# Teachers & Religion IN PUBLIC SCHOOLS

FOURTH EDITION


CENTER FOR LAW AND RELIGIOUS FREEDOM
CHRISTIAN LEGAL SOCIETY

WITH

CHRISTIAN EDUCATORS ASSOCIATION INTERNATIONAL

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# In the spirit of the First Amendment, we propose the following principles as civic ground rules for addressing conflicts in public education:

## I. RELIGIOUS LIBERTY FOR ALL

**Religious liberty is an inalienable right of every person.**

As Americans, we all share the responsibility to guard that right for every citizen. The Constitution of the United States with its Bill of Rights provides a civic framework of rights and responsibilities that enables Americans to work together for the common good in public education.

## II. THE MEANING OF CITIZENSHIP

**Citizenship in a diverse society means living with our deepest differences and committing ourselves to work for public policies that are in the best interest of all individuals, families, communities and our nation.**

The framers of our Constitution referred to this concept of moral responsibility as civic virtue.

## III. PUBLIC SCHOOLS BELONG TO ALL CITIZENS

**Public schools must model the democratic process and constitutional principles in the development of policies and curricula.**

Policy decisions by officials or governing bodies should be made only after appropriate involvement of those affected by the decision and with due consideration for the rights of those holding dissenting views.

## IV. RELIGIOUS LIBERTY AND PUBLIC SCHOOLS

**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, where appropriate, as an important part of a complete education.

*Sponsored jointly by:*

*The Freedom Forum*
*First Amendment Center*
*Christian Legal Society*
*Christian Educators Association International*
*and 17 other organizations.*

## V. THE RELATIONSHIP BETWEEN PARENTS AND SCHOOLS

**Parents are recognized as having the primary responsibility for the upbringing of their children, including education.**

Parents who send their children to public schools delegate to public school educators some of the responsibility for their children's education. In so doing, parents acknowledge the crucial role of educators without abdicating their parental duty. Parents may also choose not to send their children to public schools and have their children educated at home or in private schools. However, private citizens, including business leaders and others, also have the right to expect public education to give students tools for living in a productive democratic society. All citizens must have a shared commitment to offer students the best possible education. Parents have a special responsibility to participate in the activity of their children's schools. Children and schools benefit greatly when parents and educators work closely together to shape school policies and practices and to ensure that public education supports the societal values of their community without undermining family values and convictions.

## VI. CONDUCT OF PUBLIC DISPUTES

**Civil debate, the cornerstone of a true democracy, is vital to the success of any effort to improve and reform America's public schools.**

Personal attacks, name-calling, ridicule, and similar tactics destroy the fabric of our society and undermine the educational mission of our schools. Even when our differences are deep, all parties engaged in public disputes should treat one another with civility and respect, and should strive to be accurate and fair. Through constructive dialogue we have much to learn from one another.

**Our nation urgently needs a reaffirmation of our shared commitment, as American citizens, to the guiding principles of the Religious Liberty clauses of the First Amendment to the Constitution. The rights and responsibilities of the Religious Liberty clauses provide the framework within which we are able to debate our differences to understand one another, and to forge public policies that serve the common good in public education.**

THE TIME HAS COME FOR US TO WORK TOGETHER FOR ACADEMIC EXCELLENCE, FAIRNESS AND SHARED CIVIC VALUES IN OUR NATION'S SCHOOLS.

# MAKING A DIFFERENCE

## in America's classrooms

## OUR MISSION

The VISION of **Christian Educators Association International** is to demonstrate God's LOVE and TRUTH to the educational community. Our MISSION is to serve the educational community by encouraging, equipping and empowering Christians educators in public and private education.

### In pursuit of this mission, we:

- **Proclaim** God's Word as the source of true wisdom and knowledge,
- **Portray** teaching as a God-given calling and ministry,
- **Promote** educational excellence as an expression of Christian commitment,
- **Preserve** our Judeo-Christian heritage and values through education,
- **Provide** a forum on educational issues with a Christian world view.
- **Partner** with churches, parachurch organizations, educational institutions and parents.

Founded in 1953, **CEAI** is a professional organization of caring Christians who share a deep desire to touch others with God's love.

At regional and national conferences, local chapter meetings and other special events, members are exposed to creative ideas for becoming more Christ-like in the classroom. Valuable instruction is provided on a variety of topics, from current issues to hands-on Classroom activities.

FOR MORE INFORMATION ON MEMBERSHIP SEE PAGE 111

# Preface

Due to widespread misunderstanding of the true implications of the First Amendment, many well meaning educators and have overreacted in their response to religious issues in our public schools. In responding negatively and trying to create a religious free zone, they have actually been involved in religious discrimination or harassment.

Public school educators cannot use their positions to force their beliefs on their charges. However, they do not fully forfeit their First Amendment rights when they act in the role of a public employee, and they must respect the rights of religious expression of their students.

Many educators in public school, and especially Christian teachers, feel hopelessly caught in a maze of confusion over the status or position of religion in public schools. A host of questions emerge from teachers who want to provide their students with a solid liberal education which must include teaching about religion. Answers are needed for questions like: "Can a child pray at lunchtime in the school cafeteria? May a patriotic song which includes the name of God be used in a music class or school program? May a teacher use the Bible as a reference source in teaching? May the Christmas story be read from the Bible when teaching about this holiday? May a teacher explain the meaning of a religious holiday? May a teacher use religious art when teaching art in the classroom?"

Written with the educator in mind, this book will answer the basic questions that educators are raising. It is designed to assist teachers by using a set of symbols to indicate present practice for teachers in public schools:

**The traffic light** (symbol) indicates that it is certain to be permissible for the educator to carry out this practice or idea in public schools.


**A stop sign** (symbol) readily indicates that this practice, if carried out by an educator in public schools, would be fairly certain to be considered inappropriate or illegal.

**The caution sign** (symbol) tells the teacher the practice may be appropriate or legal but to proceed carefully. In other words, it indicates it would be easy to cross the line creating a situation that would be unconstitutional were the teacher to initiate it with public school students during the school day or while in a state-employed teaching situation on or off the school campus.

Finally, readers will find this book helpful even though they may disagree with the present position of the courts on certain issues. Please note that this book attempts to describe the rights and responsibilities of the teacher who is an agent of the state. Please also refer to the appendix for student rights on campus since they (the students) have full religious freedoms within the public schooling environment.

**Finn Laursen**
*Executive Director*
*Christian Educators Association International*
May, 2006

CHRISTIAN LEGAL SOCIETY

CHRISTIAN LEGAL SOCIETY ("CLS"), established in 1961, is a national membership organization of Christian attorneys, judges, law professors and law students. The Center for Law and Religious Freedom is a key ministry of CLS that provides legal information and court advocacy to protect Christians' free speech and free exercise of religion in cutting-edge religious liberty cases.

CLS served as the primary legal resource to members of Congress during the passage of the Equal Access Act of 1984, the federal law protecting secondary students' right to meet for prayer, Bible study, and other religious speech. For 25 years, CLS has fought to protect the right of equal access for students and community groups to public school facilities. Most recently, CLS secured the right of religious community groups to send informational fliers home to parents regarding religious after-school meetings for children on elementary school property.

CLS was a key drafter of Religion in the Public Schools: A Joint Statement of Current Law, which became the basis for the guidance letter issued by the United States Department of Education to clarify that certain religious expression is protected in the public schools. CLS also was a lead participant in the drafting of The Bible and Public Schools: A First Amendment Guide, published by the National Bible Association and First Amendment Center, which discusses the legally permissible use of the Bible in public school curricula and extracurricular activities. Working with groups across the spectrum, CLS has contributed to a number of guidelines on a variety of public school issues to assist school administrators, teachers, parents, and students to protect religious liberty in the public schools.

CLS has served as a primary legal resource to members of Congress to pass important religious liberty legislation, including the Religious Freedom Restoration Act in 1993, the Religious Liberty and Charitable Donation Protection Act in 1998, and the Religious Land Use and Institutionalized Persons Act in 2000.

CLS's website is at www.clsnet.org. Center staff may be reached by e-mail at clrf@clsnet.org or by phone at (703) 642-1070, ext. 3506. The address of its headquarters in metropolitan Washington, D.C., is 8001 Braddock Road, Suite 300, Springfield, Virginia 22151.

**Kimberlee Wood Colby, ESQ.**
*Senior Legal Counsel*

The information in this book is not legal advice nor intended to create any attorney-client professional relationship. As legal advice must be tailored to the specific circumstances of each case, nothing provided herein should be used as a substitute for advice of competent counsel. In addition, be aware that religious liberty law may vary considerably from jurisdiction to jurisdiction; some information in this book may not be applicable to your jurisdiction. An attorney should be consulted for specific advice on questions teachers, administrators or school board members may have on specific issues affecting teachers in the public school setting. Center staff may be reached by e-mail at clrf@clsnet.org or kcolby@clsnet.org, or by phone at (703) 642-1070, ext. 3506. The Center's headquarters is in metropolitan Washington, D.C., at 8001 Braddock Road, Suite 300, Springfield, Virginia 22151. Its website is at www.clsnet.org.

# Contents

# Teachers and Religion in the Public Schools

Teachers perform a critical role in the lives of their students. Christian teachers often wonder how they can incorporate their faith into this vital role.

This booklet is intended to give Christian teachers general guidance regarding the current status of the law respecting religion in the public schools. The guidance given is *general*. A teacher with a specific question should consult a lawyer about his or her specific concern. [1]

The answers given here must be *general* for the following reasons:

1. The American legal system is highly complex. Laws vary from state to state as well as within a state. Moreover, the collective bargaining agreement in a particular school district may give teachers contractual rights that they would not enjoy without the contract.
2. There have been relatively few cases involving teachers' religious activity in public schools--and most of those cases are not helpful to teachers. Many of the areas discussed below are unsettled, gray areas. These guidelines attempt to give an educated guess as to how a court would answer a particular question; however, no one can be completely certain in many of the areas what the answer would be.
3. Questions involving religion in the public schools are highly fact-specific. As judges constantly note, a change in one or two facts may change the outcome of any specific case. Facts that may seem unimportant may determine whether a practice is constitutionally permissible.

To make these guidelines easier to understand, we have coded the answers with one of three symbols. A traffic light indicates practices that are fairly certain to be allowed by courts. The stop sign indicates practices that are fairly certain to be prohibited by courts.

The exclamation point, which dominate these guidelines, signifies that a teacher needs to be careful, because the law is uncertain as to whether a teacher may do something. For example, a lower federal court may have issued an opinion prohibiting a certain practice, but it is unclear that decision is correct or that it would be followed by courts elsewhere. In these areas, the purpose of the guidelines is to give the teacher an understanding of the concerns that may be raised by a particular activity so that the teacher is aware of the possible problems he or she may encounter and may evaluate the risks involved. The information in this book is not legal advice nor intended to create any attorney-client professional relationship. As legal advice must be tailored to the specific circumstances of each case, nothing provided herein should be used as a substitute for advice of competent counsel. An attorney should be consulted for specific advice on a specific situation a teacher faces.

[1] A teacher may contact the Center for Law and Religious Freedom for further information about various issues discussed in these guidelines at (703) 642-1070 ext. 3506, 8001 Braddock Road, Suite 300, Springfield, Virginia 22151, by e-mail to kcolby@clsnet.org or to clrf@clsnet.org, or at the website www.clsnet.org. The Center often assists individuals who have experienced religious discrimination in the public schools.

# I. Brief Legal Background

A short discussion of the legal background for the guidelines may help a teacher better understand some of the answers given.

### A. The American legal system consists of multiple layers of laws that often vary from place to place.

There are federal laws, state laws, municipal laws, local school board policies, and contractual rights under the collective bargaining agreement or the individual teacher's contract. Sometimes federal laws trump all other laws; but at other times, federal rights are dependent on rights given by state laws, school board policies, or collective bargaining agreements.

**1. Federal laws** include court decisions, federal statutes, federal regulations, and federal guidelines. The federal courts include the United States Supreme Court, which issues relatively few decisions, as well as the 13 federal courts of appeals and 94 federal district courts. Federal cases begin in the district courts. Each state has at least one district court, although most states have more than one. A party that loses in the district court may appeal to the federal court of appeals. Each federal court of appeals covers several states, except the District of Columbia, which has its own court of appeals. A party that loses in the court of appeals may appeal to the Supreme Court; however, the Supreme Court chooses which cases it will hear, usually less than 100 cases a year. Perhaps 5 or 6 cases per year involve religion, public schools, or freedom of speech.

The Supreme Court's decisions are law throughout the country. The decisions made by federal courts of appeals are binding law only in the specific states under that particular court's jurisdiction. (Appendix D groups the states according to the courts of appeals' jurisdiction.) Similarly, the federal district court decisions are binding law only in the part of the state covered by that particular court.[2]

Other courts, however, often are influenced by a decision in another jurisdiction that has decided the same fact situation. Because most cases never reach the Supreme Court, the decisions of the courts of appeals can be influential beyond the states covered by a particular decision. On the other hand, a court may decide a case completely contrary to a decision by another court.

[2] A citation to a case tells what federal court of appeals or district court decided a case, which is the area in which the case is "the law." (The table in Appendix D lists the states comprised by each circuit.) The citation to a case gives the name of the case, followed by a volume number of a certain reporter series followed by a page number in that volume. In parentheses, the court is given and the year of the decision. If the case is a federal appellate court, the reporter series is "F.2d" or "F.3d" and in the parentheses the number of the circuit is indicated. For example, the citation Pope v. East Brunswick Board of Education, 12 F.3d 1244 (3d Cir. 1993), tells the name of the case (Ms. Pope sued the East Brunswick Board of Education) and that it was decided in 1993 in the Federal Third Circuit Court of Appeals, which governs Pennsylvania, New Jersey, and Delaware. The citation to "F. Supp." or "F. Supp.2d" indicates the decision is a federal district court decision. For example, the citation Youth Opportunities Unlimited v. Pittsburgh Board of Education, 769 F. Supp. 1346 (W.D. Pa. 1991), indicates the name of the case (a religious group Youth Opportunities Unlimited sued the Pittsburgh Board of Education) and that it was decided by the Federal District Court for the Western District of Pennsylvania in 1991.

In many of the answers below, only one court has ruled on a particular question. Other courts may follow that court's lead or may decide that court's decision was wrong. If the answer to a question says that the Supreme Court has decided a particular question in a particular way, then that decision applies across the country.[3] However, if a lower court has issued the decision, the decision may or may not be applied in the jurisdiction in which a teacher works.

At times, we will indicate that a lower court has said that something is impermissible for a teacher to do, but we think that the court was wrong. In those cases, a teacher should understand that we are saying that the court was wrong in our view. Nevertheless, the decision is "the law" in its jurisdiction and may be influential in courts outside its jurisdiction.

**2. Department of Education** Guidelines are referred to throughout this handbook, including guidelines from the Clinton Administration and the current guidelines of the Bush Administration. Although federal guidelines typically do not have actual legal force (that is, no one can be punished for not following them), they are highly influential with school administrators as indications of the correct legal course of action.

**The Bush Administration DOE Guidelines ("current Department of Education Guidelines")** were issued on February 28, 2003. Section 9524 of the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001, requires school districts to certify annually to the state, in order to receive federal funding, that "it has no policy that prevents, or otherwise denies participation in, constitutionally protected prayer in public schools." The DOE Guidelines explain what expression or conduct constitutes "constitutionally protected prayer in public schools." While guidelines generally do not have legal force, these guidelines are particularly important because seemingly they provide the measure by which the Department of Education will determine whether a school district is in compliance regarding constitutionally protected prayer in order to receive federal funding. The current Department of Education Guidelines are reprinted as Appendix A in the back of this handbook. Excerpts from the Guidelines will be included in the answers where appropriate.

**The Clinton Administration DOE Guidelines** were first issued in 1995 via a letter to the Nation's school superintendents entitled Religious Expression in Public Schools. They were reissued in 1998 and, without change, in 1999, and are reprinted in Appendix B. The Bush Guidelines supersede the Clinton Guidelines on several points. The Clinton Guidelines remain useful, however, because they address a few issues that the current Department of Education Guidelines do not. Also, the Clinton Guidelines may have a persuasive effect on some school administrators because a liberal administration agreed that many types of religious conduct and religious expression are constitutionally protected in the public schools. The Clinton Guidelines will be noted in footnotes to the answers as appropriate.

[3] Appendix E provides a short summary of the key cases regarding religion in the public schools decided by the Supreme Court.

The Clinton Administration's DOE Guidelines were based on a document entitled **Religion in the Public Schools: A Joint Statement of Current Law** (referred to as "Joint Statement"), reprinted in Appendix C. The Joint Statement discusses religious issues in the public schools and sets forth the areas of agreement on those issues that exist among diverse groups as to what the current state of the law in 1995 was on several issues. While the law in some areas may have become better defined since 1995, the Joint Statement is still helpful in showing school administrators that diverse groups, including many groups that are often in the forefront of attacking religious activity in the public schools, nevertheless agree that some religious conduct and expression is constitutionally protected in the public schools. The major groups drafting the Joint Statement, along with the Christian Legal Society, were: American Jewish Congress, American Civil Liberties Union, American Jewish Committee, American Muslim Council, Anti-Defamation League, Baptist Joint Committee, General Conference of Seventh-day Adventists, National Association of Evangelicals, National Council of Churches, People for the American Way, and Union of American Hebrew Congregations.[4]

**3. State laws** govern many educational situations because the states are primarily responsible for funding and directing education. State legislatures adopt laws for the state, and state agencies adopt regulations, policies, and guidelines for education within the particular state. State courts apply state laws and the state constitution *within* a particular state. Again, state courts in one state may be influenced by decisions by courts in a different state or may disregard those decisions. State attorney generals will sometimes issue advisory opinions regarding issues about religion in the public schools. The opinions are not legally binding on courts but can be influential in a particular state. These guidelines do not include state laws or attorney general opinions regarding teachers unless particularly noteworthy.

**4. Local laws** often affect teachers' rights. School boards adopt numerous policies that are very important in determining whether teachers have acted appropriately. The teachers' collective bargaining agreement may give teachers greater protection of their free expression or control over curricular questions than federal and state laws provide.

**Summary:** As a result of this diverse interplay of laws, it is impossible to give a *specific* answer to many questions teachers have about religious expression or activity in public schools; however, an educated estimate is often possible. The guidelines set out in this book are intended to give a teacher an educated estimate regarding possible courses of action in numerous situations. The purpose is to let the teacher make his or her own determination as to what action or expression he or she thinks is appropriate in a particular situation at a particular school, with an understanding of what problems may arise and how a court *might* view those problems.

[4] Reprinted in Appendix F are the Executive Guidelines on Religious Exercise and Religious Expression in the Federal Workplace (August 14, 1997). These guidelines only apply to federal workers. They also "principally address employees' religious exercise and religious expression when the employees are acting in the personal capacity within the Federal Workplace and the public does not have regular exposure to the workplace." Executive Guidelines at 1, Appendix F. Nonetheless, the Executive Guidelines may be helpful in understanding the approach the federal executive branch is taking toward certain religious activity by federal public employees.

Finally, when the current law seems too complex or even discouraging, *Galatians 5:22* offers sound encouragement:

> But the fruit of the Spirit is love, joy, peace, patience, kindness, goodness, faithfulness, gentleness, and self-control. *Against such things there is no law*.

### B. Seven Key Legal Concepts

There are seven main legal ideas that influence the permissibility of various religious activities or expression in the public schools. Courts often differ in the weight they give these ideas in deciding whether religious expression or activity in the public schools is protected. It is the interplay between these ideas that creates many of the gray areas in the law for teachers' religious activities and expression because different courts (and even judges within a particular court) sometimes weigh these factors very differently, causing a considerable difference in the outcomes of cases depending on the court or the judges hearing the case.

**1. Establishment Clause:** The First Amendment of the United States Constitution protects freedoms of speech and religion, as well as press and assembly. Its Religion Clause states that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." This protection of religious liberty has been interpreted to prohibit not only Congress, but any federal, state, or local government officials (including school administrators and teachers), from making a "law respecting an establishment of religion or prohibiting the free exercise thereof."

School officials, parents, and school attorneys often mistakenly believe that no religious expression may occur on public school campuses, which gives rise to many of the problems involving religious expression in the public schools. If a teacher respectfully provides materials, such as the DOE guidelines in Appendices A and B of this handbook, to the principal to explain that the specific religious expression does not violate the Establishment Clause, the problem sometimes may be resolved.

The critical idea is that the Establishment Clause applies only to *government* action; it does not prohibit *private* individuals from advancing, promoting or proclaiming religious ideas and expression. As the Supreme Court has emphasized:

> "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[5]

In applying the Establishment Clause, the courts are not always as careful as they should be to determine first whether the speaker of religious expression is the government or a private

[5] Board of Education v. Mergens, 496 U.S. 226, 250 (1990); Rosenberger v. University of Virginia, 515 U.S. 819 (1995); Good News Club v. Milford Central School, 533 U.S. 98 (2001). This distinction is detailed in the Bush Administration Guidelines' "Overview of Governing Constitutional Principles" in Appendix A. See also, Paragraph 1 under "Religious Expression in Public Schools" in the Clinton Administration Guidelines in Appendix B.

individual. Usually this is a fairly easy distinction to make. For example, students typically are private speakers.

When the speaker is a teacher, however, the distinction often is not easy. The courts have tended to treat a teacher as a government official, subject to Establishment Clause restrictions, rather than a private individual, exercising rights of freedom of speech and religion. There are times when a teacher should not be treated as a government official even though he or she is on school property, but instead should be treated as a private citizen expressing religious viewpoints.

Finally, each *state* constitution contains its own religious liberty protection, including a state establishment clause. Some states interpret their provisions to prohibit only what the federal Establishment Clause prohibits; other states, however, interpret their provisions to be more restrictive than the federal Establishment Clause. On rare occasions, these state provisions might be used to restrict teachers' religious activity even more than the federal Establishment Clause would. Courts have upheld the state's right to do so in certain circumstances and prohibited it in other circumstances.

**2. Freedom of Speech:** The Supreme Court has held that private individuals' religious speech is as protected by the First Amendment as any other type of speech.[6] Before 1983, several lower courts often ruled in favor of free speech and academic freedom rights of teachers in their classrooms. In 1969, the Supreme Court itself stated that students and teachers do not leave their First Amendment rights at the schoolhouse gate.[7] While those decisions have not been overruled, the courts have increasingly restricted teachers' freedom of expression at school.

Unfortunately, since 1983,[8] the Supreme Court increasingly has been restricting freedom of speech in government facilities, including schools. Rather than assuming that a person has a right to express himself in a government facility, the Supreme Court has created three tiers of government facilities. A private individual's freedom of expression is dependent on the type of forum involved. The three fora are described by the Court as follows:

1) In the **traditional public forum**, such as parks and streets, private persons may express their views without restriction because of content. Schools are *not* considered a traditional public forum.

2) In the **limited public forum**, the government has opened its facility to use by many private individuals or groups. Persons may have access to express their views without restriction due to content. Generally, a school during school hours is *not* a limited public

6 Widmar v. Vincent, 454 U.S. 263 (1981).

7 Tinker v. Des Moines Independent School District, 393 U.S. 503, 506 (1969).

8 Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983).

forum. However, at times, a school or a part of the school, such as the activity period, *may be* a limited public forum, if the school district has allowed its facilities to be used by many individuals or groups. For example, if a school has allowed groups of teachers to meet before school to discuss topics of interest to them, it may not prohibit teachers from meeting to discuss religious topics of interest to them.[9]

3) In the **nonpublic forum**, the government has restricted use of its facility by private individuals. The government may limit use to certain kinds of speakers (for example, only students) or certain topics of speech (for example, only education-related topics). The government may *not*, however, deny access to a nonpublic forum on the basis of the identity of the speaker, if similar speakers are allowed, or the *viewpoint* of the speaker's speech.[10] A school cannot pass a policy prohibiting discussion of a topic from a religious viewpoint, if it allows discussion of that topic from a nonreligious viewpoint, as long as the discussion cannot be fairly attributed to the school.[11] Generally, although not always, a school is considered a nonpublic forum during school hours.

Recently, a few courts have not attempted to categorize the school facility as limited public forum or nonpublic forum. These courts have determined that the particular teacher's expression at issue is not private speech at all but simply the **government's own speech**. If the speech is the government's speech, there is no first amendment protection for it, and the government can put any limits it wants on its own speech.[12]

**3. Freedom from Viewpoint Discrimination:** The government cannot censor private speech because of its viewpoint if other private speech on the topic is allowed. Three landmark Supreme Court decisions have applied this prohibition of viewpoint discrimination to require educational institutions to allow religious expression by students or community groups. These three decisions are the basis for most victories for private religious expression in the public schools.

In 1993, the Supreme Court ruled that a school could not deny a church access in the evening to a school auditorium to show a film with religious content.[13] Because the school district had allowed other groups access to its facilities to discuss family issues, the school district could not prohibit the church from showing a film series that addressed family issues from a religious perspective. Even assuming that the school auditorium was a nonpublic forum, the school district had violated the free speech prohibition on viewpoint discrimination by its discriminatory treatment of religious expression. The Supreme Court rejected the school

9 In May v. Evansville, 787 F.2d 1105 (7th Cir. 1986), the court denied teachers access for before-school religious meetings because teachers had not shown that other teacher groups were meeting; however, the court suggested that teachers would have the right to meet for religious speech if other meetings were permitted.

10 Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993).

11 Id.

12 These few decisions have relied upon a Supreme Court decision in Rust v. Sullivan, 500 U.S. 173 (1991), which did not involve a teacher's speech but instead allowed the government to prohibit use of federal funds by physicians or nurses to counsel patients in favor of abortion.

13 Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993)

district's claim that the Establishment Clause would be violated by the religious community group's use.

In 1995, the Supreme Court ruled that a public university could not deny student activity fee funds to a religious student group that published a magazine from an evangelical Christian viewpoint.[14] Again, this was unconstitutional viewpoint discrimination despite the university's claim that funding a religious student group would violate the Establishment Clause.

In 2001, the Supreme Court ruled that a school district could not deny Child Evangelism Fellowship equal access after school for its Good News Club meetings for elementary school-aged children.[15] Child Evangelism Fellowship requires that every child must have a permission slip signed by her parent in order to attend the meetings, which are led by volunteers. The Supreme Court required access for Good News Clubs because their meetings address issues of moral development in children from a religious viewpoint, and the school district allowed other groups to meet that assisted the moral development of children, such as the Scouts. The Supreme Court rejected the school district's claim that the Establishment Clause required it to deny access for religious meetings immediately after school in elementary school facilities.

These decisions should mean that a teacher's religious expression may not be singled out for discriminatory treatment simply because it is religious.[16] Some decisions restricting teachers' religious expression were issued before the Supreme Court decisions protecting religious expression from viewpoint discrimination. However, some courts have continued to restrict teachers' religious expression, despite a viewpoint discrimination argument, because the judges mistakenly believe the Establishment Clause concerns created by teachers' religious expression justify the school officials' viewpoint discrimination.

**4. Curricular control by school administrators:** Increasingly, some courts simply decide that school administrators' control over the curriculum justifies their decisions to stifle religious expression. The courts often balance teachers' free speech claims against the authority of school administrators to control the curriculum. The Supreme Court increased school administrators' authority to restrict student speech in curricular settings in a 1988 decision, Hazelwood v. Kuhlmeier.[17] School officials may regulate students' speech for any legitimate pedagogical reason, if the speech is attributable to the school or is an activity that is part of the school curriculum.

Although the Hazelwood decision involved student expression in the school newspaper, several courts have read it broadly to permit school officials to control teachers' expression in

14 Rosenberger v. University of Virginia, 515 U.S. 819 (1995).

15 Good News Club v. Milford Central School, 533 U.S. 98 (2001).

16 The Supreme Court decision in Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993), states that the Free Exercise Clause is violated if the government prohibits conduct done for religious reasons while allowing the same conduct done for secular reasons. Thus, viewpoint discrimination against religious perspectives also violates the Free Exercise Clause.

17 484 U.S. 260 (1988).

the classroom. This is particularly important regarding two issues concerning teachers and religious expression in the classroom.

First, religious materials may be taught in the curriculum where appropriate in an objective manner. In other words, a teacher might conclude that religious material could appropriately be used in particular lessons. However, if school officials prohibit the use of those materials, that prohibition would almost certainly be upheld in court, even though the use of the religious materials was constitutionally permissible and appropriate. This is true of both religious and nonreligious materials. That is, courts also would be likely to uphold school administrators' prohibition of the use of nonreligious curricular materials as well.

Second, the authority to control curriculum has been interpreted by several courts to include the ability of school officials to limit teachers' classroom comments on a variety of issues, including religious issues. That is, even if the comments themselves were constitutionally permissible, several courts have upheld the authority of school officials to limit such comments as part of their authority to control the curriculum.

**5. Public employees' speech rights:** In its 1969 Tinker decision, the Supreme Court stated that teachers retain First Amendment rights in school.[18] One year earlier, in Pickering,[19] the Supreme Court reversed a school district's dismissal of a teacher for his letter to the community newspaper regarding school officials' handling of a school bond referendum. The Supreme Court ruled that a teacher could not be discharged for this exercise of his freedom of speech.

