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Reply to: Virginia

February 24, 2011

Via U.S. Mail and Facsimile (540) 745-9496

Douglas Phillips
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Margaret Hubbard
Board of Education, Chairman
Floyd County Public Schools
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Floyd, VA 24091

Re: Unconstitutional Prohibition on the Student Expression

Dear Board of Education Members:

I write on behalf of Ralph and Tandra Agee, parents of Jacob Agee, a student at Floyd County High School to request a reversal of the decisions of Principal Barry Hollandsworth and Assistant Principal Tony Deibler to require the removal of religious student expressions from the face of student lockers so as not to violate the United States Constitution.

By way of introduction, Liberty Counsel is a national public interest law firm with offices in Florida, Virginia, Texas, and Washington DC, as well as affiliate attorneys throughout the country. We have had particular success in representing students whose religious expression has been censored or banned on their public school campus.

I understand the following to be true. Students of Floyd County High School are generally permitted to decorate the faces of their assigned lockers without prior approval

of staff or administrators. A tour of the school would quickly reveal a variety of student expressions of school spirit, support of activities, birthday well wishes, social causes, and so on. On Wednesday, February 24, 2011, Jacob and other members of the Fellowship of Christian Athletes posted on the face of their assigned lockers copies of the Ten Commandments. Very quickly thereafter, Principal Hollandsworth and Assistant Principal Deibler removed them all. Jacob then met with Principal Hollandsworth who explained that he could not permit students to use the face of their lockers for religious expression because if he did, students of all religions could use their lockers for religious expressions of their respective religions. Today, school officials have also suggested that prior approval is necessary for student expressions on their assigned lockers. I have been unable to locate any such policy but understand such a policy is certainly not enforced in practice. The practice is that the school has opened up student lockers for student expression, a type of limited public forum.

If there was a prior approval policy, it could very well be an unconstitutional prior restraint on speech because it requires advance approval. It would certainly be unconstitutional if it subjected religious expression to a less favorable standard than non-religious speech, especially if it banning it entirely. Although it is true that a prior restraint on speech is not unconstitutional *per se*, the United States Supreme Court has held that it comes before a federal court “with a heavy presumption against . . . constitutionality.” *Bartnicki v. Vopper*, 532 U.S. 514, 555 (2001) (quoting *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971)). Among other things, a prior restraint on private speech must not discriminate on the basis of viewpoint or content. See, e.g., *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 245-246 (1990) (collecting cases). Moreover, such policies requiring advance notice and/or approval are also typically insufficient because they lack specific guidelines and leave discretion to school officials so as to allow them to censor speech without using objective criteria. *Burch v. Barker*, 861 F.2d 1149, 1155-1157 (9th Cir. 1988) (no content control is justified for communication among students which is not part of the educational program). Because such standardless discretion invites viewpoint discrimination, they are unconstitutional on their face.

The policy actually articulated by Principal Hollandsworth would fail to satisfy constitutional requirements because it would preclude student expression that is religious because it is religious. The U.S. Supreme Court has cogently observed 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) (citations omitted). If a flat “ban on the distribution on student-initiated religious literature cannot be constitutionally justified,” *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981), neither can a flat ban on display of such literature.

While the school district may have certain constraints about how it could display the Ten Commandments as government speech, those do not apply to forums that the school has opened to private speech of its students. Permitting equal access to that forum, regardless of the religious content of the speech or religious viewpoint of the speaker, does not violate the Establishment Clause since private speech could never violate the Establishment Clause.

Liberty Counsel stands ready to defend the legal rights of Jacob and other members of the Fellowship of Christian Athletes at Floyd County High School. The decisions made by Principal Hollandsworth and Assistant Principal Deibler have unnecessarily exposed the District to liability. We write to request that you take immediate steps to reverse those positions.

We are asking for a written response to this letter by **March 15, 2011**, on behalf of the District, with assurances that Jacob can repost the Ten Commandments on the face of his assigned locker without any further interference from the District. If we do not receive such a response, we will conclude that the above-stated positions are an accurate representation of the positions of the Floyd County Public Schools.

We appreciate your immediate attention to this matter.

Sincerely

LIBERTY COUNSEL



Mary McAlister

cc: **Via E-mail**

Barry Hollandsworth, Floyd County High School, Principal,
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Tony Deibler, Floyd County High School, Assistant Principal,
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Ralph, Tandra and Jacob Agee