

Student Religious Expression

Published online in [TASB School Law eSource](#)

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Overview of 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).

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

The First Amendment Establishment Clause states: “Congress shall make no law respecting an establishment of religion . . .” U.S. Const. amend. I. The U.S. Supreme Court has interpreted this principle to mean that public schools must not advance, coerce, or endorse a particular religion or religion generally over non-religion. *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). The Court has exercised special vigilance over compliance with the Establishment Clause in elementary and secondary schools because “families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family.” *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

Historically, courts have used different tests to determine whether a governmental entity has violated the Establishment Clause. The first test developed by the U.S. Supreme Court was referred to as the *Lemon* test from *Lemon v. Kurtzman*. To avoid a violation of the Establishment Clause under the *Lemon* test, governmental action (1) must have a secular purpose, (2) must have a primary effect that neither advances nor inhibits religion, and (3) must not foster an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In subsequent cases, the Court expanded on the *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 ex rel. Doe*, 530 U.S. 290 (2000).

However, in recent years the Court has turned away from the *Lemon* test, and 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 (2022). Regardless of the test used, courts have consistently held that government action may not attempt to coerce a student to participate in a religious exercise. *Lee v. Weisman*, 505 U.S. 577 (1992).

2. The Free Exercise Clause and Texas law prohibit schools from unduly burdening citizens’ free exercise of religion.

- **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. *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).
- **Texas law:** Under the Texas Religious Freedom Restoration Act (RFRA), 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.

3. The First Amendment and Texas law protect private speech and prohibit the government from discriminating against an individual based on viewpoints or participation in a religious organization.

- **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).
- **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).
- **Texas law:** The Texas Religious Viewpoint Antidiscrimination Act (RVAA) provides that school districts will not discriminate against students’ expressions of religious beliefs, including in their personal communications, through their schoolwork, and in student clubs. The RVAA requires school districts to adopt policies creating limited public forums for student speakers at school events. Tex. Educ. Code §§ 25.151-.153. In addition, a school district may not take adverse action against a student based wholly or partly on the student’s membership in, affiliation with, or contribution,

donation, or other support provided to a religious organization. *Adverse action* is defined in the Texas Government Code and includes actions like denying admission or equal treatment in an education program or denying access to a speech forum. Tex. Gov't Code §§ 2400.001-.002.

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

- **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 (2022)., citing *Van Orden v. Perry*, 545 U. S. 677, 699 (2005) (BREYER, J., concurring in judgment).
- **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. Schs. v. Mergens*, 496 U.S. 226, 250 (1990) (opinion of O’Connor, J.) (emphasis in original)).
- **Guidance from the U.S. Department of Education (DOE):** To receive funds under the federal Elementary and Secondary Education Act, as amended by the Every Student Succeeds Act, school districts must certify that their local policies do not prevent or deny participation in constitutionally protected prayer as set forth in related DOE guidance.
- **Defining religion:** Unfortunately for school administrators, there is no official 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 Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981). 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).

Frequently Asked Questions about Student Expression

5. Can a student express religious views in the context of schoolwork?

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.

Legal Principles

- **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 Viewpoint Antidiscrimination Act (RVAA) 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). In general, rules related to curriculum and graduation requirements can be applied in a neutral manner if the district has a

legitimate interest in applying the rule. *See Hubbard v. Buffalo Indep. Sch. Dist.*, 20 F. Supp. 2d 1012 (W.D. Tex. 1998) (mem.) (holding a district’s policy of requiring proficiency exams for a student transferring from a non-accredited school did not violate the student’s free exercise claim because the policy was rationally related to the legitimate state interest in setting uniform graduation requirements.)

- **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.” *Walzv. 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) (not designated for publication) (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).

Practical Tips

- **Train district staff:** As the show-and-tell example discussed above illustrates, all instructional and administrative staff need to develop a basic understanding of the competing rights and interests at stake in everyday school scenarios. 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. Provide training and support for teachers facing tough questions, and document the fact that you provided the training.
- **Set clear parameters for student expression:** In some circumstances, controversy may be avoided by carefully designing and describing classroom activities. 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. Once the door has

been opened for personal expression, however, religious expression should be treated with the same respect and subject to the same rules as other personal communication. For example, in 2011, the Fifth Circuit Court of Appeals considered the liability of an elementary school principal who prevented a student from distributing candy-cane shaped pens with a religious message during a winter celebration. The Fifth Circuit granted the principal qualified immunity, but warned that, for future cases, the First Amendment right of students to distribute religious materials during noninstructional time when the distribution does not interfere with the work of the school or the rights of others is *clearly established*, and school employees who violate this right may not be protected by qualified immunity. *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011) (en banc).

- **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 whom to talk to if they have a concern, and when they come to talk, be quick to listen and slow to react.
- **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.

