Appignani Humanist Legal Center

1777 T Street NW, Washington DC 20009-7125 | T 800.837.3792 202.238.9088 | F 202.238.9003 | legal@americanhumanist.org | www.humanistlegalcenter.org

April 3, 2015

Via Email

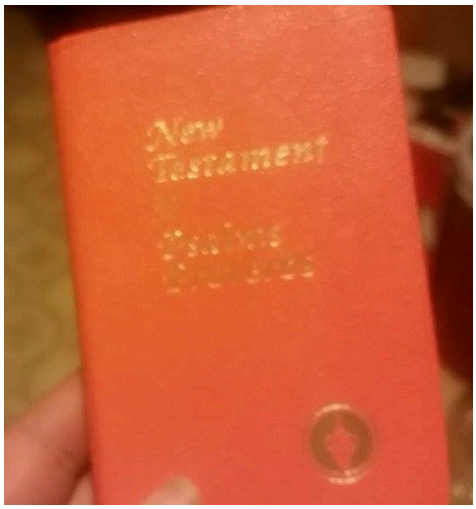
Lisha Elroy, Principal
Woodrow Wilson Elementary School
700 East Chestnut
Duncan, OK 73533
lisha.elroy@duncanps.org

Glenda Cobb, Interim Superintendent
Duncan Public Schools
1706 West Spruce
Duncan, OK 73533
glenda.cobb@duncanps.org

Re: Unconstitutional Bible Distribution

Dear Ms. Elroy and Ms. Cobb,

A parent of a third-grade student at Woodrow Wilson Elementary has contacted our office to request assistance with regard to a serious constitutional violation that has occurred under the authority of your school and school district. Yesterday (April 2), the student's teacher Erica Mackey distributed New Testament Bibles to the children in her class during class time. The student reports that Mrs. Mackey announced that she had "the holy Bible" and asked if anyone would like one. Nearly all the students walked up to her desk and she handed them out. After seeing his classmates take Bibles from the teacher, the child felt peer-pressured and coerced to do the same. A photograph of the Bible the teacher handed to him is shown below:



The school's actions in assisting the Gideons in distributing Bibles to elementary students represents a clear breach of the Establishment Clause of the United States Constitution and we hereby demand assurances that this practice will discontinue immediately.

The American Humanist Association (AHA) is a national nonprofit organization with over 415,000 supporters and members across the country, including many in Oklahoma. The mission of AHA's legal center is to protect one of the most fundamental principles of our democracy: the constitutional mandate requiring separation of church and state. Our legal center includes a network of cooperating attorneys from around the country, including Oklahoma, and we have litigated constitutional cases in state and federal courts from coast to coast.

The First Amendment's Establishment Clause "commands a separation of church and state." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). It requires the "government [to] remain secular, rather than affiliate itself with religious beliefs or institutions." *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989). Not only must the government not advance, promote, affiliate with, or favor any particular religion, it "'may not favor religious belief over disbelief.'" *Id.* at 593 (citation omitted). Indeed, the Establishment Clause "create[s] a complete and permanent separation of the spheres of religious activity and civil authority." *Everson v. Bd. of Ed*, 330 U.S. 1, 31-32 (1947). *Accord Engel v. Vitale*, 370 U.S. 421, 429 (1962). Separation "means separation, not something less." *McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948). In "no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart." *Id.*

Indeed, the government "may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling nonadherents to support the practices or proselytizing of **favored religious organizations** and conveying the message that those who do not contribute gladly are less than full members of the community." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989).

To comply with the Establishment Clause, a government practice must pass the *Lemon* test,[1] pursuant to which it must: (1) have a secular purpose; (2) not have the effect of advancing or endorsing religion; and (3) not foster excessive entanglement with religion. *Allegheny*, 492 U.S. at 592. Government action "violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). In applying these general principles to the context of public schools, the Supreme Court has emphasized that courts must defend the wall of separation with an even greater level of vigilance because "there are heightened concerns with protecting freedom of conscience from [even] subtle coercive pressure in the elementary and secondary public schools." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). Although "coercion is not necessary to prove an Establishment Clause violation," its presence "is an obvious indication that the government is endorsing or promoting religion." *Id.* at 604 (Blackmun, J., concurring). *See also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000).

