

Introduction

Each year The Rutherford Institute receives inquiries from parents who are concerned about their children's involvement in Halloween parties or other Halloween-related activities in the public schools. The Rutherford Institute is pleased to provide its Freedom Resource Brief on Halloween-related issues, and we hope that this answers some of these questions. As always, if you have further questions or would like to request assistance, please contact The Rutherford Institute at (434) 978-3888 or submit the online help request form by clicking on this web address: http://www.rutherford.org/help_now/online_help_request_form.asp

BRIEFS

Halloween Celebrations and Related Activities in the Public Schools

While it would be inappropriate for The Rutherford Institute to provide you with legal advice under these circumstances, the Institute is pleased to provide you with the following information regarding your area of concern.

Halloween is one of the most celebrated holidays in the United States. Each year millions of Americans dress in costumes, trick-or-treat, or engage in other activities to celebrate the holiday. Many public schools also celebrate the holiday by decorating classrooms and hallways, holding Halloween parties, or including Halloween-related assignments in their curriculum. Many religious parents, however, are concerned about their children's involvement in Halloween activities. These parents often point out that the origins of Halloween are, in part, from ancient Celtic rituals and that Halloween is celebrated today by adherents of the Wiccan religion as one of their four holiest days of the year.

Many public schools allow parents to opt their children out of portions of the curriculum or activities which the parents find objectionable to their faith and that of their children. In these cases, of course, it is unnecessary to consider whether parents have any constitutional right to not have their children be exposed to or participate in the objectionable curriculum or activities. Thus, while this brief will focus on parents' constitutional rights to opt their children out of Halloween activities in the public schools, parents should also inquire with their school or school board about the availability of any policy that would permit them to opt their children out of these activities.

Do Halloween Celebrations Violate the Establishment Clause?¹

Background:

While most persons today undoubtedly celebrate Halloween as a secular holiday, Halloween has its origins in ancient Celtic religious rituals. More than two thousand years ago the Celts celebrated a holiday called Samhain, named after the Celtic god of the dead, marking the end of the Celtic year. According to Celtic beliefs, Samhain permitted the souls of the dead to return to their earthly homes on this evening every year. The Druids, the priests of the Celts built bonfires on which they burned sacrifices. The people also dressed in costumes in an effort to frighten away the spirits. When the Romans began to conquer the Celts in the first century A.D., festivals honoring Roman gods were combined with the Celtic holiday of Samhain. Later, during the ninth century, Pope Boniface I established the Holiday of All Saints' Day (or "All-hallowmas" in Middle English) on November 1. The night before All Saints' Day, the old Celtic holiday of Samhain, became known as All Hallows Eve, and eventually Halloween.² Today, adherents of the Wiccan religion celebrate Halloween, which they call Samhain, as their New Year's Eve. It is one of two nights of the year in which they believe that it is easiest to communicate with the dead.³

Typical Halloween Activities Do Not Violate the Establishment Clause:

That Halloween has its roots in ancient religious beliefs and is even celebrated by some today as a religious holiday, however, does not necessarily mean that public schools may not make any reference to Halloween or include activities or lessons related to the holiday in their curriculum. Even though Christmas is a clearly religious holiday, the Establishment Clause of the First Amendment does not require public schools to avoid any inclusion of the holiday in the curriculum. For instance, courts have held that a public school chorus teacher's inclusion of Christmas music with overtly religious themes as part of a broad choral program does not violate the Establishment Clause.⁴ Certainly, the Establishment Clause does not prohibit public schools from assigning *A Christmas Carol* or *The Gift of the Magi*. In fact, public schools could probably assign even the gospel story of the birth of Christ or the Last Supper in an effort to teach students about the historical background of the holiday.⁵

In determining whether a challenged government practice violates the Establishment Clause, courts ask whether the practice (1) has a secular purpose, (2) has a primary or principal effect that neither advances nor inhibits religion, and (3) does not foster an excessive government entanglement with religion.⁶ A court will also consider a practice to have the effect of advancing religion if a reasonable observer would perceive the practice as an endorsement of religion.⁷ Furthermore, a court will

also consider whether students are coerced into participating in a religious ritual or exercise.⁸ If a government practice fails any one of these tests, a court will hold that it violates the Establishment Clause of the First Amendment. Moreover, if a school's practice violates the Establishment Clause, it cannot be saved by merely permitting parents to opt their children out of the practice.

