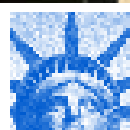




PROTECTING RELIGIOUS LIBERTY IN PUBLIC SCHOOLS

A School Official's Guide



ACLU

AMERICAN CIVIL LIBERTIES UNION
OF NEW MEXICO

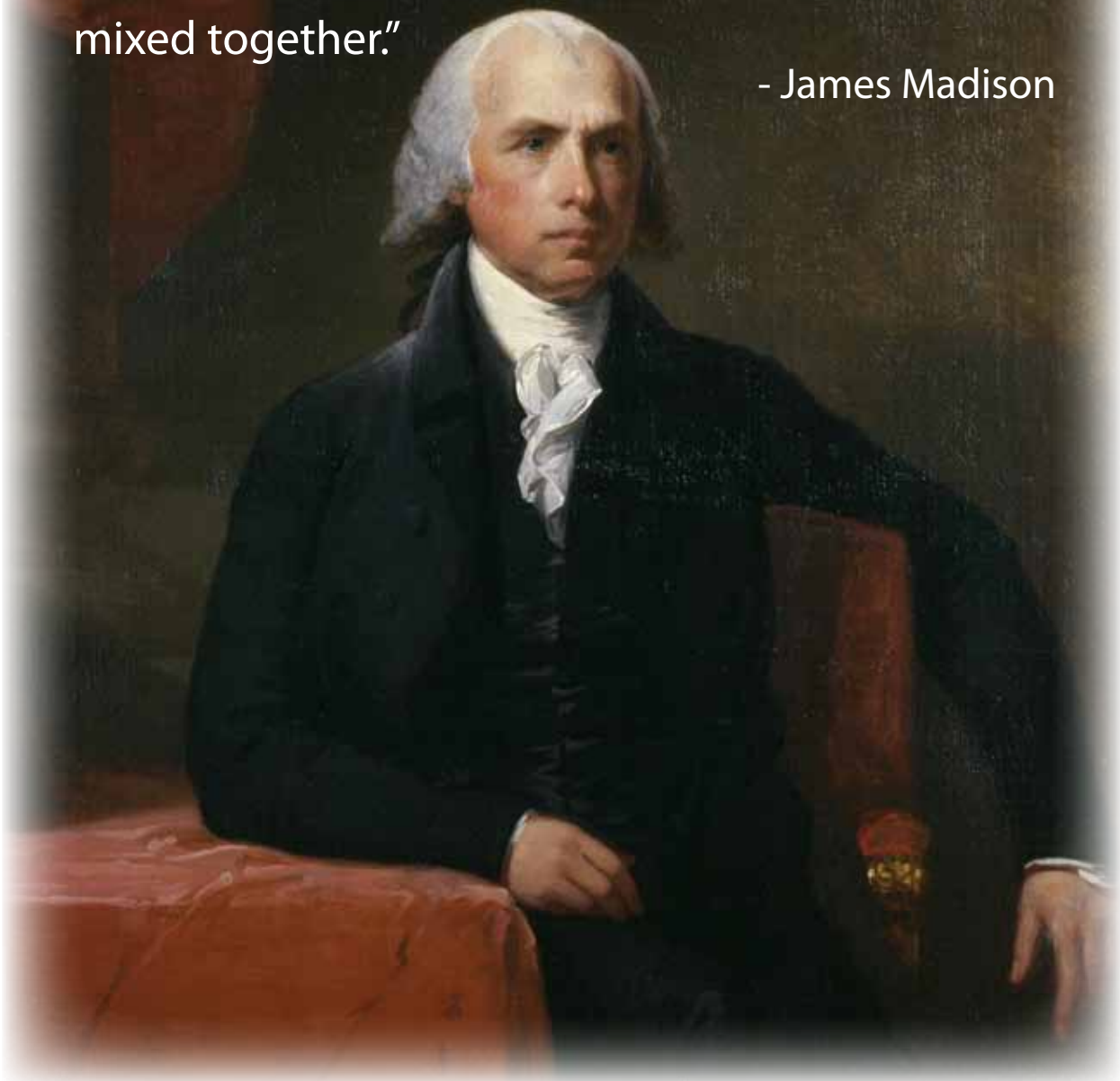


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"I have no doubt that every new example will succeed, as every past one has done, in shewing that religion & Government will both exist in greater purity, the less they are mixed together."

- James Madison



0 Why Is Religious Freedom in Public Schools Important?

The United States of America is one of the most religiously diverse nations in the world. We have such a rich tapestry of faith, at least in part, because our freedom to believe (or not believe) is protected in the Constitution. The framers recognized that both religion and government are at their best when they are kept insulated from one another. One of the ways we maintain this insulation is by making sure that public schools—which are part of and representatives of our government—neither advance nor inhibit religion.

