

Memorandum of Law

Re: Constitutional Protections of Religious Expressions in Public Schools

I. Introduction

School officials should be aware of the United States Department of Education's (ED) latest *Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools* (highlighted copy attached). Though many teachers and school officials are passionate about certain issues in their personal capacities, schools must ensure their policies are strictly based on the parameters set out in law and not based on personal emotion or opinion when it comes to the burdens it places on students and staff's First Amendment rights. Acting proactively to educate teachers and staff will help them avoid the significant legal liability that could come from violating basic constitutional protections. Though not a substitute for individual and specific legal counsel, this memorandum of law can assist schools in understanding and implementing sound policies that comply with the law.

II. Overview and General Principle

Because the First Amendment protects both religious expression and speech rights, one easy way to avoid legal error is to treat all expression equally, including religious expression. *Never* target speech or other types of expression as needing to be restricted because of their religious nature. The Constitution *prohibits* such targeting. Not even the famous "separation of church and state" concept that many use to argue in favor of limiting religious expression permits such actions. A school would prevent much conflict if it ensured all its teachers were aware of this fundamental principle of constitutional law. Where students are allowed to express their ideas, they are allowed to express their religious ideas.

III. Legal Framework

The first three clauses of the First Amendment to the U.S. Constitution state, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech.”¹ They are known as the Establishment Clause, the Free Exercise Clause, and the Free Speech Clause. The words “separation of church and state” are not in the Constitution. They are a much-abused attempt at expressing the interplay between the first two clauses: (1) government can’t establish an official religion, and (2) it cannot prohibit the free exercise of religion.

In the public school context, the U.S. Supreme Court has interpreted these to mean that a school, through its officials and teachers, cannot prescribe religious exercises. Still, it has also made it clear that neither “students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”² The ED guidelines put it this way, “Nothing in the First Amendment... converts the public schools into religion-free zones, or requires students, teachers, or other school officials to leave their private religious expression behind at the schoolhouse door.” Freedom of Speech is very broad. The Court said:

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are ‘persons’ under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.³

¹ U.S. CONST. amend. I

² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 89 S. Ct. 733, 736, 21 L. Ed. 2d 731 (1969).

³ *Id.* at 511.

That case established what is now known as the *Tinker* standard, which provides that school officials cannot censor student freedom of expression unless they can reasonably forecast that it will substantially disrupt school activities or invade the rights of others. That means schools may not prohibit a student's speech just because another student objects to it. "If school officials were permitted to prohibit expression to which other students objected, absent any further justification, the officials would have a license to prohibit virtually every type of expression."⁴

This rule applies to secular and religious speech alike. Religious speech enjoys the same protection as political speech.⁵ A student does not lose their constitutional rights when the message is of a religious nature. The guideline states:

For example, "nothing in the Constitution ... prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday," and, therefore, students may pray with fellow students during the school day on the same terms and conditions that they may engage in other comparable conversations or activities. Students may also speak to, and attempt to persuade, their peers about religious matters just as they may do with regard to, for example, political matters.⁶

Even the right to persuade, advocate or proselytize a religious viewpoint, then, is protected by the First Amendment. The Supreme Court has said that "free trade in ideas means free trade and the opportunity to persuade, not merely describe facts."⁷

"In the absence of a specific showing of constitutionally valid reason to regulate their speech, students are entitled to freedom of expression of their views."⁸ To justify the exclusion

⁴ *Clark v. Dallas Independent School District*, 806 F. Supp. 116, 120 (N.D. Tex. 1992) (citing *Rivera v. East Otero School District*, 721 F. Supp. 1189, 1193 (D.Colo. 1989); and *Slotterback v. Interboro School District*, 766 F. Supp. 280, 293 (E.D. Pa. 1991)).

⁵ *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (citing *Heffron v. ISKCON*, 452 U.S. 640 (1981)).

