

**INSIDE THE
SCHOOLHOUSE GATES:**

**A REPORT ON RELIGION
IN THE PUBLIC SCHOOLS**

PREPARED BY
THE RUTHERFORD INSTITUTE

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ABOUT THE RUTHERFORD INSTITUTE

Founded in 1982 by constitutional attorney and author John W. Whitehead, The Rutherford Institute is a civil liberties organization that provides legal services without charge to people whose constitutional and human rights have been threatened or violated. The Rutherford Institute has emerged as one of the nation's leading advocates of civil liberties and human rights, litigating in the courts and educating the public on a wide spectrum of issues affecting individual freedom in the United States and around the world.

The Institute's mission is twofold: to provide legal services in the defense of religious and civil liberties and to educate the public on important issues affecting their constitutional freedoms. Whether our attorneys are protecting the rights of parents whose children are strip-searched at school, standing up for a teacher fired for speaking about religion or defending the rights of individuals against illegal search and seizure, The Rutherford Institute offers assistance—and hope—to thousands.

The Rutherford Institute's dedication to educating the public stems from our understanding that the freedoms enshrined in our Bill of Rights and important legislation like the Equal Access Act are potent only to the extent that the people whom they protect recognize when those sacred rights are infringed. Moreover, it has been our experience that most educators and school officials genuinely desire to comply with these restraints on government power. Unfortunately, a lack of understanding frequently precludes them from doing so. It is in the spirit of assisting those who desire to respect the individual liberties and civil rights of our nation's young people that The Rutherford Institute presents the following report.

For more information about the Institute, please visit our website at www.rutherford.org.

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EXECUTIVE SUMMARY

The fear of being sued has prompted many public school officials across the country to implement restrictions that effectively banish expressions of religious faith from our public schools. However, the truth is that allowing students to freely express religious ideas at school rarely, if ever, puts officials at risk of violating the so-called “separation of church and state.”

In the words of one federal judge, “Free speech, free exercise, and the ban on establishment are quite compatible when the government remains neutral and educates the public about the reasons.”¹ This is because the Establishment Clause of the First Amendment restricts only the government—not private individuals—from endorsing religion. With respect to student expression, the duty of school officials is to remain neutral, neither favoring nor opposing religious or secular ideas.

Based on an analysis of current law in this area, The Rutherford Institute offers educators and administrators the following recommendations:

1. Err on the side of freedom
2. Use disclaimers
3. Be neutral toward religion
4. Know the Department of Education’s “Guidance on Constitutionally Protected Prayer in Public Schools”
5. Determine whether or not your school falls under the Equal Access Act, and know how to comply with it

INTRODUCTION

Faced with the fears that have been triggered in us by such senseless acts of violence as the September 11 attacks, the Columbine tragedy and the more recent terrorist attacks in Madrid and London, Americans seem to have a renewed interest in spiritual matters. The evidence surrounds us. Television viewers have noticed a flurry of stories with religious themes. Mel Gibson's release of *The Passion of the Christ* sparked a national debate and is reported to have grossed \$125.2 million in its first five days—making it the third-highest North American five-day opening in history.

At the same time, another type of fear has been created for government officials by the increasingly common and widely publicized lawsuits involving a raging constitutional debate over the place of religion in public life. This fear—the fear of being sued—has prompted many public school officials across the country to implement restrictions that effectively banish expressions of religious faith from our public schools. Thus, while many adult Americans turn to their religious faith for comfort in the midst of mayhem or seek to understand the faiths of others, millions of American students are forced to spend much of their waking lives enclosed behind religiously sterile walls. If you question the seriousness of the problem, then consider the following examples, which are drawn from actual, recent cases:

- When a second-grade class was assigned to choose songs to lip sync in front of the class, one child was told that she could not lip sync to “My God is an Awesome God” because this would violate “the separation of church and state.”
- A kindergartner in New York was told she could not pray before snack time.
- In California, a high school student was suspended for passing out invitations to a church event outside his classroom, before the school day began.
- The parent of a kindergarten student was told that she would not be permitted to read from the book of Psalms as part of a “Me Week” program that was supposed to showcase the child's favorite book.

Invariably, concerns about violating the so-called “separation of church and state” are cited as the justification for school officials' actions in cases like these. But such cases are evidence of a disappointing reality about many Americans' level of commitment to the fundamental freedoms that are the hallmark of our society. By driving the expression of individual students' religious ideas from the schoolhouse, we teach our nation's youth that our fear of violating the Constitution—or worse, our fear of allowing someone to feel uncomfortable—is greater than our commitment to the freedoms that it protects. We teach them that it is better to suppress freedom than to take a chance of giving too much of it.

