

# 16

CHAPTER 16

*Congress shall make  
no law respecting an  
establishment of religion  
or prohibiting the free  
exercise thereof; or  
abridging the freedom  
of speech, or of the press;  
or the right of the people  
peaceably to assemble,  
and to petition the  
Government for a redress  
of grievances.*

## Frequently asked Questions about Religious Liberty in Public Schools

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## FREQUENTLY ASKED QUESTIONS ABOUT RELIGIOUS LIBERTY IN PUBLIC SCHOOLS

### 1. Does the First Amendment apply to public schools?

Yes. The First Amendment applies to all levels of government, including public schools. Although the courts have permitted school officials to limit the rights of students under some circumstances, the courts have also recognized that students — like all citizens — are guaranteed the rights protected by the First Amendment.

Earlier in our history, however, the First Amendment did not apply to the states — and thus not to public schools. When adopted in 1791, the First Amendment applied only to Congress and the federal government (“Congress shall make no law ...”). This meant that when public schools were founded in the mid-19th century, students could not make First Amendment claims against the actions of school officials.

The restrictions on student speech lasted into the 20th century. In 1908, for example, the Wisconsin Supreme Court ruled that school officials could suspend two students for writing a poem ridiculing their teachers that was published in a local newspaper.<sup>1</sup> The Wisconsin court reasoned, “such power is essential to the preservation of order, decency, decorum, and good government in the public schools.” And in 1915, the California Court of Appeals ruled that school officials could suspend a student for criticizing and “slamming” school officials in a student assembly speech.<sup>2</sup>

In fact, despite the passage of the 14th Amendment in 1868, which provides that “no state shall ... deprive any person of life, liberty or property without due process of law,” it was not until 1925, by way of the Supreme Court case of *Gitlow v. New York*, that the Supreme Court held that the freedom of speech guaranteed by the First Amendment is one of the “liberties” incorporated by the Due Process Clause of the 14th Amendment.

<sup>1</sup> *State ex rel. Dresser v. Dist. Bd. of School Dist. No. 1*, 135 Wis. 619, 116 N.W. 232 (Wis. 1908).

<sup>2</sup> *Wooster v. Sunderland*, 27 Cal. App. 51, 148 P. 959 (Cal. App. 1915).

In subsequent cases, the Court has applied all of the freedoms of the First Amendment to the states — and thus to public schools — through the 14th Amendment. But not until 1943, in the flag-salute case of *West Virginia v. Barnette*,<sup>3</sup> did the U.S. Supreme Court explicitly extend First Amendment protection to students attending public schools.

The *Barnette* case began when several students who were Jehovah's Witnesses refused to salute the flag for religious reasons. School officials punished the students and their parents. The students then sued, claiming a violation of their First Amendment rights.

At the time that the students sued, Supreme Court precedent painted a bleak picture for their chances. Just a few years earlier, the Court had ruled in favor of a similar compulsory flag-salute law in *Minersville School District v. Gobitis*.<sup>4</sup> As the Court stated in that ruling, “national unity is the basis of national security.”

However, the high court reversed itself in *Barnette*, holding that the free-speech and free exercise of religion provisions of the First Amendment guarantee the right of students to be excused from the flag salute on grounds of conscience.

Writing for the majority, Justice Robert Jackson said that the Supreme Court must ensure “scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”<sup>5</sup> The Court then warned of the dangers of coercion by government in oft-cited, eloquent language:

*If there is any fixed star in our Constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.*<sup>6</sup>

## RELIGIOUS LIBERTY: THE ESTABLISHMENT CLAUSE

### **2. The First Amendment says that the government may not “establish” religion. What does that mean in a public school?**

The meaning of the Establishment Clause, often referred to as the “separation of church and state,” has been much debated throughout our history. Does it require, as described in Thomas Jefferson’s famous 1802 letter to the Danbury Baptists, a high “wall of separation”? Or may government support religion as long as no one religion is favored over others? How can school officials determine when they are violating the Establishment Clause?

<sup>3</sup> *West Virginia School Bd. v. Barnette*, 319 U.S. 624 (1943).

<sup>4</sup> *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940).

<sup>5</sup> *Barnette*, 319 U.S. at 637.

<sup>6</sup> *Id.* at 642.

In the last several decades, the Supreme Court has crafted several tests to determine when state action becomes “establishment” of religion. No one test is currently favored by a majority of the Court. Nevertheless, no matter what test is used, it is fair to say that the Court has been stricter about applying the Establishment Clause in public schools than in other government settings. For example, the Court has upheld legislative prayer, but struck down teacher-led prayer in public schools.<sup>7</sup> The Court applies the Establishment Clause more rigorously in public schools, mostly for two reasons: (1) students are impressionable young people, and (2) they are a “captive audience” required by the state to attend school.

When applying the Establishment Clause to public schools, the Court often emphasizes the importance of “neutrality” by school officials toward religion. This means that public schools may neither inculcate nor inhibit religion. They also may not prefer one religion over another — or religion over nonreligion.

### **3. If school officials are supposed to be “neutral” toward religion under the Establishment Clause, does that mean they should keep religion out of public schools?**

No. By “neutrality” the Supreme Court does not mean hostility to religion. Nor does it mean ignoring religion. Neutrality means protecting the religious liberty rights of all students while simultaneously rejecting school endorsement or promotion of religion.

In 1995, 24 major religious and educational organizations defined religious liberty in public schools this way:

Public schools may not inculcate nor inhibit religion. They must be places where religion and religious conviction are treated with fairness and respect.

Public schools uphold the First Amendment when they protect the religious liberty rights of students of all faiths or none. Schools demonstrate fairness when they ensure that the curriculum includes study about religion as an important part of a complete education.<sup>8</sup>

### **4. Does the Establishment Clause apply to students in a public school?**

The Establishment Clause speaks to what government may or may not do. It does not apply to the private speech of students. School officials should keep in mind the distinction between government (in this case “school”) speech endorsing religion — which the Establishment Clause prohibits — and private (in this case “student”) speech endorsing religion, which the free-speech and free-exercise clauses protect.<sup>9</sup>

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<sup>7</sup> *Marsh v. Chambers*, 463 U.S. 783 (1983) (legislative prayer); *Engel v. Vitale*, 370 U.S. 421 (1962) (teacher-led prayer).

<sup>8</sup> From “Religious Liberty, Public Education, and the Future of American Democracy,” a statement of principles qtd. in Haynes & Thomas, *Finding Common Ground: A Guide to Religious Liberty in Public Schools* (Nashville: First Amendment Center, 2001).

<sup>9</sup> See *Bd. of Education v. Mergens*, 496 U.S. 226 (1990).