⁶ Citing *Santa Fe*, 530 U.S. at 302, 313 (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").

⁷ *Thomas v. Collins*, 323 U.S. 516, 537 (1945).

⁸ *Clark*, 806 F. Supp. At 119 (quoting *Tinker*, 393 U.S. at 511).

of free speech, the public school has the burden to show that its actions are necessary to serve a compelling state interest and that the complete denial of speech is the least restrictive means to achieve its goal. The Supreme Court has made clear, “[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 Clause protect.”⁹

IV. Some Practical Application

Prayer in Schools

A school should be weary of restricting personal prayer. In the most recent case on this matter, Coach Joseph Kennedy of Washington State was awarded almost two million dollars in a settlement after the school fired him for praying at the 50-yard line after football games.¹⁰ To be sure, teachers can be burdened in what they teach but not in their personal exercise of their faith. Even more so in the case of students who the school does not employ. Again, a school may impose reasonable rules of order during instructional time but never outside that context. “Although school authorities may impose rules of order and pedagogical restrictions on student activities, they may not discriminate against student prayer or religious perspectives in applying such rules and restrictions,” the guideline says.

Religion in the Classroom

The guideline states, “Public schools may not provide religious instruction, but they may teach *about* religion and promote religious liberty and respect for the religious views (or lack thereof) of all.” Once again, applying the general principle is instructive in this area. Where an assignment requires students to write an essay about what they are thankful for, nothing in the law prohibits them from speaking about God and faith. A teacher should not encourage *or*

⁹ *Board of Education v. Mergens*, 110 S.Ct. 2356, 2360 (1990).

¹⁰ Steve Janoski, *High school football coach fired for prayer wins \$1.7M settlement, will get job back*, New York Post March 21, 2023, <https://nypost.com/2023/03/21/praying-football-coach-gets-job-back-1-7-million-settlement/>; see also *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022).

discourage religious expression. Religious themes abound in American History, philosophy, literature, the arts, and more, and they are perfectly appropriate for discussion within those contexts. “Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious perspective of their submissions,” the guidelines say. They should be “neither penalized nor rewarded on account of its religious perspective.”

Student Groups

Religious groups must be treated equally to any other type of group. Whatever facilities or resources are available to student groups must be available to a faith-focused student group. “[S]chool authorities may not discriminate against groups that meet to engage in religious expression such as prayer.”

Student Attire

Schools may not target religious attire for particular prohibition. Once again, the general rule should be applied. Wherever some expression is allowed, religious expression should be treated equally. Wherever exceptions for some groups are made, the same exceptions should be available for religious groups. Federal and state law may also require accommodation in some specific circumstances. Specific legal counsel should be sought in those cases.

Distributing Literature

The *Tinker* standard applies to verbal speech as well as other forms of expression, including written material. The Supreme Court has said “that the right to distribute flyers and literature lies at the heart of the liberties guaranteed by the Speech and Press Clauses of the First Amendment”¹¹ and that “It is axiomatic that written expression is pure speech.”¹² They have also stressed that “From the time of the founding of our nation, the distribution of written material has been an essential weapon in the defense of liberty.”¹³

¹¹ *ISKCON v. Lee*, 112 S. Ct. 2711, 2720 (1992).

¹² *Slotterback*, 766 F. Supp. at 288.

¹³ *Paulsen v. County of Nassau*, 925 F.2d 65, 66 (2d Cir. 1991).

