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Introduction

The question is not, will religious controversy hit your school, but will you be adequately grounded in knowledge about the law when it occurs? As communities have become more diverse, sincere disagreements regarding the role and place of religion have increased. Consequently, every principal must know the current legal status of religious expression. This Legal Memorandum highlights the most likely focal points of this conflict.

The appropriate relationship of religion and public schools is a sensitive and controversial issue that has divided Americans and resulted in more contention between community groups than any other issue in school law. The first part of the First Amendment is commonly known as the Establishment Clause, and the second part is known as the Free Exercise Clause.

In 1971, the U.S. Supreme Court, in *Lemon v. Kurtzman*, gave schools some direction when it articulated the three-part Lemon. In order for a statute or policy to be Constitutional, it must have (1) "a secular legislative purpose," (2) "a primary effect that neither advances nor inhibits religion," and (3) "it must not foster excessive entanglement between government and religion." To satisfy the Establishment Clause, governmental action must pass all three prongs of this test.

Courts attempt to balance the right of free exercise of religion against the right not to have a religion established. Problems arise when these two rights are perceived as being in conflict. In 1995, the U.S. Department of Education's published guidelines regarding religious expression in public schools. (Riley, 1995.) These guidelines reflect two basic and equally important obligations of public school officials: (1) Schools may not forbid students acting on their own from expressing their personal religious views or beliefs solely because they are of a religious nature, and (2) schools may not discriminate against private religious expression by students but must, instead, give students the same right to engage in religious activity and discussion as they have to engage in other comparable activity.

On February 7, 2003, the Secretary of Education issued guidance on constitutionally protected prayer in public elementary and secondary schools. This guidance explains the responsibilities of state educational agencies and local educational agencies with respect to this aspect of the No Child Left Behind Act of 2001 (NCLB).

Focal Point: Official Neutrality Regarding Religious

Teachers and school administrators, when acting in those capacities, are representatives of the state and are prohibited by the Establishment Clause from soliciting or encouraging religious activity and from participating in such activity with students. Teachers and administrators also are prohibited from discouraging activity because of its religious content and from soliciting or encouraging antireligious activity.

Focal Point: School Prayer and Bible Reading

Prayer at School Board Meetings

In 1999, in the case of *Coles v. Cleveland Board of Education*, the court was asked to consider the issue of prayer at a school board meeting. A student appearing at a school board meeting to accept an award indicated that she was shocked and surprised when the board began the meeting by having a Baptist minister offer a prayer that she believed showed favor to Christians and was offensive to anyone of another religion attending the meeting. The Sixth Circuit followed the Supreme Court's lead in striking down any instance of government-sponsored religious expression or involvement in public education. In striking down the school board prayer as unconstitutional, the court asserted that the practice had the primary effect of endorsing religion and further reasoned that prayer at a board meeting was arguably more coercive than at a graduation.

Prayer at Athletic Events

In June 2000, the U.S. Supreme Court handed down its decision in *Santa Fe Independent School District v. Doe*. A number of Mormon and Catholic students and their families filed a suit challenging the practice of having an elected student chaplain deliver a prayer over the public address system before each home varsity football game.

The Supreme Court ruled that the district's policy permitting student-led, student-

initiated prayer at football games violates the Establishment Clause. The court held that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way that establishes a state religion or religious faith, or tends to do so. Furthermore, the Court ruled that the delivery of a message such as the invocation, on school property, at school-sponsored events, over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer— is not properly characterized as “private” speech. The *Santa Fe* Court ruled that the policy involves both perceived and actual endorsement of religion.

Student Prayer and Religious Discussion

The Establishment Clause does not prohibit purely private religious speech by students. Students, therefore, have the same right to engage in individual or group prayer and religious discussion during the school day as they do to engage in other comparable activity. For example, students may read their Bible or other scriptures, say grace before meals, and pray before tests. Local school authorities may not structure or administer such rules to discriminate against religious activity or speech.

