Religious Freedom 101: A Religious Civil Rights Handbook ©

Federal and Multi-State Law Edition

By: Attorney Timothy W. Denney

2024 edition

Dedication:

This outline is dedicated to the memory of my father, Peter Denney, who went home to be with the Lord on April 8, 2000. It was my father who encouraged me as early as age 11 to honor God by serving Him as an attorney. It was only through his wise counsel, constant encouragement, and the grace of God that I serve in the profession I now enjoy.

Preface:

As an elementary grade schooler, with the encouragement of my father, I committed myself to becoming an attorney dedicated to defending religious liberty. After I became an attorney, I learned that there are indeed important battles for religious liberty that must be fought and won on a regular basis. However, I also discovered that there is an equally dangerous threat posed by the fact that religious people are often not aware of the protections we already have for religious freedom. I frequently run across religious people who are intimidated from exercising their faith simply because someone wrongly tells them they cannot lawfully engage in some activity our laws already condone. The truth is that precious opportunities to share our faith are being lost because religious people are not taking advantage of the religious liberties they already have. It is my prayer that this Handbook will embolden religious people to take full advantage of the wonderful opportunities that still exist to exercise their faith.

Notice:

This Handbook is designed to provide general educational background for the reader. It is not intended as legal advice. Readers should secure the advice of a competent local attorney in their state or local community if they desire to take action based on the laws in their specific state or local community. This is particularly true since a court decision from one area of the country may not be binding on courts in another area of the country, even though the earlier decision might be a reasonable reflection of how other courts will decide the same issue.

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Timothy W. Denney
Rickard, Denney, Leichliter, Childers & Bosch
110 North Saginaw Street, Suite 1
Lapeer, Michigan 48446
Telephone: (810) 664-0750
E-mail: tdenney@twdpclaw.com

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I. INTRODUCTION AND QUICK SUMMARY OF THE LAW:

This book is designed to clarify for parents and students what religious activities are or are not permitted in the public school. This author is firmly convinced that parents and students are often unaware of ample opportunities for religious activities in the public school. This book is designed to encourage parents, students, and the religious community to take advantage of the opportunities that exist for religious activities in the public school.

This book is also designed to help eliminate confusion about the legality of religious activities in the public schools. Public school officials expose their schools to substantial legal liability and even loss of federal funding if they prohibit protected religious activities. Schools also face liability if they condone prohibited religious activities. Years ago, schools could safely assume that if in doubt, they could keep religious activities out. That is no longer true. Schools are now equally likely to be sued over excluding religious activities as they are for permitting them. The good news for school officials is that in a number of areas, the law on this topic is clear and well settled, and ought to give school officials confidence to act decisively.

RELIGIOUS ACTIVITIES IN PUBLIC SCHOOLS:

QUICK SUMMARY OF THE LAW: WHAT'S ALLOWED/WHAT'S NOT IN PUBLIC SCHOOLS	
Allowed	**Not Allowed**
Student-initiated religious meetings * College, high school, elementary school * Advertising allowed as with other extra-curricular groups *Equal Access Act protections * Before/after school, lunch time, extra-curricular periods, seminar periods, and the like	**School-led, school-initiated religious activities** * School-composed prayers * Teacher-led classroom prayers * School-initiated devotional exercises * School-initiated, student-led prayers * School-sponsored or school-initiated prayers at graduation ceremonies and sporting events
Student literature distribution * Some prior screening allowed, especially at lower age groups * Subject to reasonable rules as to time, place, and manner of distribution *Student to student religious literature distributed protected. Total ban on such distribution unconstitutional	**On-campus released time religious classes** **School-sponsored religious indoctrination - Use of the Bible (or other religious books) in the curriculum if done in a manner that attempts to convert students to a particular religious belief**

Student-to-student religious discussions **Use of the Bible or other religious books in the curriculum where done objectively** (such as in teaching history, comparative religion, literature, etc.) **Off-campus released time religious instruction classes** **Religious topics in student assignments** **Use of school building by religious groups (on an equal access basis with secular groups)** **Teaching (objectively) by the school about religion** **Teaching (objectively) about religious holidays** **School-distribution of religious community group literature (equal access policy)** (some regions outside of the Midwest may not allow at elementary school level-such as Virginia, Maryland, North Carolina and South Carolina) **Performance of religious music by school choirs** **Meal-time prayers** **Student-initiated, student-led prayers at graduation ceremonies*** *Gray area (approved in some regions, not others) **Private baccalaureate services at school** **Parental prayer meetings at school (behind closed doors outside the presence of students)**	**- State-mandated posting of Ten Commandments on walls** **- School-forced recitation of Pledge of Allegiance contrary to student's religious convictions** **School-exclusion of teaching about evolution where the exclusion is for religious reasons** **State law requiring teachers to recite disclaimer prior to teaching students all theories of origin except the Biblical theory of creation** **School policy requiring that teacher read to students a disclaimer prior to the teaching of evolution** **School Board policy requiring that a written disclaimer describing evolution as a theory, not a fact, be affixed to certain science textbooks** **Student-initiated, student-led prayers at graduation ceremonies*** *Gray area (approved in some regions, not others) **Student-initiated student-led prayer before football game**

Closed-door teacher prayer meetings at school (outside the presence of students) during free time **Post-game coach prayers on football field**	

(Note: The legal substantiation and supporting The Quick Summary above set forth in this book – which can be accessed via our firm website (accessible by searching "Christians and the Law") at: www.ChristiansAndTheLaw.com [the heading will identify our local firm's name: Rickard, Denney, Leichliter, Childers & Bosch (a/k/a Denney & Leichliter, P.C.)]. Click on "Resources," then click on "Religious Freedom," then click on "Religious Freedom 101."

Timothy W. Denney
Rickard, Denney, Leichliter, Childers & Bosch
110 North Saginaw Street, Suite 1
Lapeer, Michigan 48446
Telephone: (810) 664-0750
E-mail: tdenney@twdpclaw.com
Website: www.ChristiansAndTheLaw.com

II. THE LEGAL SOURCES FOR RELIGIOUS FREEDOM PROTECTION:

A. Constitutional Protection:

1. Federal Constitution:

First Amendment:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech . . ."

(NOTE: On its face, the First Amendment appears to limit only what "Congress" may do. However, the U.S. Supreme Court has ruled that, as a result of the adoption of the 14th Amendment, these limitations also apply to all governmental entities and agencies[1], including state and local governments, public colleges, and other public schools[2].)

a) Free Exercise of Religion: Current federal constitution protection under this clause is important but unfortunately has been substantially diminished due to a 1990 court decision. In 1990, the

[1] Cantwell v. Connecticut, 310 U.S. 296 (1940).
[2] See Widmar v. Vincent, 454 U.S. 263 (1981) (college); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993) (public school).

U.S. Supreme Court ruled in the Smith case that when there is a law of general application, the First Amendment does not protect a person from having to obey that law even if it incidentally infringes upon his or her religious beliefs.[3] A law of general application is a law which is neither written nor designed to target religious conduct. However, the government may still not single out religious conduct for special discriminatory treatment – it cannot prohibit religious conduct for activities that would be permitted if done for secular reasons.[4] Legislative efforts to remedy the damage done to religious freedom by the Supreme Court's 1990 decision have been weakened by a later decision striking down at least part of the legislation as unconstitutional.[5]

b) **Freedom of Speech:** The Supreme Court has ruled that religious speech is entitled to the same protection as any other kind of speech.[6] Ironically, in many instances, religious people now receive greater religious freedom for their speech under the "freedom of speech" clause than the "free exercise" of religion clause. The extent of your freedom to speak depends in part on where you choose to speak. For example, Christians have the greatest constitutional protection to speak in a traditional public forum such as a public street, sidewalk, or park. In contrast, a religious person may have considerably less freedom to speak in a more limited public forum such as a public school or a prison. Free speech may also be constitutionally limited by reasonable time, place, and manner restrictions. For example, while the government may not be able to prohibit a religious person from loudly proclaiming their religious message in a public park during the daytime, the government may legitimately prohibit the same speaker from giving the same message with a bullhorn in a residential neighborhood in the middle of the night.

c) **Establishment of Religion:** The First Amendment prohibits laws "respecting an establishment of religion." The appropriate test for determining whether some action was constitutional under the Establishment Clause of the First Amendment changed significantly in 2002. Until 2022, the U.S. Supreme Court interpreted the constitutional ban on laws respecting an Establishment of Religion

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[3] Employment Division v. Smith, 494 U.S. 520 (1993).

[4] Church of the Lukumi Babalu Ave., Inc. v. City of Hialeah, 508 U.S. 520 (1993).

[5] In 1993, a new federal law was passed known as the Religious Freedom Restoration Act, 42 U.S.C. 2000 bb et seq. This Act was intended to reverse the effect of the Supreme Court's 1990 decision by once again prohibiting government action from burdening religious exercise unless the action was justified by a compelling government interest and accomplished in the least restrictive means. However, at least part of the Act was struck down as unconstitutional by the U.S. Supreme Court in City of Boerne v. Flores, 521 U.S. 507 (1997). Some have argued that the Act is still valid in some areas, such as when applied to decisions of the federal government and its agencies.

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

to meet the following 3-part test (the so-called Lemon test) to be met for a law to be considered valid:

1) The law must not have the primary effect of advancing or inhibiting religion;

2) The law must have a secular purpose;

3) The law must not result in excessive entanglement of government and religion.[7]

In 2022, the U.S. Supreme Court upheld the constitutionality of a public school coach praying on the football field after the game.[8] In so doing, the Court expressly rejected the "Lemon test" that it had relied on for over 50 years to evaluate the legality of religious activities in the public schools.[9] This resulted in a dramatic change in the law. The rejected Lemon test, when in effect, determined that any law which had the principal or primary effect to advance religion was unconstitutional – that test, often unfriendly to religious expression in public places, is now no longer the law. This likely means courts will be more favorably inclined to allow religious expression in public places. It also calls into question whether certain prior rulings are still valid. In place of the rejected "Lemon test," the Supreme Court replaced it with a test much more friendly to religious expression in public places. This new test requires courts to determine the legality of religious activities in public places based on whether they are consistent with history and faithfully reflect the understanding of the Founding Fathers based on the original meaning and history of the First Amendment.[10]

d) **Freedom of Association:** The Supreme Court has ruled that among the freedoms protected by the First Amendment is the freedom of association. This freedom restricts the government from adopting Communist-style laws that would hinder the ability of religious persons to meet together. The freedom of association also limits the ability of the government to intrude into the internal structure or affairs of a religious organization by forcing it to accept leaders or

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[7] Lemon v. Kurtzman, 403 U.S. 602 (1971).
[8] Kennedy v. Bremerton School Dist., 142 S. Ct. 2407, 2428 (2022).
[9] Kennedy, supra.
[10] Kennedy v. Bremerton School Dist., 142 S. Ct. 2407, 2429 (2022).

members it does not desire[11] or by forcing it to promote ideas it does not condone.[12]

2. **State Constitutions – Greater Legal Protection than Federal Constitution in Some States:** Every state in the U.S. has its own constitution which includes special protection for religious freedom.[13] This fact has become enormously important in the wake of the 1990 U.S. Supreme Court decision in the Smith case, which significantly diminished the protection for free exercise of religious under the First Amendment. In response to the Smith case, many states have begun reexamining the extent of religious freedom protection under their own state constitutions.

   a) **Greater Legal Protection through State Court Rulings – The Compelling Interest Test:** Since 1990, a significant number of state supreme courts have ruled that their own state constitution provides greater protection for religious liberty than the U.S. Constitution.[14] These courts have generally ruled that government action cannot lawfully burden religious conduct unless:

      1) It is justified by a compelling governmental interest; and

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[11] Boy Scouts of America v. Dale, 530 U.S. 640 (2000) (First Amendment freedom of association prevented State from forcing Scouting America (f/k/a Boy Scouts of America) to accept homosexual troop leaders).

[12] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc. 515 U.S. 557 (1995) (violation of freedom of association to force private parade organization to allow homosexual activist group to march in its parade).

