# Employee Religious Expression

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**The First Amendment and Public Schools**

The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . . U.S. Const. amend. I. The First Amendment applies to school districts as political subdivisions of the state through the Fourteenth Amendment. *Engel v. Vitale*, 370 U.S. 421 (1962).

**A. The Establishment Clause prohibits schools from advancing, coercing, or explicitly endorsing a particular religion or religion over non-religion.**

In a 1971 case involving state assistance for religiously affiliated private schools, the U.S. Supreme Court held that to avoid an "establishment" of religion, a government action must have a secular purpose, not have the primary effect of advancing or inhibiting religion, and not foster an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In subsequent cases, the Court expanded on the so-called *Lemon* test, holding that a school district must not persuade or compel a student to participate in a religious exercise or endorse religion in the public schools. *Lee v. Weisman*, 505 U.S. 577 (1992); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

In more recent cases, including disputes involving a World War I memorial cross on public property and prayer by local clergy at a city council meeting, the Court declined to follow *Lemon*, replacing the endorsement test with other factors such as the history of longstanding monuments and practices. In 2022, the Court decisively overturned *Lemon* in *Kennedy v. Bremerton School District*, a case involving an assistant high school football coach in Washington who successfully asserted a constitutional right to kneel and pray on the 50-yard line after football games. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (June 27, 2022).

The Establishment Clause still prohibits school districts from advancing religion or coercing students to join in religious activities. However, while districts in the past may have found a need to avoid violating the Establishment Clause by censoring implicit or indirect religious endorsements by employees, districts now may need to show that the endorsement was explicit or coercive in order to defend disciplinary action against an employee for private, personal expression.

**B. The Free Exercise Clause and Texas law prohibit schools from unduly burdening citizens' free exercise of religion.**

1. **Federal law:** The Free Exercise Clause prohibits the government from passing laws or establishing practices that specifically target adherents of particular faiths. Under the federal Free Exercise Clause, the government may, however, adopt and apply neutral, generally applicable laws and practices. *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990). "A government policy will not qualify as neutral if it is specifically directed at . . . religious practice." *Kennedy v. Bremerton,* 2022 WL 2295034 (June 27, 2022), *citing Employment Div., Dep't of Human Res. Of Or. v. Smith,* 494 U.S. 872 (1990).

2. **Texas law:** Under the Texas Religious Freedom Restoration Act, a school district may not substantially burden a person's free exercise of religion unless the school district can show that it is imposing the burden in furtherance of a compelling interest and that it is doing so through the least restrictive means available. Tex. Civ. Prac. & Rem. Code § 110.003.

**C. The Free Speech Clause and Texas law protect private speech and prohibit the government from discriminating against individual viewpoints.**

1. **Free Speech:** First amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). "That the First Amendment doubly protects religious speech is no accident. It is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (June 27, 2022).

2. **Public forums:** School officials can open school facilities for public use—in other words, create a *public forum*—through the policies or practices of the district or an individual campus. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000). Within a limited public forum, limits on expression must be viewpoint-neutral and reasonable in light of the purpose of the forum. The government may impose reasonable time, place, and manner restrictions, as long as these restrictions do not relate to the content of the expression. *See generally Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985) (federal government may exclude certain groups from federal charitable drive because First Amendment does not forbid viewpoint-neutral exclusion of speakers who would disrupt nonpublic forum). If a government exerts no control over the use of a public forum, then it may not ban religious expression within the forum. *See Shurtleff v. Boston*, 142 S. Ct. 1583 (2022) (holding City of Boston could not reject Christian flag based on Establishment Clause concerns where the City's flag-raising program was not government speech).