In addition to the students' interests in exercising their freedom, there is another interest at stake with respect to individual religious expression in the public schools: society's interest in the promotion of truth through the full discourse of ideas. As Justice Oliver Wendell Holmes stated in his well-known dissent in *Abrams v. United States*:

[T]he ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which [society's] wishes can be safely carried out.²

The expression of ideas—even, perhaps especially, religious ones—is important to the development of society. As one commentator notes: “Encouraging cognitive conflict and expressive behavior in the school not only forces students to express their own judgments or opinions, but also serves the first amendment goals of self-fulfillment, enlightenment, and preparation of children for participation in a democratic society.”³

These goals will undoubtedly be thwarted if we continue to suppress religious expression in public schools. It is no answer to say that students can learn these invaluable lessons elsewhere. Our children spend the overwhelming majority of their waking hours at school or school-related events. School *is* their society. To forbid their religious expression at school is to leave students little, if any, meaningful outlet for such expression.

Clearly, the only way to foster a school environment that is consistent with both the spirit and letter of the First Amendment is to encourage full student expression in the public school system, subject only, of course, to the school's (and society's) legitimate interest in maintaining order and safety. Unfortunately, even educators who recognize this often feel constrained by the threat of lawsuits.

There is, however, good news. In most situations, the perceived conflict between the so-called separation of church and state and students' free speech and free exercise rights is a matter of *misperception*. In other words, educators and administrators need not be motivated by legal fears when making decisions regarding student religious expression. In the words of one federal judge, “Free speech, free exercise, and the ban on establishment are quite compatible when the government remains neutral and educates the public about the reasons.”⁴

UNDERSTANDING THE LAW THAT GOVERNS STUDENT RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS

The First Amendment

Any discussion of law governing expression in public schools must, of course, begin with that bulwark of individual liberty, the First Amendment, which reads:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

As Justice Antonin Scalia has explained, “private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.”⁵

Note that the First Amendment is also the source of both the provision that protects the free exercise of religion and the provision that many interpret as requiring “the separation of church and state.” The clause, “Congress shall make no law respecting an establishment of religion,” referred to as the Establishment Clause, is almost always the asserted justification for suppression of religious speech.

The United States Supreme Court has expressed, in no uncertain terms, its commitment to protecting First Amendment freedoms in America’s classrooms.

The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the marketplace of ideas. The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection.⁶

However, because some limitations to free speech are not only appropriate but, at times, necessary, it is important for educators to gain an understanding of a few key U.S. Supreme Court decisions regarding the application of the First Amendment in the public school context.

Tinker v. Des Moines Independent School District⁷. In *Tinker*, the Supreme Court set forth the general rule governing student expression in public schools—the First Amendment applies, and student speech is generally protected. “It can hardly be argued that either teachers or students shed their constitutional rights to free speech or expression at the schoolhouse gate.”⁸ Under *Tinker*, student speech may only be limited if it “materially and substantially interferes with the requirements of appropriate discipline in the operation of the schools” or “invades the rights of others.”⁹

The Court was also careful to point out that school officials may not restrict student speech based on an “undifferentiated fear or apprehension of disturbance” or a desire to avoid possible “discomfort and unpleasantness accompanying an unpopular

viewpoint.”¹⁰ It is therefore clear that by stating that school officials may properly restrict student speech which “invades the rights of others,” the Court was using the word “rights” in the legal sense. While some may be tempted to view the expression of ideas that might make others uncomfortable as invading the “rights” of those others, this is no basis for suppressing speech. However, speech that rises to the level of constituting harassment, libel or slander should be restricted.

Bethel School District v. Fraser¹¹. With *Bethel*, the High Court added another brick to its construction of the First Amendment in the public school context, holding that schools may restrict student speech that is “vulgar, lewd, obscene and plainly offensive.”¹² However, school officials should beware that courts will not interpret “plainly offensive” too broadly.

Hazelwood School District v. Kuhlmeier¹³. The *Hazelwood* case is important because, in this decision, the Supreme Court identified a category of speech that is to be analyzed differently than other student speech. In *Hazelwood*, the plaintiffs were former high school students who were staff members of the school’s newspaper. They claimed that their First Amendment rights were violated when school officials refused to include in the newspaper an article describing students’ experiences with pregnancy and another article discussing the impact of divorce on particular students in the school.

