Student Religious Expression

Texas Administrator Guide

Texas Association of School Boards
Legal Services

512.467.3610 • 800.580.5345
legal@tasb.org
Student Religious Expression  
Texas Administrator Guide  
TASB Legal Services

As discussed in the document entitled *First Amendment Basics*, districts must balance the U.S. Constitution First Amendment Establishment Clause’s prohibition on the establishment of religion by districts with individuals’ rights to free expression of their religious beliefs, as protected by the Free Exercise Clause, and to freedom of speech, as protected by the Free Speech Clause. This balance between these principles and the protections found in federal and state statutes shapes the bounds of permissible student religious expression on campus.

---

**Voluntary Prayer**

Prayer is allowed when it is student-initiated and not disruptive to the school program. Prayer may not be sponsored by the school district.

**Individual prayer is permitted:** A public school student has an absolute right to individually, voluntarily, and silently pray or meditate in school in a manner that does not disrupt the instructional or other activities of the school. A person may not require, encourage, or coerce a student to engage in or refrain from such prayer or meditation during any school activity. Tex. Educ. Code § 25.901. Nothing in the U.S. Constitution prohibits any public school student from voluntarily praying at any time before, during, or after the school day. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

**Group prayer is permitted:** Students may pray in groups during non-instructional time, as long as they are not disruptive and do not harass other students. *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995). For example, group prayer during lunch time, in common areas, or at the flag pole are all permissible practices.

**School-sponsored prayer is not permitted:** A public school may not allow a prayer to be given over the public address system before school begins or during the school day, even if such prayer is given by a student volunteer. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff’d mem.*, 455 U.S. 913 (1982).

**Moments of silence are permitted only for secular reasons:** The Texas Education Code mandates that school districts provide for a one-minute period of silence following the recitation of the pledges of allegiance to allow each student to reflect, meditate, pray, or engage in other silent activity that does not disrupt or distract another student. Teachers and other school employees must ensure that no student is distracted or interfered with by other students during this one-minute period. Tex. Educ. Code § 25.082(d). The state statute has been upheld as
constitutional because, despite the views expressed by some of the legislators considering passage of the legislation, overall the law had a secular purpose. Croft v. Governor of Tex., 530 F. Supp. 2d 825 (N.D. Tex. 2008). See also Bown v. Gwinnett County Sch. Dist., 112 F.3d 1464 (11th Cir. 1997) (upholding state statute requiring a moment of silence each school day); Brown v. Gilmore, 258 F.3d 265 (4th Cir. 2001) (upholding a state statute that required a minute of silence each day for students to meditate, pray, or engage in any other silent activity). Nevertheless, a moment of silence would violate the First Amendment if it were used as a way to coerce prayer in the classroom. See Doe v. Sch. Bd. of Ouachita Parish, 274 F.3d 289 (5th Cir. 2001) (invalidating state statute specifically amended to delete “silent” from phrase “silent prayer” in moment of silence law).

Even if Texas’s minute of silence law was adopted with a secular purpose, a classroom teacher could still violate the constitution if he coerced, endorsed, or conversely, was hostile toward prayer in the way he administered the minute of silence. Districts should offer educators specific guidance or an optional script for introducing and overseeing the minute of silence.

In Assignments

Public school students have a First Amendment right to freedom of expression, and they do not shed that right while attending public school. Students sometimes choose to exercise their right to self expression by talking about their religious beliefs, and sometimes that expression happens during instructional time. In general, school officials must assess schoolwork that contains religious expression on the same terms as other schoolwork.

Student’s free speech rights: Students are permitted to express religious beliefs in their schoolwork, and teachers may not reward or penalize students based solely on their choice to include religious themes or content. A teacher should grade schoolwork with religious content on the same basis as other schoolwork. See, e.g., Settle v. Dickson County Sch. Bd., 53 F.3d 152 (6th Cir. 1995) (concluding that a teacher did not violate a ninth grader’s free speech rights by awarding a grade of zero on her research paper on the life of Jesus Christ because the student failed to follow instructions by seeking advance approval of the topic). Moreover, the Texas Religious Viewpoints Antidiscrimination Act (RVAA), described in more detail at Student Speakers below, specifically provides that students may express religious beliefs in homework, artwork, and other written or oral assignments and be free from discrimination based on the religious content of their submissions. Tex. Educ. Code § 25.153.

School district’s educational mission: School officials may curtail speech that causes disruption or inappropriately interferes with the school’s operations. When student expression takes place as part of the school’s curriculum, educators may exercise editorial control over the style and content of student speech as long as their actions are reasonably related to legitimate pedagogical concerns. Hazelwood Sch. Dist. v Kuhlmeier, 484 U.S. 260 (1988). At the same time, however, educators must be viewpoint neutral in exercising their editorial control. For
example, in response to an assignment to prepare a poster showing ways in which children could help the environment, a kindergartener prepared a poster showing a figure of Jesus praying. Educators censored the poster. The Second Circuit Court of Appeals determined that the assignment could be rejected on instructional grounds, such as the fact that the assignment was to show what was learned during the class unit and the unit did not include religious content. On the other hand, if the educators’ actions in censoring the poster were based solely on the poster’s religious viewpoint, their actions would have constituted religious discrimination. *Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617 (2d Cir. 2005).

