FIRST LIBERTY

February 11, 2019

Mr. Tim Bargo, Director
First Priority Tri-County
410 Barbourville Street
Corbin, KY 40701

Re: First Priority's Right to be in Public Schools

Dear Mr. Bargo:

The law that governs First Priority's access to and use of public school property, facilities, and opportunities is clear and unambiguous. This letter should resolve any confusion you may encounter on the part of a public school district or official.

Federal law, specifically the First Amendment, requires public schools to provide religious groups like First Priority equal time, treatment and access to school property and opportunities offered to any other group. *See Good News Club v. Milford Centr. Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Central Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). This protection extends to extra-curricular student-led groups, which receive the additional protection of the Equal Access Act, 20 U.S.C. § 4071 *et seq*. Like the First Amendment, the Equal Access Act requires school districts to grant student-led religious clubs the same time and access to school facilities and benefits as other clubs. *See Mergens v. Bd. of Educ. of Westside Community Schools*, 496 U.S. 226 (1990).

Further, regardless of any use or access policy a public school may have, a school may not subject a religious group like First Priority to disadvantageous treatment because the group is religious. *See, e.g., Good News Club*, 533 U.S. at 106 (schools "must not discriminate against [private] speech on the basis of viewpoint"); *Lamb's Chapel*, 508 at 392-93 (same).

Any lesser treatment of a religious group by a school district in policy or practice is unlawful religious discrimination in violation of federal law and opens the school district and its officials to civil liability. *See Good News Club*, 533 U.S. 98 (unlawful to prohibit religious group from using school when other groups are allowed to use school); *Lamb's Chapel*, 508 U.S. 384 (same); *Mergens*, 496 U.S. 226 (same). This liability includes 42 U.S.C. § 1988, which requires a school to pay a religious group's reasonable attorney fees when the group successfully enforces its rights in a court of law.

The law's applicability to First Priority is straightforward. If other groups have access to school facilities or benefits, First Priority must be provided the same time, treatment and access offered the other groups. This applies to any group sponsored by First Priority, whether student-led or otherwise. The law is so clearly established in this area that school officials responsible for any violation or discrimination against First Priority could be denied qualified immunity and held personally liable for their unlawful conduct. *See Hope v. Pelzer*, 536 U.S. 730 (2002).

Notwithstanding the clarity of the law, a lot of misinformation is circulated concerning access of religious groups to public school property, facilities and opportunities. Much of it is generated by special interest groups with anti-religious agendas operating under the guise of promoting 'separation of church and state.' The U.S. Supreme Court, however, consistently has held that separation of church and state and Establishment Clause concerns do not justify exclusion of religious groups like First Priority from public facilities open to other groups. *See, e.g., Lamb's Chapel*, 508 U.S. at 395 (permitting school property use by a religious group held no "realistic danger that the community would think that the District was endorsing religion or any particular creed…."); *Rosenberger*, 515 U.S. at 842; *Widmar v. Vincent*, 454 U.S. 263, 273-74 (1981). In fact, when a school singles out religious groups and provides it inferior access to school resources or benefits, the school shows a hostility to religion that itself violates the Establishment Clause. *Mergens*, 496 U.S. at 248 ("[I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion. The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." (internal quotations omitted)); *Good News Club*, 533 U.S. at 118 ("[W]e cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the [religious] Club were excluded. . . .").[1]

In sum, the bare minimum of the law is for a school to provide religious groups like First Priority the same time, treatment and access to benefits and facilities it provides any other group. Anything less violates clearly established federal law.

I hope this alleviates any confusion you may encounter on the part of school districts and their officials. Please let me know if there is anything further we can do to assist you.

Sincerely,

Roger Byron
Senior Counsel

[1] *See also ACLU v. Mercer County*, 432 F.3d 624, 638 (6th Cir. 2005) ("The First Amendment does not demand a wall of separation between church and state.") (collecting cases). In addition, as the U.S. Supreme Court aptly put it: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969).