Generally, students may pray in a non-disruptive manner when not engaged in school activities or instruction—subject to the rules that normally pertain in the applicable setting. Specifically, students in informal settings, such as cafeterias and hallways, may pray and discuss their religious views with each other. Students may also speak to and attempt to persuade their peers about religious topics, just as they do with regard to political topics. School officials, however, should intercede to stop student speech that constitutes harassment aimed at a student or a group of students. Students may also participate in before-or after-school events with religious content, such as “see you at the flag pole” gatherings, on the same terms as they may participate in other non-curricular activities on school premises. Teachers and school administrators should ensure that no student is in any way coerced to participate in religious activity.

School Employees' Personal Prayer

It is important for teachers and others in the school setting to remember that they are employees of the government and subject to the Establishment Clause and thus required to be neutral concerning religion while carrying out their duties. Consequently, school employees may not pray with or in the presence of students during the school day. An employee may pray silently or outside the presence of students. Employees are permitted to wear non-obtrusive religious jewelry, such as a cross or Star of David. But employees should not wear clothing with a proselytizing message.

In the classroom setting, many teachers prefer not to answer questions about their personal religious beliefs others choose to answer the question straightforwardly in the interest of an open and honest classroom environment. The critical issue is would the student be likely to interpret the teacher's personal view as the official position of the school?

Graduation Prayer and Baccalaureates

The U.S. Supreme Court has consistently held that invocations and prayers at high school graduation ceremonies violate the Establishment Clause. School officials may not mandate or organize prayer at graduation or organize religious baccalaureate ceremonies. If a school generally opens its facilities to private groups, it must make its facilities available on the same terms to organizers of privately sponsored religious baccalaureate services. However, a school may not extend preferential treatment to baccalaureate ceremonies and may, in some instances, be obliged to disclaim official endorsement of these ceremonies. In *Lee v. Weisman* (1992), the U.S. Supreme Court ruled that even though the graduation ceremony may be voluntary, it is not appropriate for the state to place a student in the position of choosing whether to miss the graduation ceremony or attend and listen to a prayer that the student might find objectionable.

Period of Silence

Some school districts and state legislatures have enacted policies and statutes that authorize a moment of silence for meditation or silent prayer. The U.S. Supreme Court ruled, in *Wallace v. Jaffree* (1985), that such a statute in Alabama violated the first prong of the Lemon test that required the statute to have a secular legislative purpose. The court ruled that Alabama's statute was not motivated by a secular purpose and had the purpose of endorsing religion.

Focal Point: Distribution of Religious Literature by Students

Students have a right to distribute religious literature to their schoolmates on the same terms as they are permitted to distribute other literature that is unrelated to school curriculum or activities. Schools may impose the same reasonable time, place, and manner or other restrictions on distribution of religious literature as they do on non-school literature generally, but they may not single out religious literature for special regulation.

Focal Point: Accommodation of Students with Special Religious Needs

Various religions have practices that may require a student to perform a specific task or refrain from performing a specific task. For example, Muslim students need a quiet place at lunch or during breaks to fulfill their prayer obligation during the school day. At schools attended by Jehovah's Witnesses students, principals are frequently given a brochure that describes the beliefs of Jehovah's Witnesses and requests that these children be excused from singing anthems and school songs; from being involved in elected offices, cheerleading, and homecoming king or queen; and from celebrating birthdays or holidays. Schools may honor these requests, but must not permit school employees to monitor or enforce a child's compliance with a particular religious requirement.

Focal Point: Teaching About Religion

Study about religion is a legitimate and essential component of a public education and has the potential to help students become more tolerant of people who hold different religious beliefs. Public schools may not provide religious instruction, but they may teach about religion, including the history of religion, comparative religion, the Bible (or other scripture) as literature, and the role of religion in the history of the United States and other countries. Similarly, it is permissible to consider religious influences on art, music, literature, and history. Although public schools may teach about religious holidays, including their religious aspects, and may celebrate the secular aspects of holidays, schools may not observe holidays as religious events or promote such observance by students.

