

**Religious Activities in the  
Public School:  
A Summary of the Law for  
Public School Administrators,  
Teachers, and Students**

[Includes a “*Quick Summary*” of the Law on Pages 3 and 4  
and An Easy to Use *Table of Contents* for Easy Reference Use]

by: Attorney Timothy W. Denney

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## **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 provide some assistance in predicting how other courts will decide the same issue.*

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## **Dedication**

*This outline is dedicated to the memory of my father, Peter Denney, who died on April 8, 2000. It was my father who encouraged me as early as age eleven to pursue a career in law. It was through his wise counsel and constant encouragement that I serve in the profession I now enjoy.*

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**I. INTRODUCTION.**

This book is 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.

<b>II. QUICK SUMMARY OF THE LAW: WHAT’S ALLOWED/WHAT’S NOT</b>	
<b><u>Allowed</u></b>	<b><u>Not Allowed</u></b>
<p><b>Student-initiated religious meetings</b>            * 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</p> <p><b>Student literature distribution</b>            * Some prior screening allowed, especially at lower age groups            * Subject to reasonable rules as to time, place, and manner of distribution</p> <p><b>Student-to-student religious discussions</b></p> <p><b>Use of the Bible or other religious books in the curriculum where done objectively</b>            (such as in teaching history, comparative religion, literature, etc.)</p> <p><b>Off-campus released time religious instruction classes</b></p> <p><b>Religious topics in student assignments</b></p>	<p><b>School-led, school-initiated religious activities</b>            * 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</p> <p><b>On-campus released time religious classes</b></p> <p><b>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</b></p> <p><b>- Posting of Ten Commandments on walls where intended to promote religion</b></p> <p><b>- School-forced recitation of Pledge of Allegiance contrary to student’s religious convictions</b></p> <p><b>School-exclusion of teaching about evolution where the exclusion is for religious reasons</b></p>

<u>Allowed (cont'd)</u>	<u>Not Allowed (cont'd)</u>
<b>Use of school building by religious groups (on an equal access basis with secular groups)</b>	<b>State law requiring teachers to recite disclaimer prior to teaching students all theories of origin except the Biblical theory of creation</b>
<b>Teaching (objectively) by the school about religion</b>	<b>School policy requiring that teacher read to students a disclaimer prior to the teaching of evolution</b>
<b>Teaching (objectively) about religious holidays</b>	<b>School Board policy requiring that a written disclaimer describing evolution as a theory, not a fact, be affixed to certain science textbooks</b>
<b>School-distribution of religious community group literature (equal access policy)</b> (Some regions outside of the Midwest may not allow at <u>elementary</u> school level-such as Virginia, Maryland, North Carolina and South Carolina)	<b>Student-initiated, student-led prayers at graduation ceremonies*</b> * gray area (approved in some regions, not others)
<b>Performance of religious music by school choirs</b>	<b>School Board initiated sectarian prayer at school board meetings</b>
<b>Meal time prayers</b>	
<b>Student-initiated, student-led prayers at graduation ceremonies*</b> * gray area (approved in some regions, not others)	
<b>Private baccalaureate services at school</b>	
<b>Parental prayer meetings at school (behind closed doors outside the presence of students)</b>	
<b>Closed-door teacher prayer meetings at school (outside the presence of students) during free time</b>	
<b>Moment of silence allowing for contemplation (where not done to encourage students to pray)</b>	

### **III. COMMON PRINCIPLES IN THE LAW REGARDING RELIGIOUS ACTIVITIES IN THE PUBLIC SCHOOL.**

At first glance, the cases on religion in the public schools seem to be hopelessly inconsistent. How 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.

#### **A. School Action vs. Private Action.**

The courts have often struck down religious practices in public schools when they were school-led or school-initiated. The U.S. Supreme Court has observed that “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.”<sup>1</sup> This explains why the U.S. Supreme Court has struck down laws or policies allowing school-composed prayers,<sup>2</sup> school-initiated student-led prayers,<sup>3</sup> school-initiated devotional exercises,<sup>4</sup> school-sponsored prayers at graduation ceremonies,<sup>5</sup> and student-initiated prayers at school-sponsored public sporting events where the circumstances were structured by the school to encourage students to pray.<sup>6</sup> 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 noninstructional time. Courts have also upheld the right of students to engage in student-to-student religious literature distribution.

#### **B. The Manner of Teaching: Education vs. Indoctrination.**

The courts have struck down school-led or school-initiated religious devotional exercises,

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<sup>1</sup> Bd. of Educ. v Mergens, 496 U.S. 226, 250 (1990).

<sup>2</sup> Engel v Vitale, 370 U.S. 421 (1962).

<sup>3</sup> Karen B. v Treen, 653 F.2d 897 (5<sup>th</sup> Cir. (1981) aff’d 455 U.S. 913 (1982)).

<sup>4</sup> Sch. Dist. Of Abington Twp. v Schempp, 374 U.S. 203 (1963).

<sup>5</sup> Lee v Weisman, 505 U.S. 577 (1992).

<sup>6</sup> Santa Fe Indep. Sch. Dist. v Doe, 120 S.Ct. 2266 (2000).

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.”<sup>7</sup>

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

**C. Location, Location, Location (On-Campus vs. 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 private religious institutions to release public school students for off-campus religious training,<sup>8</sup> but not for on-campus religious training.<sup>9</sup>

**D. Instructional vs. Noninstructional 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.

**E. Insiders vs. Outsiders.**

As a general rule, students have greater freedom of religious expression than does an outside religious organization that wants to distribute religious materials on school grounds over the school’s objections. Some 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 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.