Although the Pickering test initially was used to protect teachers' freedom of speech, it subsequently has become a test more often used to limit teachers' freedom of expression. Essentially, only speech on a topic of "public concern" is protected; the definition of "public concern" is often unclear, although some courts have found religious speech to be addressing matters of public concern.[20] Moreover, even if the speech involves a matter of "public concern," the public employee's free speech right may be outweighed by the government's interest in the efficiency and harmony of the workplace. Basically, the judge determines whether the employee's free speech interest is stronger than the government's interest in the efficiency of its workplace.[21]

18 Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969).

19 Pickering v. Board of Education, 391 U.S. 563 (1968). See also, Mount Healthy Board of Education v. Doyle, 429 U.S. 274 (1977)(teacher could not be discharged if substantial motive in discharge was exercise of First Amendment rights where teacher had discussed school policy with radio station).

20 See, e.g., Tucker v. California Department of Education, 97 F.3d 1204, 1210 (9th Cir. 1996); Nichol v. Arin Intermediate Unit 28, 268 F.Supp.2d 536 (W.D. Pa. 2003).

21 See Appendix F for the Executive Guidelines on Religious Exercise and Religious Expression in the Federal Workplace (August 14, 1997), for a more complete discussion of federal public employees' religious expression and religious exercise.

**6. Free Exercise of Religion:** At present, the constitutional right of free exercise of religion is relatively weak.[22] The freedom of speech gives religious expression more protection. Current Supreme Court caselaw allows the government to regulate religious conduct to the same degree it may regulate secular conduct.[23] However, government is still prohibited from discriminating against religious conduct. Basically, the Free Exercise Clause is violated if the government prohibits conduct done for religious reasons while allowing the same conduct done for secular reasons.[24]

**7. State Religious Freedom Restoration Acts:** In 1990, the Supreme Court diminished the constitutional protection of free exercise of religion.[25] In response, Congress passed a law, the Religious Freedom Restoration Act (called "RFRA"), to restore protection of religious liberty by requiring that an individual be exempted from a law that infringes his or her free religious exercise unless the government demonstrates a compelling state interest in forcing the individual to comply with the law. The Supreme Court has ruled that law requires exemption only from federal laws, not from state or local laws.[26] However, several state legislatures have passed Religious Freedom Restoration Acts for their individual states.

If a teacher lives in a state that has passed a state Religious Freedom Restoration Act, or similar legislation, the government may not restrict the teacher's religious conduct or expression without demonstrating that it has a compelling interest in regulating the religious conduct or expression that cannot be achieved by a less restrictive means. Such a statute may strengthen the protection of a teacher's religious conduct or expression in that particular state, although it is possible the courts might decide that school administrators' rationale for restricting the religious conduct or expression is a compelling one.[27]

22 There are exceptions to this statement. For example, a federal appellate court ruled that a school district violated a principal's free exercise right to educate his children at home when it reassigned him to a teaching position because his family homeschooled. Peterson v. Minidoka County School District, 118 F.3d 1351 (9th Cir. 1997); Barrow v. Greenville Independent School District, 332 F.3d 844 (5th Cir. 2003)(same for teacher who was denied assistant principal position because her children attended a private school).

23 Employment Division v. Smith, 494 U.S. 872 (1990).

24 Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

25 Employment Division v. Smith, 494 U.S. 872 (1990).

26 Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, ---- 546 U.S.---, 126 S.Ct. 1211 (2006)(RFRA requires federal government to demonstrate a compelling interest before forcing individuals to comply with a law that restricts their free exercise of religion); City of Boerne v. Flores, 521 U.S. 507 (1997)(Congress did not have the constitutional power to apply RFRA to state and local governments).

27 The states with a state Religious Freedom Restoration Act include: Alabama (state constitutional provision), Arizona, Connecticut, Florida, Idaho, Illinois, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Texas. Utah has a law similar to RFRA regarding students' rights. Utah Stat. 53A-13-101.3.

## II. Specific Issues Public School Teachers May Face


**A. Teachers may not lead their classes in prayer, Bible reading, or other devotional religious activity. Teachers may not avoid this prohibition by allowing students to lead the class in prayer, devotional Bible reading, or other devotional religious activity.**

***Comment:*** *The courts consistently have prohibited teachers from leading classes in prayer, Bible reading, or other devotional religious activity. Teachers may not avoid this restriction by allowing student volunteers to lead the class in a devotional religious activity. As discussed in Section P, a teacher may include religious material in the curriculum if it is taught in an objective manner and is relevant to the curriculum. As discussed in Section P.3.e, students may include religious material in their assignments and classroom remarks.*

The United States Supreme Court has issued several decisions prohibiting devotional religious activity as part of the school curriculum. In the "school prayer" decision of 1962, the Court said that the government may not write prayers for students to recite, even if the prayers were nonsectarian or nondenominational and even if students were not required to participate in the recitation.[28] In the 1963 "school prayer" decisions, the Supreme Court ruled that school officials could not have students recite the Lord's Prayer or listen to daily Bible readings at the beginning of classroom instruction.[29] The Court also held that teachers may not seek student volunteers to lead classroom devotional exercises as part of the daily curricular activities of the school.[30]

Lower state and federal courts have prohibited teachers from leading a variety of classroom devotional activities. For example, a court struck down a Florida school district's resolution calling for a five to seven minute morning exercise in every school to consist of "a period of meditation which shall include the opportunity for individual prayer and Bible reading or devotional or meditation presented by groups or organizations or an individual."[31] A Mississippi federal court struck down a school's practice of allowing the broadcast of morning prayer over the school intercom, even though the school claimed it was merely allowing a student group to engage in religious expression over the intercom.[32] The court also struck down the school's practice of allowing organized, vocal prayer in classrooms during instructional time. A federal court of appeals struck down a school district policy allowing student volunteers to read devotionals over the school public address system.[33] A teacher's

28 Engel v. Vitale, 370 U.S. 421 (1962).

29 Abington School District v. Schempp, 374 U.S. 203 (1963).

30 Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), aff'd, 455 U.S. 913 (1982)(teacher asked for student volunteer to lead class in prayer at beginning of each schoolday).

31 Meltzer v. Board of Public Instruction of Orange County, Florida, 548 F.2d 559, 561 (5th Cir. 1977), aff'd, 577 F.2d 311 (5th Cir. 1978)(en banc).

32 Herdahl v. Pontotoc County School District, 933 F. Supp. 582 (N.D. Miss. 1996).

33 Hall v. Board of School Commissioners of Conecuh County, 656 F.2d 999 (5th Cir. 1981).

discharge for opening class with the Lord's Prayer, or his own prayer, and a Bible reading was upheld.[34] A court ruled that a teacher had violated the Establishment Clause by daily asking at the beginning of class whether students had prayer requests. After students articulated requests, the teacher opened a moment of silence with "let us pray" and closed with "amen," which led the court to hold the practice unconstitutional.[35]


### B. A principal may not include prayers in mandatory teachers' meetings.

The Eighth Circuit ruled that the Establishment Clause was violated when school officials conducted prayers at mandatory teacher meetings and in-service training.[36] Giving the offended teacher the option of not attending did not cure the Establishment Clause violation.

A federal district court in Michigan, however, refused to prohibit a public school's inclusion of a guest speaker, a minister who addressed the topic of moral absolutes, in one session of a mandatory in-service training day that teachers were required to attend.[37]

### C. The inclusion of "under God" in the Pledge of Allegiance is under challenge.

***Comment:*** *Many believe that the Supreme Court eventually will hold the phrase "under God" permissible; however, teachers should carefully follow their school district's policy in leading the Pledge of Allegiance. Regardless of how the Court rules on the inclusion of "under God" in the pledge, students have a free speech right not to participate in the Pledge of Allegiance and may not be criticized or disciplined for refusing to recite the Pledge.*

Classroom recitation of the Pledge of Allegiance has been the focus of lawsuits raising three distinct issues for teachers. The first issue is whether the phrase "under God" violates the Establishment Clause by requiring students to affirm a religious belief as part of the school curriculum. In a highly publicized Supreme Court case in 2004, a California father challenged a school district's policy requiring teachers to lead their classes in daily recitation of the Pledge of Allegiance.[38] The father claimed that the words "under God" violated the Establishment Clause and, therefore, was the equivalent of requiring his daughter, an elementary school student, to participate in a religious activity as part of the school curriculum. In the end, the Supreme Court did not decide whether "under God" violated the Establishment Clause because the student's mother, not the father, had legal custody for purposes of making decisions about the child's participation in lawsuits and, therefore, the case should not have been heard by the federal courts.

[34] Fink v. Board of Education, 442 A.2d 837 (Pa. Cmwlth. 1982), app. dismissed, 460 U.S. 1048 (1983). Because the Supreme Court disposed of the case by dismissing the appeal for want of a substantial federal question, courts outside of Pennsylvania may assume the Supreme Court agreed with the Pennsylvania court's decision.

[35] Holloman v. Harland, 370 F.3d 1252 (11th Cir. 2004).

[36] Warnock v. Archer, 380 F.3d 1076 (8th Cir. 2004).

[37] Daugherty v. Vanguard Charter School Academy, 116 F. Supp.2d 897, 912 (W.D. Mich. 2000).

[38] Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004).

When the Supreme Court hears a challenge to "under God" again in the near future, many believe it will rule that the use of "under God" is constitutionally permissible. In 2005, the Fourth Circuit ruled that "under God" in the Pledge of Allegiance did not violate the Establishment Clause because the Pledge of Allegiance is a patriotic exercise that includes a religious expression, but is not itself a religious exercise.[39] The Fourth Circuit relied on the numerous times various Supreme Court justices have expressed the view that "under God" is permissible. Similarly, in 1992, the Seventh Circuit held the Pledge of Allegiance did not violate the Establishment Clause.[40] A federal district court in Sacramento, California, has ruled that the Pledge violates the Establishment Clause, but it agreed not to prevent recitation of the Pledge pending an appeal to the Ninth Circuit, which has not heard the case as of May 2006.[41]

The second issue is whether teachers may discipline students for refusing to participate in the Pledge of Allegiance. In 1943, at the height of World War II, the Supreme Court held that school districts may not require students to recite the Pledge of Allegiance. The objecting students had been threatened with expulsion for refusing to salute the flag because their religious beliefs equated the flag salute with idol worship in violation of the Second Commandment. The Court ruled that students who refused to salute the flag for either religious *or* nonreligious reasons must be allowed not to participate in the flag salute because freedom of speech protects the right *not* to speak.

In a recent Eleventh Circuit decision, a teacher and principal were sued by a student because they disciplined the student for refusing to recite the Pledge of Allegiance, which the teacher was required to lead on a daily basis under state law and school district policy, and for raising his fist during the Pledge.[43] The Court ruled the student had a free speech right to refuse to recite the Pledge and to raise his fist during the Pledge if no disruption occurred. Other students' complaints were not considered a significant disruption. The principal and teacher had disciplined the student by chastising him in class and in the principal's office, calling the student's parent, assigning detention, and administering corporal punishment.

In a recent Third Circuit decision, the court struck down a state law that required school officials to notify parents of students who did not recite the Pledge or salute the flag. The court viewed the law as unconstitutionally viewpoint discriminatory.[44] Older Third Circuit, Second Circuit, and Fifth Circuit decisions held unconstitutional requiring students to stand during the Pledge.[45]

39 Myers v. Loudoun Cty. Pub. Sch., 418 F.3d 395 (4th Cir. 2005).

40 Sherman v. Community Consol. Sch. Dist. 21, 980 F.2d 437, 445-48 (7th Cir. 1992).

41 Newdow v. The Congress of the United States of America, 383 F.Supp.2d 1229 (E.D. Cal. 2005).

42 West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).

43 Holloman v. Harland, 370 F.3d 1252 (11th Cir. 2004).

44 The Circle School v. Pappert, 381 F.3d 172 (3rd Cir. 2004).

45 Lipp v. Morris, 579 F.2d 834 (3rd Cir. 1978); Goetz v. Ansell, 477 F.2d 636 (2d Cir. 1973); Banks v. Board of Pub. Instruction of Dade County, 314 F. Supp. 285 (S.D. Fla. 1970), aff'd 450 F.2d 1103 (5th Cir. 1971).

The third issue is whether a teacher must lead the Pledge of Allegiance if the teacher has religious or political scruples against leading the Pledge. The Seventh Circuit ruled that states may require teachers to lead the Pledge as part of the curriculum and upheld the dismissal of a kindergarten teacher who refused to lead the Pledge due to her religious beliefs that were violated by patriotic exercises.[46] The Second Circuit ruled that a high school art teacher could not be disciplined for refusing to say the Pledge while another instructor led the class in the Pledge.[47]

**D. A moment of silence is probably constitutional if school officials do not encourage students to use the time to pray.**

***Comment:*** *A policy allowing or requiring a moment of silence at the beginning of the school day is impermissible if the purpose of the policy is to endorse prayer. If the purpose of the policy is to provide a moment of silence for students to use as they wish, including to pray, the policy is probably permissible.*

*Teachers may be required to implement a moment of silence law. If the school district has a policy allowing for a moment of silence, the teacher must be careful in his or her introduction of the moment of silence not to indicate to the students that they may or may not pray during the moment of silence. The teacher may pray silently but should not draw attention to what he or she is doing.*

In 1985, the Supreme Court ruled that Alabama violated the Establishment Clause when it amended its "moment of silence" law to refer explicitly to prayer as an option for students to consider during the moment of silence.[48] Nonetheless, the Supreme Court suggested that a moment of silence law could be constitutional if it did not promote prayer but simply provided a moment of silence for students to observe by doing what they chose.

Lower courts have recognized the distinction between a moment of silence policy encouraging prayer and one that is neutral about the use to which students put the moment of silence. For example, in 1997, the Eleventh Circuit held that Georgia's moment of silence law did not violate the Establishment Clause.[49] The law had a clearly secular legislative purpose of providing students with a moment of quiet reflection to think about the upcoming day. The court warned that "[t]eachers should not suggest that students use the moment of quiet reflection for prayer....[I]f students ask if they can pray during the moment of quiet reflection, the teacher should tell the students that they may pray silently if they wish."[50] A teacher was terminated for *refusing* to have his class observe a moment of silence that was required by state law.[51]

46 Palmer v. Board of Education, 603 F.2d 1271 (7th Cir. 1979).

47 Russo v. Central Sch. Dist. No.1, 469 F.2d 623 (2d Cir. 1972).

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

49 Bown v. Gwinnett County School District, 112 F.3d 1464 (11th Cir. 1997).

50 Id. at 1472.

51 Id.

However, in another Eleventh Circuit case, the court ruled that a teacher violated the Establishment Clause when she conducted a daily moment of silence by asking for prayer requests, opening the moment of silence with "let us pray," and closing by saying "amen."[52] The teacher had overstepped the required neutrality by conducting the moment of silence as a prayer session.

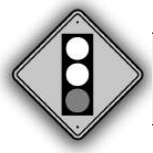
In 2001, the Fourth Circuit upheld a Virginia statute requiring a school to provide a daily observance of a minute of silence in every classroom.[53] The statute gave teachers responsibility for ensuring the students remained seated and silent. The state department of education suggested that teachers simply say, "As we begin another day, let us pause for a moment of silence." The moment of silence was not to be conducted as a religious service or exercise.[54] Teachers might inform students that they could engage in meditation, prayer or any other silent activity, as long as they did not encourage prayer.[55]

The Fifth Circuit held unconstitutional the Louisiana legislature's revision of a moment of silence statute that deleted the word "silent" before "prayer" with the purpose of allowing vocal prayer in classrooms.[56] The implication is that the moment of silence statute was constitutional before the deletion of the word "silent."

In 1965, a federal district court in Michigan permitted "a few moments of silence set aside for private meditation at the start of [the lunch] period."[57]

The current Department of Education Guidelines state:

> If a school has a 'minute of silence' or other quiet periods during the school day, students are free to pray silently, or not to pray, during these periods of time. Teachers and other school employees may neither encourage nor discourage students from praying during such time periods.[58]



**E. Secondary students may conduct meetings for prayer, Bible study, worship and other religious expression on public school property.**

***Comment:*** *Federal law (the Equal Access Act[59]) protects the right of public secondary school students to meet for prayer, Bible study, worship and other religious speech on public school campuses on the same basis as other student groups are allowed to meet. The Equal Access Act protects the right of students to meet for religious speech. Students, not teachers, should initiate the meetings and go through the administrative approval process.*

52 Holloman v. Harland, 370 F.3d 1252 (11th Cir. 2004).

53 Brown v. Gilmore, 258 F.3d 265 (4th Cir. 2001).

54 Id. at 272-273.

55 Id. at 271, 278.

56 Doe v. School Board of Ouachita Parish, 274 F.3d 289 (5th Cir. 2001).

57 Reed v. Van Hoven, 237 F. Supp. 48, 55 (W.D. Mich. 1965).

58 Department of Education Guidelines, "Moments of Silence," in Appendix A.

59 20 U.S.C. 4071, et seq.

The federal Equal Access Act requires public secondary schools to permit students to meet for religious speech, including prayer, Bible study, and worship, on the same basis as other noncurriculum-related student groups. The Supreme Court has ruled that student religious meetings on public secondary school campuses do not violate the Establishment Clause.[60]

The Equal Access Act is triggered if the school allows at least one noncurriculum-related student group to meet. (Most schools have at least one noncurriculum-related student group meeting.) The Supreme Court has ruled that a secondary school may not manipulate its definition of "noncurriculum-related" in order to prohibit a religious student group from meeting.[61]

Students, rather than teachers, should initiate student religious meetings and obtain permission to meet from school administrators. The Equal Access Act speaks in terms of teachers being present at student religious meetings in a nonparticipatory capacity. The wisest course of action is for a teacher to assume a nonparticipatory role although that assumption is beginning to change, as discussed below in Section G.

The current Department of Education Guidelines state:

> Students may organize prayer groups, religious clubs, and "see you at the pole" gatherings before school to the same extent that students are permitted to organize other non-curricular student activities groups. Such groups must be given the same access to school facilities for assembling as is given to other non-curricular groups, without discrimination because of the religious content of their expression….School authorities may disclaim sponsorship of non-curricular groups

60 Board of Education v. Mergens, 496 U.S. 226 (1990).

61 Id. at 244-45(Supreme Court rejected school district's claim that all student groups were "curriculum-related"). School districts that have claimed the Equal Access Act did not apply in their schools because they did not allow noncurriculum-related groups to meet have lost in court. The courts have found that at least one group meeting at the schools was noncurriculum-related for purposes of the Act. See Garnett v. Renton School District, 987 F.2d 641 (9th Cir. 1993); Pope v. East Brunswick Board of Education, 12 F.3d 1244 (3d Cir. 1993).

Occasionally, a school district has tried to use the Equal Access Act to justify a devotional religious activity that school officials want to promote. Those efforts have also failed. For example, a school district tried to justify allowing a religious student group to lead the school in prayer at the beginning of the school day over the intercom. The court held the practice unconstitutional when the court found that only the religious student group was being allowed to broadcast its substantive message over the intercom. Herdahl v. Pontotoc County School District, 933 F. Supp. 582 (N.D. Miss. 1996). See also, Doe v. Duncanville Indep. Sch. Dist., 994 F.2d 160 (5th Cir. 1993)(coach leading team in prayer at games and practices was not protected by the Equal Access Act). Religious student groups are allowed to use the intercom like other student groups. Mergens, 496 U.S. at 247. However, they may not lead the school in prayer over the intercom.

and events, provided they administer such disclaimers in a manner that neither favors nor disfavors groups that meet to engage in prayer or religious speech.[62]

Lower courts have upheld secondary school students' equal access rights under the Equal Access Act on several issues:

1. A school cannot evade compliance with the Act by requiring all student groups to be faculty-initiated or by creating two tiers of non-curriculum related student groups with the religious group assigned to the tier receiving less access. The student religious group still has a right to meet and enjoy the benefits official recognition accords other noncurriculum-related student groups.[63]

2. If other noncurriculum-related student groups are allowed to meet during lunch time, an activity period, or other noninstructional time during the school day, the student religious group must be allowed to meet then as well.[64]

3. School officials must comply with the federal Equal Access Act even if state law could be interpreted to prohibit student religious meetings.[65]

4. School officials may not prohibit a religious student group from requiring that its key officers share its religious viewpoints.[66]

5. Religious student groups must be given access to channels of communication available to other student groups to announce their activities, including the time and place of their

62 Department of Education Guidelines, "Organized Prayer Groups and Activities," in Appendix A. The Clinton DOE Guidelines also discuss the right of students to meet pursuant to the Equal Access Act. See Clinton DOE Guidelines, "The Equal Access Act," in Appendix B.

63 Prince v. Jacoby, 303 F.3d 1074 (9th Cir. 2002); Pope v. East Brunswick, 12 F.3d 1244 (3d Cir. 1993).

64 Donovan v. Punxsutawney Area School District, 336 F.3d 211 (3d Cir. 2003)(Equal Access Act required access for student religious group to activity period during the school day); Prince v. Jacoby, 303 F.3d 1074 (9th Cir. 2002)(Free Speech Clause required access for religious student group to a study hall class period during which other student groups met); Ceniceros v. Board of Trustees of the San Diego Unified School District, 106 F.3d 878 (9th Cir. 1997)(Equal Access Act required access for religious student group to lunch period when other student groups met). See also Clinton Guidelines "Equal Access Act," Appendix B, agreeing that the right to meet includes lunch-time, recess, and noninstructional time during the school day, as well as before and after the school day.

65 Garnett v. Renton School District, 987 F.2d 641 (9th Cir. 1993); Pope v. East Brunswick Board of Education, 12 F.3d 1244 (3d Cir. 1993).

66 Hsu v. Roslyn Union Free School District, 85 F.3d 839 (2d Cir. 1996).

meetings. These channels of communication include the public address system, bulletin boards, the school newspaper, and the yearbook.[67] The current Department of Education Guidelines reiterate this right.[68]

6. Religious student groups must be given access to a student activities fund from which various student groups receive funding. The religious group also must be given access to other fundraising opportunities open to student groups, such as a craft fair and auction, as well as the ability to hold candy sales and car washes.[69]

The principles discussed in Sections E, F, and G should apply to "See You at the Pole" observances as well. The current Department of Education Guidelines include "see you at the pole gatherings before school" in its discussion of students' right to meet for prayer.[70]

The current Department of Education Guidelines also reinforce the fact that the right of students to pray is not limited to situations governed by the Equal Access Act. The Guidelines note:

> Students may pray when not engaged in school activities or instruction, subject to the same rules designed to prevent material disruption of the educational program that are applied to other privately initiated expressive activities. Among other things, students may read their Bibles or other scriptures, say grace before meals, and pray or study religious materials with fellow students during recess, the lunch hour, or other non-instructional time to the same extent that they may engage in nonreligious activities. While school authorities may impose rules of order and pedagogical restrictions on student activities, they may not discriminate against student prayer or religious speech in applying such rules and restrictions.[71]

67 Mergens v. Board of Education, 496 U.S. 226, 247 (1990); Prince v. Jacoby, 303 F.3d 1074 (9th Cir. 2002); Pope v. Board of Education, 12 F.3d 1244 (3rd Cir. 1993).

68 The Department of Education Guidelines state:
School authorities possess substantial discretion concerning whether to permit the use of school media for student advertising or announcements regarding non-curricular activities. However, where student groups that meet for nonreligious activities are permitted to advertise or announce their meetings—for example, by advertising in a student newspaper, making announcements on a student activities bulletin board or public address system, or handing out leaflets—school authorities may not discriminate against groups who meet to pray.
Department of Education Guidelines, "Organized Prayer Groups and Activities," in Appendix A.

69 Prince v. Jacoby, 303 F.3d 1074 (9th Cir. 2002), which applied Rosenberger v. University of Virginia, 515 U.S. 819 (1995), in which the Supreme Court required a public university to fund an evangelical Christian publication when it funded numerous other student publications from a student activity fees fund.

70 Department of Education Guidelines, "Organized Prayer Groups and Activities," in Appendix A. See also, Clinton DOE Guidelines, "Student Prayer and Religious Discussion," in Appendix B, agreeing that students may participate in "see you at the pole" gatherings.

71 Department of Education Guidelines, "Prayer During Noninstructional Time," in Appendix A. See Clinton DOE Guidelines, "Student Prayer and Religious Discussion," in Appendix B.

**F. Community groups may conduct after school meetings for elementary students that include prayer, Bible study, worship and other religious expression on public school property.**

***Comment:*** *The Equal Access Act does not apply at the elementary school level. Instead, the Supreme Court has ruled that the First Amendment's Free Speech Clause protects the right of elementary school students to meet with parental permission for religious meetings after school in groups led by members of the community or by parents. These groups must be given equal access on the same basis as other community groups or parent-led groups have access to school facilities after school.*

Religious community groups must be given equal access on the same basis as other community groups or parent-led groups have access to elementary school facilities after school for meetings with students.[72] In 2001, the Supreme Court held that Good News Clubs, sponsored by a private organization called Child Evangelism Fellowship[73], had to be given after-school access to elementary school classrooms if other community groups, such as Scouts, were allowed access. The Court ruled that elementary students could understand that the school was treating the religious group like other community groups and was not giving it preferential treatment.

The fact that Child Evangelism Fellowship requires written parental consent for every child attending its after-school clubs has been an important factor in the numerous court decisions

72 Good News Club v. Milford Central School, 533 U.S. 98 (2001). *See also*, Good News/Good Sports Club v. School District of the City of Ladue, 28 F.3d 1501 (8th Cir. 1994)(parent-led student group had a free speech right to meet for religious activity on school property immediately after school on the same basis as the Boy Scouts were allowed to meet). In Sherman v. Community School District, 8 F.3d 1160 (7th Cir. 1993), an atheist challenged the practice of an elementary school allowing the Cub Scouts to use school facilities to meet after school even though the Scouts required its members to affirm belief in a Higher Being. The court ruled that the meetings did not violate the Establishment Clause. The court also approved the school's practice of distributing literature about the Scouts' meeting to students.

73 Child Evangelism Fellowship and Good News Clubs are registered trademarks used by a ministry that has been running religious clubs for children for nearly 75 years. Child Evangelism Fellowship provides training for volunteers who wish to start Good News Clubs in their local public schools, churches, or neighborhoods. For more information, contact Child Evangelism Fellowship's headquarters at P.O. Box 348, Warrenton, Missouri 63383-0348, telephone (636) 456-4321, or visit their website at http://www.cefonline.com.

upholding access for Child Evangelism Fellowship.[74] Concerns that a religious group will pressure children to attend or that children will believe the school endorses the religious content of the meetings are ameliorated by the fact that the child's parent, not the child, makes the actual decision whether the child will attend.

Schools may distribute literature giving students information to take home to their parents about such activities on the same basis that the school distributes information about other student or community group activities. While teachers should not initiate distribution of religious groups' informational materials, schools must distribute religious groups' informational materials on the same basis as the school distributes materials for other groups, even where the schools use the teachers to distribute fliers to the students to take home to parents.[75]

Finally, it should be noted that the current Department of Education Guidelines regarding students' right to "pray when not engaged in school activities or instruction" do not distinguish between elementary and secondary school students. Thus, the current Department of Education Guidelines instruct that "students may read their Bibles or other scriptures, say grace before meals, and pray or study religious materials with fellow students during recess, the lunch hour, or other non-instructional time to the same extent that they may engage in nonreligious activities."[76]

74 Good News Club v. Milford Central School, 533 U.S. 98 (2001)(elementary school must give religious group equal access to after school facilities); Child Evangelism Fellowship of New Jersey v. Stafford Township Sch. Dist., 386 F.3d 514 (3d Cir. 2004)(school district must distribute information for religious group's after school meetings on same basis as it distributes information for other community groups); Child Evangelism Fellowship of Maryland v. Montgomery Cty. Pub. Sch., 373 F.3d 589 (4th Cir. 2004)(same); Wigg v. Sioux Falls Sch. Dist., 382 F.3d 807 (8th Cir. 2004)(school district must allow teacher to help lead religious group's after school meetings at elementary school when it allowed teachers to be involved in other after-school groups' activities); Good News/Good Sports Club v. School District of the City of Ladue, 28 F.3d 1501 (8th Cir. 1994)(school district violated religious group's equal access rights by allowing Scouts and athletic groups to meet immediately after the school day but allowing access for the religious group and other community groups to meet only in the evenings). School authorities' dismissal of children to attend Child Evangelism Fellowship meetings during school time at a nearby church was held constitutional in Pierce v. Sullivan West Central School District, 379 F.3d 56 (2d Cir. 2004). See Section O on Pg. 41.

75 Child Evangelism Fellowship of New Jersey v. Stafford Township Sch. Dist., 386 F.3d 514 (3d Cir. 2004)(school district must distribute religious group's informational materials, including permission slips, for students to take home to parents, on same basis as other community groups' materials; teachers' handing the materials to the students to take home to parents does not violate the Establishment Clause); Child Evangelism Fellowship of Maryland v. Montgomery Cty. Pub. Sch., 373 F.3d 589 (4th Cir. 2004)(same); Hills v. Scottsdale Unified Sch. Dist., 329 F.3d 1044 (9th Cir. 2003)(same); Rusk v. Crestview Local Sch. Dist., 379 F.3d 418 (6th Cir. 2004)(Establishment Clause not violated by school district distributing community religious group's fliers on an equal access basis); Sherman v. Community School District, 8 F.3d 1160 (7th Cir. 1993)(same); Daugherty v. Vanguard Charter School Academy, 116 F. Supp.2d 897, 911 (W.D. Mich. 2000)(same).