The 1st Amendment to the U.S. Constitution contains three important clauses that protect individuals from government interference in their religious beliefs:

- The **Establishment Clause** says that, “Congress shall make no law respecting an establishment of religion...” The Establishment clause prohibits public schools from endorsing or encouraging religion in any way; *
- The **Free Exercise Clause** says that, “Congress shall make no law...prohibiting the free exercise [of religion].” This clause ensures that all people are free to exercise their sincere religious beliefs free from governmental coercion or interference;
- And finally, the **Free Speech Clause**, which says, “Congress shall make no law...abridging the freedom of speech.” This means that the Constitution requires school officials to allow students to express their religious views, within certain guidelines.

Each of these provisions fully apply to, and govern the conduct of, public schools in New Mexico.

These rules may seem clear and straightforward, but often educators struggle to understand how the three requirements interrelate and how they apply to specific circumstances. This is especially true when the majority of students and community members belong to the same faith tradition.

It might be tempting to conclude that the school’s treatment of religion should favor the majority’s interests, just as our democracy decides political representation. This is not the case. Majority vote may govern our elections, but a very different principle organizes our system of protections against government interference. The Bill of Rights prevents the government from suppressing groups with minority or unpopular beliefs and values.

How to use this booklet

With these complexities in mind, the ACLU designed this booklet to help you better understand the law so that you can minimize legal conflicts and complaints from students and their parents.

In the space of this booklet, we cannot provide a comprehensive analysis of the law that governs religious freedom in public schools. However, we have taken care to highlight the issues that public schools most often encounter regarding personal religious freedom and separation of church and state. Included in this booklet are several scenarios, many of which are based on actual court cases, to help illustrate real world dilemmas that public schools often face. Superscripted numbers in the text refer to key court cases described at the end of each section. For more detailed analysis of students’ rights and church/state separation, you may refer to some of the resources cited at the end of this booklet.

* It’s worth mentioning that the N.M. State Constitution provides even greater protections against government establishment of religion. N.M. Const. art. XII s 3 prohibits state funding of sectarian education, and N.M. Const. art. XXI s 4 states that schools must be free from sectarian control.

1 Prayer in the School

Prayer can be many things, but to paraphrase the definition given in the Supreme Court case *Edwards v. Aguillard*, prayer is talking to God(s)—either out loud or silently, alone or with others.

The Free Exercise and Free Speech Clauses give students the right to pray at any time and in any manner they wish, alone or with others, so long as prayer does not materially disrupt school activities. The only kind of prayer that is forbidden in public schools is **institutionalized prayer**. Remember, students have the right to express religious beliefs; public schools do not. No institutionalized prayer means:

- Educators cannot require or encourage students to recite prayers.^{1, 2}
- Outside speakers may not offer prayers at school-sponsored events, even if the prayer is “nonsectarian.”³
- Educators cannot organize a “student initiated” prayer.⁴
- Schools may not “endorse” prayers; for example, by allowing students to use the school announcement system to recite a prayer.⁴
- Educators cannot pray with students when they are acting in their official capacity.⁵

One federal appellate court has also ruled that school board members cannot open their meetings with a prayer. This may be surprising to some, considering that even Congressional sessions are opened with prayer, but the court determined that, unlike other public bodies, the school board is an integral part of the educational process and should maintain complete religious neutrality.⁶

Moments of Silence

The courts have ruled that daily moments of silence are unconstitutional if they are religiously-motivated and instituted for the purpose of encouraging prayer. In *Duffy v. Las Cruces Public Schools* (1981) the 10th Circuit Court of Appeals struck down a New Mexico statute and school board regulations permitting a moment of silence in public schools for “contemplation, meditation or prayer” because of the legislation’s religious purpose. A few years later, the US Supreme Court addressed the issue in *Wallace v. Jaffree*, striking down an Alabama “moment of silence” law based on indications in the legislative record that the law “was solely an ‘effort to return voluntary prayer’ to the public schools.”

Several federal courts have permitted moments of silence **where they had a clear secular purpose and did not expressly encourage prayer**. (See *Croft v. Texas*, *Bown v. Gwinnett County School District*, *Brown v. Gilmore*)





Graduation Ceremonies

Students have the right to include references to God in the Valedictory speeches. However, an “invocation” or “benediction” may not be part of the official program, even if conducted by a student. Nor may the school allow the student to lead the audience in prayer. Public schools also cannot invite members of the clergy to graduation to lead a prayer.

Though not directly related to prayer, it is worth mentioning that a federal court in Connecticut recently ruled that holding a graduation

ceremony in a church is a violation of the Establishment Clause because it gives an impression that the school is endorsing religion and promotes an excessive entanglement with religion.⁸

Baccalaureate Services

Students and their families have the right to organize privately-sponsored baccalaureate services, provided that they are held separately from the school’s graduation program, are entirely voluntary, and are neither sponsored, advertised nor supervised by school officials. If the school allows community groups to rent or otherwise use its facilities after instructional hours, a privately sponsored baccalaureate may be held on school property under the same terms offered to any other public community group.

Athletic Events

The Free Exercise and Free Speech Clauses give students the right to gather together to pray before a game, however, public school coaches and other staff members may not participate. Even if the coaching staff does not personally participate, they also cannot imply that athletes are required to participate in prayer circles or any other form of religious conduct. Again, coaches and other school officials may not encourage or discourage student prayer.



