a public airport's ban on First Amendment activities).

STATEMENT OF FACTS

Dexter is a second-grade student at James Madison Elementary School. Shortly before Valentine's Day, Dexter's teacher sent home to parents a note about a "friendship party and chocolate celebration" that would take place on Tuesday, February 14, 2012. The note expressly invited students to bring Valentine's Day cards and/or treats for their classmates on that day. The only specific request in the note was that any student choosing to bring Valentine's cards should bring one for each student in the class. Dexter, along with his mother and siblings, prepared Valentine's gifts for each of his classmates consisting of plastic water bottles filled with candy hearts and a typewritten note including the message "Jesus Loves You" and the text of the Bible verse John 3:16.

Upon being notified by a teacher of the religious messages within the Valentine's Day gifts brought by Dexter and his siblings, Dr. Driscoll, James Madison Elementary principal, permitted Dexter to distribute the bottles with the candy hearts in them but only after the notes with the religious message had been removed.

In response to inquiries about this matter from the local press, Mark Holzman, the District's Assistant Superintendent of Student and Instructional Services, admitted that the District has no written policy governing student speech but explained that one of the primary reasons for the prohibition against Dexter's distribution of his Valentine's Day messages was fear that students receiving Dexter's gift might not be comfortable with his religious message. In defending the District's decision to prohibit the message "Jesus Loves You" and the text of John 3:16, Mr. Holzman cited the hypothetical example of a student distributing an anti-Semitic message to classmates and the expected outrage that would result.[1] Holzman also took the position that students are permitted to "hand out religious messages" only "outside the academic day."[2]

As explained herein, the First Amendment supports neither the District's prohibition on the distribution of private religious messages, including individual student gifts to classmates, nor the positions espoused by Mr. Holzman in defense of the District's decision. Accordingly, the District's decision presents a matter of great constitutional concern to the American Center for Law & Justice. The District's refusal to permit Dexter to distribute his religious Valentine's Day messages to his classmates at a time when students were permitted to distribute Valentine's Day messages of a non-religious nature blatantly violated Dexter's First Amendment rights as a student.

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[1] Janet Ortegon, "Sheboygan elementary school bars student from giving religious valentines, District defends decision by James Madison officials," Sheboygan Press, available at http://www.sheboyganpress.com/article/20120216/SHE0101/202160443/School-bars-student-from-giving-religious-valentines?odyssey=tab|topnews|text|FRONTPAGE (last visited February 16, 2012).

[2] *Id.*

STATEMENT OF LAW

I. Students, Including Dexter, Enjoy the Right to Engage in Private Expression While in Attendance at Public Schools.

It is well-settled that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969). Consequently, school officials may not intrude upon a student's First Amendment expression without sufficient justification:

> 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 obligations to the state. In our systems, 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 expressions of those sentiments that are officially approved.

Id. at 511. While school officials may apply "reasonable regulation[s] [to] speech-connected activities in carefully restricted circumstances," they may not censor student expression unless the speech "impinge[s] upon the rights of others" or creates a material and substantial disruption to the school's ability to fulfill its educational goals. *Id.* at 509, 513. The law is quite clear, however, that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508.

In cases involving student-initiated speech, *Tinker* provides the appropriate standard for reviewing speech and its suppression by school officials. *Tinker* does not require any examination into the type of forum that a particular school creates; rather, the standard is the same regardless of whether a school is open to non-student speech. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (reaffirming *Tinker* as the proper standard for student-initiated speech by distinguishing school-sponsored speech from student-initiated speech).

Here, Dr. Driscoll's decision to prohibit Dexter from handing out his Valentine's Day gifts, including the typewritten message of "Jesus Loves You" and the Bible verse John 3:16, was patently unreasonable and cannot stand under *Tinker.* As the Supreme Court stated,

> Boards of Education . . . have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

Tinker, 393 U.S. at 507 (quoting *West Virginia v. Barnette*, 319 U.S. 624, 637 (1943)).

Again, that a substantial disruption *could* occur as a result of permitting students to exercise their First Amendment rights is an insufficient basis on which to silence student speech:

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. *But our Constitution says we must take this risk* . . . .

Id. at 508-09 (citing *Terminiello v. Chicago*, 337 U.S. 1 (1949)) (emphasis added).

School officials must be able to affirmatively establish that they have a substantial reason to interfere with a student's First Amendment rights:

> In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. As Judge Gewin, speaking for the Fifth Circuit, said, school officials cannot suppress "expressions of feelings with which they do not wish to contend."