**D. Together, these laws protect private religious expression but prohibit government action to advance, coerce, or endorse religion in the public schools.**

1. **Not "religion-free zones:"** "The Religion Clauses of the First Amendment prevent the government from making any law respecting the establishment of religion or prohibiting the free exercise thereof. By no means do these commands impose a prohibition on all religious activity in our public schools. Indeed, the common purpose of the Religion Clauses 'is to secure religious liberty.' " *Santa Fe Indep. Sch. Dist*. *v. Doe*, 530 U.S. 290, 313 (2000) (citations omitted). The Establishment Clause does not "compel the government to purge from the public sphere" anything an objective observer could reasonably infer endorses or "partakes of the religious." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (June 27, 2022), *citing Van Orden v. Perry*, 545 U. S. 677, 699 (2005) (BREYER, J., concurring in judgment).

2. **Private speech protected:** "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." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quoting *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (opinion of O'Connor, J.) (emphasis in original)).

**E. Religious discrimination is prohibited in employment.**

On the basis of religion, an employer may not fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment; or limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee. 42 U.S.C.A. § 2000e-2 (Title VII); Tex. Lab. Code § 21.051.

## Overview

Like students, teachers' constitutional rights are not completely abandoned on campus; however, employees' ability to express their religious views on campus is more limited by their employment with the district.

**School district employee speech:** Employees do not enjoy the same level of First Amendment protections for symbolic speech that students do. In general, when a school district employee is acting in an official capacity, the employee acts as a representative of the school district, and not as a private citizen. The employee does not have personal First Amendment protection for speech undertaken in the course and scope of employment, and that speech may be regulated by the district. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). School employees may have free speech protection for their personal speech undertaken as private citizens, however.

**The *Pickering* balancing test for private speech:** In *Pickering v. Board of Education of Township High School District 205*, the U.S. Supreme Court devised a test to determine whether a government employer could regulate an employee's personal speech. If an employee's speech is not part of the employee's job duties but rather is spoken in a personal capacity related to a matter of public concern, a public employer must balance the employee's right to free speech with the employer's interest in maintaining the efficiency of its operations. Only if the employer's interest outweighs the employee's personal free speech rights may the employer regulate the employee's speech. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968).

In *Kennedy v. Bremerton*, the U. S. Supreme Court applied a *Pickering*-based test and determined that a Washington school district violated an assistant football coach's First Amendment rights to free exercise of religion and free speech when he was put on administrative leave after he refused to stop engaging in demonstrative prayer on the 50-yard line immediately after football games. The Court emphasized that Kennedy's prayers, which the Court characterized as private, personal expressions of gratitude, took place when his students were otherwise occupied and "when school employees were free to speak with a friend, call for a reservation at a restaurant, check email, or attend to other personal matters." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2415 (June 27, 2022).

Prior to the Supreme Court's decision in *Kennedy*, the Ninth Circuit Court of Appeals held that a California school district did not violate a calculus teacher's First Amendment rights by requiring the teacher to take down banners in his classroom that displayed phrases such as "In God We Trust," "God Bless America," and "God Shed His Grace on Thee" when they served no pedagogical purpose. The court concluded that though religion is a matter of public concern, the employee's displays constituted speech made in the employee's official capacity. The employee was acting within district policy permitting employees to decorate their classrooms

with appropriate displays, and the displays constituted expression to students during class time. Because the displays constituted employee speech, the teacher was not entitled to First Amendment protections, and the district could restrict the speech. *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954 (9th Cir. 2011).

Similarly, the Fourth Circuit Court of Appeals applied the *Pickering* test to find that religious materials a Spanish teacher displayed on a classroom bulletin board were not private speech by an individual on a matter of public concern but rather curricular speech over which the district could exercise control. *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687 (4th Cir. 2007). Based on these circuit court opinions, a court applying *Pickering* after the Supreme Court's holding in *Kennedy* might find that a school district's interest in regulating classroom instruction outweighs a teacher's right to religious expression, at least while the teacher is speaking in a more regulated environment than the aftermath of a high school football game.