The Supreme Court explained that the question of whether the First Amendment requires schools to tolerate particular student speech (the question it addressed in *Tinker*) is different from the question of whether the First Amendment requires a school to affirmatively promote particular student speech.¹⁴ The Court held that in the context of school-sponsored publications, theatrical productions and other expressive activities that students, parents and members of the public might reasonably perceive to bear the imprimatur of the school, educators are entitled to exercise greater control over student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers are not exposed to material that may be inappropriate for their maturity level and that the speaker’s views are not erroneously attributed to the school.¹⁵ However, even in such circumstances, the restrictions imposed by school officials must be “reasonably related to legitimate pedagogical concerns.”¹⁶

There are two major points that need to be understood in order to correctly utilize *Hazelwood* controls. First, remember that *Hazelwood* only applies when the speech is “school sponsored.” The mere fact that the speech occurs on school grounds is not enough. Keep in mind that the examples of “school-sponsored” speech given in *Hazelwood* were school-sponsored publications, theatrical productions or other expressive activities that might reasonably be seen as bearing the school’s imprimatur.

School “sponsorship” of student speech is not lightly to be presumed.¹⁷ Schools may not simply suppress student speech based on a fear that some uninformed individuals might mistakenly believe that it was school-sponsored.¹⁸ As one court explained:

School districts seeking an easy way out try to suppress private speech. Then they need not cope with the misconception that whatever speech the school permits, it espouses. Dealing with misunderstandings—here,

educating the students in the meaning of the Constitution and the distinction between private speech and public endorsement—is, however, what schools are for. ... Yet [the school district] proposes to throw up its hands, declaring that because misconceptions are possible it may silence its pupils, that the best defense against misunderstanding is censorship. What a lesson [the school district] proposes to teach its students! Far better to teach them about the first amendment, about the difference between private and public action, about why we tolerate divergent views. Public belief that the government is partial does not permit the government to *become* partial.¹⁹

Where school officials fear that students or other observers will misperceive government endorsement of religion, the proper response is for them to educate the audience rather than censor the speaker. *Id.*

The second important thing to remember about *Hazelwood* is that even when greater control over speech is permissible under the *Hazelwood* framework, nothing in the Supreme Court’s opinion indicates that *viewpoint-based* censorship of student speech is allowed. Decades of the Supreme Court’s First Amendment jurisprudence warn government officials that viewpoint-based speech restrictions are extremely suspect and will rarely be tolerated. Thus, a ban on abortion-related articles in a school newspaper may be permissible, but a ban on only pro-choice or only pro-life articles would likely be held to violate the students’ First Amendment rights. Restrictions of speech on the basis of its religious content are considered to be viewpoint-based restrictions and are, thus, highly suspect.²⁰

The general rule is that student expression is protected by the First Amendment. However, school officials may restrict student speech if it would cause a substantial disturbance in the school, invade the rights of others or is vulgar, lewd or plainly offensive. Finally, with respect to school-sponsored speech or expression that bears the imprimatur of the school, educators may impose restrictions that are reasonably related to legitimate pedagogical concerns.

The Equal Access Act

In 1981, the United States Supreme Court issued its opinion in a case called *Widmar v. Vincent*.²¹ In that case, the Court considered regulations by the University of Missouri at Kansas City that made its facilities generally available for the activities of registered student groups but prohibited students from using University property for religious meetings. Not surprisingly, this regulation was prompted by the University’s fear that allowing public facilities to be used for religious purposes would violate the Establishment Clause, the so-called “separation of church and state” provision of the First Amendment. The Supreme Court held that it would not only be proper for the University to allow students to hold religious meetings in its facilities under these circumstances, but that by having opened its facilities to use by student groups for secular purposes, the First Amendment did not permit the University to exclude groups who wished to use them for religious meetings.

With the enactment of the Equal Access Act in 1984, Congress essentially

adopted this holding for application to public secondary schools. Under this federal statute, a public secondary school that receives federal funding and maintains a limited open forum may not deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within the limited open forum based on the religious, political, philosophical or other content of the speech at such meetings.²²

In determining whether or not the Act applies to a given school, it is easy enough to know whether the school is a federally funded, public secondary school. What is more difficult is understanding the phrase “limited open forum.” Under the statute, a school is considered to maintain a “limited open forum” if it allows one or more non-curriculum related groups to meet on the school premises during non-instructional time.²³

The phrase “non-curriculum related group” is one that has spawned litigation. Schools attempting to avoid having to comply with the Equal Access Act have defined clubs and groups that are allowed to meet at the school as being entirely curriculum-related, while disowning groups that they did not wish to have on campus. In a 1990 case, the Supreme Court interpreted “non-curriculum related group” to mean any student group that does not *directly* relate to the body of courses offered at the school.²⁴ A group will be considered to directly relate to the curriculum if the subject matter of the group is taught in a regularly offered course or concerns the body of courses as a whole or if participation in the group is required for a course or results in academic credit. Specifically, various courts have found environmental clubs, chess clubs, ski clubs, students against drunk driving clubs and business clubs to be “non-curriculum related.”