Numerous courts have explicitly ruled that a government's practice of assisting Gideons (or other entities) in distributing Bibles violates the Establishment Clause. *See Lubbock Civil*

[1] The test is derived from *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

Liberties Union v. Lubbock Independent Sch. Dist., 669 F.2d 1038 (5th Cir. 1982) (holding unconstitutional distribution of Gideon Bibles to fifth and sixth grade students)[2]; *Meltzer v. Bd. of Public Instruction*, 548 F.2d 559, 575-76 (5th Cir. 1977) ("the distribution of Gideon Bibles to public school students violates the First Amendment."); *Roark v. South Iron R-1 Sch. Dist*., 573 F.3d 556, 561 (8th Cir. 2009) (affirming permanent injunction enjoining school district from "allowing distribution of Bibles" during the school day); *Doe v. S. Iron R-1 Sch. Dist*., 498 F.3d 878, 882-84 (8th Cir. 2007) (same for preliminary injunction); *Berger v. Rensselaer Central Sch. Corp*., 982 F.2d 1160 (7th Cir. 1993) (policy that permitted the Gideons to distribute Bibles in public schools during school hours violated Establishment Clause because it endorsed the Gideons' beliefs and unnecessarily entangled the government in religious affairs); *Roe v. Tangipahoa Parish Sch. Bd*., 2008 U.S. Dist. LEXIS 32793, at *10-12 (E.D. La. Apr. 22, 2008) ("this Court determines that the distribution of Bibles was ultimately coercive . . . in violation of *Lee*; that distribution of Bibles is a religious activity without a secular purpose in violation of *Lemon*; and that the distribution by the Gideons amounted to promotion of Christianity by the School Board in violation of *County of Allegheny*."); *Jabr v. Rapides Parish Sch. Bd*., 171 F. Supp. 2d 653 (W.D. La. 2001) (school board's action of making Bibles available to students in principal's office, in the presence of other students, was an unconstitutional endorsement of religion); *Chandler v. James*, 985 F. Supp. 1094, 1101 (N.D. Ala. 1997); *Goodwin v. Cross Cnty. Sch. Dist. No. 7*, 394 F. Supp. 417 (E.D. Ark. 1973) (school board's practice of permitting religious organization to distribute Bibles violated Establishment Clause); *Tudor v. Bd. of Ed.*, 100 A.2d 857, 868 (N.J. 1953) (the distribution of Gideon Bibles to public school students was unconstitutional even though the Bibles were given only to children whose parents signed a request slip therefor, since this is more than mere accommodation of, or assistance to, a religious sect); *Brown v. Orange Cnty. Bd. of Public Instruction*, 128 So.2d 181, 185 (Fla. Dist. Ct. App. 1960) (distribution of Gideon Bibles in public schools unconstitutional). *See also Roark v. South Iron R-1 Sch. Dist*., 540 F. Supp. 2d 1047, 1057 (E.D. Mo. 2008) ("Numerous cases have held that the distribution of Gideon Bibles . . . on school property and during school hours violates the Establishment Clause.").

Turning to the facts here, it is plain that the School District, as in the above cases, violated the Establishment Clause pursuant to the *Lemon* and coercion tests by assisting Gideons in distributing Bibles to third grade students.

The school's actions fail the purpose prong of *Lemon* because there is no conceivable secular purpose in distributing Bibles to elementary students. *See Berger*, 982 F.2d at 1170; *Roe*, 2008 U.S. Dist. LEXIS 32793, at *11 ("As to the first prong, the Gideons were given access to the elementary school during school hours to distribute Bibles to fifth grade students. The School Board has failed to set forth a secular purpose for this practice"); *Jabr*, 171 F. Supp. 2d at 660 (school board's actions failed the first prong of *Lemon* because there was no secular purpose in permitting a principle to make Gideon Bibles available in his office).