[13] The citations for the state constitutional provisions for religious freedom in each state are as follows: (NOTE: the text of the religious freedom provisions of the state constitution of all 50 states can be found at Religion in the Workplace: Respecting Religious Practices and Reconciling Conflicts with Work Requirements (Religious Discrimination: Multi-State Survey) (ALI-ABA Course of Study), Epstein, Becker and Green, P-C (Nov. 16, 2000), which is available on the Westlaw law review database): Alaska Const. Art. I, § 4; Alaska Const. Art. I § 3; Ala. Const. Art. I, § 3; The Constitution of Alabama of 1901, Amendment Number 622, Ariz. Const. Art. 2 § 12; Arkansas: Const. Art. 2, § 5; Cal. Const. Art. 1, § 4; Colo. Const. Art. 12, § 13; Conn. Const. Art. I, § 3; Del. Const., Art. 1, §1; D.C. Code Ann. § 1-2512; Fla. Const. Art. 1, §3; Ga. Const., Art. § 1, Par. III; Haw. Const. Art. I, § 4; Idaho Const. Art. I, §4; Ill. Const. Art. I, §3; Ind. Const., Art. I, §2; Iowa Code Ann. Const. Art. 1, § 3; Kan. Bill of Rights, § 7; Ky. Const. § 5; La. Const. Art. I, § 3; Maine Const. Art. 1, § 6-A; Md. Declaration of Rights, Art. 36; Mass. Const. Pt. 1, Art. 1; Mich. Comp. Laws Ann. Art. I, § 2; Minn. Const. Art. I, Sec. 16; Miss. Const. Art. 3 § 18; Mo. Ann. Stat. Const. Art. I, § 5; Mont. Const. Art. II, § 4; Neb. Const. Art. 1, § 4; Nev. Const. Art. 1, § 4; N.H. Const. Pt. 1, Art. 5; N.J. Const. Art. I, Para. 3; N.M. Const. Art. II, § I 1; N.Y. Const. Art. 1, § 11; N.C. Const. Art. 1, § 13; N.D. Const. Art. I, § 3; Ohio Const. Art. I, § 7; Okla. Const., Art. 1, § 2; Or. Const. Art. 1, § 2; Pa. Const. Art. 1, § 3; R.I. Const. Art. I, § 2; S.C. Const., Art. 1, § 2; S.D. Const. Art. VI, § 3; Tenn. Const. Art, I, § 3; Tex. Const. Art. 1, § 3; Utah Const. Art. 1, § 4; Vt. Const. Ch. 1, Art. 3; Va. Const. Art. 1, § 16; Wash. Art. 1, § 11, W. Va. Const. Art. III § 15; Wis. Const. Art. I, § 18; Wyo. Const. Art. 1, § 18.

[14] Alaska: Swanner v. Anchorage Equal Rights Com'n., 874 P.2d 274 (Alaska 1994); Mass: Attorney General v. Desilets, 636 N.E.2d 233 (Mass. 1994); Michigan: McCready v. Hoffius, 459 Mich. 131 (1998) vacated in part on other grounds 593 N.W.2d 545 (1999) (the court vacated its ruling on the constitutional issue but almost all members of the court appear to accept the premise that the "compelling interest" test applies under the Mich. Constitution); Minnesota: State v. Hershberger, 462 N.W.2d 393 (Minn. 1990); Vermont: Hunt v. Hunt, 648 A.2d 843 (Vt. 1994); Wash: First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174 (Wash. 1992); Wisc: State v. Miller, 549 N.W.2d 235 (Wisc. 1996).

2) That it is the least restrictive means available to accomplish the government's purpose.

b) **Greater Protection Through New State Laws: The Religious Freedom Restoration Laws:** Since 1990, there has also been a movement by state governments to adopt so-called Religious Freedom Restoration Acts (RFRA's) designed to restore the level of religious freedom protection available before U.S. Supreme Court's decisions in the Smith case in 1990. Many states have adopted these by statute,[15] some by constitutional amendment.[16] These laws generally require application of the "compelling interest" test (described above) for government to justify activities which burden religious beliefs.

Just because your state legislature has not passed a Religious Freedom Restoration law, you should not assume your state has less religious freedom. Some state law makers declined to pass such laws because it was clear that their own state courts were already willing to provide the higher level of religious freedom offered by such laws.

For most people, it will take some adjustment to remind themselves that their greatest protection for religious freedom may come from state law not the First Amendment of the U.S. Constitution. However, this is a necessary adjustment if you are to appreciate the full breath of the legal protection we still enjoy for religious freedom.

B. **Statutory Protection:** A variety of federal and state statutes provide protection for religious freedom. The list set forth below is not exhaustive:

1. **The No Child Left Behind Act of 2001 (Protecting Constitutionally Protected Prayer in Elementary and High Schools):** The federal law called "The No Child Left Behind Act of 2001" requires local public schools receiving federal education funds under the Act to certify in writing each year that it has no policy that prevents, or otherwise denies participation in, constitutionally protected prayer in public schools.[17] This new law should prove to have an enormous impact in convincing thousands of public school districts to adopt policies that allow more religious freedom.

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[15] So far at least the following states have adopted RFRA's: Arizona, Florida, Idaho, Illinois, Minnesota, New Mexico, Oklahoma, Rhode Island, South Carolina, and Texas. This is not necessarily an exhaustive list – these laws have been passed in rapid succession so careful research of your state's laws is necessary before you should assume one has not been passed in your state.

[16] Alabama voters approved a state constitutional amendment adding a RFRA.

[17] 20 U.S.C. § 7904.

2. **The Equal Access Act:** The federal Equal Access Act[18] protects the right of high school students to meet for prayer, religious discussions, etc. on school grounds under certain circumstances (see extended discussed below regarding Religious Freedom in the Public Schools). Some states have now passed their own version of the Equal Access Act.[19]

3. **Private and Home School Laws:** In recent years, many states have passed laws lessening the level of regulation of private and home schooling – sometimes exempting them in whole or in part from compulsory school attendance laws.

4. **Released Time Exemptions:** Some states specifically authorize students to be excused from public school during the school day for "released time" religious instruction off school grounds.

5. **Laws Excusing Student Attendance From Sex Education Classes:** Some states by law require public schools to excuse students who do not want to attend classes concerning sex education.

6. **Laws Protecting Against Personally Invasive Test Questions:** There is a federal law called the Pupil Protection Act which limits public schools administering federally funded programs from asking certain types of invasive questions. Some states also limit the use of student personality tests.

7. **Employment Laws:** As discussed later in more detail, both federal and state laws prohibit employment discrimination based on religion. There is also legal protection for employees who do not want their union dues to be spent to promote religiously objectionable causes.

8. **Public Accommodation Laws:** Federal law and the laws in most states prohibit discrimination against individuals based on their religion when it comes to public accommodations such as housing, commercial businesses and educational institutions. There are sometimes special exemptions from such laws for religious institutions.

9. **Land Use Laws:** In the fall of 2000, a new federal law was passed known as the Religious Land Use and Institutionalized Persons Act (RLUIPA). This new law prohibits governments from imposing or implementing land use laws (such as zoning or historic landmark designation laws) in a manner that imposes a substantial burden on the religious exercise of a person or religious organization unless the government demonstrates that imposition

[18] See e.g., Equal Access Act, 20 U.S.C. § 4071 to 4074 (1990).
[19] See e.g., The Michigan Equal Access Act, MCL 380.1299.

of the burden furthers a compelling government interest and uses the least restrictive means to accomplish its purpose. The new law also prohibits governments from imposing land use regulations that treat religious groups less fairly than non-religious groups or that discriminate against religious groups on the basis of their religion with regard to land use laws. Likewise, the Act prohibits land use laws that totally exclude or unreasonably limit religious assemblies or buildings within a jurisdiction. The law also appears to provide legal protection in situations where a religious organization is leasing a facility from a governmental entity.

C. **Local Laws and Policy Protection:** Even if federal or state law does not require that a certain religious freedom be granted, local laws, local policies, and/or policies of an individual employer may allow or require it anyway. The bottom line is this. The source of your religious freedom may be closer to home than you think. Even if federal or state law does not require the government or an employer to allow certain religiously based conduct, don't be afraid to ask anyway.

1. **Example #1: The Impact of the No Child Left Behind Act on Local School Policies:** As discussed above, the federal law known as the "No Child Left Behind Act" requires public schools receiving certain federal education funds to annually certify in writing that they have no policy that prevents, or otherwise denies participation in, constitutionally protected prayer in public schools. The U.S. Dept. of Education has issued written guidance on what religious activities are protected under this law (see copy of this written guidance attached to this book in Appendix A). Make sure your school's policies comply with this new law.

2. **Example #2: Religious Content in Student Assignments:** Many local school policies specifically authorize religious subjects and artwork to be addressed in course work.

3. **Example #3: Religiously Based Excusal from Classes:** There is little constitutional protection for students who want to force the school district to allow them to be excused from classes with religiously objectionable material. However, frequently state law requires exemption from class instruction (especially sex education) for students whose parents object to such instruction. Moreover, even if state law does not require such exemptions, the local school districts often have policies that do.

4. **Example #4: Private Employers Granting Leave for Religious Reasons:** A private employer may allow an employee to be excused from work to engage in service to a church, even if the law did not require it, as long as they treat all employees evenhandedly. So just because federal or state law may not require your employer to excuse you from work, your employer may still allow it anyway.

III. RELIGIOUS FREEDOM IN THE PUBLIC SCHOOLS:

A. Common Principles: At first glance, the cases on religion in the public schools seem to be hopelessly inconsistent. However, could the U.S. Supreme Court strike down a law allowing for a moment of silence in the classroom while upholding a law allowing student Bible club meetings to be held in public school classrooms and advertised over the P.A. system? The answer lies in several common principles that run through most of the cases.

1. School Action vs. Private Action: The courts have often struck down religious practices in public schools when they were school-led or school-initiated. This explains why the U.S. Supreme Court has struck down laws or policies allowing school-composed prayers,[20] school-initiated student-led prayers,[21] school-initiated devotional exercises,[22] school-sponsored prayers at graduation ceremonies,[23] and student-initiated prayers at school-sponsored public sporting events where the circumstances were structured by the school to encourage students to pray.[24] Underlying some of these cases is the concern expressed by the courts that students are compelled by law to attend public school and therefore the school has a captive audience for exposure to religious beliefs that may be in conflict with those of the students or their parents.

In contrast, the courts have not hesitated to uphold various forms of private religious expression in the public schools. For example, courts have held that schools must allow students to use classrooms for religious meetings during non-instructional time. Courts have also upheld the right of students to engage in student-to-student religious literature distribution.

2. Age Difference: The Older the Student, the Greater the Religious Freedom: Courts have been willing to allow greater religious freedom in public schools depending on the age or educational level of the students, though this factor has been less important in recent years.[25] The higher the age, the greater the religious freedom allowed by the courts. Religious practices that courts may permit in high school may not be permitted to the same extent in elementary school due to the perceived greater impressionability of younger students. Courts allow considerably greater religious freedom where college students are involved because they are treated by the courts as having greater maturity and college attendance is purely voluntary. In recent years, courts have shown an increased

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[20] Engel v. Vitale, 370 U.S. 421 (1962).
[21] Karen B v. Treen, 653 F.2d 897 (5th Cir. 1981) aff'd 455 U.S. 913 (1982).
[22] Abington School Dist. v. Schempp, 374 U.S. 203 (1963).
[23] Lee v. Weisman, 505 U.S. 577 (1992).
[24] Santa Fe Indep. School Dist. v. Doe, 120 S. Ct. 2266 (2000).
[25] Compare Edwards v. Aguillard, 482 U.S. 578 (1987) with Good News Club v. Milford Central Schools, 121 S. Ct. 2093 (2001).

willingness to allow religious activities in public schools even if very young children might be involved.

3. **The Manner of Teaching: Education v. Indoctrination:** The courts have struck down school-led or school-initiated religious devotional exercises but, contrary to popular belief, the courts have never said that religious books like the Bible cannot be used in the schools. To the contrary, the Supreme Court has 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 certainly may be said that the Bible is worthy of study for its literary and historic qualities."[26]

In short, as will be discussed later in more detail, the Bible can be read in the public school for some purposes but not others. The legality of the use of the Bible in public schools depends on whether it is being used for education or indoctrination.

4. **Location, Location, Location (On-Campus/Off-Campus):** Sometimes the legality of a school-related religious practice turns solely on its location. For example, it is legal for school districts to cooperate with religious institutions to release public school students for off-campus religious training[27], but not for on-campus religious training[28].

5. **Instructional vs. Non-instructional Time:** Teachers and students have greater religious freedom during the portions of the school day when classes are not in session such as before and after school and during lunch time.

6. **Insiders vs. Outsiders:** As a general rule, students have greater freedom of religious expression than does an outside religious organization (such as the Gideons) that wants to distribute religious materials on school grounds. Many school districts prohibit distribution of religious literature by outside groups. Nonetheless, where permitted by the school, even outside religious organizations have been permitted under certain circumstances to distribute Bibles and other religious materials to students on the same basis as other community groups. In fact, courts have held that schools violate the law if they allow private community groups to communicate in materials, etc. with students but deny religious groups the same privilege based solely on the religious content of their message.

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[26] Abington School Dist. v. Schempp, 374 U.S. 225 (1963).
[27] Zorach v. Clauson, 343 U.S. 306 (1952).
[28] McCollum v. Bd. of Education, 333 U.S. 203 (1948).