Another aspect of the Equal Access Act that has spawned litigation is the term “non-instructional time.” The term’s definition is important because it is only when a school allows one or more non-curriculum related groups to meet during non-instructional time that a school will be deemed to operate a limited open forum and thus be subject to the Act. “Non-instructional time” is time before actual classroom instruction begins or after it ends. Educators should note that non-instructional time is not limited to the hours before the school day begins or after it ends, but rather is identified relative to *actual classroom instruction*. Thus, lunchtime is considered to be non-instructional time, as are “activity periods” during which students attend club meetings or gather with athletic teams.²⁵

Once school officials determine that their school is covered by the Equal Access Act, they need to understand what the federal law requires. Three separate requirements can be identified. First, the school may not discriminate against any group based on the content of its speech. Second, the school must grant the group equal access—the same benefits as are afforded to other groups. This often includes some form of official recognition as well as access to the school newspaper, public address system, bulletin boards, etc. Finally, the school must not deny any group a “fair opportunity” to successfully exist within the school.

In response to concerns about tying the hands of educators to make the best decisions for their schools, Congress created a safe harbor provision under which school officials may adopt certain specified rules and still be deemed to offer a “fair opportunity.”²⁶ For instance, school officials may require that group meetings be voluntary and student-led, that school employees be present at religious meetings only in a non-participatory capacity, that meetings not disrupt the educational process and that non-school persons not direct, control or regularly attend group activities.²⁷

The Department of Education’s “Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools”

The last important source of “law” governing student religious expression in public schools is a document entitled “Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools.” This document is basically a digest of the prevailing interpretation of case law applying the First Amendment in the public school context.

Section 9524 of the Elementary and Secondary Education Act (“ESEA”) of 1965, as amended by the No Child Left Behind Act of 2001, requires the Secretary of the Department of Education to issue this Guidance. As a condition of receiving ESEA funds, a local educational agency (“LEA”) must certify in writing to its State educational agency (“SEA”) that it has no policy that prevents, or otherwise denies participation in, constitutionally protected prayer in public schools as set forth in the Guidance.

Educators should pay particular attention to the Guidance for two reasons. First, federal law authorizes the Secretary of the Department of Education to issue and enforce orders with respect to an LEA that fails to provide the required certification to its SEA or files the certification in bad faith. Enforcement may include withholding federal funds until the recipient comes into compliance. Second, the Guidance is simply a convenient resource for educators who genuinely desire to respect religious students’ First Amendment rights and thus avoid costly lawsuits.

THE TRUTH ABOUT THE SO-CALLED “SEPARATION OF CHURCH AND STATE” SETS STUDENTS FREE

Unfortunately, many educators and administrators believe that they are pinned between a rock and a hard place when they are confronted by religious students who are determined to make their beliefs known and live out their faith, even when they are at school. Most school officials genuinely desire to respect that choice but fear that allowing students to vocalize their religious beliefs in various ways will meet with objections by other students and/or parents, thus leading to a dreaded lawsuit based on concepts of “the separation of church and state.” In reality, there is not nearly as much conflict between the free speech rights of students and the school’s duty to respect the Establishment Clause as many officials believe.

The crucial question to be resolved where Establishment Clause issues are raised is whether the religious speech constitutes private speech or government speech. The United States Supreme Court has explained that “there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”²⁸ The Department of Education’s Guidance states:

The Supreme Court has repeatedly held that the First Amendment requires public school officials to be neutral in their treatment of religion, showing neither favoritism toward nor hostility against religious expression such as prayer. Accordingly, the First Amendment forbids religious activity that is

sponsored by the government but protects religious activity that is initiated by private individuals, and the line between government-sponsored and privately initiated religious expression is vital to a proper understanding of the First Amendment's scope.

So rather than requiring that school officials censor students' religious speech, under most circumstances, the First Amendment forbids such censorship. The Supreme Court has consistently held that school officials may not impose restrictions on private religious speech that are not imposed on secular speech.²⁹

Educators should also realize that when they single out religious students by imposing special restrictions on religious ideas, they are sending a message of hostility toward religion. "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities."³⁰ Simply stated, neutrality is the demand of the Establishment Clause.

COMMON SOURCES OF CONFLICTS, CASES AND CONFUSION

Graduation/Assembly Speakers

In two seminal cases, *Lee v. Weisman* and *Santa Fe Independent School District v. Doe*, the United States Supreme Court has made it clear that school officials may not sponsor or promote prayer at school events by either clergy or students. However, a few important questions remain.³¹ May a high school valedictorian speak about the importance of his religious faith to his success during his valedictory address? May a student speaker invite the audience to consider faith? May a school exercise prior restraint over a student's speech by censoring it of religious messages? An analysis of the current trends in First Amendment free speech and religion clause cases suggests that school authorities should refrain from censoring student speech at graduation ceremonies solely because of its religious nature.