1.1 FRIDAY NIGHT PRAYER LIGHTS

A local student group, the Fellowship of Christian Athletes, uses the announcement system at the stadium to open a high school football game with a prayer. Is this a violation of the Establishment Clause?

Yes. Students cannot use school resources—like an announcement system—to conduct prayers at school events because this creates the impression that the school is sponsoring the prayer. Students are always free to pray informally with their friends, teammates or on their own.

1.2 SEE YOU AT THE POLE

Early one morning before class, a group of students gathered around the school flag pole to pray, read scripture and sing religious songs. Claudia, one of the students, spotted Mr. Anderson, her history teacher and also a member of her church, walking to his classroom on his way to teach. Since she knew Mr. Anderson to be a devout Christian, she called to him, inviting him to join her and the other students. Is Mr. Anderson allowed to accept Claudia's invitation?

No. Even though it is before instructional hours and Mr. Anderson and Claudia often pray together in another context, teachers may not encourage, discourage or participate in prayer with students when they are acting as school representatives. This is true regardless of whether it is before or after instructional hours. Claudia and her friends are of course allowed to pray on their own at school, and Mr. Anderson is free to pray with Claudia when he is not acting in his official capacity as a school employee.

1.3 A MOMENT OF SILENCE

Principal Gallegos announces on Veteran's Day over the intercom that the school will observe a minute of silence out of respect for fallen American soldiers. Is this moment of silence unconstitutional?

Hard to tell. If Principal Gallegos established this moment of silence for the express purpose of encouraging students to pray, then it would be unconstitutional. However, if the moment of silence was established to serve only the secular purpose of honoring soldiers' sacrifice for their country, then it is probably not a violation of the Establishment Clause.

1.4 PUTTING RELIGION TO A VOTE

Principal Williams announced that students can vote whether or not to have a student-led "non-sectarian" prayer at their graduation ceremony. The students cast their votes and 85% of the students were in favor of having a prayer at graduation. Since the prayer is student-led and an overwhelming majority of students support it, is it constitutional?

No. For several reasons:

- In this scenario the principal organizes the vote, which is a form of organizing the prayer itself, or "endorsing" religion.
- The prayer would be incorporated into the official program of a school event, which is an endorsement of religion.
- Just because a majority of students want a prayer at graduation, doesn't make it legal. In the United States, religion is not subject to a majority vote. One of the main purposes of the 1st Amendment is to protect the rights of religious minorities.

1.5 A RE-"CHOIR"-MENT

Mr. Garms, the high school choir director, has informed his students that they will be singing hymns at the school's religious baccalaureate service. Is this allowed?

No. As an educator, Mr. Garms is not allowed to help organize or advertise the religious baccalaureate service, nor may he require his students to attend or participate. However, choir students may, of their own accord, organize a group to sing at the service.

What do the courts say?

1. **Engel v. Vitale**, 370 U.S. 421 (1962): The Supreme Court determined that it is unconstitutional for state officials to compose an official school prayer and require its recitation in public schools.
2. **Abington Township School District v. Schempp**, 374 U.S. 203 (1963): In this case, the Supreme Court ruled that a Pennsylvania school's requirement that students read the Bible at the beginning of every school day was unconstitutional.
3. **Lee v. Weisman**, 504 U.S. 577 (1992): The Supreme Court ruled that the Establishment Clause forbids public schools from inviting members of clergy to offer prayers as part of official graduation ceremonies. The Court held that prayer, even nonsectarian or nonproselytizing prayer, is unconstitutional. The Court, in reaching its conclusion in *Lee*, focused on the subtle pressures that accompany any religious exercise conducted as part of a school-sponsored event. As the Court stated: "The prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid."
4. **Santa Fe Independent School Dist. v. Doe**, 530 U.S. 290 (2000): The Supreme Court held that student-led religious speech over a school's public address system is unconstitutional if it occurs in a context that creates the appearance of school sponsorship or support. In *Santa Fe*, the Texas school district had a policy of permitting its student body to vote whether to have prayers before school football games and to elect a school chaplain to deliver the prayers over the public address system. The Court stated: "Such a system encourages divisiveness along religious lines and threatens the imposition of coercion upon those students not desiring to participate in a religious exercise. Simply by establishing the school-related procedure, which entrusts the inherently nongovernmental subject of religion to a majoritarian vote, a constitutional violation has occurred."
5. **Doe v. Duncanville Independent Sch. Dist.**, 70 F.3d 402 (5th Cir. 1995): The 5th Circuit Court of Appeals ruled that a middle-school basketball coach's practice of initiating and participating in the Lord's Prayer with students was unconstitutional. Doe established that permitting school employees to lead, encourage, promote, and participate in prayers with students during various curricular and extracurricular events is unconstitutional.
6. **Coles v. Cleveland Board of Education**, 171 F.3d 369 (6th Cir. 1999): The 6th Circuit Court of Appeals found that the school board's practice of opening its meetings with a prayer violated the Establishment Clause. The court focused on the fact that the school board, unlike other public bodies, is an integral part of the public school system.
7. **Wallace v. Jaffree**, 472 U.S. 83 (1985): When a parent filed suit against an Alabama law that authorized a moment of silence in public schools for "silent meditation or voluntary prayer," the Supreme Court declared the law to be unconstitutional. The court extensively analyzed the history and language of the law, and found that it was not motivated by a secular purpose, but intended to promote prayer.
8. **Does v. Enfield Public Schools**, 3:10-CV-685 (JCH) (U.S. Connecticut District Court, 2010): The court decided that a Connecticut high school could not hold graduation ceremonies in a church sanctuary, declaring that it created an impression of an endorsement of religion and fostered excessive entanglement with religion.