Student religious expression may, however, raise Establishment Clause concerns when such expression takes place before a captive audience in a classroom or at a school-sponsored event. Students have the right to pray alone or in groups or to discuss their faith with classmates, as long as they aren't disruptive or coercive. And they may express their religious views in class assignments or discussions, as long as it is relevant to the subject under consideration and meets the requirements of the assignment.<sup>10</sup> But students don't have a right to force a captive audience to participate in religious exercises.

It isn't entirely clear under current law where teachers and administrators may draw a line limiting student religious expression before a captive audience in a classroom or school-sponsored event. In several recent cases, lower courts have deferred to the judgment of educators about when to limit the religious expression of students in a classroom or school setting. A general guide might be to allow students to express their religious views in a classroom or at a school event as long as they don't ask the audience to participate in a religious activity, use the opportunity to deliver a proselytizing sermon, or give the impression that their views are supported by or endorsed by the school.<sup>11</sup>

## **5. How can school officials tell when a planned school action or activity might violate the Establishment Clause?**

Here are some questions that teachers and administrators should ask themselves when planning activities that may involve religious content (e.g., a holiday assembly in December):

- Do I have a distinct educational or civic purpose in mind? If so, what is it? (It may not be the purpose of the public school to promote or denigrate religion.)
- Have I done what I can to ensure that this activity is not designed in any way to either promote or inhibit religion?
- Does this activity serve the educational mission of the school or the academic goals of the course?
- Have I done what I can to ensure that no student or parent may be made to feel like an outsider, and not a full member of the community, by this activity?
- If I am teaching about religion, am I balanced, accurate, and academic in my approach?

*For more information, see chapter 2 and chapter 4*

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<sup>10</sup> *Settle v. Dickson County School Bd.*, 53 F.3d 152 (6th Cir. 1995), cert. denied, 516 U.S. 989 (1995).

<sup>11</sup> *DeNooyer v. Livonia Public Schools*, 799 F. Supp. 744 (E.D. Mich. 1992); *Guidry v. Broussard*, 897 F.2d 181 (5th Cir. 1989); *Cole v. Oroville Union High School*, 229 F.3d 1092 (9th Cir. 2000).

## RELIGIOUS LIBERTY: THE FREE EXERCISE CLAUSE

### 6. What does “free exercise” of religion mean under the First Amendment?

The Free Exercise Clause of the First Amendment states that the government “shall make no law ... prohibiting the free exercise of religion.” Although the text sounds absolute, “no law” does not always mean “no law.” The Supreme Court has had to place some limits on the freedom to practice religion. To take an easy example cited by the Court in one of its landmark “free exercise” cases, the First Amendment would not protect the practice of human sacrifice even if some religion required it.<sup>12</sup> In other words, while the freedom to believe is absolute, the freedom to act on those beliefs is not.

But where may government draw the line on the practice of religion? The courts have struggled with the answer to that question for much of our history. Over time, the Supreme Court developed a test to help judges determine the limits of free exercise. First fully articulated in the 1963 case of *Sherbert v. Verner*, this test is sometimes referred to as the *Sherbert* or “compelling interest” test. The test has four parts: two that apply to any person who claims that his freedom of religion has been violated, and two that apply to the government agency accused of violating those rights.

For the individual, the court must determine

- whether the person has a claim involving a sincere religious belief, and
- whether the government action places a substantial burden on the person’s ability to act on that belief.

If these two elements are established, then the government must prove

- that it is acting in furtherance of a “compelling state interest,” and
- that it has pursued that interest in the manner least restrictive, or least burdensome, to religion.<sup>13</sup>

The Supreme Court, however, curtailed the application of the *Sherbert* test in the 1990 case of *Employment Division v. Smith*. In that case, the Court held that a burden on free exercise no longer had to be justified by a compelling state interest if the burden was an unintended result of laws that are generally applicable.<sup>14</sup>

After *Smith*, only laws (or government actions) that (1) were intended to prohibit the free exercise of religion, or (2) violated other constitutional rights, such as freedom of speech,

<sup>12</sup> *Reynolds v. U.S.*, 98 U.S. 145 (1878).

<sup>13</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>14</sup> *Employment Div. v. Smith*, 494 U.S. 872 (1990).

were subject to the compelling-interest test. For example, a state could not pass a law stating that Native Americans are prohibited from using peyote, but it could accomplish the same result by prohibiting the use of peyote by everyone.

In the wake of *Smith*, many religious and civil liberties groups have worked to restore the *Sherbert* test — or compelling-interest test — through legislation. These efforts have been successful in some states. In other states, the courts have ruled that the compelling-interest test is applicable to religious claims by virtue of the state’s own constitution. In many states, however, the level of protection for free-exercise claims is uncertain.

*For more information, see chapter 2 and chapter 4*

## ACCOMMODATING THE RELIGIOUS NEEDS AND REQUIREMENTS OF STUDENTS

### **7. How should school officials determine when they must accommodate a religious liberty claim under the Free Exercise Clause?**

The application of the *Sherbert* or “compelling interest” test was sharply curtailed by the 1990 Supreme Court decision *Employment Division v. Smith*. But some states — such as Florida, Texas and Connecticut — have passed laws requiring the use of a “compelling interest test” in free-exercise cases. Moreover, since most cases involving public schools involve more than one constitutional right (e.g., the religion claim can be linked with a parental right or free-speech claim), some might argue that the compelling-interest test must be used even under *Smith*.

Regardless of how this is eventually settled in the courts, public schools fulfill the spirit of the First Amendment when they use the *Sherbert* test to accommodate the religious claims of students and parents where feasible.

### **8. May students be excused from parts of the curriculum for religious reasons?**

As good educational policy, school officials, whenever possible, should try to accommodate the requests of parents and students for excusal for religious reasons from specific classroom discussions or activities.

In “A Parent’s Guide to Religion in the Public Schools,” the National PTA and the First Amendment Center give the following advice concerning excusal requests:

If focused on a specific discussion, assignment, or activity, such requests should be routinely granted to strike a balance between the student’s religious freedom and the school’s interest in providing a well-rounded education. If it is proved that particular lessons substantially burden a student’s free exercise of religion and if the school cannot prove a compelling interest in requiring attendance, some courts may require the school to excuse the student.<sup>15</sup>

It is important for teachers and administrators to ask themselves the questions posed in the *Sherbert* test as they make decisions about how to accommodate excusal requests.

Let’s look at one example of how the *Sherbert* test might be used in a public school: If parents ask for their child to be excused from reading a particular book for religious reasons, the teacher and administrator should first ask if the request is based on a sincere religious belief. Note that the religious belief need not be rational or even sensible to the school official. It need only be sincere. When parents and students take the time to object to a particular reading or activity, they are usually sincere.

