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May 4, 2009

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Pamlico County Schools
507 Anderson Drive
Bayboro, North Carolina 28515-9799

Mr. George Robinson
Chairman
Pamlico County Board of Education
507 Anderson Drive
Bayboro, North Carolina 28515-9799

Re: Bible Distribution at Graduation Services

Dear Dr. Coon and Mr. Robinson:

This letter is in response to your inquiry regarding the district's past practice of distributing Bibles at high school graduation. My understanding is that this practice has been in existence for decades, with students having a choice to receive from a Board member or school official an inscribed Bible that is provided by outside organizations or individuals who donated funds to pay for the Bibles. I also understand that, in limited circumstances, a Koran may have been offered to individual students. Students also could decline the Bible.

The practice described above is impermissible under the First Amendment to the United States Constitution. That amendment prescribes that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." This single phrase created both the Establishment Clause and the Free Exercise Clause, to protect the religious rights and liberties of all citizens. The Establishment Clause is often described as having created a wall of separation between church and state. Everson v. Board of Education of Ewing, 330 U.S. 1 (1947). As clearly stated in the Everson case, the Establishment Clause prohibits the state from aiding one religion or preferring one religion over another, but also prevents practices that "aid all religions" and thus endorse or promote a preference for religion over non-religion or the absence of religion. In other words, individuals are free to select any religion, any faith or none at all.

Since 1971, the leading case that sets forth the analytical framework to determine the constitutionality of government action under the Establishment Clause is Lemon v. Kurtzman, 430 U.S. 602 (1971). Under the "Lemon test," a court must examine the government's action to determine the following:

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1. Whether the government's action has a secular purpose or a religious purpose;
2. Whether the primary effect of the government's action is to advance or endorse religion; and
3. Whether the government's policy or practice fosters an excessive entanglement between government and religion.

As will later be explained in more detail below, the practice of distributing Bibles at a school-sponsored graduation exercise would fail the Lemon test, likely on all three prongs of the test. The failure to pass any one prong of the Lemon test would make the practice unconstitutional.

Pamlico County Board of Education Policy 5900 – Religion in the Schools, specifically incorporates the Lemon test. That policy states as follows:

In order to ensure that Pamlico County Schools uphold constitutional standards within the religiously neutral role assigned the public schools, the following questions established by the United States Supreme Court should be asked of each school sponsored observance, program, instructional or other activity involving religious content, ceremony, or celebration:

1. What is the purpose of the activity? Is the purpose secular in nature?
2. What is the primary effect of the activity? Is it the celebration of religion? Does the activity either advance or inhibit religion?
3. Does the activity involve an excessive entanglement with a religion, religious group, or between the schools and a religious organization? Are funds of a religious origin being used for a school activity? Does either the school or religious activity require the consent or approval of the other?

If the purpose of the activity is not secular, if the effect of the activity is to advance or inhibit religion, or if the activity involves an excessive entanglement, then the activity is unconstitutional and will not be permitted in the Pamlico County Schools.

Among the specific guidelines contained in that policy are the following:

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9. Religious books, including Bibles, or religious symbols may not be given to students as an award for achievement and may not be generally distributed by religious groups to students at school.

14. At school functions, such as graduation exercises, PTO meetings and other school programs, individuals should be sensitive to the religious beliefs of others. At no time shall any religious belief, or any system denying or objecting to religious beliefs, be advanced or disparaged, nor shall any form of religious indoctrination or exercise, including prayer, be conducted by the school system or its employees. A moment of silence may be observed at school-controlled functions, activities or events. The baccalaureate service is traditionally religious in nature and should be a voluntary service and not a required part of graduation exercises.

In court cases involving Bible distribution on school grounds, courts from other states and federal jurisdictions, as well as most of the state attorneys general from other states, have nearly unanimously held that school officials may not distribute Bibles, nor may they give preferential access or treatment to allow non-school groups to distribute Bibles on school premises.

In 1998, the Fourth Circuit Federal Court of Appeals (which includes North Carolina) issued a decision on this issue. The court held that the state does not violate the First Amendment's Establishment Clause if it permits private entities, on a non-preferential basis, to passively offer the Bible or other religious material to *secondary school students*. Peck v. Upshur County Board of Education, 155 F.3d 274 (4th Cir. 1998). The court further held that making Bibles and other religious material available in the elementary schools is not permissible. This case establishes binding precedent for North Carolina school systems.