2 School Curriculum and Religion

School curriculum must always serve a secular educational purpose. This does not mean that schools cannot teach **about** religion.



Religion can be taught in public schools if:

- The purpose is to examine its role in history, art, literature, society or other secular subjects.
- It is taught in an objective, unbiased manner.
- It does not promote or criticize any particular religion or set of beliefs.

Teaching Evolution

The New Mexico State Board of Education affirms that teaching biological evolution is a key educational benchmark for the state science curriculum. Courts throughout the country have consistently supported the teaching of evolutionary theory and have repeatedly opposed efforts to incorporate religious creation stories into the curriculum as legitimate scientific theory. The courts have established that:

- Schools cannot ban the teaching of evolution.¹
- Creationism, Intelligent Design and other “creation science” theories cannot be taught alongside evolution.^{2, 3}
- Teachers do not have “academic freedom” to teach creationism of their own accord.⁴
- Teachers cannot refuse to teach evolution because of their personal religious beliefs.⁵

2.1 ART HISTORY

Mr. De La Paz, an art history teacher, is having students read passages from the Bible, the Vedas and other religious texts in preparation for a lesson on how artists from different cultures depict creation stories. Is this constitutional?

Yes. Mr. De La Paz is using religious texts to aid in the teaching of a secular, curricular subject and does not advance nor inhibit any particular religion.

2.2 THE STRENGTHS AND WEAKNESSES

Mr. Jacobs, a biology teacher, has asked his students to analyze the “strengths and weaknesses” of evolution in order to teach that a scientific controversy surrounds the validity of biological evolution. Is this allowed?

No. A federal court stated in *Kitzmiller v. Dover Area Sch. Dist.* that teaching the “strengths and weaknesses” or the “gaps and problems” of evolution are “creationist, religious strategies that evolved from earlier forms of creationism.” Virtually all accredited scientists acknowledge evolution as scientific fact. The only controversy surrounding the validity of biological evolution is religious in nature.

What do the courts say?

1. ***Epperson v. Arkansas***, 393 U.S. 97 (1968): The Supreme Court declared Arkansas statutes forbidding the teaching of evolution in public schools violated the Establishment Clause.
2. ***Edwards v. Aguillard***, 482 U.S. 578 (1987): The Supreme Court struck down a Louisiana statute that required instruction on evolution be accompanied by teaching on “creation science.” The court found that the Louisiana statute had no identifiable purpose, but that the “pre-eminent purpose of the Louisiana Legislature was clearly to advance the religious viewpoint that a supernatural being created humankind.”
3. ***Kitzmiller v. Dover Area Sch. Dist.***, 400 F. Supp. 2d 707 (M.D. Pa. 2005): A federal court ruled that “Intelligent Design” is a religious view and not science. The court stated that intelligent design “cannot uncouple itself from its creationist, and thus religious, antecedents.”
4. ***Peloza v. Capistrano Unified School District***, 37 F.3d 517, (9th Cir. 1994): The 9th Circuit Court of Appeals declared that a public high school biology teacher did not have a free speech right or academic freedom right to deny the theory of evolution or to discuss his personal religious views in science class.
5. ***LeVake v. Independent Sch. Dist.*** No. 656, 625 N.W.2d 502 (Minn. App. 2001), cert. denied, 122 S. Ct. 814 (2002): The Minnesota Court of Appeals let a lower court ruling stand which declared that a high school biology teacher did not have the right to refuse to teach evolution under the Free Exercise Clause.

3 Dress and Dress Code

What can students wear to school to express their religious views? Constitutionally, students have a great deal of freedom in this area. Schools cannot prohibit students from wearing religious messages or symbols because they do not agree with the viewpoint expressed. This would be discrimination against the content of a student's religious speech. In the absence of a neutral school uniform policy, a student can generally wear jewelry or clothing bearing religious symbols or messages, so long as the message:

- Is not considered vulgar
- Is not considered lewd
- Does not encourage violations of the law
- Would not cause a substantial disruption or materially interfere with classroom activities.¹

Under New Mexico's Religious Freedom Restoration Act (RFRA) of 2000, students may also have the right to wear religious articles of clothing, or wear their hair long for religious reasons, even where prohibited by school dress code policy. A federal appellate court recently ruled that the Texas State RFRA gave a Native American boy the right to wear his hair in two long braids at school in accordance with his sincerely-held religious beliefs, despite the district's prohibition of long hair worn by male students.