76 Department of Education Guidelines, "Prayer During Noninstructional Time," in Appendix A. The Clinton DOE Guidelines did not make such a distinction either. See Clinton DOE Guidelines, "Student Prayer and Religious Discussion," in Appendix B.

The current Department of Education Guidelines do not distinguish between elementary and secondary students in discussing their right to "organize prayer groups, religious clubs, and 'see you at the pole' gatherings before school to the same extent that students are permitted to organize other non-curricular student activities groups. Such groups must be given the same access to school facilities for assembling as is given to other noncurricular groups, without discrimination because of the religious content of their expression."[77] The Guidelines note that school officials may disclaim sponsorship of such groups.[78]

### G. The courts are split on whether teachers may participate in religious meetings of elementary or secondary school students.

The wisest course of action is for a teacher to assume a nonparticipatory role, although court decisions have gone both ways. The most recent court decision held that teachers have a free speech right to participate in a religious group's after school meetings at an elementary school.[79] An earlier court decision ruled that coaches could not pray with students at team practice or games, although the students themselves could pray together.[80] The Equal Access Act speaks in terms of teachers being present at student religious meetings in a nonparticipatory capacity. Some courts have assumed that teachers should not participate in the substantive discussions of the religious student group under the Equal Access Act.[81] The current Department of Education Guidelines reflect the ambiguous state of the court decisions by stating:

> When acting in their official capacities as representatives of the state, teachers, school administrators, and other school employees are prohibited by the Establishment Clause from encouraging or discouraging prayer, and from actively participating in such activity with students. Teachers may, however, take part in religious activities where the overall context makes clear that they are not participating in their official capacities.[82]

77 Department of Education Guidelines, "Organized Prayer Groups and Activities," in Appendix A.

78 Id.

79 Wigg v. Sioux Falls School District 49-5, 382 F.3d 807 (8th Cir. 2004).

80 Doe v. Duncanville Independent School District, 70 F.3d 402 (5th Cir. 1995).

81 Board of Education v. Mergens, 496 U.S. 226 (1990); Chandler v. James, 180 F.3d 1254, 1264 (11th Cir. 1999), petition for certiorari granted, vacating judgment and remanding sub nom. Chandler v. Siegelman, 530 U.S. 1256 (2000), and reinstated on remand, 230 F.3d 1313 (11th Cir. 2000); Herdahl v. Pontotoc County School District, 933 F. Supp. 582 (N.D. Miss. 1996)(teacher supervision is permissible); Doe v. Duncanville Independent School District, 70 F.3d 402(5th Cir. 1995)(coach not permitted to pray with team at games or practices); Sease v. School District of Philadelphia, 811 F. Supp. 183 (E.D. Pa. 1993)(disallowing a school secretary from directing the Gospel Choir that met immediately after school on school property and other extensive involvement with the group).

82 Department of Education Guidelines, "Teachers, Administrators, and other School Employees," in Appendix A.

Most recently, the Eighth Circuit held that a teacher had a free speech right to help conduct religious meetings after school at the elementary school at which she taught.[83] School officials prohibited her participation in the religious meeting because of a school district policy that prohibited all school employees from participating in religious activities on school grounds unless the religious organization had leased the school facility from the district. The school officials interpreted this to mean that school employees could attend churches that leased school facilities evenings and weekends. School officials believed that the Establishment Clause would be violated by allowing the teacher to assist with religious meetings at the school immediately after school.

For five reasons, the Eighth Circuit rejected the school district's claim that the teacher's involvement would violate the Establishment Clause by creating the appearance that the school endorsed the religious viewpoints of the club.[84] First, even though the meetings were immediately after school, the court deemed the time to be the teacher's own time. Second, the teacher's speech did not occur during a school-sponsored event. Third, the teacher had proposed a disclaimer explaining that any school district employees participating in the club were acting as private citizens and were not representing the school district. Fourth, children could attend the meetings only if their parents consented. Finally, nonparticipating students had left the building unless they were otherwise supervised.

The Eighth Circuit found that the district "unnecessarily limits the ability of its employees to engage in private religious speech on their own time"[85] and, therefore, violated the teacher's freedom of speech. Therefore, in the states covered by the Eighth Circuit, school teachers definitely have the right to participate in student religious meetings at the elementary level and, thus, at the secondary level as well.

The Eighth Circuit decision is correct as a matter of constitutional law and, hopefully, will be the first of similar decisions in other circuits; however, other circuits might weigh the Establishment Clause concerns more heavily. Two decades ago, a federal district court in Ohio ruled the Establishment Clause prohibited meetings of elementary school students immediately after school because a teacher was heavily involved in leading the meetings and recruited students to attend.[86]

The Eleventh Circuit, in a case upholding the free speech right of students to engage in religious speech in a variety of public school contexts, noted that student-initiated religious speech *might* become state-sponsored speech if teachers participated in student-initiated prayer.[87] The court opined that the Equal Access Act did not permit teacher participation in student religious groups.

[83] Wigg v. Sioux Falls School District 49-5, 382 F.3d 807 (8th Cir. 2004).

[84] Id. at 815.

[85] Id. at 814.

[86] Quappe v. Endry, 772 F. Supp. 1004 (S.D. Ohio 1991), summarily aff'd, 979 F.2d 851 (6th Cir. 1992).

[87] Chandler v. James, 180 F.3d 1254, 1264 (11th Cir. 1999), petition for certiorari granted, vacating judgment and remanding sub nom. Chandler v. Siegelman, 530 U.S. 1256 (2000), and reinstated on remand, 230 F.3d 1313 (11th Cir. 2000).

The Fifth Circuit ruled that a coach could not participate in prayers with the basketball team at practices and games because they were "school-controlled, curriculum-related activities that members of the basketball team are required to attend."[88] The court emphasized that the students could decide to pray on their own as a team but not with teacher participation.

A federal district court in Mississippi allowed students in grades K-6 to meet for prayer and Bible reading before school in a school room with a teacher present.[89] A teacher was present to ensure order and good behavior.[90] The devotionals were led by a group of secondary school students. The elementary school students had to have parental permission to attend the meetings, a fact that was crucial in the court's upholding the activity.

A federal district court in Michigan determined that the Establishment Clause would not be violated by elementary teachers attending on campus gatherings of students praying "in a passive or supervisory capacity without participating in the prayer."[91] Although noting increased concerns, the court did not determine whether the Establishment Clause would be violated if the teachers participated with the students in prayer on school premises during noninstructional hours.

A federal district court in Pennsylvania refused to consider a school employee's free speech claim once it had determined that the school employee's participation in a student religious group was not permitted by the Equal Access Act.[92]

Teachers living outside the Eighth Circuit need to assess their individual situations. A teacher might request that her principal allow her to participate in secondary student meetings or in community religious groups' meetings after school in elementary schools. The teacher should provide the principal with a copy of the Eighth Circuit decision. However, there are situations when it may be wise at this time for a teacher to settle for attending a student religious meeting on public school campus in a nonparticipatory capacity. Some courts could view teacher involvement as a reason not to allow religious meetings for students and community groups.

88 Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402 (5th Cir. 1995).

89 Herdahl v. Pontotoc County School District, 933 F. Supp. 582, 589-590 (N.D. Miss. 1996). See also, Reed v. Van Hoven, 237 F. Supp. 48, 56 (W.D. Mich. 1965).

90 Herdahl, 933 F. Supp. at 589-590. See also, Van Hoven, 237 F. Supp. at 56 (allowing students at any grade level to meet before and after school for prayer where teacher present to maintain order).

91 Daugherty v. Vanguard Charter School Academy, 116 F. Supp.2d 897, 911 (W.D. Mich. 2000).

92 In Sease v. School District of Philadelphia, 811 F. Supp. 183 (E.D. Pa. 1993).

**H. Teachers may participate in religious activities with students outside of contract time, particularly if the activity occurs off-campus.**

***Comment:*** *The Establishment Clause raises concerns only in circumstances when teachers are acting as government officials. When teachers are not acting as government officials, the Establishment Clause cannot prohibit religious activity by them. Indeed, freedoms of speech, association, and religion protect teachers' religious activities just as they protect other citizens' religious activities. When the teacher is outside of contract time and off the school campus, he or she almost certainly is not acting as a government official, absent some unusual circumstance.*

A teacher does not forfeit the right as a citizen to engage in religious activities on his or her personal time.[93] To take an extreme example, a school board could not require teachers to agree not to attend church as a condition of employment as a public school teacher. A federal court of appeals ruled that a public school principal could not be reassigned to a teaching position merely because he intended to exercise his free exercise right to educate his children at home.[94] Nor could a teacher be denied promotion to an assistant principal position because she exercised her constitutional right as a parent to choose private education for her child.[95] If a teacher is not on contract time or school district duty assignment, the teacher is not restricted by the Establishment Clause.

As a practical matter, this means that teachers often are likely to attend religious activities that are also attended by their students. On their personal time, teachers may lead religious activities that include their students.[96] For example, a teacher may teach Sunday School at his or her church to a class that includes current students in her public school class. A teacher also may serve as an advisor to the youth group at his or her church, even though many of the young people in the group are students at the school at which the teacher teaches. A teacher may also serve as an elder in her church and fulfill the duties of that office, including serving Communion to fellow believers, even if those believers include students attending the teacher's school. Similarly, a teacher should be able to participate in a baptism service, even if he or she is baptizing students in her class.

While a teacher should not invite students to church during contract time, he or she may contact students or their parents during noncontract time, off-campus, to invite students to church or other religious activities. The teacher should make clear to the student or parent that the invitation is being given in the teacher's personal capacity and not as a representative of the school district. The teacher should be clear that the student's reaction to the invitation or discussions will have no bearing on the teacher's treatment of the student in school. The teacher should always be careful to have parental consent for any religious activity on personal time to which he or she invites a student.

93 Wigg v. Sioux Falls School District 49-5, 382 F.3d 807 (8th Cir. 2004).

94 Peterson v. Minidoka County School District, 118 F.3d 1351 (9th Cir. 1997).

95 Barrow v. Greenville Independent School District, 332 F.3d 844 (5th Cir. 2003).

96 Wigg v. Sioux Falls School District 49-5, 382 F.3d 807 (8th Cir. 2004).

Logically, this means that a teacher should be able to attend a Bible study off-campus, during noncontract time, that is attended by students in his or her public school class. Indeed, as discussed above in Section G, the Eighth Circuit recently ruled that an elementary teacher had a free speech right to participate in a meeting led by a religious community group for elementary children, including some children from her class, immediately after school on school premises.

A teacher should not recruit students for the Bible study or other church activities while on contract time; but the teacher can certainly attend, and even lead, religious activities when not on contract time when off-campus and, now, in the Eighth Circuit, on campus. The teacher should always be careful to make sure the students understand that the teacher is not acting as a representative of the school.

**I. Teachers should have a right to meet with other teachers for religious speech, including prayer and Bible study, at times when teachers are allowed to meet with other teachers for speech purposes.**

***Comment:*** *Teacher meetings for prayer, Bible study, and encouragement should be an activity protected by the Free Speech Clause. Most courts probably would rule in favor of teachers being able to meet before or after school for religious speech purposes.*

The Seventh Circuit, the only appellate court to rule directly on the issue, did not require a school district to allow the teachers to meet for a Bible study, because the religious teachers had not shown that other teachers were allowed to meet before school for speech about other topics.[97] The decision supports, however, the idea that if other teacher groups are allowed to meet, even informally, to discuss secular matters, then school officials must allow teachers to meet for religious speech.[98]

The Eighth Circuit's recent decision requiring a school district to allow an elementary teacher to meet for religious discussions with elementary children after school in school facilities almost certainly means that a district would have to allow teachers to meet with other teachers before or after school for religious speech on school grounds if the district allows teachers to meet on school grounds to discuss nonreligious topics.[99]

A federal district court in Michigan ruled that an elementary school did not violate the Establishment Clause by allowing teachers to meet for prayer and to discuss religious topics.[100] The meetings were during noninstructional time and out of the presence of students. Teachers seemed to be allowed to meet to discuss other matters not related to school business.[101]

97 May v. Evansville, 787 F.2d 1105 (7th Cir. 1986).

98 See Executive Guidelines on Religious Exercise and Religious Expression in the Federal Workplace (August 14, 1999)(Appendix F), at 2-3, for a general discussion of federal employees' ability to meet with other federal employees.

99 Wigg v. Sioux Falls School District 49-5, 382 F.3d 807 (8th Cir. 2004).

100 Daugherty v. Vanguard Charter School Academy, 116 F. Supp.2d 897, 910 (W.D. Mich. 2000).

101 Id.

Teachers meeting for religious speech should meet in an empty classroom during noninstructional time. They should be careful not to draw students' attention to their activity. If a principal is participating, he or she must be careful not to give any reason for teachers to believe that their participation, or lack of participation, will affect their job evaluations.

The current Department of Education Guidelines state:

> Before school or during lunch, for example, teachers may meet with other teachers for prayer or Bible study to the same extent that they may engage in other conversation or nonreligious activities.[102]

**J. Teachers may express their religious viewpoints in communications with other teachers.**

***Comment:*** *This issue does not seem to have been decided by the courts yet. The First Amendment should protect the right of teachers to express their personal viewpoints on religion in conversations and written communication with other teachers just as they may express their personal viewpoints on a variety of topics.*

Teachers generally have a right to express themselves to other teachers while on school property.[103] The Establishment Clause concerns that are raised when a teacher is expressing religious beliefs or ideas to students in class are not raised when teachers are communicating with other teachers.

Teachers, however, should be careful that their speech could not be construed as harassment of another teacher. That is, if a teacher indicates he or she does not want to discuss religious ideas with a teacher, the latter teacher should respect the former teacher's request.[104] If the school administration could demonstrate that the teacher's religious speech was disruptive to the work environment, it is conceivable that a court might allow the school district to require the teacher to stop expressing personal religious views in certain extreme circumstances.[105]

102 Department of Education Guidelines, "Teachers, Administrators, and other School Employees," in Appendix A.

103 Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969)(protecting personal intercommunication of students on school property and mentioning that teachers also have First Amendment rights on school property); Daugherty v. Vanguard Charter School Academy, 116 F. Supp.2d 897, 910 (W.D. Mich. 2000)(teachers have free speech right when conduct is not part of the school curriculum or school-sponsored activities).

104 See Executive Guidelines on Religious Exercise and Religious Expression in the Federal Workplace (August 14, 1997)(reprinted in Appendix F) at 5-6, 9, for an understanding of how this is treated in the federal workplace.

105 Tinker does not protect speech that creates a material and substantial disruption to the school environment. Cases after Pickering have allowed government employers to restrict employees' speech if it harms working relationships. Connick v. Myers, 461 U.S. 138 (1983).

**K. An elementary school may allow a parent group to meet during school time for religious speech if other parent groups are allowed to use school facilities during school time to encourage parental involvement.**

A federal district court in Michigan ruled that the Establishment Clause was not violated by an elementary school allowing parents to use a room specifically designated as the "parent room" for prayer and religious discussions during the school day.[106] The "parent room" was available during and after school hours to various parent groups to encourage parental involvement at the school.[107]

**L. Prayer at graduation ceremonies is often impermissible but may be permissible if an individual student has chosen to engage in religious speech, including prayer, without school officials' encouragement or review.**

***Comment:*** *School officials, including teachers, may not: 1) make the decision to include prayer in a graduation ceremony; 2) ask a clergyperson to give a prayer during a graduation ceremony; or 3) provide guidelines for such a prayer.*[108] *A student may include religious expression, including prayer, in the graduation ceremony if the student is given time to speak on any topic he or she chooses, although the Ninth Circuit has ruled to the contrary. For example, if the student is the class president or valedictorian, he or she may express personal religious viewpoints as part of the speech. The student must have been chosen to speak for secular reasons, such as academic ranking or class leadership. If a teacher is reviewing a student's proposed speech, the teacher should not encourage the student to include religious expression nor discourage the student from including religious expression.*

Even after two Supreme Court decisions, the issue of religious expression in public school graduation ceremonies is a messy area of the law with several gray areas unresolved. The following description of the court decisions is intended to illustrate the current status of the law and not to give an exhaustive review of the cases.

In 1992, the Supreme Court ruled unconstitutional graduation prayer where school officials: 1) decided to include a prayer in the ceremony; 2) invited a clergyperson to give the prayer; and 3) provided him with guidelines regarding the prayer's content.[109] After that decision, many school districts decided not to permit prayer in the graduation ceremony. Other school districts, however, adopted a variety of policies to accommodate religious expression in the graduation ceremony.

106 Daugherty v. Vanguard Charter School Academy, 116 F. Supp.2d 897 (W.D. Mich. 2000).

107 Id. at 907-909.

108 Lee v. Weisman, 505 U.S. 577 (1992).

109 Id.

In 2000, the Supreme Court struck down a school district policy that allowed the student body to vote whether to have a student give "an invocation and/or message" of the student's choice over the public address system immediately before football games.[110] If the majority voted to have a message or invocation, then the student body voted for the student speaker from a list of candidates.[111] While the Supreme Court specifically addressed only a prayer before football games, the lower courts apply its analysis to prayer at graduation ceremonies, in part because the Supreme Court relied heavily on its 1992 graduation prayer decision in Lee v. Weisman[112] to analyze the policy for pregame speeches.

Although the pregame message was the student's choice and was not required to be an invocation, the Supreme Court held the policy violated the Establishment Clause because the school district's decision "to allow the student majority to control whether students of minority views are subjected to a school-sponsored prayer violates the Establishment Clause."[113] The Court determined that the district had a religious purpose in adopting the policy as evidenced by the district's past practice of having prayer at football games and the use of the religious word "invocation" in the policy. Because the school district required the statement to be consistent with three specific goals set forth in the policy, the school was involved in supervising the content of the message. The Court concluded that "the expressed purposes of the policy encourage the selection of a religious message, and that is precisely how the students understand the policy."[114] The Court ruled that "members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration."[115]

110 Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000).

111 Before Santa Fe, the Third Circuit disallowed votes by the student body in favor of graduation prayer. American Civil Liberties Union v. Black Horse Pike Regional Board of Education, 84 F.3d 1471 (3d Cir. 1996)(en banc). See Gearon v. Loudoun County School Board, 844 F. Supp. 1097 (E.D. Va. 1993). The Fifth Circuit had upheld a policy allowing the senior class to vote to include a student reciting a nonsectarian, nonproselytizing prayer in the graduation ceremony. Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992). See also, Deveney v. Board of Education of the County of Kanawha, 231 F.Supp.2d 483 (S.D. W.Va. 2002)(post-Santa Fe, policy allowing senior class to decide whether to include invocation struck down where only invocation allowed and principal reviewed invocation's content).

112 505 U.S. 577 (1992).

113 530 U.S. at 317 n.23.

114 Id. at 307.

115 Id. at 308.

After Santa Fe, private individuals who are speaking in a graduation ceremony as the result of neutral selection criteria, such as grades or community leadership, should still be able to express their views, including religious viewpoints, in a speech that all listeners would recognize as expressing their personal views. The current Department of Education Guidelines support this view:

> School officials may not mandate or organize prayer at graduation or select speakers for such events in a manner that favors religious speech such as prayer. Where students or other private graduation speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression, however, that expression is not attributable to the school and therefore may not be restricted because of its religious (or anti-religious) content. To avoid any mistaken perception that a school endorses student or other private speech that is not in fact attributable to the school, school officials may make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker's and not the school's.[116]

The lower courts are addressing private religious speech by graduation speakers with differing results. After Santa Fe, the Eighth Circuit held that a school board member, who was allowed to speak during a graduation ceremony in accordance with a district tradition of allowing board members to speak when their children graduated, did not violate the Establishment Clause by saying the Lord's Prayer as part of his remarks in a graduation ceremony.[117] The court ruled that the prayer was constitutionally protected private speech.

After Santa Fe, the Eleventh Circuit upheld a school district policy that allowed the graduating class to choose whether the graduation ceremony would include a brief opening or closing message given by a volunteer graduating senior, also chosen by the graduating class. The graduate's message would not be reviewed by the school district in any way.[118] Unlike in Santa Fe, the policy itself did not encourage any religious messages and did not confine the content and topic of the student message.[119] The student election was permissible because it was not a vote whether to have religious content in the graduation ceremony.[120] The court noted that a speaker could choose "on his or her own to deliver a religious message," but that would reflect the speaker's choice, not a majoritarian vote "to impose religion on unwilling listeners."[121] Nor did the policy have a religious purpose.[122]

116 Department of Education Guidelines, "Prayer at Graduation," in Appendix A.

117 Doe v. School District of the City of Norfolk, 340 F.3d 605 (8th Cir. 2003).

118 Adler v. Duval County School Board, 250 F.3d 1330 (11th Cir. 2001)(en banc).

119 Id. at 1336-38.

120 Id. at 1338-39.

121 Id. at 1339.

122 Id. at 1340.

Similarly, the Eleventh Circuit held in another post-Santa Fe decision that a school district could not prohibit "genuinely student-initiated religious speech, nor apply restrictions on the time, place, and manner of that speech which exceed those placed on students' secular speech."[123] The court upheld a state law that permitted nonsectarian, nonproselytizing student-initiated prayer, invocations and benedictions during compulsory or noncompulsory school-related assemblies, sporting events, graduation ceremonies and other school-related events when the student speech was truly private speech without participation in, or supervision of the speech, by school officials.

The Ninth Circuit has ruled against student's private religious expression in graduation ceremonies in two decisions that ignore "the crucial distinction between government religious speech that is prohibited by the Establishment Clause and private religious speech that is protected by the Free Speech and Free Exercise Clauses."[124] The Ninth Circuit upheld a school district prohibition on a valedictorian's speech that contained religious expression that school officials deemed to be proselytizing and sectarian.[125] While the Ninth Circuit decisions are almost certainly wrong, because they allow viewpoint discrimination of clearly private religious speech, they are the current law in the states covered by the Ninth Circuit.

**M. Baccalaureate services should be planned with a minimum of involvement by school officials.**

***Comment:*** *The Supreme Court has not ruled on the permissibility of school involvement in baccalaureate ceremonies; however, school involvement in such ceremonies should be minimized. One possibility is for several churches to arrange a baccalaureate service for the students with a minimum of school involvement or endorsement.*

In an Alabama case, a federal court required a school district to rent its auditorium to churches that were holding a baccalaureate service.[126] School employees were permitted to attend the service, but were not permitted to encourage student attendance or give any appearance of school endorsement of the service.

In a Wyoming case, a federal court also required a school district to allow a student religious group access to school facilities for a baccalaureate service.[127] A New York federal district court rejected an Establishment Clause challenge to a school district leasing its facilities for a religious baccalaureate service that would be sponsored and organized by a student religious group without school involvement or endorsement.[128]

123 Chandler v. Siegelman, 230 F.3d 1313, 1317 (11th Cir. 2000).

124 Mergens v. Board of Education, 496 U.S. 226, 250 (1990).

125 Cole v. Oroville Union High School District, 228 F.3d 1092 (9th Cir. 2000); Lassonde v. Pleasanton Unified School District, 320 F.3d 979 (9th Cir. 2003).

126 Verbena United Methodist Church v. Chilton County Board of Education, 765 F. Supp. 704 (M.D. Ala. 1991).

127 Shumway v. Albany County School District, 826 F. Supp. 1320 (D. Wyo. 1993).

128 Randall v. Pegan, 765 F. Supp. 793 (W.D.N.Y. 1991).

In an older decision[129], the New Mexico Supreme Court ruled that public school graduation and baccalaureate ceremonies could be held in church buildings "where there was no other suitable auditorium or place available."[130]

The current DOE Guidelines state that "teachers may participate in their personal capacities in privately sponsored baccalaureate ceremonies."[131] Recently, the Virginia Attorney General issued an opinion that a school district's instructions prohibiting principals and other staff members from speaking as private citizens at a "privately sponsored, voluntarily attended" baccalaureate event violated the employees' free speech rights.[132]

Current Department of Education Guidelines advise:

> School officials may not mandate or organize religious ceremonies. However, if a school makes its facilities and related services available to other private groups, it must make its facilities and services available on the same terms to organizers of privately sponsored religious baccalaureate ceremonies. In addition, a school may disclaim official endorsement of events sponsored by private groups, provided it does so in a manner that neither favors nor disfavors groups that meet to engage in prayer or religious speech.[133]

**N. The Supreme Court has ruled unconstitutional a school district policy allowing the student body to vote whether to have a student give an invocation or message over the public address system immediately before a sporting event.**

In 2000, the Supreme Court struck down a school district policy that allowed the student body to vote whether to have a student give "an invocation and/or message" of the student's choice over the public address system immediately before football games.[134] If the majority voted to have a message or invocation, then it voted for the student speaker from a list of candidates.

Although the pregame message was the student's choice and was not required to be an invocation, the Supreme Court held the policy violated the Establishment Clause because the school district's decision "to allow the student majority to control whether students of minority views are subjected to a school-sponsored prayer violates the Establishment Clause."[135] The Court determined that the district had a religious purpose in adopting the policy as evidenced by the district's past practice of having prayer at football games and the use of the religious word "invocation" in the policy. Because the school district required the statement to be

129 Miller v. Cooper, 244 P.2d 520 (N.M. 1952).

130 Id. at 521.

131 Department of Education Guidelines, at "Teachers, Administrators, and Other School Employees," in Appendix A.

132 Va.A.G.op. 05-044 (July 11, 2005), 2005 WL 1900919.

133 Department of Education Guidelines, "Baccalaureate Ceremonies," in Appendix A.

134 Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000).

135 Id. at 317 n.23.

consistent with three goals specified in the policy, the school was involved in supervising the content of the message. The Court concluded that "the expressed purposes of the policy encourage the selection of a religious message, and that is precisely how the students understand the policy."[136] The Court ruled that "members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration."[137]

> Current Department of Education guidelines state:
>
> Student speakers at student assemblies and extracurricular activities such as sporting events may not be selected on a basis that either favors or disfavors religious speech. Where student speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression, that expression is not attributable to the school and therefore may not be restricted because of its religious (or anti-religious) content. By contrast, where school officials determine or substantially control the content of what is expressed, such speech is attributable to the school and may not include prayer or other specifically religious (or anti-religious) content. To avoid any mistaken perception that a school endorses student speech that is not in fact attributable to the school, school officials may make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker's and not the school's.[138]

A federal court of appeals ruled that a coach who was a school employee could not pray with his team before the game, because he would be taken to represent the school if he actively joined in the student-initiated prayers.[139] The basketball practices and games were, in the court's opinion, "school-controlled, curriculum-related activities that members of the basketball team are required to attend."[140] Students are not prohibited from praying, either individually or in groups, in the locker room, during practices, or before or after the game. A teacher is not prohibited from exercising deference or respect toward student-initiated prayers.[141]

A coach could provide a moment of silence for reflection by the players that may be used for any purpose, including prayer. The coach should not suggest that the time be used for prayer. See Section D above for a discussion of the permissibility of moments of silence.

136 Id. at 307.

137 Id. at 308.

138 DOE Guidelines, "Student Assemblies and Extracurricular Events," and "Overview of Governing Constitutional Principles," in Appendix A.

139 Doe v. Duncanville Independent School District, 70 F.3d 402, 406 (5th Cir. 1995).

140 Id.

141 Id. at 406 n.4.

If a teacher is present at a game on his or her own time and not in any official capacity on behalf of the school, the teacher should be free to express his or her religious views in conversations with others attending the games, including students. The teacher should be careful to disclaim any school endorsement of his or her religious views and remind the students that he or she is expressing his or her personal religious views on his or her own time and not as a school representative.[142]

**O. Released time programs for religious education are constitutional if school officials have minimal involvement.**

The Supreme Court has decided three cases that involve community groups providing religious education in the public school context, holding two constitutional and one unconstitutional. Basically, students may receive religious instruction during the school day if it is provided off campus; however, immediately following the school day, a religious community group must be allowed to provide religious activities in school facilities on the same basis as other community groups (such as Scouts) are allowed to provide activities for children.

**1. On campus, during school day, part of curriculum:** In 1948, the Supreme Court ruled unconstitutional a released time program taught by clergy from various faiths on campus during the school day as part of the school curriculum.[143] Students were released from their classrooms to attend the religion class that their parents chose for them to attend, while nonattending students remained in study hall. The Court ruled this an unconstitutional preference for religion.

Recently, the Fifth Circuit ruled that a school district may include clergy volunteers in a general school program of community volunteers who mentor and counsel students during the school day on secular issues.[144] The appellate court assumed that the program did not give special preference to clergy, and the clergy did not wear clerical garb or engage in religious discussions.[145]

**2. Off campus, during school day:** In 1952, the Supreme Court held constitutional a released time program whereby public schools adjusted their schedules to accommodate the spiritual needs of students by allowing students to leave school to participate in released time

142 The decision in Wigg v. Sioux Falls School District 49-5, 382 F.3d 807 (8th Cir. 2004), supports this view.

143 McCollum v. Board of Education, 333 U.S. 203 (1948)(school district allowed Protestant, Catholic, and Jewish clergy to lead religion classes during the schoolday as part of the curriculum).

144 Doe v. Beaumont Independent School District, 240 F.3d 462 (5th Cir. 2001). See also Clinton DOE Guidelines in Appendix B, noting that religious groups have been active in tutoring programs in the schools.