**F. Age Difference: The Older the Student the Greater the Religious Freedom.**

Courts have been willing to allow a greater level of religious activities in public schools depending on the age or educational level of the students, though this factor has been less important

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<sup>7</sup> Sch. Dist. of Abington Twp. v Schempp, 374 U.S. 203 (1963).

<sup>8</sup> Zorach v Clauson, 343 U.S. 306 (1952).

<sup>9</sup> McCullum v Bd. of Educ., 333 U.S. 203 (1948).

in recent years.<sup>10</sup> 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 willingness to allow religious activities at public schools even if very young children might be involved, especially where parental consent is required before the child can participate.

**G. “Must Do” vs. “May Do” (Mandatory vs. Discretionary).**

Even if a public school is not required by law to allow a certain type of religious activity or content, often it may allow it voluntarily as a matter of local policy. For example, even though the law does not require school districts to address religious subjects or artwork in course work, many local school districts authorize and encourage it as a matter of educational discretion. Also, even though school districts are rarely required by law to excuse students from classes due to religiously objectionable material, local school districts often already have policies that authorize such excusals on an individual basis. In short, just because a school is not compelled by law to accommodate particular religious activities or content, the school often retains the lawful discretion to do so anyway.

**IV. FEDERAL LAW MANDATES SCHOOL POLICIES THAT ALLOW CERTAIN TYPES OF RELIGIOUS ACTIVITIES AND PROHIBIT OTHERS: 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.<sup>11</sup> 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 Appendix 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 and/or study of religious books by teachers and other school employees

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<sup>10</sup> Compare Edwards v Aguillard, 482 U.S. 578 (1987) with Good News Club v Milford Cent. Sch., 121 S.Ct. 2093 (2001).

<sup>11</sup> 20 U.S.C., Section 7904.

- Moments of silence
- Released time religion classes
- Excusing students to observe religious obligation or due to religious objections
- Religious expression in student assignment
- 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.<sup>12</sup> Those measures can include the denial of federal funds.<sup>13</sup>

**V. THE LAWS REGARDING SPECIFIC RELIGIOUS ACTIVITIES IN THE PUBLIC SCHOOLS.**

**A. Student Religious Meetings.**

1) **College:** When a public college allows other student groups to use meeting facilities, the First Amendment requires the college to extend the same privilege to religious groups—even if they want to meet for prayer and worship.<sup>14</sup>

2) **High School:** Under both the federal and some state Equal Access Acts,<sup>15</sup>

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<sup>12</sup> 20 U.S.C. 7904.

<sup>13</sup> 20 U.S.C. 7904.

<sup>14</sup> Widmar v Vincent, 454 U.S. 263 (1981).

<sup>15</sup> Federal Equal Access Act, U.S.C. 4071 to 4074; Mich Equal Access Act, MCL 380.1299; Ark. Code Section 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.

when high schools allow any other non-curriculum related student groups<sup>16</sup> to meet during

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(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) nonschool 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--

(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.

<sup>16</sup> Bd. of Educ. v Mergens, 496 U.S. 226 (1990); Van Schoick v Saddleback Valley Unified Sch., 104 Cal. Rptr. 2d 562 (Cal. App., 2001).

noninstructional time, it must also allow student religious groups to meet on the same basis.<sup>17</sup> “Noninstructional time” means the time before and after school and during lunch time. It may also include other time periods during the school day when noncurriculum-related student groups are permitted to meet<sup>18</sup> such as seminar periods<sup>19</sup> or student activity periods.<sup>20</sup> Religious student groups must be given the same opportunities to advertise their meetings as are other non-religious groups.<sup>21</sup> 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.<sup>22</sup>

To trigger the protection of safe harbor provisions of the Equal Access Act, the Act 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 extended the protection of the Act for the participation of school personnel in high school student religious meetings only in a participatory capacity.<sup>23</sup> In other words, you get the protection of the safe harbor provisions 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 supervisor or monitor.<sup>24</sup> However, in 2004, a federal court of appeals held that a teacher could not be prohibited from participating actively in an after-school religious meeting in her private capacity, even where

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<sup>17</sup> Federal Equal Access Act, 20 U.S.C. 4071 to 4074 (Section 803(4)); Ceniceros v Bd. of Trustees, 106 F.3d 878 (9<sup>th</sup> Cir., 1997).

<sup>18</sup> Mergens, supra; Ceniceros, supra; Equal Access Act, 20 U.S.C. 4071 to 4074. Pearce v Northville Pub. Sch., case no. 00-CV-75174-DT (ED 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).

<sup>19</sup> Pearce v Northville Pub. Sch., case no. 00-CV-75174-DT (ED 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).

<sup>20</sup> Donovan v Punxsatawney Area Sch. Bd., 336 F.3d 211 (3d Cir., 2003) (student activity period); Jacoby v Prince, 303 F.3d 1074 (9<sup>th</sup> Cir., 2002) (student/staff period during the school day).

<sup>21</sup> Mergens, supra.

<sup>22</sup> 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).

<sup>23</sup> Mergens, supra.

<sup>24</sup> Herdahl v Pontotoc County Sch. Dist., 933 F. Supp. 582 (ED Pa, 1993); Reed v Van Hoven, 237 F. Supp. 48 (WD Mich, 1965).

the meetings took place at the school building in which the teacher taught during the school day.<sup>25</sup> 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.<sup>26</sup>

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.<sup>27</sup>

**3) 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.<sup>28</sup> The group in question was a Good News Club 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. Previous courts (but not all) had reached the same result.<sup>29</sup>

At least one state (Arizona) has adopted their own version of an Equal Access Act for 7<sup>th</sup> and 8<sup>th</sup> grade students. This Act prohibits schools from denying equal access to 7<sup>th</sup> and 8<sup>th</sup> grade students who want to meet for religious reasons if other extracurricular student groups are permitted to meet for non-religious reasons.<sup>30</sup>

**4) 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

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<sup>25</sup> Wigg v Sioux Falls Sch. Dist., 49-5, 382 F.3d 807 (8<sup>th</sup> Cir., 2004).