Some schools have adopted policies **prohibiting students from wearing rosaries** outside their clothing because they are sometimes perceived to be a sign of gang affiliation. School officials should tread very carefully in banning or otherwise regulating religious jewelry. One Texas judge ruled in *Chalifoux v. New Caney Indep. Sch. Dist.* (1997) that such policies are overly "vague" and violate students' free speech and free exercise rights.

SCENARIOS

3.1 HATS OFF

Fatima is a Muslim student who wears the hijab, a religious headscarf, as part of the observance of her sincerely-held religious beliefs. Her school's dress code has a strict no hats or scarves policy, and a school administrator recently told Fatima that she may no longer wear the hijab at school. Is this constitutional?

No. Public schools can regulate dress with dress codes, as long as those codes are content-neutral and unbiased. Schools should allow reasonable exceptions to their dress codes to accommodate students' individual religious beliefs.

3.2 WEARING YOUR BELIEFS ON YOUR SLEEVE

Jason, a high school senior, wore a t-shirt to school that bears the slogan, "Jesus Hates Abortion." The slogan has caused several complaints from other students, who find the shirt offensive. Can the school demand he stop wearing it?

No. Banning Jason from wearing the shirt because of its viewpoint is discrimination based on the religious and political content of his speech. Just because other students disagree with its message doesn't necessarily mean that the t-shirt causes a substantial, material disruption.

“As to religion, I hold it to be the indispensable duty of all government to protect all conscientious professors thereof, and I know of no other business which government hath to do therewith.”

- Thomas Paine



What do the courts say?

1. ***Tinker v. Des Moines Indep. School Dist.***, 393 U.S. 503 (1969): This Supreme Court case laid the foundation for most student free expression rights in public schools. After a school district suspended three Iowan students when they refused to remove black arm bands they wore to protest the Vietnam War, the Supreme Court reversed the lower courts' decision and affirmed that the students' symbolic speech was protected by the Free Speech Clause. The court observed, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."
2. ***A.A. v. Needville Indep. Sch. Dist.***, --F.3d--, 2010 WL 2696846 (5th Cir. 2010): The 5th Circuit Court of Appeals ruled that, notwithstanding school dress policy prohibiting boys' long hair, the Texas Religious Freedom Restoration Act granted a kindergarten student the right to wear his hair in two long braids in accordance with his Native American faith.
3. ***Littlefield v. Forney Indep. County Sch. Dist.***, 268 F 3d 275, 293-94 (5th Cir. 2001): The 5th Circuit Court of Appeals determined that a Texas school district's mandatory school uniform policy that required parents with bona fide religious or philosophical objections to apply for exemption did not violate 1st Amendment Free Exercise Clause.

4 Religious Holidays and Symbols

Here's the basic rule for religious holiday celebrations in public schools: Schools may teach **about** religious holidays, but may not celebrate them. Therefore, the rules on teaching about religious holidays are basically the same as teaching about any sort of religion in class: it must have a secular, curricular purpose.

This means:

- A school's curriculum may not favor teaching one religion's holidays over another, or favor religion generally.
- Teaching about religious holidays must serve objective, academic goals.
- Teaching about religious holidays must not serve to advance or inhibit religion.

What About Christmas Trees?