6. Is a school required to exempt students from attendance requirements for religious holy days?

In general, an absence for a religious holy day is considered an excused absence for purposes of truancy, but other considerations may apply.

Legal Principles

- **Compulsory Attendance:** 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 under this subsection may not be penalized for the absence, and a student whose absence is excused under this subsection must be allowed a reasonable time to make up the schoolwork missed. If the student satisfactorily completes the schoolwork, the day missed is counted as a day of compulsory attendance. Tex. Educ. Code § 25.087(d).
- **Absence Considerations:** Because absences for religious holy days must be counted as days of attendance when schoolwork is made up, perfect attendance awards may not be withheld on the basis of excused absences for observance of religious holidays. Tex. Att’y Gen. Op. No. JC-0099 (1999). On the other hand, absences for holy days excused under 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. Tex. Att'y Gen. Op. No. JC-0398 (2001).

- **Limitations on Religious Holy Days:** To the extent the Texas Education Code does not resolve a question about attendance, consider also the Free Exercise Clause and 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) (mem.), *aff'd*, 670 F.2d 46 (5th Cir. 1982).
- **Requests for part-time enrollment:** Parents of a home-schooled student sued a school district that refused to allow the student to attend part time, alleging a violation of the student's free exercise rights. The Tenth Circuit Court of Appeals held that the parents' right to direct the upbringing of their child had not been violated, so they had no hybrid rights claim. Moreover, because the district's full time attendance rule was one of neutral, general applicability, the court held that the rule did not violate the student's free exercise rights. *Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694 (10th Cir. 1998); *see also Michelle, S. b/n/f Mr. Richard L.S. v. Beeville Indep. Sch. Dist.*, Tex. Comm'r Educ. Decision No. 011-R5-991 (June 9, 1992) (upholding district's denial of request for home-schooled student to attend one period choir course at public high school).
- **Objections to the school calendar:** An Orthodox Jewish student who could not attend a Saturday graduation ceremony claimed the scheduling of the event violated his free exercise rights. The Second Circuit Court of Appeals concluded that the graduation could be scheduled for Saturday, as long as attendance was not required to receive a diploma. A burden was imposed on the student's religious expression, but the burden did not rise to the level of a free exercise violation, because the student was not denied a sufficiently important benefit. *Smith v. Bd. of Educ., North Babylon Union Free Sch. Dist.*, 844 F.2d 90 (2nd Cir. 1988).
- **Requests for release time for religious instruction:** 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).

Practical Tips

- **Protect individual rights by permitting temporary absences when possible:** 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. In addition, the requirement that a school district excuse a student from attending school for the purpose of observing religious holy days includes travel. Remember, that the student may not be penalized for the absence and must be allowed a reasonable time to make up the schoolwork missed. If the student satisfactorily completes the schoolwork, the day missed will be counted as a day of compulsory attendance. Tex. Educ. Code § 25.087.
- **Award credit for attendance in accordance with law:** Because absences for religious holy days must be counted as days of attendance when schoolwork is made up, perfect attendance awards may not be withheld on the basis of excused absences for observance of religious holidays. Tex. Att’y Gen. Op. No. JC-0099 (1999). However, 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 or a final grade for the course, unless the district’s attendance committee determines that extenuating circumstances existed. Tex. Att’y Gen. Op. No. JC-0398 (2001).

7. **Do students have a right to pray at school?**

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

Legal Principles

- **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 flagpole are all permissible practices.

- **School officials may have an obligation to defend students’ rights:** If a school district has actual knowledge that a student is the target of bullying and harassment based on the student’s religious beliefs and that harassment may be deemed so severe, persistent, and objectively offensive as to deprive the student of the student’s educational rights, the district has a legal obligation to respond. The district may not act with deliberate indifference by ignoring or being dismissive of the student’s concerns. *Doe v. Cape Henlopen Sch. Dist.*, 759 F. Supp. 2d 522 (D. Del. 2011) (mem.). See TASB Policies FFH(LEGAL) and (LOCAL). In some instances, school officials may also have a legal obligation to protect students’ rights to pray or gather in a lawful manner. U.S. Const. amend I. School officials should make it clear that efforts to protect students’ rights on campus are motivated by the school’s legal obligation to maintain an environment where students are free from harassment, not by the school’s endorsement of one viewpoint over another.
- **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., Pa. 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). In *Kennedy vs. Bremerton School District*, the U.S. Supreme Court found that a coach had the right to pray on the 50-yard line after football games only because the Court characterized the coach’s prayers as personal, private religious expression. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022).
- **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) (mem.); *see also Brown ex rel. 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); *Bown v. Gwinnett Cnty. Sch. Dist.*, 112 F.3d 1464 (11th Cir. 1997) (upholding state statute requiring a moment of silence each school day). 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).

