

RELIGION IN THE PUBLIC SCHOOLS: A CONSTITUTIONAL BALANCING ACT

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Public schools (“Schools”) must delicately balance the constitutional requirements prohibiting government-sponsored religious expression and protecting the exercise of individual religious preferences. Schools regularly must defend against the claims of employees, parents, and community members that Schools are either too supportive of religion or fail to respect individual rights. Some blame the problems of schools on having “kicked God out of the school,” and feel schools should support religion by allowing student prayer and observance of religious holidays. Advocates of strict separation of church and state seek limits on the degree to which religious expression infiltrates the educational process.

Any discussion about religion in school must begin with the U. S. Constitution. Two principles govern the presence of religion in a school context: the Establishment Clause and the Free Exercise Clause of the First Amendment. Under the Establishment Clause, any school action which affects religion: (1) must have a secular purpose; (2) the primary effect of the action must be one that neither advances nor inhibits religion; and (3) the action must not foster any excessive entanglement with religion. The Free Exercise Clause on the other hand, prohibits regulation of particular religious activities unless it is narrowly tailored to promote a compelling state interest.¹

The Supreme Court has repeatedly held that the First Amendment requires School officials to be neutral in their treatment of religion.² Accordingly, the First Amendment forbids government-sponsored religious activity, but protects privately-sponsored religious activity, and the line between the two is vital to understanding the First Amendment’s scope as it applies to school programs or functions.³

Over the past forty years, the Supreme Court has distinguished impermissible governmental religious speech from private religious speech of students. For example, school officials may not lead their classes in prayer,⁴ nor 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, School officials cannot direct that prayer be included in school-sponsored events. In *Lee v. Weisman*,⁷ the Supreme Court held that School officials violated the Constitution in inviting a clergy member to deliver a prayer at a graduation ceremony. Nor may School authorities grant religious speakers preferential access to public audiences, or otherwise select speakers on a basis that favors religious speech. In *Santa Fe Independent School District v. Doe*,⁸ the Court invalidated a Texas school’s football game speaker policy because it was designed by school officials to result in pregame prayer, thus favoring religious expression over secular expression.

Although the Constitution forbids School officials from directing or favoring prayer, the Supreme Court has clearly stated that students maintain free speech protections: “private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.”⁹ Furthermore, not all religious speech in Schools is governmental

speech.¹⁰ Students may voluntarily pray at any time before, during, or after the school day,¹¹ and with other students on the same terms and conditions that they may engage in other speech. Similarly, School officials possess substantial discretion to impose restrictions on or prevent disruption caused by student activities,¹² provided such rules do not discriminate against student prayer or religious speech. When schools permit student expression on the basis of genuinely neutral criteria and students retain primary control over the content of their expression, the student's religious speech is not attributable to the state and therefore may not be restricted because of its religious content.¹³ Student remarks are not attributable to the state simply because they are delivered in a public setting.¹⁴

The following are particular applications of the governing principles derived from the various court cases interpreting issues related to religion in the Schools.

Worship or Prayer at School

Schools cannot sanction prayer. However, students may voluntarily pray during school and discuss religion, provided this activity does not interfere with the educational process or infringe upon the privacy rights of others. Among other things, students may read Bibles or other scriptures, say grace before meals, 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.

Religious Performances, Programs, and Gatherings

Schools may not include religious invocations, benedictions, or formal pray at School sponsored events. Holiday activities at School should not be religious in nature but may include the singing of some holiday songs, as long as songs with religious content are balanced with music not solely of a religious nature.

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 or prayer. Where students or other private graduation speakers are selected on the basis of genuinely neutral criteria and retain primary control over the content of their expression, however, that expression is not attributable to the school and cannot be restricted because of its religious, or anti-religious, content.

Religion in the Curriculum

Schools cannot teach religion, but they may teach about religion. A comprehensive study of art, literature, history, music, and other subjects could not be adequately presented without a review or discussion about the role religion has played in those areas over time. When religion is included in the curriculum, Schools must treat it with the same objectivity and educational intent expected in other areas. Such studies should not foster any particular religious tenet or demean any religious belief. However, student initiated responses to questions or assignments reflecting their

personal beliefs about a religious theme should be accommodated when appropriate.

Accommodating Religious Expression

Schools should try to accommodate students' religious beliefs unless the expression causes substantial disruption, materially interferes with the rights of others, violates the Constitution, or places an undue burden on the school. Additionally, students may be excused, without penalty, from instructional activities contrary to their religious beliefs unless their absence would defeat an overriding educational goal. Under the New Mexico Public Schools Code, Schools may excuse a student from school to participate in religious instruction for not more than one class period each school day with the written consent of his parents at a time period not in conflict with the academic program of the school.¹⁵ However, the School cannot assume responsibility for the religious instruction or permit it to be conducted on school property during the school day.¹⁶

Organized Prayer Groups

Students may organize prayer groups and religious clubs to the same extent that students are permitted to organize other non-curricular student activities groups. Pursuant to the Equal Access Act,¹⁷ such groups must be given the same access to school facilities for assembling as is given to other non-curricular groups, regardless of the religious content of their expression. If student groups that meet for nonreligious activities are permitted to advertise their meetings—for example, in a student newspaper, making announcements on a student activities bulletin board or public address system, or handing out leaflets—so must groups who meet to pray. Schools may disclaim sponsorship of non-curricular groups and events in a manner that neither favors nor disfavors groups that meet to engage in prayer or religious speech.

Conclusion

While some groups argue that religion has an important role to play in public education, others maintain that a strict wall of separation is needed. Although the courts have given clarity to many issues related to religion in Schools, there are still many unanswered issues for legal debate and litigation. Accordingly, Schools will continue to find themselves walking a tightrope to maintain a constitutional balance of the prohibitions of the Establishment Clause and the requirements of the Free Exercise Clause.

1. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
2. *See, e.g., Everson v. Board of Ed.*, 330 U.S. 1, 18 (1947); *Good New Club v. Milford Cent. Sch.*, 433 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); accord *Rosenberger v. Rector of Univ. Of Virginia*, 515 U.S. 819, 841 (1995)).

4. *Engle v. Vitale*, 370 U.S. 421 (1962); *School Dist. of Abington Twp. V. Schempp*, 374 U.S. 203 (1963); *Mergens*, 496 U.S. at 252 .
5. *Lee v. Weisman*, 505 U.S. 577, 599 (1992); *see also Wallace v. Jaffree*, 472 U.S. 38 (1985).
6. *Weisman*, 505 U.S. at 587.
7. *Id.*
8. 530 U.S. 290 (2000).
9. *Tinker v. Des Moines Ind.ep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969); *Capital Square Review & Avisory Bd. V. Pinette*, 515 U.S. 753, 760 (1995).
10. *Santa Fe*, 530 U.S. at 302.
11. *Id.* at 313.
12. The First Amendment permits 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).
13. *Rosenberger v. Rector of Univ. Of Virginia*, 515 U.S. 819 (1995); *Board of Educ. V. Mergens*, 496 U.S. 226(1990); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb 's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).
14. *Santa Fe*, 530 U.S. at 302; *Mergens*, 496 U.S. at 248-50.
15. § 22-12-3 NMSA 1978.
16. *Id.*
17. 20 U.S.C. 4071.