**Age and understanding of the audience:** Pedagogical concerns are heightened in the elementary school environment where students are impressionable and less likely to understand the difference between private action and government action. As one court has observed, “In conventional elementary school activities, the age of the students bears an important inverse relationship to the degree and kind of control a school may exercise: as a general matter, the younger the students, the more control a school may exercise.” *Walz ex rel. Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 276 (3d Cir. 2003).

**Rights of the other students:** Students have a right to be free from school-sponsored actions that endorse religion. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000). In a federal district court case, the court upheld a classroom teacher’s decision to permit a student to read a book with religious content to the teacher, but not the whole class, although other students were permitted to read their non-religious stories to the class. *C.H. ex rel. Z.H. v. Oliva*, 990 F. Supp. 341 (D.N.J. 1997), aff’d in relevant part, 226 F.3d 198 (3rd Cir. 2000) (en banc). See also *DeNooyer v. Merinelli*, 12 F.3d 211 (6th Cir. 1993) (per curiam) (upholding teacher’s decision to stop student from showing religious video during show-and-tell because second-grade classroom was nonpublic forum subject to reasonable restrictions and legitimate pedagogical concerns).

**Clear parameters for student expression during classroom instruction recommended:** In some circumstances, controversy may be avoided by carefully designing and describing classroom activities. The key legal question in this area is whether religious content was private student speech or school-sponsored government speech. Teachers can help students, parents, administrators, lawyers, and judges have a better understanding of when a door has been opened for personal expression by articulating assignments clearly and documenting lesson plans. For example, in one federal court case, a school district’s decision not to permit a student to distribute candy canes with religious messages during a class party was upheld in part because the classroom teacher had articulated curricular goals related to the party, namely, promoting sharing and social interaction. *Walz ex rel. Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271 (3d Cir. 2003). See also *Morgan v. Plano Indep. Sch. Dist.*, No. 404CV447, 2007 WL 906453 (E.D. Tex. Mar. 22, 2007) (approving a school district policy that permitted distribution of nonschool material only at designated school parties).
Student Led Groups

Religious groups can meet on campus on the same terms as other nonschool-sponsored groups.

**District policies must be viewpoint neutral:** If noncurriculum-related student groups meet on campus, student clubs of a religious nature must be permitted to meet on school property, subject to the same rules and privileges as the other non-curricular student groups. In secondary schools, student-organized, student-led groups meet pursuant to school district policies established under the federal Equal Access Act. 20 U.S.C. § 4071. Under the Equal Access Act, employees may be present at student religious meetings only in a non-participatory capacity. 20 U.S.C. § 4071(c)(3). In both elementary and secondary schools, community groups, including adult-led groups attended by students, such as the Good News Club or the Boy Scouts, often meet on campus pursuant to local school district policy. Under the First Amendment, these policies must be viewpoint neutral; schools must permit community groups that espouse religious viewpoints to have the same access to school facilities as that extended to community groups espousing secular viewpoints. *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).

**No Establishment Clause violation:** The U.S. Supreme Court considered this issue in *Good News Club v. Milford Central Schools*, 533 U.S. 98 (2001). In *Milford*, a school district’s policy opened school facilities for social, civic, and recreational meetings but prohibited religious uses. The school district applied this policy to prohibit use by the Good News Club, a community-based Christian youth group open to children between the ages of six and twelve. The Court concluded that permitting the meetings on campus would not violate the Establishment Clause, even though the students involved were very young. In the Court’s opinion there was no danger of coercion because the meetings were not school sponsored and students’ parents—not the children themselves—decided whether the students would attend. In *Culbertson v. Oakridge School District No. 76*, the Ninth Circuit Court of Appeals applied *Milford* to a similar case involving the Good News Club that included even younger students and met immediately after school. *Culbertson v. Oakridge Sch. Dist. No. 76*, 258 F.3d 1061 (9th Cir. 2001).

**Texas RVAA:** In addition to these federal laws, the Texas Religious Viewpoints Antidiscrimination Act (RVAA), described in more detail at Student Speakers below, provides that students may organize prayer groups, religious clubs, “see you at the pole” gatherings, and other religious gatherings before, during, and after school to same extent students are permitted to organize other non-curricular groups or gatherings. Such groups are entitled to the same access to facilities as other non-curricular groups. Additionally, if student groups that meet for nonreligious activities are permitted to advertise or announce meetings, groups that meet for religious purposes must be given the same opportunities to advertise or make announcements. School districts may disclaim sponsorship of these groups in a manner that neither favors nor disfavors groups that meet for religious purposes. Tex. Educ. Code § 25.154.
**Recommended facilities use policies:** In most Texas school districts, TASB Policies FNAB(LEGAL) and (LOCAL) govern meetings of student-led, student-initiated noncurriculum-related groups at school facilities during noninstructional time. Typically, these policies provide a limited open forum for meetings of secondary school students, but not elementary students. On the other hand, TASB Policy GKD(LOCAL) governs the use of school facilities for community group meetings, including meetings organized by adults but attended by students. In most districts, these policies create a limited public forum for community group meetings under certain conditions, such as seeking access on a “first come, first served basis,” paying a usage fee, or providing proof of insurance.