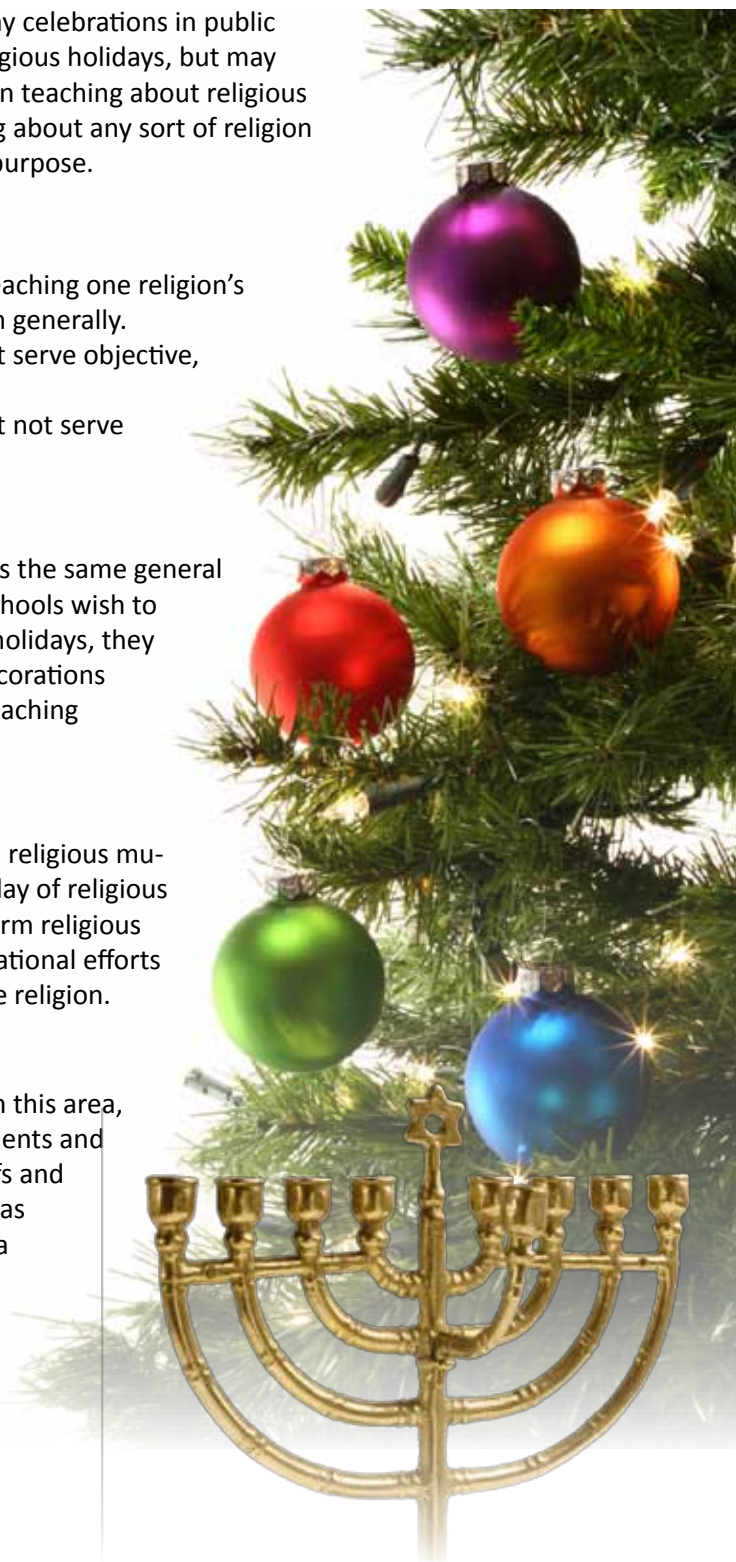
Display of religious holiday symbols follows the same general guidelines. The courts have ruled that if schools wish to display symbols associated with religious holidays, they should be displayed with other holiday decorations symbolizing different beliefs as a way of teaching about diverse cultures and traditions.

...And Silent Night?

The courts' opinion on religious carols and religious music is similar to their treatment of the display of religious symbols. Schools may have students perform religious music so long as they are part of the educational efforts of the school and not intended to promote religion.

Consider Possible Consequences

Even though the courts provide latitude in this area, it is important to consider that not all students and their families hold majority religious beliefs and may feel marginalized by religious Christmas carols. Before including religious music in a holiday program, consider how your choice affirms or diminishes the spirit of fellowship that the holiday season is intended to inspire.



4.1 DECK THE HALLS WITH CONSTITUTIONALITY

Northside High School is displaying a nativity scene (crèche), a menorah and a star and crescent to represent different religious holidays that are celebrated in the United States. Is this an unconstitutional endorsement of religion?

Yes. This scenario involves the drawing of a particularly fine line. Although this display does not show overt preference for any one religion, the courts have determined that any religious symbols that are included in a holiday display must have already taken on a dual secular meaning in society. In *Skoros v. City of New York*, the court ruled that a nativity scene, which centrally features the Christian deity, Jesus Christ, surrounded by worshipers, is a purely religious display and does not qualify. A Christmas tree, however, has taken on secular meaning in society and may be incorporated into a display. The courts have ruled that when religious holiday symbols are displayed in schools in this manner, they are a valid way to teach about diverse cultures and traditions.

What do the courts say?

1. ***Florey v. Sioux Falls School District***, 49-5, 619 F.2d 1311 (8th Cir.), cert. denied, 449 U.S. 987 (1980): The 8th Circuit Court of Appeals upheld the constitutionality of Christmas observances in public schools so long as schools present secular as well as religious aspects of Christmas.
2. ***Skoros v. City of New York***, 437 F.3d 1 (2nd Cir. 2006): The 2nd Circuit Court of Appeals declared that a temporary school holiday display policy which permitted menorah, star and crescent, and other holiday symbols—excluding nativity scenes—was used to teach about diverse cultures and traditions and did not violate the Establishment Clause.

“I hold that in this country there must
be complete severance of Church and
State...and therefore that the public
schools shall be nonsectarian...”

- Theodore Roosevelt

5 Religious Expression and Distribution of Religious Materials at School

Students do not check their right to free speech at the schoolhouse door any more than they leave behind their right to freely exercise their religion. Educators, however, are far more limited in what they can do and say because they are representatives of government and are obligated to refrain from endorsing religion in appearance or deed.

What Can Students Say About Religion at School?

The same basic rule applies to all forms of student religious expression: students may say or do anything to express their religious beliefs at school so long as it does not cause a substantial disruption or materially interfere with classroom instruction.

What Can School Employees Say About Religion in School?

The rules governing what school employees can say about religion are more restrictive because they are official representatives of the school. Students have the right to express religious beliefs; public schools do not. This means that:

- Educators may not express their religious beliefs to students.¹
- Educators may instruct students about religion as long as it serves an objective, secular and curricular purpose.
- Educators may express religious beliefs or practice their religion as long as it is not in the presence of students or done in the educators' official capacities.