The facts of this case included that the Upshur County Board of Education originally had an established policy that prohibited the "distribution" of religious or political advocacy materials to students in the schools. This policy was created in response to an incident in which a religious group "went into the classroom, talked to the students, and then handed Bibles to the students." Despite the policy, the Board of Education maintained its historical practice of allowing non-student, private groups, such

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as Little League, and Boy Scouts and Girl Scouts, to distribute literature in the schools. This continued historical practice created what is known as a “limited open forum,” in which political groups, members of all faiths, individuals opposed to religion, and others had the opportunity to participate.

A “limited open forum” exists in most school systems. If a school system chooses to allow outside (i.e. – non-school) groups to distribute information in the schools, it has thereby opened its forum to others, and may not then choose from among them based upon the content of their speech. To do so would violate the First Amendment’s protections on freedom of speech. This open forum may be limited, however, by “time, place and manner” restrictions that are consistent with a school’s primary mission: to educate students. That is, given the mission of the schools, it is reasonable to restrict the time, the place, and the manner in which materials or information may be distributed, as long as the same restrictions apply without regard to the content of those materials (unless the content falls outside of that which is protected by the first amendment; e.g. obscene materials, etc.).

With regard to religious materials, another First Amendment concern comes into play: the Establishment Clause, which prohibits the government, including schools, from promoting, endorsing or sponsoring religion or non-religion.

In response to a local religious group’s request that it be allowed to distribute Bibles in the school system, the Upshur County Board of Education recognized that it had created a limited open forum allowing outside groups to distribute materials in the schools, but did not want to violate the Establishment Clause by appearing to promote religion or a particular religious group. The school board allowed the religious group access to the schools, but with very specific guidelines. The Board designated one school day in which private religious groups were allowed into the schools to make Bibles and other religious materials available in a passive way, by displaying them on a table, consistent with most of the guidelines outlined below.

The schools were sued over this policy, allowing religious materials to be made available. The Court of Appeals upheld the district court’s decision that the school board could, for one day during the year, allow the material to be passively available, without violating the Establishment Clause. The court considered the policy allowing Bibles to be made available at schools to be private religious expression, not government speech, because it was privately sponsored and carried out by private citizens. By granting the religious group’s request, the Board of Education was merely allowing (not promoting or endorsing) private religious expression, on a neutral basis.

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Based on this case, school systems can allow private citizens to come into secondary schools and make Bibles and other religious materials available, as long as they stay within reasonable guidelines established by the school system, such as those described in Peck v. Upshur County Board of Education. Restrictions on the manner in which Bibles and other religious materials can be made available include:

- Private citizens must be responsible for setting up the tables on which the Bibles will be displayed;
- Tables should have disclaimers explicitly stating that the schools are neither endorsing nor sponsoring the display;
- Tables should have signs that inform students that they should feel free to take the Bibles or the other religious material offered;
- Bibles or other religious materials that are not picked up by students during the day should be removed by the group;
- No teacher or other school employee should participate in any activity relating to the displays;
- Tables should be placed in a location in the school that is accessible to students, such as a library or hallway, where students normally gather;
- No one should be allowed to stand and encourage or pressure students to take the Bibles;
- No one should be allowed to enter the classrooms to discuss the Bibles' availability;
- The school should not announce that the Bibles are available or hold any school assembly in connection with the availability of the Bibles;
- The Superintendent or other school personnel should review the materials before they are made available to the students;
- Bibles and other religious materials should not be available to students on a regular basis; the Court held that one day a year is reasonable.

These guidelines apply only to secondary schools. The Court made clear that making Bibles and other religious materials available in elementary schools would

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violate the Establishment Clause, because elementary age students are particularly impressionable and lack the maturity necessary to be able to recognize that the school is not endorsing the Bible distribution that it would allow under these restrictions.