---

**Student Speakers**

Students’ right to share their religious beliefs while speaking publicly at school and at school events is more limited than religious expression alone and within groups of friends because the speech could be interpreted to be school sponsored.

**Student Speakers Generally**

School-sponsored speech may not have a devotional purpose, even when it is offered by a student volunteer. Local policies may attempt to clarify that student speech is not school sponsored.

**Even student-given speeches can be considered school-sponsored:** A public school may not permit school-sponsored prayer to be given over the public address system at school or school events, even if the prayer is given by a student. In *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), the U.S. Supreme Court held that a school district’s policy permitting a student volunteer to provide an invocation before games violated the Establishment Clause due to several factors. First, the invocations in Santa Fe ISD were authorized by official policy and took place on government property, at government-sponsored events, and under the supervision of school employees. As a result, the Court refused to conclude that the pregame invocations could be considered private speech. In addition, even though attendance at football games was not mandatory, the Court felt that students should not be forced to choose between attending and facing what might be a personally offensive religious ritual. Finally, the Court took issue with the school district’s election system for choosing a student speaker. Electing a student speaker would tend to result in the majority viewpoint being selected, to the exclusion of minority viewpoints. The Court held that the school district’s policy “is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events.” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000).
Can student-initiated prayer in public ever be considered private? Under Santa Fe, when speech is school-sponsored, schools must limit religious speech in order to avoid an unconstitutional establishment of religion. When student speech is private, however, a school district may not restrict the content of the student’s speech absent a compelling interest. Do schools have a compelling interest in avoiding an establishment of religion by limiting student religious speech? Although federal courts have disagreed on this issue, at least one federal circuit court has concluded that individual rights prevail. An Alabama statute allowed nonsectarian, nonproselytizing student-initiated prayer, invocations, and benedictions during compulsory or noncompulsory school-related assemblies, sporting events, graduation ceremonies, and other school-related events. The Eleventh Circuit Court of Appeals held that genuinely student-initiated religious speech must be permitted without oversight or supervision by the school district, subject only to the same reasonable time, place, and manner restrictions applied to all other student speech. In the wake of Santa Fe, the U.S. Supreme Court vacated and remanded the Eleventh Circuit’s decision. On remand, however, the Eleventh Circuit reinstated its original decision, stating that the decisions were complementary rather than inconsistent. One prohibits government sponsorship of religious speech, while the other prohibits government censorship of religious speech. Chandler v. Sielgelman, 230 F.3d 1313 (11th Cir. 2000).

Texas statute characterizes public student speech as private: The Texas Religious Viewpoints Antidiscrimination Act (RVAA), also known as the Schoolchildren’s Religious Liberties Act, has four primary components: (1) a school district must treat a student’s voluntary expression of a religious viewpoint on an otherwise permissible topic the same way it would treat voluntary student expression of a secular viewpoint; (2) students who express religious beliefs in homework, artwork, and other written or oral assignments must be free from discrimination based on the religious content of their submissions; (3) students may organize prayer groups, religious clubs, “see you at the pole” gatherings, and other religious gatherings before, during, and after school to same extent students are permitted to organize other non-curricular groups or gatherings; and (4) school districts are required to adopt a policy that establishes a limited public forum for student speakers at all school events at which a student is to publicly speak. Tex. Educ. Code §§ 25.151-.154.

Under its student speaker policy, a school district must: not discriminate against student speakers who express religious viewpoints on otherwise permissible topics; provide neutral criteria for the selection of student speakers at school events and graduation; ensure that student speech is not offensively lewd, obscene, vulgar, or indecent; and include a disclaimer, in writing, orally, or both, to clarify that students’ speech does not reflect the endorsement, sponsorship, position, or expression by the school district. Tex. Educ. Code § 25.152.

RVAA offers a state model policy: A unique aspect of the RVAA is that it includes a model, but not mandatory, local school district policy (state model policy). See Tex. Educ. Code § 25.156. School districts may: (1) adopt the state model policy, (2) adopt a policy “substantially identical” to the state model policy, or (3) adopt a policy that differs from the model but still creates a limited public forum. See Tex. Educ. Code §§ 25.152, .155-.156. School districts that adopt the state model policy or a substantially identical policy will be deemed in compliance
with the RVAA. Tex. Educ. Code §§ 25.155-.156. No definition of substantively identical is provided. On the other hand, policies that are not substantially identical may or may not comply with the RVAA; there is no guarantee.

The state model policy includes each of the four statutorily required components, plus additional details regarding limited public forums. The state model policy creates a limited public forum for student speakers at all school events at which a student is to publicly speak. The policy lists football games, opening announcements and greetings for the school day, and other events designated by the school district as events having an introductory limited public forum. Students in the highest two grade levels are eligible to speak in the limited public forum. Within that age group, the students must hold a position of honor, such as student council officers, senior class officers, football captains, and other honorary positions designated by the school district. The state model policy goes on to include numerous other detailed provisions about speaker selection and scheduling, disclaimers, and graduation ceremonies. Tex. Educ. Code § 25.156.