A common misconception by school officials is that the school is affirmatively promoting the speech by allowing a student to hand out flyers inviting his classmates to go to a particular church-related activity. Nothing could be further from the truth. The Court has addressed such a case and sided with the school where it involved material printed in a school-sponsored newspaper that was “supervised by faculty members and designated to impart particular knowledge or skills to student participants and audiences.”¹⁴ But outside of the classroom, a “ban on the distribution of student-initiated religious literature cannot be constitutionally justified.”¹⁵

V. Conclusion

Nothing in law or the Constitution requires public school hostility towards religion.¹⁶ The U.S. Department of Education’s latest guidelines make that very clear. Public school officials should watch out for seemingly noble efforts and policies that may result in an unlawful encroachment of student or faculty First Amendment rights in practice. As U.S. Supreme Court Justice Louis Brandeis famously wrote, the answer to objectionable speech “is more speech, not enforced silence.”¹⁷ The same is true for religious beliefs. The appropriate response to any offensive religious belief is not to censor or prohibit the expression of that belief but to encourage a healthy appreciation of diverse viewpoints and the respectful exchange of ideas. Following these general principles will set you on the right track to protect constitutional rights.



Mario Diaz
General Counsel
Concerned Women for America

¹⁴ *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

¹⁵ *Widmar v. Vincent*, 454 U.S. 263, 269-270 (1981).

¹⁶ See *Bd. of Educ. of Westside Cmty. Sch. v. Mergens By & Through Mergens*, 496 U.S. 226, 248, 110 S. Ct. 2356, 2371, 110 L. Ed. 2d 191 (1990) (Indeed, the message is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.).

¹⁷ *Whitney v. California*, 274 U.S. 357 (1927).

Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools

May 15, 2023

I. Introduction

Section 8524(a) of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Every Student Succeeds Act and codified at 20 U.S.C. § 7904(a), requires the Secretary of Education (the Secretary) to issue guidance to State educational agencies (SEAs), local educational agencies (LEAs), and the public on constitutionally protected prayer in public elementary and secondary schools. In addition, section 8524(b), codified at 20 U.S.C. § 7904(b), requires that, as a condition of receiving ESEA funds, an LEA must annually certify in writing to its SEA that it has no policy that prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary and secondary schools, as detailed in this updated guidance.

The purpose of this updated guidance is to provide information on the current state of the law concerning constitutionally protected prayer and religious expression in public schools. Part I is an introduction. Part II clarifies the extent to which prayer in public schools is legally protected. SEAs and LEAs are responsible, under section 8524(b) of the ESEA, to certify each year their compliance with the standards set forth in Part II.

Part III of this updated guidance addresses constitutional principles that relate to religious expression in public schools more broadly, not limited to prayer, and Part IV discusses requirements under other Federal and State laws relevant to prayer and religious expression. These sections are designed to advise SEAs and LEAs on how to comply with governing law, certifying compliance with Parts III and IV is not a part of the required certification under section 8524(b) of the ESEA.

The principles outlined in this updated guidance are similar to the U.S. Department of Education's (Department's) 2003 and 2020 guidance on constitutionally protected prayer in public schools and with guidance that President Clinton issued in 1995.^[1] The Department's Office of the General Counsel and the Office of Legal Counsel in the U.S. Department of Justice have verified that this updated guidance reflects the current state of the law concerning constitutionally protected prayer in public elementary and secondary schools. This updated guidance will be made available on the Department's website (www.ed.gov (<https://www.ed.gov/>)).

A. The Section 8524(b) Certification Process

To receive funds under the ESEA, an LEA must annually 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 detailed in Part II of this updated guidance. An LEA must provide this certification to the SEA by October 1 of each year during which the LEA participates in an ESEA program.

Each SEA should establish a process by which its 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 detailed in this updated guidance.

Section 8524(b) of the ESEA also requires that, by November 1 of each year, each SEA must send to the Secretary a list of those LEAs that have not filed the required certification or that have been the subject of a complaint to the SEA alleging that the LEA has a policy that prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary and secondary schools. The SEA must provide a process for filing a complaint against an LEA that allegedly denies a person, including a student or employee, the right to participate in constitutionally protected prayer. The SEA must report to the Secretary all complaints that are filed through the process the SEA provides, including complaints that the SEA may deem meritless. In addition, to the extent the SEA has notice of any public legal charges or complaints, such as a lawsuit filed against an LEA alleging that the LEA denied a person the right to participate in constitutionally protected prayer, the SEA should report the charges and complaints to the Secretary.