145 Id. at 465. Subsequently, the district court determined the challenged program did unconstitutionally give preference to the clergy over other volunteers and, therefore, was unconstitutional in that particular instance. Oxford v. Beaumont Independent School District, 224 F. Supp.2d 1099 (E.D. Tex. 2002).

programs during the school day.[146] The school district excused students for a part of the school day to attend religious classes at churches, synagogues, or other facilities off campus.[147]

Current Department of Education guidelines state:

> It has long been established that schools have the discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation in such instruction or penalize students for attending or not attending.[148]

School officials must keep their involvement to a minimum and should not encourage or discourage student participation in religious released time programs.[149] A school must distribute information about released time programs if it distributes information about other community groups' activities for children.[150] Regardless of her personal views of religious released time, a teacher should not during her contract time encourage or discourage students' participation in the program.

**3. On campus, immediately after school, equal access:** In 2001, the Supreme Court ruled that public school officials must allow a community group to provide after-school religious activities for children on the same basis as other community groups were allowed to provide activities for children.[151] The fact that the activities were immediately after school in school facilities did not violate the Establishment Clause. The fact that the community group required written parental consent before any child could attend was an important factor in the Court's ruling. Section F above describes the Court's ruling in more detail.

A teacher may distribute information about these activities if he or she has been instructed to do so by the school administration. Information about an activity offered by a religious community group must be distributed for students to take home to their parents on the same

146 Zorach v. Clauson, 343 U.S. 306 (1952).

147 In Pierce v. Sullivan West Central School District, 379 F.3d 56 (2nd Cir. 2004), the Second Circuit upheld the continued constitutionality of released time programs.

148 The Clinton Guidelines also confirmed the vitality of religious released time programs, stating:

> Released time: Subject to applicable State laws, schools have the discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation or penalize those who do not attend. Schools may not allow religious instruction by outsiders on school premises during the school day.

149 The Center for Law and Religious Freedom of the Christian Legal Society has prepared a booklet describing the legal requirements of a constitutional religious released time program. It is available by contacting Christian Legal Society, (703) 642-1070 ext. 3506, 8001 Braddock Road, Suite 300, Springfield, Virginia 22151, or by e-mail to kcolby@clsnet.org or clrf@clsnet.org or on the website at www.clsnet.org.

150 See Sections F above and S below.

151 Good News Club v. Milford Central School, 533 U.S. 98 (2001).

basis as the school permits distribution about activities offered by other community groups.[152]

The Eighth Circuit has ruled that a teacher may be involved in leading a community group's religious activities for children on school campus immediately after school.[153] However, earlier decisions by other courts have allowed teacher involvement in after school religious activities to be restricted. Teachers have much to offer; however, their improper involvement may jeopardize the overall availability of the activity. Section G above should be carefully read to understand the various considerations regarding teacher involvement in religious activities after school in school facilities.

**P. Religious materials and ideas may be included in the curriculum if they are taught in an objective, rather than a devotional, manner.**

**1. School boards retain broad authority to determine what materials should be part of the curriculum.**

***Comment:*** *If a teacher wishes to include religious materials in the curriculum he or she teaches, he or she should follow the guidelines for the objective teaching of the materials. He or she should also be prepared to justify the inclusion on educational grounds. If school policy requires prior approval of curricular materials, the teacher should follow that procedure. If the school officials question inclusion of the materials, he or she should be prepared to explain the curricular benefits of inclusion of the material, as well as the legal permissibility of using the material. If his or her supervisors continue to oppose use of the materials, however, the teacher must defer to their decision.*

Several studies have demonstrated that textbooks have neglected to include sufficient amounts of religious materials and ideas in the curriculum for fear of violating the Establishment Clause or causing controversy.[154] Teachers' supplementary inclusion of religious materials in the curriculum may well be helpful to remedy this neglect.

[152] Child Evangelism Fellowship of New Jersey v. Stafford Township Sch. Dist., 386 F.3d 514 (3d Cir. 2004)(school district must distribute religious group's informational materials, including permission slips, for students to take home to parents, on same basis as other community groups' materials; teachers' handing the materials to the students to take home to parents does not violate the Establishment Clause); Child Evangelism Fellowship of Maryland v. Montgomery Cty. Pub. Sch., 373 F.3d 589 (4th Cir. 2004)(same); Hills v. Scottsdale Unified Sch. Dist., 329 F.3d 1044 (9th Cir. 2003)(same); Rusk v. Crestview Local Sch. Dist., 379 F.3d 418 (6th Cir. 2004)(Establishment Clause not violated by school district distributing community religious group's fliers on an equal access basis); Sherman v. Community School District, 8 F.3d 1160 (7th Cir. 1993)(same); Daugherty v. Vanguard Charter School Academy, 116 F. Supp.2d 897, 911 (W.D. Mich. 2000)(same).

[153] Wigg v. Sioux Falls School District 49-5, 382 F.3d 807 (8th Cir. 2004).

[154] See generally Warren A. Nord and Charles C. Haynes, Teaching Religion Across the Curriculum, Association for Supervision and Curriculum Development, 1998. The book is available from The First Amendment Center, 1207 18th Avenue South, Nashville, Tennessee 37212, (615) 727-1600 or e-mail info@fac.org.

Before reviewing the way in which religious materials may be incorporated into the curriculum, it is critical to remember that the school administration or school board, not the teacher, has ultimate authority to determine whether materials should be included in, or deleted from, the curriculum.[155]

For example, a probationary kindergarten teacher was dismissed when she informed the school administration that her religious beliefs prohibited her from teaching patriotic songs, from explaining to students why certain national holidays were celebrated, from celebrating holidays, and from participating in the Pledge of Allegiance. The court ruled she did not have a right to refuse to teach these materials.[156] Similarly, a high school biology teacher did not have a right to refuse to teach evolution.[157] Nor did a middle school teacher have a right to spend substantial time on creation in teaching a social studies class.[158]

Although there have been cases in which the courts have upheld the right of a teacher to include materials in the curriculum that the school board disapproved, recent cases have allowed school boards broad discretion in determining whether materials belong in the curriculum, regardless of the teacher's wishes. Teachers should be careful to follow any required procedures before including supplementary materials in the curriculum.

**2. The Bible, as well as other religious materials or ideas, may be taught in the public school classroom, if taught in an objective manner.**

The Supreme Court has held that public schools may teach students about the Bible, as long as such teaching is "presented objectively as part of a secular program of education."[159] As the Supreme Court noted in its 1963 "school prayer" decision[160]:

155 See generally Hazelwood v. Kuhlmeier, 484 U.S. 260 (1988). See Section I.B.4 above.

156 Palmer v. Board of Education of City of Chicago, 603 F.2d 1271 (7th Cir. 1979). However, a high school art teacher could not be compelled to participate in the Pledge of Allegiance in her classroom. Russo v. Central School District No. 1, 469 F.2d 623 (2d Cir. 1972).

157 Peloza v. Capistrano Unified School Dist., 37 F.3d 517 (9th Cir. 1994).

158 Webster v. New Lenox School District, 917 F.2d 1004 (7th Cir. 1990)(junior high teacher did not have right to teach creation science in social studies class).

159 School District of Abington v. Schempp, 374 U.S. 203, 225 (1963). See also, Stone v. Graham, 449 U.S. 39, 42 (1980)(per curiam); Edwards v. Aguillard, 482 U.S. 578, 606-608 (1987)(Powell, J., concurring). See Hall v. Board of Commissioners of Conecuh County, 656 F.2d 999, 1002 (5th Cir. 1981). See also, e.g., Skoros v. City of New York, 437 F.3d 1, 31-32, 38 (2nd Cir. 2006); Holloman v. Harland, 370 F.3d 1252, 1283 n.10 (11th Cir. 2004); Altman v. Bedford Central School District, 245 F.3d 49, 76 (2d Cir. 2001); Bauchman v. West High School, 132 F.3d 542, 554 (10th Cir. 1997); Roberts v. Madigan, 921 F.2d 1047, 1055 (10th Cir. 1990), cert. denied, 505 U.S. 1218 (1992); Grove v. Mead School District, 753 F.2d 1528, 1534 (9th Cir. 1985); Daniel v. Waters, 515 F.2d 485 (6th Cir. 1975); Washegesic v. Bloomingdale Public Schools, 33 F.3d 679 (6th Cir. 1994); Daugherty v. Vanguard Charter School Academy, 116 F. Supp.2d 897, 913-14 (W.D. Mich. 2000)(inclusion in character development curriculum of words and concepts that happen to coincide with tenets of some religions does not in itself violate the Establishment Clause).

160 Abington School District v. Schempp, 374 U.S. 203, 225 (1963).

> [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.

The Court has also held, however, that religious groups may not teach religious classes as part of the curriculum on public school premises during the school day, as discussed in Part O above.[161] For example, the Third Circuit held that teaching Transcendental Meditation by requiring students to engage in religious rituals violated the Establishment Clause.[162] The Clinton DOE Guidelines noted that public schools "may not provide religious instruction, but they may teach about religion, including the Bible or other scripture."[163] Teaching any religious material must be done for an educational purpose, rather than a devotional purpose.

There are two basic scenarios for inclusion of religious materials in the curriculum:

1) Some schools offer courses focusing upon certain religious materials, e.g., "The Bible as Literature" or "The History of Bible Times"; or,
2) Teachers may wish to include religious materials that are relevant to their subject matter. For example, religious material may be appropriate for study in history, literature, and art classes.

Many of the same basic rules apply to both scenarios, but they will be discussed separately.[164]

### a. Guidelines for Classes Focusing on the Bible as Literature or History

A relatively small number of lower court decisions have dealt directly with the constitutionality of public school classes involving the Bible.[165] These rulings show that the constitutionality of such a class is highly dependent on the facts as to the manner in which the class is taught, who teaches it, and the instructional materials used.

161 McCollum v. Board of Education, 333 U.S. 203 (1948).

162 Malnak v. Yogi, 592 F.2d 197 (3rd Cir. 1979).

163 Clinton DOE Guidelines in Appendix B.

164 Christian Legal Society helped draft a booklet regarding use of the Bible in public schools, The Bible & Public Schools, which is endorsed by a diverse set of groups, including Christian Educators Association International, and is available on the Christian Legal Society website at www.clsnet.org or from National Bible Association at www.nationalbible.org or calling First Amendment Center at (615) 727-1600 or e-mail info@fac.org.

165 See Doe v. Porter, 370 F.3d 558 (6th Cir. 2004); Hall v. Board of Commissioners of Conecuh County, 656 F.2d 999 (5th Cir. 1981); Gibson v. Lee County School Board, 1 F. Supp.2d 1426, 1432 (M.D. Fla. 1998); Herdahl v. Pontotoc County School District, 933 F. Supp. 582 (N.D. Miss. 1996); Doe v. Human, 725 F. Supp. 1503 (W.D. Ark. 1989), aff'd without opinion, 923 F.2d 857 (8th Cir. 1990); Crockett v. Sorenson, 568 F. Supp. 1422 (W.D. Va. 1983); Wiley v. Franklin, 468 F. Supp. 133 (E.D. Tenn. 1979), supp. op., 474 F. Supp. 525 (E.D. Tenn. 1979), supp. op., 497 F. Supp. 390 (E.D. Tenn. 1980); Vaughn v. Reed, 313 F. Supp. 431 (W.D. Va. 1970).

1. Manner in which the class is taught: The class must be taught in an objective, rather than a devotional, manner.[166] The purpose of the class must be the teaching about--and not of--religion. The class should inform students about religion, not inculcate them to a particular religion. The purpose of the class should be "to convey a literary or historical message" rather than "to convey a religious message."[167]

The class must not seek "either to disparage or to encourage a commitment to a set of religious beliefs."[168] As with other classes, students who have religious objections to the curricular material should be allowed to opt-out of the class and be given alternative assignments or courses.[169]

2. Who teaches the class: A school board should hire and fire teachers for any Bible class in the same manner as it hires and fires all other teachers.[170] A school board should not "contract out" the teaching of a Bible course to an outside committee that selects teachers solely from one religious perspective.[171] A school board, however, may accept an outside committee's recommendation and funding of teachers if the teachers are not "selected on the basis of a religious belief test and do not have an agenda to proselytize."[172]

Teachers should be certified according to applicable state standards.[173] "No inquiry should be made to determine the religious beliefs, or the lack thereof, of teacher applicants."[174] Nor should a teacher be excluded because he or she has a "religious educational background" or holds "a particular faith."[175]

A school board may accept contributions from private organizations for the purpose of funding a Bible course.[176] Such funds must have "no strings attached," except that they may be "earmarked for the Bible course exclusively."[177]

166 Florey v. Sioux Falls School District 49-5, 619 F.2d 1311 (8th Cir. 1980). See also, Hall, 656 F.2d at 1002; Gibson, 1 F. Supp. 2d at 1432; Herdahl, 933 F. Supp. at 592; Human, 725 F. Supp. at 1508; Crockett, 568 F. Supp. at 1427; Wiley, 497 F. Supp. at 392, 394; Vaughn, 313 F. Supp. at 433.

167 Wiley, 497 F. Supp. at 396. See also, Hall, 656 F.2d at 1003.

168 Wiley, 497 F. Supp. at 394. See also, Gibson, 1 F. Supp.2d at 1433-34.

169 See Crockett, 568 F. Supp. at 1431-1432; Gibson, 1 F. Supp.2d at 1433. But see Vaughn, 313 F. Supp. at 434.

170 Crockett, 568 F. Supp. at 1431. See also, Gibson, 1 F. Supp.2d at 1433; Vaughn, 313 F. Supp. at 434; Doe v. Porter, 370 F.3d 558 (6th Cir. 2004).

171 Id.; Herdahl, 933 F. Supp. at 593.

172 Id. at 598-99; Wiley, 468 F. Supp. at 152.

173 Crockett, 568 F. Supp. at 1431; Wiley, 474 F. Supp. At 528. See also, Gibson, 1 F. Supp.2d at 1433.

174 Crockett, 568 F. Supp. at 1431. See also, Gibson, 1 F. Supp.2d at 1433; Herdahl, 933 F. Supp. at 593-594; Wiley, 497 F. Supp. at 393.

175 Wiley, 497 F. Supp. at 393.

176 Crockett, 568 F. Supp. at 1431. See also, Gibson, 1 F. Supp.2d at 1433; Herdahl, 933 F. Supp. at 598-599.

177 Crockett, 568 F. Supp. at 1431. See also, Gibson, 1 F. Supp.2d at 1433.

3. Instructional materials: Supervision and control of the course should be under the direction of the school board.[178] The board should prescribe the curriculum and select all teaching materials, including the appropriate translation of the Bible.[179]

The Bible may be used as a primary text in the class,[180] although it probably should not be the only text for the course.[181] If the Bible is a primary text, its study should be objective and not devotional.[182] Any textbook used for the course should advance the objective, as opposed to a devotional, study of the Bible.[183] Lesson titles should not convey a religious message.[184]

### b. Guidelines for Inclusion of Religious Materials in Other Classes

The above guidelines regarding teaching courses focused on religious materials are also applicable to incorporating religious materials into courses in other subjects. For example, an art teacher may need to explain the biblical story behind a great religious painting being studied. A literature teacher might wish to expose students to the beauty of the Psalms. A world history teacher might wish to familiarize students with the Ten Commandments or other primary source material from the Bible.

In doing so, the teacher must be clear that the purpose of the use of the religious materials is to educate the students, not to inculcate religious beliefs. Nonetheless, it is advisable to preface discussion of religious materials with a respectful reminder to the students that the purpose of the study of the materials is to further specified educational goals and not to encourage them to believe or disbelieve the religious message of the materials. A teacher's disclaimer of a religious purpose is not sufficient if the teacher then proceeds to engage in a discussion of the materials that seems intended to inculcate religious beliefs.

Teachers should also be scrupulous in their respect for students' (and students' families') own religious beliefs, or lack thereof. The teacher must be careful not "to disparage or to encourage a commitment to a set of religious beliefs."[185]

As with other coursework, students who have religious objections to the religious material should be allowed to opt-out of the particular assignment and be given an alternative assignment.[186] The availability of an alternative assignment for students does not give the teacher permission to teach the religious materials in an inculcative manner to the unobjecting students.

178 Crockett, 568 F. Supp. at 1431. See also, Gibson, 1 F. Supp.2d at 1433.

179 Crockett, 568 F. Supp. at 1431. See also, Gibson, 1 F. Supp.2d at 1433.

180 Wiley, 468 F. Supp. at 151. See also, Chandler v. James, 985 F. Supp. 1062 (M.D. Ala. 1997).

181 Herdahl, 933 F. Supp. at 593, 595 & n.9. See also, Hall, 656 F.2d at 1002-1003.

182 Hall, 656 F.2d at 1002-1003.

183 Id.

184 Wiley, 474 F.Supp. at 529; id., 468 F. Supp. at 152.

185 Wiley, 497 F. Supp. at 394. See also, Gibson, 1 F. Supp.2d at 1433-34.

186 See Crockett, 568 F. Supp. at 1431-1432; Gibson, 1 F. Supp.2d at 1433. But see Vaughn, 313 F. Supp. at 434.

### c. Religious holidays may be taught in the curriculum if done for an educational purpose and in an objective manner.

Holidays that have both a religious and a secular basis may be taught in the public school curriculum if "presented in a prudent and objective manner and as a traditional part of the cultural and religious heritage of the particular holiday."[187] Solely religious holidays are not to be observed.[188] However, the significance of solely religious holidays, for example, Good Friday, can certainly be explained if done in an objective manner and related to the subject matter being taught.

Religious symbols may be used only as "a teaching aid or resource" and only if "such symbols are displayed as an example of the cultural and religious heritage of the holiday and are temporary in nature."[189]

Students may be given the opportunity to perform "a full range of music, poetry and drama that is likely to be of interest to the students and their audience."[190] A federal appellate court has explained that "to allow students only to study and not to perform religious art, literature and music when such works have developed an independent secular and artistic significance would give students a truncated view of our culture."[191] The religious content of the programs must be "presented objectively as part of a secular program of education."[192]

Historical documents with religious references may be read as part of the curriculum.[193]

## 3. Specific questions regarding religious material in the curriculum:

### a. May a teacher show sectarian videotapes to explain the "real purpose" of school holidays, such as Christmas or Easter?

Teachers may not show sectarian videotapes that "violate the neutrality that a public teacher is required to maintain toward religion, and constitute impermissible religious instruction and endorsement of religion by a public official."[194] However, a federal district court in Michigan found that a teacher's showing, without comment, of a "Veggie Tales" videotape brought to class by a student that related to the birth of Jesus and used in conjunction with materials

187 Florey v. Sioux Falls School District, 619 F.2d 1311, 1314 (8th Cir. 1980)(the decision's appendix reprints the school district's policy regarding religion in the curriculum). See also, Clever v. Cherry Hill Township Board of Education, 838 F. Supp. 929 (D.N.J. 1993)(upholding school district policy requiring classrooms to maintain calendars depicting religious and other holidays and permitting seasonal displays containing religious symbols).

188 Florey, 619 F.2d at 1314.

189 Id.; Clever v. Cherry Hill Township Board of Education, 838 F. Supp. 929 (D.N.J. 1993).

190 Florey, 619 F.2d at 1314.

191 Florey, 619 F.2d at 1316 (emphasis in original).

192 Id., quoting Abington v. Schempp, 374 U.S. at 225.

193 Reed v. Van Hoven, 237 F. Supp. 48, 55 (W.D. Mich. 1965).

194 Herdahl v. Pontotoc County School District, 933 F. Supp. 582, 599 (N.D. Miss. 1996).

concerning other religions' holiday traditions was not an Establishment Clause violation.[195]

**b. May a teacher include materials on creation science in the curriculum contrary to the directives of the school principal?**

No. A federal appellate court ruled that a junior high school teacher did not have a first amendment right to include creation science in the curriculum of his social science class, contrary to the orders of his principal.[196] The courts give school administrators the final word regarding the content of the curriculum taught by teachers.

**c. May a teacher refuse to teach evolution as part of the curriculum?**

No. A high school biology teacher lost his lawsuit against the school district for which he taught. The teacher claimed the school district violated the Establishment Clause by requiring him to teach evolution in his biology class.[197] The court rejected the teacher's claim that evolution was a religious belief system.

The teacher did not challenge the requirement that he teach evolution as a violation of his rights of free speech or free exercise of religion. However, such a challenge would probably be unsuccessful given that the courts would likely agree that the school district, as an employer, had a right to require its employee to teach what he was hired to teach.[198]

**d. May a music teacher include religious music in choral programs?**

Yes. Religious music may be taught if it is "presented objectively as part of a secular program of education."[199] For example, a choral program may include Christmas carols and other religious music.[200] Students may be given the opportunity to perform "a full range of music, poetry and drama that is likely to be of interest to the students and their audience."[201]

The Eighth Circuit has explained that "to allow students only to study and not to perform religious art, literature and music when such works have developed an independent secular and artistic significance would give students a truncated view of our culture."[202] The religious

195 Daugherty v. Vanguard Charter School Academy, 116 F. Supp.2d 897, 914 (W.D. Mich. 2000).

196 Webster v. New Lenox School District, 917 F.2d 1004 (7th Cir. 1990).

197 Peloza v. Capistrano Unified School District, 37 F.3d 517 (9th Cir. 1994).

198 Possibly a teacher could succeed if the teacher were being reassigned to teach a biology class, including evolution, that he had not been hired originally to teach. The school district might then have a duty to assign him to teach a course that did not require violation of his religious convictions under Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000(e).

199 Florey v. Sioux Falls School District, 619 F.2d 1311, 1314 (8th Cir. 1980), quoting Abington v. Schempp, 374 U.S. 203, 225 (1963); Bauchman v. West High School, 132 F.3d 542 (10th Cir. 1997); Doe v. Duncanville Independent School District, 70 F.3d 402 (5th Cir. 1995).

200 Florey, 619 F.2d at 1314, 1316 n.5.

201 Id.

202 Id. at 1316 (original quotation marks, ellipses, and parentheses omitted)(emphasis added).

content of the programs must be "presented objectively as part of a secular program of education."[203] While allowing the inclusion of Christmas carols in school programs, the same court noted that an elementary school program could not include a "Christmas quiz" in which the students responded as a group to questions by the teacher regarding the Christmas story.[204]

The Fifth and Tenth Circuits have allowed choirs to sing religious songs.[205] The Fifth Circuit expressly permitted a school choir to have a religious song as its theme song because legitimate secular reasons existed for maintaining it as the theme song.[206] The court wrote:

> Indeed, to forbid [the school district] from having a theme song that is religious would force [the school district] to disqualify the majority of appropriate choral music simply because it is religious. Within the world of choral music, such a restriction would require hostility, not neutrality, toward religion....A position of neutrality towards religion must allow choir directors to recognize the fact that most choral music is religious. Limiting the number of times a religious piece of music can be sung is tantamount to censorship and does not send students a message of neutrality.[207]

The Tenth Circuit rejected a student's lawsuit that challenged, as an Establishment Clause violation, the number of religious songs performed by a high school choir, including several written by contemporary composers.[208] The choir performed secular songs as well.[209] The court noted:

> Any choral curriculum designed to expose students to the full array of vocal music culture...can be expected to reflect a significant number of religious songs. Moreover, a vocal music instructor would be expected to select any particular piece of sacred choral music, like any particular piece of secular choral music, in part for its unique qualities useful to teach a variety of vocal music skills (i.e., sight reading, intonation, harmonization, expression).[210]

203 Id., quoting Abington v. Schempp, 374 U.S. at 225.

204 Florey, 619 F.2d at 1318.

205 Bauchman v. West High School, 132 F.3d 542 (10th Cir. 1997); Doe v. Duncanville Independent School District, 70 F.3d 402 (5th Cir. 1995).

206 Doe v. Duncanville, 70 F.3d at 407 (legitimate secular reasons were: 1) good music by a reputable composer; 2)useful to teach students sight-reading; and 3) useful to learn to sing a capella).

207 Id. at 407-408.

208 Bauchman v. West High School, 132 F.3d 542 (10th Cir. 1997).

209 Id. at 555.

210 Id. at 554.

The court also rejected the student's challenge to choir performances at religious sites, such as churches. The court determined that a choir director could wish to use churches or other religious sites because they might be "acoustically superior to high school auditoriums or gymnasiums" and would give the teacher an opportunity to "showcase his choir to the general public in an atmosphere conducive to the performance of serious choral music."[211]

A federal district court prohibited a school secretary from leading a Gospel Choir that met on school grounds immediately after school as a student extracurricular group.[212] If the school secretary wanted to continue to participate in the choir's practices on school campus immediately after school, the choir would have to change its repertoire to include songs that had no religious references, although it could continue also to sing religious songs.[213] The choir sang at school assemblies and at community events, including at churches.[214] A recent decision by the Eighth Circuit requiring school officials to allow a teacher to participate in a religious meeting with elementary school children on school premises immediately after school would suggest that similar behavior by a teacher in the Eighth Circuit might well be the teacher's constitutional right.[215]

Without substantial analysis, two district courts have recently found that inclusion of a religious song in graduation ceremonies would violate the Establishment Clause.[216] The courts failed to explain why singing a religious song would be an Establishment Clause violation because it was sung at graduation rather than in a choral program.

A federal district court in Michigan refused to prohibit religious songs played at an elementary school employees' holiday party because there was no showing that the music affected the students since none attended.[217]

211 Id. The Court noted that the choir performed in a number of settings, religious and secular, "all of which reflect the community's culture and heritage." Id. at 555.

212 Sease v. School District of Philadelphia, 811 F. Supp. 183 (E.D. Pa. 1993).

213 Id. at 186-187.

214 Id. at 184. The court did not address these activities and did not seem concerned by them.

215 Wigg v. Sioux Falls Sch. Dist., 382 F.3d 807 (8th Cir. 2004).

216 Skarin v. Woodbine Community School District, 204 F. Supp.2d 1195 (S.D. Iowa 2002)(school choir's singing "Lord's Prayer" at graduation ceremony would violate the Establishment Clause where school board did not indicate any pedagogical reason for inclusion of the song); Ashby v. Isle of Wight County School Board, 354 F. Supp.2d 616 (E.D. Va. 2004)(school's exclusion of student's religious song from graduation program justified by Establishment Clause concerns where student songs were not routine part of graduation ceremony).

217 Daugherty v. Vanguard Charter School Academy, 116 F. Supp.2d 897, 912 (W.D. Mich. 2000).

### e. May students include religious expression in their assignments and artwork?

Yes. Current Department of Education Guidelines specifically state:

> Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the school. Thus, if a teacher's assignment involves writing a poem, the work of a student who submits a poem in the form of a prayer (for example, a psalm) should be judged on the basis of academic standards (such as literary quality) and neither penalized nor rewarded on account of its religious content.[218]

The Eighth Circuit upheld a school policy that protected "[s]tudent-initiated expressions to questions or assignments which reflect their beliefs or non-beliefs about a religious theme."[219] The policy protected students' religious expression of belief or non-belief in "compositions, art forms, music, speech and debate."[220]

Recently, the Second Circuit ruled that a school district could be sued for violating a kindergarten student's free speech rights when it censored the student's poster for depicting a robed figure representing Jesus. The student prepared the poster in response to a kindergarten class assignment to create a poster showing ways to save the environment. Each student explained his poster to the class; the posters were then displayed at an assembly about the environment attended by students and parents. School officials displayed the student's poster by folding down the figure of Jesus so that it was not visible. The court ruled that the school officials acted unconstitutionally if they would have allowed nonreligious figures that had not been discussed in class to appear on student posters while censoring religious figures.[221]

A handful of court decisions have failed to protect this right of students to freedom of expression.[222] Those decisions do not affect the ability of teachers to respect, in an objective manner, the religious expression of their students. Even those decisions did not *require* a teacher to censor students' religious expression.

218 DOE Guidelines, "Religious Expression and Prayer in Class Assignments," in Appendix A.

219 Florey v. Sioux Falls School District, 619 F.2d 1311, 1320 (8th Cir. 1980).

220 Id.

221 Peck v. Baldwinsville Central School District, 426 F.3d 617 (2d Cir. 2005).

222 Settle v. Dickson County School Board, 53 F.3d 152 (6th Cir. 1995)(upholding teacher giving zero for student's research paper on Jesus Christ because, according to teacher, the topic was inappropriate); DeNooyer v. Livonia Pubic Schools, 799 F. Supp. 744 (E.D. Mich. 1992), aff'd without published opinion, 12 F.3d 211 (6th Cir. 1993).

### f. May a teacher include examples of religious expression by national leaders in the history curriculum?

Yes. The curriculum may include "examples of our national leaders lifting up their minds and hearts for worship, guidance, supplication, and thanksgiving."[223] Similarly, historical documents with religious references may be studied in the curriculum.[224]

### g. May a school display on the classroom walls posters, plaques, or pictures, with religious messages?

Religious posters and other religious displays may not be used in the classroom, unless the poster or display is relevant to the curriculum being studied and is used in an objective, educational manner or is clearly a personal religious effect. For further discussion of teacher's posting materials in their classroom, see Section Q.6 below.

In 1980, the Supreme Court struck down a state law requiring the posting of the Ten Commandments on a wall in every classroom.[225] The Supreme Court concluded that the only purpose of the state legislature in passing the law was to advance the religious message of the Ten Commandments.

