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Dear Principal:

By way of introduction, the Pacific Justice Institute ("PJI") is a non-profit law firm devoted to defending the religious liberties of students and student clubs in California's public schools. The purpose of this letter is to discuss activities that religious clubs on campus may engage in during the school year as well as the clubs' rights and the school's corresponding obligations under the Federal Equal Access Act ("EAA"), the U.S. Constitution's First Amendment, and the California Education Code.

To begin with, the EAA applies to public secondary schools that receive federal funding and have "established … 'limited open forum[s]' by allowing … 'non-curriculum (student) groups' to meet on school premises." *Prince v. Jacoby*, 303 F.3d 1074, 1079 (9th Cir. 2002), cert. denied, 540 U.S. 813 (2003) (hereinafter *Prince*). "[T]he term 'non-curriculum-related student groups' [refers to] any group that does not directly relate to the body of courses offered by the school." *Bible Club v. Placentia-Yorba Linda Sch. Dist.*, 573 F. Supp. 2d 1291, 1297 (C.D. Cal. 2008) (hereinafter *Bible Club*) [quoting *Bd. of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226, 239 (1990) (hereinafter *Mergens*)]. If a school permits even one non-curriculum student group to meet on school grounds during non-instructional time, the school has created a limited open forum. *Id.* [citing 20 U.S.C. § 4071(b)].

The EAA does not prohibit schools from creating and implementing rules, restrictions, or guidelines for student clubs to follow. *Student Coalition for Peace v. Lower Merion Sch. Dist.*, 776 F.2d 431, 442 (3rd Cir. 1985). What the EAA does require is that schools apply whatever regulations they have in place "uniformly" to all student clubs, not just religious ones. *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1146 (C.D. Cal. 2000) [citing 20 U.S.C. § 4071(c)]. With the EAA's requirement of uniform application of school regulations in mind, below is a list of activities that religious student groups may engage in during the school year, accompanied by explanations of the groups' legal rights concerning those activities.

- **Outside speakers and performers:** If a school permits non-religious student clubs to bring in guest speakers or performers for meetings or activities – including school-wide rallies, assemblies, or celebrations that clubs may host or sponsor – the EAA forbids the school to prohibit the Club from doing likewise. *Bible Club*, 573 F. Supp. 2d at 1298 [citing *Prince*, 303 F.3d at 1094, to assert that a religious student group "must be given the same rights and privileges as other student groups to comply with the EAA"].
- **Advertisements/announcements:** Religious student groups have the right "to publicize their events on an equal basis with other officially recognized school clubs." *Prince*, 303 F.3d at 1086 [citing *Mergens*, 496 U.S. at 247]. The EAA thus requires schools to grant religious student groups the same access as other student groups to the school's bulletin boards, public address system, newspaper, and any other means of communication

available for student groups to announce their meeting times and/or upcoming events. *Id.* at 1086-87. The school need not permit religious student groups "to pray or proselytize in any manner through the school's public dissemination systems." *Id.* at 1087. A religious club is not proselytizing, however, when it merely publicizes an upcoming event so interested students and staff can attend voluntarily. *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1103 (9th Cir. 2000) [quoting *Doe v. Santa Fe Indep. Sch. Dist.*, 16 F.3d 806, 817-18 (5th Cir. 1999) (defining "proselytizing" as attempting "to convert others to a certain religious viewpoint"), aff'd, 530 U.S. 290 (2000)]. School regulations targeting religious student groups based on the groups' religious messages are viewpoint-discriminatory and thus violate both the EAA and the First Amendment's Free Speech Clause. *Bible Club*, 573 F. Supp. 2d at 1296-97. Schools concerned that permitting religious student groups to publicize their events constitutes an impermissible endorsement of religion need not fear: The U.S. Supreme Court has ruled that religious clubs' "enjoyment of merely 'incidental' benefits does not violate the [First Amendment's] prohibition against the 'primary advancement' of religion" by government entities, schools included. *Widmar v. Vincent*, 454 U.S. 263, 273-74 (1981) [quoting *Committee for Public Educ. v. Nyquist*, 451 U.S. 756, 771 (1973)].

- **Distributing literature:** Both the California Education Code and the First Amendment protect the right of religious clubs and their members "to exercise freedom of speech and the press including, but not limited to, the use of bulletin boards, *the distribution of printed materials* or petitions, the wearing of buttons, badges, and other insignia," and other means of expression. Cal. Educ. Code § 48097(a) (emphasis added); see also *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 509 (1969) (hereinafter *Tinker*). Distributing literature containing scriptural references and other religious materials is thus a constitutionally protected activity, even in the context of the school environment. *Hedges v. Wauconda Community Sch. Dist. No. 118*, 9 F. 3d 1295, 1297 (7th Cir. 1993) (hereinafter *Hedges*) ["(N)o arm of the government may discriminate against religious speech when speech on other subjects is permitted in the same place at the same time"]. Religious clubs' free speech rights also include a right of access to school supplies (such as pens, markers, paint, and paper) and equipment (such as computers and copy machines) that other clubs receive so they can create literature to distribute. *Prince*, 303 F.3d at 1093. The school "is certainly permitted to maintain order and discipline in the school hallways and classrooms by [reasonably] limiting the number and manner of both printed and oral announcements." *Id.* at 1087 [citing 20 U.S.C. § 4071(f)]. Again, schools need not fear that permitting religious clubs to create and/or distribute religious literature on campus amounts to impermissibly endorsing religion: "If a religious student organization obtained access on [a] religion-neutral basis and used a computer to compose or a printer or a copy machine to print speech with a religious content or viewpoint, the [school's] action in providing the group with access would no more violate the [First Amendment's] Establishment Clause than would giving those groups access to an assembly hall." *Id.* [quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 843 (1995)]. In fact, by permitting religious clubs and their members to distribute religious literature on campus, schools uphold the rights of free speech and free exercise of religion that are at the First Amendment's core. *Hedges*, 9 F.3d at 1300 ["Schools may explain that they do not endorse speech by permitting it. … Free speech,

free exercise and the ban on establishment are quite compatible when the government remains neutral and educates the public about the reasons"].

- **Interpersonal communication:** Students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. The EAA thus prohibits schools from "abridg[ing] the constitutional rights of any person." 20 U.S.C. § 4071(d)(7). The school thus cannot prohibit a religious student group or its members from engaging fellow students or even staff in conversation about the group's religious views so long as the group or its members neither 1) "materially or substantially interfere with the requirements of appropriate discipline in the operation of the school," nor 2) interfere with the rights of others. *Tinker*, 393 U.S. at 512-13 [quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)]. The mere discomfort of some students or staff, or the potential for such discomfort, with the message of a religious club or its members does not, by itself, constitute a material or substantial disruption. *Id.* at 509.

"The message of [the EAA's] open-forum policy is one of neutrality … while discriminating against religious groups would demonstrate hostility, not neutrality, toward religion." *Ceniceros v. Bd. of Trustees of San Diego Unified Sch. Dist.*, 106 F.3d 878, 882 (9th Cir. 1997). In passing the EAA, "Congress clearly sought to prohibit schools from discriminating on the basis of the content of a student group's speech, and that obligation is the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups." *Mergens*, 496 U.S. at 241. The school must thus permit religious student groups to engage in the above activities without undue interference or regulation.

If the school has any questions concerning the matters discussed above or needs legal assistance as a result of its efforts to comply with laws concerning religious clubs' free speech and free exercise rights, please do not hesitate to contact PJI.

Sincerely,

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Chief Counsel
PACIFIC JUSTICE INSTITUTE