

RELIGION IN THE PUBLIC SCHOOLS



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RELIGION IN THE PUBLIC SCHOOLS

OVERVIEW – A COMPLEX ISSUE

The issue of the proper role of religion in the public schools continues to be the subject of great controversy. School officials, parents and students -- as well as lawyers and judges -- wrestle with these questions every day. However, clear standards and guidance are elusive. This handbook will help provide a roadmap through this terrain.

It is important to bear in mind that this issue is extremely complex. Decision makers must address many competing demands, invariably looking to balance the constitutional mandates of separation of church and state and the right to freely exercise religion, as well as freedom of speech. They must include in their thinking the needs and rights of both the religious and the non-religious. Furthermore, decision makers must strive towards a vision of a pluralistic America that is open and welcoming to all groups, including religious minorities.

This subject matter area, while complex, does not have to be divisive. School districts should set forth clear policies regarding religion in the public schools that satisfy both the letter and the spirit of the First Amendment. Parents should become involved in the process of discussing these policies with educators, and approach difficulties with an understanding that mistakes and misinformation, not malice, underlie a great many of the problems which typically arise in this area.

Addressing these concerns with civility does not mean that those involved should understate the importance of these issues, nor should they shy away from insisting that their concerns are heard and addressed. Rather, all of us should recognize that although we may define it differently, our common goal is to ensure that the vision of religious liberty upon which this nation was founded is preserved. Few Americans would disagree that our individual religious freedom is extremely precious and that no one should be subjected to inappropriate religious coercion.

The Anti-Defamation League has been fighting anti-Semitism, racism and bigotry since 1913. To that end, we have been fighting for the religious liberty rights of all Americans – whether in the minority or majority - to practice their religions freely and without government interference. As a result, we have developed an expertise in this area. We encourage you to reach out to your local Anti-Defamation League Regional Office any time you think we can be of assistance.

RELIGION IN THE PUBLIC SCHOOLS

BACKGROUND – RELIGIOUS LIBERTY IN AMERICA & OUR PUBLIC SCHOOLS

Since its founding in 1913, the Anti-Defamation League (ADL) has been guided by its mandate of combating bigotry, bias and discrimination, and securing the rights and liberties of all citizens of the United States. ADL deeply believes in the importance of preserving and safeguarding freedom of religion in our increasingly pluralistic nation. Consequently, we believe that government should neither promote nor be hostile to religion. Therefore, state sponsored or organized religious activity must be kept out of the public schools. Although this belief may be distasteful to some, this position is not one of hostility towards religion; rather, it reflects a profound respect for religious freedom and recognition of the extraordinary diversity of religions represented by the students in our public schools.

“Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure. ... In no activity of the State is it more vital to keep out divisive forces than in its schools.” *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

AMERICA'S FOUNDING PRINCIPLE: RELIGIOUS FREEDOM THROUGH SEPARATION OF CHURCH AND STATE

The right to freedom of religion is so central to American democracy that it was enshrined in the First Amendment to the U.S. Constitution.

Recognizing the unique and intimate nature of religion, the Founding Fathers wisely put religion on a different footing from other forms of speech and observance – mandating strict separation of church and state to ensure religious freedom for all individuals and faiths. Largely because of the First Amendment's prohibition against government regulation or endorsement of religion, diverse faiths have flourished and thrived in America since the founding of the republic.

The Founding Fathers in drafting the First Amendment wisely treated religion and religious

beliefs differently from other forms of expression to ensure protection of religious freedom. To do so, they placed special restrictions on religion, but importantly, they also provided religion with special constitutional protections.

These special restrictions and protections are expressed in the first sixteen words of the First Amendment, and they are called the Establishment Clause and the Free Exercise Clause:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...” (First Amendment, U.S. Constitution – December 15, 1791).

Taken together, these clauses are often referred to as the Constitution’s Religion Clauses. Each of these clauses separates religion and government in ways that protect individual religious freedom, and ensure the integrity of both religion and government.

Establishment Clause - "Congress shall make no law respecting an establishment of religion. . . ."

This clause prohibits a joining between government and religion. As such, there can be no official state religion, no preference by government of one faith over another or religion generally, no taxes to support religion, and no government support for religious worship or practice.

Free Exercise Clause - "Congress shall make no law . . . prohibiting the free exercise thereof"

This clause provides each individual with the right to freely practice the religion of his or her choosing. It ensures the autonomy houses of worship and other religious institutions from government in matters of internal governance and religious law. It prohibits government from enacting laws that specifically target religion. Importantly, it empowers the government to provide houses of worship with special accommodations and exemptions from civil law that might otherwise interfere with religious worship or practice.

The Establishment and Free Exercise Clauses complement each other to guard against “[a] union of government and religion,” which, in the words of distinguished U.S. Supreme Court Justice Hugo Black, “tends to destroy government and to degrade religion.” *Engel v. Vitale*, 370 U. S. 421, 431 (1962).

Not merely burdensome legal technicalities, these two clauses enshrine the belief that all Americans should be free to practice their religion without state interference.

Compliance with the separation of church and state must be vigorously enforced in the nation's public schools. Not endorsing or not appearing to endorse religion is especially important in the

public school setting. This is due to a number of considerations unique to the public schools: the specific sensitivities of school-age children; the fact that public schools are public institutions; and the profound influence of school officials and teachers over students. This last point bears special examination. Most children view their teachers and other school officials as important authority figures. Moreover, children are highly susceptible to coercion, and particularly cogent is the pressure to conform both from adults and from their peers. These factors create a significant danger when religion is introduced into the public schools in circumstances evincing the apparent endorsement of teachers.

Furthermore, the student body in America's public schools is growing increasingly diverse. Schools must give special consideration to the fact that many school children belong to minority religions or are raised in non-religious environments. The nation's public schools must be hospitable to students from a variety of backgrounds -- students of all faiths as well as no faith. Public schools should inculcate students with understanding and respect for diversity, as well as a spirit of tolerance, acceptance and inclusion. Moreover, all of this can be achieved without a religious message.

In *Santa Fe Independent School Dist. v. Doe*, the U.S. Supreme Court concisely summed up the difficulty with school sponsored religion:

“School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”¹

Some have said that this viewpoint "bristles with hostility to religion."² ADL does not agree. To the contrary, this statement brilliantly expresses the difficulties that arise when government makes religion its aim.

RELIGION IN THE PUBLIC SCHOOLS – GENERAL LEGAL PRINCIPLES

A. The Establishment Clause

As a legal matter, any school practice or policy must not violate the Establishment Clause. For more than three decades, compliance with the Establishment Clause has been examined under the test the U. S. Supreme Court enunciated in *Lemon v. Kurtzman*, 403 U. S. 602 (1971). When a court looks at whether a program involving religion is permissible, it first asks: does it meet the criteria set forth in *Lemon*? Indeed, the "Lemon test" has proven largely successful in protecting the religious rights and liberties of all Americans, including religious minorities. Thus, in order for a state practice or policy, including a public school practice or policy, to pass constitutional muster

¹ *Santa Fe Independent School Dist. v. Doe*, 530 U. S. 290, 390 (2000) (internal marks omitted).

² *Id.* at 318 (C. J. Rehnquist, dissenting).

under the *Lemon* test, a school official must answer "yes" to the following three questions:

- Does the policy in question have a secular purpose?
- Will the policy in question have a primary effect which neither advances nor inhibits religion?
- Does the policy in question avoid entangling government and religion?

If a school official cannot answer an unequivocal yes to all three of these questions, then the policy must be abandoned. This is necessary as a matter of constitutional law and is good policy. It respects the rights and sensitivities of all students, some of whom may have religious practices that differ from the one being advanced by the policy in question.

In practice, this means that the public schools must never endorse -- or appear to endorse -- any religion or religious practice. Indeed, not only may they not appear to endorse religion, but they may never appear to disapprove of religion either. Moreover, schools may not give the impression that they endorse religious belief over non-belief or any particular belief over others.

The principle that public schools must never endorse or disapprove of religion has been established in a long line of U. S. Supreme Court decisions. Students must never be given the impression that their school officially prefers or sanctions a particular religion or religion generally. Further, students must never feel coerced by pressure from their peers or from the public to adhere to any religion.

The U. S. Supreme Court reemphasized the importance of church-state separation in the public schools in *Lee v. Weisman*, 112 S. Ct. 2649 (1992) and more recently in *Santa Fe Independent School Dist. v. Doe*, 530 U. S. 290 (2000). In both cases, the Court was particularly concerned with the danger of student religious coercion in public schools resulting from peer and public pressure. The decisions are a ringing reaffirmation of the importance of government not endorsing one religion over another or religion over non-religion, particularly when public schools are involved. Notably, the Supreme Court has held that the state (school) is constitutionally obligated to see that state-supported activity is not used for religious indoctrination.³

B. The Free Exercise Clause

The second question a school must ask about a proposed policy or practice is whether it violates the "free exercise clause" of the First Amendment. "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all governmental regulation of religious *beliefs* as such. The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or

³ See *Levitt v. Committee for Public Education & Religious Liberty*, 413 U. S. 472 (1973).

religious status, or lend its power to one or the other side in controversies over religious authority or dogma."⁴

While this protection seems very broad, the Court has held that the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."⁵ That is, if a law or policy is passed that applies to everyone but happens to impinge on your ability to practice your religion, you may not be able to challenge the law or policy on free exercise grounds. These challenges are difficult because the government must only show a minimal justification for such laws. So, for example, criminal drug laws preventing the use of peyote are applicable even to those whose worship requires the use of peyote because the laws were not passed with religion in mind and are applicable to everyone.⁶ It should be noted, however, that in certain states there are laws requiring stronger justification for neutral laws or policies of general applicability that impinge on religious practice.

The relationship between the Establishment Clause and the Free Exercise Clause can be a bit hard to tease out. At the end of the day, however, so long as the school district is neither endorsing nor disapproving of religion, it should not run afoul of the Constitution.

⁴ *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U. S. 872, 877 (1990) (internal marks and citations omitted).

⁵ *Id.* at 879.

⁶ *Id.* 872.

RELIGION IN THE PUBLIC SCHOOLS

PRAYER IN PUBLIC SCHOOLS

Organized prayer in the public school setting, whether in the classroom or at a school-sponsored event, is unconstitutional. The only type of prayer that is constitutionally permissible is private, voluntary student prayer that does not interfere with the school's educational mission.

SPECIFIC ISSUES & QUESTIONS

May students pray? Students have the right to engage in voluntary individual prayer that is not coercive and does not substantially disrupt the school's educational mission and activities.⁷ For example, all students have the right to say a blessing before eating a meal. However, school officials must not promote or encourage a student's personal prayer. Students may engage with other students in religious activity during non-curricular periods as long as the activity is not coercive or disruptive. In addition, while students may speak about religious topics with their peers, school officials should intercede if such discussions become religious harassment. It is essential that private religious activity not materially disrupt the school's educational mission and activities.⁸ Personal religious activity may not interfere with the rights or well-being of other students, and the threat of student harassment and pressure must be carefully monitored.⁹ It is also critical to ensure that the religious activity is actually student-initiated, and that no school employee supervises or participates in the activity. Any school promotion or endorsement of a student's private religious activity is unconstitutional.

Are vocal prayer and Bible reading in the classroom permitted? Vocal denominational or nondenominational prayer, or ceremonial reading from the Bible are unconstitutional practices in the public school classroom.¹⁰ It is legally irrelevant if the prayer or Bible reading is voluntary, or if students may be excused from the activity or classroom during the prayer. Student volunteers

⁷ See *Tinker v. Des Moines Indep. Community School District*, 393 U.S. 503 (1969).

⁸ Id.

⁹ Id.

¹⁰ *School Dist. of Abington Township, Pa. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

may not offer prayers for recitation.¹¹ Similarly, student volunteers are prohibited from broadcasting prayers over a school intercom system into the classroom.¹²

Can a school or state require a moment of silence in the classroom? The U. S. Supreme Court struck down a statute requiring a moment of silence which students could use for silent prayer or meditation because it was enacted for the purpose of advancing religion.¹³ Similarly, one Federal Appeals Court struck down a moment of silence statute because it had a religious purpose.¹⁴ More recently, however, four other Federal Courts of Appeals upheld moment or minute of silence statutes. In those cases, the courts found that statutes in question and their legislative histories did not have a religious purpose or the effect of advancing religion.¹⁵ Based on the Supreme Court decision and these Federal Courts of Appeals decisions, if the language or legislative history of a moment of silence law or policy has a religious purpose, advances religious, or is entangled with religion, it is unconstitutional. Furthermore, a moment of silence law or policy - regardless of whether its language and legislative history reflect a secular purpose and effect - will be unconstitutional if the statute is implemented in any way that encourages or discourages students to pray or engage in other religious activity.

Can there be prayer before or after athletic events or activities? A school district's policy of permitting student-led, student-initiated prayer before football games is unconstitutional.¹⁶ It is also unconstitutional for a school official, including a coach, to initiate, lead, or participate in a team in prayer.¹⁷ Nor may a school official ask a team member or any other student to initiate or lead a prayer before, during or after a public or school-sponsored athletic activity or event.¹⁸ It is also unconstitutional for a member of the clergy to offer prayers before or after public school athletic activities or events.¹⁹ Voluntary prayer presented and led by students without official permission or sanction may be constitutional, provided that it is not coercive in any way.

Can there be prayer at graduation ceremonies? Prayers delivered by clergy at official public school graduation ceremonies are unconstitutional.²⁰ The fact that a prayer is nondenominational or voluntary does not render it constitutional.²¹ The U. S. Supreme Court has

¹¹ *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1982), aff'd, 455 U.S. 913 (1982).

¹² *Herdahl v. Pontotoc County School District*, 933 F. Supp 582, 588 (N.D. Miss. 1996). See also *Hall v. Board of School Com'rs of Conecuh County*, 656 F.2d 999, 1000 (5th Cir. 1981).

¹³ *Wallace v. Jaffree*, 472 U.S. 38 (1985).

¹⁴ *May v. Cooperman*, 780 F.2d 240, 252-53 (3rd Cir. 1985).

¹⁵ *Sherman v. Koch*, 623 F.3d 501, 520 (7th Cir. 2010), cert. denied, 132 S.Ct. 92 (2011); *Croft v. Perry*, 562 F.3d 735, 750 (5th Cir. 2009); *Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001), cert. denied, 122 S. Ct. 465 (2001); *Bown v. Gwinnett County School Dist.*, 112 F.3d 1464 (11th Cir. 1997).

¹⁶ *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290.