The federal Guidance casts serious doubt on the legality of official censorship of religious remarks in student speeches. The Guidance indicates that, in most instances, student speeches are not attributable to the state. Moreover, the Guidance explicitly states that school authorities may not structure or administer rules to discriminate against student prayer or religious speech. "[W]here students or other private graduation speakers are selected on the basis of neutral, evenhanded criteria and retain primary control over the content of their expression ... That expression ... may not be restricted because of its religious (or anti-religious) content."³²

The Guidance thus suggests that the best way for school officials to avoid legal problems may be to exert only very limited editorial controls over student speech. School officials who choose to review student speeches only to ensure that they do not include vulgar, lewd or otherwise inappropriate material stand on solid legal ground and face little or no risk of violating the Establishment Clause.

On the other hand, as they weigh their options with respect to student speeches, school officials must remember to factor in the very real possibility that a lawsuit may ensue from censorship of religious messages. The student's First Amendment right to

free speech is one that should not be regarded lightly.

Educators should thus steer clear of restrictions based on the particular ideas or views of the student speaker, whether political, cultural, religious, artistic, etc. Restrictions designed to monitor and control religious references in a student presentation will automatically be suspect, as they are viewpoint-based. Keep in mind that for a devout individual, religion is not a discrete category or form of “content” or topic, but rather a viewpoint that pervades the person’s outlook on life. Any restriction of religious viewpoint must accordingly be justified by a showing that it is the least restrictive means of achieving a compelling state interest.

School officials are basically left with three alternative approaches to overseeing student speeches at graduation ceremonies or other assemblies. First, officials may refrain from monitoring and censoring presentations at all. While this is constitutionally permissible, the First Amendment does not require it. Educators may understandably be concerned that this approach leaves the door open for students to include vulgar, lewd or otherwise inappropriate material in their remarks.

The second alternative is to tightly monitor speeches, censoring them of religious content because it might be controversial or cause some members of the audience to become uncomfortable. Of the three alternatives, this one is easily the most constitutionally problematic. This course requires public educators to enter the constitutionally prohibited realm of determining the degree of religious content that will be deemed acceptable and inoffensive to the audience. This kind of censorship may present not only a potential violation of the speaker’s First Amendment rights, but also a dangerous form of hostility and excessive entanglement with religion that may violate the Establishment Clause.

The third alternative is for administrators to monitor the student’s expression only for inappropriate content, in a manner that maintains neutrality toward the student’s religious, political or other views. This is certainly a constitutionally permissible course, and it is the one that is least intrusive. If school officials have lingering concerns regarding the Establishment Clause, they should consider using a disclaimer to further minimize the possibility of any misperception that the student is expressing the views of the school. For example, an announcement could be made before all student presentations to the effect that “students are speaking on their own behalf, and not on behalf of the school or its administration.”

Inclusion of Religious Discussion or Themes in Student Assignments

It happens frequently. A student chosen to read her favorite story for the class chooses a Bible story. A student asked to research a topic includes religious sources. A student asked to write about the most influential person in his life writes about Mohammed or Jesus Christ. If educators attempt to squelch these types of religious expressions, lawsuits are likely to ensue.

In a section entitled “Religious Expression and Prayer in Class Assignments,” the “Guidance” states:

Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on

the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the school. Thus, if a teacher's assignment involves writing a poem, the work of a student who submits a poem in the form of a prayer (for example, a psalm) should be judged on the basis of academic standards (such as literary quality) and neither penalized nor rewarded on account of its religious content.

Recall that local educational agencies are required to certify that they are in compliance with this Guidance.

Because the student's inclusion of religious material in the above examples and similar scenarios is expressive activity, any restriction of that choice by school officials must comport with the requirements of the First Amendment. A student's independent choice to include the religious material, when uninfluenced by any school official, is private religious expression and, as such, is entitled to full constitutional protection.³³ Again, the general rule where private student speech is concerned is that school officials may not restrict such speech unless it would cause a substantial interference with school operations.³⁴

One federal appellate court has applied the well-established principle that religious speech cannot be suppressed, solely because it is religious, specifically to the elementary school context.³⁵ The court stated:

The "marketplace of ideas," an important theme in the high school student expression cases, is a less appropriate description of an elementary school, where children are just beginning to acquire the means of expression. Grammar schools are more about learning, including learning to sit still and be polite, than about robust debate. *And yet we have held that religious speech cannot be suppressed solely because it is religious* (as opposed to religious and disruptive or hurtful, etc.), *a principle that makes sense in the elementary school environment.*³⁶

There is little reason for educators to fear that allowing students to include religious ideas in their work would create an Establishment Clause problem. Keep in mind that the question to be resolved where Establishment Clause issues are raised is whether the religious speech in question constitutes private speech or government speech. "[T]here 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."³⁷ A student's independent choice to include religious ideas in a school assignment cannot be attributed to school officials in any way; this is private expression that does not fall within the realm governed by the Establishment Clause. Where educators allow students to include religious ideas in homework or assignments that otherwise meet the teachers' requirements, just as they allow other students to include various secular ideas, the message is one of neutrality, rather than endorsement. Again, neutrality is the central demand of the Establishment Clause.³⁸

Any censorship of religious ideas from students' academic work is patently inconsistent with the United States Department of Education's guidelines on religious expression in public schools. Furthermore, students subjected to such censorship can make strong arguments that their First Amendment rights have been violated.

Literature Distribution or Access to Facilities by Non-School Organizations

Where outside organizations request access to school facilities for the purpose of distributing literature or conducting meetings, the question of whether or not the First Amendment requires officials to grant such access turns on an evaluation of whether or not officials have created a forum for these activities.³⁹ A court will find that a limited public forum has been created if school officials have manifested an intent to create such a forum and if there is evidence that wide access to the school is granted to outsiders seeking such access.⁴⁰

Where administrators adopt a formal policy for distributing literature of community non-profit groups or for allowing such groups to use school facilities, the school manifests an intent to open a limited public forum for these purposes. Once it is established that the school district has created a limited public forum, school officials must justify any content-based restrictions on access to the forum by demonstrating that said restrictions are narrowly drawn to serve a compelling state interest.⁴¹

School officials who deny religious groups permission to distribute literature or use facilities in a way that would otherwise accord with the school's policy invariably assert that their refusal is justified by a compelling interest in avoiding an Establishment Clause violation. If school officials raise this argument, then the court will determine whether or not the Establishment Clause would, in fact, be violated if school officials were to distribute the literature or allow the requested use of facilities.

The Supreme Court has repeatedly held that the government does not violate the Establishment Clause or endorse religion when it treats religious speech on equal terms with secular speech.⁴² In those cases, the Court struck down policies whereby speakers were precluded access to public fora solely because of their religious viewpoints. The Court has rejected school officials' contention that allowing religion to enter the school in this way would violate the Establishment Clause, stating:

We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis ... The proposition that schools do not endorse everything they fail to censor is not complicated.⁴³

A federal appeals court, addressing the question in the context of a junior high school, put it this way:

Ignorant bystanders cannot make censorship legitimate... Schools may explain that they do not endorse speech by permitting it. If pupils do not comprehend so simple a lesson, then one wonders whether ... schools can teach anything at all. Free speech, free exercise, and the ban on establishment are quite compatible when the government remains neutral

and educates the public about the reasons.⁴⁴

In fact, school officials' censorship of religious flyers or meetings poses a greater risk of entanglement than would a neutral policy because it requires them to engage in a sensitive line-drawing exercise regarding what level of religiousness will be tolerated.⁴⁵

When called upon to make decisions regarding the distribution of literature or access to school facilities by non-school groups, school administrators must treat religious groups or literature just as they treat secular groups or literature, remembering that neutrality is the central demand of the Establishment Clause. Just as in the context of student speeches, school officials can always distance themselves from religious messages by issuing a disclaimer.

Fundraisers

In their efforts to maximize students' educational and extra-curricular experiences, educators and administrators frequently find themselves turning to the community to help raise funds for a variety of activities. Many times, fundraisers involve the purchase of various forms of advertisements by parents or other community members. With these fundraisers has come a rash of incidents in which school administrators have attempted to preclude would-be advertisers, or even parents, from conveying some statement of religious faith in their advertisement.

In one such case, a parent association solicited community members to purchase paving bricks around the school's flagpoles.⁴⁶ Each purchaser could then choose to have the brick inscribed with a short message or symbol. This fundraiser went along without incident for a couple of years until one parent complained about several bricks already installed around the flagpoles that depicted the Latin cross. Wishing to avoid "potential legal problems," the principal ordered that the "religious" bricks be removed and that the fundraising group no longer permit the inscription of crosses on the bricks.