Guest Speakers on Religion

When community members are invited to speak on a religious topic, it is important that they have appropriate academic credentials and understand that they are to speak about religion and may not proselytize.

Student Assignments

Students may express their beliefs about religion in the form of homework, artwork, and other written and oral assignments free of discrimination based on the religious content of their submissions. 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.

Teaching About Creationism

Efforts to clarify the interpretation of the Establishment Clause and the Free Exercise Clause have resulted in a number of evolution-creationism cases. The first is the well-known 1927 case of *Scopes v. State of Tennessee*. In this case, John Scopes volunteered to be the defendant in a test case challenging Tennessee's antievolution statute. He was charged with teaching the theory of evolution in violation of Tennessee's antievolution statute, was found guilty, and was fined \$100. A year later, the Tennessee Supreme Court, on a technical point, reversed the decision of the district court.

The U.S. Supreme Court decided a second case in 1968. In *Epperson v. Arkansas*, the court invalidated an Arkansas statute that prohibited the teaching of evolution. The court held the statute unconstitutional on grounds that the First Amendment does not permit a state to require that teaching and learning must be tailored to the principles or prohibitions of any particular religious sect or doctrine.

In 1987, the U.S. Court of Appeals ruled, in *Mozert v. Hawkins*, that a group of fundamentalist Christian students in Tennessee had to participate in classroom use of a basic reading series that exposed students to competing ideas and philosophies, some of which were contrary to the students' religious beliefs. The court held that "the students were merely being exposed to the materials and were not compelled to either do an act that violated their religious convictions or communicate an acceptance of a particular idea or affirm a belief."

In the 1987 case of *Edwards v. Aguillard*, the U.S. Supreme Court held unconstitutional Louisiana's Creationism Act that prohibited the teaching of evolution in public schools, except

when it was accompanied by instruction in "creation science." The court found that, by advancing the religious belief that a supernatural being created humankind, which is embraced by the term *creation science*, the act impermissibly endorses religion.

In 1997, the U.S. District Court for the Eastern District of Louisiana rejected a policy requiring teachers to read aloud a disclaimer whenever they taught about evolution, ostensibly to promote "critical thinking." The court wrote, in *Freiler v. Tangipahoa Parish Board of Education*, that "in mandating this disclaimer, the School Board is endorsing religion by disclaiming the teaching of evolution in such a manner as to convey the message that evolution is a religious viewpoint that runs counter to... other religious views." In 1999, the Fifth Circuit Court of Appeals upheld the lower court ruling, noting that the actual effect of the disclaimer was to establish religion by encouraging them to read about religious "alternatives" to evolution. In June 2000, the U.S. Supreme Court denied the petition for a writ of *certiorari* allowing the decision of the Appeals Court to stand.

Focal Point: Religious Holidays

Teaching about religion is permissible. Celebrating religious holidays is not. Teachers may not use the study of religious holidays as an opportunity to proselytize or otherwise inject personal religious beliefs into the discussion. If any religious symbols are incorporated into the teaching unit, they may be displayed only on a temporary basis as part of the academic lesson.

Focal Point; Religious Excusals

Schools enjoy substantial discretion to excuse individual students from lessons that are objectionable to the student or the students' parents on religious or other conscientious grounds. However, students generally do not have a federal right to be excused from lessons that may be inconsistent with their religious beliefs or practices. School officials may neither encourage nor discourage students from opting out of certain activities.

Focal Point: Released Time

Schools have the discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation or penalize those who do not attend. Schools may not allow religious instruction by outsiders on school premises during the school day.

Focal Point: Character Education

Although schools must be neutral with respect to religion, they may play an active role with respect to teaching civic values and ethics. The fact that some of these values are held also by various religions does not make it unlawful to teach them in school. Teachers may teach the personal and civic virtues widely held in our society, such as integrity, honesty, fairness, and caring. However, this must be done without invoking religious authority or denigrating the religious or philosophical beliefs of students and parents. It is in the best interest of teachers and students if there is a district approved, comprehensive plan for character education, developed as a cooperative effort with parents and other community members that represent a very broad range of points of view.