The list required by section 8524(b) should be emailed to OESE@ed.gov (<mailto:OESE@ed.gov>). If an SEA is providing any Personally Identifiable Information the email must be encrypted. If an SEA is unable to electronically send the list, please email OESE@ed.gov (<mailto:OESE@ed.gov>) to request an alternative submittal method.

The SEA's submission should describe what investigation and/or enforcement action, if any, the SEA has initiated with respect to each listed LEA and the status of the investigation or action. After receiving the SEA's submission, the Department may request additional information about listed LEAs. The SEA should not send the LEA certifications themselves to the Secretary but should maintain these records in accordance with its usual records retention policy.

B. Enforcement of Section 8524(b)

Section 8524(c) of the ESEA, codified at 20 U.S.C. § 7904(c), requires the Secretary to effectuate section 8524(b) by issuing, and securing compliance with, rules or orders with respect to an LEA that fails to certify, or is found to have certified in bad faith, that no policy of the LEA prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary and secondary schools. The General Education Provisions Act also authorizes the Secretary to take actions against recipients of Federal education funds that are not in compliance with the ESEA and/or other applicable law. See 20 U.S.C. §§ 1234c–1234f. Such actions include, among other things, entering into a compliance agreement with the recipient to bring it into compliance, issuing a cease and desist order, and withholding funds until the recipient comes into compliance.

If an LEA fails to file the required certification, or is found to have a policy that prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary and secondary schools, the SEA should ensure compliance in accordance with its regular enforcement procedures.

C. Overview of Governing Constitutional Principles

The First Amendment to the U.S. Constitution both prevents the government from establishing religion and protects religious exercise and religious expression from unwarranted government interference and discrimination.^[2] School administrators and teachers have an opportunity to assist America's youth in developing an understanding of these constitutional protections as they apply to people of all faiths and no faith and an appreciation for the core American values and freedoms that undergird them.

A public school and its officials may not prescribe prayers to be recited by students or by school authorities.^[3] Indeed, it is "a cornerstone principle of [the U.S. Supreme Court's] Establishment Clause jurisprudence that 'it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.'"^[4] Nothing in the First Amendment, however,

converts the public schools into religion-free zones, or requires students, teachers, or other school officials to leave their private religious expression behind at the schoolhouse door. The line between government-sponsored and privately initiated religious expression is vital to a proper understanding of what the Religion and Free Speech Clauses of the First Amendment prohibit and protect.^[5] Although a government may not promote or favor religion or coerce the consciences of students, schools also may not discriminate against private religious expression by students, teachers, or other employees. Schools must also maintain neutrality among faiths rather than preferring one or more religions over others.^[6]

The Supreme Court's decisions set forth principles that distinguish impermissible governmental religious speech from constitutionally protected private religious speech. For example, teachers, coaches, and other public school officials acting in their official capacities may not lead students in prayer, devotional readings, or other religious activities,^[7] nor may they attempt to persuade or compel students to participate in prayer or other religious activities or to refrain from doing so.^[8] The Supreme Court has held, for instance, that public school officials violated the Establishment Clause by inviting a rabbi to deliver prayers at graduation ceremonies because such conduct was "attributable to the State" and applied "subtle coercive pressure" that effectively required students to choose between praying or openly displaying their opposition to the prayer.^[9]

Although the Constitution forbids public school officials acting in their official capacities from directing or favoring prayer, students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."^[10] 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."^[11] Moreover, not all religious speech that takes place in public schools or at school-sponsored events is governmental speech.^[12] For example, "nothing in the Constitution . . . prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday,"^[13] and therefore students may pray with fellow students during the school day on the same terms and conditions that they may engage in other comparable conversations or activities. Students may also speak to, and attempt to persuade, their peers about religious matters just as they may do with regard to, for example, political matters.