¹⁷ See *Borden v. School District of the Township of East Brunswick*, 523 F.3d 153 (3rd Cir. 2008), cert. denied, 129 S. Ct. 1524 (2009); *Doe v. Duncanville Independent School Dist.*, 70 F.3d 402 (5th Cir. 1995).

¹⁸ *Jager v. Douglas County School Dist.*, 862 F.2d 824 (11th Cir. 1989), cert. denied, 490 U.S. 1090 (1989).

¹⁹ *Duncanville Independent School Dist., v. John Doe*, 994 F.2d 160 (5th Cir. 1993).

²⁰ *Lee v. Weisman*, 505 U.S. 577 (1992). See *Santa Fe Independent School Dist.*, 530 U.S. 290.

²¹ *Lee*, 505 U.S. 577.

not specifically ruled on whether student-initiated, graduation prayer is constitutional, and the lower Federal courts disagree on the issue. However, when the Supreme Court ruled in *Santa Fe Independent School Dist. v. Doe* that a district policy allowing student-initiated and student-led prayer before football games was unconstitutional, it effectively ruled-out the possibility that any district policy allowing student-initiated and student-led prayers would be permissible at graduation ceremonies. Moreover, in both *Santa Fe v. Doe* and *Lee v. Weisman*, the Supreme Court expressed particular concern that students could be coerced, through pressure from their peers and others, into praying during school events such as football games and graduation ceremonies. This danger exists regardless of whether it is a member of the clergy or a student who offers the prayer.

The Court also emphasized in *Weisman and Santa Fe* that attendance at major school events like graduation or football games should not be considered "voluntary" even if authorities officially designate it as such. Weekly football games and high school graduation are central parts of student life and students should be able to attend these events without fear of religious coercion. However, baccalaureate services, which are distinct and separate from official graduation ceremonies, may constitutionally include prayers and religious sermons. Such events must be privately sponsored and must not be led or sponsored by school personnel. Any school endorsement of such events should be actively discouraged.

Can there be prayer at school assemblies? School officials, employees or outsiders must not offer prayers at school assemblies. Even if attendance is voluntary, students may not deliver prayers at school assemblies either.²² Student-initiated prayer at school assemblies is unconstitutional even if the prayer is non-proselytizing and nonsectarian.²³

May teachers pray in school? It is unconstitutional for teachers to pray **with** or **in the presence of** students in school or in their capacities as teachers or representatives of the school. Indeed, teachers may have their free speech and free exercise rights to speak about religious matters and otherwise say prayers in the presence of students abridged in an effort to ensure that there is no appearance that the school is violating the Establishment Clause. Because teachers hold such a special status in the school and are viewed as government officials speaking to a group that is both a captive audience and extremely impressionable, religious speech by teachers or other school personnel will be seen as a state endorsement of religion.²⁴ The Supreme Court has said that "the interest of the State in avoiding an Establishment Clause violation 'may be [a] compelling' one justifying an abridgement of free speech otherwise protected by the First Amendment..."²⁵ It is

²² *Collins v. Chandler Unified School Dist.*, 644 F.2d 759 (9th Cir.), cert. denied, 454 U.S. 863 (1981). See *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290.

²³ *Santa Fe Independent School Dist.*, 530 U.S. 290; *Ingebretsen v. Jackson Public School Dist.*, 88 F.3d 274 (5th Cir. 1996), cert. denied, 519 U.S. 965 (1996).

²⁴ *Pelozo v. Capistrano Unified School Dist.*, 37 F.3d 517, 522 (9th Cir. 1994), cert. denied, 515 U.S. 1173 (1995).

²⁵ *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, at 394 (1993) (quoting *Widmar v. Vincent*, 454 U.S. 263 (1981)).

also impermissible for a teacher to read the Bible in front of students during a daily silent reading period.²⁶

Can school boards say prayers prior to their meetings? The Supreme Court has upheld the right of legislative or deliberative bodies such as state legislatures to open their sessions with prayer.²⁷ At least two Federal Courts of Appeals, however, have struck down prayers as unconstitutional in the school board context.²⁸ Significantly, both courts found that due the close relationship of schools boards to public schools and students, such entities do not fall within the Supreme Court's meaning of legislative or deliberative body.²⁹ As a result, the courts in reaching their decisions applied the established standards for prayer in the public schools to the school boards.

SAMPLE SCENARIOS & SITUATIONS

Football Coach Leads Team in Prayer

On the day of the Central Valley High School football championship, the coach gave his team a last-minute pep talk in the Bulldogs' locker room. He then led the team in a prayer, as he traditionally did before each athletic event. Richard Nelson, a student, felt uncomfortable reciting the prayer because he was an atheist. He mentioned his discomfort to the coach who responded that Richard should simply stand in silence or feel free to leave the room while his teammates prayed together.

Is the team prayer constitutional? Is the coach's solution viable?

The team prayer led by Richard Nelson's coach is unconstitutional and the coach's offered solution is unacceptable. He has created an environment where Richard will feel isolated and as if he belonged to this group less than the other athletes. Moreover, as a school official, the coach cannot endorse religion as he is doing here.

Fourth-grader Prayer and Religious Discussion at Recess

Every day at recess, Jessica Lewis, a fourth-grade student, sits under a tree in the schoolyard, recites prayers, and engages her classmates in discussions of a religious nature. The recess monitor, unsure of whether Jessica's activities violate the school's prohibition against classroom prayer, alerts school officials who forbid Jessica's recess prayers and discussions. Jessica's mother

²⁶ *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), cert. denied, 112 S. Ct. 3025 (1992).

²⁷ *Marsh v. Chambers*, 463 U.S. 783 (1983).

²⁸ *Doe v. Indian River School District*, 653 F.3d 256 (3rd Cir. 2011), cert. denied, 132 S. Ct. 1097 (2012); *Coles v. Cleveland Board of Education*, 171 F.3d 369 (6th Cir. 1999), reh'g en banc denied, 183 F.3d 538 (6th Cir. 1999).

²⁹ See *Doe*, 653 F.3d 256; *Coles*, 171 F.3d 369; but See *Doe #2 v. Tangipahoa Parish School*, 631 F. Supp. 2d 823 (E.D. La. 2009) (Court found that the school board in question fell within meaning of deliberative body as defined by the U.S. Supreme Court in its *Marsh* decision. However, the court did not reach the ultimate question of whether the prayers occurring at school board meetings were unconstitutional).

threatens to sue the school officials, claiming that their interference with her daughter's activities was unconstitutional.

Does Mrs. Lewis have a valid claim? How should the school respond?

The school should allow Jessica Lewis to engage in prayer and religious discussions with her classmates during recess provided that her activity is not disruptive and does not coerce or otherwise infringe upon the rights of other students.

Teacher Participation at Flag Pole Prayer Event

Prior to school hours on a September morning, a group of students from Pines Middle School hold a student-initiated, led and run prayer event in front of the school flag pole. Student participation in the event is completely voluntary. Ms. Lake, a seventh grade social studies teacher, sees the students praying on her way to the school building. She stops, joins with the group of student, bows her head, and prays with the students. Mr. Jones, a Pines Middle School teacher also on his way into to the school building, sees Ms. Lake sees and hears Ms. Lake praying with the students. Mr. Jones reports Ms. Lake's conduct to Principal Franks.

Was Ms. Lake's Participation in the Student Prayer Event Permissible?

No. Provided that the flag pole prayer event was truly student initiated, led, run, and voluntary, student participation in the event was permissible. Furthermore, it is permissible for a teacher or administrator to be at the event in a non-participatory manner to ensure that students comply with school rules or policies. However, Ms. Lake's participation in the event was impermissible because it constituted an unconstitutional school endorsement of religion.

School Policy Permitting Prayer by Student at Graduation

A school district is reviewing its graduation ceremony policy. The policy calls on a member of the local clergy to deliver a "non-sectarian, non-proselytizing" prayer at the start of the ceremony. After the parent of a graduating senior complains, the school district would like to substitute a student who is elected by his or her peers to deliver the prayer instead.

Can the school district substitute a student for a local clergy person?

No. Neither is acceptable. Schools may not arrange to allow prayer at an event. Student prayer is limited to prayer that is personal, voluntary and non-disruptive. So long as the prayer is in any way sanctioned or controlled by the district, at an official event using the school's loudspeaker and podium, such prayer is prohibited.

RELIGION IN THE PUBLIC SCHOOLS

RELIGION IN THE CURRICULUM

Public schools may not teach religion, although teaching about religion in a secular context is permitted.³⁰ The Bible may be taught in a school, but only for its historical, cultural or literary value and never in a devotional, celebratory or doctrinal manner, or in such a way that encourages acceptance of the Bible as a religious document.³¹

SPECIFIC ISSUES & QUESTIONS

What distinguishes "teaching religion" from "teaching about religion"? Religion may be presented as part of a secular educational program. Programs that "teach about religion" are geared toward teaching students about the role of religion in the historical, cultural, literary and social development of the United States and other nations. These programs should instill understanding, tolerance and respect for a pluralistic society. When discussing religion in this context, religion must be discussed in a neutral, objective, balanced and factual manner. Such programs should educate students about the principle of religious liberty as one of the fundamental elements of freedom and democracy in the United States.

"Teaching religion" amounts to religious indoctrination or practice and is clearly prohibited in public schools. A public school curriculum may not be devotional or doctrinal.³² Nor may it have the effect of promoting or inhibiting religion. A teacher must not promote or denigrate any particular religion, religion in general, or lack of religious belief.³³ A teacher must not interject personal views or advocate those of certain students. Teachers must be extremely sensitive to respect, and not interfere with, a student's religious beliefs and practices. Students must not be encouraged to accept or conform to specific religious beliefs or practices.

A program intended to teach religion, disguised as teaching about religion, will be found unconstitutional.³⁴

³⁰ *School Dist. of Abington Township, Pa. v. Schempp*, 374 U.S. 203 .

³¹ *Id.*

³² See *Doe v. Paul Dee Human*, 725 F. Supp. 1503 (W.D. Ark. 1989), affirmed without opinion, 923 F.2d 857 (8th Cir. 1990), cert. denied, 499 U.S. 922 (1991); *Hall v. Board of School Commissioners of Conecuh County*, 656 F.2d 999 .

³³ See *Johnson v. Poway Unified School District*, 658 F.3d 954 (9th Cir. 2011), cert. denied, 132 S. Ct. 1807 (2012); *Lee v. York County School Division*, 484 F.3d 687 (4th Cir. 2007), cert. denied, 552 U.S. 950; *Williams v. Vidmar*, 367 F. Supp. 2d 1265 (N.D. Ca. 2005).

³⁴ *Gibson v. Lee County School Board*, 1 F. Supp. 2d 1426 (M.D. Fla. 1998).

In sum, there is a critical difference between teaching religion and teaching about religion. While it is constitutionally permissible for public schools to teach about religion, it is unconstitutional for public schools and their employees to observe religious holidays, promote religious belief, or practice religion. School officials and parents must be extremely careful not to cross the line between "the laudable educational goal of promoting a student's knowledge of and appreciation for this nation's cultural and religious diversity, and the impermissible endorsement of religion forbidden by the Establishment Clause."³⁵

May schools teach the Bible as literature? The Bible may be studied as literature, but not as religious doctrine. The lesson must be secular, religiously neutral and objective.³⁶ Classes on the Bible as literature should be optional.³⁷ The Anti-Defamation League strongly suggests that such classes be taught by school personnel who have some training in Establishment Clause issues.

May schools teach secular values which coincide with religious values? Schools may indeed and should teach secular values such as honesty, respect for others, courage, kindness and good citizenship. These values, however, must not be taught as religious tenets. The fact that most religions also teach these values does not change the lawfulness and desirability of teaching them. It is also appropriate for school officials to instill in students such values as "independent thought, tolerance of diverse views, self-respect, maturity, self-reliance and logical decision-making."³⁸

What are some concerns that arise regarding "teaching about religion" in public schools?

Although it is legal to teach about religion in public schools in a neutral and secular manner, school administrators, teachers and parents should be cognizant of the inherent dangers of bringing religion into the classroom.³⁹ Public school teachers should carefully consider the following factors:

- **Students are extremely susceptible to peer and public pressure and coercion.** This concern is heightened, of course, at the elementary school level. Any discussion of religion in the classroom should be sensitive to the beliefs of the different students in the class. No student should be made to feel that his or her personal beliefs or practices are being questioned, infringed upon or compromised. A student should never feel ostracized on the basis of his or her religious beliefs.

³⁵ *Clever v. Cherry Hill Township Bd. of Educ.*, 838 F. Supp. 929, 932 (D.N.J. 1993); see also *Busch v. Marple Newtown School District*, 567 F.3d 89 (3rd Cir. 2009), cert. denied, 130 S. Ct. 1137 (2010).

³⁶ *Schempp*, 374 U. S. 203; *Hall v. Board of School Commissioners of Conecuh County*, 656 F.2d 999 ; *Gibson*, 1 F. Supp. 1426; *Herdahl v. Pontotoc County School District*, 933 F. Supp 582, 588 .

³⁷ *Crockett v. Sorenson*, 568 F. Supp. 1422 (W.D. Va. 1983).

³⁸ *Smith v. Board of School Comm'rs of Mobile County*, 827 F.2d 684 (11th Cir. 1987).

³⁹ The difficulty of monitoring what actually occurs inside the classroom puts concerned administrators and parents at a disadvantage. The only way for administrators to become aware of problems and constitutional violations without personally monitoring classes would be through student or parent complaints, which may not always be forth-coming.

- ***If religion is discussed, great care must be taken to discuss minority as well as majority religions.*** The inclusion of only the major religions in a classroom discussion does not reflect the actual religious diversity within our society and the world. cursory discussions will subtly denigrate the validity of minority religious beliefs held by some individuals, regardless of whether adherents to minority beliefs are represented in the class. If they are present, these students may feel excluded or coerced.
- ***Students should not be put on the spot to explain their religious (or cultural) traditions.*** The student may feel uncomfortable and may not have enough information to be accurate. Moreover, by asking a student to be spokesperson for his or her religion, the teacher is sending a signal that the religion is too "exotic" for the teacher to understand. Finally, in certain cases, the teacher may be opening the door for proselytizing activity by the student, which must be avoided.
- ***Every effort should be made to obtain accurate information about different religions.*** Special training may be required to prepare teachers to discuss religion in an appropriate manner.
- ***Discussion of religion in the classroom may alienate those students who are being raised with no religious faith.*** While there is an obligation for even these students to learn what is being taught as part of a secular educational program, it is very important that teachers avoid discussions that seem to endorse religious belief over non-religious belief. Otherwise, such students may feel pressure to conform to the majority, or be made to feel inferior about their own upbringing.
- ***Discussion of religion in the classroom may alienate those who are being raised with orthodox religious faiths.*** It is equally important that teachers not appear to disapprove of faith, thereby alienating those who are raised with faith.