Focal Point: Student Attire

Students generally have no federal right to be exempted from school dress rules based on their religious beliefs or practices. Schools may not single out religious attire in general, or attire of a particular religion, for prohibition or regulation. Students may display religious messages on items of clothing to the same extent that they are permitted to display other comparable messages.

Focal Point: The Equal Access Act

The Department of Justice has advised that the Equal Access Act should be interpreted as providing, among other things, that student religious groups at public secondary schools have the same right of access to school facilities as is enjoyed by other comparable student groups. Under this Act, a school receiving federal funds that allows one or more student non-curriculum-related clubs to meet on its premises during non-instructional time may not refuse access to student religious groups. Non-instructional time is defined as that time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

The law specifically states that school districts have the option of not coming under the act. To exercise that option, they must keep their facilities closed to all non-curriculum-related student meetings and activities including religious meetings, thereby not creating a limited open forum.

In 1989, the U.S. Supreme Court ruled for the first time on the constitutionality of the Equal Access Act, in *Mergens v. Board of Education of West Side Community Schools*. This case began in 1985 when several students at a high school were denied permission to form a Christian group devoted to fellowship and Bible study. The students filed a suit arguing that their rights under the Equal Access Act had been violated. The court ruled that if a school sanctions even one student group that is not directly tied to course work, the act comes into play and the school cannot discriminate against other student organizations based on the religious, philosophical, or political views of their School districts have three options: (1) drop all extracurricular programs to ensure a closed forum, (2) only permit those groups that directly relate to the curriculum, or (3) open their doors to all student groups.

Lunchtime and Recess—Limited Open Forum

A school creates a limited open forum under the Equal Access Act, triggering equal access rights for religious groups, when it allows students to meet during their lunch periods or other non-instructional time during the school day, as well as when it allows students to meet before and after the school day.

Religious Clubs

The critical issue relating to student clubs is does the school allow other student clubs? Student religious groups at public secondary schools have the same right of access to school facilities as is enjoyed by other comparable student groups. According to the Act, outsiders may not “direct, conduct, control, or regularly attend” student religious clubs, and teachers acting as monitors may be present at religious meetings in a non-participatory capacity only. Schools must allow these groups to use the school media—including the public address system, the school newspaper, and the school bulletin board to announce their meetings on the same terms as other non-curriculum-related student groups.

Use of School Facilities by Religious Groups

School districts may not deny access to school facilities to religious groups if a school district has made itself a “limited open forum” by permitting other nonreligious groups, for example, recreational organizations, to use its facilities. (*Lamb’s Chapel v. Center Moriches Union Free School District*, 1992.)

Focal Point: Pledge of Allegiance

The first flag salute statute was passed in 1898, shortly after the United States declared war on Spain. Certain religious groups, most notably the Jehovah’s Witnesses, immediately expressed their opposition to any mandatory pledge of allegiance based on their religious teaching that forbade reverence to a national symbol. In a 1943 case, the Jehovah’s Witnesses argued that being required to recite the Pledge of Allegiance forced them to worship something other than Jehovah. (*West Virginia State Board of Education v. Barnette*, 1943)

The Supreme Court affirmed the state’s right to adopt a curriculum designed to “inspire patriotism and love of country.” The court concluded that although the state’s purpose in requiring a flag salute was valid, its methods overstepped constitutional bounds. “The actions of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power.” This decision does not prohibit schools from including a flag salute in a school’s daily program.

Focal Point: The Ten Commandments

In 1980, the Supreme Court overturned a Kentucky law calling for the Ten Commandments to be posted in public schools. (*Stone v. Graham*, 1980) At the end of its 2004-2005 Term, the Supreme Court decided two cases involving the public display of the Ten Commandments by government agencies. The Texas case involved a red six-foot tall granite monument of the Ten Commandments and was displayed 75 feet from the state capitol building. The Supreme Court reasoned that the display did not denote State support of Religion. (*Van Orden v. Perry*, 2005)

The Supreme Court reached a different result in *McCreary County v. American Civil Liberties Union* (2005). In this case two Kentucky Counties posted displays of the Ten Commandments in their courthouses. The American Civil Liberties Union brought suite arguing that the purpose of this display was religious. The Supreme Court affirmed the lower court’s ruling that the display violated the Establishment Clause.