The Rutherford Institute filed suit on behalf of those parents and former students whose bricks were removed, and the federal court held that school officials had indeed violated the brick purchasers' First Amendment free speech rights by removing the bricks, based on the content of their inscriptions. The school's administration had opened a limited public forum for expression by initiating this fundraiser project. School officials' asserted concern regarding the Establishment Clause did not justify the censorship of the brick purchasers' religious expression because "a neutral policy allowing students or family members to choose different religious symbols does not offend the Establishment Clause, but rather is required by it, once the government has opened up a public forum."⁴⁷

Released Time Programs

Half a century ago in *Zorach v. Clauson*, the United States Supreme Court upheld a New York law that excused student absences from school for the purpose of attending courses in religious observance that occurred outside the school building under the control of religious organizations.⁴⁸ Nevertheless, in the past few years, at least one challenge to these "released time" programs has made its way to the federal court system.

The rules, quite simply, have not changed since *Zorach*, which remains good law. To summarize *Zorach*, released time programs do not violate the Establishment Clause provided: 1) no religious instruction takes place inside public school classrooms; 2) no expenditure of public funds supports the program; and 3) the public school does not promote the instruction beyond simply collecting permission slips from parents. Where those features are present, schools are considered to be merely adjusting their schedules to accommodate the religious needs of the people.⁴⁹

Holiday Celebrations/Displays

In the past few years, Christmas has brought with it an onslaught of controversy over whether it is appropriate to take the chance of offending others by publicly celebrating or even referring to “Christmas” as such. Not surprisingly, this controversy has made its way to our nation’s public schools.

What might be surprising, however, is that some educators actually believe that it is legally permissible to discuss the origins or holidays of all religions except Christianity! Consider, for example, a recent incident involving a public school teacher who told a parent that while he was free to discuss the history and origin of Hanukkah, he was only permitted to discuss the secular aspects of Christmas. Similar accounts are far too common.

In fact, the Supreme Court has never indicated that the Establishment Clause requires schools to be free of religious study or references. The Court has stated that study or mention of religion or of the Bible in the public school setting is permissible as long as it occurs in the context of a general, secular program of study. The Court’s own words are worth noting:

[I]t might well be said that one’s education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.⁵⁰

In short, the Constitution permits educators to teach students about the origins of religious holidays if done as part of a “secular program of education.” Christian holidays are not off-limits simply because they are popular.⁵¹

RECOMMENDATIONS FOR EDUCATORS AND SCHOOL OFFICIALS

One of The Rutherford Institute’s most important goals is to ensure that the First Amendment rights of our nation’s youth are understood and respected. To that end, we offer educators and administrators the following recommendations.

Err on the Side of Freedom

When it comes to interfering with student expression in general and student religious expression in particular, educators and administrators should wield their powers very cautiously. Keep in mind that, ultimately, the lesson students learn about the power of their government to suppress their ideas is likely to far outlast anyone's memory of what is allowed to be said in next week's presentations.

Practical considerations also counsel against unnecessary intrusion upon student speech. Educators make a costly mistake when they assume that the potential for lawsuits is greatest when religious expression is allowed to occur. This may no longer be the case, as organizations such as The Rutherford Institute are increasingly vigilant to protect students' civil liberties.

Use Disclaimers

The easiest way to avoid legal trouble when students wish to engage in religious expression is to issue a simple disclaimer, thereby putting the world on notice that the student's expression is just that—the expression of a student—and not an announcement of the official view of the school or its administration. With this one simple step, administrators achieve several goals; they respect the free speech rights of religious students, avoid misunderstandings that might lead to lawsuits based on the Establishment Clause and, perhaps most importantly, they create an environment in which the marketplace of weighty ideas can flourish.

Be Neutral Toward Religion

If there is one thing for educators to remember about the First Amendment's Establishment Clause, it is that government neutrality toward religion is its central demand. When student expression is at issue, simply refrain from imposing restrictions on religious expression that are not imposed on secular expression.

Know the Department of Education's Guidance on Constitutionally Protected Prayer in Public Schools

Notwithstanding the limited scope of its title, this document contains a wealth of valuable information for educators and administrators regarding their legal duties toward students who wish to engage in many different forms of religious expression. It describes, in simple terms, the prevailing understanding of current First Amendment jurisprudence in the public school context. It would be foolish for any educator or administrator to needlessly risk costly litigation by failing to spend the relatively small amount of time it takes to become basically familiar with the Guidance.

Determine Whether or Not Your School Falls Under the Equal Access Act, and Know How to Comply With It

If your school is a public, federally funded secondary school, it is covered by the Equal Access Act if school officials maintain a “limited open forum” (allowing one or more non-curriculum related groups to meet on the school premises during non-instructional time). Resolve any definitional questions now, and if any doubt exists, simply comply with the law.