School officials may impose reasonable rules of order on student speech and activities as long as they do not discriminate against student speech or activities for being religiously motivated or reflecting a religious perspective. The Supreme Court has repeatedly recognized that schools have a special interest in regulating speech that occurs under their supervision where that speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."^[14] In addition, although school officials may not promote or favor religion or coerce students to pray, they also may not structure or administer the school's rules so as to discriminate against private student speech or activities that are religiously motivated or that reflect a religious perspective. Where schools permit student expression on the basis of genuinely content-neutral criteria in a context in which the speech is not school-sponsored (or otherwise disseminated under the school's auspices), the speech of students who choose to express themselves through religious means such as prayer is not attributable to the State and may not be restricted because of its religious content.^[15] Student remarks are not attributable to the school simply because they are delivered in a public setting or to a public audience,^[16] and the Constitution mandates neutrality toward privately initiated religious expression.^[17]

When teachers, coaches, and other public school officials speak in their official capacities, they may not engage in prayer or promote religious views. More broadly, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."^[18] However, not everything that a public school teacher, coach, or other official says in the workplace constitutes governmental speech, and schools have less leeway to regulate employees' genuinely private expression. To be sure, a public school, like any other governmental employer, may reasonably restrict its employees' private speech in the workplace where that speech may have a detrimental effect on close working relationships, impede the performance of the speaker's duties, or otherwise interfere with the regular operation of the enterprise.^[19] In contexts where a school permits

teachers, coaches, and other employees to engage in personal speech, however, it may not prohibit those employees from engaging in prayer merely because it is religious or because some observers, including students, might misperceive the school as endorsing that expression.^[20] That said, a school may take reasonable measures to ensure that teachers, coaches, and other school officials do not pressure or encourage students to join in the private prayer of those officials or other students.

▲ Top

II. Applying the Governing Constitutional Principles in Particular Public School Contexts Related to Prayer

A. Prayer and Religious Exercise During Non-Instructional 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. Students also may read from religious materials; say a prayer or blessing before meals; and engage in worship or study religious materials with fellow students during non-instructional time (such as recess or the lunch hour) to the same extent that they may engage in nonreligious activities. Although school authorities may impose rules of order and pedagogical restrictions on student activities, they may not discriminate against student prayer or religious perspectives in applying such rules and restrictions.

B. Organized Prayer Groups and Activities

Students may organize prayer groups and religious clubs to the same extent that students are permitted to organize other noncurricular student activity 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 groups' religious character or perspective. School officials should neither encourage nor discourage participation in student-run activities based upon the activities' religious character or perspective. Schools may take reasonable steps to ensure that students are not pressured to participate (or not to participate) in such religious activities. School authorities possess substantial discretion concerning whether to permit the use of school media for student advertising or announcements regarding noncurricular 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 that meet to engage in religious expression such as prayer. School authorities may choose to issue appropriate, neutral disclaimers of the school's sponsorship or approval of noncurricular groups and events.

C. Teachers, Administrators, and Other School Employees

Teachers, school administrators, and other school employees may not encourage or discourage private prayer or other religious activity.

The Constitution does not, however, prohibit school employees themselves from engaging in private prayer during the workday where they are not acting in their official capacities and where their prayer does not result in any coercion of students. Before school or during breaks, for instance, teachers may meet with other teachers for prayer or religious study to the same extent that they may engage in other conversation or nonreligious activities. School employees may also engage in private religious expression or brief personal religious observance during such times, subject to the same neutral rules the school applies to other private conduct by its employees. Employees engaging in such expression or observance may not, however, compel, coerce, persuade, or

encourage students to join in the employee's prayer or other religious activity, and a school may take reasonable measures to ensure that students are not pressured or encouraged to join in the private prayer of their teachers or coaches.

School employees may participate in their personal capacities in privately sponsored baccalaureate ceremonies or similar events.