If students object on religious grounds to portions of a textbook, may they be excused from studying the material? No. Public schools can require that all students use a prescribed set of textbooks if the books neither promote nor oppose any religious practice. The students must only be required to read and discuss the material and may not be required to perform or refrain from performing any act forbidden or mandated by their religion. Mere exposure to ideas that one finds objectionable on religious grounds does not rise to the level of a free exercise claim that compelled activity would.⁴⁰

Aren't these rules just promoting a "secular religion"? The state may not establish a "religion of secularism" in the sense that the state may not affirmatively oppose or show hostility to religion, thereby preferring those who believe in no religion over those who do believe.⁴¹ That being said, the prohibition on teaching religion and religious activity ensures that the government

⁴⁰ *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), cert. denied, 555 U.S. 815; *Mozert v. Hawkins County Public Schools*, 827 F.2d 1058 (6th Cir. 1987), cert. denied, 484 U.S. 1066 (1988); *Grove v. Mead School Dist. No. 354*, 753 F.2d 1528 (9th Cir.), cert. denied, 474 U.S. 826 (1985); *Williams v. Bd. of Educ.*, 388 F. Supp. 93 (D. C. W. Va.), aff'd, 530 F.2d 972 (4th Cir. 1975).

⁴¹ *Schempp*, 374 U.S. 203. See also *Zorach v. Clauson*, 343 U.S. 306 (1952).

does not advance or promote religious belief over non-religious belief or a particular religious belief over other religious beliefs.⁴² Simply, the public schools should work to ensure that they do not endorse or disapprove religion, neither promoting nor denigrating it.

What happens when a student responds to a secular assignment with religious expression?

This is as much a free speech issue as it is a religious liberty issue. Where a student responds to an assignment (for example, a book report) with a religiously-themed project (for example, reporting on a religious tract), a school may not refuse to accept the assignment solely because it has a religious basis (students have a right to free expression).⁴³ However, if in observing the presentation of the assignment -- especially expressive assignments like artwork, plays and reports that are presented publicly -- an observer might think that the project is endorsed by the school, it is a problem.⁴⁴ Thus, a book report delivered to a teacher may not be rejected merely because it is religious, whereas a work of art that will be hung up or displayed by the school or a play intended for public performance is unacceptable. Indeed, educators are able to exercise considerable control over "student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school."⁴⁵

SAMPLE SCENARIOS & SITUATIONS

Sixth-grader Asks Teacher about Religious Beliefs of Historical Groups

Mr. Clark's sixth grade class used a standard reader which had stories on a wide variety of topics. One passage in the reader involved the first settlers in the "new world," and another described Leonardo da Vinci as the human with a creative mind that "came closest to the divine touch." Talia Berk, a student in Mr. Clark's class, was interested in the passage about the first settlers and asked how the religious beliefs and practices of these settlers compared with those of the Native American Indians.

How should Mr. Clark answer Talia's question on the settlers?

After researching the question, the teacher may explain the answer to Talia in a secular, objective and nondoctrinal manner, or recommend a book on the subject which is secular, unbiased and nondoctrinal.

⁴² See *Johnson v. Poway Unified School District*, 658 F.3d 954 ; *Busch v. Marple Newtown School District*, 567 F.3d 89.

⁴³ See *Curry v. School Dist. of the City of Saginaw*, 452 F. Supp. 2d 723 (E.D. Mich. 2006), *aff'd*, *Curry v. Hensiner*, 513 F.3d 570 (6th Cir. 2008), cert denied, 555 U.S. 1069.

⁴⁴ *Id.*

⁴⁵ *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). See *Downs v. Los Angeles Unified School Dist.*, 228 F.3d 1003, (9th Cir 2000), cert. denied, 121 S. Ct. 1653 (2001); *C. H. ex rel. Z. H. v. Oliva*, 195 F.3d 167 (3rd Cir 1999), rehearing en banc granted, opinion vacated on other grounds by *C. H. v. Oliva*, 226 F.3d 198 (3rd Cir. 2000).

Parent of Sixth-grader Objects to Reading Assignment on Religious Grounds

Joe Smith, also a student in Mr. Clark's class, showed the reader referenced in the prior scenario to his mother, who became very upset with the passage on Leonardo da Vinci, since she viewed it as contrary to her religious beliefs. Joe's mother asked Mr. Clark to excuse Joe from using the reader. Mr. Clark, unsure of how to respond to Mrs. Smith's request, went to the principal to seek guidance.

Should Joe be exempted from using the standard reader?

The school should not excuse Joe from using the standard reader. However, the school must ensure that the standard reader neither promotes nor opposes religion, and that Joe is merely required to read and discuss the material and is not required to perform or refrain from performing any act forbidden or mandated by his religion.

Jewish Student Asked to Explain Hanukkah to Class

Mr. Parker, who is not Jewish, is afraid that he will mischaracterize Hanukkah when he is explaining about holidays. In class, he calls on a Jewish student to see if she would be willing to explain to the class the meaning of Hanukkah. She tries to do so. Later that day, the student tells her mother about the incident, who objects to Mr. Parker. Mr. Parker proposes that the mother come to class and explain Hanukkah. She agrees and comes to school and performs a holiday-foods cooking demonstration.

Should Mr. Parker have asked the student to explain Hanukkah? Should he have asked her mother?

By asking the student, Mr. Parker singled her out from her peers and made Hanukkah seem too exotic for him to explain. It is also unlikely that many students would have the requisite knowledge to give an accurate answer. By asking the mother, Mr. Parker rightly shifted the burden off of the student to an adult. However, he must make sure that the presentation given by the mother is neutral, objective and fits in with a broader lesson plan concerning the holidays. Better still, Mr. Parker could avail himself of one of the many books about Hanukkah and prepare himself to teach the lesson.

RELIGION IN THE PUBLIC SCHOOLS

RELIGIOUS DOCTRINE IN THE SCIENCE CLASSROOM

Religious explanations for humankind, the diversity of life on earth, or the universe, including Creationism, Creation Science, or Intelligent Design may not be taught as science under any circumstances. Evolution - the only scientific explanation for the history of life on earth - must only be taught as scientific fact.

SPECIFIC ISSUES & QUESTIONS

What is Science? According to the National Academy of Sciences (NAS), science is limited to explanations “that can only be inferred from confirmable data — the results obtained through observations and experiments that can be substantiated by other scientists.” This process is called the scientific method. Explanations that cannot be based on empirical evidence resulting from observation and experiment are not a part of science.

What is Evolution? Evolution, also called “descent with modification,” is the only scientific explanation for the history of life on earth. It states that over time, human beings and other species have evolved through processes including natural selection. This scientific theory provides understanding of the immense “complexity, diversity and activity” of life on earth. The term “scientific theory” does not mean the same thing to scientists as it does to the layman. According to the NAS, it refers not to a “guess’ or ‘hunch’,” but rather to “explanations of natural phenomena” based on “testable observations and hypotheses.” And scientific fact can mean a theory that “has been tested or observed so many times that there is no longer a compelling reason to keep testing or looking for examples.” In this sense, evolution is a fact. It has overwhelming support from the scientific community and is based on compelling evidence from “the fossil record, genetic information, the distribution of plants and animals, and similarities across species of anatomy and development.” As a result, “[s]cientists no longer question whether descent with modification occurred because the evidence supporting the idea is so strong.”

What are Creationism, Creation Science and Intelligent Design? Creationism is a religious belief that God or a divine being created the universe or humankind. Typically, creationists subscribe to the account of creation presented in the Bible’s Book of Genesis. Creation science attempts to prove that God created the world by refuting evolution and offering interpretations of scientific data to “prove” the creation account in Genesis.

The idea known as Intelligent Design is not specifically based on the Bible's account of creation, though it also is a religious or supernatural explanation for life on earth. Intelligent Design states that – due to the very complexity and organization of life and the failure of science to explain it all completely – the intervention of an intelligent designer was a critical component of life on earth. For many of its adherents, the intelligent designer is God or a supreme being. In 2005, a court specifically determined that Intelligent Design is a form of Creationism, and other courts have found that Intelligent Design is religious in nature.⁴⁶

According to the NAS, Intelligent Design is not science because it cannot be tested by the scientific method. Intelligent Design does “not offer hypotheses that are subject to change in light of new data, new interpretations, or demonstrations of error.” Rather, the concept makes observable data inferior to doctrine. Intelligent Design reverses the scientific process by setting forth an assumed conclusion — an intelligent designer is responsible for the universe — and only seeking evidence in support of this conclusion. In contrast, a scientific theory “always remains subject to the possibility of rejection or modification in light of new knowledge.”

May a public school science teacher's right to teach Evolution be restricted? No. The United States Supreme Court has determined that it is unconstitutional to restrict an educator's right to teach Evolution.⁴⁷

May a science teacher who teaches Evolution also teach Creationism or Intelligent Design? No. Educators may not teach, as fact, religious explanations for humankind or the history of life on earth. In science classes, educators must present only scientific explanations for life on earth and scientific critiques of Evolution. Furthermore, schools may not refuse to teach Evolution in an effort to avoid offending religious individuals. The United States Supreme Court has held that it is unconstitutional to require educators who teach Evolution also to teach Creationism.⁴⁸ Furthermore, a U.S. District court has held that it is unconstitutional to teach Intelligent Design as science.⁴⁹

In addition, disclaimers regarding the theory of Evolution as the only explanation for the development of humankind have been found to be unconstitutional. In *Freiler v. Tangipahoa Parish Board of Education*, 185 F. 3d 337 (5th Cir 1999), cert. denied, 530 U. S. 1251 (2000), the court struck down a school board rule requiring teachers to read a disclaimer that said that the teaching of Evolution is “not intended to influence or dissuade the Biblical version of Creation or any other concept.”

⁴⁶ *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005); See *Ass'n of Christian Sch. Int'l v. Stearns*, 679 F. Supp. 2d 1083 (C.D. Cal. 2008), aff'd 362 Fed. Appx. 640 (9th Cir. 2010), cert. denied, 131 S. Ct. 456 (2010).

⁴⁷ *Epperson v. Arkansas*, 393 U.S. 97 (1968).

⁴⁸ *Aguillard v. Edwards*, 765 F.2d 1251 (5th Cir.), aff'd, 482 U.S. 578 (1987).

⁴⁹ *Kitzmiller*, 400 F. Supp. 2d 707.

May Creationism or Intelligent Design ever be discussed in the public schools?

Yes. Human understanding is not limited to science. Throughout our history we have also advanced our understanding of ourselves and the world around us by developing religion, philosophy and myth. These subjects have traditionally struggled with questions that raise matters beyond human perception and intelligence. Creationism and Intelligent design fit squarely within this category of study; they seek to explain the mysteries of life that transcend human comprehension. Because Creationism and Intelligent Design have religious and spiritual implications, they are ideas that should be seriously discussed and considered in houses of worship, private religious schools, and in the home. In the proper context, they also warrant discussion in the public schools. But context is crucial so as not to undermine the foundations of a solid science education or to promote religious doctrine inappropriately in public schools. Thus, Creationism or Intelligent design may well be proper subjects of public school study in comparative religion, philosophy and anthropology classes, which address humankind's various attempts to explain the origins of life and the universe.

Do scientific integrity and equity require that we teach a competing theory of human origins? Some have argued that equity, intellectual honesty and scientific integrity require the teaching of Creationism, Creation Science or Intelligent Design as differing and alternative point of views. However, these concepts may not be taught as a response to the theory of Evolution. Indeed, Creationism (or "creation science") or Intelligent Design do not meet the tenets of science as scientists use the term.⁵⁰ Moreover, it is not a matter of equity to teach a religious point of view in a public school classroom with taxpayer dollars.

SAMPLE SCENARIOS & SITUATIONS

Parent Asks Biology Teacher to Stop Teaching Evolution or Include Creationism

Mrs. Anderson teaches a seventh grade biology class which includes a section on Darwinism and Evolution. Jenny Hunter is a student in Mrs. Anderson's class. Jenny's mother was helping Jenny with her homework one night when she realized that Jenny was studying Evolution, which goes against the family's belief in divine creation. Jenny's mother asked Mrs. Anderson to either stop teaching Evolution or to also include a section on Creationism, Creation Science or Intelligent Design in her biology class.

How should Mrs. Anderson respond?

Mrs. Anderson should continue to teach Evolution and should not teach any religious explanation for humankind. While Jenny should be expected to learn and understand the theory of Evolution, she should not feel compelled to agree with the theory. Mrs. Anderson should make sure Jenny is not ridiculed because she believes in divine creation.

⁵⁰ *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707; *McLean v. Arkansas Board of Education*, 529 F. Supp. 1255 (E.D. Ark. 1982) (cited favorably in *Aguillard v. Edwards*, 482 U.S. 578).

Parent Group Petitioners School Board for Evolution Disclaimer in 10th Grade Biology Textbook

At Belmer Public High School the theory of Evolution is taught in 10th grade biology class. The textbook used for the class devotes a chapter to Evolution. Prior to the new school year, a group of parents whose children will be going into 10th grade and taking biology in the coming year petition the school board to insert a disclaimer into the biology textbook stating: "Evolution is a theory, not a fact, regarding the origins of humankind and the history of life on Earth. This material should be approached with an open mind, carefully reviewed, and critically considered in light of other theories such as Intelligent Design."

What Should the School Board Do?

The school board should deny the parents' petition. As Intelligent Design is religious in nature and has found to be a form of Creationism, the proposed disclaimer would be constitutionally impermissible.

RELIGION IN THE PUBLIC SCHOOLS

TEACHING ABOUT RELIGIOUS HOLIDAYS – “THE DECEMBER DILEMMA”

Teachers must be careful not to cross the line between teaching about religious holidays (which is permitted) and celebrating religious holidays (which is not). Celebrating religious holidays in the form of religious worship or other practices is unconstitutional. Teaching about a holiday will be constitutional if it furthers a genuine secular program of education, is presented objectively, and does not have the effect of advancing or inhibiting religion.⁵¹ The U. S. Supreme Court has not specifically ruled on this subject.