"I am for freedom of religion and against all maneuvers to bring about a legal ascendancy of one sect over another."

- Thomas Jefferson

Distribution of Religious Materials at School

Outside groups and organizations generally may not distribute Bibles or other religiously themed materials on school property, either during or after instructional hours.^{3, 4} However, if a school has created an open public forum in which any and all community groups can distribute materials, some courts have held that religious groups may distribute materials to students under the same terms as any other group. However, this would mean that schools could not discriminate against groups based on their viewpoint and would therefore be required to give equal access to Christians, Unitarians, Buddhists, Muslims, Mormons, Atheists, New Age religions, etc.



Students, however, generally do have a right to distribute religious materials at school in compliance with any reasonable restrictions on the time, place and manner of distribution. As always, schools cannot show preference for one religion over another when students request permission to hand out materials.

Incorporation of Religion into Assignments

If it is relevant to the current topic and meets the requirements of the assignment, students also have the right to express their religious views during a class discussion or as part of a written assignment or art activity. If a student inserts his or her religious beliefs into class work in a way that is irrelevant, teachers should address it as they would any other off-topic comments.

5.1 SPREADING THE WORD

Cheryl, a high school sophomore, is an evangelical Christian who firmly believes that a key requirement of her faith is to share the gospel with others. She frequently approaches other students between classes to share her beliefs and invite them to learn more about her religion. Is this sort of student-to-student evangelism permitted in public schools?

Yes. Most of the time, this is a perfectly acceptable way for Cheryl to exercise her right to freely express her religious beliefs, as long as she does not disrupt class or harass or coerce other students with over-aggressive or unwanted overtures.

What do the courts say?

1. ***Helland v. South Bend Community School Corp.***, 93 F.3d 327 (1996): The 7th Circuit Court of Appeals ruled that school officials did not violate the First Amendment rights of a substitute teacher when they removed him from the substitute teacher list for poor performance and proselytizing in elementary school classrooms. The court stated, “A school can direct a teacher to refrain from expressions of religious viewpoints in the classroom and like settings.”
2. ***Roark v. South Iron R-1 Sch. Dist.***, 573 F.3d 556, 561 (8th Cir. 2009): A Missouri school board voted to continue to allow Gideons International to distribute Bibles to 5th grade students during class time against the advice of the Superintendent and school lawyers. The 8th Circuit Court of Appeals upheld a lower court’s ruling that asserted that the School Board’s only purpose appeared to be the promotion of Christianity to elementary school children, and was thus unconstitutional.
3. ***Berger v. Rensselaer Cent. Sch. Corp.***, 982 F.2d 1160 (7th Cir 1993): The 7th Circuit Court of Appeals found it unconstitutional for an Indiana elementary school to assemble fifth-graders every year to allow for the distribution of Bibles by the Gideons. That decision recognized a concern that a “fifth grader cannot be expected to make subtle distinctions between speakers or instructors invited by [the school] and those whose invitations are self-initiated, even assuming the children were told how the Gideons arrived in their classrooms.”

6 The Pledge of Allegiance

The Free Speech Clause not only guarantees freedom of expression, but also guarantees protection against coerced speech. This issue regularly pops up in public schools where the Pledge is recited every morning. Some students do not wish to recite the pledge for religious, political or philosophical reasons. **This is their 1st Amendment right.**¹ The courts have established that schools cannot require students to:

- Recite the Pledge
- Stand silently while other students recite the Pledge
- Leave the room while other students recite the Pledge
- Obtain parental approval to be exempt from reciting the Pledge.
- Explain or justify themselves, should they choose not to recite the Pledge.

Even though current New Mexico policy does not require schools to inform students beforehand that they have the right to opt out of the Pledge, we highly recommend schools do so. Students may not be aware that the Pledge is optional and may feel pressured to recite it when they do not wish to.

From our observations here in New Mexico, not all school district policies regarding the Pledge of Allegiance conform to well-established constitutional guarantees. Please contact the ACLU if you have any questions about your district's policy.



What do the courts say?

1. ***West Virginia State Board of Education v. Barnette***, 319 U.S. 624 (1943): The Supreme Court struck down a resolution that declared students' refusal to salute the flag to be an act of insubordination punishable by expulsion. The court ruled that forcing students to recite the Pledge of Allegiance or salute the flag is compelled speech and violates the 1st Amendment.

Student Religious Clubs:

The Equal Access Act

What about religious clubs? Are they allowed at school? The Equal Access Act (EAA) is a federal law that prevents schools from discriminating against student groups because of the content or viewpoint of the group's message. The EAA applies to all secondary schools that receive federal funding.

Whenever a secondary school permits the first non-curricular student club to form, the EAA is triggered and creates a "limited open forum." This means that schools must provide the same rights and privileges to any other non-curricular student clubs—religious or secular—that wish to use the school facilities in a non-disruptive manner.