B. **Federal Law Mandates School Policies That Allow Religious Freedom: The Impact of the No Child Left Behind Act of 2001:** In 2001, Congress passed the No Child Left Behind Act. The impact of this law cannot be overstated. The Act requires public elementary and high schools receiving federal funds under the Act to annually certify in writing to the state education agency that they have no policy that prevents or otherwise denies participation in constitutionally protected prayer in the public schools.[29] The U.S. Department of Education issues written "guidance" on what religious activities are constitutionally protected. A copy of this written guidance document is attached hereto as Exhibit A (hereafter the "2003 U.S. Department of Education Guidelines"). This Guidance document will be referred to often in this book. Among the topics covered by the Guidance document are:

- Prayer during non-class time
- Organized student prayer groups and activities
- Prayer/Bible study by teachers and other school employees
- Moments of silence
- Released time religion classes
- Excusing students due to observing religious objection or due to religious objections
- Religious expression in student assignments
- Religious topics in student assemblies/extracurricular events
- Prayer at graduation
- Baccalaureate ceremonies

The Secretary of Education has authority to bring enforcement actions against schools not complying with the law. Those measures can include the denial of federal funds.

The No Child Left Behind Act should have a tremendous positive effect in making local school policies more accommodating to legally protected religious activities in the public school. At the very least, many schools will need to confront and delete many policies that are unnecessarily hostile to religious activities.

C. **Specific Religious Activities in the Public School:**
(NOTE: The list below is not exhaustive and by design tends to focus on what Christians can do rather than what they can't do)

1. **Student Religious Meetings:**

a) **College:** When a public college allows other student groups to use meeting facilities, the First Amendment requires the college to

[29] 20 U.S.C. §7904.

extend the same privilege to Christian groups, even if they want to meet for prayer and worship.[30]

b) **High School:** Under both the federal and some state Equal Access Acts[31], when high schools allow any other non-curriculum related

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[30] Widmar v. Vincent, 454 U.S. 263 (1981).

[31] Federal Equal Access Act, U.S.C. 4071 to 4074; Mich Equal Access Act, MCL 380.1299; Ark. Code § 6-21-204; with minor exceptions, the federal and Michigan Equal Access Act are worded almost identically. The Federal Equal Access Act provides as follows in pertinent part:

The Equal Access Act

Denial of Equal Access Prohibited

Sec. 802. (a) It shall be unlawful for any public secondary school which receives federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) A public secondary school has limited open forum 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.

(c) Schools 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:

(1) the meeting is voluntary and student-initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5) non-school persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Nothing in this title shall be construed to authorize the United States or any State or political subdivision thereof:

(1) to influence the form or content of any prayer or other religious activity;

(2) to require any person to participate in prayer or other religious activity;

(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;

(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;

(5) to sanction meetings that are otherwise unlawful;

(6) to limit the rights of groups of students which are not of a specified numerical size; or

(7) to abridge the constitutional rights of any person.

(e) Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this title shall be construed to authorize the United States to deny or withhold federal financial assistance to any school.

(f) Nothing in this title shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

Definitions

Sec. 803. As used in this title:

student groups[32] to meet during non-instructional time, it must also allow student religious groups to meet on the same basis.[33] "Non-instructional time" means the time before and after school and during lunch time. It may also include other time periods during the school day when non-curriculum-related student groups are permitted to meet[34] such as seminar periods[35] or student activity periods.[36] Religious student groups must be given the same opportunities to advertise their meetings and the same access and resource benefits as are other non-religious groups.[37] In the leading case, the U.S. Supreme Court ruled that access rights for the student religious group included the right to advertise in the school newspaper, on the school bulletin board, on the public address system and in the annual Club fair.[38]

If the school provides benefits to non-religious extracurricular student groups, the Equal Access Act requires that these benefits also be made available to student religious groups, including free appearances in the yearbook, participation in an annual craft fair, school auctions, and other fundraising events, priority access to audio-visual equipment and use of school vehicles for field trips.[39] Even if the Equal Access Act does not require certain school benefits to be provided to religious groups that are provided to non-religious groups, the First Amendment of the U.S. Constitution bars the

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(1) The term "secondary school" means a public school which provides secondary education as determined by state law.

(2) The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.

(3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.

(4) The term "noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

[32] Bd. of Education v. Mergens, 496 U.S. 226 (1990); Van Schoick v. Saddleback Valley Unified School, 104 Cal. Rptr. 2d 562 (Cal. App. 2001).

[33] Federal Equal Access Act, 20 U.S.C. 4071 to 4074 (§ 803(4)); Ceniceros v. Bd of Trustees, 106 F.3d 878 (9th Cir. 1997).

[34] Mergens, supra; Ceniceros, supra; Equal Access Act, 20 U.S.C. 4071 to 4074. Pearce v. Northville Public Schools, case no. 00-cv-75174-dt (E.D. Mich. 2000) (copy on file with author) (consent judgment requiring school to allow extracurricular religious group to meet in school room during school day during Seminar Period on the same basis as other non-religious extracurricular student groups).

[35] Pearce v. Northville Public Schools, case no. 00-cv-75174-dt (E.D. Mich. 2000) (copy on file with author) (consent judgment requiring school to allow extracurricular religious group to meet in school room during school day during Seminar Period on the same basis as other non-religious extracurricular student groups).

[36] Donovan v. Punxsatawney Area Sch. Bd., 336 F.3d 211 (3d Cir. 2003) (student activity period); Jacoby v. Prince, 303 F.3d 1074 (9th Cir. 2002) (student/staff period during the school day).

[37] Mergens, supra.

[38] Bd. of Education v. Mergens, 496 U.S. 226 (1990); Van Schoick v. Saddleback Valley Unified School, 104 Cal. Rptr. 2d 562 (Cal. App. 2001).

[39] Prince v. Jacoby, 303 F.3d 1074 (9th Cir. 2002) cert den 540 U.S. 813 (2003).

school from denying those benefits to student religious groups because of the religious nature of the group.[40] In short, student religious groups cannot be treated worse by the school than non-religious student groups.

To trigger the protection of the Equal Access Act, the law imposes some restrictions on, among other things, the ability of school personnel to participate in the meetings, etc. So far, courts finding the Equal Access Act applicable have approved the participation of school personnel in high school student religious meetings during the school day only in a non-participatory capacity.[41] In other words, you get the protection of the Act only if the teacher or other school staff does not participate in the content of the meeting. Most court decisions that have addressed the extent to which school personnel can participate in on-campus student religious meetings assume that the personnel can do so only as a supervisor or monitor.[42] However, in 2004, a federal court of appeals held that a teacher could not be prohibited from leading an after-school student religious meeting, even where the meetings took place at the school building in which the teacher taught during the school day.[43] It is well-settled that a teacher can always attend such meetings in a non-participatory capacity, regardless of whether they are held at the school where the teacher works.[44]

Courts have rejected attempts by schools to creatively or deceptively redefine student groups in an attempt to allow all but religious student groups to meet.[45]

c) **Elementary School:** In June 2001, the U.S. Supreme Court ruled in the Good News Club case that it was lawful for elementary school students to meet on school grounds after school for religious meetings.[46] The group in question was a Good News Club and was sponsored by Child Evangelism Fellowship. The Club openly encouraged the children to pray, taught Bible lessons, encouraged Bible memorization and diligently worked to evangelize children. The court ruled that the school could not exclude the group because of the religious content of its message.

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[40] Jacoby v. Prince, 303 F.3d 1074 (9th Cir. 2002) cert den 540 U.S. 813 (2003).
[41] Mergens, supra.
[42] Herdahl v. Pontotoc County School Dist., 933 F.Supp. 582 (E.D. Pa. 1993); Reed v. Van Hoven, 237 F.Supp. 48 (W.D. Mich. 1965).
[43] Wigg v. Sioux Falls School Dist., 49-5, 382 F.3d 807 (8th Cir. 2004).
[44] Mergens, supra.
[45] See e.g., Bd. of Educ. v. Mergens, 496 U.S. 226 (1990); Van Schoick v. Saddleback Valley Unified School, 104 Cal. Rptr. 2d 562 (Cal. App. 2001); Pope v. East Brunswick Bd of Ed, 12 F.3d 1244 (3d Cir. 1993).
[46] Good News Club v. Milford Central School, 121 S. Ct. 2093 (2001).

Previous courts (but not all) had reached the same result.[47] The Good News Club case did not decide the issue whether elementary school students could meet during the school day, such as during lunch hour.

At least one state (Arizona) has adopted their own version of an Equal Access Act for 7th and 8th grade students. This Act prohibits schools from denying equal access to 7th grade students who want to meet for religious reasons if other extracurricular student groups are permitted to meet for non-religious reasons.[48]

d) **Federal Guidelines on Student Religious Meetings:** The 2003 U.S. Department of Education Guidance on Constitutionally Protected Prayer states:

> "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."

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[47] Good News/Good Sports Club v. School Dist. of City of Ladue, 28 F.3d 1501 (8th Cir. 1994), cert den 515 U.S. 1173 (1995); Herdahl v. Pontotoc County School Dist., 933 F.Supp. 582 (W.D. Miss. 1996); Reed v. Van Hoven, 237 F.Supp. 48 (W.D. Mich. 1965).

[48] Ariz. Stat. § 15-720.

See Appendix A.

2. **Student Religious Literature Distribution and Possession:** It is true that "students and teachers do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,' Tinker, 393 U.S. at 506, 89 S. Ct. 733, [but] '[i]t is also common ground ... that the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired.'"[49] Courts have repeatedly upheld the right of students to distribute religious literature to fellow students during non-class time[50] as long as the restrictions are viewpoint neutral and reasonable in light of the school's interest in the effectiveness of the school's intended purpose.[51] Schools can lawfully adopt reasonable policies as to the time, place, or manner that student-to-student literature distribution can take place - in most instances it makes sense for religious students to follow these rules; some courts have found these pre-distribution screening policies to be constitutional, others not.[52] However, schools cannot lawfully use the discretion they maintain under such policies to artificially exclude religious literature. Generally, schools are not permitted to treat student religious literature any differently than non-religious literature. A complete ban on all student-to-student religious literature distribution during the school day has been ruled unconstitutional.[53]

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[49] M.A.L. v. Kinsland, 543 F.3d 841, 846 (2008) (quoting Tinker v. Des Moines Independent School Dist., 393 U.S. 503, 506 (1969).

[50] Morgan v. Swanson, 659 F.3d 359 (5th Cir. 2011) (en banc) (principal banning student's after-school distribution of religious materials based on the religious nature of the message would violate the First Amendment) (when a public school seeks to restrict a student's extracurricular speech based on the viewpoint being expressed, it can only do so where it would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, impinges on the rights of other students, or promotes illegal activities); Hedges v. Wauconda Community Unit School District, 9 F.3d 1295 (7th Cir. 1993) (total ban on student religious literature distribution at junior high school found unconstitutional); J.S. v. Holly Area Schools, 749 F.Supp.2d 614 (E.D. Mich. 2010) ("blanket prohibition upon a student's distribution of material [of an outside religious group] on the basis of religious viewpoint is not constitutionally permissible") (bracketed statement added for clarity; cite omitted); Westfield High School L.I.F.E. Club v. City of Westfield, 249 F.Supp.2d 98 (D. Mass. 2003) (ruling ban on religious literature distribution outside of class was unlawful); Johnston-Loehner v. O'Brien, 859 F.Supp. 575 (M.D. Fla. 1994); Nelson v. Moline School Dist., 725 F.Supp. 965 (C.D. Illin. 1989); Clark v. Dallas Independent School Dist., 806 F.Supp. 116 (N.D. Tex. 1992); Slotterback v. Interboro School Dist., 766 F.Supp. 280 (E.D. Pa. 1991) (upholding right of students to distribute religious tracts and striking down school policy banning materials that proselytized a particular belief); Thompson v. Waynesboro Area School Dist., 673 F.Supp. 1379 (M.D. NC. 1987). Note: Some earlier decisions prohibiting student distribution of religious literature, see e.g. - Perumal v. Saddleback Valley Unified School, 198 Cal. App. 3d 64 (Cal. App. 1988), may no longer be good law. See Van Schoick v. Saddleback Valley Unified School, 104 Cal. Rptr. 56 (Cal. App. 2001) (Judge Bedworth concurring, noting that "to the extent [Perumal] has any vitality left, it is overruled").

[51] M.A.L. v. Kinsland, 543 F.3d 841, 847 (6th Cir. 2008) (cites omitted).

[52] M.A.L., supra, but see Slotterback, supra; Johnston-Loehner, supra.

[53] J.S. v. Holly Area Schools, 749 F.Supp.2d 614 (E.D. Mich. 2010) ("blanket prohibition upon a student's distribution of material [of an outside religious group] on the basis of religious viewpoint is not constitutionally permissible" (bracketed phrase added for clarity)); see also Morgan, supra.

When a public school engages in viewpoint discrimination by restricting student speech based on the religious nature of the message, it can do so only if the restriction is justified by a showing that the student's activities would materially or substantially interfere with the work and discipline of the school or would promote illegal activities.[54] Public schools almost never can show student religious messages are this disruptive. This means public schools can almost never justify restricting student-to-student distribution of religious materials based solely on the religious content of the materials.

In 1998, the U.S. Department of Education issued the following guidelines about student religious distribution:

> "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."

See Appendix B.