Next, school officials must determine whether or not reading the assigned book would constitute a “substantial burden” on the student’s religious liberty rights. This is more difficult to determine, but if the parent and student find the book deeply offensive to their religious beliefs, then making the student read the book might place a substantial burden on her religious freedom. One federal appeals court has ruled that merely exposing students to ideas that contradict their religious beliefs does not constitute a substantial burden on religious exercise.<sup>16</sup>

If a student can prove that the school has placed a substantial burden on her sincere exercise of religion, then the inquiry shifts to the school. First, the school must show that it has a “compelling state interest” — described by the Supreme Court as “an interest of the highest order.”<sup>17</sup> Clearly, public schools have a compelling interest in the education and welfare of children. In this instance, for example, the school clearly has a compelling interest in teaching the student to read. But the last part of the test requires that the school pursue that interest in a manner least restrictive of a complaining student’s religion. Thus the school may have an interest in teaching the student to read, but can that interest be accomplished without making the student read that particular book? In other words, the school should choose a course of action that does not violate the student’s religion if such a course of action is available and feasible for the school.

This may be easy to do if a student and parent object to a particular reading assignment on religious grounds. When this happens, the teacher may simply assign an alternate selection. If, however, requests for exemption become too frequent or too burdensome for the school, a court will probably find the school’s refusal to offer additional alternatives to be justified.

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<sup>15</sup> Twenty-two national educational and religious organizations agreed to this language in “A Teacher’s Guide to Religion in the Public Schools,” qtd. in Haynes & Thomas, *Finding Common Ground* (Nashville: First Amendment Center, 2001).

<sup>16</sup> *Mozet v. Hawkins County*, 764 F2d 75 (6th Cir. 1985).

<sup>17</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

## **9. How should school officials respond to request for accommodation of religious practices during the school day?**

Enforcing adherence to religious requirements, such as special diet or dress, is the responsibility of a parent, not of the public school.

However, some religious requirements or practices may conflict with school practices or schedules. In those cases, school officials should try to accommodate these needs if feasible. Let's look at a few examples.

Jehovah's Witnesses may ask that their children be excused from birthday or holiday activities. Teachers should honor these requests by planning alternate activities or time in the library for affected students.

The school may have a "no caps" policy because of concerns about gang activity. But exemptions should be made for Orthodox Jews and other students who must wear head coverings for religious reasons.

Muslim students may request permission to pray in a designated area during the school day. If space is available, and if the educational process isn't disrupted, schools should try to grant this request. Schools may not set up "prayer rooms," but they may find ways to allow students to meet their religious obligations.

Students of various faiths may have dietary restrictions. Under the Establishment Clause, schools probably cannot prepare special foods to fulfill a student's particular religious requirements. But schools may help their religious students and others by labeling foods and offering a variety of choices at every meal.

As noted in the answer to Question 6, it is not entirely clear under current law how much accommodation schools must make for "free exercise" claims. And the legal requirement to accommodate requests may vary from state to state, depending on state law and state constitutional provisions. Nevertheless, schools uphold the principles of religious liberty and the spirit of the First Amendment when they make every effort to accommodate religious requests for exemption from school policies or practices.

## **10. May students be absent for religious holidays?**

Schools should have policies concerning absences that take into account the religious needs and requirements of students. Students should be allowed a reasonable number of excused absences, without penalties, to observe religious holidays within their traditions. Students may be asked to complete makeup assignments or tests in conjunction with such absences.

*For more information, see chapter 6 and chapter 8*

## SCHOOL PRAYER

### 11. Is it legal for students to pray in public schools?

Yes. Contrary to popular myth, the Supreme Court has never outlawed “prayer in schools.” Students are free to pray alone or in groups, as long as such prayers are not disruptive and do not infringe upon the rights of others. But this right “to engage in voluntary prayer does not include the right to have a captive audience listen or to compel other students to participate.”<sup>18</sup>

What the Supreme Court has repeatedly struck down are state-sponsored or state-organized prayers in public schools.

The Supreme Court has made clear that prayers organized or sponsored by a public school — even when delivered by a student — violate the First Amendment, whether in a classroom, over the public address system, at a graduation exercise, or even at a high school football game.<sup>19</sup>

### 12. Is it constitutional for a public school to require a “moment of silence”?

Yes, if, and only if, the moment of silence is genuinely neutral. A neutral moment of silence that does not encourage prayer over any other quiet, contemplative activity will not be struck down, even though some students may choose to use the time for prayer.<sup>20</sup>

If a moment of silence is used to promote prayer, it will be struck down by the courts. In *Wallace v. Jaffree* the Supreme Court struck down an Alabama “moment of silence” law because it was enacted for the express purpose of promoting prayer in public schools.<sup>21</sup> At the same time, however, the Court indicated that a moment of silence would be constitutional if it is genuinely neutral. Many states and local school districts currently have moment-of-silence policies in place.

### 13. May a student pray at graduation exercises or at other school-sponsored events?

This is one of the most confusing and controversial areas of the current school-prayer debate. While the courts have not clarified all of the issues, some are clearer than others.

For instance, inviting outside adults to lead prayers at graduation ceremonies is clearly unconstitutional. The Supreme Court resolved this issue in the 1992 case *Lee v. Weisman*, which began when prayers were delivered by clergy at a middle school’s commencement exercises in Providence, Rhode Island.<sup>22</sup> The school designed the program, provided for the invocation, selected the clergy, and even supplied guidelines for the prayer.

<sup>18</sup> This is the language supported by a broad range of civil liberties and religious groups in a joint statement of current law.

<sup>19</sup> *Engel v. Vitale*, 370 U.S. 421 (1962); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Lee v. Weisman*, 505 U.S. 577 (1992); *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000).

<sup>20</sup> See *Bown v. Gwinnett County School Dist.*, 112 F.3d 1464 (11th Cir. 1997).

<sup>21</sup> *Wallace v. Jaffree*, 472 U.S. 38 (1985).

<sup>22</sup> *Lee v. Weisman*, 505 U.S. 577 (1992).

Therefore, the Supreme Court held that the practice violated the First Amendment's prohibition against laws "respecting an establishment of religion." The majority based its decision on the fact that (1) it is not the business of schools to sponsor or organize religious activities, and (2) students who might have objected to the prayer were subtly coerced to participate. This psychological coercion was not resolved by the fact that attendance at the graduation was "voluntary." In the Court's view, few students would want to miss the culminating event of their academic career.

A murkier issue is student-initiated, student-led prayer at school-sponsored events. On one side of the debate are those who believe that student religious speech at graduation ceremonies or other school-sponsored events violates the Establishment Clause. They are bolstered by the 2000 Supreme Court case of *Santa Fe v. Doe*,<sup>23</sup> which involved the traditional practice of student-led prayers over the public-address system before high school football games.

According to the district, students would vote each year on whether they would have prayers at home football games. If they decided to do so, they would then select a student to deliver the prayers. To ensure fairness, the school district said it required these prayers to be "non-sectarian [and] non-proselytizing."