**Employee religious expression limited:** As stated above, employees' statements in their official capacity are attributed to the school district. Consequently, courts in the past have found that employees are not at liberty to express their personal religious beliefs in a way that violates the constitutional prohibition on an establishment of religion. *See, e.g., Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995) (holding that teachers can neither participate in student-initiated prayer nor supervise students in prayer, because participation improperly entangles state representatives in religion and serves as a signal of state endorsement that would violate the Establishment Clause).

In *Kennedy*, the Court distinguished the coach's postgame prayers on the 50-yard line from previous cases in which prayer involving public school students was found to be problematic, including *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), in which the Court held that allowing students to pray over the loudspeaker at a football game violated the Establishment Clause. According to Justice Neil Gorsuch's majority opinion, Kennedy's prayers were different because they "were not publicly broadcast or recited to a captive audience," students "were not required or expected to participate," and, "in fact, none of Mr. Kennedy's students did participate in any of the three October 2015 prayers that resulted in Mr. Kennedy's discipline." Thus, in light of *Kennedy*, it appears that the endorsement analysis applied by courts in the past no longer applies to employee religious expression, as long as the expression is protected and there is no evidence that the employee coerced students to participate.

Like their employer, district employees are required to educate and serve all students equally regardless of religious faith. Students, particularly younger students, may have difficulty distinguishing between an employee's personal views and the lessons they are required to learn as part of the district curriculum. Depending on the circumstances, an employee's discussion of personal religious beliefs could have the effect of coercing students to develop similar beliefs.

Additionally, such discussion could contradict the beliefs of a student's parents, and thereby violate the parents' fundamental right to direct their child's education. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972) (upholding a free exercise objection to compulsory high school education by Amish students after applying a heightened standard of review stemming from the fact that the claims relied both on free exercise rights and fundamental parental rights to determine their children's upbringing).

## Praying with Students

A school employee may not lead or participate in a religious activity with students while acting in the employee's official capacity.

**Employee prayer with students:** Employees acting in their official capacity may not lead or participate in any student prayer. *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995). Prior to *Kennedy,* the Third Circuit Court of Appeals concluded that a coach's actions in praying with his student athletes before games and at other times was not protected by his personal First Amendment rights because he was not speaking as a private citizen on a matter of public concern. Rather, the coach violated the Establishment Clause when he bowed his head and took a knee while his team prayed. *Borden v. Sch. Dist. of East Brunswick*, 523 F.3d 153 (3d Cir. 2008). In *Kennedy*, the Court's majority and dissenting opinions conflict with respect to the impact of Kennedy's conduct on students. However, it was important to the case that Kennedy was suspended not for leading students in prayer but simply for continuing to pray on the 50-yard line after he was told not to. The majority of the Court considered the prayers private and not coercive towards students.

**Employee conversations with students:** When acting in an official capacity, it is risky for employees to discuss religious beliefs with students. In the past, federal courts in other jurisdictions have upheld the ability of school district employers to direct employees to refrain from such discussions. *See Marchi v. Bd. of Cooperative Educ. Services of Albany*, 173 F.3d 469 (2d Cir. 1999) (finding New York district's directive that special ed teacher not use religion in instruction did not violate teacher's First Amendment rights); *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1994) (finding California district's interest in avoiding Establishment Clause violation outweighed teacher's free speech interest in discussing religion with students during school day).

The Supreme Court's decision in *Kennedy* raises a question about the relevance of these earlier cases, especially to the extent that they rely on the *Lemon* test. In short, there is some risk in directing an employee to refrain from discussing the employee's religious beliefs with students, particularly if employees in a similar setting are allowed to discuss other types of non-instructional or personal topics with students. Training for employees should emphasize neutrality and explain the need to avoid coercion. Even parents who share the same faith as a teacher may complain if they think their child is being taught religious values at school.

When asked directly about their personal beliefs, school employees may decline to answer. For example, a biology teacher asked about evolution vs. creationism could say, "We're not here to talk about me. We're talking about these scientific ideas." Or the employee may answer briefly, e.g., "I belief in both. Many scientists do. But right now we're looking at the research." Outside of class, while the employee is still acting in an official capacity, conversations about religion and faith should be limited, respectful, age-appropriate, and not devotional or proselytizing. Districts should review their training materials and employee handbooks for consistency. To avoid disputes, employees must understand when they are acting in an official capacity and discussions with students can be regulated.