Some schools have attempted to avoid blatant discrimination against literature distribution with religious content by adopting policies that ban or place additional restrictions on distribution of literature that is not drafted by the students themselves.[55] Limiting literature distribution to student-drafted documents has been upheld,[56] although it is such an arbitrary distinction that it is questionable whether schools will adopt it on a widespread basis. Moreover, even courts have invalidated these kinds of policies where religious literature was singled out for unfavorable treatment.[57]

The State of Tennessee passed a law stating that public school students may "[p]ossess or distribute religious literature in a public school, subject to reasonable time, place, and manner restrictions to the same extent and under the same circumstances as a student is permitted to possess or distribute literature[58] on non-religious topics or subjects." Similarly, the Commonwealth of Massachusetts adopted a Students Freedom of

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[54] Tinker v. Des Moines School Dist., 393 U.S. 503, 513 (1969); M.A.L. v. Kinsland, 543 F.3d 841, 850 (6th Cir. 2008); J.S. v. Holly Area Schools, 749 F.Supp.2d 614, 622-623 (E.D. Mich. 2010); Morgan v. Swanson, 659 F.3d 359 (5th Cir. 2011) (en banc) cert den.

[55] Hedges, supra (upholding some restrictions on distribution of literature not drafted by the students).

[56] Hedges, supra.

[57] Slotterback v. Interboro School Dist., 766 F.Supp. 280 (E.D. Pa. 1991).

[58] Tenn. Code § 49-6-2904(b)(4).

Expression Law which gives similar protection to student-to-student communications including literature distribution.[59]

Occasionally, parents tell this author that they have been told by school personnel that their child could not have a Bible in their possession at school. Schools have no legal basis to do this. Most school superintendents and school attorneys would be aghast if they found out that such a rule was being imposed. In addition, the 2003 U.S. Department of Education Guidance materials state as follows:

> "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."

3. **Student-To-Student Evangelism:** Student-to-student evangelism in a public school is protected for the same reasons described above concerning student-to-student religious distribution. Obviously, the school can legitimately prohibit a student from disrupting a class in progress by sharing their religious faith with a friend. However, outside the classroom, students have broad freedom to discuss religious topics with other students in face-to-face conversations.

In 1998, the U.S. Department of Education published the following guideline on student religious discussions:

> "Students . . . have the same right to engage in . . . religious discussion during the school day as they do to engage in other comparable activity . . . 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 . . .
>
> 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

[59] See law explained in Westfield High School L.I.F.E. Club v. City of Westfield, 249 F.Supp.2d 98 (D. Mass. 2003).

> 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."

See Appendix B.

The 2003 U.S. Department of Education Guidelines state as follows:

> "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."

At least one state (Tennessee) has passed a law stating that public school students have the right to "[s]peak to and attempt to share religious viewpoints with other students in a public school to the same extent and under the same circumstances as a student is permitted to speak to and attempt to share non-religious viewpoints with such other students."[60] Similarly, the Commonwealth of Massachusetts has a law that also specifically protects student freedom of expression.[61]

4. **Public School Distribution of Flyers/Information Regarding Religious Community Groups:** Public schools are not required to hand out flyers or otherwise provide information advertising any community group events. Most do. It is now well-established that if a public school hands out flyers or otherwise provides information to students regarding secular community groups, it must also do so for religious community groups and such materials/information distribution has repeatedly upheld as lawful.[62] This

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[60] Tenn. Code § 49-6-2904(b)(3).

[61] See Mass. Law explained in Westfield High School L.I.F.E. Club v. City of Westfield, 249 F.Supp.2d 98 (D. Mass. 2003).

[62] Rusk v. Crestview Local School District, 379 F.3d 418 (6th Cir. 2004); Scalise v. Boy Scouts of America, 265 Mich.App. 1 (2005) lv den 473 Mich. 853 (2005); Hills v. Scottsdale Unified School District, 329 F.3d 1044 (9th Cir. 2003) cert den 124 S. Ct. 1146 (2004); Child Evangelism Fellowship of Maryland v. Montgomery County Public Schools, 373 F.3d 589 (4th Cir. 2004); Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Township School District, 386 F.3d 514 (3d Cir. 2004); see also Wright v. Pulaski County Special School Dist., 803 F.Supp.2d 980 (E.D. Ark. 2011); Sherman v. Community School District, 8 F.3d 1160 (7th Cir. 1993) cert den 511 U.S. 1110 (1994) (school distribution of Scouting America literature upheld even though Scouts require members to affirm belief in God); Daugherty v. Vanguard Charter School Academy, 116 F.Supp.2d 897, 911-912 (W.D. Mich. 2000) (upholding public charter school policy allowing distribution of religious materials of private community groups on same basis as non-religious groups), but see Hills, supra (and cases cited therein) (school cannot hand out flyers with overtly proselytizing language, but modified flyers approved; even this rule still allows the school to advertise a religious

rule of law is an enormous opportunity for religious community groups, including churches, to make their work and events known to public school students.

5. **Released Time Classes:**

a) **Off-Campus Released Time Classes:** "Released time" classes refer to classes held by churches or other religious groups for public school students. With their parents' permission, these students are released from public school during the school day to an off-site location so they can be taught religious values without any of the restrictions that apply to the public school employees. In many states, there are laws specifically authorizing public school students to be released for religious instruction.[63] In 1952, the U.S. Supreme

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evangelistic event); J.S. v. Holly Area Schools, 749 F.Supp.2d 614 (E.D. Mich. 2010) (total ban on student-to-student religious literature distribution unconstitutional).

[63] Set forth below is a non-exhaustive list of certain states that specifically authorize religious released time (you should research your own state's law):

Arizona: Ariz statutes, Ariz. Rev. Stat. § 15-806 (authorized but leaves it to local school board to adopt policy)
California: Calif. Educ. Code §46014 (4 hours per month)
Florida: Fla. Stat. §232.0225 (local school boards required to adopt policies to authorize released time)
Hawaii: Haw. Stat. § 302A-1139 (up to 1 hour per week)
Idaho: Idaho Code Ann. § 33-519 (up to 5 class periods per week, not to exceed 165 per school year)
Indiana: Ind. Code § 20-33-2-19 (the principal, subject to superintendent review, specifies the amount of time allowed, not to exceed 2 hours per week)
Massachusetts: Mass. Gen. Laws, Vol. 76, § 1 (authorizes released time; leaves up to local school councils to establish rules)
Michigan: MCLA 380.1561(3)(d) (up to 2 hours per week); In re Proposal C, 384 Mich. 390, 432 (1971) (released time classes constitutional)
Minnesota: Minn. Stat. § 120A.22, subdv. 12(3) (school board may allow up to 3 hours per week)
Montana: Mont. Stat. § 20-1-308 (trustee of school district determines the amount of time students may be released)
North Dakota: N.D. Stat. § 15:1-19-04 (principal must allow release up to 1 hour per week)
New Mexico: New Mex. Stat. § 22-12-3 (1 class period per day, subject to approval of principal)
New York: N.Y. Educ. Code § 3210(2)(b)
Ohio: Ohio Rev. Code Ann. § 3321.04(c) (local board of education may prescribe the authority and manner which a child may be excused; there is no express statutory provision either permitting or prohibiting religious released time); Ohio Attorney General Opinion No. 88-001, 1988 WL 428789 (1988) (it is lawful for Ohio public schools to authorize release of public school students to attend off-site released time religious instruction classes); but see Moore v. Bd. of Educ., 4 Ohio Misc. 257, 212 N.E.2d 833 (1965) (even if the religious instruction is off school property, the instruction cannot be sponsored or taught by school officials) (the Moore case contains very unusual facts reflecting a situation where the school initially conducted the released time program and this author is aware of no released time programs operating similarly; therefore careful reading of the opinion is required)
Oregon: Or. Rev. Stat. § 339.420 (students may be released up to 2 hours per week for elementary students and up to 5 hours per week for secondary students); Dilger v. School Dist. 24 CJ, 222 Or. 108, 117, 352 P.2d 564 (1960) (the school district must allow released time instruction but the school district may determine the time and days of release)
Pennsylvania: Pa. Stat. Ann. § 15-1546 (superintendent must release students up to 36 hours/school year)
South Dakota: S.D. Stat. § 13-33-10 (1 hour/week)
Vermont: Vt. Stat. Vol. 16 §1051 (state policy to allow released time)
West Virginia: W.V. Stat. § 18-18-1, Exemption J (local boards can establish rules to implement it).

Court ruled that such classes are constitutional.[64] Released time classes have been a common-place in many schools in Michigan and other states for over 60 years. There are a number of religious missionary groups that conduct these released time classes on an ongoing basis. This type of released time class opportunity is used far too little by religious people!!!

The 2003 U.S. Department of Education Guidelines also approve of released time classes:

> "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."

See Appendix A.

There are excellent written guidelines available to help you design a released time program that complies with the law.[65]

b) **On-Campus Released Time Classes:** On-campus released time classes – where students were released to attend elective religious instruction classes on school grounds offered by a variety of outside religious groups – were held unconstitutional by the Supreme Court in 1948.[66]

6. **Religious Topics in the Curriculum:** Contrary to popular belief, the Bible and other religious subjects can be addressed in the classroom when done appropriately. The law does not allow schools to use the classroom as a pulpit for evangelism nor under current law can classrooms be administered like a Sunday school class.

Rather than try to live within these constraints, most public schools and teachers have abandoned teaching anything significant about religion, thus leaving children with only a secularist viewpoint. Textbook publishers have

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[64] Zorach v. Clauson, 343 U.S. 306 (1952).

[65] The Center for Law and Religious Freedom, an affiliate of the Christian Legal Society, (703) 642-1070 has published an excellent 33-page booklet on this issue entitled Religious Released Time Education: The Overlooked Open Doors in Public Schools. This publication is available through the Christian Legal Society or copies are available through my office.

[66] McCollum v. Bd. of Educ., 333 U.S. 203 (1948).

likewise abandoned including much of anything in their textbooks about the influence of religious beliefs on history, music, art, etc. It is well documented that public school textbooks have systematically eliminated most references to religious topics. Even the U.S. Supreme Court has said that:

> "[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."[67]

This willingness by school, teachers, and textbook publishers to omit discussion of religion has left public school students with the definite impression that religion is irrelevant. Set forth below are some "pair-words" developed by James V. Panoch and adapted and revised by the author of this outline to train educators how religion can be taught permissibly under current law:

> The school may sponsor the study of religion, but may not sponsor the practice of religion.
>
> The school may expose students to all religious views, but may not impose any particular view.
>
> The school's approach to religion is one of instruction, not one of indoctrination.
>
> The function of the school is to educate about all religions, not to convert to any one religion.
>
> The school's approach to religion is academic, not devotional.
>
> The school may strive for student awareness of all religions, but may not press for student acceptance of any one religion.
>
> The school may inform the student about various beliefs, but may not seek to conform him to any one belief.
>
> Nicholas Piediscalzi, Ph.D. and William E. Collie, Ed.D., Teaching About Religion in Public Schools.

These limitations make many religious people uncomfortable. Religious teachers often want the freedom to tell children about the complete truth of

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[67] Abington School Dist. v. Schempp, 374 U.S. 225 (1963).

their religious faith and to encourage students to believe. Unfortunately, the courts have repeatedly stopped attempts to exceed these limitations. Unless religious people learn to live within these restraints and take advantage of the freedom we do have, we risk raising up a generation that knows nothing about any religion, not even basic background information.

The 1998 U.S. Department of Education Guidelines note that public schools:

> ". . . may teach about religion, including the Bible . . . – as literature and the role of religion in the history of the United States and other countries all are permissible school subjects. Similarly, it is permissible to consider religious influences on art, music, literature and social studies."

See Appendix A.

Some local school policies encourage the objective study of comparative religions and the contribution made by religion to civilization.

7. **Religious Holidays and Religious Music in the Curriculum:** Schools are permitted by law to explain to students the meaning of religious holidays.[68] Religious symbols such as a cross and other symbols can be used as part of an overall education in our cultural and religious heritage.[69] Music, art, literature and drama having religious themes are permitted as part of the curriculum for school-sponsored activities and programs if presented in a prudent and objective manner and as a traditional part of the cultural and historical heritage of a particular holiday.[70] Some local school religious policies specifically authorize educating students about religious holidays. Schools can include traditional Christmas carols as part of the educational program about the Christmas holiday.[71] In fact, courts have even indicated that a blanket school ban on exclusively religious music would violate the First Amendment of the U.S. Constitution if it were adopted with the express purpose of sending a message of disapproval of religion.[72]

Even outside the holiday season, school choirs are permitted to perform religious songs as part of their training and performances.[73]

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[68] Florey v. Sioux Falls School Dist., 619 F.2d 1314 (8th Cir. 1980) cert den 449 U.S. 987 (1980).
[69] Florey, supra.
[70] Florey, supra; Bauchman v. West High School, 132 F.3d 542 (10th Cir. 1997); Doe v. Duncanville Independent School Dist., 70 F.3d 402 (5th Cir. 1995).
[71] Florey, supra; Bauchman, supra.
[72] Stratechuk v. Board of Educ., 200 F. App'x 91 (3d Cir. 2006) (an unpublished opinion) ("a categorical ban on exclusively religious music, enacted with the express purpose of sending a message of disapproval of religion, appears to state a claim under the First Amendment") (citation omitted).
[73] Bauchman, supra; Doe, supra.