The Equal Access Act says:

- Non-curricular student religious clubs must have all the same privileges secular student clubs enjoy, including access to meeting spaces, PA system, bulletin boards, yearbook pages, etc.
- Meetings must be voluntary and student initiated.
- The school, the government, or its agents or employees may not sponsor meetings.
- School staff may monitor religious club meetings, but may not participate in them in any way.
- Meetings must not materially and substantially interfere with the orderly conduct of educational activities within the school.
- Schools may limit meeting times and locations, but only if the rules apply to all groups and clubs.
- Community members who are not students may not direct, conduct, control or regularly attend student religious club meetings. Schools may prohibit people from the community from attending student groups and/or clubs.

6.1 QUR'AN CLUB

The Northside High School allows non-curricular student clubs to meet in the cafeteria after school. When a group of Muslim students approached the school principal for permission to conduct study of the Qur'an in the cafeteria after school, the principal refused, claiming that he didn't want to violate the Establishment Clause. Was the Principal correct?

No. If a school allows any student non-curricular clubs access to its facility, it must accommodate religious student non-curricular clubs as well.

6.2 WICCAN OR WICCAN'T?

Maria, a high school student, wants to form a Wiccan student group with her friends at school. The principal refuses to allow the group to form, even though the school permits other non-curricular student groups, because she does not want her students involved in "witchcraft." Is the principal violating the Equal Access Act?

Yes. Even though educators may not agree with students' religious beliefs or non-belief, they may not ban a non-curricular student religious group when other non-curricular groups are permitted to form.

8 Accommodations Students' Religious Needs



In general, schools should make every reasonable effort to accommodate a student's religion, unless doing so would create an "excessive burden" on the school, violate the Establishment Clause or inhibit the religious freedom of other students. Some accommodations that schools may make are:

- Religious Diets: Some students have special religious dietary requirements. Schools may accommodate religious diets in the cafeteria, but are not required to provide special places for students to eat these meals.
- Ritual Prayer: Some students, such as strictly observant Muslims, may request a space in which they can perform ritual prayer. Schools may allow students to use an empty room, for example, to conduct their prayers as long as the room used is not designated exclusively for prayer or other religious observances.
- Released Time: A New Mexico law [N.M. Stat. Ann. § 22-12-3 (2002)] permits any student, with the consent of his parents, to be excused from public school in order to participate in religious instruction. The student may not be excused for more than one hour each school day at a time period not in conflict with the academic program of the public school. All excuses are subject to the approval of the local school board. Religious instruction cannot be conducted on school property, nor can school representatives assume responsibility for the instruction.

Display of Artistic and Literary Religious Works

- Schools generally may not display or accept gifts of religious paintings or icons except, possibly, as part of a secular curriculum focusing on their historical or artistic value.
- School libraries may contain holy scriptures so long as preference is not given for the texts of one religion over another.
- Schools cannot use religious criteria for selecting or removing books from the school library collection.

The rights guaranteed to us in the 1st Amendment make the United States one of the most free, diverse and inclusive societies in the world. No other country enjoys as much religious diversity, religious tolerance and religious freedom as the United States. However, we can't take these rights for granted; as citizens and public servants we have the important responsibility of ensuring that these freedoms remain intact.

Resolving the tension between students' individual religious freedom and our constitutional separation of church and state can be difficult, but keeping a few core principles in mind will help you make the decisions that will protect religious freedom in your schools.

Remember:

- When students express religious views, they are exercising their constitutional rights. When schools endorse religious viewpoints, they violate the 1st Amendment.
- Schools cannot limit student expression unless it causes a substantial disruption or interferes with the learning process.
- Favoring one particular religion or religious belief over another, or religion generally over nonreligion, is against the law.
- Teaching about religion is allowed, even encouraged, just so long as the approach is objective and academic, not devotional.
- In public schools, prayer belongs solely to students. Educators may not participate in, lead or encourage prayer in any form at school or at school-sponsored events.
- There is no majority rule when it comes to religion. The 1st Amendment is designed to protect the rights of religious minorities.



10 Resources and Credits

The ACLU of New Mexico is always available to consult with school officials on specific constitutional questions in public schools. We may request that you submit your questions in writing. You can reach us at:

ACLU of New Mexico
P.O. BOX 566
Albuquerque, NM 87103

T/(505) 266-5915 Ext. 1003
F/(505) 266-5916
info@aclu-nm.org

Much of the information provided in this booklet was taken from the following publications:

Religion in the Public Schools: A Road Map for Avoiding Lawsuits and Respecting Parents' Legal Rights (2009), by Anne Marie Lofaso. Available online at <http://religioninthepublicschools.com/>.

Finding Common Ground: A Guide to Religious Liberty in Public Schools (2001), by Charles C. Haynes and Oliver Thomas

Memorandum on Religious Expression in Public Schools, President Bill Clinton, 1995. Available online at <http://www.presidency.ucsb.edu/ws/index.php?pid=51609>.

Many other useful resources available at www.aclu.org/religion-belief, www.freedomforum.org and www.firstamendmentcenter.org.

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Editor: Micah McCoy

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www.aclu-nm.org