Recently, a federal district court in Virginia upheld a state statute that required schools to display at one "prominent" place in each school a sign reading, "In God We Trust 'the National Motto, enacted by Congress in 1956.'"[226] The court reasoned that the "national motto's reference to God does not make the statement religious as opposed to secular."[227]

223 Reed v. Van Hoven, 237 F. Supp. 48, 57 (W.D. Mich. 1965).

224 Id at 55.

225 Stone v. Graham, 449 U.S. 39 (1980).

226 Myers v. Loudoun County School Board, 251 F.Supp.2d 1262 (E.D. Va. 2003).

227 Id. at 1274.

**Q. Teachers' expression of personal religious viewpoints in the classroom should be protected but is not receiving protection from the lower federal courts.**

***Comment:*** *Basically, at this time, teachers have opportunities--but not rights--to express religious viewpoints on matters being discussed in class. If a supervisor tells a teacher not to express religious viewpoints in the classroom, the teacher may attempt to educate the supervisor as to the appropriateness of the comments and the fact that the Establishment Clause does not prohibit all personal religious expression. However, if the supervisor insists that no religious comments be made, the teacher should defer, as the courts are most likely to uphold a supervisor's restriction of a teacher's religious expression in the classroom.*[228]

*While the Constitution protects religious expression, the courts have not protected teachers' religious expression in the classroom. Thus, a teacher should defer to any warnings she receives from supervisors regarding the content, including religious content, of her classroom speech.*[229]

In conducting their classes, teachers do not read from a script. Teachers often include personal comments and observations while conducting their classes. In the 1970s, teachers won some cases involving their right to express personal political or social viewpoints during class.[230] Two decisions in 1968 and 1969 by the Supreme Court referred to teachers having First Amendment rights. In Tinker v. Des Moines Independent School District,[231] the Supreme Court stated that teachers and students do not leave their First Amendment rights behind when they enter school. In Pickering v. Board of Education,[232] the Supreme Court reversed a school board's dismissal of a teacher for writing a letter to the community newspaper critical of the school administration for its handling of a school bond issue. In Mount Healthy Board of Education v. Doyle,[233] the Supreme Court ruled that a teacher could not be dismissed if a substantial motivating factor in the school district's decision to dismiss was the teacher's exercise of First Amendment rights.[234]

228 There is some hope that this area of the law will change. Recent Supreme Court decisions in Lamb's Chapel v. Center Moriches Union Free School District, 393 U.S. 384 (1993), Rosenberger v. University of Virginia, 515 U.S. 819 (1995), and Good News Club v. Milford Central School, 533 U.S. 98 (2001) have prohibited discrimination against individuals' religious expression. At this time, however, lower federal courts have failed to afford teachers' religious expression adequate protection.

229 A teacher might wish to consult her union representative. The collective bargaining agreement may provide greater contractual protections for teachers' classroom expression than does current First Amendment caselaw.

230 James v. Board of Education, 461 F.2d 566 (2d Cir. 1972); Kingsville Independent School District v. Cooper, 611 F.2d 1109 (5th Cir. 1980); Keefe v. Geankos, 418 F.2d 359 (1st Cir. 1969).

231 393 U.S. 503 (1969).

232 391 U.S. 563 (1968).

233 429 U.S. 274 (1977).

234 The teacher had "conveyed through a telephone call to a radio station the substance of a memorandum relating to teacher dress." 429 U.S. at 274.

Furthermore, the Supreme Court made clear that the government cannot discriminate against religious viewpoints in three recent decisions, Lamb's Chapel v. Center Moriches Union Free School District,[235] Rosenberger v. University of Virginia,[236] and Good News Club v. Milford Central School.[237] In those cases, the Supreme Court rejected the argument that the Establishment Clause justified viewpoint discrimination against religious viewpoints. These cases would seem to support the right of teachers to discuss their personal religious viewpoints in an appropriate manner during class; *however, many courts at this time are unlikely to rule in favor of the teacher's right to classroom religious expression*.

On the other hand, three recent lines of Supreme Court decisions have undercut teachers' freedom of speech in the classroom in general. To the degree that teachers' freedom of expression can be restricted on secular topics—and it increasingly is being restricted--, courts will also allow teachers' expression to be restricted on religious topics.

Increasingly, the courts treat teachers' comments during class as part of the school curriculum, which can be restricted by school officials through their power to control the curriculum.[238] These courts rely on the Supreme Court's decision in Hazelwood v. Kuhlmeier,[239] in which the Court allowed school officials to restrict student articles in the school newspaper. The Court determined that the school newspaper was part of the school curriculum and could be restricted by school officials as long as they had a legitimate pedagogical reason for their regulations. The decision was not about teachers, yet several courts have adopted the Hazelwood test to restrict teachers' classroom expression.[240]

Another line of Supreme Court decisions have not involved teacher speech but are being applied to restrict teacher speech.[241] In these cases, the Court has ruled that when speech is actually the government's own speech—and not that of an individual—, the government may refuse to say whatever it wishes.[242] While that seems a matter of commonsense, the problem is that a few courts have treated a teacher's speech as simply the government's own speech, allowing the government to censor the teacher's speech without having to justify its censorship.

235 508 U.S. 384 (1993). The Court upheld the right of a community religious group to have equal access to a school auditorium in the evenings to show a religious film series.

236 515 U.S. 819 (1995). The Court upheld the right of a university student religious publication to receive funding from the student activity fees program on an equal basis with other student groups.

237 533 U.S. 98 (2001). The Court upheld the right of a religious community group to have equal access to elementary school facilities immediately after school for religious meetings.

238 See Section I.B.4 above.

239 484 U.S. 260 (1988).

240 See, e.g., Miles v. Denver Public Schools, 944 F.2d 773 (10th Cir. 1991); Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991); Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990).

241 See Section I.B.2 above.

242 Rust v. Sullivan, 500 U.S. 173 (1991)(government can prohibit use of federal funds to counsel patients in favor of abortion).

The third line of cases used by lower courts to restrict teachers' freedom of expression is the Supreme Court's decisions regarding the First Amendment rights of public employees. Teachers are public employees.[243] The Supreme Court has ruled that public employees' expression is protected from regulation by the government employer only if it regards a matter of "public concern" and the expression does not cause a significant disruption of the workplace.[244] This test favors the government employer in restricting its employees' freedom of expression.

The bottom line is that the school officials do not have to prohibit all religious expression by teachers. The Establishment Clause does not require school officials to suppress all religious expression by teachers. Indeed, the Supreme Court cases prohibiting discrimination on the basis of religious viewpoints would seem to protect personal religious expression by teachers. However, the courts have followed Supreme Court decisions that have given school officials broad control over the curriculum to restrict teachers' classroom expression. The courts have also followed Supreme Court decisions that allow the government to restrict the First Amendment rights of its employees in general. Therefore, because teachers' expression on secular topics may be restricted to a great degree, many courts fail to give teachers' religious expression adequate protection.

### 1. May a teacher discuss her personal religious viewpoints during class discussions?

This question has two answers: how the law should be applied and how the law will probably be applied. The law should be applied to allow teachers to express their personal religious viewpoints during class discussions to the same degree teachers discuss other personal viewpoints during class discussions within appropriate limits.

Many courts have not given adequate protection to teachers' religious expression. Several federal appellate courts have allowed school officials to prohibit teachers from discussing their personal religious viewpoints during class discussions.[245]

In these cases, typically the teacher has continued to engage in religious expression and religious activity despite previous warnings by the school administration to cease. For example, a substitute teacher was dropped from the list of substitute teachers after several years of warnings, during which he had read the Bible to students during class and distributed

243 See Section I.B.5 above.

244 Pickering v. Board of Education, 391 U.S. 563 (1968). See also, Mount Healthy Board of Education v. Doyle, 429 U.S. 274 (1977)(teacher could not be discharged if substantial motive in discharge was exercise of First Amendment rights).

245 Helland v. South Bend Community School Corp., 93 F.3d 327, 331 (7th Cir. 1996)("A school can direct a teacher to refrain from expressions of religious viewpoints in the classroom and like settings."); Marchi v. BOCES, 173 F.3d 469 (2d Cir. 1999)(same); Peloza v. Capistrano Unified School Dist., 37 F.3d 517 (9th Cir. 1994)(same); Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991)(university could direct assistant professor to refrain from expressions of religious viewpoints in the classroom).

religious materials to students in class.[246] Another teacher had continued for several years to discuss his religious beliefs at length in class.[247] A teacher's religious expression was curtailed as part of his refusal to teach evolution in his high school biology course.[248] Another teacher's discussions of evolution were curtailed because they were not directly relevant to his subject.[249]

If a teacher wishes to refer to his or her personal religious viewpoints during class, the following guidelines are suggested. However, if supervisors instruct the teacher to stop discussing personal religious viewpoints during class, it is highly unlikely that the teacher would succeed in a legal challenge to that requirement. For example, the First Circuit ruled that a school district could restrict a teacher's in-class comments on any topic, including the specific comments on abortion that the teacher had made; however, the teacher could not be disciplined where she had not been given prior notice that the comments were not allowed by the school district. The existence of a policy likely would be sufficient notice, even if the teacher were not actually aware of the policy.[250] While some notice usually is given, a few court cases have not required previous notice before a teacher was disciplined for inappropriate secular speech.

The guidelines a teacher should follow if mentioning personal religious viewpoints during class are:

1. The discussion should be relevant to the subject being taught;[251]
2. The comments should be appropriate for the age level of the students in the class;
3. The discussion should not take a disproportionate amount of the class time;
4. The teacher should preface her remarks by saying that the comments represent her personal viewpoints and do not represent the view of the school district.

Even if a teacher follows these guidelines, he or she may nonetheless be directed to stop discussing religious viewpoints in class discussions. The guidelines are minimal boundaries to observe if the teacher has not been instructed to refrain from discussing personal religious viewpoints in class. While it is unlikely for a teacher to be disciplined without prior warning, it is possible.

246 Helland v. South Bend Community School Corp., 93 F.3d 327, 331 (7th Cir. 1996)("A school can direct a teacher to refrain from expressions of religious viewpoints in the classroom and like settings.")

247 Marchi v. BOCES, 173 F.3d 469 (2d Cir. 1999).

248 Peloza v. Capistrano Unified School Dist., 37 F.3d 517 (9th Cir. 1994).

249 Webster v. New Lenox, 917 F.2d 1004 (7th Cir. 1990).

250 Hickey v. Ward, 996 F.2d 448 (1st Cir. 1993).

251 Webster v. New Lenox, 917 F.2d 1004 (7th Cir. 1990).

### 2. May a teacher silently read her own Bible during class time?

The only court to address this question said that school officials could prohibit an elementary school teacher from reading the Bible during a silent reading time.[252]

This decision seems wrong; nonetheless, it could be influential. The teacher behaved correctly. He sometimes read the Bible during the daily silent reading time for his fifth grade class, although he also read other books, including books about other religions. He did not read aloud from the Bible or overtly proselytize his students.[253] For the school to prohibit a teacher from reading from the Bible at a time when the teacher may read from other materials of his own choosing would seem to be unconstitutional viewpoint discrimination.[254]

### 3. May a teacher keep a Bible on her desk?

In the same Tenth Circuit case, a principal ordered a teacher to remove his Bible from the top of his desk. The court seemed to assume the teacher must obey that order.[255] This decision seems wrong: a teacher should be able to keep a Bible on the desktop if the teacher would be allowed to keep other personal reading books on top of the desk.

In contrast, the Eighth Circuit recently ruled that a principal could have personal religious effects, which included a Bible and a framed psalm, on the wall of his office.[256] A teacher claimed these violated the Establishment Clause; however, the court noted that government employees did not give up their free exercise or free speech rights if the personal religious effects are clearly personal and do not convey the impression of government endorsement.

### 4. May a teacher include religious books in the classroom library?

The only court to address this question said that school officials could prohibit an elementary school teacher from including religious books in his classroom library.[257]

Again, this decision seems wrong; nonetheless, it could be influential.[258] Inclusion of

252 Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990).

253 Id. at 1049.

254 The Supreme Court decisions in Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993), Rosenberger v. University of Virginia, 515 U.S. 819 (1995), and Good News Club v. Milford Central School, 533 U.S. 98 (2001), in which the Court condemned discrimination against religious viewpoints, had not yet been decided. It is doubtful that the Roberts decision is correct after those decisions, but other courts are likely to be influenced by it.

255 Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990).

256 Warnock v. Archer, 380 F.3d 1076, 1079, 1082 (8th Cir. 2004).

257 Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990).

258 The Supreme Court decisions in Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993), Rosenberger v. University of Virginia, 515 U.S. 819 (1995), and Good News Club v. Milford Central School, 533 U.S. 98 (2001), in which the Court condemned discrimination against religious viewpoints, had not yet been decided. It is doubtful that the Roberts decision is correct after those decisions, but other courts are likely to be influenced by it.

"religious" books in a classroom library should be permissible as long as: 1) the classroom library has numerous secular books on a broad range of topics; 2) students are not encouraged in any way to choose to read the "religious" books; and 3) the "religious" books are a very small percentage of the books in the library.

As the Supreme Court has noted:

> [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.[259]

**5. Must a school remove the Bible from the school library?**

No. Inclusion of a Bible in a school library is appropriate. Indeed, the Tenth Circuit drew the line at ordering removal of the Bible from a school library and instead ordered a school to put a Bible back onto school library shelves, stating that "it is inconceivable that the Bible should be excluded from a school library."[260] The court concluded that "[t]he Establishment Clause does not require that religious books be removed from the shelves of school libraries."[261]

**6. May a teacher display on the classroom walls posters, plaques, or pictures, with religious messages?**

Religious posters and other religious displays may not be used in the classroom, unless the poster or display is relevant to the curriculum being studied and is used in an objective, educational manner or is clearly a personal religious effect. See Section P.3.g above.

In Stone v. Graham,[262] the Supreme Court struck down a state law requiring the posting of the Ten Commandments on a wall in every classroom. The Supreme Court concluded that the only purpose of the state legislature in passing the law was to advance the religious message of the Ten Commandments.

In Roberts v. Madigan,[263] a court of appeals prohibited a teacher from displaying a poster in his classroom that read, "You have only to open your eyes to see the hand of God."

Some courts have deferred to school administrators' decisions to remove materials that teachers have posted on bulletin boards or walls and that reflect the teacher's personal viewpoints. In schools where teachers are generally permitted to post pictures, articles, or other items on school walls or bulletin boards that reflect the teacher's personal interests or

259 Abington School District v. Schempp, 374 U.S. 203, 225 (1963).

260 Roberts v. Madigan, 702 F. Supp. 1505, 1513 (D. Colo. 1989). The court ordered a principal to replace a Bible that she had allegedly removed from the school library. See also, Roberts v. Madigan, 921 F.2d at 1053 n.6.

261 702 F. Supp. at 1513.

262 449 U.S. 39 (1980).

263 921 F.2d 1047,1057 (10th Cir. 1990).

views, a teacher may do so; however, if the school administration advises the teacher to remove the items, several courts have determined that the school administration has the authority to do so.

For example, in one recent district court decision in Virginia (the home of George Washington), a Spanish teacher lost his challenge to a principal removing from the classroom bulletin board a picture the teacher had posted of George Washington praying and articles about President George Bush, then-Attorney General John Ashcroft, and an area resident who was a missionary in a Spanish-speaking country.[264] The court allowed their removal because, in the court's view, a principal may remove any materials he deems inappropriate from classroom bulletin boards. While the principal removed the materials because they had a religious connotation, the court's ruling was not based on the religious nature of the materials. The court would allow the principal to remove any material, nonreligious or religious, a teacher had posted. While the court erred in disregarding the teacher's viewpoint discrimination claim, the case represents the extreme deference that many judges will afford school administrators.

In another case, during a school district's official observance of gay and lesbian awareness month, a high school teacher posted materials on a bulletin board near his classroom giving his viewpoint on the gay and lesbian lifestyles as an alternative to the favorable view the school was espousing.[265] When school officials removed the items, the teacher sued in federal court and lost. The Ninth Circuit ruled that the materials on school bulletin boards were the government's own speech over which the school, not the teacher, had control. Again the court ignored the teacher's viewpoint discrimination claim.

In contrast, the Eighth Circuit ruled that a principal could have personal religious effects, which included a Bible and a framed psalm on the wall of his office.[266] A teacher claimed these violated the Establishment Clause; however, the court noted that government employees did not give up their free exercise or free speech rights if the personal religious effects are clearly personal and do not convey the impression of government endorsement.

264 Lee v. York County School Division, 418 F.Supp.2d 816 (E.D. Va. 2006).

265 Downs v. Los Angeles Unified School District, 228 F.3d 1003 (9th Cir. 2000).

266 Warnock v. Archer, 380 F.3d 1076, 1079, 1082 (8th Cir. 2004).

**R. Teachers' comments in the classroom before and after class should be protected but might not be protected in the courts.**

***Comment:*** *Teacher's expression outside of the classroom should not be considered curricular speech and, therefore, should be more protected from restrictions by school administrators. Teachers should be free to discuss their religious viewpoints with students outside of classroom time. However, it is possible that teachers' speech during contract time, even when outside of classroom time, may be treated by some courts as curricular speech and subject to the restrictions discussed in Part Q.*

Teacher participation in elementary and secondary religious student groups after school is discussed at Section G above. This answer does not address that specific situation.

The Ninth Circuit stated that "[t]o permit [a teacher] to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause of the First Amendment."[267] This decision would seem to be incorrect because it forbids any response to a student-initiated inquiry regarding religion during contract time. A teacher should be able to discuss his or her religious viewpoints with students, particularly in response to a student's questions and particularly outside of the classroom during lunch, or before class begins or after class ends, on the same basis as other teachers may discuss their personal views on political, ideological or social issues. The Supreme Court decisions in Lamb's Chapel v. Center Moriches Union Free School District,[268] Rosenberger v. University of Virginia,[269] and Good News Club v. Milford Central School[270] would seem to require equal protection of expression of religious viewpoints, but it is not clear whether lower courts will apply this Supreme Court precedent to protect a teacher's religious expression.

As explained in Section Q.1 above, a teacher should be careful to explain to students that he or she is explaining his or her own personal religious viewpoints and not the school's or government's views. It is best if the teacher is responding to a student's question to him or her about his or her views on a topic. The teacher should be sensitive to discuss his or her views only as long as the student is receptive. The teacher should also be certain that the student is in no way made to feel that his or her grade or treatment by the teacher will be affected by the student's interest in or agreement with the teacher's religious viewpoints. If the teacher is warned to stop such discussions, the teacher should be aware that many courts will not adequately protect teachers' religious expression.

267 Peloza v. Capistrano Unified School District, 37 F.3d 517, 522 (9th Cir. 1994). One judge strongly dissented, arguing that free speech protected teacher's religious discussions with students in some circumstances. Id. at 525-526 (Poole, J., concurring in part and dissenting in part)("I can imagine a wide range of circumstances and questions 'regarding religion' which Peloza could permissibly answer without violating the Establishment Clause.")

268 508 U.S. 384 (1993).

269 515 U.S. 819 (1995).

270 533 U.S. 98 (2001).

Teachers should have a right to read their Bibles and pray before and after classes or during lunchtime, when teachers otherwise may engage in off-task activities.[271] The Department of Education Guidelines state:

> Before school or during lunch, for example, teachers may meet with other teachers for prayer or Bible study to the same extent that they may engage in other conversation or nonreligious activities.[272]

**S. Religious literature distribution by teachers is permissible if the teacher is simply distributing religious literature approved by the school for distribution on the same basis as other community groups' literature is distributed.**

Teachers should not make available religious literature in the classroom, except for curricular purposes.[273] It is permissible, however, for a teacher to distribute religious literature that is being used in an objective manner as part of the curriculum.[274]

Schools may distribute literature giving students information to take home to their parents about community groups' or student groups' religious activities on the same basis that the school distributes information about other student or community group activities. While teachers should not initiate distribution of religious groups' informational materials, schools must distribute religious groups' informational materials on the same basis as the schools distribute materials for other groups, even where the schools use the teachers to distribute fliers to the students to take home to parents.[275]


**T. Teachers should not invite outside groups to distribute religious literature directly to students in the classroom.**

Teachers should not invite outside groups to distribute religious literature directly to students in the classroom.[276] A school district may allow community religious groups to make Bibles or

271 See Section H above for discussion of teacher's off-campus religious expression and activities.

272 Department of Education Guidelines, "Teachers, Administrators, and Other School Employees," in Appendix A.

273 Miller v. Cooper, 244 P.2d 520 (N.M.1952)(religious literature may not be kept in classroom, even though teacher did not distribute them to students or say it should be read).

274 See Section P above.

275 Child Evangelism Fellowship of New Jersey v. Stafford Township Sch. Dist., 386 F.3d 514 (3d Cir. 2004)(school district must distribute religious group's informational materials, including permission slips, for students to take home to parents, on same basis as other community groups' materials; teachers' handing the materials to the students to take home to parents does not violate the Establishment Clause); Child Evangelism Fellowship of Maryland v. Montgomery Cty. Pub. Sch., 373 F.3d 589 (4th Cir. 2004)(same); Hills v. Scottsdale Unified Sch. Dist., 329 F.3d 1044 (9th Cir. 2003)(same); Rusk v. Crestview Local Sch. Dist., 379 F.3d 418 (6th Cir. 2004)(Establishment Clause not violated by school district distributing community religious group's fliers on an equal access basis); Sherman v. Community School District, 8 F.3d 1160 (7th Cir. 1993)(same); Daugherty v. Vanguard Charter School Academy, 116 F. Supp.2d 897, 911 (W.D. Mich. 2000)(same).

276 Brown v. Orange County Board of Public Instruction, 128 So.2d 181 (Fla. App. 1960).

other religious material available on tables set up in accessible locations, such as halls or libraries, in the schools on the same basis as other community groups may make literature available to students.[277] In the Peck case, "the displays [were] set up and stocked entirely by private citizens who [were] not affiliated in any way with the schools, and the tables [bore] signs informing students only that they should feel free to take the Bible or other material offered....[T]he tables also [bore] a disclaimer, renouncing any sponsorship or endorsement by the school. No one [was] allowed to enter classrooms to announce the availability of the religious or political material, or to stand at the tables to encourage or pressure students to take the material. No school announcement or assembly [was] allowed to mark the availability of the Bibles or any other religious or political material."[278]

**U. Religious literature distribution by students is permissible if students may distribute nonreligious literature.**

Students should be allowed to distribute religious literature to their classmates to the same degree students may distribute nonreligious literature. The leading case is a Seventh Circuit decision upholding the right of middle school students to distribute religious literature when other students were allowed to distribute nonreligious literature.[279] A federal district court in Massachusetts recently required a school district to allow high school students to distribute to other students a candy cane with a religious message attached during noninstructional time.[280] The Third Circuit, however, upheld a school district's refusal to allow a kindergartner to distribute candy canes with messages to his classmates during a holiday party that the court deemed to be instructional time.[281] The teacher should neither discourage nor encourage students' distribution of religious literature.

**V. Teacher correspondence should be protected.**

**1. May a teacher include religious references in correspondence with parents?**

It depends on whether the teacher is writing to students' parents in his capacity as a teacher. If he is, then the letters may be considered part of his instructional program which can be regulated by the school officials. School officials may require that he not include religious references in letters written to parents in his capacity as a teacher.[282] The school should not be able to regulate communications to students' parents on matters unrelated to school.

277 Peck v. Upshur County Board of Education, 155 F.3d 274 (4th Cir. 1998).

278 Id. at 275-76.

279 Hedges v. Wauconda Community School District, 9 F.3d 1295 (7th Cir. 1993).

280 Westfield High School LIFE Club v. City of Westfield, 249 F. Supp.2d 98 (D. Mass. 2003).

281 Walz v. Egg harbor Township Board of Education, 342 F.3d 271 (3rd Cir. 2003).

282 Marchi v. BOCES, 173 F.3d 469 (2nd Cir. 1999).

### 2. May a teacher include religious references in correspondence with other teachers?

The First Amendment should protect the right of teachers to express their personal viewpoints on religion in conversations and written communication with other teachers just as they may express their personal viewpoints on a variety of topics.[283]

**W. A public school counselor may suggest programs with a spiritual component if the overall program addresses a secular problem and the counselor does not coerce the student's attendance.**

A counselor may wonder whether he or she may suggest family help programs or Alcoholics Anonymous programs that have a spiritual component. There does not seem to be a decision specifically addressing this issue. Recently, the Fifth Circuit ruled that a school district may include clergy volunteers in a general school program of community volunteers who mentor and counsel students during the school day on secular issues.[284] The program did not appear to give special preference to clergy, and the clergy did not wear clerical garb or engage in religious discussions.[285]

However, it seems permissible for the counselor to include a program with a spiritual component among his or her recommendations, if the counselor truly believes the program will help the student address his or her problem. The counselor should suggest a variety of possible programs, both spiritual and non-spiritual.

The suggestion of a program with a spiritual component should be low-key and without any pressure on the student to participate. For example, the student should not be given the choice between detention and attending Alcoholics Anonymous. The counselor should always be respectful of the student's, including his or her family's, religious background, or lack thereof.

**X. The courts do not agree on whether teachers have a right to wear religious garments or jewelry with religious symbols.**

The issue of whether a teacher may wear religious garb while teaching is one of the oldest issues involving religion in the public schools. The issue arose a century ago as Protestants increasingly wanted to keep the government from funding Catholic schools. At the time, much religious activity was permitted in the public schools as long as it was Protestant in orientation. Some states attempted to fund Catholic schools as public schools with nuns teaching the classes. Persons opposed to Catholic schools used laws prohibiting religious garb

283 See Section J above for further discussion.

284 Doe v. Beaumont Independent School District, 240 F.3d 462 (5th Cir. 2001). See also Clinton DOE Guidelines in Appendix B, noting that religious groups have been active in tutoring programs in the schools.

285 Id. at 465. Eventually, the district court determined the challenged program did unconstitutionally give preference to the clergy over other volunteers and, therefore, was unconstitutional in that particular instance. Oxford v. Beaumont Independent School District, 224 F. Supp.2d 1099 (E.D. Tex. 2002).

in the classroom to keep funding from going to Catholic schools. Many anti-religious garb cases date from the turn of the century.[286]

The rule should be that teachers may wear jewelry or articles of clothing that express their religious affiliation or values if other teachers may wear jewelry with nonreligious symbols or similar articles of clothing. That is, if a teacher's faith requires him or her to wear headgear (such as a yarmulke for adherents to the Orthodox Jewish faith), he should certainly be allowed to wear it if other teachers may wear headgear (for example, a baseball cap) in the classroom. Even if other teachers are prohibited from wearing headgear, the teacher's religious needs should be accommodated under free exercise of religion or Title VII of the Civil Rights Act of 1964.

Furthermore, federal law requires an employer to accommodate the religious practices of an employee if the employer may do so without suffering undue hardship. Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000(e) prohibits an employer from discriminating against an employee on the basis of "race, color, religion, sex, or national origin." The employer violates the law unless it "demonstrates that [it] is unable to reasonably accommodate...an employee's...religious observance or practice without undue hardship on the conduct of the employer's business."[287] The term "religion" includes "all aspects of religious observance and practice, as well as belief."[288]

Title VII is important but does not offer the broad scope of protection that its terms imply. For example, the employer has a great deal of flexibility in determining what accommodation it will offer the employee. The employer does not have to accept the accommodation that the employee wants if the employer has a different accommodation to offer. "[T]he employer need only demonstrate that the proffered accommodation is reasonable, not that it is the most reasonable or the employee's preferred accommodation."[289]

The courts have differed in their treatment of teachers' religious garb, jewelry, or headgear. Most recently, a federal district court in Pennsylvania ruled unconstitutional a school district policy that prohibited employees from wearing religious jewelry, including crosses and Stars of David.[290] An instructional aide was suspended for wearing a small cross while she assisted a special needs elementary school student. The court ruled that the policy was hostile toward religion and violated the aide's free exercise and free speech rights.[291]

286 United States v. Board of Education, 911 F.2d 882, 894 (3d Cir. 1990).

287 Ansonia Board of Education v. Philbrook, 479 U.S. 60 (1986)(quoting 42 U.S.C. 2000e(j)).

288 42 U.S.C. 2000e(j). See also Executive Guidelines on Religious Exercise and Religious Expression in the Federal Workplace (August 14, 1997)(reprinted in Appendix F) at 6-7, 9-10.

289 United States v. Board of Education for the School District of Philadelphia, 911 F.2d 882, 886 (3d Cir. 1990), citing Ansonia Board of Education v. Philbrook, 479 U.S. 60 (1986).

290 Nichol v. Arin Intermediate Unit 28, 268 F.Supp.2d 536 (W.D. Pa. 2003).

291 Id. at 548.

In a 1990 Third Circuit case regarding a teacher's religious garb, the United States sued a school district for refusing to allow a substitute teacher to wear her Muslim dress and headgear in the classroom.[292] The United States claimed the school district violated the teacher's right under Title VII, but the federal appellate court disagreed. The court ruled that preserving the appearance of neutrality avoided undue hardship for the employer as did compliance with the state law prohibiting teachers from wearing religious garb.[293] Therefore, Title VII was not violated by the school district refusing to allow the substitute teacher to teach while dressed in religious garb.