A 6-to-3 majority of the Supreme Court still found the Santa Fe policy to be unconstitutional. The majority opinion first pointed out that constitutional rights are not subject to a vote. To the contrary, the judges said the purpose of the Bill of Rights was to place some rights beyond the reach of political majorities. Thus, the Constitution protects a person's right to freedom of speech, press, or religion even if no one else agrees with the ideas a person professes.<sup>24</sup>

In addition, the Court found that having a student, as opposed to an adult, lead the prayer did not solve the constitutional dilemma. A football game is still a school-sponsored event, they held, and the school was still coercing the students, however subtly, to participate in a religious exercise.<sup>25</sup>

Finally, the Court ruled that the requirement that the prayer be "non-sectarian" and "non-proselytizing" not only failed to solve the problems addressed in *Lee v. Weisman*, it may have aggravated them.<sup>26</sup> In other words, while some might like the idea of an inclusive, nonsectarian "civil" religion, others might not. To some people, the idea of nonsectarian prayer is offensive, as though a prayer were being addressed "to whom it may concern." Moreover, the Supreme Court made clear in *Lee v. Weisman* that even nondenominational prayers or generic religiosity may not be established by the government at graduation exercises.<sup>27</sup>

<sup>23</sup> *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000).

<sup>24</sup> *Id.* at 305–306.

<sup>25</sup> *Id.* at 306.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

Another thorny part of this issue is determining whether a particular prayer tends to proselytize. Such determinations entangle school officials in religious matters in unconstitutional ways. In fact, one Texas school district was sued for discriminating against those who wished to offer more-sectarian prayers at graduation exercises.

On the other side of this debate are those who contend that not allowing students to express themselves religiously at school events violates the students' free exercise of religion and free speech.

Case law indicates, however, that this may be true only in instances involving strictly student speech, and not when a student is conveying a message controlled or endorsed by the school. As the 11th Circuit case of *Adler v. Duval County* suggests, it would seem possible for a school to provide a forum for student speech within a graduation ceremony when prayer or religious speech might occur.<sup>28</sup>

For example, a school might allow the valedictorian or class president an opportunity to speak during the ceremony. If such a student chose to express a religious viewpoint, it seems unlikely it would be found unconstitutional unless the school had suggested or otherwise encouraged the religious speech.<sup>29</sup> In effect, this means that in order to distance itself from the student's remarks, the school must create a limited open forum for student speech in the graduation program.

Again, there is a risk for school officials in this approach. By creating a limited open forum for student speech, the school may have to accept almost anything the student wishes to say. Although the school would not be required to allow speech that was profane, sexually explicit, defamatory, or disruptive, the speech could include political or religious views offensive to many, as well as speech critical of school officials.

If school officials feel a solemnizing event needs to occur at a graduation exercise, a neutral moment of silence might be the best option. This way, everyone could pray, meditate, or silently reflect on the previous year's efforts in her own way.

#### **14. Are baccalaureate services constitutional?**

Yes, if they are privately sponsored. Public schools may not sponsor religious baccalaureate ceremonies. But parents, faith groups, and other community organizations are free to hold such services for students who wish to attend. The school may announce the baccalaureate in the same way it announces other community events. If the school allows community groups to rent or otherwise use its facilities after hours, then a privately sponsored baccalaureate may be held on campus under the same terms offered to any private group.

*For more information, see chapter 6.*

<sup>28</sup> *Adler v. Duval County*, 250 F.3d 1330 (11th Cir. 2001), cert. denied, 122 S. Ct. 664 (2001).

<sup>29</sup> See *Doe v. Madison School Dist.*, 177 F.3d 789 (9th Cir. 1998, vacated on other grounds); *Adler v. Duval County*, 250 F.3d 1330 (11th Cir. 2001), cert. denied, 122 S. Ct. 664 (2001).

## STUDENT RELIGIOUS EXPRESSION

### **15. May students share their religious faith in public schools?**

Yes. Students are free to share their faith with their peers, as long as the activity is not disruptive and does not infringe upon the rights of others.

School officials possess substantial discretion to impose rules of order and other pedagogical restrictions on student activities. But they may not structure or administer such rules to discriminate against religious activity or speech.

This means that students have the same right to engage in individual or group prayer and religious discussion during the school day as they do to engage in other comparable activities.<sup>30</sup> For example, students may read their Bibles or other scriptures, say grace before meals, and pray before tests.

Generally, students may share their faith or pray in a nondisruptive manner when not engaged in school activities or instruction, subject to the rules that normally pertain in the applicable setting. Specifically, students in informal settings, such as cafeterias and hallways, may pray and discuss their religious views with each other, subject to the same rules of order as applied to other student activities and speech.<sup>31</sup>

Students may also speak to and attempt to persuade their peers about religious topics just as they do with regard to political topics. School officials, however, should intercede if a student's speech begins to constitute harassment of a student or group of students.

Students may also participate in before- or after-school events with religious content, such as “See You at the Pole” gatherings, on the same terms as they may participate in other noncurriculum activities on school premises. School officials may neither discourage nor encourage participation in such an event.

Keep in mind, however, that the right to engage in voluntary prayer or religious discussion free from discrimination does not necessarily include the right to preach to a “captive audience,” like an assembly, or to compel other students to participate. To that end, teachers and school administrators should work to ensure that no student is in any way coerced — either psychologically or physically — to participate in a religious activity.<sup>32</sup>

### **16. May students express their beliefs about religion in classroom assignments or at school-sponsored events?**

Yes, within limits. Generally, if it is relevant to the subject under consideration and meets the requirements of the assignment, students should be allowed to express their religious or nonreligious views during a class discussion, as part of a written assignment, or as part of an art activity.

<sup>30</sup> See generally, *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503 (1969).

<sup>31</sup> *Id.*

<sup>32</sup> *Lee v. Weisman*, 505 U.S. 577 (1992).

This does not mean, however, that students have the right to compel a captive audience to participate in prayer or listen to a proselytizing sermon. School officials should allow students to express their views about religion, but should draw the line when students wish to invite others to participate in religious practices or want to give a speech that is primarily proselytizing. There is no bright legal line that can be drawn between permissible and impermissible student religious expression in a classroom assignment or at a school-sponsored event. In recent lower court decisions, judges have deferred to the judgment of educators to determine where to draw the line.<sup>33</sup>

### **17. What about the power of schools to control student speech in the classroom?**

Schools have great latitude to control the speech that occurs in a classroom and, in that setting, can probably prohibit the distribution of student publications altogether.<sup>34</sup> Similarly, schools may impose any reasonable constraint on student speech in a school-sponsored publication such as the school newspaper.

### **18. How do schools resolve the tension between freedom of speech and the need for discipline and control?**

Preserving the speech rights of students and maintaining the integrity of public education are not mutually exclusive. Schools should model First Amendment principles by encouraging and supporting the rights of students to express their ideas in writings. On the other hand, students should not expect to have unfettered access to their classmates and should be prepared to abide by reasonable time, place, and manner restrictions.