We are aware of no court that has found that public school celebrations of Halloween violate the Establishment Clause. In *Guyer v. School Board of Alachua County* a Florida appeals court held that a public school's Halloween decorations, including depictions of witches, cauldrons, and brooms and teachers dressing up as witches, did not violate the Establishment Clause.⁹ The court held that the school's Halloween celebration had the secular purposes of enriching students' educational backgrounds and cultural awareness and of making the day fun for students and that it created no excessive entanglement with religion.¹⁰ The court also had little difficulty in concluding that the Halloween costumes and decorations did not have the principal or primary effect of advancing or endorsing religion. Although the court acknowledged that the symbols "are capable of communicating a religious message to some people," the court held that the symbols and costumes were not likely to be perceived as an endorsement of Wicca or any other religion.¹¹ Thus, the court held that the Halloween costumes and decorations did not violate the Establishment Clause.

Other courts addressing school requirements that children read materials discussing witchcraft or magic or even make models of Indian gods and pretend to be witches have held that these practices did not violate the Establishment Clause.¹² Thus, although the specific facts of each case are important, it is unlikely that a court would find that a school's Halloween decorations, costumes, or Halloween-themed homework assignments violated the Establishment Clause. However, courts have signaled that a school's requirement that students actively participate in religious ritual poses a greater risk of an Establishment Clause violation than mere reading about or discussing texts that some consider religious.¹³ Thus, it is possible that school requirements that students actively participate in chants or other religious rituals might violate the Establishment Clause.

The Right to Opt Children Out of Halloween Activities

As previously noted, if a school's Halloween-related activities violate the Establishment Clause, then it is unconstitutional even if the school permits parents to opt their children out of the practice. However, under some circumstances parents may also have a right to have their child excused from Halloween-related activities.

Summary:

The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment protects a parent's right to instruct and direct the upbringing of his or her child. This right, however, generally does not include the right to determine a child's

public school curriculum, at least where the objection is a secular one. Nevertheless, in some instances, a parent may have the right to have their child not participate in Halloween related activities where their objection is based on religious grounds. However, the recent trend in the courts has been to refuse to recognize a parents' right to have their children excused from activities or curriculum that conflicts with the parents' religious beliefs.

Free Exercise of Religion:

The Free Exercise Clause of the First Amendment forbids government actions that substantially burden religious exercise. However, in *Employment Division v. Smith*,¹⁴ the Supreme Court held that the free exercise clause does not forbid the government from enacting laws or regulations that are generally applicable and neutral as to religion. Such laws are constitutional although they burden the free exercise of religion of some. Thus, laws which prohibit polygamy are constitutional because they apply to all persons, whether they wish to engage in polygamy for religious reasons or not, despite the fact that they prohibit some from engaging in a practice which they believe is mandated or encouraged by their religious beliefs.¹⁵ Such laws are constitutional even though they incidentally burden the religious exercise of some so long as they are supported by a rational basis.¹⁶ The Free Exercise Clause alone, therefore, will usually not provide a parent the right to withhold his or her child from Halloween-related curricula or activities that are objectionable to a parent's religious beliefs.

The Supreme Court has also held, however, that where a person's free exercise rights coupled with some other right are infringed upon, the government's action must be justified by a compelling government interest and narrowly tailored to achieve that interest. As explained below, Supreme Court precedent suggests that in some circumstances a parent's right to control the upbringing and education of their children coupled with the parents' right to the free exercise of religion may provide parents a right to have their children excused from Halloween related curriculum or activities that are objectionable to the parents' religious beliefs.