---

[2] *See Ingebretsen v. Jackson Pub. Sch. Dist*., 864 F. Supp. 1473, 1492 (S.D. Miss. 1994) (citing *Lubbock*). Note also that the district court in *Doe v. Duncanville Indep. Sch. Dist*., 70 F.3d 402, 408 (5th Cir. 1995) held that the distribution of Gideon Bibles in public schools was unconstitutional and enjoined the school district from "leading, authorizing, permitting or condoning the distribution of Bibles to students on school premises and during school hours." The Fifth Circuit vacated the order on standing grounds only.

A religious purpose may be inferred where, as here, "the government action itself besp[eaks] the purpose . . . [because it is] patently religious." *McCreary County v. ACLU of Ky.,* 545 U.S. 844, 862-63 (2005). *See Stone v. Graham*, 449 U.S. 39, 41 (1980) ("The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths"); *Mellen v. Bunting*, 327 F.3d 355, 373 (4th Cir. 2003) ("When a state-sponsored activity has an overtly religious character, courts have consistently rejected efforts to assert a secular purpose for that activity.").

Nothing "could be more unabashedly Christian than the New Testament Bibles." *Jabr*, 171 F. Supp. 2d at 660. "Permitting distribution of 'The New Testament' . . . affronts not only non-religious people, but all those whose faiths, or lack of faith, does not encompass the New Testament." *Berger*, 982 F.2d at 1170. Clearly, a government practice that assists in tendering New Testament "has the purpose of promoting and approving Christianity." *Jabr*, 171 F. Supp. 2d at 660. *See also Meltzer*, 548 F.2d at 576 n.36 ("We join with the Courts in both *Tudor* and *Brown* in surmising that if the tables were turned, so that it was the Douay version of the Bible, or the Koran, or the Talmud which was being distributed to public school students, the Protestant groups in the County would feel a tremendous sectarian resentment against the actions of the school authorities.").

Regardless of the purposes motivating it, the school's actions fail *Lemon's* second prong. The "effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval [of religion]." *Wallace v. Jaffree*, 472 U.S. 38, 56 n.42 (1985) (quotation marks omitted). The "advancement need not be material or tangible. An implicit symbolic benefit is enough." *Friedman v. Board of County Comm'rs*, 781 F.2d 777, 781 (10th Cir. 1985).[3]

It is apodictic that private citizens such as the Gideons have no right to "use the machinery of the State to practice its beliefs." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 226 (1963).[4] For instance, in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307 (2000), the Supreme Court held that student-led prayer at public school football games failed the second

---

[3] *See Larkin v. Grendel's Den*, 459 U.S. 116, 125-26 (1982) ("The *mere appearance* of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred. It does not strain our prior holdings to say that the statute can be seen as having a 'primary' and 'principal' effect of advancing religion.") (emphasis added). By way of example, in *Granzeier v. Middleton*, 955 F. Supp. 741, 746-47 (E.D. Ky. 1997), *aff'd*, 173 F.3d 568 (6th Cir. 1999), the court held that a government sign depicting a small (4-inch) "clip art" cross violated the Establishment Clause reasoning, "the sign could be, and was in fact, perceived by reasonably informed observers, to be a government endorsement of the Christian religion. The court accepts that this apparent endorsement was **not intended**, but this made no difference in the observer's perception."

[4] *See Lee*, 505 U.S. at 592 (private citizens have no right to use "the machinery of the State to enforce a religious orthodoxy."); *Chandler v. James*, 180 F.3d 1254, 1265 (11th Cir. 1999) ("[A] student's right to express his personal religious beliefs does not extend to using the machinery of the state as a vehicle for converting his audience."). *See also Allegheny*, 492 U.S. at 601 n.51 ("To be sure, prohibiting the display of a creche in the courthouse deprives Christians of the satisfaction of seeing the government adopt their religious message as their own, but this kind of government affiliation with particular religious messages is precisely what the Establishment Clause precludes.").

prong of *Lemon* because the prayer was "delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property." Even though any prayer would be delivered by a student rather than a government official, the Court concluded that "an objective observer, . . . would perceive it as a state endorsement of prayer[.]" *Id*. at 308 (internal quotation marks omitted). And surely, "[t]here is no inherent right in any citizen or in any religious or political organization to use public school buildings for any other purposes than those devoted to the public schools." *Baggerly v. Lee*, 73 N.E. 921, 922 (Ind. App. 2d Div. 1905).