Alternatives to the state model policy: Due to a variety of practical and legal considerations, many school districts have adopted a policy that differs in some way from the state model policy. The variations are limitless, but common changes include changing the designated school events with introductory student speakers, changing the speaker selection process, and/or adding definitions into the policy in an attempt to guide uniform enforcement of the policy. Other districts are still exploring their options or have made a conscious decision not to adopt a new policy in response to the RVAA. For a side-by-side comparison of the pros and cons of the various policy options, see the attachment entitled RVAA Policy Options.

Possible challenges to the RVAA: The limited public forums created pursuant to the RVAA offer an opportunity for student expression without school officials controlling or disciplining students based on the viewpoints they express. This opportunity for student speech may be welcomed by many school districts. Nevertheless, establishing limited public forums for student speech may subject school districts to practical and legal challenges—even if the school districts are complying with the RVAA. New opportunities for student free speech raise the possibility that some speech will be controversial. For example, religious speech that expresses the viewpoint of a minority religion may cause controversy in some communities. Parents who initially supported the idea of student speeches may withdraw their support upon learning that their children have been exposed to viewpoints that differ from their own. On the other hand, implementation of RVAA policies raises the risk of an “as applied” challenge to the policies. A family professing a minority religious view in a school district that creates limited public forums that, over time, are used solely or primarily by students professing majority religious views may be able to establish that a school district’s policy adopted under the RVAA nevertheless violates the First Amendment as interpreted by the U.S. Supreme Court in Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).
Graduation Ceremony Speakers

Although the U.S. Supreme Court has ruled that school officials cannot arrange for prayer to be included in a graduation ceremony, questions remain about the circumstances under which a student might independently elect to include prayer as part of his or her remarks during such an event.


Graduation speeches: Graduation speeches cannot contain sectarian or proselytizing language if the speeches are properly characterized as school sponsored. For example, a California appellate court permitted a school district to edit the content of commencement addresses because the content of the speech was sectarian. The court held that the degree of school sponsorship and control over the speech made it state-sponsored speech. Consequently, to permit students to deliver sectarian speeches would have violated the Establishment Clause. *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092 (9th Cir. 2000). See also *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979 (9th Cir. 2003) (upholding a school district’s decision to edit proselytizing text from a student’s graduation speech). The RVAA takes specific steps to disclaim that student speeches are not school sponsored. Whether these declarations will hold up under legal challenge remains to be seen.

Student-initiated graduation prayer before *Santa Fe*: The Fifth Circuit Court of Appeals upheld student-initiated, student-led, nonsectarian, nonproselytizing prayer at graduation. *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992). The Fifth Circuit affirmed this holding in a number of subsequent cases, including its opinion in the *Santa Fe* appeal. *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806 (5th Cir. 1999).

Student-initiated graduation prayer after *Santa Fe*: To many, the U.S. Supreme Court’s reasoning in *Santa Fe* seems to prohibit even student-led prayer at graduation. Significantly, however, the U.S. Supreme Court was asked but declined the opportunity to reverse the Fifth Circuit’s decision regarding graduation prayer in the *Santa Fe* appeal. *Santa Fe Indep. Sch. Dist. v. Doe*, 528 U.S. 1002 (1999). After *Santa Fe*, another federal circuit court, the Eleventh Circuit Court of Appeals, affirmed en banc an earlier opinion upholding a policy permitting seniors to elect to have unrestricted student-led messages at the beginning and end of graduation ceremonies. In the court’s opinion, the student messages made possible by this policy need not be constrained because the messages would constitute purely private speech. *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330 (11th Cir. 2001).
**Student-initiated graduation prayer after the RVAA:** A primary purpose of the RVAA was to indicate in state law and local school district policies that school districts do not sponsor student speech, including prayer, at events such as graduation. See Tex. Educ. Code §§ 25.152, .156 (requiring disclaimers in local policy). In this respect, the RVAA echoes the U.S. Department of Education’s (DOE) Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools, available at [www.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html](http://www.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html). The guidance provides that when student speakers are selected based on genuinely neutral and even-handed criteria, and when student speakers selected under such criteria retain primary control over the content of their expression, such student speech is not attributable to the school and may not be restricted for either its religious or anti-religious content. Both the RVAA and the DOE guidance rely on disclaimers and local school district policies to declare that student speech is not school sponsored. Whether the disclaimers will suffice will depend on the circumstances of any potential challenge.

---

**Distribution of Materials**

Religious materials can be distributed on the same terms as all other nonschool materials.

**Forum analysis:** Cases involving the distribution of proselytizing or other nonschool materials on school campuses by students and community members require courts to engage in *forum analysis*. If local school district policy or practice permits distribution or posting of noncurriculum-related materials on school grounds, the Free Speech Clause prevents a district from discriminating based on the viewpoints, including religious viewpoints, expressed in the materials. *Hedges v. Wauconda Cmty. Unit Sch. Dist.*, No. 118, 9 F.3d 1295 (7th Cir. 1993); *Rivera v. East Otero Sch. Dist.*, 721 F. Supp. 1189 (D. Colo. 1989). For example, a district engaged in unconstitutional viewpoint discrimination when it refused to permit distribution of camp brochures expressing a religious viewpoint on otherwise permissible subject matter. *Hills v. Scottsdale Unified Sch. Dist.*, No. 48, 329 F.3d 1044 (9th Cir. 2003) (per curiam). Courts have held that schools do not violate the Establishment Clause by permitting religious viewpoints to be disseminated as part of an open forum for communication. *E.g., Child Evangelism Fellowship of N.J. v. Stafford Twp. Sch. Dist.*, 233 F. Supp. 2d 647 (D.N.J. 2002) (granting a preliminary injunction to give Christian youth group access to school’s methods of distributing nonschool materials to students and posting nonschool materials).