A subsequent Third Circuit decision, however, has questioned the correctness of the 1990 decision in light of changes in Supreme Court Establishment Clause precedent.[294] A federal district court also stated it was "unlikely that the Garb Statute would withstand the heightened scrutiny and endorsement analysis to which it now must be subjected."[295]

In another case, a teacher challenged a school district policy prohibiting her religious headgear, not on Title VII grounds, but on constitutional free exercise of religion grounds.[296] The Oregon Supreme Court ruled that the Oregon law prohibiting religious garb in the schools violated the teacher's free exercise of religion, but that violation was justified by a compelling state interest. The compelling interest was in preserving the appearance of religious neutrality in public schools. The court "did not conclude that tolerating religious garb in the classroom would violate the establishment clause, but rather that 'a rule against such religious dress is permissible to avoid the appearance of sectarian influence, favoritism, or official approval in the public school.'"[297] The Third Circuit has questioned this decision's correctness as well.[298]

A teacher lost a free speech challenge when an assistant principal required her to cover up the "Jesus 2000" tee-shirt she was wearing in class during instructional time. The federal district court in Connecticut accepted the school district's justification that it feared students might view the school as endorsing the tee-shirt's religious message.[299]

292 United States v. Board of Education, 911 F.2d 882 (3d Cir. 1990).

293 Id. at 891.

294 Tenafly Eruv Association v. The Borough of Tenafly, 309 F.3d 144, 173 n.33 (3rd Cir. 2002).

295 Nichol v. Arin Intermediate Unit 28, 268 F. Supp.2d 536, 555 (W.D. Pa. 2003).

296 Cooper v. Eugene School District, 723 P.2d 298 (Or. 1986), appeal dismissed, 480 U.S. 942 (1987). The United States Supreme Court did not hear arguments or have full briefing on this case; nonetheless, its disposition of the case (implying that the teacher's free exercise claim was correctly decided by the Oregon Supreme Court) may be influential in other courts, as it was in United States v. Board of Education, supra.

297 United States v. Board of Education, 911 F.2d at 888, quoting Cooper, 723 P.2d at 308. See also, Zellers v. Huff, 236 P.2d 949 (N.M. 1951)(prohibiting religious garb in classroom in context where state was funding a Roman Catholic school system).

298 Tenafly Eruv Association v. The Borough of Tenafly, 309 F.3d 144, 173 n.33 (3rd Cir. 2002).

299 Downing v. West Haven Board of Education, 162 F. Supp.2d 19 (D. Conn. 2001).

A state supreme court held that a teacher was entitled to unemployment benefits when she was discharged for refusing to cease wearing a headdress that was an expression of her religious and cultural values.[300] The court did not address whether her discharge was lawful.

Even the courts that have upheld school districts' prohibition of daily religious dress by teachers have noted that the occasional wearing of jewelry like a cross or a Star of David was not prohibited by the school districts.[301] Nor were isolated occurrences of religious dress prohibited.[302]

As the Third Circuit has noted, it is questionable whether these decisions are correct under the Supreme Court's more recent interpretations of the Free Exercise Clause and the Establishment Clause. The Free Exercise Clause prohibits the government from singling out religious conduct for prohibition when the same conduct is permitted for secular reasons.[303] That is, if teachers are allowed to wear headgear or long dresses for secular reasons, they cannot be prohibited from wearing similar clothing for religious reasons, unless the government can show a compelling interest in its differential treatment of religious clothing. The school district would likely argue that a teacher wearing religious clothing violates the Establishment Clause, but that argument should not succeed.[304] The school administration could explain to the student body that it is merely treating teachers in the neutral manner required by the First Amendment by respecting their religious conviction that requires them to wear religious garments. Such an explanation could overcome any misperception of students that the school itself endorsed the teacher's religious beliefs.[305]

### Y. Teachers may take religious holidays if it does not impose any undue hardship on their employer.

Under Title VII, a teacher may take time off for a religious holiday if this does not impose an undue hardship on his or her employer. The employer, however, does not need to accept the teacher's proposed accommodation but may impose on the teacher any reasonable accommodation the employer chooses. The employer may require the teacher to use unpaid

300 Mississippi Employment Security Commission, 556 So.2d 324 (Miss. 1990).

301 United States v. Board of Education, 911 F.2d at 890, citing Cooper, 723 P.2d at 312.

302 Id.

303 Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

304 It would, however, have support from the decisions in United States v. Board of Education, supra, and Cooper v. Eugene School District, supra. Neither case ruled that the Establishment Clause was violated by a teacher wearing religious garments, but both permitted a school district to justify its prohibition due to its Establishment Clause concerns.

305 The Supreme Court directed school districts to correct any misperceptions regarding student religious groups meeting on school property in Board of Education v. Mergens, 496 U.S. 226 (1990). The school district could not justify its ban on student religious groups because it feared other students would misperceive endorsement of the religious students' beliefs; instead, the school district had the burden of correcting any misperceptions.

leave for a religious holiday,[306] unless paid leave is provided for all purposes except religious ones.[307] "Such an arrangement would display a discrimination against religious practices that is the antithesis of reasonableness."[308]

In order to take the religious holiday, the teacher must inform the school of the conflict between his or her religious holidays and the school schedule early enough for the school to plan a substitute teacher. The teacher must be prepared to demonstrate that taking the holiday is a sincerely held religious belief.

**Z. Teachers may educate their children at home or in private schools.**

The Ninth Circuit ruled that a school district violated a principal's free exercise right to educate his children at home when it reassigned him to a teaching position because his family homeschooled.[309] Similarly, the Fifth Circuit ruled that a teacher's constitutional rights of free exercise and parental right to direct the education of one's child were violated when the school district denied her promotion to assistant principal because her children attended a private school.[310]

**AA. Teachers who object to the political positions taken by a union may withhold the portion of their union dues that funds the union's political stances.**

Public employees' unions may not spend a public employee's dues on political or ideological causes not germane to the union's duties as collective bargaining agent, if the employee objects.[311] Public employees, including teachers, have a free speech right to not be compelled to support unions' political or ideological speech with which they disagree.[312]

A union must establish a process by which objecting members may register their objection and redirect the portion of their dues that support ideological or political causes not germane to the union's duties.[313]

A teacher who wishes to exercise this right should contact the Christian Educators Association International for its booklet on teachers' rights *vis a vis* union activities. Because it is important to work through the process in a correct manner, a teacher should be familiar with this booklet before attempting to deal with union procedures.[314]

306 Ansonia Board of Education v. Philbrook, 479 U.S. 60 (1986).

307 Id. at 373.

308 Id.

309 Peterson v. Minidoka County School District, 118 F.3d 1351 (9th Cir. 1997).

310 Barrow v. Greenville Independent School District, 332 F.3d 844 (5th Cir. 2003).

311 Abood v. Detroit Board of Education, 431 U.S. 209 (1977).

312 Id.

313 Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986); Lehnert v. Ferris Faculty Association, 500 U.S. 507 (1991).

314 The CEAI booklet was written by attorney Bruce Cameron, who can be contacted at the National Right To Work Legal Defense Foundation, 8001 Braddock Road, Springfield, Virginia 22151, (703) 321-8510, or by visiting their website at http://www.nrtw.org. The website has a useful guide to these issues.

# Appendix A

## Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools

**United States Department of Education**

February 7, 2003

### INTRODUCTION

Section 9524 of the Elementary and Secondary Education Act ("ESEA") of 1965, as amended by the No Child Left Behind Act of 2001, requires the Secretary to issue guidance on constitutionally protected prayer in public elementary and secondary schools. In addition, Section 9524 requires that, as a condition of receiving ESEA funds, a local educational agency ("LEA") must certify in writing to its State educational agency ("SEA") that it has no policy that prevents, or otherwise denies participation in, constitutionally protected prayer in public schools as set forth in this guidance.

The purpose of this guidance is to provide SEAs, LEAs, and the public with information on the current state of the law concerning constitutionally protected prayer in the public schools, and thus to clarify the extent to which prayer in public schools is legally protected. This guidance also sets forth the responsibilities of SEAs and LEAs with respect to Section 9524 of the ESEA. As required by the Act, this guidance has been jointly approved by the Office of the General Counsel in the Department of Education and the Office of Legal Counsel in the Department of Justice as reflecting the current state of the law. It will be made available on the Internet through the Department of Education's web site (www.ed.gov). The guidance will be updated on a biennial basis, beginning in September 2004, and provided to SEAs, LEAs, and the public.

### THE SECTION 9524 CERTIFICATION PROCESS

In order to receive funds under the ESEA, an LEA must certify in writing to its SEA that no policy of the LEA prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary and secondary schools as set forth in this guidance. An LEA must provide this certification to the SEA by October 1, 2002, and by October 1 of each subsequent year during which the LEA participates in an ESEA program. However, as a transitional matter, given the timing of this guidance, the initial certification must be provided by an LEA to the SEA by March 15, 2003.

The SEA should establish a process by which LEAs may provide the necessary certification. There is no specific Federal form that an LEA must use in providing this certification to its SEA. The certification may be provided as part of the application process for ESEA programs, or separately, and in whatever form the SEA finds most appropriate, as long as the certification is in writing and clearly states that the LEA has no policy that prevents, or

otherwise denies participation in, constitutionally protected prayer in public elementary and secondary schools as set forth in this guidance.

By November 1 of each year, starting in 2002, the SEA must send to the Secretary a list of those LEAs that have not filed the required certification or against which complaints have been made to the SEA that the LEA is not in compliance with this guidance. However, as a transitional matter, given the timing of this guidance, the list otherwise due November 1, 2002, must be sent to the Secretary by April 15, 2003. This list should be sent to:

**Office of Elementary and Secondary Education**
*Attention: Jeanette Lim*
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

The SEA's submission should describe what investigation or enforcement action the SEA has initiated with respect to each listed LEA and the status of the investigation or action. The SEA should not send the LEA certifications to the Secretary, but should maintain these records in accordance with its usual records retention policy.

## ENFORCEMENT OF SECTION 9524

LEAs are required to file the certification as a condition of receiving funds under the ESEA. If an LEA fails to file the required certification, or files it in bad faith, the SEA should ensure compliance in accordance with its regular enforcement procedures. The Secretary considers an LEA to have filed a certification in bad faith if the LEA files the certification even though it has a policy that prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary and secondary schools as set forth in this guidance.

The General Education Provisions Act ("GEPA") authorizes the Secretary to bring enforcement actions against recipients of Federal education funds that are not in compliance with the law. Such measures may include withholding funds until the recipient comes into compliance. Section 9524 provides the Secretary with specific authority to issue and enforce orders with respect to an LEA that fails to provide the required certification to its SEA or files the certification in bad faith.

## OVERVIEW OF GOVERNING CONSTITUTIONAL PRINCIPLES

The relationship between religion and government in the United States is governed by the First Amendment to the Constitution, which both prevents the government from establishing religion and protects privately initiated religious expression and activities from government interference and discrimination.[1] The First Amendment thus establishes certain limits on the conduct of public school officials as it relates to religious activity, including prayer.

The legal rules that govern the issue of constitutionally protected prayer in the public schools are similar to those that govern religious expression generally. Thus, in discussing the operation of Section 9524 of the ESEA, this guidance sometimes speaks in terms of "religious

expression." There are a variety of issues relating to religion in the public schools, however, that this guidance is not intended to address.

The Supreme Court has repeatedly held that the First Amendment requires public school officials to be neutral in their treatment of religion, showing neither favoritism toward nor hostility against religious expression such as prayer.[2] Accordingly, the First Amendment forbids religious activity that is sponsored by the government but protects religious activity that is initiated by private individuals, and the line between government-sponsored and privately initiated religious expression is vital to a proper understanding of the First Amendment's scope. As the Court has explained in several cases, "there is a crucial difference between ***government*** speech endorsing religion, which the Establishment Clause forbids, and ***private*** speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[3]

The Supreme Court's decisions over the past forty years set forth principles that distinguish impermissible governmental religious speech from the constitutionally protected private religious speech of students. For example, teachers and other public school officials may not lead their classes in prayer, devotional readings from the Bible, or other religious activities.[4] Nor may school officials attempt to persuade or compel students to participate in prayer or other religious activities.[5] Such conduct is "attributable to the State" and thus violates the Establishment Clause.[6]

Similarly, public school officials may not themselves decide that prayer should be included in school-sponsored events. In Lee v. Weisman[7], for example, the Supreme Court held that public school officials violated the Constitution in inviting a member of the clergy to deliver a prayer at a graduation ceremony. Nor may school officials grant religious speakers preferential access to public audiences, or otherwise select public speakers on a basis that favors religious speech. In *Santa Fe Independent School District v. Doe*[8], for example, the Court invalidated a school's football game speaker policy on the ground that it was designed by school officials to result in pregame prayer, thus favoring religious expression over secular expression.

Although the Constitution forbids public school officials from directing or favoring prayer, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[9] and the Supreme Court has made clear that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."[10] Moreover, not all religious speech that takes place in the public schools or at school-sponsored events is governmental speech.[11] For example, "nothing in the Constitution ... prohibits any public school student from voluntarily praying at any time before, during, or after the school day,"[12] and students may pray with fellow students during the school day on the same terms and conditions that they may engage in other conversation or speech. Likewise, local school authorities possess substantial discretion to impose rules of order and pedagogical restrictions on student activities,[13] but they may not structure or administer such rules to discriminate against student prayer or religious speech. For instance, where schools permit student expression on the basis of genuinely neutral criteria and students retain primary control over the content of their expression, the speech of students who choose to express themselves through religious means such as prayer is not attributable

to the state and therefore may not be restricted because of its religious content.[14] Student remarks are not attributable to the state simply because they are delivered in a public setting or to a public audience.[15] As the Supreme Court has explained: "The proposition that schools do not endorse everything they fail to censor is not complicated,"[16] and the Constitution mandates neutrality rather than hostility toward privately initiated religious expression.[17]

## APPLYING THE GOVERNING PRINCIPLES IN PARTICULAR CONTEXTS

### *Prayer During Noninstructional Time*

Students may pray when not engaged in school activities or instruction, subject to the same rules designed to prevent material disruption of the educational program that are applied to other privately initiated expressive activities. Among other things, students may read their Bibles or other scriptures, say grace before meals, and pray or study religious materials with fellow students during recess, the lunch hour, or other noninstructional time to the same extent that they may engage in nonreligious activities. While school authorities may impose rules of order and pedagogical restrictions on student activities, they may not discriminate against student prayer or religious speech in applying such rules and restrictions.

### *Organized Prayer Groups and Activities*

Students may organize prayer groups, religious clubs, and "see you at the pole" gatherings before school to the same extent that students are permitted to organize other non-curricular student activities groups. Such groups must be given the same access to school facilities for assembling as is given to other non-curricular groups, without discrimination because of the religious content of their expression. School authorities possess substantial discretion concerning whether to permit the use of school media for student advertising or announcements regarding non-curricular activities. However, where student groups that meet for nonreligious activities are permitted to advertise or announce their meetings—for example, by advertising in a student newspaper, making announcements on a student activities bulletin board or public address system, or handing out leaflets—school authorities may not discriminate against groups who meet to pray. School authorities may disclaim sponsorship of non-curricular groups and events, provided they administer such disclaimers in a manner that neither favors nor disfavors groups that meet to engage in prayer or religious speech.

### *Teachers, Administrators, and other School Employees*

When acting in their official capacities as representatives of the state, teachers, school administrators, and other school employees are prohibited by the Establishment Clause from encouraging or discouraging prayer, and from actively participating in such activity with students. Teachers may, however, take part in religious activities where the overall context makes clear that they are not participating in their official capacities. Before school or during lunch, for example, teachers may meet with other teachers for prayer or Bible study to the same extent that they may engage in other conversation or nonreligious activities. Similarly, teachers may participate in their personal capacities in privately sponsored baccalaureate ceremonies.

### *Moments of Silence*

If a school has a "minute of silence" or other quiet periods during the school day, students are

free to pray silently, or not to pray, during these periods of time. Teachers and other school employees may neither encourage nor discourage students from praying during such time periods.

***Accommodation of Prayer During Instructional Time***

It has long been established that schools have the discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation in such instruction or penalize students for attending or not attending. Similarly, schools may excuse students from class to remove a significant burden on their religious exercise, where doing so would not impose material burdens on other students. For example, it would be lawful for schools to excuse Muslim students briefly from class to enable them to fulfill their religious obligations to pray during Ramadan.

Where school officials have a practice of excusing students from class on the basis of parents' requests for accommodation of nonreligious needs, religiously motivated requests for excusal may not be accorded less favorable treatment. In addition, in some circumstances, based on federal or state constitutional law or pursuant to state statutes, schools may be required to make accommodations that relieve substantial burdens on students' religious exercise. Schools officials are therefore encouraged to consult with their attorneys regarding such obligations.

***Religious Expression and Prayer in Class Assignments***

Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the school. Thus, if a teacher's assignment involves writing a poem, the work of a student who submits a poem in the form of a prayer (for example, a psalm) should be judged on the basis of academic standards (such as literary quality) and neither penalized nor rewarded on account of its religious content.

***Student Assemblies and Extracurricular Events***

Student speakers at student assemblies and extracurricular activities such as sporting events may not be selected on a basis that either favors or disfavors religious speech. Where student speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression, that expression is not attributable to the school and therefore may not be restricted because of its religious (or anti-religious) content. By contrast, where school officials determine or substantially control the content of what is expressed, such speech is attributable to the school and may not include prayer or other specifically religious (or anti-religious) content. To avoid any mistaken perception that a school endorses student speech that is not in fact attributable to the school, school officials may make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker's and not the school's.

***Prayer at Graduation***

School officials may not mandate or organize prayer at graduation or select speakers for such events in a manner that favors religious speech such as prayer. Where students or other

private graduation speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression, however, that expression is not attributable to the school and therefore may not be restricted because of its religious (or anti-religious) content. To avoid any mistaken perception that a school endorses student or other private speech that is not in fact attributable to the school, school officials may make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker's and not the school's.

***Baccalaureate Ceremonies***

School officials may not mandate or organize religious ceremonies. However, if a school makes its facilities and related services available to other private groups, it must make its facilities and services available on the same terms to organizers of privately sponsored religious baccalaureate ceremonies. In addition, a school may disclaim official endorsement of events sponsored by private groups, provided it does so in a manner that neither favors nor disfavors groups that meet to engage in prayer or religious speech.

**NOTES:**

1 The relevant portions of the First Amendment provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." U.S. Const. amend. I. The Supreme Court has held that the Fourteenth Amendment makes these provisions applicable to all levels of government—federal, state, and local—and to all types of governmental policies and activities. *See Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

2 *See, e.g., Everson*, 330 U.S. at 18 (the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them"); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

3 *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quoting *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)); *accord Rosenberger v. Rector of Univ. of Virginia*, 515 U.S. 819, 841 (1995).

4 *Engel v. Vitale*, 370 U.S. 421 (1962) (invalidating state laws directing the use of prayer in public schools); *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (invalidating state laws and policies requiring public schools to begin the school day with Bible readings and prayer); Mergens, 496 U.S. at 252 (plurality opinion) (explaining that "a school may not itself lead or direct a religious club"). The Supreme Court has also held, however, that the study of the Bible or of religion, when presented objectively as part of a secular program of education (e.g., in history or literature classes), is consistent with the First Amendment. *See Schempp*, 374 U.S. at 225.

5 *See Lee v. Weisman*, 505 U.S. 577, 599 (1992); *see also Wallace v. Jaffree*, 472 U.S. 38 (1985).

6 *See Weisman*, 505 U.S. at 587.

7 505 U.S. 577 (1992).

8 530 U.S. 290 (2000).

9 *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969).

10 *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

11 *Santa Fe*, 530 U.S. at 302 (explaining that "not every message" that is "authorized by a government policy and take[s] place on government property at government-sponsored school-related events" is "the government's own").

12 *Santa Fe*, 530 U.S. at 313.

13 For example, the First Amendment permits public school officials to review student speeches for vulgarity, lewdness, or sexually explicit language. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683-86 (1986). Without more, however, such review does not make student speech attributable to the state.

14 *Rosenberger v. Rector of Univ. of Virginia*, 515 U.S. 819 (1995); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Santa Fe*, 530 U.S. at 304 n.15. In addition, in circumstances where students are entitled to pray, public schools may not restrict or censor their prayers on the ground that they might be deemed "too religious" to others. The Establishment Clause prohibits state officials from making judgments about what constitutes an appropriate prayer, and from favoring or disfavoring certain types of prayers—be they "nonsectarian" and "nonproselytizing" or the opposite—over others. *See Engel v. Vitale*, 370 U.S. 421, 429-30 (1962) (explaining that "one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services," that "neither the power nor the prestige" of state officials may "be used to control, support or influence the kinds of prayer the American people can say," and that the state is "without power to prescribe by law any particular form of prayer"); *Weisman*, 505 U.S. at 594.

15 *Santa Fe*, 530 U.S. at 302; *Mergens*, 496 U.S. at 248-50.

16 *Mergens*, 496 U.S. at 250 (plurality opinion); *id*. at 260-61 (Kennedy, J., concurring in part and in judgment).

17 *Rosenberger*, 515 U.S. at 845-46; Mergens, 496 U.S. at 248 (plurality opinion); *id*. at 260-61 (Kennedy, J., concurring in part and in judgment).

# Appendix B

### UNITED STATES DEPARTMENT OF EDUCATION
### THE SECRETARY

*"...Schools do more than train children's minds. They also help to nurture their souls by reinforcing the values they learn at home and in their communities. I believe that one of the best ways we can help out schools to do this is by supporting students' rights to voluntarily practice their religious beliefs, including prayer in schools.... For more than 200 years, the First Amendment has protected our religious freedom and allowed many faiths to flourish in our homes, in our work place and in our schools. Clearly understood and sensibly applied, it works."*

**President Clinton**
May 30, 1998

Dear American Educator,

Almost three years ago, President Clinton directed me, as U.S. Secretary of Education, in consultation with the Attorney General, to provide every public school district in America with a statement of principles addressing the extent to which religious expression and activity are permitted in our public schools. In accordance with the President's directive, I sent every school superintendent in the country guidelines on Religious Expression in Public Schools in August of 1995.

The purpose of promulgating these presidential guidelines was to end much of the confusion regarding religious expression in our nation's public schools that had developed over more than thirty years since the U.S. Supreme Court decision in 1962 regarding state sponsored school prayer. I believe that these guidelines have helped school officials, teachers, students and parents find a new common ground on the important issue of religious freedom consistent with constitutional requirements.

In July of 1996, for example, the Saint Louis School Board adopted a district wide policy using these guidelines. While the school district had previously allowed certain religious activities, it had never spelled them out before, resulting in a lawsuit over the right of a student to pray before lunch in the cafeteria. The creation of a clearly defined policy using the guidelines allowed the school board and the family of the student to arrive at a mutually satisfactory settlement.

In a case decided last year in a United States District Court in Alabama, (Chandler v. James) involving student initiated prayer at school related events, the court instructed the DeKalb County School District to maintain for circulation in the library of each school a copy of the presidential guidelines.

The great advantage of the presidential guidelines, however, is that they allow school districts to avoid contentious disputes by developing a common understanding among students, teachers, parents and the broader community that the First Amendment does in fact provide ample room for religious expression by students while at the same time maintaining freedom from government sponsored religion.

The development and use of these presidential guidelines were not and are not isolated activities. Rather, these guidelines are part of an ongoing and growing effort by educators and America's religious community to find a new common ground. In April of 1995, for example, thirty-five religious groups issued "Religion in the Public Schools: A Joint Statement of Current Law" that the Department drew from in developing its own guidelines. Following the release of the presidential guidelines, the National PTA and the Freedom Forum jointly published in 1996 "A Parent's Guide to Religion in the Public Schools" which put the guidelines into an easily understandable question and answer format.

In the last two years, I have held three religious-education summits to inform faith communities and educators about the guidelines and to encourage continued dialogue and cooperation within constitutional limits. Many religious communities have contacted local schools and school systems to offer their assistance because of the clarity provided by the guidelines. The United Methodist Church has provided reading tutors to many schools, and Hadassah and the Women's League for Conservative Judaism have both been extremely active in providing local schools with support for summer reading programs.

The guidelines we are releasing today are the same as originally issued in 1995, except that changes have been made in the sections on religious excusals and student garb to reflect the Supreme Court decision in Boerne v. Flores declaring the Religious Freedom Restoration Act unconstitutional as applied to actions of state and local governments.

These guidelines continue to reflect two basic and equally important obligations imposed on public school officials by the First Amendment. First, schools may not forbid students acting on their own from expressing their personal religious views or beliefs solely because they are of a religious nature. Schools may not discriminate against private religious expression by students, but must instead give students the same right to engage in religious activity and discussion as they have to engage in other comparable activity. Generally, this means that students may pray in a nondisruptive manner during the school day when they are not engaged in school activities and instruction, subject to the same rules of order that apply to other student speech.

At the same time, schools may not endorse religious activity or doctrine, nor may they coerce participation in religious activity. Among other things, of course, school administrators and teachers may not organize or encourage prayer exercises in the classroom. Teachers, coaches and other school officials who act as advisors to student groups must remain mindful that they cannot engage in or lead the religious activities of students.

And the right of religious expression in school does not include the right to have a "captive audience" listen, or to compel other students to participate. School officials should not permit student religious speech to turn into religious harassment aimed at a student or a small group of students. Students do not have the right to make repeated invitations to other students to

participate in religious activity in the face of a request to stop.

The statement of principles set forth below derives from the First Amendment. Implementation of these principles, of course, will depend on specific factual contexts and will require careful consideration in particular cases.

In issuing these revised guidelines I encourage every school district to make sure that principals, teachers, students and parents are familiar with their content. To that end I offer three suggestions:

First, school districts should use these guidelines to revise or develop their own district wide policy regarding religious expression. In developing such a policy, school officials can engage parents, teachers, the various faith communities and the broader community in a positive dialogue to define a common ground that gives all parties the assurance that when questions do arise regarding religious expression the community is well prepared to apply these guidelines to specific cases. The Davis County School District in Farmington, Utah,is an example of a school district that has taken the affirmative step of developing such a policy.

At a time of increasing religious diversity in our country such a proactive step can help school districts create a framework of civility that reaffirms and strengthens the community consensus regarding religious liberty. School districts that do not make the effort to develop their own policy may find themselves unprepared for the intensity of the debate that can engage a community when positions harden around a live controversy involving religious expression in public schools.

Second, I encourage principals and administrators to take the additional step of making sure that teachers, so often on the front line of any dispute regarding religious expression, are fully informed about the guidelines. The Gwinnett County School system in Georgia, for example, begins every school year with workshops for teachers that include the distribution of these presidential guidelines. Our nation's schools of education can also do their part by ensuring that prospective teachers are knowledgeable about religious expression in the classroom.

Third, I encourage schools to actively take steps to inform parents and students about religious expression in school using these guidelines. The Carter County School District in Elizabethton, Tennessee, included the subject of religious expression in a character education program that it developed in the fall of 1997. This effort included sending home to every parent a copy of the "Parent's Guide to Religion in the Public Schools."

Help is available for those school districts that seek to develop policies on religious expression. I have enclosed a list of associations and groups that can provide information to school districts and parents who seek to learn more about religious expression in our nation's public schools.

In addition, citizens can turn to the U.S. Department of Education web site (http://www.ed.gov) for information about the guidelines and other activities of the Department that support the growing effort of educators and religious communities to support the education of our nation's children.

Finally, I encourage teachers and principals to see the First Amendment as something more than a piece of dry, old parchment locked away in the national attic gathering dust. It is a vital

living principle, a call to action, and a demand that each generation reaffirm its connection to the basic idea that is America -- that we are a free people who protect our freedoms by respecting the freedom of others who differ from us.

Our history as a nation reflects the history of the Puritan, the Quaker, the Baptist, the Catholic, the Jew and many others fleeing persecution to find religious freedom in America. The United States remains the most successful experiment in religious freedom that the world has ever known because the First Amendment uniquely balances freedom of private religious belief and expression with freedom from state-imposed religious expression.

Public schools can neither foster religion nor preclude it. Our public schools must treat religion with fairness and respect and vigorously protect religious expression as well as the freedom of conscience of all other students. In so doing our public schools reaffirm the First Amendment and enrich the lives of their students.

I encourage you to share this information widely and in the most appropriate manner with your school community. Please accept my sincere thanks for your continuing work on behalf of all of America's children.

Sincerely,
**Richard W. Riley**
U.S. Secretary of Education

## RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS

Student prayer and religious discussion: The Establishment Clause of the First Amendment does not prohibit purely private religious speech by students. Students therefore 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 activity. For example, students may read their Bibles or other scriptures, say grace before meals, and pray before tests to the same extent they may engage in comparable nondisruptive activities. Local school authorities 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.

Generally, students may pray in a nondisruptive manner when not engaged in school activities or instruction, and 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 apply to other student activities and speech. 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 to stop student speech that constitutes harassment aimed at a student or a group of students.

Students may also participate in before or after school events with religious content, such as "see you at the flag 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.

The right to engage in voluntary prayer or religious discussion free from discrimination does not include the right to have a captive audience listen, or to compel other students to participate. Teachers and school administrators should ensure that no student is in any way coerced to participate in religious activity.

Graduation prayer and baccalaureates: Under current Supreme Court decisions, school officials may not mandate or organize prayer at graduation, nor organize religious baccalaureate ceremonies. If a school generally opens its facilities to private groups, it must make its facilities available on the same terms to organizers of privately sponsored religious baccalaureate services. A school may not extend preferential treatment to baccalaureate ceremonies and may in some instances be obliged to disclaim official endorsement of such ceremonies.