<sup>26</sup> Mergens, supra.

<sup>27</sup> See e.g. - Bd. of Ed. v Mergens, 496 U.S. 226 (1990); Van Schoick v Saddleback Valley Unified Sch., 104 Cal. Rptr. 2d 562 (Cal. App., 2001); Pope v East Brunswick Bd. of Educ., 12 F.3d 1244 (3d Cir., 1993).

<sup>28</sup> Good News Club v Milford Cent. Sch., 121 S.Ct. 2093 (2001).

<sup>29</sup> Good News/Good Sports Club v Sch. Dist. of City of Ladue, 28 F.3d 1501 (8<sup>th</sup> Cir., 1994) cert. denied 515 U.S. 1173 (1995); Herdahl v Pontotoc County Sch. Dist., 933 F. Supp. 582 (WD Miss, 1996); Reed v Van Hoven, 237 F. Supp. 48 (WD Mich, 1965).

<sup>30</sup> Ariz Stat, Section 15-720.

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.”

See Appendix A.

## **B. Student Religious Literature Distribution and Possession.**

Courts have repeatedly upheld the right of students to distribute religious literature to fellow students during non-class time.<sup>31</sup> Most schools have commonsense policies involving reasonable time, place, and manner of distribution rules. Some courts have found these pre-distribution screening policies to be unconstitutional if they were unreasonable.<sup>32</sup> In addition, schools cannot lawfully use the discretion they maintain under such policies to artificially exclude religious literature. Generally, when it comes to student literature distribution policies, schools are not permitted to treat religious literature any differently than non-religious literature, at least where only distribution outside the classroom is involved.<sup>33</sup>

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

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<sup>31</sup> Curry v Sch. Dist. Of the City of Saginaw, 452 F Supp 2d 723 (ED Mich, 2006) (found that school violated 5<sup>th</sup> grade students’ constitutional rights by forbidding student from distributing candy canes with religious message to fellow students); Martin v Liverpool Central Sch. Dist., 487 F Supp 117 (ND N.Y., 2007) (school violated First Amendment by prohibiting 5<sup>th</sup> grader from handing out religious tracts to other students during lunch-time); M.A.L. v Kunsland, 2007 WL 313283 (ED Mich, 2007) (preliminary injunction granted against school’s ban on student distribution of religious literature against abortion); Hedges v Wauconda Comm. Unit Sch. Dist., 9 F3d 1295 (7<sup>th</sup> Cir, 1993) (total ban on student religious literature distribution at junior high school found unconstitutional); Westfield High Sch. LIFE 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 (MD Fla, 1994); Nelson v Moline Sch. Dist., 725 F Supp 965 (CD Illin, 1989); Clark v Dallas Independent Sch. Dist., 806 F Supp 116 (ND Tex, 1992); Slotterback v Interboro Sch. Dist., 766 F Supp 280 (ED 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 Sch. Dist., 673 F Supp 1379 (MD 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”).

<sup>32</sup> Slotterback, supra; Johnston-Loehner, supra.

<sup>33</sup> See previous footnote.

“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.<sup>34</sup> Limiting literature distribution to student-drafted documents has been upheld<sup>35</sup>, although it is such an arbitrary distinction that it is questionable whether schools will adopt it on a widespread basis. Courts have observed that such policies result in absurd results because they would even prohibit students from handing out a copy of the Federal Constitution—since it too was not drafted by the students. Moreover, courts have even invalidated these kinds of policies where religious literature was singled out for unfavorable treatment.<sup>36</sup>

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<sup>37</sup> on non-religious topics or subjects.” Similarly, the Commonwealth of Massachusetts adopted a Students’ Freedom of Expression Law which gives similar protection to student-to-student communications including literature distribution.<sup>38</sup>

Occasionally, parents tell this author that they have been told by school personnel that their child could not have religious literature in their possession at school. There appears to be no legal basis for schools to ban mere possession of religious literature by a student on school grounds. In fact, since there is case law indicating that a school superintendent had a constitutionally protected right to maintain a Bible on his desk and framed Bible verses on his office wall because they reflected merely “personal” religious expression, it is highly likely that courts will conclude that public school students have a constitutional right to possess and read religious materials at school

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<sup>34</sup> Hedges, supra (upholding some restrictions on distribution of literature not drafted by the students).

<sup>35</sup> Hedges, supra.

<sup>36</sup> Slotterback v Interboro Sch. Dist., 766 F. Supp. 280 (ED Pa, 1991).

<sup>37</sup> Tenn Code, Section 49-6-2904(b)(4).

<sup>38</sup> See law explained in Westfield High Sch. LIFE Club v City of Westfield, 249 F. Supp. 2d 98 (D. Mass, 2003).

during non-instructional time.<sup>39</sup> One federal court did prohibit a teacher from keeping his Bible on a classroom desk,<sup>40</sup> but this case is distinguishable for several reasons. First, the First Amendment places limitations on what government officials can do, but it generally does not limit what private individuals can do, especially since private individual religious practices are protected by the First Amendment protection for freedom of religion and freedom of speech. Secondly, there are greater limitations on what a government official, such as a teacher, can do in the classroom setting as opposed to their free time at school. 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.”

Appendix A.