**Viewpoint-neutral rules required:** Within an open limited public forum for distribution or posting of nonschool materials, distribution or posting cannot be denied solely on the basis of religious content. *See, e.g., M.B. ex rel. Martin v. Liverpool Cent. Sch. Dist.*, 487 F. Supp. 2d 117 (N.D.N.Y. 2007) (permitting an elementary student to distribute copies of her personal statement of faith to classmates during noninstructional time). Distribution or posting can be denied on other, viewpoint-neutral grounds, however. *See, e.g., Walz ex rel. Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271 (3d Cir. 2003) (concluding that a student’s First Amendment
rights were not abridged when his school prevented him from distributing gifts with religious messages to classmates during instructional time); *Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412 (3d Cir. 2003) (concluding that a student’s First Amendment rights were not abridged when her school prevented her from circulating a petition criticizing a class trip to the circus during a quiet reading period or during recess on an icy playground).

**Time, place, and manner restrictions permitted:** Within an open limited public forum for distribution or posting of nonschool materials, the district can impose reasonable *time, place, and manner* restrictions on distributors. *Cornelius v. NAACP Legal Def. and Educ. Fund*, 473 U.S. 788 (1985). For example, a campus could adopt a *place* restriction that required all materials to be placed on a particular table in the front office. The campus could impose a *manner* restriction that required all remaining materials to be picked up after a certain number of days. A common example of a reasonable time, place, and manner restriction in the elementary setting is a restriction that permits community members to stack materials in a specified location but does not have district staff facilitate distribution by handing the materials to students or placing materials in students’ backpacks.

**Literature distribution policies:** In most Texas school districts, TASB Policy FNAA(LOCAL) governs the distribution of nonschool materials by students, while TASB Policy GKDA(LOCAL) governs the distribution of nonschool materials by community members, including parents. In most districts, these policies create a limited public forum for distribution of nonschool materials. Typically, materials to be distributed or posted on campus must be submitted for prior review; the purpose of the review is to ensure that the materials do not contain any of the specified categories of prohibited content, such as speech that is defamatory, that advertises or encourages the use of illegal drugs, or that is reasonably calculated to cause a material disruption of school operations. *See Pounds v. Katy Indep. Sch. Dist.*, 517 F. Supp. 2d 901 (S.D. Tex. 2007) (upholding facial constitutionality of district’s FNAA(LOCAL) with the provisions described above).

**Written campus guidelines for literature distribution recommended:** In most districts, board-adopted literature distribution policies provide that campus principals will make appropriate time, place, and manner restrictions for their campuses. By law, these rules must be reasonable and viewpoint neutral. The rules should also be written, circulated, and posted in appropriate ways and consistently applied. Even if campus rules are quite restrictive with respect to mass distribution or posting of materials by community members, campus rules should leave ample opportunities for students to share written materials with each other in the ordinary course of social interaction. *See Pounds v. Katy Indep. Sch. Dist.*, 517 F. Supp. 2d 901 (S.D. Tex. 2007) (upholding FNAA(LOCAL) provisions delegating time, place, and manner decisions to campus administrators and permitting up to ten copies of students’ nonschool materials to be distributed without prior review).
Religious Diversity

Students or their parents may request one of several exemptions from district requirements based on their religious beliefs.

Attendance

Temporary absence to observe a religious holy day required: A school district must excuse a student from attending school for the purpose of observing religious holy days, including traveling for that purpose. A student whose absence is excused to observe a religious holy day may not be penalized for the absence and must be allowed a reasonable time to make up the school work missed. If the student satisfactorily completes the school work, the day missed will be counted as a day of compulsory attendance. Tex. Educ. Code § 25.087(b).

Because absences for religious holy days must be counted as days of attendance when school work is made up, perfect attendance awards may not be withheld on the basis of excused absences for observance of religious holidays. Op. Tex. Att’y Gen. No. JC-99 (1999). On the other hand, absences for holy days excused under Texas Education Code section 25.087(b) do not count as days of attendance for the purpose of the 90 percent rule, found at Texas Education Code section 25.092. Regardless of whether the absences are excused, the student must actually be in attendance 90 percent of the days a class is offered in order to receive credit for the course, unless the district’s attendance committee determines that extenuating circumstances existed. Op. Tex. Att’y Gen. No. JC-398 (2001).

To the extent the Texas Education Code does not resolve a question about attendance, consider also the Free Exercise Clause and Texas Religious Freedom Restoration Act (RFRA). In a case predating the current Texas Education Code, members of a church requiring abstinence from secular activity on seven annual holy days, causing students to miss between eight and ten school days per year, successfully challenged a school district policy that limited excused absences for religious holidays to two days per school year and required that students receive zeros for days with unexcused absences. The court held that the district’s policy violated the students’ free exercise rights, because no compelling governmental interest justified the significant burden on the students’ religious practice. Church of God (Worldwide, Tex. Region) v. Amarillo Indep. Sch. Dist., 511 F. Supp. 613 (N.D. Tex. 1981), aff’d, 670 F.2d 46 (5th Cir. 1982).