CONCLUSION

It is the hope of The Rutherford Institute that this report has dissolved the fears of “the separation of church and state” that have for too long driven individual expression of religious ideas into hiding. The Establishment Clause is not a license to censor individual students’ religious speech. The tragic fact is that most of the time school officials are wrong in their suspicions that student religious expression would violate the Establishment Clause. Their restrictions reflect a begrudging interpretation of constitutional freedoms, rather than the generous reading that our freedom-loving forefathers intended.

Sadly, students who wish to engage in religious speech often stand alone in attempting to defend their free speech rights against the vastly stronger power of school authorities, courts, public interest advocacy groups and other religious views. Indeed, instead of there being a church-state problem, in the public school context the predicament is often one of *religious believer versus the state*. This represents the turning of the First Amendment on its head. The Establishment Clause was never intended to be used to silence the religious expression of private citizens. This includes students. The good news is that for educators and administrators who genuinely desire to comply with the First Amendment, doing so is much less complicated than they might believe.

END NOTES

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- ¹ *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295 (7th Cir. 1993).
- ² *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
- ³ See William B. Senhauser, Note, *Education and The Court: The Supreme Court's Educational Ideology*, 40 Vand. L. Rev. 939, 979 (1987).
- ⁴ *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295 (7th Cir. 1993).
- ⁵ *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).
- ⁶ *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).
- ⁷ *Tinker v. Des Moines Ind. Sch. Dist.*, 393 U.S. 503 (1969).
- ⁸ *Id.* at 506.
- ⁹ *Id.* at 509.
- ¹⁰ *Id.* at 508.
- ¹¹ 478 U.S. 675 (1986).
- ¹² *Id.* at 685-86.
- ¹³ 484 U.S. 260 (1988).
- ¹⁴ *Id.* at 270.
- ¹⁵ *Id.*
- ¹⁶ *Id.* at 273.
- ¹⁷ *Saxe*, 240 F.3d at 214, citing *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993).
- ¹⁸ See *id.*
- ¹⁹ *Id.* at 1299 (internal citations omitted).
- ²⁰ *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).
- ²¹ 454 U.S. 263 (1981).
- ²² 20 U.S.C. § 4071(a).
- ²³ 20 U.S.C. § 4071(b).
- ²⁴ *Board of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990).
- ²⁵ See, e.g., *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211 (2003).
- ²⁶ 20 U.S.C. § 4071(c).
- ²⁷ *Id.*
- ²⁸ *Mergens*, 496 U.S. at 250 (1990).
- ²⁹ See *Mergens*, *supra*; *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Good News Club v. Milford Central Sch. Dist.*, 533 U.S. 98 (2001).
- ³⁰ *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring).
- ³¹ 505 U.S. 577 (1991), 530 U.S. 290 (2000).
- ³² Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools (February 7, 2003).
- ³³ See *Mergens*, 496 U.S. at 250 (“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.”).
- ³⁴ *Tinker*, 393 U.S. at 513.
- ³⁵ *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530 (7th Cir. 1996), *cert. denied*, 520 U.S. 1156 (1997).

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- ³⁶ *Id.* at 1538 (emphasis added). *See also Hedges, supra*, (“[N]othing in the first amendment postpones the right of religious speech until high school...”).
- ³⁷ *Mergens*, 496 U.S. at 250.
- ³⁸ *See Rosenberger*, 515 U.S. at 839.
- ³⁹ *See, e.g., Good News Club, supra; Slotterback v. Interboro Sch. Dist.*, 766 F.Supp. 280, 292 (E.D.Pa. 1991).
- ⁴⁰ *Id.*
- ⁴¹ *Id.*
- ⁴² *See Good News Club*, 533 U.S. at 114; *Widmar v. Vincent*, 454 U.S. 263, 274 (1981); *Mergens*, 496 U.S. at 252.
- ⁴³ *Mergens*, 496 U.S. at 250.
- ⁴⁴ *Hedges*, 9 F.3d at 1299-1300.
- ⁴⁵ *See Slotterback*, 766 F.Supp. at 296.
- ⁴⁶ *Demmon v. Loudoun County Public Sch.*, 342 F.Supp.2d 474 (E.D. Va. 2004).
- ⁴⁷ *Id.* at 494 (citing *Rosenberger*, 515 U.S. at 839).
- ⁴⁸ *Zorach v. Clauson*, 343 U.S. 306 (1952).
- ⁴⁹ *Id.*
- ⁵⁰ *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963).
- ⁵¹ *See, e.g. Ganulin v. United States*, 71 F.Supp.2d 824 (S.D. Ohio 1999), *aff’d* 2000 U.S. App. LEXIS 33889 (6th Cir. 2000).