Parents' Right to Direct Their Children's Education:

In *Meyer v. Nebraska*¹⁷ the Supreme Court held that the Fourteenth Amendment protects a parent's right to direct and control the "child rearing and education" of their children.¹⁸ In *Meyer*, the Court struck down a Nebraska law that prohibited foreign language instruction for young children. Two years later, in *Pierce v. Society of Sisters*, the Court held that an Oregon law requiring all children between the ages of eight and sixteen to be educated in public schools interfered with parents' constitutional rights to direct their children's education and upbringing.¹⁹ In *Wisconsin v. Yoder*, the Supreme Court held that Amish parents had a right to have their children excused from

compulsory public school attendance laws.²⁰ The Court held that a parent's right to conduct one's child's education and upbringing coupled with the right to freely exercise one's religion outweighed the government's compelling interest in insuring that all children are educated.²¹

A parent could similarly argue that before public schools may require his or her child to participate in some Halloween activities, the parent's right to direct their children's education, coupled with the right to freely exercise one's religion requires that a public school justify its mandatory curriculum with a compelling government interest.

The Trend in the Courts:

Since *Wisconsin v. Yoder*, however, the Supreme Court has been reluctant to address parental rights claims and most courts confronted with such claims have been reluctant to recognize a parental right to control what their children are taught in the public schools.

In *Brown v. Hot, Sexy, and Safer Productions, Inc.*, the First Circuit Court of Appeals held that although the state could not foreclose parents from choosing a different path of education for their children, the court held that this freedom did not include "a fundamental right to dictate the curriculum at the public school to which they have chosen to send their children."²² *Brown* concerned parental challenges to a mandatory sexually explicit sex education lecture. Unfortunately, the *Brown* court drew no distinction between parents who try to tell a school what to teach and parents who seek to excuse their children from offensive activities or assignments.

In *Mozert v. Hawkins*, the Sixth Circuit Court of Appeals held that a school district's use of textbooks which included stories about telepathy and magic were not an unconstitutional burden on the parents' free exercise rights.²³ The court held that the parents' and students' free exercise rights were not burdened by their mere exposure to the readings where there was no "governmental compulsion to engage in conduct that violated the plaintiffs' religious convictions."²⁴

In *Fleischfresser v. Dir. of Sch. Dist. 200*, the Seventh Circuit Court of Appeals held that a school district's use of a textbook series that included stories about "wizards, sorcerers, giants and unspecified creatures with supernatural powers" did not substantially burden the parents' free exercise rights.²⁵ The Court held that because the school merely required students to read the texts and did not compel parents or students "to do or refrain from doing anything of a religious nature ... no coercion exists and the parents' free exercise of their religion is not substantially burdened."²⁶

Parents achieved short-lived success more recently in *Altman v. Bedford Central School District*. In *Altman* a federal district court in New York held that a school

assignment in which students were required to construct models of an Indian god violated the free exercise rights of the students by requiring them to construct images of false gods in violation of their religious beliefs.²⁷ The Court also held that assignments requiring students to construct “worry dolls,” which they were told would take their worries away as they slept, violated the free exercise rights of the Catholic students and parents because their faith “[prohibits] all forms of divination, magic and sorcery.”²⁸ The *Altman* decision, however, was later reversed by the Second Circuit Court of Appeals on other grounds.²⁹

As these cases highlight, courts are unlikely to find a violation of a parent’s free exercise rights where the school merely requires that children read stories or complete assignments which have a Halloween theme. However, these cases also suggest that where students *are* required “to do or refrain from doing anything of a religious nature,” a court might find that these activities substantially burden the parents’ or students’ free exercise of their religion.³⁰ This burden on the free exercise of religion coupled with the parents’ right to control their children’s education and upbringing should require the school to present a compelling interest to justify the practice as well as a showing that the practice is narrowly tailored to meet this interest.³¹ Unless the school can satisfy this high standard, parents should have a right to have their children excused from the objectionable activity.