Practical Tips

- **Explain basic guidelines to parents:** Find ways to share basic guidelines on prayer and religious expression with parents. Find ways to involve parents in dialogue about religion and their local public schools. Create an environment of mutual trust between parents and school officials. When necessary, set proper boundaries for school visits.
- **Do *not* just say no:** If school officials refuse a request from a student or parent to allow students to gather together for a religious purpose, offer the requestor a reasonable alternative. For example, if school officials stop students from gathering before school to pray at the school's entrance because the crowd is creating a congestion problem, brainstorm with the group to offer another suitable location for the gathering.
- **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.
- **Train teachers on how to direct students to observe the minute of silence:** Even if Texas' minute of silence law was adopted with a secular purpose, a classroom teacher could still violate the constitution if the teacher's manner of administering the minute of silence could be seen as explicitly endorsing or coercing prayer, or conversely, as hostile to prayer. Offer teachers specific guidance or an optional script for introducing and overseeing the minute of silence.

8. **Do students have a right to abstain from participation in the pledge, moment of silence, or national anthem?**

Students have rights under Texas law and federal law that enable students to abstain from participation in patriotic activities.

Legal Principles

- **Daily recitation:** Texas Education Code section 25.082 requires daily recitation of the Pledge of Allegiance to the United States and Texas flags. The statute permits exemptions to be granted upon the request of students' parents. Students may also be able to exempt themselves out of the pledge, but the issue is muddled when the

parent disagrees with the student. *See Frazier ex rel. Frazier v. Winn*, 535 F.3d 1279 (11th Cir. 2008) (per curiam) (holding student’s the ability to refuse to say the pledge without parental permission hindered parents’ fundamental right to control their children’s upbringing).

- **School activity exemption:** Texas law also specifies that parents are entitled to remove their child temporarily from a school activity that conflicts with their religious or moral beliefs if the parent presents a written statement authorizing the removal of the child from the class or other school activity. School activities may include patriotic activities such as the pledge of allegiance or the national anthem.
- **Constitutional law:** Students have a well-established right to not participate in the pledge of allegiance if it contradicts the student’s religion. *See Oliver v. Klein Indep. Sch. Dist.*, 448 F. Supp. 3d 673 (S.D. Tex. 2020) (mem. op.) (recognizing established right of student who philosophically disagreed with religious portions of state and federal pledges to sit silently during pledges.) In 1943, the U.S. Supreme Court decided that a regulation requiring children in public schools to participate in the pledge of allegiance violated a Jehovah’s Witness student’s rights to free speech and free exercise of religion. *W. Va State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

Practical Tips

- **Consider bullying and other student safety issues:** Students that choose to abstain from patriotic activities may become the target of other individuals, including students and adults. Be sure the district is trained on how to address bullying or religious discrimination for exercise of this right.
- **Extracurricular rights:** Students do not lose their constitutional rights when they participate in extracurricular activities. *See Kountze Indep. Sch. Dist. v. Matthews ex rel. Matthews*, No. 09-13-00251-CV, 2017 WL 4319908 (Tex. App.—Beaumont Sept. 28, 2017, pet. denied) (mem. op) (holding cheerleaders had a First Amendment right to holding run-through banners with religious messages at football games.)

9. When can religious materials be distributed on a public school campus?

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

Legal principles

- **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 ex rel. Chavira v. East Otero Sch. Dist. R-1*, 721 F. Supp. 1189 (D. Colo. 1989) (mem.). 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. See e.g., *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 233 F. Supp. 2d 647 (D.N.J. 2002) (mem.) (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:** 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 *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011) (en banc) (principal who refused to allow student to dispense candy canes with religious message granted qualified immunity, but warned that, for future cases, the First Amendment right of students to distribute religious materials during noninstructional time when the distribution does not interfere with the work of the school or the rights of others is now *clearly established*); *M.B. ex rel. Martin v. Liverpool Cent. Sch. Dist.*, 487 F. Supp. 2d 117 (N.D.N.Y. 2007) (mem.) (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:** 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. & 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.

Practical tips

- **Adopt and apply a sound local policy:** 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) (mem.) (upholding facial constitutionality of district’s FNAA(LOCAL) with the provisions described above). For assistance in developing a local policy on distribution of nonschool materials that meets the requirements of federal law, contact your TASB Policy Service consultant.
- **Establish written campus guidelines:** In most districts, board-adopted policies at TASB Policy FNAA(LOCAL) and TASB Policy GKDA(LOCAL) 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) (mem.) (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).

10. **May schools prevent students from expressing their religious beliefs through their dress and grooming?**

Yes, but only if (1) the school district has adopted a legitimate, viewpoint-neutral rule, like a standardized dress code, that does not impose an undue burden on the individual’s free exercise of religion and freedom of speech; or (2) the student’s symbolic speech would cause a material and substantial disruption of school operations.