8. **Religious Topics in Student Assignments:** The 2003 U.S. Department of Education Guidelines state as follows:

> "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."

See Appendix A.

Many schools have also adopted similarly generous policies which encourage students that expressing religion themes in class assignments is permissible. In 1980, a federal appellate court upheld a school policy that stated as follows:

> "Student-initiated expressions to questions or assignments which reflect their beliefs or non-beliefs about a religious theme shall be accommodated. For example, students are free to express religious belief or non-belief in compositions, art forms, music, speech and debate."[74]

In a number of federal court decisions, the courts have demonstrated that they are very hesitant to punish school districts for isolated incidents where student religious expressions in school assignments were treated unfavorably, especially where the student's work was displayed to other students.[75] These cases are likely a reflection of the general hesitance of courts to step in and overrule particular classroom curriculum decisions.

One state (Tennessee) has by law stated that students may express religious viewpoints in public school to the same extent and under the same

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[74] Florey, 619 F.2d at 1320; see also Walz v. Egg Harbor Township Board of Educ., 342 F.3d 271 (3d Cir. 2003) (explaining in dicta why student religious communications where the school invited personal viewpoints would likely not be a constitutional problem).

[75] See e.g., Settle v. Dickson County School Board, 53 F.3d 152 (6th Cir. 1995) (upholding loss of credit penalty for student research paper on Jesus Christ because the teacher deemed the topic to be beyond the scope of the assignment); DeNooyer v. Livonia Public Schools, 799 F.Supp. 744 (E.D. Mich. 1992) aff'd without published opinion 12 F.3d 211 (6th Cir. 1993) (exclusion of school girl's video presentation of religious song was upheld).

circumstances as a student is permitted to express viewpoints on non-religious topics.[76]

In summary, student religious expression in class assignments is legally permissible. The No Child Left Behind Act and its accompanying guidelines issued by the U.S. Department of Education now make it clear that schools risk losing federal funding if they do not allow students to express their religious viewpoints in their student assignments. This author is convinced that most censorship of student religious expression in class assignments is based on an uninformed belief that the teacher is allowing something unlawful if such censorship does not take place. Intelligently and tactfully informing school personnel that this is not legally necessary will go a long way toward correcting this problem.

9. **School Administrator/Teacher/Coach/School Employee Rights:** The subject of the freedom of school administrators, teachers, coaches, and other school employees in religious matters in public schools is too lengthy for us to cover in this outline in detail. However, I encourage you to obtain a copy of an excellent book on that subject called Teachers and Religion in Public Schools, authored by the Center for Law and Freedom. See Section E below regarding how to obtain the book.

Below, I highlight some of the good news in the area of public employee rights to engage in religious activities in the public school.

a) **School Employee Prayer on School Grounds:** The 2003 U.S. Department of Education Guidelines for the first time acknowledged that there are times when teachers and other school employees are, under certain circumstances, entitled to pray on school grounds:

> "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,

[76] Tenn. Code § 49-6-2904(b)(2).

teachers may participate in their personal capacities in privately sponsored baccalaureate ceremonies."

See Appendix A.[77]

Also, in 2000, a federal court in Michigan upheld the right of a public school to allow teachers and school staff to meet privately for prayer on school grounds during the school day, at least where this was done outside the presence of the students.[78]

In 2009, another federal district court found a teacher's First Amendment rights were not violated when she observed school administrators and teachers participating in private prayer groups in the principal's office during non-school hours outside the presence of students, observed faculty members participating in an opening school prayer before the beginning the school year and observed faculty members praying over food served at a faculty holiday party.[79] School employees have considerably more legal freedom for religious expression when students are not present, even if it occurs on school grounds.[80]

Teacher attendance of student-led, student-initiated religious meetings during the school day is more fully discussed in Section III-C-1 of this Book. Under the Federal Equal Access Act, teachers have the right during the school day to attend student-initiated, student-led religious meetings on school grounds during extracurricular time in a nonparticipating capacity.

b) **Public School Employee Rights to Engage in After-School Off-The-Clock Religious Activities:** Public school administrators, teachers, and other school employees have broad legal protection to engage in religious activities off-the-clock after school hours. For example, in 2022, the U.S. Supreme Court found that a public school football coach had a right under the Free Exercise of Religion and Free Speech clauses of the First Amendment to pray at the 50 yard line after the football games.[81] The Court noted the specific context: Coach Kennedy was engaged in private speech, as a private citizen,

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[77] But see May v. Evansville-Vanderburgh School Corp., 787 F.2d 1105 (7th Cir. 1986) (holding public teachers not entitled to require school to allow them to meet for group prayer before school on school grounds).
[78] Daugherty v. Vanguard Charter School Academy, 116 F.Supp.2d 897 (W.D. Mich. 2000).
[79] Eder v. City of New York, 2009 WL 362706 (S.D.N.Y. 2009).
[80] Eder, supra ("While courts have recognized a school district's interest in restricting or prohibiting a teacher from communicating with students about their religious beliefs, it does not follow that the Establishment Clause prevents school employees from engaging in religious speech that poses no threat of being interpreted as an endorsement of religion").
[81] Kennedy v. Bremerton School District, 142 S. Ct. 2407 (2022).

not government speech; he was not speaking pursuant to a government policy, nor was he speaking a government-created message." In that context, public school employees can engage in private religious exercise, even on school grounds and even more clearly if off school grounds in private religious activities. The government has no lawful basis to prevent such private religious exercises unless it can prove its restrictions are necessary to serve a compelling interest and narrowly tailored to that end.[82] The government can almost never satisfy that burden. This means public school employees have the First Amendment right to engage in private religious activities after-hours when they are off-the-clock. To put it another way, if a public school cannot prohibit a private religious exercise by a public school employee on school grounds after a football game, then it certainly cannot generally prohibit a school employee from engaging in private religious activities off school grounds. This means public school employees are free to engage in private after-hours religious activities such as teaching religious classes or otherwise assisting their own church, or other religious organization in religious activities.

c) **Public School Employee Right to Teach in After-School Student Religious Meetings on School Grounds:** Public school teachers and other public school employees also have the First Amendment right to teach or assist in after-school student religious meetings. In 2004, a federal court of appeals ruled that a school district was barred by the First Amendment from prohibiting a public school teacher from teaching in an after-school Bible club for elementary school children, even if the club met at the same school building where the teacher taught during the school day.[83] The Court specifically found that the teacher's religious activities in the after-school Bible club were private speech protected by the First Amendment and the school policy prohibiting school personnel from participating in religious activities on school grounds (as applied to ban a teacher from teaching an after-school religious meeting on school grounds) violated the First Amendment Free Speech Clause. The students attending those after-school religious meetings had the permission of their parents or guardians. Based on the First Amendment, public school administrators and teachers should not hesitate to engage in off-the-clock after-hours private religious activities. Such activities are legally protected.

10. **Excusals Due to Religiously Objectionable Material:** Courts have generally refused to find that a student is constitutionally entitled to be

[82] Kennedy, 142 S. Ct. at 2428.
[83] Wigg v. Sioux Falls School Dist., 49-5, 382 F.3d 807 (8th Cir. 2004).

excused without loss of credit from classes containing religiously objectionable material.[84] However, in an appropriate case, mandatory excusal may be constitutionally required, such as where the student is compelled to affirm orally or in writing his or her belief in something that contradicts his or her religious beliefs.[85]

In many states, schools are required to allow students, without penalty or loss of credit, to opt out of classes dealing with sex education when their parents object.[86] You should check your local laws to see what steps need to be taken to take advantage of these opt-out procedures. Often the parent's objections must be filed in writing to relieve their child of the obligation to attend the class.

Other than sex and family education classes, schools are permitted but not generally required to excuse students from classes due to religious objections to class materials. By policy, some local school districts allow religiously-based excusals. Often, schools are receptive to well thought out proposals for students to study specific alternative materials as a substitute for study of the objectionable materials.

Also, a federal law called the Pupil Protection Act limits the ability of schools administering federally-funded programs to ask students questions about the student's political affiliation, sexual behavior and attitudes, mental and psychological problems potentially embarrassing to the student or his family, or critical appraisals of other individuals with whom the student has close family relationships, however, in 2002 the U.S. Supreme Court ruled that private individuals do not have the right to sue to enforce this law.[87] Some state laws also limit the ability of the schools to administer certain types of personality tests without the parent's consent.[88]

11. **Meal-Time Prayers:** Students are lawfully permitted to pray for their meals at school. Courts have repeatedly reinforced this conclusion.[89] The U.S. Department of Education stated in its 2003 Guidelines that "students may . . . say grace before meals . . . to the same extent they may engage in

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[84] Smith v. Board of School Commissioners, 827 F.2d 684 (11th Cir. 1987); see also Mozert v. Hawkins County Board of Educ., 827 F.2d 1058 (6th Cir. 1987).

[85] Mozert, supra; Board of Educ. v. Barnette, 319 U.S. 624 (1943).

[86] See example: California: Calif. Education Code § 55-1554; Georgia: Ga. Code § 20-2-143; Idaho: Idaho Stat. § 33-1611; Illinois: ILCS § 27-9-1; Louisiana: La Stat. 17:281; Massachusetts: Mass. Vol 71 § 32A; Michigan: Mich. Comp. Laws § 380.1507(3); Mississippi: Miss. Code § 37-13-17; New Jersey: N.J. Stat. § 18A:35.4.7; Oklahoma: Okl. Stat. 70-11-105.1; Rhode Island: R.I. Stat. § 16-22-18.

[87] 20 U.S.C. §1232; but see Gonzaga University v. Doe, 536 U.S. 273 (2002) (Supreme Court ruled that private individuals do not have the right to sue to try to enforce the provisions of the Family Educational Rights and Privacy Act of 1974, 42 U.S.C. §1232g).

[88] See e.g., MCL 380.1172 (Mich.); Mich. Admin. Code 340.1101, et seq.

[89] Reed v. Van Hoven, 237 F.Supp. 48 (W.D. Mich. 1965); Chandler v. James, 998 F.Supp. (N.D. Miss. 1996); see also Herdahl v. Pontotoc County School Dist., 933 F.Supp. 582, 1255, 1282-1283 (M.D. Ala. 1997).

nonreligious activities." See Appendix A. Even public school employees saying meal-time prayers has not been ruled a constitutional violation, at least where it was not done in the presence of students.[90] See also Appendix A - Federal Guidance on Constitutionally Protected Prayer.

12. **A Moment of Silence:** A majority of the U.S. Supreme Court suggested in 1985 that allowing a moment of silence in public classrooms to allow for prayer or other meditative activities would probably be constitutional but that court did strike down a "moment of silence" law based on its conclusion that the law was passed specifically to promote religious activities.[91] However, since 1985, federal courts have concluded that a neutral "moment of silence" law allowing for a time for quiet reflection at the beginning of the school day is constitutional.[92] In addition, the legal test relied upon to decide the 1985 U.S. Supreme Court case, the Lemon test, has now been rejected by the Court as of 2022 so the 1985 ruling is likely no longer good law.[93] A significant number of states have statutes authorizing schools to allow for a moment of silence at the beginning of the school day.

13. **Access to Public Schools by Private Religious Community Groups:** If a public school opens its doors to allow community groups to distribute literature, etc. to students then private religious groups may also lawfully distribute religious literature under a neutral open access policy, even at the elementary school level.[94] There even exists special federal statutory protection prohibiting schools receiving federal funds from discriminatorily denying access to schools by Scouting America (f/k/a Boy Scouts of America).[95]

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[90] Eder v. City of New York, 2009 WL 362706 (S.D.N.Y. 2009).

[91] Wallace v. Jaffree, 472 U.S. 38 (1985) (the moment of silence statute reviewed in this case was struck down because the court concluded it was passed with the intent to promote religion). This case may no longer reflect good law because the court reached its decision based on the so-called Lemon test, which required laws to have a secular purpose. In 2022, the U.S. Supreme Court abandoned and abrogated the Lemon test and its progeny. Kennedy v. Bremerton School Dist., 142 S. Ct. 2407, 2428 (2022); see also Groff v. DeJoy, 600 U.S. 447, 460 (2023) (Lemon test is "now abrogated").

[92] See e.g., Brown v. Gwinnet County School Dist., 112 F.3d 1464 (11th Cir. 1997).

[93] Kennedy v. Bremerton School Dist., 142 S. Ct. 2407, 2428 (2022).

[94] Rusk v. Crestview Local School District, 379 F.3d 418 (6th Cir. 2004) (allowing school to permit private religious groups to distribute literature at elementary school level); Sherman v. Community School District, 8 F.3d 1160 (7th Cir. 1993) cert den 511 U.S. 1110 (1994) (school distribution of Scouting America literature upheld even though Scouts require members to affirm belief in God); Daugherty v. Vanguard Charter School Academy, 116 F.Supp.2d 897, 911-912 (W.D. Mich. 2000) (upholding public charter school policy allowing distribution of religious materials of private community groups on same basis as non-religious groups).