SPECIFIC ISSUES & QUESTIONS

May religious symbols be used as teaching aids in the classroom? Yes. Religious symbols such as crosses, creches and menorahs may be used as teaching aids in the classroom provided that the symbols are displayed as examples of the cultural and religious heritage of the holiday, and are temporary in nature. However, teachers or schools cannot be required, including by parents, guardians, or third-parties, to use religious symbols in teaching about religious holidays.⁵²

May religious symbols be used as decorations? No. Religious symbols are not permissible seasonal or permanent decorations.⁵³

What about symbols that have become secular? The Supreme Court has held that a Christmas tree has become such a secular symbol of the winter holiday season that its display by a public entity does not violate the Establishment Clause.⁵⁴ The Supreme Court has also found that a Hanukkah menorah is a symbol with both secular and religious meanings, and its display by a public entity other than a school within a predominantly secular holiday display does not offend the Establishment Clause.⁵⁵ The Supreme Court has not addressed whether such a display is permissible in the public school context, but it has noted that a school's display of a Christmas tree

⁵¹ See *Florey v. Sioux Falls School Dist.* 49-5, 619 F.2d 1311 (8th Cir.), cert. denied, 449 U.S. 987 (1980).

⁵² See *Skoros v. City of New York*, 437 F.3d 1 (2d Cir. 2006), cert. denied, 549 U.S. 1205 (2007).

⁵³ See *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 629 (1989) (footnote No. 69, noting the special establishment clause sensitivities present in the public school context); *Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679 (6th Cir. 1994), cert. denied 115 S.Ct. 1822 (1995).

⁵⁴ *County of Allegheny*, 492 U.S. at 616; see *Skoros*, 437 F.3d 1.

⁵⁵ *County of Allegheny* at 613-14, 618.

and menorah could raise additional constitutional concerns.⁵⁶ However, lower courts have not invalidated such displays and it is likely that they are permissible.

Setting aside the legal questions for a moment, teachers and school administrators should be extremely cautious in using these symbols as decorations. The classroom and school premises are the place where children spend the majority of their day. It is important that all students feel comfortable and accepted in their school. Symbols of religious holidays may make some students uncomfortable and unwelcome because their holidays and traditions are not represented or because they do not celebrate religious holidays at all.

May religious music, art, literature and drama be used in teaching about holidays?

Yes. Music, art, literature, and drama with religious themes may be included in teaching about holidays, provided that their overall effect is not to endorse religion and that they are presented in a religiously neutral, prudent and objective manner, and relate to sound, secular educational goals. Indeed, the study of religiously inspired material can, in the correct setting, be made a part of a secular educational program.⁵⁷

May school assemblies or special events include religious music or drama?

Yes. Religious music or drama may be included in school events that are part of a secular program of education. However, there is no requirement that religious music or drama be included at school events.⁵⁸ The content of school special events, assemblies, concerts and programs must be primarily secular, objective and educational, and may not focus on any one religion or religious observance and may not appear to endorse religion over non-religion or one religion over another.⁵⁹ Such events must not promote or denigrate any particular religion, serve as a religious celebration, or become a forum for religious devotion. Student participation should be voluntary. Thus, a school's choral group can sing songs that are religious in nature but may only do so if the song is part of a larger program of music which is secular.

May schools incorporate religious themes in a holiday assembly or winter concert?

The study of religious holidays may also include "more than mere classroom instruction."⁶⁰ For instance, public performances or presentations of music, literature and art are permissible, as long as they are "presented objectively as part of a secular program of education."⁶¹ A permissible purpose for such a program may be advancing students' knowledge of society's cultural and

⁵⁶ Id. at 629 (footnote No. 69).

⁵⁷ *Illinois ex rel. McCollum v. Board of Education of School Dist. No. 71, Champaign County*, 333 U.S. 203 (1948) (Jackson, J., concurring). See also *Florey, v. Sioux Falls School Dist.* 49-5, 619 F.2d 1311.

⁵⁸ See *Stratechuk v. Board of Education, South Orange Maplewood School District*, 587 F.3d 597 (3d Cir. 2009), cert. denied, 131 S. Ct. 72 (2010).

⁵⁹ *School Dist. of Abington Township, Pa. v. Schempp*, 374 U. S. 203 ; *Sease v. School Dist. of Philadelphia*, 811 F. Supp. 183 (E.D. Pa. 1993); see also *Golden v. Rossford Exempted Village School District*, 445 F. Supp. 2d 820 (N.D. Oh. 2006).

⁶⁰ *Florey*, 619 F.2d 1311.

⁶¹ *Schempp*, 374 U.S. 203.

religious heritage.⁶²

Religious music, literature, art or other religious activities should never dominate school activities. These activities are permissible only if they make up a small portion of a school-sponsored event.⁶³ For instance, it may be permissible to have students act out a play which contains one scene where a family is shown opening presents on Christmas morning. However, school-sponsorship of a play about the birth of Jesus would be impermissible because such performances are inherently affirmations of a certain religious point of view.

School-sponsored activities should also focus on more than one religion and religious holiday. Depicting a diversity of beliefs and customs is important to teaching public school students about religion and culture. It also helps to ensure that public schools remain neutral and do not endorse, promote or denigrate any particular denomination or custom.

It is also important to provide students the opportunity to choose not to participate in activities they find offensive to their religious sensibilities. Importantly, a student's grades or school record must not be affected by a decision not to participate.

May students be excused from classes that teach about religious holidays if they have objections based on religious beliefs? Yes. If the religious beliefs of students or their parents conflict with the content of classroom activity, students may be excused.^{64 65} However, in excusing a student, care should be taken to avoid stigmatizing or appearing to punish the student (for example, a student who is not permitted to take part in a holiday party should not be required to sit in the hall and do math problems).

Should schools close for major religious holidays? Public schools should not close or reschedule activities solely because of conflicts between the school calendar and religious holidays. However, schools may consider closing when large numbers of student and teacher absences are anticipated.⁶⁶ Schools should still take great care in creating their schedules. To avoid penalizing students for religious observance, school calendars should be prepared, to the greatest extent feasible, so as not to conflict with religious holidays of all faiths. A sincere attempt should be made to avoid scheduling graduation, assemblies, and other special school and student events on religious holidays. If conflicts occur, teachers and administrators should exercise

⁶² *Florey v. Sioux Falls School Dist.* 49-5, 619 F.2d 1311.

⁶³ See *Doe v. Wilson County School System*, 564 F.Supp.2d 766 (M.D. Tenn. 2008).

⁶⁴ *Id.*

⁶⁵ In certain states, there are state constitutional provisions or statutes that provide public school students with stronger religious accommodation protections than the First Amendment of the U.S. Constitution. To properly address requests for religious accommodations by parents or students during the December holidays, school administrators should be familiar with the specifics of their state requirements.

⁶⁶ See *Koenick v. Felton*, 190 F.3d 259 (4th Cir 1999), cert. denied, 528 U.S. 1118 (2000); *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995).

sensitivity and flexibility in resolving them.⁶⁷

What are the responsibilities of the school toward a student who has taken an excused absence for a religious holiday? A student should not suffer adverse or prejudicial consequences from an excused absence for religious observance and should be allowed a reasonable opportunity to make up the schoolwork missed due to the absence. Penalties to scholastic records may not be imposed upon students who are absent for religious holidays.⁶⁸ Students should never feel pressured to choose between school attendance and religious observance.⁶⁹

SAMPLE SCENARIOS & SITUATIONS

Muslim's Parents Complain About a December Holiday Lesson Limited to Christmas and Hanukkah

Ms. Thomas, a fourth grade teacher, taught a holiday lesson in December which included a brief historical review of Christmas, a discussion of art memorializing the birth of Jesus Christ, and a study of Christmas carols in the designated music period. Ms. Thomas also told the class about Hanukkah, the Maccabee warriors and the menorah oil that lasted eight days, and passed around a dreidel to help the class understand the Jewish holiday. The parents of James Mitchell, a Muslim student in her class, complained to the principal that Ms. Thomas only included Christianity and Judaism in her holiday lesson, and ignored their child's faith completely.

Was the holiday lesson appropriate? What should the principal do to remedy the concerns of James Mitchell's parents?

The holiday lesson plan was appropriate according to legal standards. However, the Muslim religion's holidays, as well as holidays of other religious minorities, should be included in the holiday lesson plan to reflect the true diversity of religions in our culture.

Sixth-grader Seeks to Be Excused from Performing in December Concert That Includes Secular and Religious Songs

An elementary school choir is performing a holiday concert in December which includes secular seasonal songs such as "Jingle Bells" and religious songs such as "Silent Night." Deborah Perry, a sixth grade member of the school choir, asks to be excused from singing at the concert since participation would violate her religious beliefs. Deborah's parents complain to school officials that the holiday concert is unconstitutional because it features religious songs.

⁶⁷ Notably, because in some religions (including Judaism), holidays fall on different days each year, ADL annually publishes a calendar that lists the holidays of numerous religions. Your ADL Regional Office would be pleased to provide you with information about obtaining a copy.

⁶⁸ *Church of God v. Amarillo Independent School Dist.*, 511 F. Supp. 613 (N.D. Tex. 1981), aff'd, 670 F.2d 46 (5th Cir. 1982); see footnote 14.

⁶⁹ Id; see footnote 14.

How should school officials resolve this situation?

The school concert may constitutionally include some religious songs provided that the concert features mostly secular songs, and that the concert as a whole is primarily educational, secular, objective and nondenominational. However, Deborah Perry's participation should be voluntary, and therefore she should be excused from participation in the concert. Deborah's grade or school record should not be affected by her decision not to participate.

RELIGION IN THE PUBLIC SCHOOLS

RELIGIOUS DISPLAYS ON SCHOOL PROPERTY

School-sponsored displays of religious symbols, texts or artwork on school property are impermissible unless a display is integrated into an appropriate secular curriculum.^{70 71} The fact that a display is donated by a private group or paid for by private funds will not affect whether it is permissible under the Establishment Clause.⁷²

SPECIFIC ISSUES & QUESTIONS

May a school permanently display the Ten Commandments within classrooms or on school property? No. A temporary display of the Ten Commandments integrated into a secular curriculum such as history or comparative religion may be permissible.⁷³ However, the Ten Commandments are "undeniably" a religious text, and the Supreme Court and a number of lower courts evaluating permanent displays of the Ten Commandments have found that such displays have a predominantly religious purpose and violate the Establishment Clause.⁷⁴

⁷⁰ See *Stone v. Graham*, 449 U. S. 39, 42 (1980); *ACLU of Kentucky v. McCreary County*, 354 F. 3d 438 (6th Cir. 2003); rehearing denied, 361 F.3d 928 (2004); *Washegesic v. Bloomingdale Public Schools*, 33 F. 3d 679 ; *Joki v. Board of Education of Schuylerville Central School Dist.*, 745 F. Supp. 823 (N. D. N. Y. 1990).

⁷¹ See *Bannon v. School District of Palm Beach*, 387 F.3d 1208 (11th Cir. 2004), cert denied, 546 U.S. 811 (2005) (Court found that murals painted in school hallway by student volunteers during non-curricular time were school sponsored, and it upheld the school's removal of religious messages painted by certain students from the murals); *Demmon v. Loudon County Public Schools*, 342 F.Supp. 2d 474 (E.D. Va. 2004) (Court found that a "walkway of fame" on high school grounds containing bricks bearing secular and religious symbols purchased by students, parents, and family members as part of parent fundraising program was not school sponsored, and it held that the school's removal bricks bearing Latin Crosses was improper); *Phillips v. Oxford Separate Municipal School District*, 314 F.Supp. 2d 643 (N.D. Miss. 2003) (Court found that middle-school student council candidates' posters were school-sponsored, and it upheld the school's removal of a candidate poster bearing religious messages).

⁷² See *Stone*, 449 U. S. at 42; *Baker v. Adams County*, 86 Fed. Appx. 104, 2004 U.S. App. LEXIS 481 (6th Cir. 2004), cert denied, 545 U.S. 1152 (2005).

⁷³ See *Stone* at 42; *McCreary County*, 354 F. 3d 438.

⁷⁴ See *Stone* at 41-42; *Adams County*, 86 Fed. Appx. 104, 2004 U.S. App. LEXIS 481; *McCreary*, 354 F. 3d 438.

May a school permanently display religious artwork within classrooms or on school property? No. Similar to displays of the Ten Commandments, a temporary display of religious artwork integrated into a secular curriculum may be permissible. However, courts also have found that permanent displays of religious artwork have a predominantly religious purpose and violate the Establishment Clause.⁷⁵

SAMPLE SCENARIOS & SITUATIONS

Principal Displays Religious Painting in High School Hallway

Rob Franklin, a graduating high school senior who is heading off to art school, donates a painting to his high school depicting the Last Supper of Jesus and his apostles. Impressed by the quality of the work, Principal Bard hangs the painting in a hallway of the school. A year later, Ms. Greene, the parent of a ninth-grader, sees the painting when she visits the school for parent-teacher night. She later tells Principal Bard that the display of the painting is inappropriate and asks that it be taken down.

Is the display of the painting permissible? Should Principal Bard take it down?

Principal Bard should take down the painting because its display violates the Establishment Clause. The display is not temporary and integrated into a secular curriculum. Rather, it is a permanent display representing a central event to the Christian faith, and therefore advances and endorses religion. The fact that Rob donated the painting to the school does not diminish this endorsement.

⁷⁵ See *Washegesic v. Bloomingdale Public Schools*, 33 F. 3d 679; *Joki v. Board of Education of Schuylerville Central School District*, 745 F. Supp. 823.

RELIGION IN THE PUBLIC SCHOOLS

RELEASE TIME PROGRAMS

Release time in the public schools refers to programs in which students are released from school early to attend religious classes off school premises. Participating students must have permission from their parents. Nonparticipating students remain in school. Such programs may be constitutional if the religious classes take place off school grounds, if no public school funds are expended, and if school officials or teachers do not promote program attendance through coercion or other means.⁷⁶

SPECIFIC ISSUES & QUESTIONS

Are public schools required to enact released time programs? No. While a school may choose to enact a released time program, it is never required to do so.

Who bears the expense of released time programs? The religious organization that sponsors the program is responsible for all expenses.⁷⁷ The public school may not bear any of the program expenses, including, but are not limited to, solicitation, applications, distribution of notices, and permission slips.

May a religious organization use school facilities for a released time program?

A released time program may only take place off school premises.⁷⁸ A religious organization may not rent or otherwise use public school facilities to conduct a release time program.⁷⁹ ⁸⁰ The location and timing of the religious classes, combined with the impressionable ages of the students, could create the erroneous impression of official school support for the program.