Schools must continue to maintain order, discipline and the educational mission of the school as they seek to accommodate the rights of the students. As a result, the free-speech rights of students are not co-extensive with the rights of adults. Hate speech and sexually explicit speech, though protected for adults, are probably not protected in a public school.

### **19. May students distribute religious literature in a public school?**

Court decisions on the issue generally fall into two categories. A minority of decisions hold that schools can prohibit the distribution of any publication that is not sponsored by the school. Of course, the ban must be applied even-handedly to all student publications. A school could not, for example, allow the distribution of political literature while barring religious publications. This is particularly evident in light of the Supreme Court's decision in *Westside Community School v. Mergens*, upholding the federal Equal Access Act. Under this minority view, however, a blanket prohibition on all student publications would be permissible.

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<sup>33</sup> *C.H. v. Olivia*, 226 F.3d 198 (2nd Cir. 2000) (2nd Cir. 2000), cert. denied, 533 U.S. 915 (2001).

<sup>34</sup> *C.H. v. Olivia*, 226 F.3d 198 (2nd Cir. 2000), cert. denied, 533 U.S. 915 (2001).

The majority of courts take a different view. These courts hold that while schools may place some restrictions on the student publications, they may not ban them altogether. The courts base their decisions on the landmark case of *Tinker v. Des Moines School District*, which upheld the right of students to wear black armbands protesting the Vietnam War, even in a public school. Included in this right of free speech is not only the right to speak for oneself but also to distribute the writings (i.e., speech) of others. Thus, courts have generally upheld the rights of students to distribute non-school publications subject to the school's right to suppress such publications if they create substantial disruption, harm the rights of other students or infringe upon other compelling interests of the school. Again, the *Mergens* decision makes clear that the fear of a First Amendment violation is not sufficient justification to suppress a student publication that happens to be religious. Some states, such as California, have incorporated the majority view into their own state education codes.<sup>35</sup>

## **20. Do schools that permit the distribution of student religious literature give up all control over how it is done?**

No. Just because schools may not prohibit the distribution of all student materials does not mean that schools have no control over what may be distributed on school premises. On the contrary, courts have repeatedly held that schools may place a reasonable “time, place and manner” restrictions on all student materials distributed on campus. Thus, schools may specify when the distribution may occur (e.g., lunch hour or before or after classes begin), where it can occur (e.g., outside the school office) and how it can occur (e.g., from fixed locations as opposed to roving distribution). One recent decision upheld a policy confining the distribution of student literature to a table placed in a location designated by the principal and to the sidewalks adjacent to school property. Of course, any such restriction must be reasonable.

It is also likely that schools may insist on screening all student materials prior to distribution to ensure the appropriateness for a public school. Any such screening policy should provide for a speedy decision, a statement of reasons for rejecting the literature and a prompt appeals process. Because the speech rights of students are not coextensive with those of adults, schools may prohibit the distribution of some types of student literature altogether. Included in this category would be:

- Materials that would likely cause substantial disruption of the operation of the school. Literature that uses fighting words or other inflammatory language about students or groups of students would be an example of this type of material. Student speech may not be prohibited simply because it is considered offensive by some.<sup>36</sup>
- Material that violates the rights of others. Included in this category would be literature that is libelous, invades the privacy of others or infringes on a copyright.

<sup>35</sup> See e.g., West's Ann.Cal.Educ.Code § 48907.

<sup>36</sup> *Saxe v. State College Area School Dist.*, 240 F. 3d 200 (3rd Cir. 2001).

- Materials that are obscene, lewd or sexually explicit.
- Commercial materials that advertise products unsuitable for minors.
- Materials that students would reasonably believe to be sponsored or endorsed by the school. One recent example of this category of speech was a religious newspaper that was formatted to look like the school newspaper.

While schools have considerable latitude in prohibiting the distribution of materials that conflict with their educational mission, schools generally may not ban materials based solely on content. Similarly, schools should not allow a heckler's veto by prohibiting the distribution only of those materials that are unpopular or controversial. If Christian students are allowed to distribute their newsletters, Buddhists, Muslims and even Wiccans must be given the same privilege.

*For more information, see chapter 6.*

## STUDENT EXTRACURRICULAR CLUBS AND ACTIVITIES

### **21. May students form religious or political clubs in secondary public schools?**

Yes, if the school allows other extracurricular (noncurriculum-related) groups. Although schools do not have to open or maintain a limited open forum, once they do, they may not discriminate against a student group because of the content of its speech.

The Equal Access Act (EAA), passed by Congress in 1984 and upheld as constitutional by the Supreme Court in 1990, makes it “unlawful for any public secondary school that receives federal funds and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.”

The EAA covers student-initiated and student-led clubs in secondary schools with a limited open forum. According to the act, “non-school persons may not direct, conduct, or regularly attend activities of student groups.”

A “limited open forum” is created whenever a public secondary school provides an opportunity for one or more “noncurriculum related groups” to meet on school premises during noninstructional time. The forum created is said to be “limited” because only the school’s students can take advantage of it.

## **22. What is a “noncurriculum related student group” under the Equal Access Act?**

In the 1990 Supreme Court case of *Westside Community Schools v. Mergens*,<sup>37</sup> the Court interpreted a “noncurriculum related student group” to mean “any student group [or club] that does not directly relate to the body of courses offered by the school.”

According to the Court, a student group directly relates to a school’s curriculum only if (1) the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; (2) the subject matter of the group concerns the body of courses as a whole; or (3) participation in the group is required for a particular course or results in academic credit.

As examples, the Court identified three groups that were noncurriculum related at the Westside schools: (1) a scuba club, (2) a chess club, and (3) a service club. The Court found these groups to be noncurriculum related because they did not meet the criteria set forth above. Conversely, the French club was found to be curriculum related since the school regularly offered French classes.

Subject to review by the courts, local school authorities must determine whether a student group is curriculum related or not. Schools may not, however, substitute their own definition of “noncurriculum related” for the definition provided by the Court.

If the school violates the EAA, an aggrieved person may bring suit in U.S. district court to compel the school to observe the law. Although violations of equal access will not result in the loss of federal funds, the school could be liable for damages and the attorney’s fees of a student group that successfully challenges a denial to meet under the act.

## **23. What control does the school retain over student meetings in a limited open forum?**

The EAA does not take away a school’s authority to establish reasonable time, place, and manner regulations for a limited open forum. For example, a school may establish for its student clubs a reasonable meeting time on any one school day, a combination of days, or all school days. It may assign the rooms in which student groups can meet. It may enforce order and discipline during the meetings. The key, however, is that the school’s time, place, and manner regulations must be uniform, nondiscriminatory, and neutral in viewpoint.

## **24. May teachers or other school employees participate in student religious clubs?**

No. The EAA states that “employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity.”

<sup>37</sup> *Bd. of Education v. Mergens*, 496 U.S. 226 (1990).