Accordingly, a public school could lose federal funding under the No Child Left Behind Act if it prohibited students from reading religious literature on school grounds during non-instructional time.

### **C. Student-to-Student Religious Discussions.**

Student-to-student religious discussions in public school are legally protected for the same reasons described in Section B above concerning student-to-student religious distribution. Obviously, the school can legitimately prohibit a student from disrupting a class in progress by carrying on a religious discussion with a friend. However, during non-instructional time, 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 activity or speech . . .

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<sup>39</sup> Warnock v Archer, 380 F.3d 1076 (8<sup>th</sup> Cir., 2004) (and cases cited therein). Compare Roberts v Madigan, 921 F.2d 1047 (10<sup>th</sup> Cir., 1990) cert. denied 505 U.S.

<sup>40</sup> Roberts v Madigan, 921 F.2d 1047 (10<sup>th</sup> Cir., 1990) cert. denied 505 U.S. 1218 (1992).

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.”

See Appendix B.

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.”<sup>41</sup> Similarly, the Commonwealth of Massachusetts has a law that also specifically protects student freedom of expression.<sup>42</sup>

#### **D. School-Composed or School-Initiated Prayer.**

As observed in the 2003 U.S. Department of Education Guidelines, “When acting in their official capacity 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.” See Appendix A. For this reason, the U.S. Supreme Court has struck down laws or policies allowing school-composed prayer<sup>43</sup>, school-initiated student-led prayers<sup>44</sup>, school-sponsored prayers at graduation ceremonies<sup>45</sup>, and student-initiated prayers at school sponsored public sporting events where the circumstances were structured by the school to encourage students to pray.<sup>46</sup> Several courts, including the Federal court whose decisions are binding in the State of Michigan, have ruled that the practice of public school boards beginning their meetings with sectarian prayer violates the Constitution.<sup>47</sup>

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<sup>41</sup> Tenn. Code Section 49-6-2904(b)(3).

<sup>42</sup> See Mass. law explained in Westfield High Sch. LIFE Club v City of Westfield, 249 F. Supp. 2d 98 (D. Mass, 2003).

<sup>43</sup> Engel v Vitale, 370 U.S. 421 (1962). (Prayer written by state officials and students led in this prayer each day).

<sup>44</sup> Karen B v Treen, 653 F.2d 897 (5<sup>th</sup> Cir., 1981) aff’d 455 U.S. 913 (1982). (Teacher initiated student to pray in class).

<sup>45</sup> Lee v Weisman, 505 U.S. 577 (1992). (School chose clergy to defer prayer at graduation ceremony and give guidelines on content of prayers).

<sup>46</sup> Santa Fe Indep. Sch. Dist. v Doe, 12 S.Ct. 2266 (2000).

<sup>47</sup> See e.g. - Coles v Cleveland Bd. of Educ., 171 F.3d 369 (6<sup>th</sup> Cir., 1999).

**E. School-Led or School-Initiated Devotional Exercises.**

A public school is prohibited from initiating students to engage in religious devotional exercises. For example, in 1963, the U.S. Supreme Court struck down a state law that required ten verses from the Bible to be read at the opening of each school day.<sup>48</sup> In that case, the verses were read over the school public address system each day followed by a daily recitation of the Lord's Prayer. The U.S. Supreme Court treated this practice as a religious devotional exercise and declared it unconstitutional. The U.S. Supreme Court went on to clarify that it was not banning the use of the Bible as part of the curriculum where it was integrated into an overall objective educational program:

“It might well be said that one’s education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicated that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.”

**F. Baccalaureate Ceremonies.**

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

“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 or 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.:

See Appendix A.<sup>49</sup>

**G. Graduation Prayers or Student Graduation Speeches with Religious Content.**

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

“School officials may not mandate or organize prayer at graduation or select speaker 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,

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<sup>48</sup> Sch. Dist. of Abington Twp v Bd. of Educ., 374 U.S. 203 (1963).

<sup>49</sup> See also Lee v Weisman, 505 U.S. 577 (1992) (school-sponsored graduation prayer struck down).

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."

See Appendix A.

In 1992, the U.S. Supreme Court declared unconstitutional a public school's practice of selecting a clergy member to offer a prayer at its graduation ceremony and providing the clergy member with specific guidelines for the prayer's content.<sup>50</sup>

However, despite this ruling, questions concerning the validity of different variations of graduation prayers and student graduation speeches with religious content still remained. A number of lower courts have addressed these questions, and have provided some guidance for public school personnel, but the cases are conflicting.

For example, at least one federal court, whose decisions are binding in the states of Texas, Louisiana, and Mississippi, has upheld a public high school's policy of permitting its seniors to choose a student volunteer to deliver a nonsectarian, non-proselytizing invocation at its graduation ceremony.<sup>51</sup> Nonetheless, several other courts outside of that three-state region have stated that such a practice is impermissible based on their belief that a public school cannot delegate to its students a decision which itself cannot make.<sup>52</sup>

The Ninth Circuit Court of Appeals, whose decisions are binding in the states of Washington, Montana, Oregon, Idaho, California, Arizona, Nevada, Alaska, and Hawaii, has ruled that a public high school did not violate the First Amendment of the Constitution by requiring the school's salutarian to omit all proselytizing comments from his graduation speech, while allowing him to reference his own beliefs in God during the speech.<sup>53</sup> The court stated that permitting a proselytizing speech at a public school's graduation ceremony "would amount to coerced participation in a

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<sup>50</sup> Lee v Weisman, 505 U.S. 577 (1992).

<sup>51</sup> Jones v Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5<sup>th</sup> Cir., 1992) cert. denied, 508 U.S. 967, 113 S.Ct. 2950, 124 L.Ed.2d 697 (1993).