D. Moments of Silence

If a school has a "moment 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 not require or encourage students to pray, or discourage them from praying, during such time periods.

E. Accommodation of Prayer and Religious Exercise During Instructional Time

Students may engage in prayer or religious expression during instructional time to the same degree they may engage in nonreligious private expression during such time. Students may, for example, bow their heads and pray to themselves before taking a test.

F. Student Assemblies and Noncurricular Events

Student speakers at school assemblies and noncurricular activities such as sporting events may not be selected on a basis that either favors or disfavors religious perspectives. Where a student speaker is selected on the basis of genuinely content-neutral, evenhanded criteria, and the school does not determine or have control over the content of the student's speech, the expression is not reasonably attributed to the school and therefore may not be restricted because of its religious content (or content opposing religion) and may include prayer. In these circumstances, school officials may choose to make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker's and not the school's speech. By contrast, where school officials determine or have control over the content of what is expressed, such speech is attributable to the school and may not include prayer or content promoting (or opposing) religion.

G. 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 content-neutral, evenhanded criteria, and schools do not determine or have control over their speech, however, that expression is not attributable to the school and therefore may not be restricted because of its religious content (or content opposing religion) and may include prayer. In these circumstances, school officials may choose to make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker's and not the school's speech.

H. Baccalaureate Ceremonies

School officials may not mandate or organize religious baccalaureate 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 sponsorship or approval of events held 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.

▲ Top

III. Applying Constitutional Principles Regarding Religious

Expression Other Than Prayer in Particular Public School Contexts

A. Religious Literature

Public school 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 curricula or activities. Schools may impose the same reasonable time, place, or manner restrictions on distribution of religious literature as they do on non-school literature generally, but they may not target religious literature for more permissive or more restrictive regulation.

B. Teaching about Religion

Public schools may not provide religious instruction, but they may teach *about* religion and promote religious liberty and respect for the religious views (or lack thereof) of all. For example, philosophical questions concerning religion, the history of religion, comparative religion, religious texts as literature, and the role of religion in the history of the United States and other countries are all permissible public school subjects. Similarly, it is permissible to study religious influences on philosophy, art, music, literature, and social studies. For example, public schools generally may allow student choirs to perform music inspired by or based on religious themes or texts as part of school-sponsored activities and events, provided that the music is not performed as a religious exercise and is not used to promote or favor religion generally, a particular religion, or a religious belief.

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, nor may schools promote or disparage such observance by students.

C. Student Dress Codes and Policies

Public schools generally may adopt policies relating to student dress and school uniforms to the extent consistent with constitutional and statutory civil rights protections. Schools may not, however, target religious attire in general, or the attire of a particular religion, for prohibition or regulation. If a school makes exceptions to a dress code to accommodate nonreligious student needs, it ordinarily must also make comparable exceptions for religious needs. Students may display religious messages on items of clothing to the same extent and pursuant to the same conditions that they are permitted to display nonreligious messages. In addition, in some circumstances Federal or State law may require schools to make accommodations that relieve substantial burdens on students' religious exercise. School officials may wish to consult with their attorneys regarding such obligations.

D. Religious Expression in Class Assignments and Homework

Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious perspective of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance, relevance, and other legitimate pedagogical objectives. 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 be neither penalized nor rewarded on account of its religious perspective.

E. Excusals for Religious Activities

Public schools have discretion to permit students to attend 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 burden on their religious exercise,

including prayer or fasting, at least where doing so would not impose material burdens on other students. For example, it would be constitutional for schools to excuse students from class to enable them to fulfill their religious obligations regarding prayer, religious holidays, or other observances.

Where school officials have a practice of excusing students from class on the basis of requests for accommodation of nonreligious needs, religiously motivated requests for excusal may not be accorded less favorable treatment. In some circumstances, Federal or State law may require schools to make accommodations that relieve substantial burdens on students' religious exercise. School officials may wish to consult with their attorneys regarding such obligations.