[95] 29 U.S.C. § 7905.

D. **Strategies for Success in Solving Religious Freedom Problems in the Public School:**

1. **The Daniel Approach (Wise, Gracious, and Private Confrontation): (Daniel 1:1-17):**

When your religious freedom is infringed upon:

a) Approach school officials humbly, graciously, and tactfully (and if possible, privately);

b) Find common ground and suggest reasonable alternatives – be constructive – no one likes a constant critic who has no positive ideas to solve the problem. Suggest alternative curriculum when religious excusal is sought.

2. **The Apostle Paul Approach (Insisting On Our Rights When Religious Freedom is Unlawfully Attacked):** When necessary, be willing to stand up and insist upon your religious freedom rights when unlawfully violated (Acts 16:35-40; Acts 22:24-29).

E. **Other Resources:**

1. **The 2003 U.S. Department of Education Guidance on Constitutionally Protected Activity in the Public Elementary and Secondary Schools:** This is an excellent summary of the law which now essentially wields the force of law since public schools receiving federal funds under the No Child Left Behind Act of 2001 must certify annually that they do not prohibit the protected religious activities described in the Guidance document. A copy is attached as Appendix A.

2. **Teachers and Religion in the Public Schools (2000):** This book, authored by the Center for Law and Religious Freedom ("CLRF"), focuses mainly on the rights of teachers but it also covers many of the topics covered in this handbook though, as the title suggests, the book tends to focus more on what teachers can or cannot do whereas this handbook focuses more on what students can do. You can order the book directly from CLS at P.O. Box 7712, McLean, VA 22106-7712, (703) 642-1070.

3. **Seasonal Religious Expressions on Public Property:** This topic is covered in a 19-page booklet by the same name available through the Alliance Defending Freedom of Scottsdale, AZ, (800) 835-5233. This excellent booklet covers, among other topics, the following topics applicable to the public school setting:

- Seasonal religious displays in public schools
- Student-initiated religious displays in the public school
- The study and performance of religious songs in the public schools
- Distribution of religious holiday cards and other literature in the public schools

4. **The 1998 U.S. Department of Education Guidelines Letter on Religion in the Public Schools (attached hereto as Appendix B):** This is an excellent and quite accurate summary of the law on the subject. This is an excellent document to suggest to a local public school as a policy statement.

5. **Religion in the Public Schools: A Joint Statement of Current Law (1995):** This is a summary of the law of religious freedom co-authored by an extremely broad array of conservative and not-so-conservative groups. It demonstrates that despite our ideological differences, we agree on many points about what the current law is on these subjects. Copies are available from my office or the Christian Legal Society.

IV. RELIGIOUS FREEDOM FOR PRIVATE AND HOME SCHOOLS:[96]

A 50-state analysis of the laws concerning the freedom of parents to educate their children in private schools and homeschools is beyond the scope of this Handbook. However, Home School Legal Defense Association (HSLDA) publishes an excellent state-by-state analysis of the key laws governing private and homeschooling in all 50 states on its website at www.HSLDA.org.[97] HSLDA also publishes that information in written form and it can be secured directly through HSLDA at: P.O. Box 3000, Purcellville, VA 20134, (540) 338-5600. Over the last few decades, enormous strides have been made to broaden the rights of parents to educate their children in private and home schools with minimal state regulation. The changes made in these laws in many states over this time period have been nothing short of monumental in their impact in expanding

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[96] The highlights of laws in Michigan concerning private and home schools are as follows:

As a general rule, all children between ages 6 and 16 are required to attend public school in Michigan. However, by law certain forms of education are treated as valid exceptions to public school attendance.

(A) **Private Schools:** Private religious schools are legal alternatives to public school attendance if the child "is attending regularly and is being taught in a state approved nonpublic school, which teaches subjects comparable to those taught in the public schools to children of corresponding age and grade as determined by the course of study for the public schools of the district in which the nonpublic school is located." MCL 380.1561(3)(a). Over the years, as a practical matter, this provision resulted in very little state regulation of private religious schools with one exception. Michigan is one of less than a small handful of states in the nation that requires all private school teachers to be certified by the state. This resulted in numerous legal clashes with the state, homeschoolers and private religious schools over what the schools considered to be a burdensome and unnecessary requirement. Finally in 1993, in a decision that shocked many, the Michigan Supreme Court struck down as unconstitutional the teacher certification requirement as applied to parents who had sincerely held religious objections to the requirement. People v. Dejonge, 442 Mich. 266 (1993). As a practical matter, this has largely taken the wind out of the State's efforts to seriously regulate private schools, although theoretically there is nothing legally preventing the State from attempting to apply the teacher certification rule against religious schools that do not have religious objections to the use of state-certified teachers.

B. **Home Schools:** As noted above, until the Michigan Supreme Court decision in 1993, many homeschool parents lived with the serious worry that they would be prosecuted criminally for violating the teacher certification requirement. This worry was largely alleviated by the Michigan Supreme Court decision. Dejonge, supra. Subsequently, in 1995, the Michigan legislature for the first time amended the compulsory attendance law to clearly indicate that homeschooling was a valid legal alternative to public school. The 1995 amendment states that a child is not required to attend public school if he or she "is being educated at the child's home by his or her parent or legal guardian in an organized educational program in the subject areas of reading, spelling, mathematics, science, history, civics, literature, writing and English grammar." MCL 380.1561(3(f). If the parents operate under the homeschool exemption, the Michigan Department of Education – in its own words – states on its website that the Department "plays no role with this homeschool family" and that "There are no minimum qualifications for teachers except that they must be the parents or legal guardians of the children." Homeschoolers may also qualify as a private school if they so choose but few choose to do so. MCL 380.1561(4). As a practical matter, the 1995 amendments have virtually eliminated all state regulation of homeschools.

[97] HSLDA is designed primarily to address the laws concerning homeschools, but since operating as a private school is also one valid option for homeschools, the summary also lists the private school requirements in most states.

religious freedom. A great deal of thanks is owed to the hard work of Christian attorneys and other courageous individuals who made this change possible.

V. RELIGIOUS FREEDOM IN THE WORKPLACE:

A. Discrimination Laws: A Shield and a Sword:

1. **The Shield of the Basic "No Religious Discrimination" Rule:** Both federal law and the laws of most states prohibit various forms of discrimination against current or prospective employees based on their religion.[98] These laws typically prohibit religious discrimination in recruiting, hiring, firing, promotion, discipline, compensation and other terms and conditions of employment.[99]

   The federal law against religious discrimination applies only to employers with 15 or more employees.[100] Often state laws against religious discrimination apply to employers with less employees, even as few as 1.[101]

   Both federal law and laws in many states prohibit a labor union from excluding or expelling from its membership or to otherwise discriminate against any individual because of his religion[102] or to cause an employer to discriminate against an employee on that basis.[103] Under some state laws, neither may a labor union lawfully fail to fairly and adequately represent a member in a grievance because of the member's religious beliefs.[104]

2. **The Shield of the Employer's Duty to Accommodate Employee Religious Practices:** Under federal law, employers with 15 or more employees have a duty to reasonably accommodate an employee's religious practices. Normally an employee must notify an employer of the need for accommodation before the employer's duty to accommodate is triggered. An employer has no duty to accommodate if it can show it would result in undue hardship. The duty to accommodate has been used by some

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[98] Title VII of Civil Rights Act of 1964, 42 U.S.C. 2000e-2; see also, for example: Michigan Elliott-Larsen Civil Rights Act, MCL 37.2202; Religion in the Workplace: Respecting Religious Practices and Reconciling Conflicts with Work Requirements (Religious Discrimination: Multi-State Survey) (ALI-ABA Course of Study), Epstein, Becker and Green, P-C (Nov. 16, 2000), which is available on the Westlaw law review database) (quotes text of religious discrimination laws in all applicable states).

[99] Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2; Michigan Elliott-Larsen Civil Rights Act, MCL 37.2202(1)(a). See also cites in prior footnote.

[100] 42 U.S.C. § 2000e(b).

[101] MCL 37.2201 (Mich. Laws apply to any employer with one or more employees).

[102] See e.g., 42 U.S.C. § 2000e-2(c)(1) and (3); see also Religion in the Workplace: Respecting Religious Practices and Reconciling Conflicts with Work Requirements (Religious Discrimination: Multi-State Survey) (ALI-ABA Course of Study), Epstein, Becker and Green, P-C (Nov. 16, 2000), which is available on the Westlaw law review database) (quotes text of religious discrimination laws in all applicable states).

[103] See e.g., 42 U.S.C. § 2000e-2(c)(3); MCL 37.2204 (Mich.).

[104] See e.g., MCL 37.2204 (Mich.).

employees to try to force employers to accommodate religious objections to working on Saturday or Sunday.[105] In 2023, the extent of an employer's duty to accommodate an employee's religious beliefs was increased significantly.[106] Under Title VII of the federal Civil Rights Act, an employer has no duty to accommodate an employee's religious beliefs if it would cause undue hardship. Before 2023, an employer did not need to incur more than a "de minimis" burden.[107] In 2023, the Supreme Court ruled that to prove undue hardship "an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business."[108] This new interpretation is certain to increase the ability of employees to obtain accommodations for their religious beliefs.

3. **The Shield of Exemptions for Religious Institutions from Discrimination Laws:** If religious discrimination laws were applied blindly, they would prohibit a church or other religious institutions from hiring or firing ministers or other teaching employees based on their religious qualifications or lack thereof. If other discrimination laws such as those prohibiting sex discrimination were applied without regard to the religious character of the employer, they would prohibit churches from refusing to hire a female pastor or priest based on their belief that only men were biblically permitted to serve in that position. For states with laws prohibiting discrimination based on sexual orientation, the lack of an exemption for religious institutions would force a religious organization to hire a pastor or teacher who has engaged in conduct the church considers immoral. For those reasons and others, various exemptions from these laws have been carved out for religious institutions. Sometimes the legislature has written the nondiscrimination laws so as to expressly exempt religious institutions from their application. For example, under Title VII of the federal Civil Rights Act, religious institutions are expressly exempted from the nondiscrimination provision when it comes to hiring employees – even for secular jobs – based on the religious beliefs of the employee.[109] The U.S. Supreme Court has upheld the constitutionality of that exemption.[110] Many states have similar exemptions for religious institutions.[111]

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[105] See e.g., Cooper v. Oak Rubber Co., 15 F.3d 1375 (6th Cir. 1994); McGuire v. General Motors Corp, 956 F.2d 607 (6th Cir. 1992); see also generally Gail Burks-McCracken and Douglas L. Toering, "Employer Accommodation of Employee Religious Practices: Analysis of Sixth Circuit Law," Dec. 1998, Mich Bar Journal.

[106] Groff v. DeJoy, 143 S. Ct. 2279 (2023).

[107] Id.

[108] Id.

[109] 42 U.S.C. § 2000e-1.

[110] Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987).

[111] See generally, Religion in the Workplace: Respecting Religious Practices and Reconciling Conflicts with Work Requirements (Religious Discrimination: Multi-State Survey) (ALI-ABA Course of Study), Epstein, Becker and Green, P-C (Nov. 16, 2000), which is available on the Westlaw law review database) (reference citations for every state with a statutory exemption provision).

Sometimes state employment nondiscrimination laws often have no express exemption for religious institutions.[112] In those instances, courts have concluded that the Free Exercise clause of the First Amendment prohibits government from interfering with religious institutions in hiring and firing ministers, teachers and other employees whose duties involve spreading the faith, church governance or supervision or participation in religious ritual or worship.[113] Some courts have also ruled that it is unlawful to apply state religious discrimination employment laws to a church-operated school.[114] Unfortunately, some courts have indicated that laws preventing sex discrimination can be applied to employee discipline and other regulations involving so-called "lay" employees.[115]

One of the more serious future threats to religious freedom is the occasional tendency of courts to apply discrimination in laws to religious institutions like churches and religious schools.[116] As noted above, courts have almost uniformly refused to do this with religious employees such as ministers, religious teachers and others actively involved in spreading the faith.[117] However, courts seem willing at times to redefine certain employees as "secular" rather than "religious" employees and then apply discrimination laws in a way that forces the religious institution to obey the law or abandon its beliefs.[118]

Fortunately, recent decisions from the U.S. Supreme Court give hope that the courts will continue to protect the integrity of religious organizations from the improper application of discrimination laws. For example, the Supreme Court has recently ruled that the freedom of association prohibits

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[112] See e.g., McLeod v. Providence Christian School, 160 Mich.App. 333 (1987).

[113] See e.g., Our Lady of Guadalupe School v. Morrissey-Berru, 591 U.S. ____ (2020) (First Amendment barred application of age discrimination law to religious teacher); Hossana-Tabor Evangelical Church v. EEOC, 565 U.S. 171 (2012) (First Amendment barred application of employment discrimination to case involving firings of a religious school teacher/minister); Assemany v. Archdiocese of Detroit, 173 Mich.App. 752 (1988) (and cases cited therein) (court ruled that application of discrimination law to firing of church music director would violate First Amendment); Conlon v. InterVarsity Christian Fellowship, 777 F.3d 829 (6th Cir. 2015) (First Amendment barred application of employment discrimination laws in case of firing of employee involved in religious teaching for religious nonprofit group); Rayburn v. General Conference of Seventh Day Adventists, 772 F.2d 1164 (4th Cir. 1985) (associate pastor); EEOC v. Southwestern Baptist Seminary, 651 F.2d 277 (5th Cir. 1981) (certain supervisory staff at seminary).