For insurance purposes, or because of state law or local school policy, teachers or other school employees are commonly required to be present during student meetings. But if the student club is religious in nature, school employees may be present as monitors only. Such custodial supervision does not constitute sponsorship or endorsement of the group by the school.

**25. May religious leaders or other outside adults attend the meetings of student clubs?**

Yes, if the students invite these visitors and if the school does not have a policy barring all guest speakers or outside adults from extracurricular club meetings. However, the EAA states that the nonschool persons “may not direct, conduct, control, or regularly attend activities of student groups.”<sup>38</sup>

**26. May noncurriculum-related student groups use school media to advertise their meetings?**

Yes. A student group may use school media — such as the public-address system, school paper, and school bulletin board — as long as other noncurriculum-related student groups are allowed to do so. Any policy concerning the use of school media must be applied to all noncurriculum-related student groups in a nondiscriminatory manner. Schools, however, may issue disclaimers indicating that extracurricular student groups are not school-sponsored or endorsed.

**27. May the school exclude any student extracurricular group?**

Yes. According to guidelines endorsed by a broad coalition of educational and religious liberty organizations, “student groups that are unlawful, or that materially and substantially interfere with the orderly conduct of educational activities, may be excluded. However, a student group cannot be denied equal access simply because its ideas are unpopular. Freedom of speech includes the ideas the majority may find repugnant.”<sup>39</sup>

Most schools require students to submit a statement outlining the purpose and nature of the proposed club. School officials do not have to allow meetings of groups that advocate violence or hate or engage in illegal activity. This does not mean, however, that schools may bar students from forming clubs to discuss controversial social and legal issues such as abortion or sexual orientation. Again, student-initiated clubs in a limited open forum may not be barred on the basis of the viewpoint of their speech.

Some schools require parental permission for students to join an extracurricular club. Although this step is not required by the EAA, it has enabled schools to keep the forum open in communities where student clubs have sparked controversy.

<sup>38</sup> 20 U.S.C. 4071(c)(3).

<sup>39</sup> “The Equal Access Act: Questions and Answers,” found in Haynes & Thomas, *Finding Common Ground* (2001).

## **28. Do students have the right to form religious or political clubs below the secondary level?**

Probably not, but current law is unclear on this point. Although the EAA does not apply to public schools below the secondary level, some courts have held that the Free Speech Clause protects the right of middle school or elementary school students to form religious or political clubs on an equal footing with other student-initiated clubs. When the EAA was debated in Congress, many lawmakers expressed doubt that young children could form religious clubs that would be truly initiated and led by students. In addition, younger students are more likely to view religious clubs meeting at the school as “school sponsored.” For these and other reasons, Congress declined to apply equal access below the secondary level.

May administrators permit students to form religious or political clubs in middle schools, even if the law does not require that such clubs be allowed? Again, current law is unclear on this point. If school officials decide to allow middle school students to form religious or political clubs, then at the very least the school should have in place a clear policy and ground rules for the clubs, consistent with the EAA, and explain that the student clubs are not school sponsored.<sup>40</sup>

*For more information, see chapter 7.*

# TEACHING ABOUT RELIGION

## **29. Is it constitutional to teach about religion in a public school?**

Yes. In the 1960s school-prayer cases that prompted rulings against state-sponsored school prayer and devotional Bible reading, the U.S. Supreme Court indicated that public school education may include teaching about religion. In *Abington v. Schempp*, Associate Justice Tom Clark wrote for the Court:

*[I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education may not be effected consistently with the First Amendment.<sup>41</sup>*

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<sup>40</sup> *Good News Club v. School Dist. of Ladue*, 28 F.3d 1501 (8th Cir. 1994).

<sup>41</sup> *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

### 30. What does it mean to teach “about” religion under the First Amendment?

The key is to understand the difference between the teaching *of* religion — that is, religious indoctrination or faith formation — and teaching *about* religion — that is, the academic study of religion. The distinction may be summarized this way:

- The school’s approach to religion is *academic*, not *devotional*.
- The school strives for student *awareness* of religions, but does not press for student *acceptance* of any religion.
- The school sponsors study *about* religion, not the *practice* of religion.
- The school may *expose* students to a diversity of religious views, but may not *impose* any particular view.
- The school *educates* about all religions; it does not *promote* or *denigrate* religion.
- The school *informs* students about various beliefs; it does not seek to make students *conform* to any particular belief.<sup>42</sup>

Classroom discussions concerning religion must be conducted in an environment that is free of advocacy on the part of the teacher. Students may express their own religious views, as long as such expression is germane to the discussion. But public school teachers are required by the First Amendment to teach about religion fairly and objectively, neither promoting nor denigrating religion in general or specific religious groups in particular. When discussing religion, many teachers must guard against injecting personal religious beliefs by teaching through attribution (e.g., by using such phrases as “most Buddhists believe ...” or “according to the Hebrew scriptures ...”).

### 31. Does the First Amendment require that “equal time” be given to all faiths in the public school curriculum?

No. The grade level of the students and the academic requirements of the course should determine which religions to study and how much to discuss about religion.

In the elementary grades, the study of family, community, culture, history, literature, the nation, and other themes and topics should naturally involve some discussion of religion. Elementary students are introduced to the basic ideas and practices of the world’s major religions by focusing on the generally agreed-upon meanings of religious faiths — the core beliefs and symbols as well as important figures and events. Stories drawn from various faiths may be included among the wide variety of stories read by students, but the material selected must always be presented in the context of learning about religion.

On the secondary level, the social studies, literature, and the arts offer opportunities for the inclusion of study about religions, their ideas, and practices. The academic needs of the

<sup>42</sup> Based on guidelines originally published by the Public Education Religious Studies Center at Wright State University and subsequently agreed to by seventeen national religious and educational organizations in “Religion in the Public School Curriculum: Questions and Answers.” The full guidelines may be found in Haynes & Thomas, *Finding Common Ground* (Nashville: First Amendment Center, 2001).

course should determine which religions are studied and how much time is required to provide an adequate understanding of the concepts and practices under consideration.

In a U.S. history course, for example, some faith communities may be given more time than others simply because of their predominant influence on the development of the nation. In world history, a variety of faiths must be studied, based on the regions of the world, in order to understand the various civilizations and cultures that have shaped history and society.

Fair and balanced study about religion on the secondary level includes critical thinking about historical events involving religious traditions. Religious beliefs have been at the heart of some of the best and worst developments in human history. The full historical record, and various interpretations of it, should be available for analysis and discussion. Using primary sources whenever possible allows students to work directly with the historical record.

Of course, fairness and balance in U.S. or world history and literature is difficult to achieve, given the brief treatment of religious ideas and events in most textbooks and the limited time available in the course syllabus. Teachers will need scholarly supplemental resources that enable them to cover the required material within the allotted time, while enriching the discussion with study of religion. In fact, some schools now offer electives in religious studies to provide additional opportunities for students to study about the major faith communities in greater depth.