<sup>52</sup> Am. Civil Liberties Union of N.J. v Black Horse Pike Reg'l. Bd. of Educ., 84 F.3d 1471 (3<sup>rd</sup> Cir., 1996); Gearon v Loudoun Cty. Sch.Bd., 844 F. Supp. 1097 (ED Va., 1993); Appenheimer v Sch. Bd. of Wash. Cmty. High Sch. Dist. 308 No. 01-1226, 2001 WL 1885834 (CD Ill., 2001).

<sup>53</sup> Lassonde v Pleasanton Unified Sch. Dist., 320 F.3d 979 (9<sup>th</sup> Cir., 2003) cert den 540 US 817 (2003); see also Cole v Oroville Union High Sch. Dist., 228 F.3d 1092 (9<sup>th</sup> Cir, 2000) cert den 532 US 905 (2001).

religious practice.”<sup>54</sup>

Finally, at least one court, whose decisions are binding in the region covering Alabama, Florida, and Georgia has upheld a school practice permitting high school seniors to vote upon the delivery by a student of a message entirely of that student’s choosing as part of graduation ceremonies, even if the student’s message turned out to have religious content.<sup>55</sup> This practice was deemed permissible because the school board did not have control over the section of the individual delivering the message, the content of the message, or the decision whether or not there would be a message in the first place.<sup>56</sup>

The disagreement among the various courts over the graduation speeches/prayers can be summarized as follows. Some courts believe that if the school gives the students a public or limited public forum to speak that it may not penalize the student who chooses to include religious content in that speech.<sup>57</sup> Those courts view the matter as a free speech issue. Other courts reject the free speech argument and take the position that a school that permits a student to speak at a school-sponsored event where the student prays or otherwise includes religious content in their speech leads observers to believe that the school is endorsing their religious views - in violation of the First Amendment clause against laws respecting an “establishment of religion.”<sup>58</sup> This disagreement will likely remain unresolved unless the U.S. Supreme Court chooses to resolve the issue.

In summary, this area of the law is not well-settled and the rulings vary significantly depending on where you live. Given the controversial nature of the graduation prayer issue and the conflicting case law, it would be wise for schools addressing this issue to seek the counsel of an attorney familiar with this area of the law before taking action. In short, the law on this issue may depend on the region of the country in which you live.

## **H. Released Time Classes.**

**1) Off-Campus Released Time Classes.** “Released time” classes are classes typically 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

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<sup>54</sup> Lassonde, 320 F.3d at 984.

<sup>55</sup> Adler v Duval Cty. Sch. Bd., 250 F.3d 1330 (11<sup>th</sup> Cir., 2001), cert. denied, 534 U.S. 1065, 122 S.Ct. 664, 151 L.Ed. 579 (2001).

<sup>56</sup> Id., at 1333.

<sup>57</sup> Jones, supra; Adler, supra.

<sup>58</sup> Lassonde, supra.

location so they can be given religious instruction. In many states, there are laws specifically authorizing public school students to be released for religious instruction.<sup>59</sup> In 1952, the U.S.

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<sup>59</sup> 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, Section 15-806 (authorized but leaves it to local school board to adopt policy).

California: Calif. Educ. Code School Section 46014 (4 hours per month).

Florida: Fla Acts, Section 232.0225 (local school boards required to adopt policies to authorize released time).

Hawaii: Haw Stat, Section 302A-1139 (up to 1 hour per week).

Idaho: Idaho Stat, Section 33-519 (up to 5 class periods per week or 165 per school year).

Indiana: Ind Code, Section 20-8, 1-3-2, Sec. 22 (up to 120 minutes per week).

Massachusetts: Mass. Gen. Laws, Vol. 76, Section 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); Accompanying state regulations indicate that if the school is provided with appropriate parental permission slips, the school must release students for religious released time classes. Mich. Admin Code R 340.71.

Minnesota: Minn Stat, Section 120A.22, subdv. 12 (3 hours per week).

Montana: Mont. Stat, Section 20-1-308 (2 hours per week).

North Dakota: N.D. Stat, Section 15:1-19-04 (1 hour per week).

New Mexico: New Mex Stat, Section 22-12-3 (1 class period per day).

New York: N.Y. Educ. Code, Section 3210 (authorized as per local rules).

Oregon: Or. Stat, 339.420 (2 hours per week).

Pennsylvania: Pa Stat, Section 15-1546 (36 hours/school year).

South Dakota: S.D. Stat, Section 13-33-10 (1 hour week).

Tennessee: Tenn Code, 49-6-2904(b)(5) (releases for religious reasons allowed on same basis as releases for non-religious reasons).

Vermont: Vt. Stat, Vol 16, Section 1051 (state policy to allow released time).

West Virginia: W.V. Stat, Section 18-18-1, Exemption J (local boards can establish rules to implement it).

For information on all 50 states, please log onto [www.releasedtime.org](http://www.releasedtime.org)

Supreme Court ruled that such classes are constitutional.<sup>60</sup> Off-campus released time classes are a commonplace in many schools in Michigan and other states. The continued legality of off-campus released time classes was reaffirmed by a federal court in 2004.<sup>61</sup>

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.”

Appendix A.

2) **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.<sup>62</sup>

### **I. Religious Topics in the Curriculum.**

Contrary to popular belief, religious texts and other religious subjects can be addressed in the classroom when done appropriately. However, the law does not allow schools to use the classroom as a tool for religious indoctrination.<sup>63</sup>

The U.S. Supreme Court has said that:

“It 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.”<sup>64</sup>

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<sup>60</sup> Zorach v Clauson, 343 U.S. 306 (1952).