May a school grant credit for or accept

grades from an otherwise constitutional release time program? One U.S. Court of Appeals – the Fourth Circuit – upheld a school district policy accepting up to two elective credits and grades

⁷⁶ *Zorach v. Clauson*, 343 U.S. 306 ; *Pierce v. Sullivan West Central Sch. Dist.*, 379 F.3d 56 (2d. Cir. 2004).

⁷⁷ See *Zorach*, 343 U.S. 306; *Pierce*, 379 F.3d 56.

⁷⁸ *Zorach*, 343 U.S. 306; *Illinois ex. rel. McCollum*, 333 U.S. 203 .

⁷⁹ See *Zorach*, 343 U.S. 306; *McCollum*, 333 U.S. 203.

⁸⁰ In *H.S. v. Huntington Cty. Community Sch. Corp.*, 616 F. Supp. 2d 863 (N.D. Ind. 2009), the court issued a preliminary injunction prohibiting a school district from allowing a religious organization to park a mobile classroom trailer owned by the organization and bearing no outside religious iconography on school property for the purpose of conducting a release time program.

for religion classes taken by students in an otherwise constitutional release time program.⁸¹ In that case, the unaccredited release time program had its classes and grades evaluated by an accredited private school.⁸² The transfer of the credits and grades were handled in a manner similar to a student transferring from an accredited private school to public school.⁸³ The court found that through this procedure the school district did not become entangled with religion because it accepted the coursework and grades “without individually assessing the quality or subject matter of the course, trusting the private school accreditation process to ensure adequate academic standards.”⁸⁴

ADL believes that a public school accepting credits or grades from an otherwise constitutional release time program raises significant issues of entanglement with and endorsement of religion. Until the U.S. Supreme Court definitively rules on this issue, ADL recommends that schools outside the Fourth Circuit refrain from implementing similar policies.

What problems can arise when released time programs are instituted? A released time program must be structured to avoid any perception of public school promotion or endorsement of religious instruction. If any element of the program gives the impression of public school support for religion -- or if any actual support is given -- then the program will likely be struck down by the courts as a violation of the Establishment Clause.⁸⁵

Further, students who choose not to participate in the program may feel isolated or ostracized. These programs can be divisive and may be unfair to children who adhere to religions which are too small to set up their own religious instruction classes or which do not participate in such programs. Also, released time programs disrupt classroom activities and detract from the time children need to master their school work. School officials should be sensitive to these problems and structure the released time program to avoid them. Alternatively, officials may simply choose not to implement released time programs at all.

⁸¹ *Moss v. Spartanburg County School District Seven*, 2012 U.S. App. LEXIS 13248 (4th Cir. June 29, 2012).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ In *Perry v. School Dist. No. 81*, 54 Wash.2d 886, 344 P.2d 1036 (1959), the court held that it is unconstitutional for a school to announce a release time program on school bulletin boards and to distribute cards on which students could express interest in participating in the program. However, in *Moss v. Spartanburg Cty. Sch. Dist. No. 7*, 775 F. Supp. 2d 858 (D. SC 2011), *aff'd*, 2012 U.S. App. LEXIS 13248 (4th Cir. June 28, 2012), the court found no constitutional violation where a school allowed a religious organization to make classroom presentations to students about its release time program and allowed the organization access to the names and addresses of incoming students. According to the court, this conduct did not rise to the level of a “... systemic and intricate relationship formed between a public school and religion found unconstitutional in ...” the U.S. Supreme Court’s *Illinois ex. rel. McCollum* decision. In light of the fact that this decision is limited to the Fourth Circuit and the U.S. Supreme Court has yet to address similar issues, ADL takes the position that such conduct is constitutionally problematic. ADL further recommends that a school district seek legal counsel prior to engaging in such activities.

SAMPLE SCENARIOS & SITUATIONS

Elementary School Parent Objects to Released Time Program as Unconstitutional

An elementary school has instituted a "released time" religious education program. On Thursday afternoons, students are released from regular classes to attend religious classes conducted off school premises. Only students who have written requests from their parents may attend the religious classes, and nonparticipating students remain in their classroom for a silent reading period. Rebecca Segall is a nonparticipating student in the third grade. Rebecca's father objects to the released time program because he believes that the school is unconstitutionally supporting religious education, since public school teachers police the program's attendance and regular classroom activities come to a halt for the program. When school officials hear that Mr. Segall is planning on legally challenging the program, they call a meeting to discuss the issue.

What conclusion should the school officials reach regarding Mr. Segall's claim?

This released time program would likely be found constitutional since it takes place off school grounds, involves no expenditure of public funds, and is not promoted by school officials. The fact that regular class activities are suspended during the program, and that school personnel monitor possible truancy, is not sufficient to make the program unconstitutional. However, it is disruptive to the ordinary educational activity of the school, and on that basis alone, the school district should feel free not to continue the program.

RELIGION IN THE PUBLIC SCHOOLS

STUDENT-INITIATED RELIGIOUS CLUBS

The Equal Access Act ("EAA") (20 U. S. C. §§ 4071-74) requires public secondary schools which meet certain criteria to treat all student-initiated groups equally, regardless of the religious, political, philosophical or other orientation of the groups. This means that to the extent that a school board opens up its school facilities to *any* student-led and run non-curriculum related group, it must uniformly open its facilities to all student-led and run groups, including religious ones. The EAA was adopted by Congress in 1984, and its constitutionality was upheld by the U. S. Supreme Court in *Board of Education of Westside Community Schools v. Mergens*, 496 U. S. 226 (1990).⁸⁶

SPECIFIC ISSUES & QUESTIONS

Does the EAA apply to all schools? No. The EAA only applies to schools that meet a three-part test. The school must:

- Be a public secondary school;
- Receive federal financial assistance; and
- Have designated certain facilities as a "limited open forum."

What is a "Secondary School" in the context of the EAA? The EAA does not define "secondary school." Rather, a secondary school is usually defined by state statute or regulation, and it typically means grades 9 - 12.

What is a "limited open forum" in the context of the EAA? A "limited open forum" is created when a public secondary school allows one or more "non-curriculum related student groups to meet on school premises during non-instructional time." 20 USCA § 4071(b). Local school boards decide whether to create and maintain limited open forums.

What is a "non-curriculum related student group?" "Non-curriculum related student group," as used in Equal Access Act, refers to those student groups whose activities are not directly related to the body of courses offered by the public school (e. g., the chess club). Student groups that are

⁸⁶ This section is limited to a discussion of student-initiated religious clubs. For information about after-school religious clubs run by outside religious organizations see the section entitled, "Use of School Facilities by Outside Religious Organizations and Clubs."

directly related to the subject matter of courses offered by the school (e. g., the Spanish club) do not fall within the non-curriculum-related category and thus would be considered curriculum-related.^{87 88}

What restrictions does EAA place on non-curriculum related student groups?

- The group must be student-initiated.
- The group must be student-sponsored and student-led.
- Participation in the group must be voluntary.

What are the rights of non-curriculum related student groups under the EAA?

The EAA grants these groups equal access to school facilities for meetings, and equal access to school media (e. g. school publications, school bulletin boards and public address systems) for publicizing their activities.⁸⁹ They may choose their own leaders, restricting certain leadership roles to people of their own faith.⁹⁰ However, general membership probably cannot be limited, including limitations based on religion.⁹¹

What is "non-instructional time?" "Non-instructional time" is time during the school day which a school sets aside before classroom instruction begins or after classroom instruction ends. Non-instructional time also encompasses an activity period or lunch period during which instruction does not occur and during which other groups are allowed to meet.⁹²

What are the rights retained by school authorities under the EAA? School officials have the right to monitor club meetings to ensure compliance with provisions of the EAA. School authorities can "maintain order and discipline on school premises" and may prohibit club meetings which "materially and substantially interfere with the orderly conduct of educational activities within the school." School officials have the duty of protecting the "well-being of students and faculty." School officials should require religious clubs to follow the same rules as all other student clubs, including adherence to any nondiscrimination policy.⁹³

⁸⁷ See *Board of Educ. of Westside Community Schools v. Mergens*, 496 U. S. 226 (1990).

⁸⁸ Many state constitutions have establishment clause provisions that are more restrictive than the First Amendment. In some such instances, state law bars all religious meetings on public school grounds and thus comes into direct conflict with the EAA. One appellate court found that, when these conflicts arise, the EAA preempts (overrules) the state law. *Garnett v. Renton*, 987 F. 2d 641 (9th Cir.), cert. denied, 510 U. S. 819 (1993).

⁸⁹ See *Straights and Gays for Equality v. Osseo Area Schools*, 540 F.3d 911 (8th Cir. 2008); *Krestan v. Deer Valley Unified Sch. Dist. No. 97*, 561 F. Supp. 2d. 1078 (D. Ariz. 2008); *Bowler v. Town of Hudson*, 514 F. Supp. 2d 168 (D. Mass. 2007); *ALIVE v. Farmington Public Schools*, 2007 U.S. Dist. LEXIS 65326 (E.D. Mich. 2007).

⁹⁰ *Hsu v. Roslyn Union Free School. Dist.*, 85 F. 3d 839 (2nd Cir.), cert. denied, 519 U. S. 1040 (1996).

⁹¹ In *Truth v. Kent Sch. Dist.*, the court found that uniform application of a non-discrimination policy, which covered religion, to all non-curriculum-related clubs, including religious clubs, did not violate the EAA or the First Amendment. 542 F.3d 634 (9th Cir. 2008), *rehearing en banc denied*, 551 F.3d 850, *cert denied*, 129 S. Ct. 2866 (2009).

⁹² *Donovan v. Punxsutawney Area School Board*, 336 F. 3d 211 (3rd Cir. 2003); *Ceniceros v. Board of Trustees*, 106 F. 3d 878 (9th Cir. 1997).

⁹³ See *Truth*, 542 F.3d 634.

School authorities may establish time, place and manner regulations applicable to club meetings, provided that the restrictions are uniform and nondiscriminatory.⁹⁴ School officials have the right to close the limited open forum at any time by prohibiting all non-curriculum related clubs from meeting on school premises, thus ending the school's obligations under the EAA.⁹⁵ School officials also have the right to uniformly eliminate non-curriculum club access to particular resources or facilities such as school publications, school bulletin boards or public address systems.

What are the restrictions and obligations placed upon the school, its agents and employees by the EAA? School personnel, including teachers, may not initiate, sponsor, promote, lead or participate in religious club meetings. However, school personnel may be required to monitor club meetings. 20 USCA §4071.

May outsiders attend meetings? Outsiders, such as clergy members, may not initiate club meetings. Outsiders "may not direct, conduct, control or regularly attend activities of student groups."⁹⁶ Outsiders may occasionally attend club meetings if invited by the students and if the school does not generally prohibit such guests. However, school officials may totally forbid non-school persons from attending all student club meetings.⁹⁷

What are some concerns that arise when a club meets pursuant to the EAA?

The meeting of religious clubs in school facilities pursuant to their rights under the EAA may create an appearance of school endorsement of religion in violation of the Establishment Clause. School officials must protect against such impressions and may do so by issuing disclaimers clearly stating that the school is not sponsoring, endorsing or promoting any non-curriculum related student groups.

Schools must also recognize and guard against the threat of coercive peer pressure, which may be substantial. Student club members may be able to coerce students into joining sectarian groups and adhering to the club's beliefs, particularly if the student body is composed largely of the same religious faith as that practiced by club members. Such clubs might create "insider" and "outsider" student groups, and, as a result, students may be ridiculed, harassed or ostracized.

⁹⁴ See *Krestan v. Deer Valley Unified Sch. Dist.*, 561 F. Supp. 2d 1078, (Uniform application to all non-curriculum-related clubs of leaflet distribution to "17-day club rush and election periods" did not violate First Amendment rights of religious club.

⁹⁵ *Hsu v. Roslyn Union Free Sch. Dist.*, 85 F. 3d 839; *Pope v. East Brunswick Bd. of Educ.*, 12 F. 3d 1244 (3rd Cir 1993).

⁹⁶ 20 U. S. C. A. § 4071(c); *Hsu*, 85 F. 3d 839 (footnote 16); *Student Coalition for Peace v. Lower Merion School Dist.* 776 F. 2d 431 (3rd Cir 1985).

⁹⁷ *Student Coalition for Peace*, 776 F. 2d 431.

SAMPLE SCENARIOS & SITUATIONS

High School Principal Rejects Student Application for Bible Club, but Permits Other Non-Curriculum Related Clubs

Three students at Hawthorne High School decide to form a Bible study club. To organize and structure their club, they enlist the help of their local minister. A school science teacher agrees to become the club advisor. The principal has allowed a wide variety of clubs to meet during the school lunch hour, including the chess club, the audiovisual squad, and the Spanish club, but is concerned about the controversy that this club could create. The students claim that the Equal Access Act protects their right to form this club. When he rejects the club proposal, the principal states that all other school clubs are related to the curriculum and hence the Equal Access Act does not apply.

Is the principal correct?

The school has created a limited open forum by allowing other non-curriculum related clubs such as the chess club to meet, and therefore it must allow the Bible study club to meet. However, the roles of the minister and science teacher in the club have to be carefully controlled pursuant to the dictates of the EAA.

High School Principal Limits Bible Club's Access to School Facilities

Hawthorne High School allows all non-curriculum clubs to make morning announcements and show promotional videos over the school's P.A. and video feed system. Although pursuant to the EAA the principal recognizes the Bible study club and allows it to meet during non-curriculum time, he prohibits the club from making morning announcements or showing promotional videos, none of which contain prayers or are proselytizing.

Can the principal place such limits on the Bible Study Club?

No – Non-curriculum-club access or limitations to use of school resources and facilities must be uniform. However, if the Bible study club's announcements or videos, included prayers or proselytizing messages, it is likely that the principal could prohibit such announcements or videos to avoid an Establishment Clause violation.

People in Community Object to Controversial Non-Curriculum Related Club

A high school allows non-curriculum related student-organized, student-led clubs to meet before and after the school day. A very controversial club has been proposed by a student, and many in the community are opposed to this club's meeting.

**What are the school's options?**

Under any circumstance, a school may prohibit clubs and organizations that are contrary to the educational mission of the school or present a danger to the health and safety of a school. This is a very high standard: a school district may not bar a student club merely because the school or the community disagrees with its message, even if they disagree strongly. Should the District so elect, it can ban all such non-curriculum related clubs (such as service clubs), including this one.