Official neutrality regarding religious activity: Teachers and school administrators, when acting in those capacities, are representatives of the state and are prohibited by the establishment clause from soliciting or encouraging religious activity, and from participating in such activity with students. Teachers and administrators also are prohibited from discouraging activity because of its religious content, and from soliciting or encouraging antireligious activity.

Teaching about religion: Public schools may not provide religious instruction, but they may teach about religion, including the Bible or other scripture: the history of religion, comparative religion, the Bible (or other scripture)-as-literature, and the role of religion in the history of the United States and other countries all are permissible public school subjects. Similarly, it is permissible to consider religious influences on art, music, literature, and social studies. Although public schools may teach about religious holidays, including their religious aspects, and may celebrate the secular aspects of holidays, schools may not observe holidays as religious events or promote such observance by students.

Student assignments: Students may express their beliefs about religion in the form of homework, artwork, and other written and oral assignments free of discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance, and against other legitimate pedagogical concerns identified by the school.

Religious literature: Students have a right to distribute religious literature to their schoolmates on the same terms as they are permitted to distribute other literature that is unrelated to school curriculum or activities. Schools may impose the same reasonable time, place, and manner or other constitutional restrictions on distribution of religious literature as they do on nonschool literature generally, but they may not single out religious literature for special regulation.

Religious excusals: Subject to applicable State laws, schools enjoy substantial discretion to excuse individual students from lessons that are objectionable to the student or the students' parents on religious or other conscientious grounds. However, students generally do not have a Federal right to be excused from lessons that may be inconsistent with their religious beliefs or practices.

School officials may neither encourage nor discourage students from availing themselves of an excusal option.

Released time: Subject to applicable State laws, schools have the discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation or penalize those who do not attend. Schools may not allow religious instruction by outsiders on school premises during the school day.

Teaching values: Though schools must be neutral with respect to religion, they may play an active role with respect to teaching civic values and virtue, and the moral code that holds us together as a community. The fact that some of these values are held also by religions does not make it unlawful to teach them in school.

Student garb: Schools enjoy substantial discretion in adopting policies relating to student dress and school uniforms. Students generally have no Federal right to be exempted from religiously-neutral and generally applicable school dress rules based on their religious beliefs or practices; however, schools may not single out religious attire in general, or attire of a particular religion, for prohibition or regulation. Students may display religious messages on items of clothing to the same extent that they are permitted to display other comparable messages. Religious messages may not be singled out for suppression, but rather are subject to the same rules as generally apply to comparable messages.

## THE EQUAL ACCESS ACT

The Equal Access Act is designed to ensure that, consistent with the First Amendment, student religious activities are accorded the same access to public school facilities as are student secular activities. Based on decisions of the Federal courts, as well as its interpretations of the Act, the Department of Justice has advised that the Act should be interpreted as providing, among other things, that:

General provisions: Student religious groups at public secondary schools have the same right of access to school facilities as is enjoyed by other comparable student groups. Under the Equal Access Act, a school receiving Federal funds that allows one or more student noncurriculum-related clubs to meet on its premises during noninstructional time may not refuse access to student religious groups.

Prayer services and worship exercises covered: A meeting, as defined and protected by the Equal Access Act, may include a prayer service, Bible reading, or other worship exercise.

Equal access to means of publicizing meetings: A school receiving Federal funds must allow student groups meeting under the Act to use the school media -- including the public address system, the school newspaper, and the school bulletin board -- to announce their meetings on the same terms as other noncurriculum-related student groups are allowed to use the school media. Any policy concerning the use of school media must be applied to all noncurriculum-related student groups in a nondiscriminatory matter. Schools, however, may inform students that certain groups are not school sponsored.

Lunch-time and recess covered: A school creates a limited open forum under the Equal

Access Act, triggering equal access rights for religious groups, when it allows students to meet during their lunch periods or other noninstructional time during the school day, as well as when it allows students to meet before and after the school day.

Revised May 1998

## List of organizations that can answer questions on religious expression in public schools

**Religious Action Center of Reform Judaism**
Name: Rabbi David Saperstein
Address: 2027 Massachusetts Ave., NW, Washington, DC 20036
Phone: (202) 387-2800
Fax: (202) 667-9070
Web site: http://www.rj.org/rac/

**American Association of School Administrators**
Name: Andrew Rotherham
Address: 1801 N. Moore St., Arlington, VA 22209
Phone: (703) 528-0700
Fax: (703) 528-2146
Web site: http://www.aasa.org

**American Jewish Congress**
Name: Marc Stern
Address: 15 East 84th Street, New York, NY 10028
Phone: (212) 360-1545
Fax: (212) 861-7056

**National PTA**
Name: Maribeth Oakes
Address: 1090 Vermont Ave., NW, Suite 1200, Washington, DC 20005
Phone: (202) 289-6790
Fax: (202) 289-6791
Web site: http://www.pta.org

**Christian Legal Society**
Name: Steven McFarland
Address: 4208 Evergreen Lane, #222, Annandale, VA 22003
Phone: (703) 642-1070
Fax: (703) 642-1075
Web site: http://www.clsnet.com

**National Association of Evangelicals**
Name: Forest Montgomery
Address: 1023 15th Street, NW #500, Washington, DC 20005
Phone: (202) 789-1011
Fax: (202) 842-0392
Web site: http://www.nae.net

**National School Boards Association**
Name: Laurie Westley
Address: 1680 Duke Street, Alexandria, VA 22314
Phone: (703) 838-6703
Fax: (703) 548-5613
Web site: http://www.nsba.org

**Freedom Forum**
Name: Charles Haynes
Address: 1101 Wilson Blvd, Arlington, VA 22209
Phone: (703) 528-0800
Fax: (703) 284-2879
Web site: http://www.freedomforum.org

# Appendix C

### Religion In The Public Schools:
### A Joint Statement Of Current Law
### April 1995

Drafting Committee: American Jewish Congress, Chair, American Civil Liberties Union, American Jewish Committee, American Muslim Council, Anti-Defamation League, Baptist Joint Committee, Christian Legal Society, General Conference of Seventh-day Adventists, National Association of Evangelicals, National Council of Churches, People for the American Way, Union of American Hebrew Congregations.

Endorsing Organizations: American Ethical Union, American Humanist Association, Americans for Religious Liberty, Americans United for Separation of Church and State, B'nai B'rith International, Christian Science Church, Church of the Brethren, Washington Office, Church of Scientology International, Evangelical Lutheran Church in America- Lutheran Office of Government Affairs, Federation of Reconstructionist Congregations and Havurot, Friends Committee on National Legislation, Guru Gobind Singh Foundation, Hadassah-The Women's Zionist Organization of America, Interfaith Alliance, Interfaith Impact for Justice and Peace, Jewish Council on Public Affairs, National Council of Jewish Women, National Ministries, American Baptist Churches-USA, National Sikh Center, North American Council for Muslim Women, Presbyterian Church (U.S.A.), Reorganized Church of Jesus Christ of Latter Day Saints, Unitarian Universalist Association of Congregations, United Church of Christ-Office for Church in Society, United Methodist Church-General Board of Church and Society.

The Constitution permits much private religious activity in and about the public schools. Unfortunately, this aspect of constitutional law is not as well known as it should be. Some say that the Supreme Court has declared the public schools "religion-free zones" or that the law is so murky that school officials cannot know what is legally permissible. The former claim is simply wrong. And as to the latter, while there are some difficult issues, much has been settled. It is also unfortunately true that public school officials, due to their busy schedules, may not be as fully aware of this body of law as they could be. As a result, in some school districts some of these rights are not being observed.

The organizations whose names appear below span the ideological, religious and political spectrum. They nevertheless share a commitment both to the freedom of religious practice and to the separation of church and state such freedom requires. In that spirit, we offer this statement of consensus on current law as an aid to parents, educators and students.

Many of the organizations listed below are actively involved in litigation about religion in the schools. On some of the issues discussed in this summary, some of the organizations have urged the courts to reach positions different than they did. Though there are signatories on both sides which have and will press for different constitutional treatments of some of the topics discussed below, they all agree that the following is an accurate statement of what the law currently is.

### Student Prayers

1. Students have the right to pray individually or in groups or to discuss their religious views with their peers so long as they are not disruptive. Because the Establishment Clause does not apply to purely private speech, students enjoy the right to read their Bibles or other scriptures, say grace before meals, pray before tests, and discuss religion with other willing student listeners. In the classroom students have the right to pray quietly except when required to be actively engaged in school activities (e.g., students may not decide to pray just as a teacher calls on them). In informal settings, such as the cafeteria or in the halls, students may pray either audibly or silently, subject to the same rules of order as apply to other speech in these locations. However, the right to engage in voluntary prayer does not include, for example, the right to have a captive audience listen or to compel other students to participate.

### Graduation Prayer and Baccalaureates

2. School officials may not mandate or organize prayer at graduation, nor may they organize a religious baccalaureate ceremony. If the school generally rents out its facilities to private groups, it must rent them out on the same terms, and on a first- come first-served basis, to organizers of privately sponsored religious baccalaureate services, provided that the school does not extend preferential treatment to the baccalaureate ceremony and the school disclaims official endorsement of the program.
3. The courts have reached conflicting conclusions under the federal Constitution on student-initiated prayer at graduation. Until the issue is authoritatively resolved, schools should ask their lawyers what rules apply in their area.

### Official Participation or Encouragement of Religious Activity

4. Teachers and school administrators, when acting in those capacities, are representatives of the state, and, in those capacities, are themselves prohibited from encouraging or soliciting student religious or anti-religious activity. Similarly, when acting in their official capacities, teachers may not engage in religious activities with their students. However, teachers may engage in private religious activity in faculty lounges.

### Teaching About Religion

5. Students may be taught about religion, but public schools may not teach religion. As the U.S. Supreme Court has repeatedly said, "[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 would be difficult to teach art, music, literature and most social studies without

considering religious influences.

The history of religion, comparative religion, the Bible (or other scripture)-as-literature (either as a separate course or within some other existing course), are all permissible public school subjects. It is both permissible and desirable to teach objectively about the role of religion in the history of the United States and other countries. One can teach that the Pilgrims came to this country with a particular religious vision, that Catholics and others have been subject to persecution or that many of those participating in the abolitionist, women's suffrage and civil rights movements had religious motivations.

6. These same rules apply to the recurring controversy surrounding theories of evolution. Schools may teach about explanations of life on earth, including religious ones (such as "creationism"), in comparative religion or social studies classes. In science class, however, they may present only genuinely scientific critiques of, or evidence for, any explanation of life on earth, but not religious critiques (beliefs unverifiable by scientific methodology). Schools may not refuse to teach evolutionary theory in order to avoid giving offense to religion nor may they circumvent these rules by labeling as science an article of religious faith. Public schools must not teach as scientific fact or theory any religious doctrine, including "creationism," although any genuinely scientific evidence for or against any explanation of life may be taught. Just as they may neither advance nor inhibit any religious doctrine, teachers should not ridicule, for example, a student's religious explanation for life on earth.

**Student Assignments and Religion**

7. Students may express their religious beliefs in the form of reports, homework and artwork, and such expressions are constitutionally protected. Teachers may not reject or correct such submissions simply because they include a religious symbol or address religious themes. Likewise, teachers may not require students to modify, include or excise religious views in their assignments, if germane. These assignments should be judged by ordinary academic standards of substance, relevance, appearance and grammar.
8. Somewhat more problematic from a legal point of view are other public expressions of religious views in the classroom. Unfortunately for school officials, there are traps on either side of this issue, and it is possible that litigation will result no matter what course is taken. It is easier to describe the settled cases than to state clear rules of law. Schools must carefully steer between the claims of student speakers who assert a right to express themselves on religious subjects and the asserted rights of student listeners to be free of unwelcome religious persuasion in a public school classroom.
    a. Religious or anti-religious remarks made in the ordinary course of classroom discussion or student presentations are permissible and constitute a protected right. If in a sex education class a student remarks that abortion should be illegal because God has prohibited it, a teacher

should not silence the remark, ridicule it, rule it out of bounds or endorse it, any more than a teacher may silence a student's religiously-based comment in favor of choice.

b. If a class assignment calls for an oral presentation on a subject of the student's choosing, and, for example, the student responds by conducting a religious service, the school has the right -- as well as the duty -- to prevent itself from being used as a church. Other students are not voluntarily in attendance and cannot be forced to become an unwilling congregation.

c. Teachers may rule out-of-order religious remarks that are irrelevant to the subject at hand. In a discussion of Hamlet's sanity, for example, a student may not interject views on creationism.

**Distribution of Religious Literature**

9. Students have the right to distribute religious literature to their schoolmates, subject to those reasonable time, place, and manner or other constitutionally-acceptable restrictions imposed on the distribution of all non-school literature. Thus, a school may confine distribution of all literature to a particular table at particular times. It may not single out religious literature for burdensome regulation.

10. Outsiders may not be given access to the classroom to distribute religious or anti-religious literature. No court has yet considered whether, if all other community groups are permitted to distribute literature in common areas of public schools, religious groups must be allowed to do so on equal terms subject to reasonable time, place and manner restrictions.

**"See You at the Pole"**

11. Student participation in before- or after-school events, such as "see you at the pole," is permissible. School officials, acting in an official capacity, may neither discourage nor encourage participation in such an event.

**Religious Persuasion Versus Religious Harassment**

12. Students have the right to speak to, and attempt to persuade, their peers about religious topics just as they do with regard to political topics. But school officials should intercede to stop student religious speech if it turns into religious harassment aimed at a student or a small group of students. While it is constitutionally permissible for a student to approach another and issue an invitation to attend church, repeated invitations in the face of a request to stop constitute harassment. Where this line is to be drawn in particular cases will depend on the age of the students and other circumstances.

### Equal Access Act

13. Student religious clubs in secondary schools must be permitted to meet and to have equal access to campus media to announce their meetings, if a school receives federal funds and permits any student non-curricular club to meet during non-instructional time. This is the command of the Equal Access Act. A non-curricular club is any club not related directly to a subject taught or soon-to-be taught in the school. Although schools have the right to ban all non-curriculum clubs, they may not dodge the law's requirement by the expedient of declaring all clubs curriculum-related. On the other hand, teachers may not actively participate in club activities and "non-school persons" may not control or regularly attend club meeting.

    The Act's constitutionality has been upheld by the Supreme Court, rejecting claims that the Act violates the Establishment Clause. The Act's requirements are described in more detail in The Equal Access Act and the Public Schools: Questions and Answers on the Equal Access Act*, a pamphlet published by a broad spectrum of religious and civil liberties groups.

### Religious Holidays

14. Generally, public schools may teach about religious holidays, and may celebrate the secular aspects of the holiday and objectively teach about their religious aspects. They may not observe the holidays as religious events. Schools should generally excuse students who do not wish to participate in holiday events. Those interested in further details should see Religious Holidays in the Public Schools: Questions and Answers*, a pamphlet published by a broad spectrum of religious and civil liberties groups.

### Excusal From Religiously-Objectionable Lessons

15. Schools enjoy substantial discretion to excuse individual students from lessons which are objectionable to that student or to his or her parent on the basis of religion. Schools can exercise that authority in ways which would defuse many conflicts over curriculum content. 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 the school would be legally required to excuse the student.

### Teaching Values

16. Schools may teach civic virtues, including honesty, good citizenship, sportsmanship, courage, respect for the rights and freedoms of others, respect

for persons and their property, civility, the dual virtues of moral conviction and tolerance and hard work. Subject to whatever rights of excusal exist (see #15 above) under the federal Constitution and state law, schools may teach sexual abstinence and contraception; whether and how schools teach these sensitive subjects is a matter of educational policy. However, these may not be taught as religious tenets. The mere fact that most, if not all, religions also teach these values does not make it unlawful to teach them.

**Student Garb**

17. Religious messages on T-shirts and the like may not be singled out for suppression. Students may wear religious attire, such as yarmulkes and head scarves, and they may not be forced to wear gym clothes that they regard, on religious grounds, as immodest.

**Released Time**

18. Schools have the discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation or penalize those who do not attend. Schools may not allow religious instruction by outsiders on premises during the school day.

* Copies may be obtained from any of the undersigned organizations.

## Appendix

### Organizational Contacts for "Religion in the Public Schools: A Joint Statement of Current Law"

**American Civil Liberties Union**
Beth Orsoff, William J. Brennan Fellow
202/544-1681 (x306)

**American Ethical Union**
Herbert Blinder, Director, Washington Ethical Action Office
301/229-3759

**American Humanist Association**
Frederick Edwords, Executive Director
800/743-6646

**American Jewish Committee**
Richard Foltin, Legislative Director/Counsel
202/785-4200

**American Jewish Congress**
Marc D. Stern, Co-Director, Commission on Law and Social Action
212/360-1545

**American Muslim Council**
Abdurahman M. Alamoudi, Executive Director
202/789-2262

**Americans for Religious Liberty**
Edd Doerr, Executive Director
301/598-2447

**Americans United for Separation of Church and State**
Steve Green, Legal Director
202/466-3234

**Anti-Defamation League**
Michael Lieberman, Associate Director/Counsel, Washington Office
202/452-8320

**Baptist Joint Committee**
J. Brent Walker, General Counsel
202/544-4226

**B'nai B'rith**
Reva Price, Director, Political Action Network
202/857-6645

**Christian Legal Society**
Steven T. McFarland, Director, Center for Law and Religious Freedom
703/642-1070

**Christian Science Church**
Philip G. Davis, Federal Representative
202/857-0427

**Church of the Brethren, Washington Office**
Timothy A. McElwee, Director
202/546-3202

**Church of Scientology International**
Susan L. Taylor, Public Affairs Director, Washington Office
202/667-6404

**Evangelical Lutheran Church in America, Lutheran Office for Governmental Affairs**
Kay S. Dowhower, Director
202/783-7507

**Federation of Reconstructionist Congregations and Havurot**
Rabbi Mordechai Liebling, Executive Director
215/887-1988

**Friends Committee on National Legislation**
Ruth Flower, Legislative Secretary/Legislative Education Secretary
202/547-6000

**General Conference of Seventh-day Adventists**
Gary M. Ross, Congressional Liaison
301/680-6688

**Guru Gobind Singh Foundation**
Rajwant Singh, Secretary
301/294-7886

**Interfaith Alliance**
Jill Hanauer, Executive Director
202/639-6370

**Interfaith Impact for Justice and Peace**
James M. Bell, Executive Director
202/543-2800

**National Association of Evangelicals**
Forest Montgomery, Counsel, Office of Public Affairs
202/789-1011

**National Council of Churches**
Oliver S. Thomas, Special Counsel for Religious and Civil Liberties
615/977-9046

**National Council of Jewish Women**
Deena Margolis, Legislative Assistant
202/296-2588

**National Jewish Community Relations**
Advisory Council (NJCRAC)
Jerome Chanes, Director, Domestic Concerns
212/684-6950

**National Ministries, American Baptist Churches, USA**
Renee Ladue, Program Assistant,
Office of Government Relations
202/544-3400

**National Sikh Center**
Chatter Saini, President
703/734-1760

**North American Council for Muslim Women**
Sharifa Alkhateeh, Vice-President
703/759-7339

**People for the American Way**
Elliot Mincberg, Legal Director
202/467-4999

**Presbyterian Church (USA)**
Eleonora Giddings Ivory, Director,
Washington Office
202/543-1126

**Reorganized Church of Jesus Christ of Latter Day Saints**
W. Grant McMurray, First Presidency
816/521-3002

**Union of American Hebrew Congregations**
Rabbi David Saperstein, Director, Religious Action Center
202/387-2800

**Unitarian Universalist Association of Congregations**
Robert Alpern, Director, Washington Office
202/547-0254

**United Church of Christ, Office for Church in Society**
Patrick Conover, Acting Head of Office,
Washington Office
202/543-1517

# Appendix D

## COURTS OF APPEALS

**The relevant twelve judicial circuits of the United States are constituted as follows:**

| Circuits | Composition |
|---|---|
| District of Columbia | District of Columbia |
| First | Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island |
| Second | Connecticut, New York, Vermont |
| Third | Delaware, New Jersey, Pennsylvania, Virgin Islands |
| Fourth | Maryland, North Carolina, South Carolina, Virginia, West Virginia |
| Fifth | District of the [Panama] Canal Zone, Louisiana, Mississippi, Texas |
| Sixth | Kentucky, Michigan, Ohio, Tennessee |
| Seventh | Illinois, Indiana, Wisconsin |
| Eighth | Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota |
| Ninth | Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, Guam, Hawaii |
| Tenth | Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming |
| Eleventh | Alabama, Florida, Georgia |

# Appendix E

## KEY SUPREME COURT CASES INVOLVING RELIGION IN THE PUBLIC SCHOOLS

**1. FIRST AMENDMENT: A CHECK ON THE FEDERAL GOVERNMENT.** "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...." [First Amendment (1791)].

**2. FOURTEENTH AMENDMENT: A CHECK ON STATE AND LOCAL GOVERNMENTS.** "No state shall...deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." [Fourteenth Amendment (1868)].

**3. THE FEDERAL PROTECTION OF FREE EXERCISE OF RELIGION APPLIES TO THE STATES.** The Free Exercise Clause applies to state and local governmental entities. [Cantwell v. Connecticut, 310 U.S. 296 (1940)].

**4. SCHOOLS CANNOT FORCE STUDENTS TO VIOLATE RELIGIOUS CONVICTIONS.** Public school students cannot be forced to participate in an activity that forces them to say words that violate their religious convictions. [West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943)].

**5. THE ESTABLISHMENT CLAUSE APPLIES TO THE STATES.** The Establishment Clause applies to state and local governmental entities and not just the federal government. [Everson v. Board of Education, 330 U.S. 1 (1947)].

**6. PUBLIC SCHOOLS CANNOT INCULCATE "THE FAITH".** The public school curriculum cannot be used to inculcate "the faith" , whether Catholicism, Protestantism, Mormonism, Judaism or any other "ism. " [McCollum v. Board of Education, 333 U. S. 203 (1948)].

**7. PUBLIC SCHOOLS MAY ACCOMMODATE STUDENTS' SPIRITUAL NEEDS.** The public school may adjust its program to accommodate the spiritual needs of schoolchildren by working with churches, synagogues and families in released time programs, by which children are excused from school to be taught "the faith" during the schoolday by instructors of the parents' own choosing, free from direct school input or influence. [Zorach v. Clauson, 343 U.S. 306 (1952)].

**8. OFFICIAL STATE-COMPOSED PRAYERS FOR STUDENTS ARE OUT.** The state cannot write official school prayers to be recited by children in the public schools. [Engel v. Vitale, 370 U.S. 421 (1962)].

**9. STATE-INITIATED DEVOTIONAL EXERCISES ARE OUT; OBJECTIVE TEACHING OF RELIGION AND THE BIBLE IS DESIRABLE.** State-initiated devotional exercises for public schoolchildren in the public school classroom as part of the curricular program are barred by the Establishment Clause. The objective teaching about

religion in history, music, literature, and art, and courses teaching the Bible as literature or comparative religion, are both permissible and desirable for a complete education. [Abington School Dist. v. Schempp, 374 U.S. 203 (1963)].

**10. EVOLUTION CANNOT BE EXCLUDED FOR RELIGIOUS REASONS.** The state cannot exclude the teaching of evolution in the public schools for religious reasons. [Epperson v. Arkansas, 393 U.S. 97 (1968)].

**11. STUDENTS DO NOT LEAVE THEIR CONSTITUTIONAL RIGHTS AT THE SCHOOLHOUSE GATE.** Public school students and teachers do not leave their First Amendment rights at the schoolhouse gate. Students may discuss controversial subjects in and out of the classroom during the school day as long as school discipline is not disrupted and the rights of others are not invaded. [Tinker v. Des Moines School District, 393 U.S. 503 (1969)].

**12. STUDENT GROUPS MAY ENGAGE IN CONTROVERSIAL SPEECH.** Banning by university officials of a student group engaged in controversial speech violates the First Amendment. [Healy v. James, 408 U.S. 169 (1972)].

**13. PARENTS DIRECT THEIR CHILDREN'S EDUCATION.** Parents have the primary responsibility for directing the education of their children in a manner consistent with their religious convictions. [Wisconsin v. Yoder, 406 U.S. 205 (1972); Employment Division v. Smith, 494 U.S. 872 (1990)].

**14. A PUBLIC UNIVERSITY MAY NOT DENY EQUAL ACCESS.** A public university may not deny voluntary student groups equal access to the use of the university facilities because the content of their speech is religious. Worship and prayer are protected speech. [Widmar v. Vincent, 454 U.S. 263 (1981)].

**15. STATE-INITIATED, STUDENT-LED DEVOTIONS ARE OUT.** State-initiated programs allowing students to lead classroom devotional exercises as part of the daily curricular activities of the school violates the Establishment Clause. [Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), aff'd, 455 U.S. 913 (1982)].

**16. A MOMENT OF SILENCE DURING THE SCHOOLDAY PROBABLY IS PERMISSIBLE.** A moment of silence must not be instituted for the purpose of putting "prayer in schools" . However, a school probably may have a period of silence during the school day during which individual students may think about whatever they want, including pray. The state, school, or teacher may not encourage students to use the time to pray, although students may use the time to pray. [Wallace v.Jaffree, 472 U.S. 38 (1985)].

**17. EQUAL ACCESS REINSTATED.** The Supreme Court effectively reinstated a federal district court decision permitting public high school students to meet during a student activity period for prayer, Bible study, and religious discussion during the schoolday on campus. [Bender v. Williamsport Area School District, 475 U.S. 534 (1986)].

**18. SCHOOL ADMINISTRATORS MAY PUNISH STUDENTS FOR LEWD SPEECH.** Public school administrators may discipline students for offensively lewd and indecent speech. The Court notes that the fundamental values to be taught in public school

include tolerance of divergent political and religious views, even when the views expressed may be unpopular. [Bethel School District v. Fraser, 478 U. S. 675 (1986)] .

**19. CURRICULUM MAY NOT HAVE THE PURPOSE OF PROMOTING A PARTICULAR RELIGIOUS TENET.** A state law requiring balanced treatment of the teaching of creation science and evolution is unconstitutional if its sole purpose is to change the curriculum to endorse a particular religious belief. [Edwards v. Aguillard, 482 U.S. 578 (1987)].

**20. SCHOOL MAY REGULATE CURRICULAR SPEECH.** A school may exercise editorial control over the content of a school newspaper that is published as a regular class activity for which students receive grades and academic credit. Students' personal speech remains protected under Tinker. [Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988)].

**21. A PUBLIC SECONDARY SCHOOL MAY NOT DENY EQUAL ACCESS TO STUDENT RELIGIOUS GROUPS.** A public secondary school that allows one noncurriculum related student group to meet must allow a religious student group to meet under the Equal Access Act. Equal access includes access to the school newspaper, bulletin boards, public address system, club fairs, and other components of the student activities program. [Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990)].

**22. SCHOOL-ENDORSED PRAYERS MAY NOT BE INCLUDED IN A GRADUATION CEREMONY.** A graduation ceremony may not include an invocation or benediction where the school district has chosen a member of the clergy to deliver such prayers in the graduation ceremony and has given him or her guidelines as to the content of the prayers. Individual speakers may include religious expression, values, and ideas in their speeches on their own. [Lee v. Weisman, 505 U.S. 577 (1992)].

**23. SCHOOL DISTRICT MAY NOT DENY EQUAL ACCESS TO RELIGIOUS COMMUNITY GROUP.** A school district must grant access to school facilities during evenings and weekends to religious community groups to discuss religious viewpoints on social and civic subjects that it allows other community groups access to discuss. [Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993)].

**24. GOVERNMENT OFFICIALS MAY NOT PERMIT CONDUCT WHEN DONE FOR SECULAR REASONS AND PROHIBIT THE SAME CONDUCT WHEN DONE FOR RELIGIOUS REASONS.** The Free Exercise Clause protects religious persons from discriminatory treatment by the government. If the government permits conduct done for secular reasons, it may not prohibit the same conduct done for religious reasons. [Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993)].

**25. PUBLIC SCHOOL EMPLOYEES MAY PROVIDE SERVICES TO SPECIAL NEEDS STUDENTS AT RELIGIOUS SCHOOLS.** Establishment Clause does not prohibit a public school employee from providing interpretive services to a deaf student during the school day at a private religious school, including interpreting religious lessons. [Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993)].

**26. UNIVERSITY OFFICIALS MAY NOT DENY EQUAL ACCESS TO STUDENT FUNDING TO RELIGIOUS STUDENT PUBLICATION.** University officials impermissibly discriminated against religious viewpoints when a student religious publication was denied equal access to a student activity fees program. [Rosenberger v. University of Virginia, 515 U.S. 819 (1995)].

**27. PUBLIC SCHOOL TEACHERS MAY TEACH REMEDIAL CLASSES IN PRIVATE SCHOOLS.** Establishment Clause not violated if public school employees go into private school classrooms to teach remedial classes. [Agostini v. Felton, 521 U.S. 203 (1997)].

**28. SCHOOL OFFICIALS MAY NOT HOLD STUDENT BODY VOTE TO INCLUDE A PRAYER IN PRE-GAME CEREMONIES.** Establishment Clause violated by school officials allowing the student body to vote to have prayer by student speakers as part of pre-game ceremonies at school athletic events. [Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000)].