▲ Top

IV. Additional Requirements under the Equal Access Act and Other Federal and State Laws

In addition to the constitutional principles discussed above, public schools may also be subject to requirements under Federal and State laws relevant to prayer and religious expression. (Such Federal and State laws may not, however, obviate or conflict with a public school's Federal constitutional obligations described herein.)

For example, the Equal Access Act, 20 U.S.C. § 4071, is designed to ensure that student religious activities are accorded the same access to Federally funded public secondary school facilities as are student secular activities. Under the Equal Access Act, a public secondary school receiving Federal funds that creates a "limited open forum" may not refuse student religious groups access to that forum.^[21] A "limited open forum" exists "whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(b). Such meetings, as defined and protected by the Equal Access Act, may include a voluntary and student-initiated prayer service, scripture reading, or other worship exercise. Under the Act, a public secondary school receiving Federal funds must also allow student religious groups to use school media—including the school's newspaper, public address system, and bulletin board—to announce their meetings on the same terms as other noncurriculum-related student groups are allowed to use school media. Any policy concerning the use of school media must be applied to all noncurriculum-related student groups in a nondiscriminatory matter. Schools may, however, issue appropriate, neutral disclaimers of the school's sponsorship or approval of noncurricular groups and events. Consistent with the First Amendment, the Equal Access Act also states that it should not be construed (among other things) to authorize a public school or its officials to influence the form or content of any prayer, require any person to participate in prayer, or abridge the constitutional rights of any person. 20 U.S.C. § 4071(d).

▲ Top

Notes:

[1] See U.S. Dep't of Educ., *Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools* (Jan. 16, 2020); U.S. Dep't of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools* (Feb. 7, 2003); President William J. Clinton, *Religious Expression in Public Schools*, 2 Pub. Papers 1083 (July 12, 1995).

[2] The relevant portions of the First Amendment provide that "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 first two quoted clauses are often referred to as the Establishment Clause and the Free Exercise Clause of the First Amendment, collectively the Religion Clauses. The language "or abridging the freedom of speech," also relevant to prayer and religious expression, is usually referred to as the Free Speech Clause of the

First Amendment. The Supreme Court has held that the Fourteenth Amendment makes these provisions applicable to States and localities, see, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), and therefore they apply to the actions of public schools.

[³] *Town of Greece v. Galloway*, 572 U.S. 565, 581 (2014) (citing *Engel v. Vitale*, 370 U.S. 421, 430 (1962)).

[⁴] *Lee v. Weisman*, 505 U.S. 577, 588 (1992) (quoting *Engel*, 370 U.S. at 425); see also *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223–25 (1963) (holding that it violated the Establishment Clause for schools to require the selection and reading at the opening of the school day of verses from the Bible and the recitation of the Lord's Prayer by the students in unison, under the supervision and with the participation of teachers).

[⁵] See *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2423–24 (2022) (making the point with respect to the Free Speech Clause); see also *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) ("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" (quoting *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality op.))); accord *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995).

[⁶] *Larson v. Valente*, 456 U.S. 228 (1982); *Epperson v. Arkansas*, 393 U.S. 97 (1968).

[⁷] *Schempp*, 374 U.S. 203 (invalidating state laws and policies requiring public schools to begin the school day with Bible readings and prayer); *Engel*, 370 U.S. 421 (invalidating a state law and regulation directing the use of prayer in public schools); *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam) (holding that a state statute requiring posting of Ten Commandments on walls of every public school classroom was unconstitutional).

[⁸] See *Lee*, 505 U.S. at 599 see also *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Kennedy*, 142 S. Ct. at 2429, 2431 (emphasizing that the football coach in that case did not coerce, require, or ask any students to pray, nor seek to persuade them to participate in his private prayer).