Overall, the curriculum should include all major voices, and many minor ones, in an effort to provide the best possible education.

### **32. Is it legal to invite guest speakers to help teach about religion?**

Yes, if the school district policy allows guest speakers in the classroom.

If a guest speaker is invited, care should be taken to find someone with the academic background necessary for an objective and scholarly discussion of the historical period and the religion under consideration. Faculty from local colleges and universities often make excellent guest speakers, or they can recommend others who might be appropriate for working with students in a public school setting.

Religious leaders in the community may also be a resource. Remember, however, that they have commitments to their own faith. Above all else, be certain that any guest speaker understands the First Amendment guidelines for teaching about religion in public education and is clear about the academic nature of the assignment.

*For more information, see chapter 9.*

## RELIGIOUS HOLIDAYS

### **33. How should religious holidays be treated in the classroom?**

Teachers must be alert to the distinction between teaching about religious holidays, which is permissible, and celebrating religious holidays, which is not. Recognition of and information about holidays may focus on how and when they are celebrated, their origins, histories, and generally agreed-upon meanings. If the approach is objective and sensitive, neither promoting nor inhibiting religion, this study can foster understanding and mutual respect for differences in belief. Teachers may not, however, use the study of religious holidays as an opportunity to proselytize or otherwise inject their personal religious beliefs into the discussion.

The use of religious symbols is permissible as a teaching aid or resource, provided they are used only as examples of cultural or religious heritage. Religious symbols may be displayed only on a temporary basis as part of the academic lesson being studied. Students may choose to create artwork with religious symbols, but teachers should not assign or suggest such creations.

The use of art, drama, music, or literature with religious themes is permissible if it serves a sound educational goal in the curriculum. Such themes should be included on the basis of their academic or aesthetic value, and not as a vehicle for promoting religious beliefs. For example, sacred music may be sung or played as part of the academic study of music. School concerts that present a variety of selections may include religious music. Concerts should, however, avoid programs dominated by religious music, especially when these coincide with a particular religious holiday.

### **34. What should schools do in December?**

Decisions about what to do in December should begin with the understanding that public schools may not sponsor religious devotions or celebrations; study about religious holidays does not extend to religious worship or practice.

Does this mean that all seasonal activities must be banned from the schools? Probably not, and in any event, such an effort would be unrealistic. The resolution would seem to lie in devising holiday programs that serve an educational purpose for all students — programs that make no students feel excluded or forcibly identified with a religion not their own.

Holiday concerts in December may appropriately include music related to Christmas, Hanukkah, and other religious traditions, but religious music should not dominate. Any dramatic productions should emphasize the cultural aspects of the holidays. Conversely, Nativity pageants or plays portraying the Hanukkah miracle would not be appropriate in the public school setting.

In short, while recognizing the holiday season, none of the school activities in December should have the purpose, or effect, of promoting or inhibiting religion.

### **35. How should religious objections to holidays be handled?**

Students from certain religious traditions may ask to be excused from classroom discussions or activities related to particular holidays. For example, holidays such as Halloween and Valentine’s Day, which are considered by many people to be secular, are viewed by others as having religious overtones.

Excusal requests may be especially common in the elementary grades, where holidays are often marked by parties and similar nonacademic activities. Such requests should be routinely granted in the interest of creating good policy and upholding the religious-liberty principles of the First Amendment.

In addition, some parents and students may make requests for excusals from discussions of certain holidays, even when these holidays are treated from an academic perspective. If these requests are focused on a limited, specific discussion, administrators should grant such requests, in order to strike a balance between the student’s religious freedom and the school’s interest in providing a well-rounded education.

Administrators and teachers should understand, however, that a policy or practice of excusing students from a specific activity or discussion may not be used as a rationale for school sponsorship of religious celebration or worship for the remaining students.

*For more information, see chapter 10.*

## **USE OF SCHOOL FACILITIES BY OUTSIDE GROUPS**

### **36. Do outside groups have the right to distribute their material on campus?**

No. Adults from outside the school do not have the right to distribute materials to students in a public school. May school officials allow them to do so? Although this area of the law is somewhat unclear, it is fair to say that schools should exercise great caution before giving an outside group access to students during the school day. Giving some groups access opens the door to others. Moreover, if a religious group is allowed to actively distribute religious literature to students on campus, that activity is likely to violate the Establishment Clause.

At least one lower court has upheld “passive” distribution of materials by religious and other community groups. Note that in this case the group left materials for students to browse

through and take only if they wished. Also, a wide variety of community groups were given similar privileges, and the school posted a disclaimer explaining that the school did not endorse these materials. Under those conditions, this court allowed passive distribution, but only in a secondary school setting<sup>43</sup> (although other federal courts have rejected this distinction).

Schools may announce community events or meetings of groups — including religious groups — that work with students. All of these groups should be treated in the same way. The school should make clear that it does not sponsor these community groups.<sup>44</sup>

### **37. What about distribution of flyers from religious groups about events or programs for youth?**

Although outside groups generally have no right to distribute religious materials on campus, flyers from religious groups may be another matter. If a school allows outside groups such as the Girl Scouts to send flyers home with students about programs for youth, some courts have ruled that schools may not deny that privilege to a religious group.<sup>45</sup>

### **38. May public school facilities be used by outside community groups during nonschool hours?**

Generally, yes. Although schools are not required to open their facilities to any community group, when they do, all groups — including those with a religious viewpoint — must be treated the same.<sup>46</sup> In fact, the Supreme Court has ruled unanimously that schools may not discriminate on the basis of religious viewpoint when making their facilities available to community groups during nonschool hours.<sup>47</sup>

Schools may, of course, impose reasonable, content-neutral restrictions on the use of their facilities. For example, schools may decide when meetings may be held, how long they may last, whether they may continue during weeks or months when school is not in session, what maintenance fee must be paid, and what insurance might be required.

Some content-based restrictions may also be allowed. For example, schools may probably exclude for-profit, commercial businesses even though community nonprofits are allowed to use school facilities after hours. They may also limit the use of the facilities to such things as “educational purposes,” but such distinctions may prove difficult to administer, as many groups may claim to meet the stipulated purpose.

Schools should be aware that the imposition of content-based restrictions could raise difficult constitutional questions. For example, the Supreme Court has held in *Good News v. Milford* that in the case of the Good News Club, a content-based restriction excluding

<sup>43</sup> *Peck v. Upshur County*, 155 F.3d 274 (4th Cir. 1998).

<sup>44</sup> *Child Evangelism Fellowship v. Stafford Township*, 386 F.3d 514 (3rd Cir. 2004).