**29. PUBLIC FUNDS MAY BE USED FOR EDUCATIONAL EQUIPMENT AT PRIVATE RELIGIOUS SCHOOLS.** Establishment Clause does not prohibit public funding of educational equipment at private religious schools, including computers and library books. [Mitchell v. Helms, 530 U.S. 793 (2000)].

**30. PUBLIC UNIVERSITIES MUST BE VIEWPOINT NEUTRAL IN ALLOCATING STUDENT ACTIVITY FEES FUNDING TO STUDENT ORGANIZATIONS.** A public university does not have to allow students to opt out of its student activity fees requirement even though they object to the ideology of some of the groups funded; however, the university must administer the program in a neutral manner and not deny funding to a group because of its viewpoints. [Board of Regents of University of Wisconsin v. Southworth, 529 U.S. 217 (2000)].

**31. PRIVATE ORGANIZATIONS MAY CHOOSE THEIR LEADERSHIP ACCORDING TO THEIR RELIGIOUS VALUES OR OTHER BELIEFS.** The Boy Scouts may choose its leadership in accordance with its values and does not have to include leaders who espouse homosexuality as acceptable conduct. [Boy Scouts v. Dale, 530 U.S. 640 (2000)].

**32. SCHOOL MAY NOT DENY EQUAL ACCESS TO RELIGIOUS COMMUNITY GROUP SEEKING ACCESS TO ELEMENTARY SCHOOL FACILITIES.** A school district must grant access to elementary school facilities after school to a religious community group that provides values training to children if the school district allows other groups access for meetings involving values training. [Good News Club v. Milford Central School, 533 U.S. 98 (2001)].

**33. PUBLIC FUNDS MAY BE USED TO PAY STUDENTS' TUITION AT PRIVATE RELIGIOUS SCHOOLS CHOSEN BY THEIR PARENTS.** Establishment Clause does not prohibit a voucher program in which public funds pay tuition for students whose parents choose for them to attend religious private schools, as one of many educational choices from which parents may choose, including public schools, charter schools,

and private secular schools. [Zelman v. Simmons-Harris, 536 U.S. 639 (2002)].

**34. STATE MAY REFUSE TO FUND STUDENT'S MINISTERIAL TRAINING.** Establishment Clause allows state scholarship to pay for student's training to be a minister as part of a scholarship program that funds other career choices; however, Free Exercise Clause does not require state to pay scholarship for ministerial training if state constitution prohibits such funding. [Locke v. Davey, 540 U.S. 712 (2004)].

**35. CONSTITUTIONALITY OF "UNDER GOD" IN PLEDGE OF ALLEGIANCE UNRESOLVED.** Father of elementary school student did not have legal custody of his child for purposes of challenging the constitutionality of the phrase "under God" in the Pledge of Allegiance recited by public school students; therefore, the issue remains unresolved. [Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004)].

# Appendix F

**THE WHITE HOUSE**

**Office of the Press Secretary**

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## GUIDELINES ON RELIGIOUS EXERCISE AND RELIGIOUS EXPRESSION IN THE FEDERAL WORKPLACE

The following Guidelines, addressing religious exercise and religious expression, shall apply to all civilian executive branch agencies, officials, and employees in the Federal workplace.

These Guidelines principally address employees' religious exercise and religious expression when the employees are acting in their personal capacity within the Federal workplace and the public does not have regular exposure to the workplace. The Guidelines do not comprehensively address whether and when the government and its employees may engage in religious speech directed at the public. They also do not address religious exercise and religious expression by uniformed military personnel, or the conduct of business by chaplains employed by the Federal Government. Nor do the Guidelines define the rights and responsibilities of non-governmental employers -- including religious employers -- and their employees. Although these Guidelines, including the examples cited in them, should answer the most frequently encountered questions in the Federal workplace, actual cases sometimes will be complicated by additional facts and circumstances that may require a different result from the one the Guidelines indicate.

**SECTION 1. GUIDELINES FOR RELIGIOUS EXERCISE AND RELIGIOUS EXPRESSION IN THE FEDERAL WORKPLACE.** Executive departments and agencies ("agencies") shall permit personal religious expression by Federal employees to the greatest extent possible, consistent with requirements of law and interests in workplace efficiency as described in this set of Guidelines. Agencies shall not discriminate against employees on the basis of religion, require religious participation or non-participation as a condition of employment, or permit religious harassment. And agencies shall accommodate employees', exercise of their religion in the circumstances specified in these Guidelines. These requirements are but applications of the general principle that agencies shall treat all employees with the same respect and consideration, regardless of their religion (or lack thereof).

**A. Religious Expression.** As a matter of law, agencies shall not restrict personal religious expression by employees in the Federal workplace except where the

employee's interest in the expression is outweighed by the government's interest in the efficient provision of public services or where the expression intrudes upon the legitimate rights of other employees or creates the appearance, to a reasonable observer, of an official endorsement of religion. The examples cited in these Guidelines as permissible forms of religious expression will rarely, if ever, fall within these exceptions.

As a general rule, agencies may not regulate employees' personal religious expression on the basis of its content or viewpoint. In other words, agencies generally may not suppress employees' private religious speech in the workplace while leaving unregulated other private employee speech that has a comparable effect on the efficiency of the workplace -- including ideological speech on politics and other topics -- because to do so would be to engage in presumptively unlawful content or viewpoint discrimination. Agencies, however, may, in their discretion, reasonably regulate the time, place and manner of all employee speech, provided such regulations do not discriminate on the basis of content or viewpoint.

The Federal Government generally has the authority to regulate an employee's private speech, including religious speech, where the employee's interest in that speech is outweighed by the government's interest in promoting the efficiency of the public services it performs. Agencies should exercise this authority evenhandedly and with restraint, and with regard for the fact that Americans are used to expressions of disagreement on controversial subjects, including religious ones. Agencies are not required, however, to permit employees to use work time to pursue religious or ideological agendas. Federal employees are paid to perform official work, not to engage in personal religious or ideological campaigns during work hours.

(1) Expression in Private Work Areas. Employees should be permitted to engage in private religious expression in personal work areas not regularly open to the public to the same extent that they may engage in nonreligious private expression, subject to reasonable content-and viewpoint-neutral standards and restrictions: such religious expression must be permitted so long as it does not interfere with the agency's carrying out of its official responsibilities.

Examples

(a) An employee may keep a Bible or Koran on her private desk and read it during breaks.

(b) An agency may restrict all posters, or posters of a certain size, in private work areas, or require that such posters be displayed facing the employee, and not on common walls; but the employer typically cannot single out religious or anti-religious posters for harsher or preferential treatment.

(2) Expression Among Fellow Employees. Employees should be permitted to engage in religious expression with fellow employees, to the same extent that they may engage in comparable nonreligious private expression, subject to reasonable and content-neutral standards and restrictions: such expression should not be restricted so long as it does not interfere with workplace efficiency. Though agencies are entitled to regulate such employee speech based on reasonable predictions of disruption, they should not restrict speech based on merely hypothetical concerns, having little basis in fact, that the speech will have a deleterious effect on workplace efficiency.

Examples

(a) In informal settings, such as cafeterias and hallways, employees are entitled to discuss their religious views with one another, subject only to the same rules of order as apply to other employee expression. If an agency permits unrestricted nonreligious expression of a controversial nature, it must likewise permit equally controversial religious expression.

(b) Employees are entitled to display religious messages on items of clothing to the same extent that they are permitted to display other comparable messages. So long as they do not convey any governmental endorsement of religion, religious messages may not typically be singled out for suppression.

(c) Employees generally may wear religious medallions over their clothes or so that they are otherwise visible. Typically, this alone will not affect workplace efficiency, and therefore is protected.

(3) Expression Directed at Fellow Employees. Employees are permitted to engage in religious expression directed at fellow employees, and may even attempt to persuade fellow employees of the correctness of their religious views, to the same extent as those employees may engage in comparable speech not involving religion. Some religions encourage adherents to spread the faith at every opportunity, a duty that can encompass the adherent's workplace. As a general matter, proselytizing is as entitled to constitutional protection as any other form of speech -- as long as a reasonable observer would not interpret the expression as government endorsement of religion. Employees may urge a colleague to participate or not to participate in religious activities to the same extent that, consistent with concerns of workplace efficiency, they may urge their colleagues to engage in or refrain from other personal endeavors. But employees must refrain from such expression when a fellow employee asks that it stop or otherwise demonstrates that it is

unwelcome. (Such expression by supervisors is subject to special consideration as discussed in Section B(2) of these guidelines.)

Examples

(a) During a coffee break, one employee engages another in a polite discussion of why his faith should be embraced. The other employee disagrees with the first employee's religious exhortations, but does not ask that the conversation stop. Under these circumstances, agencies should not restrict or interfere with such speech.

(b) One employee invites another employee to attend worship services at her church, though she knows that the invitee is a devout adherent of another faith. The invitee is shocked, and asks that the invitation not be repeated. The original invitation is protected, but the employee should honor the request that no further invitations be issued.

(c) In a parking lot, a non-supervisory employee hands another employee a religious tract urging that she convert to another religion lest she be condemned to eternal damnation. The proselytizing employee says nothing further and does not inquire of his colleague whether she followed the pamphlet's urging. This speech typically should not be restricted.

Though personal religious expression such as that described in these examples, standing alone, is protected in the same way, and to the same extent, as other constitutionally valued speech in the Federal workplace, such expression should not be permitted if it is part of a larger pattern of verbal attacks on fellow employees (or a specific employee) not sharing the faith of the speaker. Such speech, by virtue of its excessive or harassing nature, may constitute religious harassment or create a hostile work environment, as described in Part B(3) of these Guidelines, and an agency should not tolerate it.

(4) Expression in Areas Accessible to the Public. Where the public has access to the Federal workplace, all Federal employers must be sensitive to the Establishment Clause's requirement that expression not create the reasonable impression that the government is sponsoring, endorsing, or inhibiting religion generally, or favoring or disfavoring a particular religion. This is particularly important in agencies with adjudicatory functions.

However, even in workplaces open to the public, not all private employee religious expression is forbidden. For example, Federal employees may wear personal religious jewelry absent special circumstances (such as safety concerns) that might require a ban on all similar nonreligious jewelry. Employees may also display religious art and literature in their personal work areas to the same extent that they may display other art and literature, so long as the viewing public would reasonably understand the religious expression to be that of the

employee acting in her personal capacity, and not that of the government itself. Similarly, in their private time employees may discuss religion with willing coworkers in public spaces to the same extent as they may discuss other subjects, so long as the public would reasonably understand the religious expression to be that of the employees acting in their personal capacities.

**B. Religious Discrimination.** Federal agencies may not discriminate against employees on the basis of their religion, religious beliefs, or views concerning religion.

(1) Discrimination in Terms and Conditions. No agency within the executive branch may promote, refuse to promote, hire, refuse to hire, or otherwise favor or disfavor, an employee or potential employee because of his or her religion, religious beliefs, or views concerning religion.

Examples

(a) A Federal agency may not refuse to hire Buddhists, or impose more onerous requirements on applicants for employment who are Buddhists.

(b) An agency may not impose, explicitly or implicitly, stricter promotion requirements for Christians, or impose stricter discipline on Jews than on other employees, based on their religion. Nor may Federal agencies give advantages to Christians in promotions, or impose lesser discipline on Jews than on other employees, based on their religion.

(c) A supervisor may not impose more onerous work requirements on an employee who is an atheist because that employee does not share the supervisor's religious beliefs.

(2) Coercion of Employee's Participation or Nonparticipation in Religious Activities. A person holding supervisory authority over an employee may not, explicitly or implicitly, insist that the employee participate in religious activities as a condition of continued employment, promotion, salary increases, preferred job assignments, or any other incidents of employment. Nor may a supervisor insist that an employee refrain from participating in religious activities outside the workplace except pursuant to otherwise legal, neutral restrictions that apply to employees' off-duty conduct and expression in general (e.g., restrictions on political activities prohibited by the Hatch Act).

This prohibition leaves supervisors free to engage in some kinds of speech about religion. Where a supervisor's religious expression is not coercive and is understood as his or her personal view, that expression is protected in the Federal workplace in the same way and to the same extent as other constitutionally valued speech. For example, if

surrounding circumstances indicate that the expression is merely the personal view of the supervisor and that employees are free to reject or ignore the supervisor's point of view or invitation without any harm to their careers or professional lives, such expression is so protected.

Because supervisors have the power to hire, fire, or promote, employees may reasonably perceive their supervisors' religious expression as coercive, even if it was not intended as such. Therefore, supervisors should be careful to ensure that their statements and actions are such that employees do not perceive any coercion of religious or non-religious behavior (or respond as if such coercion is occurring), and should, where necessary, take appropriate steps to dispel such misperceptions.

Examples

(a) A supervisor may invite co-workers to a son's confirmation in a church, a daughter's bat mitzvah in a synagogue, or to his own wedding at a temple.

but - A supervisor should not say to an employee: "I didn't see you in church this week. I expect to see you there this Sunday."

(b) On a bulletin board on which personal notices unrelated to work regularly are permitted, a supervisor may post a flyer announcing an Easter musical service at her church, with a handwritten notice inviting co-workers to attend.

but - A supervisor should not circulate a memo announcing that he will be leading a lunch-hour Talmud class that employees should attend in order to participate in a discussion of career advancement that will convene at the conclusion of the class.

(c) During a wide-ranging discussion in the cafeteria about various non-work related matters, a supervisor states to an employee her belief that religion is important in one's life. Without more, this is not coercive, and the statement is protected in the Federal workplace in the same way, and to the same extent, as other constitutionally valued speech.

(d) A supervisor who is an atheist has made it known that he thinks that anyone who attends church regularly should not be trusted with the public weal. Over a period of years, the supervisor regularly awards merit increases to employees who do not attend church routinely, but not to employees of equal merit who do attend church. This course of conduct would reasonably be perceived as coercive and should be prohibited.

(e) At a lunch-table discussion about abortion, during which a wide range of views are vigorously expressed, a supervisor shares with those he supervises his belief that God demands full respect for unborn life, and that he believes it is appropriate for all persons to

pray for the unborn. Another supervisor expresses the view that abortion should be kept legal because God teaches that women must have control over their own bodies. Without more, neither of these comments coerces employees' religious conformity or conduct. Therefore, unless the supervisors take further steps to coerce agreement with their view or act in ways that could reasonably be perceived as coercive, their expressions are protected in the Federal workplace in the same way and to the same extent as other constitutionally valued speech.

(3) Hostile Work Environment and Harassment. The law against workplace discrimination protects Federal employees from being subjected to a hostile environment, or religious harassment, in the form of religiously discriminatory intimidation, or pervasive or severe religious ridicule or insult, whether by supervisors or fellow workers. Whether particular conduct gives rise to a hostile environment, or constitutes impermissible religious harassment, will usually depend upon its frequency or repetitiveness, as well as its severity. The use of derogatory language in an assaultive manner can constitute statutory religious harassment if it is severe or invoked repeatedly. A single incident, if sufficiently abusive, might also constitute statutory harassment. However, although employees should always be guided by general principles of civility and workplace efficiency, a hostile environment is not created by the bare expression of speech with which some employees might disagree. In a country where freedom of speech and religion are guaranteed, citizens should expect to be exposed to ideas with which they disagree.

The examples below are intended to provide guidance on when conduct or words constitute religious harassment that should not be tolerated in the Federal workplace. In a particular case, the question of employer liability would require consideration of additional factors, including the extent to which the agency was aware of the harassment and the actions the agency took to address it.

Examples

(a) An employee repeatedly makes derogatory remarks to other employees with whom she is assigned to work about their faith or lack of faith. This typically will constitute religious harassment.An agency should not tolerate such conduct.

(b) A group of employees subjects a fellow employee to a barrage of comments about his sex life, knowing that the targeted employee would be discomforted and offended by such comments because of his religious beliefs. This typically will constitute harassment, and an agency should not tolerate it.

(c) A group of employees that share a common faith decides that they

want to work exclusively with people who share their views. They engage in a pattern of verbal attacks on other employees who do not share their views, calling them heathens, sinners, and the like. This conduct should not be tolerated.

(d) Two employees have an angry exchange of words. In the heat of the moment, one makes a derogatory comment about the other's religion. When tempers cool, no more is said. Unless the words are sufficiently severe or pervasive to alter the conditions of the insulted employee's employment or create an abusive working environment, this is not statutory religious harassment.

(e) Employees wear religious jewelry and medallions over their clothes or so that they are otherwise visible. Others wear buttons with a generalized religious or anti-religious message. Typically, these expressions are personal and do not alone constitute religious harassment.

(f) In her private work area, a Federal worker keeps a Bible or Koran on her private desk and reads it during breaks. Another employee displays a picture of Jesus and the text of the Lord's Prayer in her private work area. This conduct, without more, is not religious harassment, and does not create an impermissible hostile environment with respect to employees who do not share those religious views, even if they are upset or offended by the conduct.

(g) During lunch, certain employees gather on their own time for prayer and Bible study in an empty conference room that employees are generally free to use on a first-come, first-served basis. Such a gathering does not constitute religious harassment even if other employees with different views on how to pray might feel excluded or ask that the group be disbanded.

**C. Accommodation of Religious Exercise.** Federal law requires an agency to accommodate employees' exercise of their religion unless such accommodation would impose an undue hardship on the conduct of the agency's operations. Though an agency need not make an accommodation that will result in more than a de minimis cost to the agency, that cost or hardship nevertheless must be real rather than speculative or hypothetical: the accommodation should be made unless it would cause an actual cost to the agency or to other employees or an actual disruption of work, or unless it is otherwise barred by law.

In addition, religious accommodation cannot be disfavored vis-a-vis other, nonreligious accommodations. Therefore, a religious accommodation cannot be denied if the agency regularly permits similar accommodations for nonreligious purposes.

Examples

(a) An agency must adjust work schedules to accommodate an

employee's religious observance -- for example, Sabbath or religious holiday observance -- if an adequate substitute is available, or if the employee's absence would not otherwise impose an undue burden on the agency.

(b) An employee must be permitted to wear religious garb, such as a crucifix, a yarmulke, or a head scarf or hijab, if wearing such attire during the work day is part of the employee's religious practice or expression, so long as the wearing of such garb does not unduly interfere with the functioning of the workplace.

(c) An employee should be excused from a particular assignment if performance of that assignment would contravene the employee's religious beliefs and the agency would not suffer undue hardship in reassigning the employee to another detail.

(d) During lunch, certain employees gather on their own time for prayer and Bible study in an empty conference room that employees are generally free to use on a first-come, first-served basis. Such a gathering may not be subject to discriminatory restrictions because of its religious content.

In those cases where an agency's work rule imposes a substantial burden on a particular employee's exercise of religion, the agency must go further: an agency should grant the employee an exemption from that rule, unless the agency has a compelling interest in denying the exemption and there is no less restrictive means of furthering that interest.

Examples

(a) A corrections officer whose religion compels him or her to wear long hair should be granted an exemption from an otherwise generally applicable hair-length policy unless denial of an exemption is the least restrictive means of preserving safety, security, discipline or other compelling interests.

(b) An applicant for employment in a governmental agency who is a Jehovah's Witness should not be compelled, contrary to her religious beliefs, to take a loyalty oath whose form is religiously objectionable.

**D. Establishment of Religion.** Supervisors and employees must not engage in activities or expression that a reasonable observer would interpret as Government endorsement or denigration of religion or a particular religion. Activities of employees need not be officially sanctioned in order to violate this principle; if, in all the circumstances, the activities would leave a reasonable observer with the impression that Government was endorsing, sponsoring, or inhibiting religion generally or favoring or disfavoring a particular religion, they are not permissible. Diverse factors, such as the context of the expression or whether official channels of communication are used, are relevant to what a reasonable observer would conclude.

Examples

(a) At the conclusion of each weekly staff meeting and before anyone leaves the room, an employee leads a prayer in which nearly all employees participate. All employees are required to attend the weekly meeting. The supervisor neither explicitly recognizes the prayer as an official function nor explicitly states that no one need participate in the prayer. This course of conduct is not permitted unless under all the circumstances a reasonable observer would conclude that the prayer was not officially endorsed.

(b) At Christmas time, a supervisor places a wreath over the entrance to the office's main reception area. This course of conduct is permitted.

**SECTION 2. GUIDING LEGAL PRINCIPLES.** In applying the guidance set forth in section 1 of this order, executive branch departments and agencies should consider the following legal principles.

**A. Religious Expression.** It is well-established that the Free Speech Clause of the First Amendment protects Government employees in the workplace. This right encompasses a right to speak about religious subjects. The Free Speech Clause also prohibits the Government from singling out religious expression for disfavored treatment: "[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression," Capitol Sq. Review Bd. v. Pinette, 115 S.Ct. 2448 (1995). Accordingly, in the Government workplace, employee religious expression cannot be regulated because of its religious character, and such religious speech typically cannot be singled out for harsher treatment than other comparable expression.

Many religions strongly encourage their adherents to spread the faith by persuasion and example at every opportunity, a duty that can extend to the adherents' workplace. As a general matter, proselytizing is entitled to the same constitutional protection as any other form of speech. Therefore, in the governmental workplace, proselytizing should not be singled out because of its content for harsher treatment than nonreligious expression.

However, it is also well-established that the Government in its role as employer has broader discretion to regulate its employees' speech in the workplace than it does to regulate speech among the public at large. Employees' expression on matters of public concern can be regulated if the employees' interest in the speech is outweighed by the interest of the Government, as an employer, in promoting the efficiency of the public services it performs through its employees. Governmental employers also possess substantial discretion to impose content-neutral and viewpoint-neutral time, place, and manner rules regulating private employee expression in the workplace (though they may not structure or administer such rules to discriminate against particular viewpoints). Furthermore, employee speech can be regulated or discouraged if it impairs discipline by superiors, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise, or demonstrates that the employee holds views that could lead his employer or the public

reasonably to question whether he can perform his duties adequately.

Consistent with its fully protected character, employee religious speech should be treated, within the Federal workplace, like other expression on issues of public concern: in a particular case, an employer can discipline an employee for engaging in speech if the value of the speech is outweighed by the employer's interest in promoting the efficiency of the public services it performs through its employee. Typically, however, the religious speech cited as permissible in the various examples included in these Guidelines will not unduly impede these interests and should not be regulated. And rules regulating employee speech, like other rules regulating speech, must be carefully drawn to avoid any unnecessary limiting or chilling of protected speech.

**B. Discrimination in Terms and Conditions.** Title VII of the Civil Rights Act of 1964 makes it unlawful for employers, both private and public, to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion." 42 U.S.C. 2000e-2(a)(1). The Federal Government also is bound by the equal protection component of the Due Process Clause of the Fifth Amendment, which bars intentional discrimination on the basis of religion. Moreover, the prohibition on religious discrimination in employment applies with particular force to the Federal Government, for Article VI, clause 3 of the Constitution bars the Government from enforcing any religious test as a requirement for qualification to any Office. In addition, if a Government law, regulation or practice facially discriminates against employees' private exercise of religion or is intended to infringe upon or restrict private religious exercise, then that law, regulation, or practice implicates the Free Exercise Clause of the First Amendment. Last, under the Religious Freedom Restoration Act, 42 U.S.C. 2000bb-1, Federal governmental action that substantially burdens a private party's exercise of religion can be enforced only if it is justified by a compelling interest and is narrowly tailored to advance that interest.

**C. Coercion of Employees' Participation or Nonparticipation in Religious Activities.** The ban on religious discrimination is broader than simply guaranteeing nondiscriminatory treatment in formal employment decisions such as hiring and promotion. It applies to all terms and conditions of employment. It follows that the Federal Government may not require or coerce its employees to engage in religious activities or to refrain from engaging in religious activity. For example, a supervisor may not demand attendance at (or a refusal to attend) religious services as a condition of continued employment or promotion, or as a criterion affecting assignment of job duties. Quid pro quo discrimination of this sort is illegal. Indeed, wholly apart from the legal prohibitions against coercion, supervisors may not insist upon employees' conformity to religious behavior in their private lives any more than they can insist on conformity to any other private conduct unrelated to employees' ability to carry out their duties.

**D. Hostile Work Environment and Harassment.** Employers violate Title VII's ban on discrimination by creating or tolerating a "hostile environment" in which an employee is subject to discriminatory intimidation, ridicule, or insult sufficiently severe or pervasive to alter the conditions of the victim's employment. This statutory standard can be triggered (at the very least) when an employee, because of her or his religion or lack thereof, is exposed to

intimidation, ridicule, and insult. The hostile conduct -- which may take the form of speech -- need not come from supervisors or from the employer. Fellow employees can create a hostile environment through their own words and actions.

The existence of some offensive workplace conduct does not necessarily constitute harassment under Title VII. Occasional and isolated utterances of an epithet that engenders offensive feelings in an employee typically would not affect conditions of employment, and therefore would not in and of itself constitute harassment. A hostile environment, for Title VII purposes, is not created by the bare expression of speech with which one disagrees. For religious harassment to be illegal under Title VII, it must be sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. Whether conduct can be the predicate for a finding of religious harassment under Title VII depends on the totality of the circumstances, such as the nature of the verbal or physical conduct at issue and the context in which the alleged incidents occurred. As the Supreme Court has said in an analogous context:

> [W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

The use of derogatory language directed at an employee can rise to the level of religious harassment if it is severe or invoked repeatedly. In particular, repeated religious slurs and negative religious stereotypes, or continued disparagement of an employee's religion or ritual practices, or lack thereof, can constitute harassment. It is not necessary that the harassment be explicitly religious in character or that the slurs reference religion: it is sufficient that the harassment is directed at an employee because of the employee's religion or lack thereof. That is to say, Title VII can be violated by employer tolerance of repeated slurs, insults and/or abuse not explicitly religious in nature if that conduct would not have occurred but for the targeted employee's religious belief or lack of religious belief. Finally, although proselytization directed at fellow employees is generally permissible (subject to the special considerations relating to supervisor expression discussed elsewhere in these Guidelines), such activity must stop if the listener asks that it stop or otherwise demonstrates that it is unwelcome.

**E. Accommodation of Religious Exercise.** Title VII requires employers "to reasonably accommodate . . . an employee's or prospective employee's religious observance or practice" unless such accommodation would impose an "undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j). For example, by statute, if an employee's religious beliefs require her to be absent from work, the Federal Government must grant that employee compensation time for overtime work, to be applied against the time lost, unless to do so would harm the ability of the agency to carry out its mission efficiently. 5 U.S.C. 5550a.

Though an employer need not incur more than de minimis costs in providing an accommodation, the employer hardship nevertheless must be real rather than speculative or

hypothetical. Religious accommodation cannot be disfavored relative to other, nonreligious, accommodations. If an employer regularly permits accommodation for nonreligious purposes, it cannot deny comparable religious accommodation: "Such an arrangement would display a discrimination against religious practices that is the antithesis of reasonableness." Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 71 (1986).

In the Federal Government workplace, if neutral workplace rules -- that is, rules that do not single out religious or religiously motivated conduct for disparate treatment -- impose a substantial burden on a particular employee's exercise of religion, the Religious Freedom Restoration Act requires the employer to grant the employee an exemption from that neutral rule, unless the employer has a compelling interest in denying an exemption and there is no less restrictive means of furthering that interest. 42 U.S.C. 2000bb-1.

**F. Establishment of Religion.** The Establishment Clause of the First Amendment prohibits the Government -- including its employees -- from acting in a manner that would lead a reasonable observer to conclude that the Government is sponsoring, endorsing or inhibiting religion generally or favoring or disfavoring a particular religion. For example, where the public has access to the Federal workplace, employee religious expression should be prohibited where the public reasonably would perceive that the employee is acting in an official, rather than a private, capacity, or under circumstances that would lead a reasonable observer to conclude that the Government is endorsing or disparaging religion. The Establishment Clause also forbids Federal employees from using Government funds or resources (other than those facilities generally available to government employees) for private religious uses.

**SECTION 3. GENERAL.** These Guidelines shall govern the internal management of the civilian executive branch. They are not intended to create any new right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. Questions regarding interpretations of these Guidelines should be brought to the Office of the General Counsel or Legal Counsel in each department and agency.

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You receive legal defense and protection of your assets (up to $2,000,000) when faced with a lawsuit related to your profession.

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You receive help with legal fees in case of job action, demotion or job transfer.

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You can call or email CEAI with prayer requests and be linked with other members for prayer support. We will assist you to form prayer groups at your school. You can also join a nationwide prayer network at **www.raiseyourhand.us**.



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Includes $1 Million Professional Liability Coverage with Job Action Protection.

**Salary:**
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KIMBERLEE WOOD COLBY, ESQ. graduated from Harvard Law School in 1981. Since then, she has been a staff attorney for the Center for Law and Religious Freedom of the Christian Legal Society. During that time, she has worked on passage of the Equal Access Act to secure the right of students to meet for prayer, Bible study, and religious discussions in the public schools. In several cases, she has served as co-counsel for students wishing to engage in religious expression in the public schools. Ms. Colby has filed numerous briefs amici curiae in the Supreme Court and lower courts to protect religious rights in the public school context.

*"Questions abound for Christian teachers and students in public schools, especially for those who refuse to leave their faith at the door. I'm so grateful that some of the best Christian legal minds today are answering those questions in a clear, easy-to-read format. This is a must-read for Christian educators, administrators, school board members, and parents."*

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