With regard to graduation exercises, in 1992 the United States Supreme Court held that prayer at public school graduation ceremonies, even if it is non-sectarian and non-proselytizing prayer, violates the Establishment Clause of the Constitution. Lee v. Weisman, 505 U.S. 577 (1992). In that case, a Rabbi was permitted to deliver a non-sectarian prayer at a junior high school graduation ceremony. The court held that the degree of involvement of the school gave the prayer "the imprint of the State." The court went on to state that, while participation in graduation ceremonies is technically "voluntary," the importance of the event "coerced" students who might object, into participating in a religious exercise. Simply put, the court found that the inclusion of prayers as part of a school-sponsored and school-supervised graduation exercise violated the Establishment Clause because it both coerced students into participating in religion and conveyed a message that the government was endorsing religion.

It is instructive to note that the Supreme Court in that case focused on the coercive nature that students attending graduation. While students were not required to attend graduation, nor required to pick up their diplomas only at graduation, their attendance at the graduation exercise was found by the court to be, in effect, not voluntary. The court stated as follows:

Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions.... Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years.

Id. at 595.

The court went on to state:

The prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid.

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Id. at 598.

The court also analyzed the effort on the part of the school system in that case to make sure that the prayers were non-denominational. The court analyzed that issue as follows:

The question is not the good faith of the school in attempting to make the prayer acceptable to most persons, but the legitimacy of its undertaking that enterprise at all when the object was to produce a prayer to be used in a formal religious exercise which students, for all practical purposes, are obliged to attend.

Id. at 588.

The bottom line, as the court observed, was that the religion clauses of the First Amendment “mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State.” Id. at 589. In short, as the United States Supreme Court had earlier explained in the school prayer case of Engel v. Vitale, 370 U.S. 421 (1962):

It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.

Id. at 435.

The participation and/or the supervision of a Bible distribution program, or merely allowing it at a school-sanctioned and school-sponsored graduation exercise suggests that the practice is part of a legally required public education. Regardless of whether it is the Bible, New Testament, Old Testament, the Koran or any other religious book, the practice makes the case that religion is sponsored or approved by the government. As the Supreme Court stated in Lee v. Weisman, “when the government puts its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs.” Further, it “sends a message to non-adherents that they are outsiders, not full members of the political community, and an

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accompanying message to adherents that they are insiders, favored members of the political community.”

In a leading case from the Seventh Circuit Court of Appeals, Berger v. Rensselaer Central School Corp., 982 F.2d 1160 (7th Cir.), cert. denied 508 U.S. 911 (1993), dealing with Bible distribution by the Gideons in the schools, the Seventh Circuit noted the following concerns:

the act of accepting a Bible in front of other students, with the option of returning it later privately or choosing not to read it, signals accord with the Gideons' beliefs. Presumably, the fifth graders could make a public show of not accepting the Bible, just as students could walk out of the graduation ceremony in Lee, or leave during the scriptural reading in Abington, but the First Amendment prohibits the government from putting children in this difficult position.

Id. at 1170.

Again looking back to the guidance provided by the U.S. Supreme Court in Lee v. Weisman, the Supreme Court has repeatedly emphasized the impressionability of school children and the pressures they may feel from school officials and peers to conform. In Lee, the court stated, ““there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.” 505 U.S. 577, 592 (1992).

In sum, the courts are clear that school systems should stay out of the business of religion altogether when it is coercive or when it has the clear imprimatur of approval of the state.

If an outside organization wants to distribute Bibles to high school graduates, there is no problem with that organization doing so on their own, separate and apart from the school system. For example, Bibles could be distributed from a parked car or truck across the street from school grounds, if students are free to come and go and receive the Bibles of their own volition. Bibles could be distributed at churches on graduation weekend or otherwise. Churches, as a joint project, could arrange for a central distribution point at the church or churches located nearest to the high school. Any of these types of planned distributions would be perfectly legal and in accordance with the balance that is established by court precedent.

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Further, baccalaureate services usually feature a religious theme, a sermon and prayers. The school system may not sponsor such baccalaureate services, but churches or other outside organizations are free to do so. Attendance cannot be required by the school system. Frequently, these sorts of activities take place away from school grounds. They may, however, be held on school grounds if they take place in school facilities that are rented to outside organizations on the same basis as they are made available to other outside organizations.

I hope this information is both helpful and clear. Please let me know if you have any further questions or concerns.

Very truly yours,

A handwritten signature in black ink, appearing to read 'RAS', with a long, sweeping horizontal line extending to the right.

Richard A. Schwartz

RAS/rb