Focus Point: Distribution of Bibles in Public Schools

Historically, some schools have allowed or encouraged outside groups, such as the

Gideons, to come into schools and distribute Bibles to students. The Fifth Circuit Court, in *Meltzer v. Board of Pub. Instruction of Orange County* (1977), prohibited this practice, stating that the practice favored the Gideons and consequently was not a neutral act. However, in *Peck v. Upshur County Bd. of Education* (1996), a federal court in West Virginia ruled that as long as the distribution was conducted in an area that is open to other outside organizations, and the students are free to refuse the Bibles, the distribution is permitted.

In a 1997 case in Alabama, a teacher argued the distribution of Bibles during homeroom to public school students by an outside group did not violate the First Amendment because no instruction took place during homeroom. The court ruled against permitting the distribution stating that because the homeroom was surrounded by other school activities, such a practice gave the impression that the school endorsed the religious activity. (*Chandler v. James*, 1997).

Conclusion

Every school district should have a clear policy that informs all staff members about the appropriate relationship of religion and public education. This policy should emphasize that any inclusion of religious activities must be cleared by building principal. All religion included religious activities must be for educational reasons; not for proselytizing. Every policy must conform to any state statutes and state board of education policies. All teachers who deal with religiously contested matters should discuss the content of their syllabus and various course activities with their principal. If there are courses that deal with comparative religion or world religions, the principal should ensure that there are teachers competent to teach them. A school committee, to ensure that the material is appropriate, should review all textbooks and other curriculum materials.

Cases Cited

Aguilar v. Felton, 473 U.S. 4902 (1985).
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Elk Grove School District v. Newdow, 124 S. Ct. 2301, (2004)
Epperson v. Arkansas, 393 U.S. 97, (1968).
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Meltzer v. Board of Pub. Instruction of Orange County 577 F.2d 311 (1978),
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Mergens v. Board of Education of West Side Community Schools (867 F.2d 1076 (8th Cir. 1989).
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Santa Fe Independent School District v. Doe., 120 S.Ct. 2266 (2000).
School District of Abington Township v. Schempp, 374 U.S. 203 (1963).
Scopes v. State of Tennessee, 154 Tenn. 105, 289, S.W. 363 (1927).
Serna v. Portales, F.2d 1147 (10th Cir. May 1974).
Steirer v. Bethlehem Area Sch. Dist. 510 U.S. 824 (1993),
Van Orden v. Perry, 125 S. Ct. 2854 (2005)
Wallace v. Jaffree, 472 U.S. 38 (1985).
West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

Side Bar #1

It is generally permissible

- To use art, drama, music, or literature with religious themes if it serves a sound educational goal in the curriculum
- To include religious themes on the basis of their academic or aesthetic value, not as a vehicle for promoting religious belief
- To sing or play sacred music as part of the academic study of music
- For school concerts, to include a variety of selections that include religious music
- To accommodate the requests of parents and students to be excused from classroom discussions or activities for religious reasons
- To routinely grant requests for excuses from specific discussions, assignments, or activities
- To excuse students from particular lessons if the school cannot prove a compelling interest in requiring attendance
- To provide speech, hearing, and psychological services at a parochial site or a neutral site

Some of the material in this Memorandum is drawn from *The Principal's Quick-Reference to School Law*, Second Edition, Corwin Press, Dennis R. Dunklee and Robert J. Shoop.

About the Author

Robert J. Shoop (rshoop@ksu.edu) is professor of educational law and senior scholar, Leadership Studies at Kansas State University. His most recent books are *An Anatomy of a Lawsuit* and *Sexual Exploitation in Schools*. He conducts training for schools and serves as an expert witness in school cases.