Temporary absence based on objections to curriculum permitted: Parents may temporarily remove their children from classes or school activities that conflict with their religious or moral beliefs by providing the teacher with a written statement to that effect; however, the removal may not be to avoid a test or for an entire semester, and the exemption from instruction does not exempt the child from grade level and graduation requirements. Tex. Educ. Code § 26.010.
Requests for release time for religious instruction permitted: Public schools may, but are not required to, permit release time for public school students to attend religious classes, so long as the religious classes are not on public school property and the public schools do not coerce students to attend religious instruction or punish those who do not attend. Zorach v. Clauson, 343 U.S. 306 (1952).

Patriotic Observances

Exemption from the Pledges of Allegiance required: Texas, like many other states, requires its public school students to recite daily the pledges of allegiance to the United States and state flags. On request from a student’s parent or guardian, a school district must excuse the student reciting a pledge. Tex. Educ. Code § 25.082(b), (c).

Freedom of speech: A Florida statute almost identical to Texas Education Code section 25.082 has been upheld in part and declared unconstitutional in part. Cameron Frazier, an eleventh grade student with Palm Beach County School District, refused to say or stand during the pledge of allegiance due to his personal political beliefs. The district’s policies, applying a Florida state statute, mandated that students recite the pledge unless excused by a parent’s written request. On Frazier’s behalf, his mother sued school officials for violations of his First and Fourteenth Amendment rights. The court considered Frazier’s First Amendment claims and determined that students do have the right to make determinations regarding their participation in the pledge, a right that was not changed by the U.S. Supreme Court’s decision in Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004). The court also pointed out that Frazier was asserting his right not to participate, not the daily recital of the pledge in all state classrooms, and that right was not compromised by his parents’ rights to guide his education. The court held the statute unconstitutional on its face and enjoined the district and those associated with it from requiring a student to recite the pledge, to obtain parental permission not to recite the pledge, or to stand during the pledge. Frazier v. Alexandre, 434 F. Supp. 2d 1350 (S.D. Fla. 2006).

The Eleventh Circuit Court of Appeals disagreed. The Eleventh Circuit concluded that parents’ rights to guide their children’s education do outweigh the students’ rights to free speech. The Court reversed the lower court’s opinion on that point. However, the Court did agree with the lower court that students may not be required to stand during the pledge, upholding that portion of the decision. Frazier v. Winn, 535 F.3d 1279 (11th Cir. 2008).

Dress and Grooming Codes

Exemptions from uniform requirements required: Under Texas Education Code section 11.162, authorizing the adoption of uniform policies, parents may seek an exemption from a school uniform requirement or request a transfer to a campus without such a requirement based on a bona fide religious objection. Tex. Educ. Code § 11.162.
In addition, the Fifth Circuit Court of Appeals has assumed, for purposes of a constitutional challenge to a uniform policy, that a student’s manner of dress implicates the First Amendment. According to the court,

Clothing may also symbolize ethnic heritage, religious beliefs, and political and social views . . . . The Supreme Court suggested that clothing may have symbolic meaning in religious contexts . . . . We therefore disagree with the district court’s blanket assertion that, like the length of a male student’s hair, clothing does not contain sufficient communicative content.


After Forney ISD adopted a uniform policy and asked parents seeking a religious exemption to complete a questionnaire, parents filed suit claiming the policy violated students’ free speech rights, the parents’ right to direct the upbringing and education of their children, and the free exercise rights of some of the parents asked to fill out the questionnaire. In light of *Canady v. Bossier Parish School Board*, cited above, the court agreed that the policy implicated the students’ free speech rights, but the court found no violation because the policy met the U.S. Supreme Court’s standard for content-neutral restrictions on expressive conduct. The court refused to recognize parental rights claims based solely on secular objections to uniforms. Finally, the court rejected the parents’ free exercise objection to the questionnaire, concluding that the district’s opt out procedures were a neutral and rational means of evaluating the sincerity of requests for exemptions. *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275 (5th Cir. 2001). See also *S.L.W. ex rel. P.W. v. Crandall Indep. Sch. Dist.*, No. 027-R5-1101 (Tex. Comm’r of Educ. Sept. 9, 2003) (upholding a student’s application for a religious exemption to a district’s standardized dress policy based on the student’s religious objection to wearing unfeminine colors including khaki, navy blue, and black).

