

**RELIGIOUS EXPRESSION IN
PUBLIC SCHOOLS**

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INTRODUCTION

“As our courts have reaffirmed...nothing in the First Amendment converts our public schools into religion-free zones or requires all religious expression to be left behind at the schoolhouse door. While the government may not use schools to coerce the conscience of our students or to convey official endorsement of religion, the government’s schools also may not discriminate against private religious expression during the school day.” -President Bill Clinton, Memorandum on Religious Expression in Public Schools, July 12, 1995.

RELEVANT LAW

- U.S. Constitution
 - First Amendment
- Title VII
 - Nondiscrimination on the basis of religion in employment matters
- Title VI
 - Prohibits discrimination against students on the basis of national origin, which could relate to assumptions about the student’s religion
- The New Mexico Human Rights Act
- New Mexico Religious Freedom Restoration Act

THE FIRST AMENDMENT

“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.”

BREAKING IT DOWN

- The Establishment Clause (freedom *from* religion)
 - “Congress shall make no law respecting an establishment of religion, . . .”
- This constitutional mandate prohibits school districts and district employees from “establishing,” advancing, endorsing, or coercing belief in a particular religion, or in religion over non-religion.

CONTINUING TO BREAK IT DOWN

- The Free Exercise Clause (freedom *of* religion)
 - “. . . or prohibiting the free exercise thereof; . . .”
- This constitutional mandate prohibits school districts and district employees from unduly burdening citizens’ right to exercise their religious beliefs, or non-belief.

THE FIRST AMENDMENT: IN PRACTICE

- ❑ Balancing the Establishment Clause and the Free Exercise clause is the legal challenge for public school districts.
- ❑ While public schools are not absolutely religion-free zones, as the Supreme Court has put it, "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."

OR, AS THE TENTH CIRCUIT PUTS IT

- ❑ It is difficult to determine the "proper balance between the freedom from religious coercion created by state-sponsored religion and the inescapable reality that our culture is permeated by religious symbols and rituals. Nowhere has the proper line of demarcation been more difficult to define than in our nation's public schools."

Roberts v. Madigan, 921 F.2d 1047, 1053 (10th Cir. 1990).

WHAT LIMITS CAN THE DISTRICT SET?

- ❑ While a district may not abridge an individual's free exercise of a **sincerely held religious belief** absent a compelling governmental interest, neutral or generally applicable laws or rules that do not target a particular faith are acceptable.
- ❑ The "right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability..."

Emp't Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990)

ACCESS TO SCHOOL FACILITIES

- In its policies, a school district can open school facilities for private use, which creates a “limited public forum.”
- Within a limited public forum, limits on private expression must be viewpoint neutral and reasonable in light of the purpose of the forum.
- This type of “time, place, and manner restrictions” are constitutional, as long as the restrictions do not relate to the content of the expression.
- For example: Students may non-disruptively distribute non-school related flyers before and after school, and during passing periods, but not during classes. This includes flyers with religious content.

ACCESS TO SCHOOL FACILITIES

- If the district allows non-school use of its facilities, religious organizations have the same right to access school facilities as non-religious organizations.
- Prohibiting religious organizations from using school facilities is unlawful viewpoint discrimination, and allowing religious organizations to use school facilities does not violate the Establishment Clause.

SOME GUIDING PRINCIPLES

- Students’ rights** to express religion, in the appropriate time (e.g. non-instructional periods or as assigned in class), place (as designated for all non-school “speech”), and manner (non-disruptively and respectful of others) usually prevails unless their speech would violate the Establishment Clause.
- In their capacity as **district employees**, public school employees represent “the government” and must avoid appearing to endorse, establish, or prohibit student expression of religion.
 - This means that the district’s interest in preventing a violation of the Establishment Clause often outweighs the employee’s First Amendment rights while the employee is on duty.
 - Away from the school setting, on their own time, school employees enjoy the same religious liberties as other citizens.

COMMON WAYS IN WHICH RELIGION ARISES

- Religion comes up in the school context in many different situations
 - Religious displays
 - School activities with religious content
 - Prayer at school board meetings and extracurricular events
 - Dress codes
 - Distributing religious materials
 - Student prayer
 - Employee prayer
 - Student groups
 - Yoga