By assisting Gideons in distributing Bibles to a captive audience of elementary students, the School District sends the "unequivocal message that" the School District, "as an institution, endorses the religious expressions embodied" in the Bibles, *Mellen*, 327 F.3d at 374, and thus violates the Establishment Clause under the second prong of *Lemon*. *See Meltzer*, 548 F.2d at 575-76 ("the school board's use of the school system as a means of distribution amounts to its placing, at least in the eyes of children and perhaps their parents, its stamp of approval upon the Gideon version of the Bible, thus creating an unconstitutional preference for one religion over another."); *Berger*, 982 F.2d at 1171 ("Though we are confident the school district's policy is not aimed at promoting the religious values of the Gideons, it does have the effect of sending a message to an objective observer that the Corporation endorses the Gideons' beliefs, and it entangles the government unnecessarily in religious affairs."); *Roe*, 2008 U.S. Dist. LEXIS 32793, at *11 ("As for prong two, allowing the Gideons to distribute Bibles under the circumstances in this case evidences a preference towards religion, specifically, Christianity."); *Jabr*, 171 F. Supp. 2d at 663-64 (school board's "action of permitting the principal of the school to offer, give, or make available Bibles . . . in his office . . . is an unconstitutional endorsement of religion . . . creating an impression that the school endorsed a particular religious belief: Christianity."); *Goodwin*, 394 F. Supp. at 427 ("permitting representatives of the well-known and active Gideon organization to distribute their Bibles to students" was unconstitutional advancement of religion); *Brown*, 128 So.2d at 185 ("The distribution of Gideon Bibles through the school system each year certainly approximates an annual promotion and endorsement of the religious sects or groups which follow its teachings and precepts.").

It is no defense to claim that the teacher was merely making Gideon Bibles available to the students. Indeed, the very first court to address the issue held:

> We cannot accept the argument that . . . the State is merely 'accommodating' religion. It matters little whether the teachers themselves will distribute the Bibles or whether that will be done by members of the Gideons International. The same vice exists, that of preference of one religion over another. . . . The society is engaged in missionary work, accomplished in part by placing the King James version of the Bible in the hands of public school children throughout the United States. To achieve this end it employs the public school system as the medium of distribution. . . . ***In other words, the public school machinery is used to bring about the distribution of these Bibles to the children*****[.]**

Tudor, 100 A.2d at 868 (emphasis added).[5] *See also Meltzer*, 548 F.2d at 575 ("In the first wave of distribution, the Gideons simply walked into classrooms, asked the children who would like a

[5] The Fifth Circuit agrees that *Tudor* is the "leading case to consider the issue of the constitutionality of Bible distribution to public school children." *Meltzer*, 548 F.2d at 574.

free Bible, and passed out the Bibles to the children who raised their hands. In the second wave of distribution, the Gideons set up a central Bible distribution point on campus, and students who wanted Bibles had to walk to the distribution center to get them. In both methods, however, the distribution took place with the permission of the school board and the local schools."); *Berger*, 982 F.2d at 1164 (Gideons sent representatives to distribute Bibles to students); *Roe*, 2008 U.S. Dist. LEXIS 32793 (same); *Goodwin*, 394 F. Supp. at 428 (the practice "permitted by the school authorities of distributing the Gideon Bible by a representative of the Society to the fifth grade students in the elementary schools of the Cross County School District is an exercise of religious character which is prohibited by the First Amendment"); *Jabr*, 171 F. Supp. 2d at 660 (observing that "in *Berger*, the classroom teachers did not even participate in the handing out of the Bibles, they merely observed private citizens, known as Gideons, distribute the Bibles to students.").[6]

Because the School District "acted with state authority in welcoming the Gideons," "its actions are subject to the dictates of the First Amendment. Under the Establishment Clause, the government may not aid one religion, aid all religions or favor one religion over another." *Berger*, 982 F.2d at 1168-69.