<sup>61</sup> Pierce v Sullivan West Central Sch. Dist., 379 F.3d 56 (2<sup>nd</sup> Cir, 2004).

<sup>62</sup> McCullum v Bd. of Educ., 333 U.S. 203 (1948).

<sup>63</sup> Doe v Porter, 370 F.3d 558 (6<sup>th</sup> Cir., 2004) (finding unconstitutional a particular classroom program which, due to its content, was ruled to constitute an unconstitutional establishment of religion).

<sup>64</sup> Sch. Dist. of Abington Twp. v Schempp, 374 U.S. 203 (1963).

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 about 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 school may educate about all, 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

Public school teaching programs that teach religious texts as religious truth are likely to be found unconstitutional.<sup>65</sup>

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 B.

Many local school policies encourage the objective study of comparative religions and the contribution made by religion to civilization, a practice that appears consistent with current U.S. Supreme Court pronouncements on this issue.

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<sup>65</sup> See e.g., Doe v Porter, 370 F.3d 558 (6<sup>th</sup> Cir., 2004) (declaring unconstitutional a public school program where religious college students taught materials to public school students as “religious truth”).

In 1980, the U.S. Supreme Court declared unconstitutional a state law requiring the posting of the Ten Commandments in each class because the Court concluded that the law's intent was to promote a religion.<sup>66</sup> Even so, in that same case, the Supreme Court repeated its earlier pronouncements that it was not banning the use of the Bible where used as part of an objective educational curriculum.

#### **J. Teaching About Creation or Evolution.**

Courts have also ruled on a number of questions related to the teaching of evolution and/or "creation science" in the public schools. In 1987, the U.S. Supreme Court struck down a state statute that forbid the teaching of evolution in public schools unless "creation science" was also taught because the Court concluded that the intent of the law was to promote religion. However, in that same case, the U.S. Supreme Court specifically stated that "teaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction."<sup>67</sup> The U.S. Supreme Court also has struck down a state statute that made it unlawful for public school teachers to instruct students on the Darwinian theory of evolution.<sup>68</sup>

The question of providing written or spoken disclaimers prior to the teaching of theories of human origin has been addressed by courts, as well. In 1975, a court ruled that it was unconstitutional for a state to require a disclaimer to accompany all theories of origin except the Biblical theory of creation.<sup>69</sup> Later, another court held that it was impermissible for a school to require that a teacher read to students a disclaimer prior to the teaching of evolution because such a disclaimer had the primary effect of endorsing a particular religious viewpoint.<sup>70</sup> In 2005, a federal court in Georgia determined that a school board policy requiring that a written disclaimer describing evolution as a theory, not a fact, and stating that the material should be critically considered be affixed to certain science textbooks was similarly unconstitutional.<sup>71</sup>

#### **K. Religious Holidays and Religious Music in the Curriculum.**

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<sup>66</sup> Stone v Graham, 449 U.S. 39 (1980).

<sup>67</sup> Edwards v Aguillard, 482 U.S. 578 (1987).

<sup>68</sup> Epperson v Arkansas, 393 U.S. 97 (1968).

<sup>69</sup> Daniel v Waters, 515 F.2d 485 (6<sup>th</sup> Cir., 1975).

<sup>70</sup> Freiler v Tangipahoa Parish Bd. of Educ., 185 F.3d 337 (5<sup>th</sup> Cir., 1999).

<sup>71</sup> Selman v Cobb Cty. Sch. Dist., 390 F. Supp. 2d 1286 (ND Ga 2005) (the disclaimer at issue stated as follows: "This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things. This material should be approached with an open mind, studied carefully, and critically considered.").

Schools are permitted by law to objectively explain to students the meaning of religious holidays.<sup>72</sup> Religious symbols such as a cross and other symbols can be used if it is done as part of an objective overall education in our cultural and religious heritage.<sup>73</sup> 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.<sup>74</sup> Some local school religion policies specifically authorize educating students about religious holidays. Schools can include traditional Christmas carols as part of the educational program about the Christmas holiday.<sup>75</sup> Even outside the holiday season, school choirs are permitted to perform religious songs as part of their training and performances.<sup>76</sup> One court noted that “Any choral curriculum designed to expose students to the full array of vocal music culture . . . can be expected to reflect a significant number of religious songs.”<sup>77</sup> Courts have also observed that, “given the prevalence of religious themes in the field of choral music, a total ban on all religious choral music would require hostility, not neutrality toward religion.”<sup>78</sup> However, certainly a curriculum that is disproportionately weighted with religious themes and religious music poses constitutional problems. For example, religious music sung in public schools with the intent that it be a religious devotional exercise would be unconstitutional.<sup>79</sup> School musical performances that amount to religious devotionals, such as where a prayer is set to music and sung before each athletic event, have been found unlawful.<sup>80</sup> Obviously, good judgment calls for common sense and discretion when addressing religious holidays and religious music in a way that properly respects the religious diversity that exists in our country. For example, it would be wise and, at times, constitutionally necessary, to allow students to be excused without academic penalty from participation in singing of certain religious songs or recognition of certain religious

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<sup>72</sup> Florey v Sioux Falls Sch. Dist., 619 F.2d 1311 (8<sup>th</sup> Cir., 1980) cert. denied 449 U.S. 987 (1980); Clever v Cherry Hill Twp Bd. of Educ., 838 F. Supp. 929 (D N.J., 1993) (upholding school religious holiday policy similar to that upheld in Florey case).

<sup>73</sup> Florey, supra.