RELIGION IN THE PUBLIC SCHOOLS

USE OF SCHOOL FACILITIES BY OUTSIDE RELIGIOUS ORGANIZATIONS

During school hours, outside religious organizations and clubs must not meet at public schools. After school hours, such groups may meet at a public school only if the school permits other outside clubs and organizations to meet at the same time, under the same terms and conditions, and does not endorse the club or organization's religious activity.^{98 99}

SPECIFIC ISSUES & QUESTIONS

May religious clubs meet in public schools?

During school hours: An outside religious organization or club must not meet at public schools.

After school hours: An outside religious organization or club may meet at a public school under the following circumstances:

- The group may meet only if the school allows other outside organizations or clubs to meet at the same time.
- The school must assume the duty of ensuring that it does not appear to be endorsing or disapproving of religion.

⁹⁸ See *Good News Club v. Milford Central School District*, 533 U.S. 98 (2001) (where school district permitted non-religious clubs to use elementary school facilities after school hour hours, it was required to accord the same access to an outside religious club provided there was no perceived endorsement of the club's religious activity); *Child Evangelism Fellowship of South Carolina v. Anderson School District Five*, 470 F.3d 1062 (4th Cir. 2006) (school district was required to provide use of facilities at no cost to all similarly situated community groups); *Doe v. Wilson County School System*, 564 F. Supp. 2d 766 (religious group meeting at school during instructional time constituted an unconstitutional endorsement of religion); *Gracepointe Church v. Jenkins*, 2006 U.S. Dist. LEXIS 38018 (D.S.C. 2006) (school district was required to allow congregation that otherwise met access criteria to use facilities for worship services).

⁹⁹ But see *Bronx Household of Faith v. Board of Education of the City of New York*, 650 F.3d 30 (2nd Cir. 2011), *cert. denied*, 132 S. Ct. 816 (2011). There, the court held that a school board did not violate the First Amendment by prohibiting a congregation using school facilities from engaging in religious worship services. However, as of this writing, this prohibition is again being challenged as violating the First Amendment and a district court granted a preliminary injunction against its enforcement. *Bronx Household of Faith v. Bd. of Educ.*, 2012 U.S. Dist. LEXIS 91015 (S.D.N.Y. June 29, 2012).

- The school district must proactively work to prevent even the perception that it may be endorsing the club's religious activity. In *Good News Club v. Milford Central School*, 533 U. S. 98 (2001), the U. S. Supreme Court found no perceived endorsement of a religious club's activities because the club meetings were not held in elementary school classrooms, the instructors were not school teachers, the students ranged in age, and the children who attended the club had obtained signed permission slips from their parents.
- The school may not allow the club or organization to solicit students, unless it allows all groups to do so. If the school allows such solicitation, it must make sure that no proselytizing or religious message is part of the communication.
- A school district must take extra care to make sure that students from minority religions are not teased or made to feel unwelcome or left out merely because they choose not to attend a religious club meeting.

May a teacher serve as an instructor in a religious club that meets at the school where the teacher works? In *Wigg v. Sioux Falls School District*,¹⁰⁰ the U. S. Court of Appeals for the Eighth Circuit found that an elementary school teacher could participate in a religious club meeting where she teaches. However, the decision is inconsistent with the U. S. Supreme Court's decision in *Good News Club v. Milford Central School*. In *Good News*, the Supreme Court's found that no perceived endorsement of religion occurred by allowing a religious club on campus in part because "... instructors [were] not school teachers."¹⁰¹ However, *Wigg* omitted discussion of this finding. Therefore, until the U. S. Supreme Court definitively answers this question, ADL strongly recommends that teachers not participate in religious clubs meeting in schools where they work.

SAMPLE SCENARIOS & SITUATIONS

Outside Religious Club Seeks to Lease Elementary School Space on Days When Other Outside Clubs Are Not Permitted to Lease Space

An elementary school has a policy of not letting any outside organizations rent space on campus during the week. However, the school does rent space to a soccer league to practice on Saturdays and to a homeowners group on Sundays. A local religious group has applied for permission to meet on campus on Wednesday afternoons.

Does the school have to allow the group to meet?

No. The school district does not allow other groups to meet at that time, so it is not required to allow this club to meet. However, the school district may have to allow the religious club to meet on the weekends, because that is when it allows the other clubs to meet.

Outside Religious Club Seeks to Meet at High School That Permits

¹⁰⁰ 382 F.3d 807 (8th Cir. 2004), reh'g en banc denied, 2004 U.S. App. LEXIS 20976.

¹⁰¹ *Good News Club v. Milford Central School District*, 533 U.S. at 118.

Non-Curriculum Related Student Clubs to Meet Before and After School

A high school allows student-organized, student-led non-curriculum related clubs to meet before and after the school day, but does not allow other groups to use the school. A local religious organization wants to meet on campus after school. While students will attend the club, the club will be run by a local religious leader.

Must the school allow this club to meet?

No. Since the school does not allow outside groups, it is not required to allow this one. However, since it allows student-organized, student-led non-curriculum related clubs to meet, it would have to allow a student-organized, student-led religious group to meet.

Outside Religious Club Seeks to Meet at Elementary School at the Same Time Other Outside Clubs Meet

Several groups currently use an elementary school campus immediately after the school day, including a computer club, a karate class, and a Cub Scouts chapter. A religious group wants to begin meeting on campus every Tuesday at the same time.

Does the school have to allow the religious club to meet?

Yes. So long as the district has opened its doors to outside organizations (such as the Cub Scouts), the school must allow the religious club in its facilities. However, the school must proactively ensure that it does not endorse or disapprove of the activity. The school district should take extra care to make certain that students from minority religions are not teased or made to feel unwelcome or left out merely because they do not attend the meetings.

Leader of Outside Religious Club Seeks to Solicit Students to Club Meetings at a School Assembly and Through Permission Slips

A religious club wants to meet in an elementary school. The club's leader, a minister, would like to make a brief announcement at an assembly concerning the club and would like the school to include a permission slip in its regular "Tuesday Folder," a weekly communication with parents.

What should the school do?

The minister may make the announcement only if (a) other after-school organizations' leaders are permitted to do so, (b) her message contains no religious or proselytizing themes and (c) the school takes steps to ensure that it is not endorsing the minister's message. To ensure that the school is not endorsing the minister's message, it may wish to make an explicit statement to that effect and it may wish to have the minister speak only when other groups are making their announcements. The school can also require permission slips from parents. However, if the school distributes or collects permission slips, it must be careful not to involve itself in, or endorse the religious activities of, the club.

Permissible Limitations on Notice Posting Policy for After-School Non-Curriculum Related Clubs

A school allows the posting of notices inviting students to attend after-school meetings of non-curriculum related organizations and clubs.

What limits may the school place on the posting of such notices?

The school can require that a staff-person review and approve all notices before they are posted, and the school may limit the time, place and manner for distribution of the notices. For example, the school may require that notices be posted only within a particular display case or on a specific wall, and require that each notice bear a stamp indicating it has been approved for posting. To ensure that it is not endorsing the religious message of the poster, schools may use a disclaimer on the notice or at the location where all notices are posted. School teachers should not be directly, personally involved in the distribution of fliers. However, pursuant to a school policy, teachers can distribute fliers through a flier or backpack forum. Outsiders may never distribute such invitations on school property during school hours.¹⁰²

¹⁰² For more information about distribution of materials by outside religious groups, see the section entitled, "Distribution of Religious Material and Proselytizing by Non-school Personnel."

RELIGION IN THE PUBLIC SCHOOLS

DISTRIBUTION OF RELIGIOUS MATERIALS BY STUDENTS

The First Amendment's free speech clause provides students with a right to free expression in public schools, including a limited right to distribute religious and non-religious materials within public schools.¹⁰³ The specific limitations depend on whether the materials are distributed within or outside school-sponsored activities. Additionally, the age of the students affects these rights: high-school students have greater freedom of expression compared to elementary school students.¹⁰⁴

Outside of school-sponsored activities, a school can prohibit distribution of materials that materially or substantially disrupts the school or invades the rights of others.¹⁰⁵ Within school-sponsored activities, a school can restrict distribution provided the limitation is reasonably related to a legitimate educational concern.¹⁰⁶

Furthermore, in order to avoid violating the Establishment Clause, it is essential that the school neither sponsor nor appear to sponsor the distribution of religious materials by students.¹⁰⁷

SPECIFIC ISSUES & QUESTIONS

What concerns arise when students distribute religious material prepared by a student or outside organizations? The distribution by students of religious material, under a school's auspices and with its apparent sanction, creates the serious danger of school and state advancement of specific religious practices or beliefs, or at a minimum the impression of such endorsement, which may violate the Establishment Clause.

¹⁰³ *Tinker, v. Des Moines Indep. Community School District*, 393 U.S. 503

¹⁰⁴ *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011); *Walker-Serrano v. Leonard*, 325 F.3d 412 (3rd Cir. 2003); *Walz v. Egg Harbor Township Board of Education*, 342 F.3d 271 (3rd Cir. 2003), cert denied, 541 U.S. 936 (2004); see also *K.A. ex rel. Ayers v. Pocono Mountain School Dist.*, 710 F.3d 99 (3d Cir. 2013).

¹⁰⁵ *Tinker*, 393 U.S. 503.

¹⁰⁶ *Hazelwood School District, et. al. v. Kuhlmeier*, 484 U.S. 260 .

¹⁰⁷ See *Good News Club v. Milford Central School District*, 533 U.S. 98 ; *Morgan*, 659 F.3d 359.

Students of minority religions, or those who do not practice a religion, may face considerable pressure from students distributing the religious material to accept it, and may be harassed, intimidated, or ostracized if they decline. Such distribution may interfere with the rights and well-being of other students, as well as disrupt the educational process and the fundamental mission of the school to create a learning environment that is hospitable to all students.

How may a school limit a student's distribution of religious materials prepared by the student or outside organizations?

On-Campus Distribution Outside of Curricular or School-Sponsored Activities:

School officials can prohibit student speech, including distribution of materials prepared by the student or outside groups, where they can reasonably forecast that such speech will materially or substantially disrupt the school or school activities, or invade the rights of other students.¹⁰⁸ However, a prohibition on student distribution of materials simply to avoid the discomfort or unpleasantness of an unpopular view is not permissible.¹⁰⁹

This standard, however, is not uniformly applied to elementary through high-school students. The rights of elementary school students are more limited because they are more susceptible to coercion and peer pressure, whereas older students are more emotionally and intellectually capable of coping with potentially offensive speech.¹¹⁰ One U.S. Court of Appeals has found that “when officials have a legitimate educational reason – whether grounded on the need to preserve order, to facilitate learning, or social development, or to protect the interests of other students – they may ordinarily regulate public elementary school children’s speech.”¹¹¹

Schools may also adopt certain policies regulating student distribution of materials. However, regarding distributions outside of curricular or school-sponsored activities, the policies should be neutral to the viewpoints expressed in the materials.¹¹²

A school may require a review of materials before they are distributed and can prohibit distribution if the materials are, for example, threatening, obscene, lewd, promote drug use, or would materially or substantially disrupt the school.¹¹³ School officials can require that materials carry a disclaimer reflecting the school’s neutrality on their content or views expressed.¹¹⁴ Indeed, a disclaimer requirement can be an effective tool to ensure that a school fulfills its constitutional duty not to endorse or sponsor a student’s religious speech.

¹⁰⁸ *Tinker v. DesMoines Indep. Community School District*, 393 U.S. 503.

¹⁰⁹ *Id.*

¹¹⁰ *Morgan v. Swanson*, 659 F.3d 359; *Walker-Serrano v. Leonard*, 325 F.3d 412.

¹¹¹ *Walker-Serrano*, 325 F.3d 412.

¹¹² *M.A.L. v. Stephen Kinsland*, 543 F.3d 841 (6th Cir. 2008), rehearing en banc denied, 2009 U.S. App. LEXIS 24176.

¹¹³ See *Morse v. Frederick*, 551 U.S. 393 (2007); *Bethel School District v. Fraser*, 478 U.S. 675 (1986); *Tinker*, 393 U.S. 503; *M.A.L.*, 543 F.3d 841; *Pounds v. Katy Indep. School Dist.*, 517 F. Supp. 2d 901 (S.D. Tex 2007).

¹¹⁴ See *Muller v. Jefferson Light-House School*, 98 F.3d 1530 (7th Cir. 1996).

A school also may place reasonable time, place and manner restrictions on student distribution of materials.¹¹⁵ However, at least one court has held that an across-the-board ban of student-to-student distribution of materials on school grounds is not permissible.¹¹⁶

Distribution within Curricular or School-Sponsored Activities

In addition to the rules concerning on-campus distribution of materials outside of curricular or school-sponsored activities, school officials have further authority to prohibit or restrict student speech, including student distribution of materials, within curricular or school-sponsored activities. The general rule is that a school may prohibit a distribution as long as the action is reasonably related to a pedagogical or educational concern.¹¹⁷ High-school students have greater freedom of expression rights in school-sponsored activities than elementary school students.¹¹⁸

School-sponsored activities are not limited to the traditional classroom setting.¹¹⁹ Rather, they can be any school activity that is supervised by faculty members and designed to impart knowledge or skills to students, or bear the imprimatur of the school.¹²⁰ A recent U.S. Court of Appeals decision outlined a number of factors to determine whether speech occurs at a school-sponsored activity, including:

- Where and when does the speech occur;
- Are students at the activity a captive audience;
- Is the activity organized by the school, conducted pursuant to official guidelines, or supervised by school officials, and
- Is the activity designed to impart some skills or knowledge to students.¹²¹

Within school-sponsored activities, school officials may prohibit student distribution of materials based on their viewpoint or content.¹²² For instance, U.S. Courts of Appeals have allowed schools to prohibit student distribution of materials based on their religious content.¹²³ In one decision, the Court found that the school had a legitimate educational purpose in avoiding elementary school children being subjected to an unsolicited religious promotional message that might conflict with what they are taught at home.¹²⁴

¹¹⁵ See *M.A.L. v. Stephen Kinsland*, 543 F.3d 841; *Pounds v. Katy Indep. School Dist.*, 517 F. Supp. 2d 901; *Leal v. Everett Public Schools*, 2015 U.S. Dist. LEXIS 153319 (W.D. WA Feb. 19, 2015).

¹¹⁶ *J.S. v. Holly Area Schools*, 749 F. Supp. 2d 614 (E.D. Mich. 2010); see also *K.A. ex rel. Ayers*, 710 F.3d 99.

¹¹⁷ *Hazelwood School District, et. al. v. Kuhlmeier*, 484 U.S. 260.

¹¹⁸ See *Walz v. Egg Harbor Township Board of Education*, 342 F.3d 271.

¹¹⁹ *Hazelwood*, 484 U.S. 260.