## Teaching Class

Religious topics may be presented objectively as part of a secular education program.

**Teachers can be required to teach:** Regardless of a teacher's personal religious beliefs, a teacher can be required to teach the state-mandated curriculum. *See, e.g., Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989) (holding history teacher's use of an alternative reading list was not private speech and therefore unprotected by the First Amendment); *Palmer v. Bd. of Educ. of the City of Chicago*, 603 F.2d 1271 (7th Cir. 1979) (holding state's interest in teaching the prescribed curriculum outweighed Jehovah's Witness teacher's interest in refusing to lead the Pledge of Allegiance, sing patriotic songs, and celebrate national holidays).

**Instruction about religion cannot coerce:** Teachers may include religious elements in instruction, as long as these elements would not be viewed by a reasonable person as coercing the practice of a particular religion. *See Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49 (2d Cir. 2001) (rejecting lower court's findings that celebration of Earth Day taught earth worship).

For more information, see TASB Legal Services' Teaching about Religion in Public Schools.

## With Other Employees

Despite the limitations placed on an employee's religious expression with students by the Establishment Clause, employees are granted more freedom to share their religious beliefs with other employees.

**Sharing religious beliefs with other employees permitted:** Employees may share their religious beliefs with other employees while on-campus during their free time and away from students. For example, a group of employees may meet in the faculty lounge during their lunch break to study the Bible. These private communications are subject to the *Pickering* balancing test,

which means that the speech is given First Amendment protection but only insofar as it does not interfere with the school district's management needs. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968). The employees may not attempt to force their beliefs on other employees or harass other employees based on their religious beliefs, however. For more information see Freedom Forum First Amendment Center, Finding Common Ground.

**School districts may exercise control over official emails:** A school district may adopt a policy that governs email correspondence sent by employees and students. *Fla. Family Ass'n, Inc. v. Sch. Bd. of Hillsborough Cnty.*, 494 F. Supp. 2d 1311 (M.D. Fla. 2007). At least one federal court of appeals has held that a school district's email facility was a nonpublic forum and therefore not available for a private citizen to use in order to communicate with the district or other members of the community. *Page v. Lexington Cnty. Sch. Dist. One*, 531 F.3d 275 (4th Cir. 2008). Additionally, the Ninth Circuit Court of Appeals has stated that, when a school district employee is performing in an official capacity, the employee speaks not as an individual, but as a public employee, and the school district is free to take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted. *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954 (9th Cir. 2011). Many districts use standardized signature blocks for district emails. Rather than explicitly prohibiting religious messages, a district with a standardized signature should disallow *any* personal messages, regardless of whether the message is religious in nature.

**School districts may not discriminate against religious viewpoints within an open forum for employees' personal communication, however:** As the U. S. Supreme Court has held multiple times, when the government opens a forum for communication, restrictions on use of the forum must be reasonable and viewpoint neutral. Targeting religious views (including religious sentiments, quotes from religious texts, or invitations to religious gatherings) is not viewpoint neutral. Religious content need not be excluded from a public forum for communication because permitting equal access to a forum does not endorse religion. As a result, a district court concluded that a fire department was not reasonable in censoring a firefighter's posts about a Christian fellowship of firefighters from the department's electronic bulletin board, which was commonly used for personal communications on a variety of non-work-related topics. The firefighter was speaking as a private citizen to firefighters outside of his direct command and in some instances on matters of public concern with posts that were not otherwise disruptive or offensive. *Sprague v. Spokane Valley Fire Dep't*, 189 Wash. 2d 858 (Wash. 2018).