Conclusion:

Common Halloween decorations and parties and Halloween-related assignments which merely require students to read materials that have religious significance to some are unlikely to be held to violate the Establishment Clause of the First Amendment. However, it is possible that a school’s use of chants or similar practices might be held to be an unconstitutional endorsement of religion or coercion of students to participate in a religious ritual.

Moreover, although the Supreme Court has stated that parents have a right to control the education and upbringing of their children, recent court decisions have expressed a reluctance to recognize this right. There does appear to be a chance, however, that a court could recognize a parent’s constitutional right to have their child excused from an objectionable activity or assignment when the parental rights claim is combined with the constitutional right to the free exercise of one’s religion. Such a claim is most likely to succeed where students are required to *act* in a manner inconsistent with their religious beliefs, rather than merely being required to read about or contemplate objectionable material. The Rutherford Institute will continue to litigate parental rights issues in this area in an effort to reverse the dangerous trend undercutting parental rights in public education.

Requests for Further Information or Legal Assistance

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The Rutherford Institute hopes that this information has been helpful to you in your fight for religious freedom. If you desire additional information on this or other issues of religious liberty, or if you need personal legal assistance in any area regarding religious freedoms, please feel free to write to us at The Rutherford Institute, P.O. Box 7482, Charlottesville, Virginia 22906-7482, or visit our website at www.rutherford.org.

Endnotes

¹ "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof..." U.S. Const. Amendment 1.

² <http://www.historychannel.com/exhibits/halloween/>, site visited October 17, 2002.

³ <http://www.wicca.com/celtic/akasha/samhainlore.htm>, site visited October 17, 2002.

⁴ *Bauchman v. West High Sch.*, 132 F.3d 542 (10th Cir. 1997) (holding that selection of explicitly Christian music for public high school choir did not violate the Establishment Clause); *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311 (8th Cir. 1980) (holding that the school board's adoption of a policy permitting observance of holidays having both a religious and a secular basis, including music such as Christmas carols, did not violate the Establishment Clause).

⁵ See, e.g., *Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam) ("The Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like."); *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968) ("Study of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment's prohibition.")

⁶ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

⁷ *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000).

⁸ *Lee v. Weisman*, 505 U.S. 577 (1992).

⁹ *Guyer v. Alachua County Sch. Bd.*, 634 So. 2d 806 (Fla. App. 1994)

¹⁰ *Id.* at 808.

¹¹ *Id.* at 809.

¹² See *Altman v. Bedford Central Sch. Dist.*, 245 F.3d 49 (2001); *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373 (9th Cir. 1994); *Fleischfresser v. Directors of Sch. Dist.* 200, 15 F.3d 680 (7th Cir. 1994); *Mozert v. Hawkins County Bd. of Ed.*, 827 F.2d 1058 (6th Cir. 1987).

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- ¹³ See *Brown*, 27 F.3d at 1380; *Malnak v. Maharishi Mahesh Yogi*, 592 F.2d 197 (3rd Cir. 1979).
- ¹⁴ *Employment Div. Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).
- ¹⁵ *Id.* at 886.
- ¹⁶ *Id.*
- ¹⁷ 262 U.S. 290 (1923).
- ¹⁸ *Id.* at 299.
- ¹⁹ *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).
- ²⁰ 406 U.S. 205 (1972).
- ²¹ *Id.* at 215.
- ²² 68 F. 3d 525, 533 (1st Cir. 1995).
- ²³ 827 F.2d at 1070.
- ²⁴ *Id.* at 1065.
- ²⁵ 15 F.3d at 690.
- ²⁶ *Id.*
- ²⁷ 45 F. Supp. 2d 368, 383-84 (S.D.N.Y. 1999)
- ²⁸ *Id.* at 385.
- ²⁹ *Altman v. Bedford Central Sch. Dist.*, 245 F.3d 49 (2nd Cir. 2001).
- ³⁰ *Id.*
- ³¹ *Smith*, at 888.