[⁹] *Lee*, 505 U.S. at 592–94; see also *Town of Greece*, 572 U.S. at 590 (describing *Lee* as having held that a religious invocation was coercive as to an objecting student "in the context of a graduation where school authorities maintained close supervision over the conduct of the students and the substance of the ceremony").

[¹⁰] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

[¹¹] *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (citing *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Mergens*, 496 U.S. 226; *Widmar v. Vincent*, 454 U.S. 263 (1981); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981)).

[¹²] *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").

[¹³] *Id.* at 313.

[¹⁴] See, e.g., *Morse v. Frederick*, 551 U.S. 393, 397 (2007) (the rights of students "'must be 'applied in light of the special characteristics of the school environment'" (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Tinker*, 393 U.S. at 506))); see also *Tinker*, 393 U.S. at 513; *Mahanoy Area Sch. Dist. v. B. L. by and through Levy*, 141 S. Ct. 2038, 2045 (2021); *Morse*, 551 U.S. at 403–04.

[¹⁵] *Rosenberger*, 515 U.S. at 829 ("Once it has opened a limited forum, . . . the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of its viewpoint." (citations and quotation marks omitted)); see also *Shurtleff v. City of Bos.*, 142 S. Ct. 1583, 1589–90 (2022) (explaining that the Court looks to various factors to determine whether the government intends to speak for itself or to regulate private expression, including "the history of the expression at issue; the public's likely perception as to who (the

government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression"); *Lamb's Chapel*, 508 U.S. at 392–93 ("[C]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." (quotation marks omitted)); *Widmar*, 454 U.S. at 269–76; *Good News Club*, 533 U.S. at 122 (Scalia, J., concurring) ("Even subject-matter limits must at least be reasonable in light of the purpose served by the forum[.]" (quotation marks omitted)). When, by contrast, student speech is made in the context of school-sponsored activities, such as in school-sponsored publications or theatrical productions, educators have more discretion to regulate such speech and generally do not offend the First Amendment by exercising editorial control over the style and content so long as their actions are reasonably related to legitimate pedagogical concerns. See *Hazelwood*, 484 U.S. at 271–73.

[¹⁶] *Santa Fe*, 530 U.S. at 302 *Rosenberger*, 515 U.S. at 834–35; *Mergens*, 496 U.S. at 250 (plurality op.).

[¹⁷] *Rosenberger*, 515 U.S. at 845–46 *Everson*, 330 U.S. at 18.

[¹⁸] *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006); accord *Lane v. Franks*, 573 U.S. 228, 237 (2014).

[¹⁹] See *Kennedy*, 142 S. Ct. at 2423–24; *Rankin v. McPherson*, 483 U.S. 378, 388 (1987); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568–73 (1968); see also *Walden v. Ctrs. for Disease Control & Prevention*, 669 F.3d 1277, 1286 (11th Cir. 2012); *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 648–51 (9th Cir. 2006); *Brown v. Polk Cty.*, 61 F.3d 650, 658 (8th Cir. 1995).

[²⁰] *Kennedy*, 142 S. Ct. at 2426–28.

[²¹] See, e.g., 20 U.S.C. § 4071(c)(3) (Equal Access Act provision stating that a school "shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that," inter alia, "employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity"); see also *Mergens*, 496 U.S. at 251 (plurality op.) (explaining that this feature of the Equal Access Act helps ensure there will be "little if any risk of official state endorsement or coercion" of students); cf. *Lee*, 505 U.S. at 592 (recognizing "heightened concerns with protecting freedom of conscience from subtle coercive pressure" and noting that prayer exercises in public elementary and secondary schools "carry a particular risk of indirect coercion").

Archived 2020 Guidance (</policy/gen/guid/religionandschools/prayer-guidance-2020.html>)

Archived 2003 Guidance (/policy/gen/guid/religionandschools/prayer_guidance-2003.html)

Last Modified: 05/15/2023