<sup>74</sup> Florey, supra; Bauchman v West High Sch., 132 F.3d 542 (10<sup>th</sup> Cir., 1997); Doe v Duncanville Indep. Sch. Dist., 70 F.3d 402 (5<sup>th</sup> Cir., 1995).

<sup>75</sup> Florey, supra; Bauchman, supra.

<sup>76</sup> Bauchman, supra; Doe, supra.

<sup>77</sup> Bauchman, 132 F.3d at 554.

<sup>78</sup> Duncan v Duncanville Indep. Sch. Dist., 70 F.3d 402, 407 (5<sup>th</sup> Cir., 1995) (footnote omitted).

<sup>79</sup> Sch. Dist. of Abington v Schempp, 347 U.S. 203 (1963).

<sup>80</sup> Doe v Alpine Indep. Sch. Dist., 563 F. Supp. 883 (SD Tex, 1982).

holidays if it would otherwise violate the student's religious convictions.<sup>81</sup>

#### **L. 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 whose 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 advise students that expressing religious 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.”<sup>82</sup>

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.<sup>83</sup> These cases are likely a reflection of the general hesitance of courts to step in and overrule particular classroom curriculum decisions.

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<sup>81</sup> See e.g. - Bauchman, 132 F.3d at 557. (Discussing excusal of student without academic penalty from singing of certain religious songs; also discusses excusal from religious holiday recognition).

<sup>82</sup> Florey, 619 F.2d at 1320; see also Walz v Egg Harbor Twp. Bd. of Educ., 342 F.3d 271 (3<sup>rd</sup> Cir., 2003) (explaining in dicta why student religious communications where the school invited personal viewpoints would likely not be a constitutional problem).

<sup>83</sup> See e.g., Settle v Dickson Cty Sch. Bd., 53 F.3d 152 (6<sup>th</sup> 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 Pub. Sch., 799 F. Supp. 744 (E.D., Mich, 1992) aff'd without published opinion 1 F.3d 1240 (6<sup>th</sup> Cir., 1993) (exclusion of school girl's video presentation of religious song was upheld).

One state (Tennessee) has by law stated that students may express religious viewpoints in public school to the same extent and under the same circumstances as a student is permitted to express viewpoints on non-religious topics.<sup>84</sup>

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.

#### **M. Excusals Due to Religiously Objectionable Materials.**

Courts have generally refused to find that a student is constitutionally entitled to be excused from classes without loss of credit where the class content includes religiously objectionable material.<sup>85</sup> 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.<sup>86</sup>

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.<sup>87</sup> Often the parent's objections must be filed in writing to relieve their child of the obligation to attend the class.

Other than where required by state law, 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 or his family, or

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<sup>84</sup> Tenn. Code, Section 49-6-2904(b)(2).

<sup>85</sup> Smith v Bd. of Sch. Comm'rs, 827 F.2d 684 (11<sup>th</sup> Cir., 1987); Mozert v Hawkins Cty Bd. of Educ., 827 F2d 1058 (6<sup>th</sup> Cir., 1987).

<sup>86</sup> Mozert, supra; Bd. of Educ. V Barnette, 319 U.S. 624 (1943).

<sup>87</sup> See example: California: Calif. Educ. Code Section 55-1554; Georgia: Ga. Code Section 20-2-143; Idaho: Idaho Stat Section 33-1611; Illinois: ILCS Section 27-9-1; Louisiana: La. Stat 17:281; Massachusetts: Mass, Vol 71, Section 32A; Michigan: Mich Comp Law L. Ann 380.1507(3); Mississippi: Miss Code Section 37-13-17; New Jersey: N.J. Stat Section 18A:35.4.7; Oklahoma: Okl Stat 70-11-105.1; Rhode Island: R.I. Stat Section 16-22-18.

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.<sup>88</sup> Some state laws (such as in Michigan) also limit the ability of the schools to administer certain types of personality tests without the parent's consent.<sup>89</sup>

**N. Meal-time Prayers.**

Students are lawfully permitted to pray for their meals at school. Courts have repeatedly reinforced this conclusion.<sup>90</sup> 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 nonreligious activities.” See Appendix A.

**O. 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 in question was passed specifically to promote religious activities.<sup>91</sup> 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.<sup>92</sup> A significant number of states have statutes authorizing schools to allow for a moment of silence at the beginning of the school day. In addition, the 2003 U.S. Department of Education guideline states as follows:

“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.”

See Appendix A.

**P. Teacher Rights.**

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<sup>88</sup> 20 U.S.C. Section 1232; but see Gonzaga Univ. 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. Section 1232g).

<sup>89</sup> See e.g., MCL 380.1172 (Mich.); Mich Admin Code 340.1101 et seq.

<sup>90</sup> Reed v Van Hoven, 237 F.Supp.48 (WD, Mich, 1965); Chandler v James, 998 F.Supp.1255, 1282-1283 (MD. Ala., 1997); see also Herdahl v Pontotoc Cnty Sch. Dist., 933 F.Supp.582 (ND Miss., 1996).

<sup>91</sup> Wallace v Jaffree, 472 U.S. 38 (1985).

<sup>92</sup> See e.g., Brown v Gwinnet Cnty Sch. Dist., 112 F.3d 1464 (11<sup>th</sup> Cir., 1997).

The subject of the freedom of teachers in religious matters in public school is too lengthy to be covered in this book. However, some recent developments in this area are noted below.

There are some recent developments in the area of teacher rights.

1) **Teacher 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, teachers may participate in their personal capacities in privately sponsored baccalaureate ceremonies.”