¹²⁰ See *Hazelwood*, 484 U.S. 260; *Morgan v. Swanson*, 659 F.3d 359.

¹²¹ *Morgan*, 659 F.3d 359.

¹²² See *Morgan*, 659 F.3d 359; *Curry v. Hensiner*, 513 F.3d 570, ; *Walz*, 342 F.3d 271.

¹²³ See *Curry*, 513 F.3d 570; *Walz*, 342 F.3d 271.

¹²⁴ *Curry*, 513 F.3d 570.

SAMPLE SCENARIOS & SITUATIONS

Fifth-grader Distributes Religious Pamphlet to Peers at Lunchtime

Charles Hamilton, a fifth grade student at Benjamin Franklin Elementary School, brought 35 copies of a pamphlet entitled "Good Fun" to school. The pamphlet, prepared by an evangelical organization, contained crossword puzzles, word searches and comic strips. The theme running through "Good Fun" was the power of religion and the evils of secularism. Charles gave out his copies of "Good Fun" during lunch to the students who were waiting in the cafeteria line. Jonathan Freeman, a fourth grade student, accepted the pamphlet and played through the puzzles that evening. When Jonathan's mother realized that the pamphlet was religious material of a proselytizing nature, she called the principal of Benjamin Franklin Elementary School seeking an explanation. The principal had no knowledge that Charles had distributed "Good Fun" and agreed with Mrs. Freeman that the matter had to be looked into and resolved.

How should the principal resolve this matter?

Does Charles have the right to distribute "Good Fun" in school?

The school is required to allow Charles to distribute "Good Fun" subject to certain time, place, and manner restrictions designed to prevent disruption to the educational process and to prevent disruption of the rights and well-being of fellow students. Such content-neutral regulations typically provide that materials may only be distributed during certain times of the day, and from designated locales.

Second-grader Asks to Distribute Candy with an Attached Religious Message at a Curricular Holiday Program

As part of the elementary school curriculum, second-graders at Draper Elementary School participate in a two-day exercise called Draper Market where students create and produce a good which they sell for fake money in a market setting. Cindy Jones wants to sell candy cane ornaments with an attached card containing a religious message. Cindy's teacher Mrs. Lutz will allow Cindy to sell the ornaments, but without the attached card. Cindy tells her parents who complain to the school principal that Cindy's freedom of speech is being violated.

Does Cindy have the right to distribute the ornament with the card containing the religious message?

Most likely not – Draper Market is part of the school curriculum. Therefore, the school can restrict distribution of student materials based on the material's content or viewpoint where there is a valid educational purpose. Under similar circumstances, a U.S. Court of Appeals found that a religious message could offend other students and their parents, and therefore the school's desire to avoid having a curricular event offend students or parents, and to avoid subjecting young children to an

unsolicited religious message contrary to what they might learn at home is a valid educational purpose to prohibit distribution of a religious message.

RELIGION IN THE PUBLIC SCHOOLS

DISTRIBUTION OF RELIGIOUS MATERIALS & PROSELYTIZING BY OUTSIDE GROUPS AND INDIVIDUALS

Individuals, including parents, and groups who have no formal relationship to a school (Third Parties) may distribute religious materials, including Bibles, to students outside of school premises. They may also discuss religious matters with students.

Third-party materials or publications of a religious viewpoint may be distributed on-campus to the same extent distribution of third-party secular materials is permitted. However, courts have applied different rules to distribution of uniquely religious documents such as the Bible. A school can prohibit on-campus, distribution of third-party religious materials by implementing a universal prohibition of on-campus distribution of third-party materials.

Proselytizing or religious indoctrination on-campus by third parties except in the context of Equal Access Act clubs is not permitted. However, there is limited case law suggesting that clergy may come on-campus to discuss secular matters with students to the same extent other third-parties are permitted on campus to discuss secular matters with students.

SPECIFIC ISSUES & QUESTIONS

Off school premises may third parties distribute religious materials to students or speak with students about religion? Yes, third parties may distribute religious materials, including Bibles, to students outside school grounds, as well as speak with students about religious matters.¹²⁵ For example, such distribution or discussion is permissible on a public sidewalk or park - areas traditionally open to the public for expressive activity. However, in their roles as teachers or administrators, school personnel cannot direct students to accept religious materials from or engage in discussion of religious matters with third parties. Furthermore, local officials

¹²⁵ See *Bacon v. Bradley-Bourbonnais High School Dist. No. 307*, 707 F. Supp. 1005 (C. D. Ill. 1989).

may implement reasonable content-neutral time, place and manner regulations on such distributions. For instance, regulations may prohibit the distribution of materials that disturbs the work of the school or interferes with the well-being of students.

What are some concerns that arise when third parties distribute religious material to students in close proximity to the school grounds?

- Students might not realize that the school itself is not endorsing a religious message. School officials should take affirmative steps to make certain that students understand this.
- Students who reject religious material in front of other students may confront peer pressure, coercion or ostracism.
- It is possible that a religious group, in its zeal, may harass students and force material and views upon the students.

Under what circumstances may third-party religious materials be distributed in school?

Courts have essentially adopted a rule of equal access for distribution of third-party materials or publications in public schools.¹²⁶ Where a school has a policy or practice allowing a broad array of secular groups to have their materials distributed in schools, the school is required to allow distribution of materials from a religious perspective on the same subject matters, and on the same terms and conditions.¹²⁷ However, a school can issue reasonable and viewpoint neutral rules and restrictions on access to the school and materials to be distributed.¹²⁸ A school has the right to discontinue such a policy or practice, and thereby prohibit any on-campus distribution to students of third-party materials whether religious or secular.¹²⁹

Under this rule of equal access, if a school, for instance, allows non-profit community groups to have their materials distributed, it would be required to allow a similar religious group to have its materials distributed as well. However, it would not be required to allow a for-profit religious group to distribute religious materials. Furthermore, for example, permissible materials could be limited to brochures or promotional fliers providing a short, general description about an outside group, and the date, location and times of events. In this instance, a religious or secular group could not provide a long or proselytizing description about an event.¹³⁰

¹²⁶ See *Victory Through Jesus Sports Ministry v. Lee Summit R-7 School District*, 640 F.3d 329 (8th Cir. 2011), cert denied, 132 S. Ct. 592; *Child Evangelism Fellowship of New Jersey v. Stafford Township School District*, 386 F.3d 514 (3d Cir. 2004); *Child Evangelism Fellowship of Maryland v. Montgomery County Public Schools*, 373 F.3d 589 (4th Cir. 2004); *Hills v. Scottsdale Unified District*, 329 F.3d 1044 (9th Cir. 2003), cert denied, 540 U.S. 1149.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See *Perry Education Association v. Perry Education Local Educators Association, et. al.*, 460 U.S. 37 (1983); *Make the Road by Walking, Inc. v. Turner*, 378 F.3d 133, (2d Cir. 2004); *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001); *Marlin v. District of Columbia Board of Elections and Ethics*, 236 F.3d 716 (D.C. Cir. 2001), cert denied, 532 U.S. 1039; *Diloreto v. Downey Unified School District Board of Education*, 196 F.3d 958 (9th Cir. 1999).

¹³⁰ See *Hills*, 329 F.3d 1044.

May Bibles from third-parties be distributed in public schools? Courts have uniformly decided that Bibles from third parties cannot be distributed in public elementary schools.¹³¹ And the vast majority of courts have decided that Bibles cannot be distributed in public middle or high schools, as well.¹³² One decision from the U.S. Court of Appeals for the Fourth Circuit allowed for “passive” distribution of Bibles from a third party.¹³³ However, under the relevant policy, teachers or other school personnel could have no active or passive involvement with the distribution, including having no custody over the Bibles. Additionally, the policy placed numerous other restrictions on the distribution.¹³⁴

During school hours may clergy or other third-parties visit public schools to proselytize or otherwise religiously indoctrinate students? Schools are not required to allow any third parties on campus during school hours to meet or have discussions with students on any subject.¹³⁵ Other than for the purposes of Equal Access Act Clubs (see Chapter 9), if third parties are allowed on campus during school hours, they should not proselytize or otherwise religiously indoctrinate students.¹³⁶ However, there are limited cases indicating that clergy are permitted on campus during school hours to meet or have discussions with students on secular subjects, provided that clergy do not wear clerical garb and that non-clergy or secular professionals are permitted to meet with students on the same terms and conditions.¹³⁷

SAMPLE SCENARIOS & SITUATIONS

Outside Group Situated on Public Sidewalk Adjacent to School Gives Religious Material to Passing Students

On the public sidewalk outside a public elementary school, a group of religious advocates handed out chocolate chip cookies and pamphlets on religious observance to passing students. A half

¹³¹ See *Roark v. South Iron R-1 School District*, 573 F.3d 556 (8th Cir. 2009); *Peck v. Upshur Board of Education*, 155 F.3d 274 (4th Cir. 1998); *Berger v. Rensselaer Central School Corporation*, 982 F.2d 1160 (7th Cir. 1993), amended by, rehearing en banc, denied by, 1993 U.S. App. LEXIS 2543, cert denied, 508 U.S. 911; *Roe v. Tangipahoa Parish School Board*, 2008 U.S. Dist. LEXIS 32793 (E.D. LA 2008); *Jabr v. Rapides Parish School Board*, 171 F. Supp. 2d 653 (W.D. LA 2001).

¹³² See *Roark*, 573 F.3d 556; *Berger*, 982 F.2d 1160; *Roe*, 2008 U.S. Dist. LEXIS 32793; *Jabr*, 171 F. Supp. 2d 653

¹³³ See *Peck*, 155 F.3d 274.

¹³⁴ The additional restrictions, include: (1) distribution occurs at tables set up in hallways or libraries where students congregate and do not feel they are being watched or pressured to take a Bible; (2) the tables must be set up by the third party distributing the Bibles and excess Bibles must be removed by the third party from the school by the end of the day; (3) no person is allowed to stand by the table to encourage or pressure students to take a Bible; (4) a sign must be placed at the table stating “please feel free to take one,” but the source of the Bibles cannot not be identified; (5) a required disclaimer of endorsement by the school at the table; (6) the availability of the Bibles cannot be announced at the school or discussed in classrooms; and (7) there can be no student assembly in connection with the availability of the Bibles. See *Peck*, 155 F.3d 274.

¹³⁵ See Footnote No. 128.

¹³⁶ See *Doe v. Beaumont Independent School District*, 240 F.3d 462 (5th Cir. 2001); see also *School Dist. of Abington Township, Pa. v. Schempp*, 374 U.S. 203 .

¹³⁷ See *Doe*, 240 F.3d 462; *Oxford v. Beaumont Independent School District*, 224 F. Supp. 2d 1099 (E.D. Tex. 2002).

block away, the community Little League passed out booklets describing the League's activities. Between the two groups, the local firemen's committee distributed handouts containing fire safety tips. Some students accepted all or some of the handouts, others accepted none. Naturally, many students were interested only in the chocolate chip cookies. Michael Johnson accepted the handouts of all three groups and brought them home. When Mrs. Johnson saw that Michael had been given religious material at school, she called the school to complain. The principal told Mrs. Johnson that since the religious group distributed its material off school property, did not force its pamphlets upon the students, and was one of the many groups allowed to distribute its material that afternoon, there was nothing that he could do about it. The principal recommended that Mrs. Johnson instruct her son not to accept any religious material.

Mrs. Johnson was not pleased with the principal's response. What can she do?

Since the distribution of religious material took place on the sidewalk in front of the school and not in the school, the principal cannot ban the distribution. However, local officials may enact time, place and manner regulations to ensure that the distribution does not interfere with school activities or student welfare. School officials should also inform the students that the school is not connected to the religious group and neither supports nor opposes the distribution of religious material. Furthermore, both Mrs. Johnson and school officials should advise Michael that he does not have to accept the religious material.

Middle School Flier Forum for Summer Activities

A Barnard Middle School policy allows creates a flier forum for non-profit groups that offer summer activities for students ages 11-14 on four occasions during the Spring Semester. The flier can provide a brief description of the group, a short and general description of the activity, as well as the activities times and locations, and contact information for the group.

Under the policy, a group must provide a copy of flier to the principal for review. The principal can reject a flier if it is from a for-profit group, threatening or intimidating, uses lewd, offensive, or obscene images or language, engages in libel or slander, promotes unlawful drug use, or is reasonably likely to cause a material or substantial disruption of the school. If the flier is approved, a group must make sufficient copies for distribution to all students and deliver them to the office of administration. The office of administration provides the fliers to teachers who place a flier in each student's homeroom mailbox at the end of the school day.

Camp Blue Lake, a for-profit organization, submits a flier to the principal for approval, but is denied. The Baker County Library, a non-profit group, and Camp Serenity, a non-profit, religious group, also submit fliers for approval. Both fliers include long descriptions about their summer activities. Furthermore, part of Camp Serenity's long description includes the listing of Bible class as one activity as well as a long proselytizing message.

The principal will allow the Library participate in the forum provided that its activity descriptions are shortened and general. However, he rejects Camp Serenity's flier because it lists Bible class as

an activity and it includes a long proselytizing message. The flier otherwise meets the requirements of the policy.

Camp Blue and Camp Serenity demand that their fliers be accepted. Is the principal required to accept the fliers?

The policy's requirement that groups be non-profit does not differentiate among groups based on secular or religious viewpoints. Therefore, the principal can prohibit Camp Blue's participation because it is a for-profit group. The principal can require that Camp Serenity revise its flier to provide a shorter description of activities, including removal of the long proselytizing message because it is not brief or general. However, the principal cannot bar Camp Serenity from the forum because it is religious in nature or because one of the listed activities is Bible class.

RELIGION IN THE PUBLIC SCHOOLS

DRESS CODES

The First Amendment allows for mandatory uniform policies or dress codes in the public schools. However, it also generally permits exemptions from such policies or codes for students to wear religious clothes, head coverings, symbols or other attire. Under many circumstances policies or codes that prohibit students from wearing religious clothes or other attire are unconstitutional or unlawful.

SPECIFIC ISSUES & QUESTIONS

Under what circumstances are mandatory uniform policies or dress codes permissible under the First Amendment? A student's decision about the clothes he or she wears is a form of expression.¹³⁸ Therefore, a limitation on clothing choices through uniform policies or dress codes must comply with the First Amendment's free speech clause.¹³⁹ What is required by the First Amendment depends on whether a policy or code is neutral to expression, or it differentiates among viewpoints or opinions.