RELIGIOUS DISPLAYS

- Stone v. Graham*, 449 U.S. 39 (1980) – The Supreme Court overturned a state law that required the Ten Commandments to be displayed in all schools.
- Johnson v. Poway v. Unified Sch. Dist.*, 658 F.3d 954 (9th Cir. 2011) – A math teacher had no First Amendment right to display religious signs in his classroom that said “In God We Trust,” “One Nation Under God,” and “God Shed His Grace on Thee,” and similar messages. The court said that a teacher in the classroom speaks as an employee of the district, not as an individual, and the district had a legitimate interest in ensuring it did not violate the Establishment Clause.
- Schultz v. Medina Valley Indep. Sch. Dist.*, 2012 WL 517518 (W.D. Tex. 2012) – This settlement agreement included the provision that “School District Personnel will not display crosses, religious images, religious quotations, Bibles or religious texts, or other religious icons or artifacts on walls, filing cabinets, halls, lobbies, locker rooms, windows, and doors of Medina Valley High School, unless such is for pedagogical and non-religious purposes (such as a history of world religions course).”

SCHOOL ACTIVITIES

- Neither the District nor District invited speakers can offer invocation prayers prior to commencement.
 - But moments of silence are okay.
- School-sponsored prayer over the loudspeaker prior to football games violates the Establishment Clause.
 - But students have the right to pray on their own, and may pray in the locker room or on the field, as long as the prayer is student-initiated and is not coercive to students who do not want to participate. Employees may not participate or encourage the students to pray.
- District can include some religious content in its concerts or plays where it is presented objectively and is mixed with secular content.

PRAYER AT SCHOOL BOARD MEETINGS

- The Courts are divided.
- Legislative prayer is permitted during the opening of sessions of legislative and other deliberative public bodies, because such prayer “is deeply embedded in the history and tradition of this country.” *Marsh v. Chambers*, 463 U.S. 783, 789 (1983).
 - Some federal courts have said that school board meetings are “more like a legislature than a school classroom or event,” and therefore, prayer at school board meetings falls under that legislative prayer exception. See *American Humanist Ass’n v. McCarty*, 851 F.3d 521, 526 (5th Cir. 2017).
 - But other federal circuit courts have said that board meetings are a crucial part of the public school system, where students often spoke or were invited to appear, and so the board prayers were more like unconstitutional school prayers.
 - Yet others have said that board prayers were unconstitutional because they conveyed a message of governmental endorsement of religion.

DRESS CODE

- Generally, content neutral dress codes and hair length regulations have been held to be valid. See *Hodge v. Lynd*, 88 F.Supp.2d 1234, 1241 (D.N.M. 2000); See *Freeman v. Flake*, 448 F.2d 258, 262 (10th Cir. 1971).
- Some courts have required religious accommodations to the dress code:
 - A Native American student had a right to express his sincerely held religious belief in wearing his hair long.
- But, a teacher could be required to remove or cover-up a “Jesus 2000” which had been worn during instructional time, and an employee could be required to cover her religious piercings where there was a no jewelry policy.

DISTRIBUTION OF RELIGIOUS MATERIALS

- If a school opens a limited public forum to students and community members and allows distribution of non-school literature, it cannot discriminate based on the viewpoint in those materials.
- For example, a school district cannot allow someone to distribute literature promoting the local pie baking club without allowing someone to distribute religious pamphlets.
- Some Circuit Courts have found that a school district may restrict distribution of non-school materials to students without having to allow nonstudents to do the same. See *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295 (7th Cir. 1993).

STUDENT PRAYER

- Students have the right to pray on their own or with other students.
 - Individual prayer can be any time before, during or after school, but must not disrupt instructional activities or other school activities.
- Students may also pray in the locker room or on the athletic field, as long as the prayer is not disruptive, is student-initiated and is not coercive to students who do not want to participate.

EMPLOYEE PRAYER

- Employees may not participate in student prayer, and may not encourage the students to pray or not pray.
- Employees may be directed to refrain from discussing religious beliefs with students.
- Employees may pray privately with other employees, or by themselves, during off-duty time and out of sight of students.

STUDENT GROUPS

- Students can organize prayer groups and religious clubs to the same extent students may organize other non-curricular clubs or groups.
 - Remember: employees may only monitor, not participate in, or even initiate such groups.
- Employees could also pray or otherwise practice their religion, even as an informal group, before and after the school day begins, on planning periods and lunch breaks. Any employee group's prayer time cannot be on their duty time, and it cannot be conducted in the presence of students, nor can it unreasonably disturb other employees or create a situation where they feel pressured to participate.

YOGA

- A California school district began offering yoga as part of its curriculum.
 - See *Sedlock v. Baird*, 235 Cal. App. 4th 874, 185 Cal. Rptr. 3d 739 (2015).
- When challenged, the court ruled in favor of the school district, observing, “It is clear that while yoga may be practiced for religious reasons, it cannot be said to be inherently religious or overtly sectarian.”