The unconstitutional endorsement is even more troubling here because the Gideons were distributed to students in *elementary* school. Elementary students are vastly more impressionable than high school students and are more likely to perceive the school's actions as an endorsement of religion. *See Peck v. Upshur Cnty. Bd. of Educ.*, 155 F.3d 274, 288 n* (4th Cir. 1998) (equal access policy allowing the limited display of religious and non-religious materials by private groups was unconstitutional "in the elementary schools" but not in the high schools due to the impressionability of the younger children); *Bell v. Little Axe Independent School Dist*., 766 F.2d 1391, 1404 (10th Cir. 1985) ("Elementary schoolchildren are vastly more impressionable than high school or university students and cannot be expected to discern nuances which indicate whether there is true neutrality toward religion on the part of a school administration"). *See also Morgan v. Swanson*, 659 F.3d 359, 382 (5th Cir. 2011); *Walz v. Egg Harbor Twp. Bd. of Educ*., 342 F.3d 271, 277 (3d Cir. 2003) (explaining that in "an elementary school" the line "between school-endorsed speech and merely allowable speech is blurred" and that "[w]hile 'secondary school students are mature enough and are likely to understand that a school does not endorse or support speech that it merely permits on a nondiscriminatory basis,'" elementary students "are different.") (citation omitted).

In *Peck*, for instance, the Fourth Circuit reviewed the constitutionality of a school board's policy allowing the limited display of religious *and* non-religious materials by private groups in elementary and secondary schools. Despite the board's efforts to avoid endorsement, the court held the policy unconstitutional "to the extent that it allows . . . religious material in the elementary schools." 155 F.3d at 288 n.* The court distinguished elementary students from high school students and noted, "because children of these ages may be unable to fully recognize and

[6] *Cf. Stone*, 449 U.S. at 42-43 ("It does not matter that the posted copies of the Ten Commandments are financed by voluntary private contributions, for the mere posting of the copies under the auspices of the legislature provides the 'official support of the State . . . Government' that the Establishment Clause prohibits.") (citations omitted); *Allegheny*, 492 U.S. at 580, 597.

appreciate the difference between government and private speech" the school's "policy could more easily be (mis)perceived as endorsement rather than as neutrality." *Id.*[7]

The school district's actions are also "unconstitutional when measured by the third prong of the *Lemon* test." *Jabr*, 171 F. Supp. 2d at 661 ("when the School Board permitted the principal to make Bibles available to students in the principal's office, the principal became excessively entangled with religion."). *See also Roe*, 2008 U.S. Dist. LEXIS 32793, at *11 ("as for prong three, the teachers who were required to inquire as to which students want the Bible, and then organize and direct them to the principal's office, became excessively entangled with religion."). In *Berger*, the Seventh Circuit held that "[t]eachers, who did not actively participate in Bible distribution, but merely observed non-school personnel distribute the material, became excessively entangled with religion in violation of the Establishment Clause." *Id.* (citing *Berger*, 982 F.2d at 1162-63). *See Berger*, 982 F.2d at 1171 ("Though we are confident the school district's policy is not aimed at promoting the religious values of the Gideons, it . . . entangles the government unnecessarily in religious affairs."). Here of course, unlike in *Berger*, the teacher was not merely a passive observer but expressly offered the Bibles to her students in class and during class time and then personally distributed the Bibles out to the students.

In addition to violating the Establishment Clause pursuant to the *Lemon* test, *supra*, the school's actions also violate the Establishment Clause pursuant to the separate coercion test. The Supreme Court has made clear that "at a minimum, the [Establishment Clause] guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Lee*, 505 U.S. at 587. In *Lee*, the Court held that a public school's inclusion of a nonsectarian prayer in a graduation ceremony was unconstitutionally coercive even though the event was technically voluntary and students were not required to participate in the prayer. *Id.* at 586.