**Exemptions from hair length restrictions required:** Absent a compelling reason, a district must grant an exemption to a student who asserts an exemption to hair length restrictions based on a sincerely held religious belief. In one case, Native American students whose sincerely held religious beliefs required them not to cut their hair were granted a preliminary injunction against a school district grooming code that required male hair to be kept short. The students presented a hybrid rights case, requiring the school district to respond with a compelling rather than a rational reason for imposing the hair length rule. The students’ deeply held religious beliefs outweighed the district’s interest in the rule to promote discipline and public image. *Alabama & Coushatta Tribes of Tex. v. Trs. of Big Sandy Indep. Sch. Dist.*, 817 F. Supp. 1319 (E.D. Tex. 1993).
Absent a substantial disruption, religious symbols may not be specifically prohibited:
Though a district may establish a general dress code provision of neutral application, such as a ban on all t-shirts, a district may not specifically prohibit students from wearing religious symbols absent a substantial disruption. In one case, students who were prohibited by a school dress code provision concerning gang apparel from wearing rosaries as necklaces sued the district under 42 U.S.C. § 1983 for violation of their First Amendment rights. The court held that wearing the rosaries was religious expression akin to pure speech, and absent a substantial reason to believe wearing the rosaries would cause a disruption, application of the regulation to prohibit wearing rosaries was a violation of the students’ free speech rights. The court concluded that the application of the prohibition to rosaries also violated the students’ free exercise rights. *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659 (S.D. Tex. 1997). See also *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995) (ordering a school district to allow students of the Khalsa Sikh faith to wear ceremonial knives to school after the students successfully argued that a regulation prohibiting the knives placed a substantial burden on their free exercise of religion).

Growing safety concerns: Nevertheless, when student safety is at stake, courts may be increasingly willing to defer to the judgment of government officials. For example, in *Freeman v. State*, No. 2002-CA-2828, 2003 WL 21338619 (Fla. Cir. Ct. June 6, 2003), a Muslim woman brought suit under Florida’s Religious Freedom Restoration Act after her driver’s license was revoked because she refused to remove her niqab veil for the photograph. Being photographed without her veil was found not to substantially burden her free exercise of religion, in light of the fact that the state was willing to have her unveil in front of only a female employee. The court also found that the state had a compelling law enforcement interest in having a driver’s license picture of the woman without her veil.

Health Requirements

Exemptions from immunizations required: Under the Texas Education Code, immunization is not required for admission to public school if the applicant for admission submits an affidavit signed by the applicant or, if a minor, by the applicant’s parent or guardian stating that the applicant declines immunization for reasons of conscience, including a religious belief. The affidavit must be notarized and submitted on the official form promulgated by the Texas Department of State Health Services. A person who has not received the required immunizations for reasons of conscience, including because of the person’s religious beliefs, may be excluded from school in times of emergency or epidemic declared by the commissioner of public health. Tex. Educ. Code § 38.001; 25 Tex. Admin. Code § 97.62. See also *City of New Braunfels v. Waldschmidt*, 109 Tex. 302 (Tex. 1918) (concluding that generally applicable vaccination requirement was a valid use of the city’s police power and did not violate the constitutional rights of Christian Scientist objectors).
**Exemptions from drug testing not required:** A district is not required to exempt a student from a mandatory drug testing policy based on religious belief if the policy does not single out religion and is rationally related to a legitimate governmental interest. A parent whose children were subject to a drug testing policy in Marble Falls ISD, sued the school district. The father claimed the drug testing policy would violate his children’s rights of religious freedom, privacy, and due process, because the children occasionally consumed wine as part of Jewish observances. The court found no free exercise violation under the state and federal constitutions because the policy was generally applicable and did not single out religion. The court found no due process violation because the policy was rationally related to a legitimate governmental interest. *Marble Falls Indep. Sch. Dist. v. Shell*, Nos. 03-02-00652-CV, 03-02-00693-CV, 2003 WL 1738417 (Tex. App.—Austin Apr. 3, 2003, no pet.).

---

**Tips to Remember**

A district should consider several tips when addressing concerns related to student religious expression.

**Know your district’s relevant policies:** Obviously, the legal and practical risks surrounding student religious expression are significant, so it is important that employees know and follow your local school district policy. If employees have any questions about how to interpret or implement the policy, they should ask the appropriate administrator, and the district should consider getting further guidance from your school district’s counsel.

**Be consistent:** Employees need to follow district policy and practices consistently. A school district would have a very difficult time defending a lawsuit in which school board policy and campus practices were not aligned. Moreover, if a campus official acted outside the bounds of clearly established law, he or she might lose the protection of qualified official immunity. Good communication with campus administrators and instructional staff is an essential part of reducing legal risks in this area.

**Train district staff on managing student religious expression:** All instructional and administrative staff need to develop a basic understanding of the competing rights and interests at stake. For example, instructional practices are often “hands on” and participatory, creating more opportunities for students to share personal perspectives in class. At the same time, students may lack the maturity to distinguish between the views of fellow students and those of their teacher or the school district. Teachers need to know how to respond with sensitivity to delicate situations. They also need specific guidance on where to seek answers when a constitutional law question pops up in the middle of classroom instruction.
In another example, the daunting task of implementing the required limited public forums under the student speaker policies will fall to campus administrators. They will be the ones ensuring that the crucial disclaimers are read or published, and they will be the ones deciding whether student speakers have gone beyond the limitations of their forums by speaking over the time limit or straying off the topic. Knowing the boundaries set by local policy, such as limits on topic and prohibited speech, and knowing when they are expected to set additional limits, such as time limits, is essential. Provide training and support for all employees facing tough questions, and document the fact that you provided the training.