## Religious Diversity

Employees are entitled to religious accommodations in certain limited circumstances. In addition to the Free Exercise and the Free Speech Clauses, employees are protected by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17. Title VII prohibits a district from discriminating against an employee or prospective employee on the basis of the employee's religion.

## Attendance

**Discrimination based on an absence to observe a religious holy day prohibited:** Under federal law, absent a demonstration of undue hardship on the part of the district, an employee may not be subjected to an adverse employment action based on an absence taken to observe a religious holy day. *See* 42 U.S.C. § 2000e-2 (Title VII). In one case, a teacher's aide, whose job did not allow for vacation time and who was a member of a church that required her to refrain from secular work on seven holy days each year, was fired due to her absence. She brought suit under Title VII. Because the school district failed to show that the absence caused an undue hardship, the court held that she was wrongfully discharged. *Edwards v. Sch. Bd. of Norton, Va.*, 483 F. Supp. 620 (W.D. Va. 1980), *vacated in part on other grounds*, 658 F.2d 951 (4th Cir. 1981). In another case, the Fifth Circuit Court of Appeals reversed a grant of summary judgement for a county when the county terminated an employee for not showing up for work after she had informed her supervisor that she would not be able to work on a Sunday morning due to a previous religious commitment. *Davis v. Fort Bend Cnty.*, 765 F.3d 480 (5th Cir. 2014).

**Denial of compensation prohibited:** Texas Education Code section 21.406 expressly prohibits a district from denying a salary, bonus, or similar compensation, based in whole or part on attendance, to an educator on the basis of an absence for observation of a religious holy day. The holy day must be observed by a religion whose places of worship are exempt from property taxation under Texas Tax Code section 11.20. Tex. Educ. Code § 21.406.

## Dress Code

**Neutral and generally applicable dress code restrictions may be permitted:** Rules that burden religion must be neutral and generally applicable, so if an exception to a uniform policy has been made for a secular purpose, a religious exemption is required. *E.g., Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3rd Cir. 1999) (holding unconstitutional a police department requirement that Sunni Muslims shave their beards in violation of their religious beliefs in accordance with department policy after the department had made exceptions to the rule for medical reasons). However, In a U.S. Supreme Court case, a private retail clothing store refused to hire an applicant for employment who wore a head scarf due to her Islamic beliefs. The store had a neutral "no hats" policy and refused to hire the applicant based on that policy. The U.S. Supreme Court held that an employer is entitled to have a no headwear policy, but when an applicant requires an accommodation due to a religious practice, it is no response that the failure to hire was due to an otherwise neutral policy. Ultimately, the Court said, an employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions. *Equal Emp't Opportunity Comm'n v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015).

**Targeted dress code restriction may be permitted if dress causes an undue hardship:** A restriction specifically targeting religious dress may be adopted if a district can show the dress would cause an undue hardship on the district. For example, a Muslim teacher's Title VII claim against a school district failed because it would have imposed an undue hardship on the school board to accommodate the teacher by allowing her to wear religious garb that covered all but her face and hands. Pennsylvania had a garb statute that prohibited teachers from wearing anything indicative of religious affiliation. The school district successfully argued that the statute was narrowly tailored to the compelling state interest of maintaining the appearance of religious neutrality in schools, and it would have been an undue hardship for the school board to violate it. *United States v. Bd. of Educ. for the Sch. Dist. of Phil.*, 911 F.2d 882 (3rd Cir. 1990) (citing *Cooper v. Eugene Sch. Dist. No. 4J*, 723 P.2d 298 (Or. 1986), *appeal dismissed*, 480 U.S. 942 (1987)).

However, non-obtrusive items like a cross necklace are unlikely to be deemed to cause the district an undue hardship; therefore, a policy restricting such symbols will likely be held unconstitutional. *Nichol v. ARIN Intermediate Unit 28*, 268 F.Supp.2d 536 (W.D. Penn. 2003) (mem. op.) (granting instructional assistant preliminary injunction to continue openly wearing a cross on her necklace).