<sup>45</sup> *Hills v. Scottsdale S.D. County Pub. Schools*, 329 F.3d 1044 (9th Cir. 2003); *Rusk v. Crestview Local School Dist.*, 379 F.3d 418 (6th Cir. 2004); *Child Evangelism Fellowship v. Mont. Co. Public Schools*, 373 F.3d 89 (4th Cir. 2004).

<sup>46</sup> *Good News Club v. Milford Central School Dist.*, 533 U.S. 98 (2001).

<sup>47</sup> *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Good News Club v. Milford*, 533 U.S. 98 (2001).

religious worship and instruction amounted to impermissible viewpoint discrimination. School districts should be especially mindful to consult with legal counsel if they decide to draft content-based restrictions.

*For more information, see chapter 12.*

## COOPERATIVE AGREEMENTS BETWEEN PUBLIC SCHOOLS AND RELIGIOUS COMMUNITIES

### **39. May public schools and religious communities enter into cooperative agreements to help students with such programs as tutoring?**

Yes, but only if appropriate constitutional safeguards are in place. Remember, public schools must remain neutral among religions and between religion and nonreligion. For that reason, religious groups must refrain from proselytizing students during any cooperative programs with public schools. Participation or nonparticipation by students in such cooperative programs should not affect the student's academic ranking or ability to participate in other school activities. In addition, cooperative programs may not be limited to religious groups, but must be open to all responsible community groups.<sup>48</sup>

*For more information, see chapter 12.*

## RELEASED-TIME PROGRAMS

### **40. May students be released for off-campus religious instruction during the school day?**

Yes. Subject to applicable state laws, public schools have the discretion to release students who have parental permission to attend off-campus religious instruction during the school day. The Supreme Court in the 1952 case *Zorach v. Clauson* ruled “released-time” programs constitutional.<sup>49</sup>

If a public school decides to allow released time, the program must take place off campus and must be wholly organized and run by religious or community groups and not by the school. Schools may not encourage or discourage participation by students or in any way penalize students who do not attend.

*For more information, see chapter 6.*

<sup>48</sup> For more detailed guidelines, see “Public Schools and Religious Communities: A First Amendment Guide” published by the American Jewish Congress, Christian Legal Society, and First Amendment Center and co-signed by 12 additional educational and religious organizations (1999).

<sup>49</sup> *Zorach v. Clauson*, 343 U.S. 306 (1952).

## TEACHER AND ADMINISTRATOR RIGHTS AND RESPONSIBILITIES

### **41. May teachers and administrators pray or otherwise express their faith while at school?**

As employees of the government, public school teachers and administrators are subject to the Establishment Clause and thus required to be neutral concerning religion while carrying out their duties. That means, for example, that school officials do not have the right to pray with or in the presence of students during the school day.

Of course, teachers and administrators — like students — bring their faith with them through the schoolhouse door each morning. Because of the First Amendment, however, school officials who wish to pray or engage in other religious activities — unless they are silent — should do so outside the presence of students.

If a group of teachers wishes to meet for prayer or scriptural study in the faculty lounge during free time in the school day, most legal experts see no constitutional reason why they should not be permitted to do so, as long as the activity is outside the presence of students and does not interfere with their duties or the rights of other teachers.<sup>50</sup>

Teachers are permitted to wear unobtrusive jewelry, such as a cross or the Star of David. But teachers should not wear clothing with a proselytizing message (e.g., a “Jesus Saves” T-shirt).

When not on duty, of course, educators are free like all other citizens to practice their faith. But school officials must refrain from using their position in the public school to promote their outside religious activities.

### **42. May teachers wear religious jewelry in the classroom?**

Most experts agree that teachers are permitted to wear unobtrusive jewelry, such as a cross or a Star of David. But they should not wear clothing with a proselytizing message (e.g., a “Jesus Saves” T-shirt).

### **43. How should teachers respond if students ask them about their religious beliefs?**

Some teachers prefer not to answer the question, believing that it is inappropriate for a teacher to inject personal beliefs into the classroom. Other teachers may choose to answer the question directly and succinctly in the interest of an open and honest classroom environment.

Before answering the question, however, teachers should consider the age of the students. Middle and high school students may be able to distinguish between a personal conviction

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<sup>50</sup> See generally, McFarland, S. T. (1996). “A Religious Equality Amendment? The Necessity and Impact of the Proposed Religious Equality Amendment,” B.Y.U.L. Rev. 627; (2001).

and the official position of the school; very young children may not. In any case, the teacher may answer at most with a brief statement of personal belief — but may not turn the question into an opportunity to proselytize for or against religion. Teachers may neither reward nor punish students because they agree or disagree with the religious views of the teacher.

#### **44. May a teacher refuse to teach certain materials in class if she feels the curriculum infringes on her personal beliefs?**

Generally, teachers must instruct their students in accordance with the established curriculum. For example, the 9th Circuit ruled in 1994 against a high school biology teacher who had challenged his school district's requirement that he teach evolution, as well as its order barring him from discussing his religious beliefs with students. In the words of the court, "[a] school district's restriction on [a] teacher's right of free speech in prohibiting [the] teacher from talking with students about religion during the school day, including times when he was not actually teaching class, [is] justified by the school district's interest in avoiding [an] Establishment Clause violation."<sup>51</sup>

More recently, a state appeals court ruled again that a high school teacher did not have a First Amendment right to refuse to teach evolution in a high school biology class.<sup>52</sup> The teacher had argued that the school district had reassigned him to another school and another course because it wanted to silence his criticism of evolution as a viable scientific theory. The state appeals court rejected that argument, pointing out that the teacher could not override the established curriculum.

Other courts have similarly found that teachers do not have a First Amendment right to trump school district decisions regarding the curriculum.<sup>53</sup> One court wrote: "the First Amendment has never required school districts to abdicate control over public school curricula to the unfettered discretion of individual teachers."<sup>54</sup> More recently, the 4th Circuit ruled that a teacher had "no First Amendment right to insist on the makeup of the curriculum."<sup>55</sup>

*For more information, see chapter 5.*

<sup>51</sup> *Pelozo v. Capistrano Unified School Dist.*, 37 F.3d 517 (9th Cir. 1994), cert. denied, 515 U.S. 1173 (1995).

<sup>52</sup> *LeVake v. Independent School Dist. No. 656*, 625 N.W.2d 502 (Minn. App. 2001), cert. denied, 122 S. Ct. 814 (2002).

<sup>53</sup> *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972), cert. denied, 411 U.S. 972 (1973); *Webster v. New Lenox School Dist. No. 122*, 917 F.2d 1004 (7th Cir. 1990).

<sup>54</sup> *Kirkland v. Northside Independent School Dist.*, 890 F.2d 794 (5th Cir. 1989), cert. denied, 496 U.S. 926 (1990).

<sup>55</sup> *Boring v. Buncombe County Bd. of Education*, 136 F.3d 364 (4th Cir. 1998), cert. denied, 525 U.S. 813 (1998) (teacher had no First Amendment right to select particular play for students to perform).