Applying *Lee*, the Seventh Circuit in *Berger* held that a school's "practice of assisting Gideons in distributing Bibles for non-pedagogical purposes is a far more glaring offense to First Amendment principles than a nonsectarian graduation prayer." 982 F.2d at 1169. *See also Roe*, 2008 U.S. Dist. LEXIS 32793, at *10-11 (distribution of Gideon Bibles held unconstitutionally coercive). In *Jabr*, the school defendants argued that "when the principal placed Bibles on his desk, the school did not place any pressure or coerce the child to take the Bible because the child could freely decide whether to accept or reject possession of the Bible." 171 F. Supp. 2d at 661-62. The court disagreed. *Id.* The court explained, "[e]ven when we assume that the principal 'passively' or 'neutrally' offered the Bibles to the students, . . . [t]he pressure created by the principal in his office was coercive and, thus, illegal." *Id. See also Meltzer*, 548 F.2d at 574; *Goodwin*, 394 F. Supp. at 427 ("The fact that a student is not required to accept the [Gideons'] presentation is of no significance.").

---

[7] *Peck* is further distinguishable because in that case, the school district had an equal access policy allowing private citizens to display and make available religious and non-religious materials for *a single day* each year. The table displays also included a "disclaimer, renouncing any sponsorship or endorsement by the school." *Id.* at 275. No one was allowed to stand at the tables to encourage or pressure students to take the material. *Id.* at 275-76. The court thus held that "the School Board could, **for one day during the year**, permit the table displays without violating the Establishment Clause because the Board has a n**eutral policy of allowing religious and nonreligious groups alike** to set up such displays in the schools[.]" *Id.* But as noted above, even this neutral policy was unconstitutional in the elementary schools.

As the Seventh Circuit aptly observed: "The only reason the Gideons find schools a more amenable point of solicitation than, say, a church or local mall, is ease of distribution, since all children are compelled by law to attend school and the vast majority attend public schools." *Berger*, 982 F.2d at 1167. And the Supreme Court has made clear that, "'the government may no more use social pressure to enforce orthodoxy than it may use more direct means.'" *Santa Fe*, 530 U.S. at 312 (quoting *Lee*, 505 U.S. at 594). Put simply, the government's actions in offering Bibles to elementary students "exacts an unconstitutional toll on the consciences of religious objectors." *Id.*[8]

In view of the aforementioned authorities, it is beyond clear that the School District violated the First Amendment by assisting in the distribution of Gideon Bibles to elementary school students. Based on the above, we demand the following assurances: (1) That teachers in your school district be advised that they are not permitted to distribute Bibles to students in class or during class time; (2) That teachers be instructed that under no circumstances should they attempt to persuade students to take Bibles during class time; and (3) The School District and its agents must refrain from leading, authorizing, permitting or condoning the distribution of Bibles at any elementary or middle school premises and during school hours, or immediately before or immediately after school hours.

We kindly ask that you respond to this letter immediately and no later than seven (7) days, to avoid litigation. Thank you in advance for turning your attention to this serious matter.

Sincerely,
Monica L. Miller, Esq.

[8] Any claim by the School District that it established a "public forum" for private speech is belied by the actual facts in this case. For one thing, the "evidence shows that the only group who has been allowed access" to distribute materials "is the Gideons." *Roark*, 540 F. Supp. 2d at 1058 (E.D. Mo. 2008). *See also Berger*, 982 F.2d at 1166 (rejecting free speech defense, observing that "the record is barren of addresses or literary distributions by political groups or religious organizations other than the Gideons."). *See also Cole v. Oroville Union High Sch*., 228 F.3d 1092, 1101 (9th Cir. 2000) (even assuming the "graduation ceremony was a public or limited public forum, the District's refusal to allow the students to deliver a sectarian speech or prayer" was "necessary to avoid violating the Establishment Clause"); *Herdahl v. Pontotoc County Sch. Dist*., 933 F. Supp. 582, 589 (N.D. Miss. 1996) (even if a school "established a limited open forum" sectarian "prayer broadcast over the public school loudspeaker would still violate the First Amendment").