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STATE of SOUTH CAROLINA

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Office of the Attorney General
Columbia 29211

February 10, 1998

The Honorable Michael L. Fair
Senator, District No. 6
501 Gressette Building
Columbia, South Carolina 29202

Dear Senator Fair:

You have asked if our opinion of January 13, 1998 would govern to require the School District of Greenville County to allow Riverside High School to permit student Bible Club members to meet at the same time as the school permits other clubs to meet. It is my opinion that the earlier opinion is controlling and that the Federal Equal Access Act as well as the Free Exercise Clause of the United States Constitution would require the school district to allow such meetings.

Law / Analysis

The January 13, 1998 opinion related to the issue of "whether the Fellowship of Christian Athletes may meet during time set aside during the school day when non-academic related clubs are permitted to meet." We quoted the federal Equal Access Act, 20 U.S.C. § 4071(a), which provides that

> [i]t shall be unlawful for any public secondary school which receives federal financial assistance and which has a limited open forum to deny equal access ... to ... any students who wish to conduct a meeting within that limited open forum on the basis of the religious ... or other content of the speech at such meetings.

We noted therein that whether a "limited public forum" exists depends upon whether "non-curriculum related student groups [are granted an opportunity] to meet on school

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premises during non-instructional time." § 4071(b). The federal statute defines "non-instructional time" as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends." § 4072(4). (Emphasis added). We referenced the recent case of Ceniceros v. Board of Trustees, 66 F.3d 1535 (9th Cir. 1995) superseded on other grounds, 106 F.3d 878 (9th Cir. 1997) wherein the Court held that the term "non-instructional time" included the lunch period at a high school when no classroom instruction occurred during that period. Also cited in the earlier opinion was the United States Supreme Court decision of Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226, 110 L.Ed.2d 191, 110 S.Ct. 2356, 2373 (1990) which concluded that the federal Equal Access Act did not contravene the Establishment Clause under the First Amendment. Ceniceros, we noted in the earlier opinion, also upheld the constitutionality of the Equal Access Act under the Establishment Clause. Based upon the foregoing authorities, we concluded that "Ceniceros does support a conclusion that 'noninstructional time' could include a similar period in a South Carolina school when no classroom instruction was ongoing ... ."

Another leading case decided by the United States Supreme Court in this area is Widmar v. Vincent, 454 U.S. 263, 70 L.Ed.2d 440, 102 S.Ct. 269 (1981). There, the University of Missouri at Kansas City promulgated a policy whereby any registered student was allowed use of university facilities for its meetings. The one exception to the policy was religious organizations. The University rested its distinction upon the Establishment Clause. However, the United States Supreme Court disagreed. The Court rejected the State's argument that extending the "open public forum" to religious groups would lead to the "establishment" or fostering of religion. The Court deemed the aid or benefit to religion as incidental and not the primary effect of an open public forum. The Court analyzed that such a strict reading of the Establishment Clause would lead to the result that churches could not even be protected by the local fire department for fear that such would violate the Establishment Clause.

Attorneys General in other states have reached similar conclusions that a school may not create a public forum, permitting other groups to meet and use the school's public property, but deny such benefits to religious groups. See, AGO 1995 No. 3 (Wash., March 23, 1995) ["granting equal access to religious groups was not only constitutionally permissible, but constitutionally required."]; Op. Atty. Gen., Calif. No. 91-808 (April 20, 1993) ["'The Supreme Court has made it clear that a policy of permitting open access to a public forum including non-discriminatory access for religious speech, is a valid secular purpose.'"]; Op. Atty. Gen., Va. (August 10, 1990) ["... the holdings in Widmar and Mergens obligate the School Board to base any treatment of religious groups that differs from its treatment of nonreligious groups on a compelling state interest, and to draw its regulation narrowly to serve that interest."].

The law in this area is clear and persuasive. A school district cannot permit secular groups to use its facilities during non-instructional time, but deny such use to religious groups. Both the Free Exercise Clause of the United States Constitution, as well as the federal Equal Access Act require such free exercise of religion. While I have no doubt that the Greenville County School District is acting in good faith here to avoid violation of the Establishment Clause, the District need not fear the Establishment Clause of the Constitution, but instead must be concerned that denial to the Riverside Bible Club violates the Free Exercise Clause and the Equal Access Act. The United States Supreme Court has ruled that the free exercise of religion must prevail in this instance. Ceniceros, 106 F.3d at 878 ["discriminating against religious groups would demonstrate hostility, not neutrality, toward religion."]

To provide school facilities and resources to the chess club, violin club, or ecology club, but not to the Bible Club, singles out religion for discrimination and denies its free exercise. Such unequal treatment cannot stand under federal and state law. Accordingly, it is my opinion that the Riverside Bible Club is entitled to hold its meetings at the High School during non-instructional time and that the School District cannot lawfully deny such meetings.

Sincerely,

Charles M. Condon
Attorney General

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