Id. at 511 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

Moreover, contrary to the District's assertion that students enjoy private speech rights only outside of the academic school day, Dexter possesses his constitutional rights throughout the school day:

> A student's rights . . . do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects . . . if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others.

Id. at 512-13 (quoting *Burnside*, 363 F.2d at 749).

II. A Prohibition Against Student Speech Because of Its Religious Nature Violates the First Amendment.

The First Amendment precludes any government effort to single out and censor or otherwise burden the speech of private parties solely because that speech is religious. In fact, in *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), the Supreme Court held that "[t]he principle that government, in pursuit of legitimate interests, cannot in a selective manner, impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Id.* at 543.

It is well settled that religious speech is protected by the First Amendment and may not be singled out for disparate treatment. *See Good News Club*, 533 U.S. 98; *Rosenberger*, 515 U.S. 819; *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (U.S. 1995); *Mergens,* 496 U.S. 226; *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (citing *Heffron v. Int'l Soc'y 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)). The Supreme Court has clearly stated the importance of the preservation of *private religious* speech:

> 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.

Pinette, 515 U.S. at 760.

Specifically addressing student speech in the public school context, the Seventh Circuit Court of Appeals, relying on *Tinker*, has unequivocally held that "[s]chools may not prohibit their pupils from expressing ideas. And no arm of government may discriminate against religious speech when speech on other subjects is permitted in the same place at the same time." *Hedges v. Wauconda Community Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1297 (7th Cir. 1993) (internal citation omitted) (holding unconstitutional a school district policy prohibiting students from distributing written material of a religious nature in elementary and junior high schools). As the *Hedges* Court explained, "[e]ven when the government may forbid a category of speech outright, it may not discriminate on account of the speaker's viewpoint. Especially not on account of a religious subject matter, which the free exercise clause of the first amendment singles out for protection." *Id.* at 1298 (internal citation omitted). Moreover, "nothing in the first amendment postpones the right of religious speech until high school, or draws a line between daylight and evening hours." *Id.* Because the District expressly permitted—even invited—James Madison Elementary students to distribute Valentine's Day cards and other gifts to their classmates, its refusal to permit Dexter to distribute his Valentine's notes with the messages of "Jesus Loves You" and the Bible verse John 3:16 because of their religious nature constituted blatant viewpoint-based discrimination in violation of Dexter's First Amendment right to freedom of speech.

III. No Constitutionally Valid Justification Supports the District's Decision.

Dr. Driscoll's decision to prohibit Dexter from distributing his religious Valentine's Day message to fellow students was not based on any material or substantial disruption to proper school functions. Rather, as Mr. Holzman admitted, the decision was based on the religious nature of Dexter's message and the District's concern that others might not agree with that message. Thus, under *Tinker*, the decision directly infringed upon Dexter's free speech rights under the First Amendment.

Although the District has not expressed as much, even if its decision stemmed from concerns about compliance with the Establishment Clause, this is not a valid reason for quashing Dexter's religious speech. As the Seventh Circuit has explained, "[t]he Supreme Court has . . . rejected the view that, in order to avoid the perception of sponsorship, a school may suppress religious speech." *Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1544 (7th Cir. 1996) (citing *Widmar*, 454 U.S. at 271-73; *Mergens*, 496 U.S. at 247-52; *Lamb's Chapel*, 508 U.S. 384); *see also Hedges*, 9 F.3d at 1298 (same). As the Supreme Court has explained, "[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. . . . The proposition that schools do not endorse everything they fail to censor is not complicated." *Mergens*, 496 U.S. at 250. Addressing this very concern, the *Hedges* Court admonished that "[p]ublic belief that the government is partial does not permit the government to *become* partial. Students therefore may hand out literature even if the recipients would misunderstand its provenance. The school's proper response is to educate the audience rather than squelch the speaker." 9 F.3d at 1299 (emphasis in original).

DEMAND

This situation is of serious importance, not just to Dexter, but to all students attending the Sheboygan Area Schools, who are entitled to the full protection of their First Amendment liberties. Given the nature of the rights involved, we respectfully request your assurances that the District will cease its viewpoint-discriminatory treatment of religious student speech and will permit students, including Dexter, to distribute messages of a religious nature to their classmates on the same terms that messages of a non-religious nature are permitted. **Please direct your written response to me no later than 12:00 p.m., Friday, February 24, 2012.**

Thank you for your prompt attention to this matter.

Sincerely,

Carly F. Gammill

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Litigation Counsel
AMERICAN CENTER FOR
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Cc: Client
David French, ACLJ Senior Counsel