Neutral Policies: Such policies as written and in application are not intended to suppress student expression or viewpoints.¹⁴⁰ To be valid under the First Amendment, neutral policies must meet three criteria. First, they must further an important or substantial government interest, which can include, increasing student achievement and focusing on learning, promoting safety, providing a more orderly school environment, encouraging professional dress, promoting school spirit, improving student self-esteem, or bridging socio-economic differences.¹⁴¹ Second, the school interest in the code or policy must be unrelated to suppression of free expression. And third, any incidental restrictions on student expression must be no more necessary than to further or facilitate the government interest in the policy or code.¹⁴² If other forms of student communications are available, including peer to peer communications, school newspapers, or

¹³⁸ See *Palmer v. Waxahachie Indep. School District*, 579 F.3d 502 (5th Cir. 2009), cert denied, 130 S. Ct. 1055 (U.S. 2010); *Jacobs v. Clark County School District*, 526 F.3d 419 (9th Cir. 2008); *Bar-Navon v. Brevard County School District*, 290 Fed. Appx. 273 (11th Cir. 2008); *Blau v. Fort Thomas Public School District*, 401 F.3d 381 (6th Cir. 2005); *Littlefield, et. al. v. Forney Indep. School District*, 268 F.3d 275 (5th Cir. 2001); *Canady v. Bossier Parish School Board*, 240 F.3d 437 (5th Cir. 2001).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

school organizations, the third requirement is generally met.¹⁴³ Furthermore, policies or codes that allow students' clothes to bear small clothing logos, school logos or messages, or allow students to wear buttons bearing viewpoints do not generally transform them into policies or codes that differentiate among viewpoints or opinions.¹⁴⁴

Policies Differentiating Among Viewpoints or Opinions: Such policies or codes censor or bar certain viewpoints or opinions, including religious viewpoints or expression.¹⁴⁵ They are valid under the following circumstances. First, where a school demonstrates that a particular message or expression causes a material or substantial disruption to the school environment, or school officials can reasonably forecast that the message will cause a material or substantial disruption.¹⁴⁶ Such a forecast cannot be based on mere speculation, but on prior events or history.¹⁴⁷ Second, the message is lewd, vulgar or sexual in nature.¹⁴⁸ Or third, the message promotes illegal drug use.¹⁴⁹

Under What Circumstances Must Exemptions from a Uniform Policy or Dress Code Be Granted for Students to Wear Religious Clothes or Other Attire?

The public schools generally are permitted to accommodate the religious clothing and attire needs of students.¹⁵⁰ Provided that a uniform policy or dress code complies with the First Amendment's free speech clause and it is truly general in nature and neutral to religion, the policy or code may prohibit students from wearing religious clothes or attire so long as there is a nominal justification for the prohibition.¹⁵¹ However, there are a number of significant exceptions to this rule. So under many circumstances schools will be required to exempt students from uniform policies or dress codes for the purpose of wearing religious attire:

¹⁴³ Id.

¹⁴⁴ See *Palmer v. Waxahachie Indep. School District*, 579 F.3d 502; *Jacobs v. Clark County School Dist.*, 526 F.3d 419; *Littlefield et. al. v. Forney Indep. School District*, 268 F.3d 275; see also *Frudden v. Pilling*, 2015 U.S. Dist. LEXIS 16890 (D. Nev., Feb, 10, 2015) (elementary school had compelling state interest for placing school motto on uniform).

¹⁴⁵ See *Nuxoll v. Indian Prairie School District*, 636 F.3d 874 (7th Cir. 2011); *B.W.A. v. Farmington R-& School District*, 554 F.3d 734 (8th Cir. 2009); *Barr v. Lafon*, 538 F.3d 554 (6th Cir. 2008), rehearing, en banc, denied by, 553 F.3d 463 (2009), cert denied, 130 S. Ct. 63 (U.S.); *Sapp v. School Board of Alachua County Florida*, 2011 U.S. LEXIS 124943 (N.D. Fla. 2011); *Nixon v. Northern Local School District Board of Education, et. al.*, 383 F. Supp. 2d 965 (S.D. Ohio 2005).

¹⁴⁶ See *Tinker, v. Des Moines Indep. Community School District*, 393 U.S. 503 ; *Nuxoll*, 636 F.3d 874 (T-shirt bearing the message "My Day of Silence, Straight Alliance" and "Be Happy, Not Gay" did not cause a material or substantial disruption); *B.W.A.*, 554 F.3d 734 ; *Barr*, 538 F.3d 554 ; *Sapp*, 2011 U.S. LEXIS 124943 (T-shirt which stated in part "Islam is the Devil" caused a substantial disruption); *Nixon*, 383 F. Supp. 2d 965 (T-Shirt which said in part "Homosexuality is a sin, Islam is a lie, and Abortion is murder" did not cause a material or substantial disruption).

¹⁴⁷ Id.

¹⁴⁸ See *Bethel School District v. Fraser*, 478 U.S. 675 ; *Nixon*, 383 F. Supp. 2d 965 (T-shirt bearing the message "My Day of Silence, Straight Alliance" and "Be Happy, Not Gay" was not offensive within the meaning of *Fraser*).

¹⁴⁹ See *Morse v. Frederick*, 551 U.S. 393.

¹⁵⁰ See *Employment Div. v. Smith*, 494 U.S. 872, 890; see generally, *Locke v. Davey*, 540 U.S. 712 (2004).

¹⁵¹ See *Smith*, 494 U.S. 872.

State Laws

Approximately twenty states have laws – either by statute or court decision - called Religious Freedom Restoration Acts which require the government, including public schools, to demonstrate a narrow and compelling interest where religious activity or practice is substantially burdened by a law, ordinance, government rule or practice.¹⁵² Demonstrating such an interest is extremely difficult. For the purposes of these laws, it is irrelevant whether or not the law, rule or practice is general in nature or neutral towards religion.

A uniform policy or dress code prohibiting a student from wearing religious clothes or attire will generally constitute a substantial burden on religious practice and will be impermissible under such state laws.

Uniform Polices or Dress Codes Targeting Religion

If a uniform policy or dress code is not neutral to religion and adversely treats religious activity or practice compared to secular activity, the First Amendment’s free exercise clause requires that a school must demonstrate a narrow and compelling interest for the policy or code.¹⁵³ Under such circumstances, it is highly unlikely that the policy or code’s prohibition on a student wearing religious clothes or attire will be constitutional.

There are several common circumstances where a policy or code is not neutral to religion. First, the language of the policy or code specifically targets religion or religious practice for adverse treatment.¹⁵⁴ Second, the policy or code may provide secular accommodations, for instance a medical exemption, but no similar exemption for religious practice.¹⁵⁵ Or third, the policy or code may be designed in way that effectively targets religious, but not secular conduct.¹⁵⁶

Uniform Policies or Dress Codes Raising Constitutional Issues In Addition to Free Exercise of Religion

Students, their parents or guardians sometimes bring other constitutional challenges to uniform polices or dress codes in addition to the free exercise of religion. Under such circumstances where there is another legitimate constitutional claim such as free speech or the right to direct a child’s

¹⁵² The twenty states are Alabama, Alaska, Arizona, Connecticut, Florida, Idaho, Illinois, Indiana, Massachusetts, Minnesota, Missouri, New Mexico, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, Washington, and Wisconsin.

¹⁵³ See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

upbringing some courts will apply more rigorous scrutiny to a policy or code's prohibition on the wearing religious clothes or attire.¹⁵⁷

Some courts have required a demonstration of a narrow and compelling interest.¹⁵⁸ And other courts have required a lesser balancing test evaluating whether the policy or code places an undue burden on religious practice and whether the policy or code bears more than a reasonable relation its stated objective.¹⁵⁹ Under either test, the policy or code will likely be unconstitutional.

The law in this area diverges by jurisdiction.¹⁶⁰ It is therefore highly advisable for school personnel, parents or guardians to consult with an attorney to determine the local standards.

Can schools ban the wearing of religious symbols in an effort to stop gang activity or violence? Most courts evaluating prohibitions on gang activity in public schools that bar the wearing of religious symbols have found them unconstitutional on free speech or vagueness grounds.¹⁶¹ Furthermore, the same exceptions to uniform policy and dress code bans on religious clothing would apply to prohibitions on gang activity that bar religious symbols. So if such a prohibition is issued in a state that has a Religious Freedom Restoration Act or if it is not neutral to religion, the ban would likely be unconstitutional. Additionally, if such a ban is challenged on free exercise of religion and other constitutional groups, it also may be subject to more rigorous scrutiny and be found unconstitutional. So in the aggregate, most bans on gang activity that bar the wearing of religious symbols will be unconstitutional or unlawful.

SAMPLE SCENARIOS & SITUATIONS

Neutral Uniform Policy in State with a Religious Freedom Restoration Act

Zoe attends Farmdale Middle School. Zoe is Muslim and is required by her faith to wear a religious head covering called a Hijab. Over the summer the Farmdale School District adopts a viewpoint neutral mandatory dress code that prohibits the wearing of any hats or head coverings during the school day. Zoe's parents advise the Farmdale Middle School principal that their faith requires Zoe

¹⁵⁷ See *Hicks v. Halifax County Board of Education*, 93 F.Supp. 2d 649 (E.D. N.C. 1999); *Chalifoux v. New Caney Indep. School District*, 976 F.Supp. 659 (S.D. Tex. 1997).

¹⁵⁸ See *Chalifoux v. New Caney Indep. School District*, 976 F. Supp. 659.

¹⁵⁹ See *Hicks*, 93 F.Supp. 2d 649.

¹⁶⁰ See *Jacobs v. Clark County School Dist*, 526 F.3d 419; *Combs v. Homer-Center School District*, 540 F.3d 231 (3rd Cir. 2008), cert denied, 555 U.S. 1138 (2009); *Parker v. Hurley*, 514 F.3d 87 ; *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003), cert denied, 541 U.S. 1096 (2004); *Leebaert v. Harrington*, 332 F.3d 134 (2nd Cir. 2003); *Henderson v. Kennedy*, 253 F.3d 12 (D.C. Cir. 2001), rehearing denied, 265 F.3d 1072, cert denied, 535 U.S. 986 (2002); *Kissinger v. Board of Trustees of the Ohio State University, College of Veterinary Medicine*, 5 F.3d 177 (6th Cir. 1993); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991); *Society of Separationists v. Herman*, 939 F.2d 1207 (5th Cir. 1991), aff'd, rehearing en banc, 946 F.2d 1373, aff'd on rehearing, 959 F.2d 1283 (1992), cert denied, 506 U.S. 866.

¹⁶¹ See *Stephenson v. Davenport Community School District*, 110 F.3d 1303 (8th Cir. 1997), rehearing, en banc, denied by, 1997 U.S. App. LEXIS 13019; *Chalifoux*, 976 F.Supp. 659 .

to wear a Hijab. They ask the principal for an accommodation to allow their daughter to wear the Hijab at school. Zoe lives in a state with a Religious Freedom Restoration Act.

Should the Principal Allow Zoe to Wear the Hijab to School?

The Farmdale School District has adopted a neutral mandatory uniform policy which complies with the First Amendment's free speech clause. Under the First Amendment, the principal could allow Zoe to wear the Hijab, so the question is whether he is required to do. Because Zoe lives in a state with a Religious Freedom Restoration Act, the school would have to demonstrate a narrow and compelling reason for why Zoe cannot wear the Hijab at school. It is highly unlikely that the school will be able to demonstrate such a reason. Therefore, the prohibition will be unlawful under the state Religious Freedom Restoration Act.

Neutral Dress Code that Allows Medical Exemptions

Jeff attends Western High School in Franklin County. Over Winter break, the Franklin County School District adopts a viewpoint neutral mandatory dress code that prohibits the wearing of hats or head coverings during the school day. However, the code allows medical exceptions, including to the head-covering prohibition. The policy also allows students to wear hats for head coverings for school-related activities such as sports and drama. Jeff's faith requires him to wear a Jewish head covering called a Yarmulke. On the first day back from break, Jeff wears his Yarmulke to school. His teacher tells him that under the new code he cannot wear his Yarmulke during the school day, tells Jeff to remove it, and advises Jeff that he could be suspended if he again wears the Yarmulke to school.

Can the School Bar Jeff From Wearing a Yarmulke to School?

Although the dress code is neutral for the purposes of free speech, it is not neutral towards religion for two reasons. First, it allows secular medical exceptions. And second, it allows students to wear hats or head coverings for school-sponsored student activities. Therefore, the school district will have to demonstrate a narrow and compelling interest for prohibiting Jeff from wearing a Yarmulke. It is highly unlikely that the district will be able to make this demonstration, and therefore the prohibition is unconstitutional under the First Amendment's free exercise clause.

T-Shirt Bearing a Religious Message

The Walton School District has a mandatory dress code requiring all students to wear collared blue, green or white shirts with khaki blue or tan pants or skirts. However, messages are permitted on shirts provided they are not disruptive, offensive, or do not promote illegal drug use. Sally, a high school student, wears to school a white collared shirt which states "Moses was the greatest prophet." Her teacher, Mr. Jones, believes that her shirt may offend other students and sends Sally to the school principal to make determination as to whether she can wear the shirt and remain at school for the day. The shirt has caused no disruption and there is no past history at the school of religious-related harassment or other incidents?

Can the Principal Prohibit Sally from Wearing the Shirt?

No. Although the shirt in question bears a religious message, the scenario raises a free speech issue. Under the dress code, Sally can wear a collared white shirt bearing a message. The shirt has caused no disruption, and furthermore there is no basis for school personnel to reasonably forecast a disruption. The shirt is not offensive as it is not lewd, vulgar or sexual in nature. And it does not promote illegal drug use. Therefore, Sally can wear the shirt to school.

Student Wearing Religious Symbol is Suspended for Violating Gang Activity Policy

Robert, a middle school student, is Jewish. His grandfather recently gave him a silver Star of David necklace, which he wears to school. Very few Jewish children attend his school. David's school district has an anti-gang policy which prohibits students from wearing gang-affiliated colors, signs or symbols. The policy does not define the meaning of gang-affiliated. Additionally, the school principle has full discretion to determine what colors, signs and symbols are gang related. The school principle sees David wearing the necklace and tells him that he cannot wear the necklace to school because the Star of David is a symbol used by certain gangs.

Can the Principal Prohibit David from Wearing his Necklace at School?

No. Although the anti-gang prohibition appears to be general and neutral towards religion, it is unconstitutionally vague for two reasons. First, it does not define the term "gang-related" and therefore provides no notice of what is and what is not a gang symbol. Second, the principal has full discretion to determine whether a symbol is gang-related and therefore any such determination is subjective.