

# THE RUTHERFORD INSTITUTE

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March 8, 2012

Dr. Jesus J. Chavez, Principal  
Bowie High School  
801 South San Marcial  
El Paso, TX 79905

**Re: *Students' First Amendment Rights***

Dear Dr. Chavez:

Too often, the Establishment Clause of the First Amendment is erroneously interpreted to mean freedom *from* religion, rather than freedom *of* religion. It is an important distinction. Those who subscribe to the notion that government, and society as a whole, should be altogether free from religion tend to use the principle of a separation of church and state as a bludgeon with which to eradicate religion from the public sphere. On the other side are those, like The Rutherford Institute,<sup>1</sup> who believe that the First Amendment provides for freedom *of* religion and that the so-called “wall of separation between Church and State,” as coined by Thomas Jefferson, was intended to refer to a wall placed around the church in order to protect it from any interference with its rights to religious freedom by the federal government.

While it is not easy navigating the waters between the First Amendment’s Free Speech/Free Exercise and Establishment Clauses, neither is it impossible. There are still viable options available to those who wish to exercise their First Amendment rights within the schoolhouse gates. For example, the Freedom from Religion Foundation’s (FFRF) recent threat of legal action over Bowie High School’s tradition of having a pastor lead the football team in a pre-game prayer does not mean that all prayers must cease. Indeed, although the Establishment Clause, as currently interpreted, limits government-sponsored religious speech, the First Amendment still fully protects *student-led* religious speech.

It has been firmly established that the Free Speech and Free Exercise Clauses of the First Amendment protect private religious speech. Moreover, the Supreme Court of the United States

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<sup>1</sup> The Rutherford Institute is a non-profit civil liberties organization that provides free legal representation to those whose civil rights are threatened or infringed.

has affirmed that these protections encompass individual and corporate prayer by public school students. As the Court has explained, “[N]othing in the Constitution . . . prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday.”<sup>2</sup>

Thus, while the Establishment Clause is regularly invoked in an effort to squelch students’ religious expression, it, in fact, creates an additional bar to official interference with religious speech. This is because the central demand of the Establishment Clause of the First Amendment is that the state maintains “neutrality between religion and religion, and religion and non religion.”<sup>3</sup> As the Supreme Court has noted, denying students their rights to engage in religious speech runs the risk of expressing hostility to religion and violating the neutrality that the Establishment Clause requires.<sup>4</sup>

Thus, in considering challenges to student prayers under the Establishment Clause, federal courts are always particularly careful to recognize and respect students’ rights under the Free Speech and Free Exercise Clauses and the protections afforded to student-initiated prayer.<sup>5</sup> For instance, in *Doe v. Duncanville Independent School District*, the United States Court of Appeals noted that “neither the Establishment Clause nor the district court’s order prevent [school] employees from treating students’ religious beliefs and practices with deference and respect; indeed, the constitution requires this.”<sup>6</sup>

Finally, we would direct you to the United States Department of Education’s Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools, which states, in pertinent part:

[L]ocal school authorities possess substantial discretion to impose rules of order and pedagogical restrictions on student activities, but they may not structure or administer such rules to discriminate against student prayer or religious speech. For instance, where schools permit student expression on the basis of genuinely neutral criteria and students retain primary control over the content of their expression, the speech of students who choose to express themselves through religious means such as prayer is not attributable to the state and therefore may

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<sup>2</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000). See also *Chandler v. Siegelman*, 230 F.3d 1313, 1317 (11th Cir. 2000) (“So long as the prayer is genuinely student-initiated, and not the product of any school policy which actively or surreptitiously encourages it, the speech is private and it is protected.”) (emphasis omitted).

<sup>3</sup> *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

<sup>4</sup> See *Rosenberger v. Rectors and Visitors of the Univ. of Va.*, 515 U.S. 819, 845–46 (1995) (plurality opinion).

<sup>5</sup> See *Santa Fe Indep. School Dist.* 530 U.S. at 313 (“By no means do [the religion clauses of the First Amendment] impose a prohibition on all religious activity in our public schools.”); see also *Lee v. Weisman*, 505 U.S. 577, 598 (1992) (“A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution.”); *Siegelman*, 230 F.3d at 1317 (“Private speech endorsing religion is constitutionally protected—even in school. Such speech is not the school’s speech even though it may occur in the school. Such speech is not unconstitutionally coercive even though it may occur before non-believer students.”).

<sup>6</sup> *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406 n.4 (5th Cir. 1995).

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not be restricted because of its religious content. Student remarks are not attributable to the state simply because they are delivered in a public setting or to a public audience. As the Supreme Court has explained: "The proposition that schools do not endorse everything they fail to censor is not complicated," and the Constitution mandates neutrality rather than hostility toward privately initiated religious expression.

We hope this information has been helpful to you as you strive to comply with all aspects of the First Amendment dictates regarding the freedom of expression and the free exercise of religion. Please do not hesitate to contact The Rutherford Institute if we can provide further assistance in the future.

Sincerely yours,



John W. Whitehead  
President

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