- **Symbolic speech:** The First Amendment Free Speech Clause protects not only verbal and written expression but also symbols and conduct that constitute symbolic speech. *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275 (5th Cir. 2001). Symbolic speech is protected by the First Amendment if the person who displays the symbol or message intends to convey a particularized message and there is a great

likelihood that the message will be understood by those observing it. *Spence v. Washington*, 418 U.S. 405 (1974) (per curiam); *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437 (5th Cir. 2001).

- **Dress and grooming codes must have a legitimate purpose:** In the school context, school administrators may regulate expressive conduct that is normally protected by the First Amendment Free Speech Clause using a content and viewpoint neutral regulation that satisfies the time, place, and manner test. As described above, such a regulation meets the standard only if (1) the regulation, like a dress code, furthers an important or substantial governmental interest; (2) the interest is unrelated to the suppression of student expression; and (3) the incidental restrictions on First Amendment activities are no more than is necessary to facilitate that interest. *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437 (5th Cir. 2001); *see also, Palmer ex rel. Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502 (5th Cir. 2009) (upholding a school dress code that banned any messages on student clothing).
- **Uniform policies:** For districts with formal school uniform policies, state law provides that parents may exempt their children from a school uniform requirement if they can provide a bona fide religious or philosophical objection to wearing the uniform. Tex. Educ. Code § 11.162(c). The Fifth Circuit Court of Appeals upheld a district dress code adopted within the parameters of state law under the Free Speech Clause because it met the substantial interest of improving the educational performance of the district, the uniform policy was not enacted to suppress student expression, and the restrictions were narrowly tailored because they only affected student attire during school hours. Further, the court concluded that the “opt-out” procedure did not violate the Free Exercise Clause because the district utilized a neutral and rational means to determine the sincerity of the proffered religious belief. *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275 (5th Cir. 2001); *see also S.L.W. on behalf of P.W. v. Crandall Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 027-R5-1101 (Sept. 9, 2003) (upholding a student’s application for a religious objection to wearing unfeminine colors including khaki, navy blue, and black).
- **Texas Religious Freedom Restoration Act:** When analyzing whether a school rule may impose upon a student’s religious practice, the Fifth Circuit Court of Appeals has also applied the RFRA. The RFRA prevents a government agency in Texas from substantially burdening a person’s free exercise of religion unless it demonstrates that the application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. Tex. Civ. Prac. & Rem. Code §§ 110.003, .009. The Fifth Circuit held that a Texas school district violated the RFRA when the district required a Native American student to wear his long hair either in a bun or tuck it into his shirt while at school. After concluding that the student and his family met their burden to demonstrate a sincerely held religious belief in wearing visibly long hair, the court held that the

grooming restrictions were a substantial burden on his free exercise of religion, and the school district's interests in teaching hygiene, preventing disruptions, avoiding safety hazards, instilling discipline, asserting authority, and uniformity were not compelling interests that justified such a burden. *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248 (5th Cir. 2010).

- **Religious symbols:** In general, districts should accommodate students who wish to wear religious symbols. In a case involving religious apparel, 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. Because the students had raised a hybrid claim, the court applied heightened scrutiny and 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).
- **Substantial disruption standard:** Absent a more specific dress code regulation, like a uniform requirement, the standard set by the U.S. Supreme Court in *Tinker v. Des Moines Independent Community School District* applies. Messages on clothing should not be censored unless they (1) impinge upon the rights of other students; or (2) substantially disrupt or materially interfere with school activities. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). Typically courts apply the second prong. A district must find an actual connection between attire and potential disruption. *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243 (3d Cir. 2002). Material and substantial disruption may be substantiated by evidence of disturbance. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). Complaints filed by other students regarding a student's attire can serve as evidence of a disruption. *Chambers v. Babbitt*, 145 F. Supp. 2d 1068 (D. Minn. 2001) (mem.).

Determining whether speech is disruptive in its own right or whether the speech is protected but viewers are responding in a way that causes disruption requires a case-by-case determination. Speech may be deeply offensive, but still entitled to First Amendment protection. *See, e.g., United States v. O'Brien*, 391 U.S. 367 (1968) (extending free speech protection to the symbolic act of burning a draft card).

11. Can religious groups meet after school on a public school campus?

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

Legal Principles

- **District policies must be viewpoint neutral:** Student clubs of a religious nature must be permitted to meet on school property, subject to the same rules and privileges as 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, meet on campus pursuant to 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 RVAA 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 the same extent that students are permitted to organize other noncurricular groups or gatherings. Such groups are entitled to the same access to facilities as other noncurricular 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.

Practical Tips

Know your local 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 GKDA(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.

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

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Published August 2022