[114] See e.g., Porth v. Roman Catholic Diocese of Kalamazoo, 209 Mich.App. 630 (1995).

[115] See e.g., McLeod v. Providence Christian School, 160 Mich.App. 333 (1987) (ruling that First Amendment did not prevent application of sex discrimination law to prohibit church school from applying policy against hiring women for lay teaching position who had preschool age children); EEOC v. Pacific Press, 676 F.2d 1272 (9th Cir. 1982); Southwestern Baptist, supra (support staff and non-academic administrators at seminary); EEOC v. Fremont Christian School, 781 F.2d 1362 (9th Cir. 1986) (teachers at religious school).

[116] See e.g., McLeod v. Providence Christian School, 160 Mich.App. 333 (1987) (sex discrimination law applied to find school liable for policy banning employment of women with preschool age children).

[117] See Assemany v. Archdiocese of Detroit, 173 Mich.App. 752 (1988); Rayburn, supra; Southwestern Baptist Seminary, supra.

[118] See e.g., McLeod, supra; Fremont Christian School, supra; Southwestern Baptist Seminary, supra.

government from forcing Scouting America to accept leaders who promote homosexuality.[119] This same principle would protect a religious organization from being forced to hire a pastor, priest or teacher who engaged in conduct the organization considered religiously immoral.

4. **The Shield of Legal Protection Against Paying Union Dues for Religiously Objectionable Causes:** By law, unions may not over the employee's objection force public or private employees to pay union dues to support lobbying, ideological activities, public image-building advertising and other activities not germane to the collective bargaining process.[120]

To opt out of paying union dues not related to collective bargaining, employees must normally submit certain paperwork within certain set deadlines. For example, major teacher unions have a well-established procedure but one with fairly tight deadlines. However, there are excellent publications and resources available to assist those who desire to avail themselves of the opt-out opportunity.[121]

Some employees have religious objections to any association with or financial support of a particular union and they have asserted successfully that paying any union dues would violate their First Amendment rights. In those cases, courts have upheld a procedure under which the employee paid no union dues and instead their "union dues" money was sent to an unrelated charitable organization or other unrelated third party."[122]

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[119] See e.g., Our Lady of Guadalupe School v. Morrissey-Berru, 591 U.S. ____ (2020) (First Amendment barred application of age discrimination law to religious teacher); Hossana-Tabor Evangelical Church v. EEOC, 565 U.S. 171 (2012) (First Amendment barred application of employment discrimination to case involving firings of a religious school teacher/minister); Assemany v. Archdiocese of Detroit, 173 Mich.App. 752 (1988) (and cases cited therein) (court ruled that application of discrimination law to firing of church music director would violate First Amendment); Conlon v. InterVarsity Christian Fellowship, 777 F.3d 829 (6th Cir. 2015) (First Amendment barred application of employment discrimination laws in case of firing of employee involved in religious teaching for religious nonprofit group); Rayburn v. General Conference of Seventh Day Adventists, 772 F.2d 1164 (4th Cir. 1985) (associate pastor); EEOC v. Southwestern Baptist Seminary, 651 F.2d 277 (5th Cir. 1981) (certain supervisory staff at seminary).

[120] Abood v. Detroit Bd of Education, 431 U.S. 209 (1977) (First Amendment prohibited board of education from requiring any teacher to contribute to support of an ideological cause that he might oppose as a condition of holding a job as a public teacher); Lehnert v. Ferris Faculty Assoc., 500 U.S. 507 (1991) (state could not compel public employees to pay union dues to subsidize union's lobbying and other political activities or public image-building advertising); Communications Workers of America v. Beck, 487 U.S. 735 (1988) (private employee unions not permitted over employee objections to expend funds on activities unrelated to collective bargaining activities).

[121] An excellent resource is a booklet available from the Christian Educators Association International and written by attorney Bruce Cameron who can be reached at National Right to Work Legal Defense Foundation, 9001 Braddock Rd., Springfield, Virginia 22160; (703) 321-8510 or by viewing their website at www.nrtw.org.

[122] See e.g., E.E.O.C. v. University of Detroit, 904 F.2d 331 (6th Cir. 1990); McDaniel v. Essex International, Inc., 696 F.2d 34 (6th Cir. 1982).

Based on a 2005 U.S. Supreme Court ruling, public sector employees may no longer be forced to pay any union dues as a condition of public employment, without the consent of the employee.[123]

5. Laws Regarding Religious Expression in the Workplace: Sword or Shield?

a) **Public Employees:** Religious employees in public employment do have some legal protection to express their faith in the workplace. Under both Title VII of the federal Civil Rights Act and the First Amendment, public employers cannot legally ban employees from witnessing, counseling or evangelizing fellow employees on the job.[124] Courts have also indicated that public employers can normally not prohibit employees from keeping a Bible on their desk or displaying plaques or other material with religious messages around their private work area, even if other employees find them offensive.[125] A blanket ban on religious advocacy in a government workplace violates the First Amendment.[126] Even so, courts have refused to extend legal protection to religious expression in the workplace which is deemed to rise to the level of "religious harassment."[127] Many states have employment laws specifically prohibiting religious harassment.[128]

In 1997, the White House also published "Guidelines on Religious Exercise and Religious Expression in the Federal Workplace." A copy of those guidelines are attached to this outline as Appendix C. They are well written and adopt a fairly balanced approach to religious expression in a government office. While they apply only to federal employees, they are an excellent resource for state and local governments who desire to adopt reasonable policies on this issue.

Public employees have considerably less freedom of religious expression whey they are speaking in their capacity as an agent for

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[123] Janus v. Am. Federation of State, County, and Municipal Employees, Council 31, 138 S. Ct. 2448, 585 U.S. 878 (2018).

[124] Brown v. Polk County, 61 F.3d 650 (8th Cir. 1995).

[125] Brown v. Polk County, Iowa, 61 F.3d 650 (8th Cir. 1995); see also Tucker v. State of Calif Dept of Education, 97 F.3d 1204 (9th Cir. 1995) (striking down discriminatory ban of religious materials on office cubicles).

[126] Tucker v. State of Calif Dept. of Education, 97 F.3d 1204 (9th Cir. 1995).

[127] Vanderlan v. Mulder, 178 Mich.App. 172 (1989) (upholding dental assistant termination when she refused to stop sharing faith with patients).

[128] See generally Religion in the Workplace: Respecting Religious Practices and Reconciling Conflicts with Work Requirements (Religious Discrimination: Multi-State Survey) (ALI-ABA Course of Study), Epstein, Becker and Green, P-C (Nov. 16, 2000) (quoting the laws in all 50 states concerning religious discrimination and if the state has one, laws against religious harassment) (NOTE: available on Westlaw Law Review database).

a government entity.[129] In this role, public employees are subject to the restrictions of the Establishment Clause which prohibits them from promoting particular religious beliefs when acting on behalf of the government.[130]

b) **Private Employees:** Private employees have somewhat less legal protection for religious expression in the workplace. This is because the First Amendment protections for freedom of speech and the free exercise of religion apply only to government entities not private employees. Nonetheless, as noted above in this outline, private employers are still prohibited under religious discrimination laws from treating employees adversely solely because of their religious beliefs.[131] Under Title VII of the federal Civil Rights Act, private employers also have a duty to accommodate an employee's religious beliefs and practices unless it will cause the employer undue hardship.[132] Accordingly, employee-to-employee discussions about religious topics should be considered legally protected, especially when they take place during employee free time or do not affect workplace operations.

Courts have not been willing to provide legal protection for workplace employee evangelism when it interferes with the employer's efforts to service their customers.[133] Also, generally courts will not tolerate religious expression that rises to the level of religious harassment and many state employment laws specifically and expressly prohibit religious harassment and in many other states, the courts have interpreted the state employment laws to prohibit religious harassment.[134] However, the development of laws and regulations concerning religious harassment deserve close scrutiny. If written broadly, religious harassment provisions can severely restrict the rights of employees to share their faith in the

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[129] Spratt v. County of Kent, 621 F.Supp. 594 (W.D. Mich. 1985) aff'd w/o published opinion 810 F.2d 203 (6th Cir. 1986) (upheld firing of county social worker for inclusion of certain religious practices in counseling of jail inmates).

[130] Spratt, supra.

[131] See also Brown v. Polk County, Iowa, 61 F.3d 650 (8th Cir. 1995); see generally Religion in the Workplace: Respecting Religious Practices and Reconciling Conflicts with Work Requirements (Religious Discrimination: Multi-State Survey) (ALI-ABA Course of Study), Epstein, Becker and Green, P-C (Nov 16, 2000), which is available on the Westlaw law review database) (quotes text of religious discrimination laws in all applicable states).

[132] Brown, supra; see also Sections IV-A1 and 2 of this outline.

[133] Vanderlan v. Mulder, 178 Mich.App. 172 (1989) (upholding dental assistant termination when she refused to stop sharing faith with patients).

[134] Religion in the Workplace: Respecting Religious Practices and Reconciling Conflicts with Work Requirements (Religious Discrimination: Multi-State Survey) (ALI-ABA Course of Study), Epstein, Becker and Green, P-C (Nov 16, 2000) (NOTE: Available on Westlaw law review database) (quoting religious harassment laws in all states that have such laws and noting states where courts have interpreted state employment law to prohibit religious harassment). At least the following state's employment laws expressly prohibit religious harassment: Alaska, Arkansas, Colorado, Nebraska, North Carolina and West Virginia. Id.

workplace.[135] The line between protected religious expression and religious harassment can be fuzzy, but religious people would do well to err on the side of protecting religious expression lest anti-harassment rules be used as a sword to substantially diminish opportunities to share their faith in the workplace.

c) **Religious Employers:** It is no surprise that some religious employers believe that their religious convictions ought to be integrated into their business. This is admirable. However, courts have generally refused to allow religious employers to force employees to attend or participate in mandatory devotional religious meetings.[136] These same general principles may also be applied to religious employees who may be entitled to refuse to attend "New Age"-type training programs where they are forced to engage in or be exposed to teaching or activities (like Yoga or meditation) that are contrary to the employee's religious beliefs.

While there is little case law on the subject, it would appear that employers have great freedom to express their religious beliefs in the workplace as long as there is not religious harassment and employees are not forced to participate in or attend religious devotional meetings.

VI. RELIGIOUS FREEDOM IN THE PUBLIC SQUARE:

A. Door-to-Door, Sidewalk, and Street Canvassing:

1. **The General Rule:** The U.S. Supreme Court has repeatedly upheld the rights of individuals to go door-to-door sharing their faith and distributing religious literature and the Court reaffirmed these rights as recently as in 2002.[137] Historically, courts have granted the broadest legal protection for evangelism when done in traditional public places such as public sidewalks and streets.[138] Municipalities can place reasonable limits on the hours of

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[135] See generally "Religious Activity and Proselytization in the Workplace: The Murky Line Between Healthy Expression and Unlawful Harassment." 31 Colum. J. L. Soc. Probs 39 (1997).

[136] E.E.O.C. v. Townley Engineering & Manufacturing Co., 859 F.2d 610 (9th Cir. 1988) (mandatory devotional religious meetings with prayer, singing and scripture readings); Young v. Southwestern Savings & Loan Ass'n, 509 F.2d 140 (5th Cir. 1975) (mandatory prayer and religious devotionals).

[137] Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150 (2002) (holding that ordinance that required individuals to obtain a permit before handing out religious tracts door-to-door violated the First Amendment); Lovell v. Griffin, 303 US 444 (1938); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (striking down license fee imposed on door-to-door religious literature distribution); Martin v. Struthers, 319 U.S. 141 (1941) (door-to-door distribution of handbills advertising religious meeting); Jamison v. Texas, 318 U.S. 413 (1943) (distribution of religious handbills regarding upcoming religious meeting).

[138] Lovell v. Griffin, 303 U.S. 444 (1938); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (striking down license fee imposed on door-to-door religious literature distribution); Martin v. Struthers, 319 U.S. 141 (1941) (door-to-door

canvassing.[139] However, they cannot prohibit canvassing entirely, cannot force religious canvassers to obtain a license prior to canvassing, and cannot impose license fees on religious canvassers.[140]

2. **Special Issues:**

a) **Canvassing in Mobile Home Parks and Shopping Malls:** Shopping malls and mobile home parks sometimes present unique barriers to evangelism. These are usually located on private property. One of the legal rights that has historically accompanied private property ownership is the right to exclude others. Thus, as a general rule, under federal law and many state laws, shopping malls and mobile home park owners are legally entitled to exclude all canvassers, including religious canvassers.[141] Policies vary greatly from place to place, mall to mall and park to park so you should never assume that malls or mobile home parks will always prohibit canvassing. Sometimes a polite request can open the door to a mall or park that would otherwise be closed. A few state courts have held based on special constitutional provisions in those states that shopping malls are required to allow private literature distribution.[142]

B. **Equal Access to Public Facilities:**

1. **The General Rule:** As a general rule, when a government entity opens up public facilities to use by community groups, it cannot discriminate against groups based on the religious content of their message.[143] Public facilities

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distribution of handbills advertising religious meeting); Jamison v. Texas, 318 U.S. 413 (1943) (distribution of religious handbills regarding upcoming religious meeting).