Appendix A.<sup>93</sup>

Also, in 2000, a federal court 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.<sup>94</sup>

2) **Teacher Participation in After-school Student Religious Meetings:** In 2004, a federal court of appeals ruled that a school district could not prohibit a teacher from participating in teaching an after-school Bible club for elementary school children, even if the club met at the school building in which the teacher taught at during the school day.<sup>95</sup> The U.S. Supreme Court has also ruled that it is clearly legal for teachers to be present at any after-school religious meetings with high school students where they attend in a nonparticipating capacity.

#### **Q. Public Schools Distribution of Literature From Private Religious Community Groups.**

Public schools are normally not required to allow outside community groups to have access

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<sup>93</sup> But see May v Evansville-Vanderburgh Sch. Corp., 787 F.2d 1105 (7<sup>th</sup> Cir., 1986) (holding public teachers not entitled to require school to allow them to meet for group prayer before school on school grounds).

<sup>94</sup> Daugherty v Vanguard Charter Sch. Acad., 116 F.Supp.2d 897 (WD Mich, 2000).

<sup>95</sup> Wigg v Sioux Falls Sch. Dist./49-5, 382 F.3d 807 (8<sup>th</sup> Cir., 2004).

to their buildings to communicate their message to students during the school day. However, if a public school opens its doors to allow community groups to distribute literature to students, put up posters, etc., then private religious groups may also lawfully distribute religious literature under a neutral open access policy, even at the elementary school level (except in a few states).<sup>96</sup> If the public school itself distributes literature to students from local private community groups, it is unlawful for the school to discriminatorily deny access to community groups because of the religious content of their message.<sup>97</sup> For example, if the school hands out flyers for a private secular community group, the school must also hand out flyers for private religious groups.<sup>98</sup>

There even exists special federal statutory protection prohibiting schools receiving federal funds from discriminatorily denying access to schools by the Boy Scouts of America.<sup>99</sup> This law was a response to negative treatment of Boy Scouts by some schools after the U.S. Supreme Court upheld the Boy Scout's decision refusing to allow homosexual troop leaders. However, one exception to the general rule must be noted. One court has held that community group literature messages which overtly urges a reader to adhere to a particular religion may not be distributed by the public school.<sup>100</sup> An invitation for a student to attend an event sponsored by a religious organization is not prohibited under this exception.<sup>101</sup>

## **VI. OTHER RESOURCES**

### **A. The 2003 U.S. Department of Education Guidance on Constitutionally Protected**

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<sup>96</sup> Rusk v Crestview Local Sch. Dist., 379 F.3d 418 (6<sup>th</sup> Cir, 2004) (upholding legality of school distribution of religious materials to elementary school students); Sherman v Community Sch. Dist., 8 F.3d 1160, (7<sup>th</sup> Cir, 1993) cert den 511 U.S. 1110 (1994) (school distribution of Boy Scout literature upheld even though Scouts require members to affirm belief in God); see also Scalise v Boy Scouts of America, 265 Mich App 1 (2005) 1v den 473 Mich 853 (2005) (public elementary school distribution of Boy Scouts literature to students upheld); Daugherty v Vanguard Charter Sch. Academy, 116 F Supp 2d 897, 911-912 (WD 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 Peck v Upshur County Bd. of Educ., 155 F.3d 274 (4<sup>th</sup> Cir, 1998) (school distribution of community group religious materials permitted to junior high students, not elementary school students, but the court's rationale as to elementary students was expressly rejected by the Sixth Circuit (which controls Michigan) in Rusk, supra).

<sup>97</sup> Child Evangelism Fellowship of Maryland v Montgomery County Public Schools, 457 F.3d 376 (4<sup>th</sup> Cir, 2006) (exclusion of religious organization from right to submit flyers for distribution by school to elementary school students was unlawful); Hills v Scottsdale Unified Sch. Dist., 329 F.3d 1044 (9<sup>th</sup> Cir., 2003) cert. denied 124 S.Ct. 1146 (2004); Child Evangelism Fellowship of Md., Inc. V Montgomery County Pub. Sch., 373 F.3d 589 (4<sup>th</sup> Cir., 2004); Child Evangelism Fellowship of N.J., Inc. v Stafford Twp. Sch. Dist., 386 F.3d 514 (3<sup>rd</sup> Cir., 2004).

<sup>98</sup> See cases in prior footnote.

<sup>99</sup> 29 U.S.C. Section 7905.

<sup>100</sup> Hills v Scottsdale Unified Sch. Dist., 329 F.3d 1044 (9<sup>th</sup> Cir., 2003) cert. denied 124 S.Ct. 1146 (2004).

<sup>101</sup> See Hills, supra, Rusk, supra, Montgomery Sch. Dist., supra and Stafford Twp. Sch. Dist., supra.

### **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.

#### **B. The 1998 U.S. Department of Education Guidelines Letter on Religion in the Public Schools (attached hereto as Exhibit B).**

This is an excellent and quite accurate summary of the law on the subject. It is a document that a local public school can easily incorporate as a policy statement.

#### **C. 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 groups ranging from the Christian Legal Society to the American Civil Liberties Union (ACLU). It demonstrates that despite ideological differences, there is widespread agreement on many points about what the current law is on these subjects. Copies are available from my office or they can be obtained from the websites for the Christian Legal Society or the American Civil Liberties Union.

## **VII. CONCLUSION**

The topic of religion in the public schools can be a controversial one. Given the current state of the law, school officials can no longer play it safe by trying to lean toward one side or the other of the controversy. It is best to know what the law actually is and to follow it. Fortunately, there are some areas of the law concerning religion in the public schools that are now quite clearly defined. This should give public school officials greater confidence to adopt and apply policies to follow the law. I trust that this book has assisted school officials in doing just that.