**Dress that promotes religion prohibited:** District officials have reasonable concerns about employees wearing clothing that promotes a particular religion. In one case from Connecticut, a teacher brought a First Amendment claim under 42 U.S.C. § 1983 after she was asked by school officials to change or cover up a t-shirt that said "Jesus 2000." The court held that being told to change was not an adverse employment action for purposes of Section 1983 and that the request did not violate her free exercise or free speech rights, because allowing her to wear the shirt could have been construed as governmental endorsement of religion. *Downing v. West Haven Bd. of Educ.*, 162 F. Supp. 2d 19 (D. Conn. 2001). A Texas court might not reach the same conclusion after the Supreme Court's rejection of the *Lemon* case in *Kennedy*, especially if the district allowed employees to wear clothing with other personal messages. Districts should ensure that employee dress codes are consistent and up-to-date.

## Away from School

Outside of the school context, employees' freedom to express their religious beliefs is less constrained than in the classroom.

**Off-duty employees may act as private citizens off campus:** In their free time, away from school and school events, school employees are free to involve themselves in religious activities, including activities designed for youth that may involve some of the students the employee knows from school. The employees outside of school will not be perceived to be serving in their roles as district employees and potentially run afoul of the Establishment Clause. In addition, the district is prohibited from taking any adverse action against an employee based wholly or partly on the employee's participation in a religious organization. Tex. Gov't Code § 2400.002.

**Off-duty, on-campus employee freedom of religious expression less clear:** A more difficult scenario is presented, however, when school employees wish to act as private citizens while on campus or at school events. In a South Dakota case, an elementary school teacher successfully sued her school district employer claiming that the district violated her First Amendment rights by preventing her from serving as a religious youth group leader at meetings happening on her own campus immediately following the school day. *Wigg v. Sioux Falls Sch. Dist. 49-5*, 382 F.3d 807 (8th Cir. 2004). There is no Fifth Circuit case on this topic, but the Supreme Court's analysis of the coach's First Amendment right to pray on the 50-yard line after football games in *Kennedy* suggests that future courts might also find that a teacher has a protected right to engage in religious activities at school, after school hours. Keep in mind that under the federal Equal Access Act, if a secondary school allows student groups to meet on campus before or after instruction, the meetings must be student-led and employees may attend religious student groups only in a nonparticipatory capacity.

## Tips to Remember

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

**Know your district's relevant policies:** The legal and practical risks surrounding employee 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, a campus official who acts outside the bounds of clearly established law 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.

**Do not target religious expression during unregulated time:** After the Supreme Court's decision in *Kennedy,* school officials will need to adjust to a post-*Lemon* world. Not all of the ramifications are known, but it appears that courts will no longer accept the argument that a district needs to restrict an employee's private, personal religious expression in order to avoid the appearance of a governmental endorsement—even if the expression amounts to an overt demonstration of religious belief. This means that it is risky for a district to direct employees not to engage in religious conduct or expression if, under the same circumstances, employees are allowed to engage in other types of personal conduct or expression.

**Train district staff on managing employee religious expression:** All instructional and administrative staff need to develop a basic understanding of the competing rights and interests at stake. For example, teachers of subjects in which religion is relevant to the curriculum need adequate instruction on how to talk about religion objectively, without coercion. They also need specific guidance on where to seek answers when a question about religious liberty pops up in the middle of classroom instruction.

In another example, campus administrators must apply the employee dress code. Knowing the boundaries set by local policy on employee religious dress is essential. Provide training and support for all employees facing tough questions, and document the fact that you provided the training.

**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 (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. *See Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981) (awarding unemployment benefits to Jehovah's witness who quit his job at a foundry after being transferred to department that fabricated military tank apparatus, which offended his religious beliefs); *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).

**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.

This document is continually updated at tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Community/Religion-in-the-Public-Schools/documents/employee_religious_expression.pdf. For more information on school law topics, visit TASB School Law eSource at schoollawesource.tasb.org.

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