[139] See e.g., Mich Atty Gen Opin. No 538 (1978).

[140] See preceding footnote; see also Mich Atty Gen Opin. No 6359 (1986); see also Village of Stratton, supra; see also Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150 (2002) (holding that ordinance that required individuals to obtain a permit before handing out religious tracts door-to-door violated the First Amendment).

[141] Lloyd v. Tanner, 407 U.S. 551 (1972); see also Woodland v. Mich Citizens Lobby, 423 Mich. 188 (1985).

[142] See e.g., Green Party of New Jersey v. Hartz Mountain Industries, Inc., decided June 13, 2000, New Jersey Supreme Court (shopping mall's limitation on private literature distribution violated state constitution's free speech protection); see also Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) (upholding California provision forcing shopping center to grant access for private literature distribution).

[143] Good News Club v. Milford Central School, 121 S. Ct 2093 (2001) (after-school hours use of school by elementary school age student group sponsored by outside religious group); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993) (after-school hours use of school by religious groups); Rosenberger v. Rector Visitors of Univ of Va, 515 U.S. 810 (1995) (equal access to funding for student religious publication); Widmar v. Vincent, 454 U.S. 263 (1981) (college facility); Bd. of Education v. Mergens, 496 U.S. 226 (1990) (public high school); Capital Square Review and Advisory Board v. Pinette, 515 U.S. 753 (1995) (public park); Good News/Good Sports Club v. School Dist. of City of LaDue, 28 F.3d 1501 (8th Cir. 1994) (cert den. 515 U.S. 1173 1995) (after-school religious meetings at junior high school; to allow scout clubs, but not religious groups, to meet was unconstitutional); Grace Bible Fellowship v. School Admin Dist. 5, 941 F.2d 45 (1st Cir. 1991) (after-school use of high school by religious

to which religious persons or organizations are entitled to equal access would include the following:

- City, village or township halls[144]
- Public parks[145]
- Public airports[146]
- Government-owned senior center[147]
- Public schools (at least during non-school hours)[148]
- Public libraries[149]

Government entities are generally prohibited from charging higher rental rates to religious groups using public facilities based on the religious content of their message.[150]

It is also possible that the newly passed federal law known as the Religious Land Use and Institutionalized Persons Act of 2000 will also be helpful in protecting religious groups and individuals from religious discrimination in their access to public buildings. This new law is discussed in more detail in Section V-E below.

The principles of equal access do not prevent a government entity from totally closing off a facility to private use.[151] For example, a township may lawfully choose not to allow its township hall to be rented out for any private gatherings.

2. **Access to Public Schools by Private Religious Community Groups:** If a public school opens its doors to allow community groups to distribute literature, etc. to students then private religious groups may also lawfully distribute religious literature under a neutral open access policy, even at the elementary school level.[152] There even exists special federal statutory

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group); Gregoire v. Centennial School Dist., 907 F.2d 1366 (3d Cir. 1990) (after-school use of school auditorium for Christian presentation); Church of the Rock v. City of Albuquerque, 84 F.3d 1273 (10th Cir. 2001) (town's revocation of permit allowing church to use town facility for religious worship violated First Amendment).

[144] Awandola v. Town of Babylon, 251 F.3d 339 (2d Cir. 2001) (town hall facility use by church for religious worship).

[145] See Pinette, supra.

[146] Board of Airport Commissioners v. Jews for Jesus, 482 U.S. 569 (1987).

[147] Church of the Rock v. City of Albuquerque, 84 F.3d 1273 (10th Cir.) cert den 519 U.S. 949 (1996).

[148] Widmar, supra; Lamb's Chapel, supra; Mergens, supra; Good News/Good Sports Club, supra.

[149] Concerned Women for America v. Lafayette County, 883 F.2d 32 (5th Cir. 1989) (striking down prohibition of religious group meeting in public library where open forum created).

[150] Fairfax Covenant Church v. Fairfax County School Board, 17 F.3d 703 (4th Cir. 1994) (regulation allowing School Board to charge church higher rent for use of school facilities violates free speech clause).

[151] Grossbaum v. Indianapolis-Marion County Bldg., 100 F.3d 1287 (7th Cir. 1996).

[152] High level federal courts reflecting 22 of the 50 states have upheld the lawfulness of public schools handing out private religious literature to school children where it distributes private secular community group literature as well. Child Evangelism Fellowship of Maryland v. Montgomery County Public Schools, 457 F.3d 376 (4th Cir. 2006) (court found public school unlawfully excluded private religious group from submitting flyers to elementary school students

protection prohibiting schools receiving federal funds from discriminatorily denying access to schools by Scouting America.[153] This law was a response to negative treatment of Scouting America's decision refusing to allow homosexual troop leaders.

However, one exception to the general rule must be noted. Some courts have held that messages which overtly urge a reader to adhere to a particular religion may not be distributed in a public school,[154] however, there is serious doubt this rule will be followed by other courts. The decision is only binding in the States of California, Oregon, Washington, Idaho, Montana, Hawaii, Arizona, and Nevada and a simple invitation for a student to attend an event sponsored by a religious organization is not prohibited under this exception.[155]

C. Public Accommodation Laws: Freedom from Religious Discrimination:

1. Housing and Real Estate Transactions:

a) General Rule: It is unlawful under federal law and many state laws for landlords and real estate sellers to discriminate on the basis of a person's religion in the sale or rental of real estate.[156] For example, it would be illegal for a landlord to refuse to rent an apartment to someone because he or she was a religious person.

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to take home to their parents); Child Evangelism Fellowship of Maryland v. Montgomery County Public Schools, 373 F.3d 589 (4th Cir. 2004) (same); Rusk v. Crestview Local Public School District, 379 F.3d 418 (6th Cir. 2004) (public school distribution of private religious groups flyers to elementary school students was lawful); Hills v. Scottsdale Unified School District, 329 F.3d 1044 (9th Cir. 2003) cert den 124 Sct 1146 (2004) (public school refusal to distribute flyers to students from a private religious group on the same basis as other private secular community groups was unlawful); Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Township School District, 386 F.3d 514 (3d Cir. 2004) (same) (court's opinion authored by Judge Alito, now U.S. Supreme Court Justice Alito); Sherman v. Community Consolidated School District, 8 F.3d 1160 (7th Cir. 1993) cert den 511 US 1110 (1994) (public school distribution of private religious organization's flyers to elementary school students was lawful); Daugherty v. Vanguard Charter School Academy, 116 F.Supp.2d 897, 911-912 (W.D. Mich. 2000) (upholding public charter school policy allowing distribution of religious materials of private community groups on same basis as non-religious groups); see also Scalise v. Boy Scouts of America, 265 Mich.App. 1 (2005) lv den 473 Mich 853 (2005) (upholding public school distribution of private religious group flyers to elementary students as lawful under Michigan law); cf J.S. v. Holly Area Schools, 749 F.Supp.2d 614 (E.D. Mich. 2010) ("blanket prohibition upon a student's distribution of material [of an outside religious group] on the basis of religious viewpoint is not constitutionally permissible") (bracketed statement added for clarity; cite omitted).

[153] 29 U.S.C. § 7905.

[154] Hills v. Scottsdale Unified School District, 329 F.3d 1044 (9th Cir. 2003) cert den 124 S. Ct. 1146 (2003).

[155] Rusk, supra.

[156] 42 U.S.C. § 3604. See e.g., MCL 37.2501 (Mich.); see also generally Religion in the Workplace: Respecting Religious Practices and Reconciling Conflicts with Work Requirements (Religious Discrimination: Multi-State Survey) (ALI-ABA Course of Study), Epstein, Becker and Green, P-C (Nov 16, 2000), which is available on the Westlaw law review database).

b) **Special Problems for Religious Landlords:** Would a religious landlord have the right to refuse to rent an apartment or house to an unmarried cohabitating couple based on the landlord's religious objections to cohabitation? Courts have reached different conclusions on this issue in different areas of the country. Some courts have upheld the right of a religious landlord to refuse to rent to someone engaged in immoral behavior and other courts have ruled the landlord cannot refuse to do so.[157]

2. **Commercial Businesses:** Federal law and many state laws prohibit commercial businesses from treating customers or potential customers differently based on their religious beliefs.[158]

3. **Educational Institutions:**

a) **General Rule:** As a general rule, the combination of federal and many state laws prohibit educational institutions from discriminating against students or potential students based on their religious beliefs.[159]

b) **Exceptions:** Some state laws exempt religious schools from the "no religious discrimination" rule in education.[160] Even if no statutory exemption existed, courts have ruled that the First Amendment would not require a religious school which limited its membership to religious students to be forced to accept a non-religious student.[161]

D. **Seasonal Religious Expression on Public Property:** This topic is covered in a 19-page booklet by the same name from the Alliance Defending Freedom of Scottsdale, Arizona; (602) 953-1200. This excellent booklet covers topics including the following:

- Nativity scenes on public property
- Privately-initiated religious displays on public property
- Seasonal displays in and around government buildings

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[157] Compare Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994) (landlord won on constitutional grounds); North Dakota Fair Housing Council v. Peterson, 625 N.W.2d 551 (ND. 2001) (landlord's action did not violate statute); McCready v. Hoffius, case nos. 94-69473-CH and 94-694472-CH, Jackson County Circuit Court (decided Dec 6, 2000) (on file with author) (on remand from Mich Supreme Court) (losing party did not appeal) (court ruled that constitution barred application of housing laws to Christian landlord who refused to rent to cohabitating couple); Smith v. Fair Employment and Housing Comm'n, 913 P.2d 909 (Cal. 1996) cert den 521 U.S. 1129 (1997) (landlord's constitutional claim rejected).

[158] 42 U.S.C. §2000a; Mich Comp. Laws Ann. 37.2301, et seq.

[159] See e.g., 20 U.S.C. §1011 (higher education discrimination); MCL 37.2401, et seq.

[160] See e.g., MCL 37.2403 (Mich.).

[161] See e.g., Dlaikan v. Roodbeen, 206 Mich.App. 591 (1994) (on First Amendment grounds, the court refused to overrule religious school's decision to refuse to admit several prospective students).

- Public holiday closures
- Religious displays in public schools

E. **Land Use Laws:** In recent years, there has been increasing concern that zoning laws and other land use laws are significantly restricting the ministry of religious organizations. Sometimes communities have, in effect, zoned churches and other religious ministries out of large geographical areas under the banner of land use planning. In other instances, churches have been designated historic landmarks, which have imposed severe restrictions on the church's ability to alter its buildings to meet changing ministry needs.

In response to these concerns, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000.[162] This new law prohibits governments from imposing or implementing land use laws (such as zoning or historic landmark designation laws) in a manner that imposes a substantial burden on the religious exercise of a person or religious organization unless the government demonstrates that imposition of the burden furthers a compelling government interest and uses the last restrictive means to accomplish its purpose.

This new land use law is being used to lessen the burdens imposed on religious exercise imposed by land use regulations. The law only applies where the burden on religious exercise 1) is imposed in a federally funded program or activity, 2) affects interstate or international commerce or, 3) is imposed where the government has formal or informal procedures that permit the government to make individualized assessments of the proposed uses of the property involved.

There is an excellent website operated by the Beckett Fund that summarizes many of the cases decided and pending under this new law – you can find it by searching under "Religious Land Use" on the Internet. Another excellent publication on this subject is Litigating Religious Land Use Cases, by Daniel Dalton.

VII. CONCLUSION:

Religious people in the United States have the benefit of some of the broadest legal protection for religious liberty that believers have ever known in history. "To whom 'much is given . . . , much is required.'" Luke 12:48. Have we been good stewards of the great religious freedoms God has so graciously bestowed upon us?

[162] 42 U.S.C. §2000bb, et seq.

APPENDIX A

GUIDANCE ON CONSTITUTIONALLY PROTECTED PRAYER IN PUBLIC ELEMENTARY AND SECONDARY SCHOOLS

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 biannual 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

[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).

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

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[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. Schl.,* 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 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.

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 pre-game 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 schoolday,"[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

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[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 takes[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

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 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. 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.

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

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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 stat 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 845-45; *Mergens*, 496 U.S. at 248 (plurality opinion); *id.* at 260-61 (Kennedy, J., concurring in part and in judgment).

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 exercise 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 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.

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)-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

APPENDIX C

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release August 14, 1997

GUIDELINES OF 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 nongovernmental 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 work-place 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 dining 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

(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 "perceptions."

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 I 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 after 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.