**Be open with parents:** Being transparent with parents about the issues raised by religion in public schools is the first step to setting a tone of cooperation and mutual support. Use a variety of means to express your desire to comply with the law and respect the rights of all students. Tell students and parents who to talk to if they have a concern, and when they come to talk, be quick to listen and slow to react.

**Set boundaries for personal religious speech among students:** Employees with supervisory authority over students need to respect students’ rights to express their own religious viewpoints, but they also need to be vigilant for instances when private religious expression becomes perceived harassment or bullying based on religion. If a student speaker is not taking no for an answer and continues to pressure other students to join in a religious activity or accept religious literature, for example, supervisory employees need to intervene. Employees may also need to step in when a student is having trouble articulating an objection to a classmate’s religious advances. In a perfect world, this would be accomplished with sensitivity and without embarrassing any of the students involved.

**Do not argue about religious tenets:** Unfortunately for school administrators, there is no handy list of approved religions or religious tenets within each religion. The U.S. Supreme Court offers only a working definition, which asks whether a belief functions as religion in the life of the individual in question. To qualify as religious, a belief must “occupy the same place in the life of the [individual] as [would] an orthodox belief in God,” and the belief must be “sincerely held.” *United States v. Seeger*, 380 U.S. 163, 184-85 (1965). To be religious, a belief need not profess the existence of a supreme being; nor must a belief be logical, consistent, or comprehensible to others. *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981); *Welsh v. United States*, 398 U.S. 333 (1970). A school district should not attempt to assess the validity of a religious belief, but rather whether the belief is sincerely held and whether it functions as religion for the individual in question. *See, e.g., United States v. Ballard*, 322 U.S. 78 (1944) (concluding that trial judge was correct not to submit question of veracity of defendants’ religious beliefs to the jury).
Look for creative solutions: School districts, their employees, and their students are best served when school officials approach requests for religious accommodations with an open mind. When requests based on sincerely held religious beliefs are not accommodated, families are forced to choose between their faith and their students’ attendance at public school. But when school officials and school attorneys approach requests with a spirit of open dialogue and mutual understanding, most requests can be accommodated in the public school setting. This is not only wise risk management, but also a sound educational approach in our pluralistic democracy.

Have a plan: Despite the best of intentions, difficult situations will arise. Have a plan for how to put tough situations on hold. Know where to go for quick answers. Communicate with the relevant parents and staff about how and why you are seeking more guidance. Have a media plan for high profile situations.
## RVAA Policy Options

<table>
<thead>
<tr>
<th>Policy Options</th>
<th>Pros</th>
<th>Cons</th>
</tr>
</thead>
</table>
| Option 1: Adopt the state model policy | 1. May satisfy some local community groups.  
2. Unlikely that school districts will be sued by proponents of the legislation.  
2. Because the policy includes more opportunities for student speech through the broad venues of football games and morning announcements, individuals will have more opportunities to disagree with the policy or the district’s implementation of the policy.  
3. Only speakers who hold positions of honor, most of which are elected, are allowed to speak. As in *Santa Fe*, this may have the unconstitutional effect of limiting minority viewpoints or being “an improper majoritarian election on religion.”  
4. Key terms like *school event* and *publicly speak*, which trigger the requirement to create a limited public forum are not defined.  
5. As implemented, the model state policy may be interpreted by the courts as school-sponsored speech instead of private student speech.  
6. Despite attempts by some to characterize the state model policy as a “safe harbor,” opponents of the new legislation may sue school districts that adopt the state model policy. In the event of a challenge, the state’s attorney general may choose to defend the constitutionality of the statute itself, but the attorney general will not be in a position to defend the policy and implementation choices of individual school districts. |
<table>
<thead>
<tr>
<th>Policy Options</th>
<th>Pros</th>
<th>Cons</th>
</tr>
</thead>
</table>
| **Option 2: Adopt an alternative policy** | 1. Complies with the statutory requirements in the RVAA.  
2. Some alternatives may be “substantially identical” to the state model policy.  
3. May limit the number of speaking venues so there are fewer opportunities for challenges.  
4. May allow all students who volunteer to participate, in an attempt to eliminate the *Santa Fe* problem with majoritarian elections.  
5. TASB alternative defines the terms *school event* and *publicly speak* so it is clear when the limited public forum is triggered.  
6. May restrict eligibility for students placed in disciplinary settings.  
7. May add limits on speech that would result in a material or substantial disruption of school operations. | 1. Proponents of the new law have threatened to sue any school district that does not adopt the state model policy.  
2. Unless the alternate is “substantially identical” to the model policy, it is not explicitly deemed to be in compliance with the statute.  
3. As implemented, an alternate policy may be interpreted by the courts as school-sponsored speech and not private student speech. |
| **Option 3: Do not adopt a policy** | Other school districts can serve as the “test case” on this issue. | 1. Because litigation moves slowly, schools are unlikely to receive a quick judicial determination as to whether the statute and policy are lawful.  
2. Districts with no policy may be sued by RVAA proponents.  
3. The district may not have insurance coverage if determined not to be in compliance with state law.  
4. If sued, individual school officials may lose good faith qualified immunity. |

Alternatives to the state model policy are available. For example, in its *Urgent Starting Points on Student Expression*, TASB offered an alternative policy based on the state model policy. Several private law firms also offered language to assist districts in further customizing the TASB alternative policy.