YOGA

- Other factors also persuaded the court to rule for the school district:
 - Although an outside foundation provided some money, the district maintained complete control over the curriculum, stripping it of anything that even hinted at, or sounded religious.
 - For example, the “lotus position” was renamed “criss-cross applesauce.”
 - Yoga may have religious roots, but that does not mean that its current practice in the district is religious.
 - The court noted evidence in the record showing that “contemporary yoga is commonly practiced in the United States for reasons that are entirely distinct from religious ideology.” Surveys showed that people practiced yoga primarily for 1) increased flexibility; 2) stress relief; and 3) improvement in physical health.

A WORD ABOUT TITLE VII

- Under Title VII of the Civil Rights Act, it is unlawful for an employer to discriminate against an individual based on their religion, or religious beliefs.
- So any employee cannot be fired, paid less, disciplined, etc. because of their religious beliefs.
- When an employee asks for a religious accommodation – e.g. time off for a religious holiday or an exception to the dress code for religious garb – the employer must engage in the interactive process.
- An employer should reasonably accommodate an employee’s requested accommodation, unless it can show that it would create an undue hardship.

**A RECENT CASE:
EEOC V. ABERCROMBIE & FITCH**

This case was recently decided by the U.S. Supreme Court.

Facts:

- The employer had a dress code – what it called a “Look Policy” – that prohibited employees from wearing headwear.
- An applicant was a practicing Muslim who wore a hijab to the interview, although this was not discussed at the interview.
- Because the applicant wore the hijab to the interview, the employer believed that such head garb “would violate the Look Policy, as would all other headwear, religious or otherwise,” and so she was not hired.

THE DECISION: EEOC V. ABERCROMBIE & FITCH

The U.S. Supreme Court ruled that it was discrimination on the basis of religion if an employee’s expressed need for an accommodation was a motivating factor in an employer’s adverse employment decision (here: the decision not to hire).

- “[A]n employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed.”
- “Title VII requires otherwise-neutral policies to give way to the need for an accommodation.”

HYPOTHETICAL #1

Can a state pass a law that allow Bible study as an elective course?

HYPOTHETICAL #1

- Yes, if curriculum is objective and does not disparage or encourage a commitment to a set of religious beliefs
- Needs to focus on the historical importance of the Bible and not to communicate a religious message

HYPOTHETICAL #2

- Just before the chess team begins a tournament, the coach leads a prayer in front of the team. He later claims it was optional and students were free to leave. Would this be allowed?

HYPOTHETICAL #2

- No.
- Coach was acting in his official capacity as coach of the chess team, as he was performing the duties of his position. Employees acting in their official capacity may not lead or participate in any student prayer. Nor may they pray while in their official capacity, in the presence of students.
- A reasonable observer could see Coach's conduct as a district endorsement of religion which violates the Establishment Clause.
- Also this was not student initiated prayer, and would not have been perceived by students as optional.

HYPOTHETICAL #3

- The elementary campus has a door decorating contest during December. The teacher is out of new ideas and asks each of her students to bring in a holiday card that they like.
- Several students bring in cards with Bible verses on them, or manger scenes, two students bring in cards with the image of a Menorah on the front, and there are non-religious cards as well.
- The students vote on which cards will go on the door, and three cards make the final cut: one has a manger scene, one a Menorah, and one is a humorous card.
- In the final vote, the students pick the humorous one: a group of purple grapes on the front; each grape has a face and is singing "Tis the Season to be Jelly."
- The students think this is hilarious, as does Bertha, and they decorate the class door. A problem?

HYPOTHETICAL #3

- The ultimate outcome – "Tis the Season to be Jelly" – is not a problem, as it is not necessarily religious, nor connected to any one religion.
- But, if one of the religious cards had been selected, there may have been a violation of the Establishment Clause because a majority vote got to choose whether to have a religious message or not.
- The courts have said that the Establishment Clause of the Constitution was specifically intended to prevent the majority from determining the religious faith for everyone because majoritarian elections on religious matters silence minority religious view points.

HYPOTHETICAL #4

- A 3rd Grade teacher puts up a poster endorsing a specific religion, stocks his book shelves with books about the same religion, and prominently displays his religion's main text on his desk, which he reads silently from daily. The teacher would silently read from the text during classroom hours. Is there a problem?

HYPOTHETICAL #4

- Yes, these activities would violate the Establishment Clause.
- This was the case in the Tenth Circuit's *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990).
- The court ruled that the materials demonstrated a religious purpose with the primary effect of promoting the teacher's religion.
 - Thus, this violated the Establishment Clause.

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